THE INTERIM NON-PUBLICATION ORDER MADE BY THE EMPLOYMENT COURT REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA759/2021
[2022] NZCA 148

BETWEEN	ABC Applicant
AND	DEF Respondent

Court: French and Courtney JJ

Counsel: Applicant in person
S L Hornsby-Geluk and B J Locke for Respondent

Judgment: (On the papers) 28 April 2022 at 9 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal under s 214 of the Employment Relations Act 2000 is declined.

C There is no award of costs.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] For determination is an application under s 214(3) of the Employment Relations Act 2000 (the Act) for leave to bring an appeal against a decision of

Judge Corkill in the Employment Court.[1] The application for leave to appeal was filed out of time and therefore the applicant also seeks an extension of time.[2]

Background

[2] The applicant is a former employee of the respondent. The parties signed a record of settlement of a relationship problem. The settlement contained a confidentiality clause and a non-disparagement provision.

[3] Subsequently the applicant filed a statement of problem in the Employment Relations Authority challenging the settlement and in particular the provisions relating to confidentiality and disparagement.

[4] The Authority directed the parties to attend mediation and attempt in good faith to resolve their differences. It suspended its investigation pending the outcome of the mediation.

[5] The applicant considered the direction to attend mediation was inappropriate; her main objection being that it would prevent her from being able to challenge any without prejudice statements made at mediation. She therefore sought to challenge the Authority's direction in the Employment Court by way of a de novo challenge.[3]

[6] Judge Corkill held the Authority's direction to attend mediation was a matter of procedure for the purposes of s 179(5) of the Act and that therefore the Employment Court had no jurisdiction to entertain the applicant's challenge.[4] Section 179(5) sets out the kinds of Authority determinations that cannot be challenged under s 179(1) of the Act. It states:

> (5) Subsection (1) does not apply—
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> (aa) to an oral determination or an oral indication of preliminary findings given by the Authority under section 174(a) or (b); and

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1 *ABC v DEF* [2021] NZEmpC 208 [Employment Court decision].
2 Court of Appeal (Civil) Rules 2005, r 16A.
3 Employment Relations Act 2000, s 179(1).
4 Employment Court decision, above n 1, at [38].

(a) to a determination, or part of a determination, about the procedure that the Authority has followed, is following, or is intending to follow; and

(b) without limiting paragraph (a), to a determination, or part of a determination, about whether the Authority may follow or adopt a particular procedure.

[7] The Judge further held that even if he were wrong and the Court did have jurisdiction, he would still have dismissed the challenge on its merits having regard to the provisions of s 159 of the Act. Section 159 provides:

159 Duty of Authority to consider mediation

(1) Where any matter comes before the Authority for determination, the Authority—

(a) must, whether through a member or through an officer, first consider whether an attempt has been made to resolve the matter by the use of mediation; and

(b) must direct that mediation or further mediation, as the case may require, be used before the Authority investigates the matter, unless the Authority considers that the use of mediation or further mediation—

(i) will not contribute constructively to resolving the matter; or

(ii) will not, in all the circumstances, be in the public interest; or

(iii) will undermine the urgent or interim nature of the proceedings; or

(iv) will be otherwise impractical or inappropriate in the circumstances; and

(c) must, in the course of investigating any matter, consider from time to time, as the Authority thinks fit, whether to direct the parties to use mediation.

(1A) *[Repealed]*

(2) Where the Authority gives a direction under subsection (1)(b) or subsection (1)(c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences, and proceedings in relation to the request before the Authority are suspended until the parties have done so or the Authority otherwise directs (whichever first occurs).

(3) This section applies subject to section 159AA.

[8] Applying the provisions of s 159(1)(b)(iv) to the circumstances of this case, Judge Corkill said he was unable to conclude the mediation would not contribute constructively to resolving the matter nor that it would be impractical or inappropriate.[5]

[9] Dissatisfied with this outcome, the applicant then filed an application for leave to appeal Judge Corkill's decision. Section 214(2) of the Act imposes a time limit of 28 days to apply for leave. Because the Judge issued his decision on 25 November 2021 that meant the last day for seeking leave was 23 December 2021.

[10] The applicant filed her application in this Court on 23 December 2021. However, by virtue of the Court of Appeal (Civil) Rules 2005, an application for leave is only brought when it has been both filed in the Court and served on the other parties to the proceeding.[6] The applicant did not attend to service of her application on the respondent until 12 January 2022 and so was out of time.

The application for an extension of time

[11] It is common ground the application was out of time. It is also common ground that due to the intervening Christmas vacation period the delay was short, being only a matter of days.[7] There is a reasonable explanation for the delay, namely an honest mistake in failing to appreciate the dual requirements of filing and service. Further the respondent cannot point to any prejudice caused by the delay.

[12] In all those circumstances, we consider the application for an extension of time should be granted and accordingly so order.

[13] We therefore turn now to the merits of the application for leave.

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5 At [71] and [87].

6 Court of Appeal (Civil) Rules, r 16(1).

7 The applicant says she was eight days out of time. The respondent says ten days. If the computation were to be working days, it would only be two days.

The application for leave

[14] The right of appeal from decisions of the Employment Court is limited to questions of law and is subject to a leave requirement. Under s 214(3) of the Act leave may be granted if in the opinion of this Court, the proposed question of law is one that by reason of its general or public importance or for any other reason ought to be submitted for determination.

[15] The applicant's proposed questions of law are:

> Is a direction to mediation, in accordance with s 159 of the Employment Relations Act 2000 a process of the Authority for the purposes of s 179(5)?
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> In considering the Employment Court's jurisdiction of equity and good [conscience] in accordance with s 189 is it appropriate for a de novo challenge to a direction to mediation [to] be heard by traditional adversarial processes?
>
> Is the threshold of "impractical or inappropriate" for the purposes of s 159, a low or high threshold?

[16] In support of the application, the applicant submits in essence that this case would provide an opportunity for this Court to clarify the scope of the Authority's duty to direct mediation under s 159. The issues raised by the proposed questions of law have never been considered by this Court before and are therefore, it is submitted, of general or public importance.

Our view

[17] In our view, the application fails to meet the threshold required under s 214(3) before leave to appeal may be granted.

[18] We acknowledge that interpretation issues relating to the scope of ss 179(5) and 159 potentially qualify as questions of law. However, the proposed questions must be seriously arguable and in our view the questions in this case are plainly not.

[19] In particular, we consider that a direction to attend mediation cannot be anything other than procedural in nature. Such a direction does not affect substantive rights nor impact on the determination of the claim. If the mediation does not resolve the dispute, the claim simply proceeds. All substantive rights are preserved.

[20] The conclusion that the direction was procedural in nature for the purposes of s 179(5) means the second question must fall away. The Employment Court simply had no jurisdiction to entertain the applicant's challenge. In the absence of jurisdiction, whether the Court should adopt an inquisitorial or adversarial procedure is thus irrelevant. The statute prevails.

[21] Our conclusion in relation to the first issue also means the third question becomes untenable. This Court would not entertain an appeal where it was certain from the outset that determination of the questions would make no difference to the outcome of the appeal. We would add that in any event we agree with the Judge's application of the s 159 factors and consider his conclusion unassailable. We also endorse his observations about the importance of mediation under the Act.[8]

Outcome

[22] The application for an extension of time is granted.

[23] The application for leave to appeal under s 214 of the Employment Relations Act 2000 is declined.

[24] The respondent did not seek costs and its opposition to the extension of time was unsuccessful. In those circumstances, we consider there should be no award of costs on either application. For completeness we note that the applicant's request for us to determine costs in the Employment Court is misconceived. That is a matter for the Employment Court, not this Court.

Solicitors:
Dundas Street Employment Lawyers, Wellington for Respondent

[8] Employment Court decision, above n 1, at [56]–[59].