

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2011] NZEmpC 141
CRC 4/11**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND

IN THE MATTER OF an application for leave to defend out of
time

BETWEEN SILVER SERVICE SKIPS LIMITED
Plaintiff

AND DIANNA ROBYN LITTLE
Defendant

Hearing: On the papers - submissions received 18 July and 17 August 2011

Appearances: John Shingleton, counsel for the plaintiff
David Beck, counsel for the defendant

Judgment: 28 October 2011

INTERLOCUTORY JUDGMENT OF JUDGE A A COUCH

[1] Silver Service Skips Limited (the Company) operates a waste disposal business. Ms Little was employed by the company as a truck driver until her dismissal in November 2009.

[2] Ms Little pursued a personal grievance and the Employment Relations Authority determined¹ that she had been unjustifiably dismissed. Ms Little was awarded compensation of \$5,000.

¹ [2011] NZERA Christchurch 7, 14 January 2011.

[3] The Company challenged the whole of that determination and sought a hearing de novo. The statement of claim was filed on 10 February 2011 and served on Ms Little on 16 February 2011.

[4] Regulation 19 of the Employment Court Regulations 2000 provides:

- 19 Obligation to file statement of defence
- (1) Except where the Registrar of the court or a Judge otherwise orders, every defendant who intends to defend any proceedings in the court must file a statement of defence with the Registrar of the court.
 - (2) The statement of defence must be filed,—
 - (a) for a defendant served in New Zealand, within 30 clear days after the date of the service of the statement of claim on the defendant; or
 - (b) for an overseas party, within the time specified in regulation 31E.
 - (3) Every defendant must, as soon as practicable after filing a statement of defence under subclause (1), serve a copy of the statement of defence on the plaintiff.
 - (4) Every defendant who fails to comply with subclauses (1) to (3) may defend the proceedings only with the leave of the court.

[5] The effect of this regulation was that, unless Ms Little filed a statement of defence by 18 March 2011, she could only defend the proceeding with the leave of the Court. She took no formal steps until 6 May 2011 when, through her solicitor, she filed an application for an extension of time. I have treated that application as if it were an application for leave to defend as required by reg 19(4). That application is opposed by the Company. Through counsel, the parties agreed that the application should be decided on the papers. In support of the application, Ms Little swore an affidavit and Mr Beck filed a draft statement of defence. For the Company, Mr Te Amo swore an affidavit in opposition. I received written submissions from counsel for both parties.

Principles

[6] The Court's discretion to grant leave to defend in these circumstances is unqualified by the regulation but, like any discretion, must be exercised judicially and in accordance with principle. The overriding concern must be the interests of justice but, in assessing where that lies, relevant considerations will include the

extent of the delay, reasons for the delay, whether the delay is adequately explained, any prejudice resulting from granting or refusing leave and whether there is an arguable defence to the claim.

Evidence

[7] Ms Little is now a full time mother living in Kaiapoi, a town north of Christchurch. She has three teenage children who live with her and her partner in rented accommodation. Her partner is a truck driver on a modest salary who often must work away from home. They struggle to meet expenses, including those of Ms Little's eldest son who is at university.

[8] Prior to the September 2010 earthquake, the family had arranged to move to a larger house. That house was significantly damaged in the earthquake but, as they were committed to the move, it still took place. Kaiapoi as whole was seriously affected by that earthquake and Ms Little's family were without electricity, telephone or sewer. She described life in Kaiapoi at that time as "very stressful".

[9] Ms Little acknowledges receiving the statement of claim on 16 February 2011 but says that she found it difficult to understand. She thought about taking advice but had no money with which to pay a lawyer. The second major earthquake affecting the Canterbury region occurred on 22 February 2011, six days after the statement of claim was served. Ms Little says that this resulted in increased liquefaction around their home and a great deal of tension in the family. She also says "I was very scared about the prospect of more quakes and it continues to dominate our lives as Kaiapoi now seems to have slipped off the radar a bit with the Christchurch quake."

[10] About mid-April 2011, Ms Little spoke to a friend who advised her to seek legal advice from the Canterbury Community Law Centre. She did so and was given a list of lawyers willing to do employment work on legal aid but says she was not told that she needed to file any documents. The first lawyer Ms Little approached had a conflict of interest and referred her to Mr Beck whom she first saw on 2 May

2011. It was then she first realised that she had to file a statement of defence and instructed Mr Beck to take the necessary steps on her behalf.

[11] Ms Little accepts that she ought to have been more careful and made greater efforts to obtain legal advice earlier than she did but explains that she had never had reason to see a lawyer before this case came up.

[12] Mr Te Amo is a director of the Company. He describes Ms Little's actions as "neglectful" and suggests that her explanation for delay lacks credibility. He points to the notice attached to the statement of claim which explicitly informed Ms Little of her obligation to file a statement of defence within 30 days if she wished to defend the matter. He also observes that Ms Little made no attempt to contact the registrar of the Court.

[13] Mr Te Amo questions Ms Little's evidence that the community law centre lawyer she saw did not tell her of her obligation to file a statement of defence, suggesting that any capable lawyer would have given Ms Little such advice. Mr Te Amo also observes that Ms Little does not provide any evidential basis for a defence in her affidavit.

[14] Finally, Mr Te Amo says simply that the Company would be prejudiced if Ms Little was granted leave to defend but does not explain why he believes that to be so.

[15] Although Mr Te Amo challenges much of Ms Little's evidence, no evidence has been provided on behalf of the Company to contradict it. Rather, Mr Te Amo's beliefs are based on inferences which he implicitly invites the Court to adopt.

Delay

[16] The first step taken by Ms Little was 49 days after the expiry of the time within which she was required by the regulations to file a statement of defence. That is a considerable time in the context of proceedings such as this. I repeat, however,

what I said in *Otago Taxis v Strong*² where extensions of time were sought by both parties:

The final factor I take into account is the length of the delay which, in this case, is at least 87 days. Such a delay in making application for an extension of time to file a challenge would be regarded as very substantial and, in most cases, fatal to the application. Where the application is for an extension of time to a file statement of defence, the importance of this factor is very much less. This is because the interests of justice are different. Permitting a party to participate in the resolution of a dispute which is already properly before the Court is fundamentally different to permitting a party to renew a dispute before the Court which the other party is entitled to believe has been finally determined by the Authority in its favour.

[17] Mrs Little's explanation for this delay is in two parts. She says that she mistakenly thought that the next step in the proceeding was to be taken by the Company and was waiting for that to happen. She also says that she was unable to pay a lawyer for advice. What any explanation must overcome is the fact that the notice which forms part of the statement of claim specifically advised Ms Little of her obligation to file a statement of defence within 30 days. While I accept that Mrs Little genuinely held the mistaken belief she refers to, it suggests that she failed to properly read the document served on her. To an extent that may be explained by the distressing, and no doubt distracting effects on her of the major earthquakes and I certainly do not underestimate those effects. This explanation is, however, not entirely satisfactory given the length of the delay.

Prejudice

[18] Although Mr Te Amo says in his affidavit that the Company will be prejudiced if leave is granted, he does not suggest what form that prejudice would take or how that would happen. Such unexplained assertions are of no help in deciding the matter. In every case, it may be said that a plaintiff whose case is allowed to proceed unchallenged is in a better position than one facing an active defence, but that is not the sort of prejudice the Court is concerned with. Rather, the Court is concerned to know whether the plaintiff's ability to put forward its case would be adversely affected by allowing a defence to be mounted later than would

² CC6/07, 2 March 2007.

have occurred had the defendant filed a statement of defence in time. There is no evidence that such prejudice would occur in this case.

Defence

[19] Mr Shingleton's submissions focussed on the proposition that Ms Little's affidavit disclosed no basis for a defence of the plaintiff's claim. While that is correct, I do not accept his conclusion that this rendered the affidavit "fatally defective". Equally, I do not accept his submission that, for that reason, the Court cannot grant the leave sought by Ms Little.

[20] The Company is challenging the determination of the Authority. That determination was in favour of Ms Little. It follows that she must have a case which the Authority found to be not only substantial but superior to that of the Company. The Authority's determination is detailed and reasoned. It is not based on any obvious errors of law. Rather, it is based on findings of fact and the application of s103A of the Employment Relations Act 2000.

[21] Mr Shingleton makes the point that the challenge is based on the proposition that Ms Little's claim was settled by agreement with her representative. He submits that Ms Little needs to provide an evidential basis for denying that proposition before leave can be granted. I disagree. Although not discussed in great detail, it is clear from paragraph [19] of the determination that this proposition was before the Authority and equally clear from the result that the Authority rejected it. The implication of that must be that Ms Little has an arguable defence to the Company's claim now before the Court.

Conclusion

[22] Returning to the overall justice of the matter, I conclude that leave should be granted. The delay was significant and inadequately explained but there is no evidence that the Company would be prejudiced by a grant of leave. Ms Little has a defence to the Company's claim of sufficient strength to have persuaded the

Authority in her favour and, if she were now to be denied an opportunity to retain the benefit of the orders made by the Authority, that would indeed be unjust.

[23] The draft statement of defence filed on 18 July 2011 will be accepted as a substantive statement. The Registrar is now directed to arrange a telephone conference with counsel to discuss further directions for the disposition of this matter.

Costs

[24] Costs are reserved pending a final outcome of this proceeding.

A A Couch
Judge

Signed at 11.00 am on 28 October 2011