

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2014] NZEmpC 169
WRC 23/14**

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

BETWEEN ROBIN GOULDEN
Plaintiff

AND CAPITAL AND COAST DISTRICT
HEALTH BOARD
Defendant

Hearing: (on the papers by memoranda filed on 1 September 2014)

Appearances: P McBride, counsel for the plaintiff
J Drayton, counsel for the defendant

Judgment: 15 September 2014

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

[1] An issue has arisen as to whether a statement of defence sent to the Court herein was filed in time under the Employment Court Regulations 2000 (the Regulations).

[2] The issue was raised by counsel for the plaintiff at a telephone directions conference held on 29 August 2014. The parties were invited to see whether it was capable of resolution. That has not been possible. Counsel subsequently filed memoranda, annexing correspondence which set out their respective views of the matter.

[3] The facts are:

- a) On 7 July 2014, the plaintiff's lawyers contacted the defendant's lawyers asking whether they were authorised to accept service of the

plaintiff's statement of claim. By email of 7 July 2014, counsel for the defendant confirmed that she was so authorised.

- b) On the same day a letter was sent by signature-required courier from the plaintiff to the defendant, enclosing by way of service the statement of claim filed in the Employment Court, dated 1 July 2014.
- c) The letter and its attachments were delivered by a courier to the defendant's lawyers on a track-and-trace basis, at 11.19 am on 8 July 2014.
- d) A statement of defence was delivered to the Court and served on the plaintiff's lawyers on 7 August 2014.

[4] Counsel for the plaintiff submits that the statement of defence should have been filed and served by 6 August 2014; counsel for the defendant submits that it was filed and served on the final day for which filing is permitted under the Regulations.

[5] Regulation 19(2)(a) of the Regulations provides that a defendant must file a statement of defence within 30 clear days after the date of service of the statement of claim. Regulation 19(4) of the Regulations states that:

Every defendant who fails to comply with sub-clauses (1) to (3) may defend the proceedings only with the leave of the court.

[6] Regulation 28 provides for service of notices and documents. It relevantly provides:

(2) Except where an Act, or these regulations, prescribes a particular or exclusive mode of service, service of a notice, order, or other document which is required to be served by the Act or these regulations and which relates to proceedings before the court may be effected,—

...

- (b) if the opposing party has given an address for service,—
 - (i) by leaving the notice, order, or document with the person to be served or, if that person does not accept it, by putting it down in that person's presence and bringing it to that person's notice; or

- (ii) by leaving the notice, order, or document at that address for service at any time between 9 am and 5 pm; or
- (iii) if the person to be served has given a facsimile number for service, by transmitting the notice, order, or document to that facsimile number; or
- (iv) if the person to be served has given a document exchange box number for service, by sending the notice, order, or document to that document exchange box; or
- (v) if the person to be served has given an email address for service, by sending the notice, order, or document to that email address; or
- (vi) by sending the notice, order, or document by registered post, ordinary post, or courier to that address for service; or
- (vii) if a person, being a barrister, solicitor, or other representative, represents in writing that that person is authorised to accept service of any notice, order, or document on behalf of the person to be served, by serving the notice, order, or document on that barrister, solicitor, or other representative in accordance with subparagraphs (i) to (vi);

...

[7] Counsel for the defendant first submits the effect of reg 19(2)(a) is that the calculation of 30 clear days runs from service of the statement of claim “on the defendant” – i.e. when the defendant (or its representative) actually receives the document.¹ It is argued that, in this instance the statement of claim was accordingly served on the defendant on 8 July 2014.

[8] However, it is reg 28 which stipulates how – and when – service is effected on a party. Because counsel for the defendant represented in writing that she was authorised to accept service, reg 28(2)(b)(i)-(vi) applied.

[9] Each of sub-regs (i)-(vi) stipulates a means by which service is effected. Service is achieved by:

- a) Leaving the notice, order or document with the person to be served by putting it down in the person’s presence or bringing it to their notice, under reg 28(2)(b)(i).

¹ Reg 12 adopts the same terminology.

- b) Leaving a notice, order or document in the defined circumstances of reg 28(2)(b)(ii).
- c) Transmitting a notice, order or document by facsimile under reg 28(2)(b)(iii)
- d) Sending the notice, order or document to a document exchange box under reg 28(2)(b)(iv)
- e) Sending the notice, order or document to an email address under reg 28(2)(b)(v).
- f) Sending the notice, order or document by registered post, ordinary post, or courier to the nominated address for service under reg 28(2)(b)(vi).

[10] The clear conclusion in each instance is that service is effected when the physical step is taken as described by the particular sub-regulation.

[11] Whilst counsel for the defendant submits that the mere act of posting or sending documents via courier is an alarming result, it is in fact what the Regulations provide.²

[12] In this instance reg 28(2)(b)(vi) applied. It was the fact of despatching the courier to the defendant's authorised representative which constituted service. This occurred on 7 July 2014.

[13] Counsel for the defendant also submitted that "clear days" is reckoned by excluding both the date of service and the date of expiry of the period. This submission is made in reliance on a statement in *Halsbury's Laws of England*.³ The authors of *Brookers Employment Law* make the same point in reliance on the same statement.⁴

[14] However the statement relied on relates to the calculation of time when a period is fixed before the expiration of which an act may not be done, and where, in

² This mode of service is to be contrasted with that which is provided under r 6.18 of the High Court Rules, whereby a document is treated as served on a person on the date on which a solicitor for that person signs on a copy of the document a note accepting service of it, or at a proved earlier date.

³ *Halsbury's Laws of England* (4th edition, reissue, 1998) vol 45 Time at [1133].

⁴ *Employment Law* (online looseleaf ed, Brookers) at [EC19.01].

many statutes or other instruments, there is an intention to exclude both the first day and the last day.

[15] *Halsbury's* goes on to consider the different situation which applies in cases where a period is fixed within which an act must be done. There, it is stated that "the general rule is that the day of the act or event from which the period runs should not be counted against that person".⁵ Then follows this statement:⁶

Last day of period: subject to certain exceptions [such as a period expiring on a Sunday or a holiday] the general rule is that, when an act may be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed up to the last moment of the last day of that period. Hence, a notice is required to be given within so many days from or before a given date must be at the latest given on the last of such days.

That is the relevant statement of principle in the present case.

[16] In New Zealand the general principles as to the computation of time are provided in s 35 of the Interpretation Act 1999, which states:

35 Time

- (1) A period of time described as beginning at, on, or with a specified day, act or event includes that day or the day of the act or event.
- (2) A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.
- (3) A period of time described as ending by, on, at, or with, or as continuing to until, a specified day, act, or event includes that day or the day of the act or event.
- (4) A period of time described as ending before a specified day, act, or event does not include that day or the day of the act or event.
- (5) A reference to a number of days between 2 events does not include the days on which the events happened.
- (6) A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or the last day of that period is not a working day, be done on the next working day.

⁵ *Halsbury's Laws of England* (4th edition, reissue, 1998) vol 45 Time at [1134]. An example of this principle in the UK is provided by Part 2 of the Civil Procedure Rules (UK) which regulates the calculation of periods of time for undertaking any act specified by the Rules, such as the service of proceedings. CPR 2.8(2) states that a period of time expressed as a number of days shall be computed as clear days. "Clear days" is defined in CPR 2.8(3) as meaning that in computing the number of days the day on which the period begins and, if the end of the period is defined by reference to an event, the day on which that event occurs, are not included. Examples are provided including: "Particulars of claim must be served within 14 days of service of the claim form. The claim form is served on 2 October. The last day for service of the particulars of claim is 16 October." In that example, the end of the period is not defined by reference to an event.

⁶ *Halsbury's Laws of England* (4th edition, reissue, 1998) vol 55 Time at [1135].

[17] Regulation 19(2) is clear; the statement of defence must be served “within 30 clear days after the date of the service of the statement of claim”. Plainly, the date of service is excluded, and the statement of defence must be served *within* 30 clear days thereafter.

[18] It is a formulation that is consistent with s 35(2) of the Interpretation Act 1999.⁷ For the avoidance of doubt, the formulation is not one to which s 35(5) would apply, because the “event” to which that sub-section refers is one which is independent of the action which is required to be undertaken.

[19] Accordingly, the time within which the statement of defence needed to be served in this instance expired on 6 August 2014. It was out of time by one day when it was served on 7 August 2014.

[20] In the correspondence between the parties, counsel for the plaintiff accepted that there was no prejudice, but submitted that the position needed to be regularised. After considering the matter carefully, I agree that the timeframes for filing are those as imposed under the Regulations, and those requirements cannot be waived by counsel.⁸

[21] Section 221(d) of the Employment Relations Act 2000 provides that in order for the Court to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may at any stage of the proceedings, of its own motion give such directions as are necessary or expedient in the circumstances.

[22] In this instance, I am satisfied that a genuine issue has arisen as to the correct means by which time should be calculated. There is no evidence of any prejudice to the plaintiff, who consents to any necessary extension of time. I am satisfied that it is in the interests of justice for the Court to act on its own motion and to grant leave for the statement of defence to be filed and served out of time. The formal order of

⁷ An example of this principle is contained in *Carter v M* HC Wellington CIV-2003-485-1666, 14 June 2013. For a similar provision see r 1.17 of the High Court Rules, and the discussion of that rule in *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR 1.17.02].

⁸ Although, where there is non-compliance as to time it is competent for counsel to consent to the Court making a necessary order.

the Court is that the statement of defence must be filed and served within five working days from the date of this judgment.

[23] Turning to costs, I do not consider that costs should follow the event. There was a minor breach only and no possible prejudice; the position of the plaintiff was effectively to abide the decision of the Court. In circumstances where there was a bona fide issue as to interpretation, costs are to lie where they fall.

B A Corkill
Judge

Judgment signed at 9.35 am on 15 September 2014