IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA211/2021
[2021] NZCA 429

BETWEEN	BRIAN SAIPE Applicant
AND	TRUDE JEAN BETHELL (ALSO KNOWN AS TRUDE JEAN BETHELL-PAICE) Respondent

Court:	Cooper and Brown JJ
Counsel:	M C Donovan and S E Greening for Applicant R J Hooker for Respondent
Judgment: (On the papers)	3 September 2021 at 10.00 am
Recalled and Reissued:	20 October 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant is to pay costs to the respondent for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Mr Saipe applies for leave to appeal under s 214(1) of the Employment Relations Act 2000 (the Act) against a decision of the Employment Court[1] upholding a decision of the Employment Relations Authority (the Authority)[2] that Mr Saipe's claim for unjustified dismissal was filed outside the statutory limitation period of three years.[3]

[2] Under s 214(3) of the Act, this Court may only grant leave to appeal if the question of law raised by the proposed appeal is one which by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.

Background

[3] Ms Bethell and her husband own and operate Bethells Beach Cottages, a provider of boutique holiday accommodation on Auckland's West Coast. Mr Saipe worked for Bethells Beach Cottages as a part-time assistant manager from November 2012. By email dated 24 August 2013 he was dismissed by Ms Bethell. The email stated that his engagement was ended "[a]s from this date 24th August 2013".

[4] Mr Saipe responded in an email of 26 August 2013, the heading of which included reference to "notice of my dismissal". He asserted that "an employment relationship problem exists between us" and he invited Ms Bethell to participate in a mediation. He advised that he had contacted the Ministry of Business, Innovation and Employment about available mediation dates. The following day he contacted the Ministry seeking a mediation date and followed that up with an email on 29 August 2013.

[5] On 26 November 2013 Mr Saipe wrote again to Ms Bethell advising that he intended to commence proceedings in the Authority, asserting that he had been unjustifiably and summarily dismissed without warning. There was no evidence of any

---

1 *Saipe v Bethell* [2021] NZEmpC 33, [2021] ERNZ 74 [Employment Court judgment].
2 *Saipe v Bethell* [2018] NZERA Auckland 180 [Authority judgment].
3 Employment Relations Act 2000, s 114(6).

further contact between the two until Mr Saipe filed his claim for unjustified dismissal with the Authority on 29 August 2016.

[6] The Authority ruled that the dismissal occurred on 24 August 2013 and Mr Saipe's personal grievance claims raised (by email) on 26 August 2013.[4] Consequently, Mr Saipe's claim had been filed outside the statutory limitation period of three years for commencing an action in the Authority after the date on which the personal grievance was raised. The Authority declined Mr Saipe's application for an extension of time to file his personal grievance claims, finding that the grievances were not strongly arguable and there was no justification for the delay, even if it was insignificant and did not create any prejudice.[5]

[7] Mr Saipe challenged the Authority's determination contending:[6]

(a) his dismissal only took effect after a period of reasonable notice which would have resulted in an effective dismissal date of 2 September 2013;

(b) his email of 26 August 2013 could not constitute the raising of a personal grievance for unjustifiable dismissal as he had not been dismissed at that point;

(c) his personal grievance was raised by his letter of 26 November 2013 which was submitted to Ms Bethell within 90 days of the effective date of dismissal; and

(d) hence the claim for unjustified dismissal was filed with the Authority on 29 August 2016, within three years of his raising the personal grievance.

---

4 Authority judgment, above n 2, at [35]–[37].
5 At [74].
6 Employment Court judgment, above n 1, at [25].

The Employment Court judgment

[8] In a decision delivered on 22 March 2021 the Employment Court upheld the Authority's finding that the personal grievance claim was not filed within the required period.[7] In Judge Holden's analysis the sequence of events gave rise to several issues including (a) when Mr Saipe's dismissal became effective and (b) when he first raised his personal grievance.

[9] On the first issue the Judge reasoned:

> [32] In considering whether an employee has been dismissed, the test is an objective one – was it reasonable for somebody in the position of the employee to have considered that their employment had been terminated?
>
> [33] Understandably, it is not part of Mr Saipe's case that the 24 August 2013 email was not the instrument of his dismissal; the email was unequivocal; Ms Bethell advises Mr Saipe that the business cannot continue engaging his services and requests that he cease using the Cottages' systems; he was asked to hand over login details. In his email of 26 August 2013, Mr Saipe recognises that Ms Bethell had dismissed him from his position in her email dated 24 August 2013.
>
> [34] Mr Saipe's argument rests on the effective date of the dismissal. Mr Saipe relies on cases where an employee has been paid their notice period but not worked it out, and the Courts have found that the employment continues until the end of that notice period. The cases say whether that is so in particular circumstances is a question of fact. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal; but, if the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice, which has been conveyed in clear and unambiguous terms, then that is a termination on notice and the employment ends at the end of the notice period.
>
> (Footnotes omitted.)

[10] With reference to the second issue the Judge found that, while Mr Saipe's letter of 26 November 2013 went into more detail about his concerns, his email of 26 August 2013 was sufficient to advise Ms Bethell that Mr Saipe had a personal grievance for unjustifiable dismissal that he wished to address.[8] That was what s 114(2) of the Act required. Consequently the filing of the statement of problem with the Authority on 29 August 2016 was beyond the three-year time limit.

---

7 At [5].
8 At [39].

[11] However the Judge further observed that, if Mr Saipe had been able to pursue his claim for unjustifiable dismissal, he would have been successful and would have obtained orders for compensation for lost earnings and for humiliation, loss of dignity and injuries to his feelings in the order of $20,000, less $2,000 for contributory conduct.[9]

The application for leave to appeal

[12] In his application for leave to appeal to this Court Mr Saipe submits three proposed questions of law:

(a) Did the Employment Court fail to apply the correct legal test to determine the effective date on which the employee's employment terminated in circumstances where the employer purported to terminate summarily, and if so, what is the correct date of termination of employment?

(b) Did the Employment Court fail to apply the correct approach for assessing the starting points for an award of compensation for hurt and humiliation under s 123(1)(c)(i) of the Act?

(c) Did the Employment Court fail to correctly exercise its discretion to reduce the award of compensation for humiliation under s 124 of the Act?

[13] Mr Saipe acknowledges that the second and third proposed questions will only arise for consideration if he succeeds on the first question.

Discussion

[14] For Mr Saipe, Mr Donovan submits that the date when Mr Saipe's employment contract terminated is key because a personal grievance for unjustifiable dismissal cannot be raised until after the contract is at an end. Thus, if the effective date of

---

9 At [5] and [56].

dismissal was later than 26 August 2013, Mr Saipe could not have raised his grievance by his email of that date.

[15] Citing *Paper Reclaim Ltd v Aotearoa International Ltd* Mr Donovan submits that the correct legal test for ascertaining the date of termination of a contract repudiated by one party is by reference to the response of the other party to the contract.[10] He argues that it was open to Mr Saipe to choose either to accept the repudiation in Ms Bethell's email of 23 August 2013, thereby bringing the contract to an end immediately, or to affirm the contract in which case the effective date of termination would occur by reason of some later event — whether by reason of expiry of an implied reasonable period of notice or by the parties mutually agreeing to end the contract.

[16] Thus Mr Donovan contends that Mr Saipe's email of 26 August 2013, in which Mr Saipe sought to affirm the employment contract, was not an acceptance of Ms Bethell's repudiation. Consequently the contract of employment did not end on or before 26 August 2013 but continued until at least 2 September 2013 which was when Mr Saipe ceased to carry out work for Ms Bethell, or alternatively upon the expiry of a reasonable period of notice. On this analysis Mr Saipe could not have raised a personal grievance for his dismissal until after 2 September 2013 and hence it was successfully raised by delivery of the subsequent letter of 26 November 2013.

[17] Mr Saipe's argument involves two limbs. The reasonable notice proposition was considered and rejected by the Judge.[11] Whether Ms Bethell sought to terminate Mr Saipe's employment summarily or on notice involved the interpretation of her email. As this Court noted in *Appleyard v Corelogic NZ Ltd* the interpretation of a letter terminating employment is fact specific and, while it may involve a mixed question of law and fact, it does not raise an issue of general or public importance.[12]

[18] The alternative proposition, which was at the forefront of Mr Donovan's argument in support of leave, to the effect that by his email of 26 August 2013

---

10 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
11 Employment Court judgment, above n 1, at [34]–[35].
12 *Appleyard v Corelogic NZ Ltd* [2020] NZCA 572 at [16].

Mr Saipe was rejecting Ms Bethell's repudiation of the contract and asserting an ongoing contractual relationship, was not addressed in the judgment sought to be appealed. Hence there are no findings of fact or statement of conclusion on that line of argument.

[19] Mr Hooker for the respondent submits that is explicable for the reason that the "repudiation" proposition was not contained in any pleading, statement of claim, list of issues or evidence. Whatever the reason may be, it is not appropriate for this Court to entertain an appeal on a question of law in the abstract, that is, without factual findings and consequential conclusions by the lower Court. If Mr Saipe wished to pursue the repudiation proposition, the avenue to do so was a request for a recall of the Employment Court's decision.

[20] As we consider that the application cannot succeed in respect of the first proposed question of law, it is unnecessary to consider the second and third questions.

[21] Mr Hooker filed a memorandum objecting to the fact that a submission in reply was filed by Mr Saipe. While in the case of an oral hearing it will be unusual for the submissions timetable to provide for a reply by the appellant or applicant, in relation to miscellaneous applications, which in the normal course are determined on the papers, the Registrar may permit a reply to be filed. However such a submission must be strictly in reply.

[22] In the present case the reply submission was confined to comment on four decisions which were traversed in Mr Hooker's submission on behalf of Ms Bethell. While there may be differences in view as to whether a reply was necessary in the particular circumstances, the submission itself was unobjectionable as to its scope. We do not consider the Registrar erred in permitting the reply submission to be filed.

Result

[23] The application for leave to appeal is declined.

[24] The applicant is to pay costs to the respondent for a standard application on a band A basis and usual disbursements.

Solicitors:
Watermark Employment Lawyers, Auckland for Applicant
Vallant Hooker and Partners, Auckland for Respondent