**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2015] NZEmpC 23**
**ARC 22/14**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | SHABEENA SHAREEN NISHA (NISHA ALIM)<br>Plaintiff |
| AND | LSG SKY CHEFS NEW ZEALAND LIMITED<br>Defendant |

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| Hearing: | By written submissions filed on 23 January, 3 and 5 February 2015 |
| Appearances: | AF Drake and B Nicholson, counsel for plaintiff<br>J Douglas, counsel for defendant |
| Judgment: | 25 February 2015 |

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**INTERLOCUTORY JUDGMENT (NO 4) OF CHIEF JUDGE G L COLGAN**

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[1] The issues for decision on this further interlocutory judgment are:

- Whether the defendant filed and served her challenge to the plaintiff's objection to disclosure of documents within the five clear days allowed for doing so; and

- if not, whether the time for doing so should be extended to permit the Court to consider the defendant's challenge to objection.

[2] The relevant history of this matter is as follows. On 23 December 2014 the defendant gave the plaintiff notice, pursuant to reg 42 of the Employment Court

Regulations 2000 (the Regulations), requiring documents to be disclosed by the plaintiff.

[3] On 23 January 2015 (the plaintiff's time for doing so having been extended without objection) the plaintiff served on the defendant her notice of objection to disclosure of some of the documents covered by the defendant's notice of 23 December 2014. The plaintiff's grounds of objection to disclosure included irrelevance to the issues in the litigation, what was said to be an unreasonably broad range of documentation and that the disclosure amounted to "a fishing expedition or audit of the plaintiff's employment history".

[4] The plaintiff's notice of objection was sent by email from the plaintiff's solicitors to the defendant's solicitors at 4.31 pm on Friday 23 January 2015. The defendant's solicitors' office and (I assume) the office of the relevant person responsible for this litigation at the defendant, were closed on the following three days, these being a weekend and then the Auckland Anniversary public holiday on Monday 26 January 2015.

[5] Counsel for the defendant took instructions on the matter of the notice of objection on Tuesday 27 January 2015, and filed and served its challenge to objection to disclosure on Friday 30 January 2015.

[6] Whether the challenge was filed within time (within five clear days of receipt of the service of the notice of objection) depends, first, on whether it was served at 4.31 pm on Friday 23 January 2015. The plaintiff argues that the five clear days expired at the end of Wednesday 28 January 2015; that is, five days after the day of 23 January 2015 calculated from and including Saturday 24 January 2015. The second question is whether "clear days" are calendar days other than working days. The plaintiff says not and that any full day constitutes a "clear day".

[7] The matter is governed by the Regulations. Regulation 4 provides: "These regulations must be construed in a manner that best secures the speedy, fair, and just determination of proceedings before the court".

[8] Regulation 45(1) ("Challenges to objections") allows a party to apply to the Court to challenge the objection to disclosure "within 5 clear days after the day on which that party is served with the notice …". The phrase "clear days" is not defined in the Act or the Regulations; and nor are such other words or phrases used in the legislation as "days" or "working days".

[9] To determine whether the challenge was filed within time, it is necessary to decide when that time began to run. The plaintiff invokes reg 28(2)(b)(v). This provides that in circumstances where a party has given an email address for service, service may be effected by sending the notice or document to that email address. Counsel submits that the regulation determines that service is effected in this manner when the email is sent and not later, for example when the email is opened and read or is otherwise brought to the recipient's attention.

[10] Next, the plaintiff relies on reg 45(1), emphasising that the time for filing a challenge expires after five "clear days" and not working days or some other qualification of the word "days" as the plaintiff's counsel submits is the defendant's case. The phrase "clear days", in relation to times for taking steps under the Regulations, also appears in regs 13, 16, 19, 31E and elsewhere.

[11] This first issue of when service is effected, was examined recently by the Court in *Goulden v Capital & Coast District Health Board.*[1] His Honour Judge Corkill rejected an argument that the time for responding ran from the actual receipt by the party (or representative) of the document which might be later than, for example, its delivery to an address for service.[2] Among the examples that the Judge gave of the effecting of such service was the "[s]ending [of] the notice, order or document to an email address under reg 28(2)(b)(v)". He held: "The clear conclusion in each instance is that service is effected when the physical step is taken as described by the particular sub-regulation."[3] He continued: "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."[4] In that case, in

[1] *Goulden v Capital and Coast District Health Board* [2014] NZEmpC 169.
[2] At [7].
[3] At [10].
[4] At [11].

which reg 28(2)(b)(vi) applied, the Court held that it was the fact of "despatching the courier to the defendant's authorised representative which constituted service".[5] The analogy in this case is with the activation of the "Send" icon on the screen of a computer, which despatches an email and thereby constitutes service of its contents.

[12] The Judge in *Goulden* then moved to deal with the phrase "clear days" which, on one submission to him, was said to have meant "excluding both the date of service and the date of expiry of the period". Distinguishing the points made in the commentaries in *Brookers Employment Law*,[6] ( which endorsed a commentary in *Halsbury's Laws of England*),[7] the Judge concluded[8] that although the first day commenced after the day on which service was effected, the last day expired at the end of the final day of the period:

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

[13] The phrase "clear days" is, despite appearing in numerous New Zealand legislative instruments, not defined in any of them. It is notable, in particular, that there is no definition of it in the Interpretation Act 1999 despite that legislation addressing at least one other "time" phrase, "working days".

[14] The defendant's preferred meaning (that is, in effect, a working day or a week day as opposed to a weekend day and a public holiday) is, however, addressed expressly in the United Kingdom. Rule 2.8(2) of the United Kingdom's Civil Procedure Rules requires that any period of time of up to five days for doing something specified by those Rules, must be computed as "clear days". Those are defined expressly as excluding Saturdays, Sundays, bank holidays (what we call public holidays), Christmas Day, and Good Friday.[9] So, when a step must be taken within five days, in the United Kingdom, this will be interpreted to mean a traditional Monday to Friday (inclusive) working day. But the English Civil

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[5] At [12].
[6] *Employment Law* (online looseleaf ed, Brookers) at [EC19.01].
[7] *Halsbury's Laws of England* (4th edition, reissue, 1998) vol 45 Time at [1133].
[8] *Goulden v Capital & Coast District Health Board*, above n 2, at [14].
[9] Rule 2.8(4).

Procedure Rules do not, of course, apply in New Zealand and the Executive (in the case of the Employment Court Regulations 2000) having used the undefined phrase "clear days", has arguably elected not to qualify that term in the same way as, for example, it is in the United Kingdom.

[15] Adopting those principles and the Judge's reasoning in *Goulden*, I confirm that the phrase "clear days" means whole calendar days as opposed to parts of whole calendar days. The controversial issue in this case is, however, another one of interpretation of the phrase "clear days" which was not dealt with in *Goulden* and, from my researches, has not been addressed in this jurisdiction.

[16] I have concluded that the phrase "within 5 clear days" in reg 45(1) does not exclude what are commonly called non-working days, that is Saturdays, Sundays and public holidays. That is for the following reasons.

[17] Section 35(6) of the Interpretation Act 1999, which governs the interpretation of all statutes and regulations in New Zealand, provides:

> (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.

[18] Working day is defined in s 29 of the Interpretation Act as:

> … a day of the week other than—
> (a) a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, and Labour Day; and
> (b) a day in the period commencing with 25 December in a year and ending with 2 January in the following year; and
> (c) if 1 January falls on a Friday, the following Monday; and
> (d) if 1 January falls on a Saturday or a Sunday, the following Monday and Tuesday; and
> (e) if Waitangi Day or Anzac Day falls on a Saturday or a Sunday, the following Monday.

[19] Section 35(6) itself does not assist the defendant or determine the issue in this preliminary judgment because, with one exception, on either party's case, the last day of the five day period was a working day as defined in s 29 of the Interpretation Act. The defendant is, therefore, thrown back to an argument that the Saturday,

Sunday, and Monday public holiday in this case (what the plaintiff says were the first three days of the five day period), were not "clear days". I find against that argument for the following reasons.

[20] In the Employment Relations Act 2000, Parliament has only used the phrase "clear days" once. That is in cl 5 of sch 3 to the Act which provides that service of an application for a rehearing must be made within "7 clear days" of an event. That one use of the phrase "clear days" in the Act is in contrast to its multiple use in the Employment Court Regulations 2000 (the Regulations) made pursuant to the Act. There, the Executive has made frequent use of the phrase "clear days" in conjunction with numerous numerical variations. There is no discernible explanation for this contrasting use of the phrase defining time.

[21] In the Employment Relations Act, Parliament has used twice the phrase "working days". That is in ss 64 ("7 working days") and 20A ("2 working days"). By contrast, the Regulations nowhere refer to a period of "working days".

[22] To complete the picture, although the case does not turn on this, the unqualified words "day" or "days" appear numerous times in the Employment Relations Act.

[23] Finally, I note the treatment of the issue in Laws of New Zealand. Under (10) "Computation of period when non-working days intervene" the commentary at 52 (the footnotes being to the references in the text) provides:

> **52. General.** Where it is necessary that there be a given period of notice before some act may be performed or some event may occur, Saturdays and Sundays should not be excluded for the purposes of determining whether the requisite period of notice has been given.[10] In another decision, however, it was held that the fact that the last three days of a period of notice were public holidays was relevant to the question of whether the notice period was reasonable.[11]

[24] It follows from this analysis that the references to "working days" in ss 20A and 64 of the Act are subject to the definition of that phrase in ss 29 and 35(6) of the

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[10] *Downes v Downes* [1954] NZLR 171and *Defiance Churn Co v Tait* (1894) 12 NZLR 607. As to service of process on Sundays and other holidays, see para 21.
[11] *Kuratau Land Co Ltd v Kahu Te Kuru* [1966] NZLR 544.

Interpretation Act. Parliament having chosen to express time limits in "working days" in the Employment Relations Act, I conclude that the reference to the different phrase "clear days" in the Regulations cannot have been intended to mean the same as "working days" in the Employment Relations Act, the definition of which, under s 29, is that for which the defendant argues.

[25] In these circumstances, I conclude that the defendant's "5 clear days" within which to file a challenge to objection commenced on Saturday 24 January 2015 and concluded at the end of Wednesday 28 January 2015. The challenge filed on Friday 30 January 2015 was, therefore, out of time.

[26] The plaintiff's application succeeds in this respect, but that is not the end of the objection.

[27] Section 221 of the Act provides materially:

> In order to enable 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, … and upon such terms as it thinks fit, by order,—
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> …
>
> (c) subject to section 114(4),[12] extend the time within which anything is to or may be done; …

[28] The defendant has applied for such an order in the circumstances in which I have found that it was out of time to file a challenge to objection to disclosure.

[29] It is not difficult to understand how an email sent (and I assume received by the recipient's email system) just after 4.30 pm on the Friday before a holiday weekend may not have been considered and actioned before the following Tuesday morning. By then, three of the five "clear days" allowed by the regulation had expired. The five day time limit is tight, even without the intervention of statutory holidays and, in many more cases, those five days will cut across a weekend or part of a weekend when the offices of lawyers and other parties' representatives have closed.

[12] Not applicable in this case.

[30] Pursuant to s 121, I have no hesitation in concluding that the s 221 test is made out and extend the defendant's time for applying to challenge the plaintiff's objection to the date on which it was filed.

[31] A valid challenge to the plaintiff's objection to disclosure having now been lodged, it is incumbent on the plaintiff to support her objection to disclose some of the documents and that dispute must now be determined. The Registrar should now arrange a telephone directions conference to deal with these matters of document disclosure, and other steps towards an increasingly overdue fixture of this case.

[32] There will be no orders for costs on this application in the circumstances outlined above.

## Comment

[33] If the Executive by the Regulations intended to allow a party to have five working days within which to consider, decide to, and file a challenge to a notice objecting to disclosure, the use of the otherwise undefined phrase "clear days" means that, in most cases, fewer than five working days will be available to do so. This case illustrates, albeit as an extreme example, that the available time may be as short as two working days. Parties are able to give notice of objection by email deemed to have been served when it is sent, thus potentially reducing the effective time within which to respond even further. In these circumstances, the Executive may wish to consider whether parties such as the defendant in this case should not have to resort to an application for leave to extend time to have a proper opportunity to file a challenge without delaying unduly the interlocutory progress of the proceeding.

GL Colgan
Chief Judge

Judgment signed at 11.15 am on Wednesday 25 February 2015