25/6

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.95/81

681

BETWEEN ROBERT PATRICK PARKER of Lower Hutt, Unemployed Building Manager

Plaintiff

AND ALFRED NOEL GRIGG of Lower Hutt, Engineer

First Defendant

AND LOWER HUTT CITY CORPORATION a Body Corporate constituted under the Local Government Act 1974

Second Defendant

Hearing 18 June 1984

Counsel T G Goddard for plaintiff
D L Mathieson for both defendants

Judgment 22 June 1984

JUDGMENT OF DAVISON C.J.

The plaintiff was formerly employed by the second defendant as a building inspector. His services were terminated by one month's notice on or about 4 May 1976.

In 1977 the plaintiff applied to the Department of Labour for employment. He learned that the first defendant had allegedly advised the Department of Labour that he (the plaintiff) lost his job with the Lower Hutt City Council because he was a violent person. He consulted solicitors who on 9 November 1977 wrote to the second defendant stating:

> " He instructs us further that he has recently been in receipt of unemployment benefit and that during the course of a recent interview which he had with an officer of the Labour Department he was told by that officer 'You lost your job with the Lower Hutt City Council because you were a violent person'. Naturally enough this caused our client great distress.

> We should like to have your written confirmation that Parker did not lose his job for the reason given above so that the matter may be sorted out with the Labour Department. "

The first defendant, the City Engineer, replied to that letter on 18 November 1977. He said:

> " In reply to your letter dated 9th November 1977, it is advised that Mr Parker was employed as a Building Inspector in this Department from 17th October 1975 to 7th May 1976. Mr Parker was unable to accept instructions from his immediate superiors, and he did not co-operate with the other members of his section in their efforts to provide a high standard of service to the public.
>
> If the term 'violent' has been used, it would not be in the physical sense, but rather to indicate that Mr Parker had been involved in a number of violent altercations with senior officers of this Department.
>
> I am enclosing a copy of the letter dated 6th May 1976 which formally confirmed the dismissal of Mr Parker. "

The timetable of events which thereafter took place is as follows:

July/November 1977:	Cause of action arose
6 May 1981	Defamation writ issued by plaintiff against first and second defendants.
19 June 1981	First and second defendants filed Statements of Defence.
15 July 1981	Plaintiff filed Particulars of Malice.
17 July 1981	Plaintiff filed Orders for Discovery against first and second defendants.
20 July 1981	Plaintiff moved to strike out a paragraph in each Statement of Defence and moved for an order for leave to deliver interrogatories.
21 July 1981	First and second defendants filed amended Statement of Defence.
22 July 1981	Defendants filed Order for Discovery against plaintiff.
28 July 1981	Plaintiff filed affidavit of documents.

4 August 1981	Jeffries J. made order granting leave to deliver interrogatories all excepting Question 4. The application to strike out para 7 of each Statement of Defence was refused.
25 August 1981	First and second defendants filed affidavit documents. First and second defendants filed answers to interrogatories.
3 November 1981	Mutual inspection of documents made.
21 December 1981	Letter from defendants' Solicitor to plaintiff's solicitor asking if action is to proceed.
21 January 1982	Further letter from defendants' solicitor to plaintiff's solicitor asking for reply.
3 March 1982	Further letter from defendants' solicitor to plaintiff's solicitor seeking reply.
8 March 1982	Letter from plaintiff's solicitor to defendants' solicitor advising plaintiff had every intention to proceed to trial.
19 July 1982	Letter from defendants' solicitor advising if action not diligently pursued, defendants intend to move to strike out.
26 July 1982	Letter from plaintiff's solicitor advising "appropriate proceedings" will be filed as soon as possible.
22 December 1983	Defendants filed motion to dismiss action for want of prosecution.
28 February 1984	Plaintiff filed motion for leave to deliver further interrogatories. Plaintiff filed amended Statement of Claim.
1 March 1984	Plaintiff filed affidavit in reply to motion to dismiss.

In summary, a period of approximately three and a half years elapsed between the cause of action in November 1977 and the issue of the writ in May 1981. From issue of the writ, matters proceeded rapidly until inspection of documents six months later on 3 November 1981 but thereafter a period of two and a quarter years elapsed before the plaintiff took the next procedural steps in seeking further interrogatories and filing an amended statement of claim.

THE ACTION (THE CLAIM)

The cause of action in defamation is based on slander. The words allegedly used by the first defendant or by another senior executive of the second defendant are:

> " Parker (meaning thereby the plaintiff) lost his job with the Lower Hutt City Council because he is a violent person."

It is claimed that these words were published by the first and second defendants to the Department of Labour and that it was intended that they should be reported by officers of that Department to prospective employers of the plaintiff or, alternatively, that it was a natural and probable consequence of that publication that the words would be published by officers of the Department to such prospective employers.

Damages of $25,000 for each publication are sought.

(THE DEFENCE)

The defendants -

(a) Deny the publications alleged

(b) Plead qualified privilege in respect of each publication alleged.

DECISION

The legal principles to be applied in this application are well known. They are referred to in two decisions of our Court of Appeal: New Zealand Industrial Gases Ltd v Andersons Ltd [1970] NZLR 58; and Fitzgerald v Beattie [1976] 1 NZLR 265. They are:

To succeed, an applicant seeking to strike out an action for want of prosecution should establish:

1. That there has been inordinate delay;
2. That the delay is inexcusable;
3. That the defendants are likely to be seriously prejudiced by the delay.

Those considerations are not necessarily exclusive and R.273 under which such applications are made requires that the overriding consideration must always be whether justice can be done despite the delay.

I now deal first with the three matters referred to.

IS THE DELAY INORDINATE?

A plaintiff is entitled to issue proceedings as of right so long as the period of limitation appropriate to those proceedings has not expired. Mere tardiness in issuing proceedings within the limitation period can never of itself be a ground for striking out. But where a plaintiff has delayed in issuing proceedings it behoves him thereafter to proceed diligently with his action and delays occurring after the writ is issued may well justify an application to strike out: Rowe v Tregaskes [1968] 3 All ER 447, 448. Where such delays occur after the issue of the writ then the whole of the delays are taken into account, those occurring before the writ was issued and those occurring afterwards: N.Z.I.G. Ltd v Andersons Ltd (ante) p 64; Birkett v James [1977] 2 All ER 801, 809.

As Lord Denning, M.R. said in Rowe v Tregaskes (ante) at p 448:

> " The delay in the first two or three years is often the most prejudicial of all. "

In the present case there was a delay of some three and a half years after the cause of action arose before the writ was issued. After the issue of the writ (taking into account the brief period of activity on the part of the plaintiff over a period of six months) there was a further delay of two and a quarter years before the plaintiff took the next step which was subsequent to the filing of the defendants' motion to strike out. The total period of delay which can be laid at the door of the plaintiff is thus some five and three quarter years.

During that period, the limitation period expired in November 1983. That is a material matter "which often - indeed the cases say normally - leads to striking out": Greening v Ormond [1961] NZLR 965; N.Z.I.G. v Andersons Ltd (ante) at p 62.

I must conclude that delay or inactivity for a total of five and three quarter years over a period of six and a half years is inordinate delay.

IS THE DELAY EXCUSABLE?

The plaintiff has filed an affidavit in which he seeks to excuse the delays which occurred. The matters of excuse referred to are:

1. The retirement of his solicitor to accept a Judicial appointment:
2. The need to secure a grant of legal aid:
3. The refusal of the Department of Labour to disclose evidence:
4. The decision of the Ombudsman not to interfere with the Department's decision:
5. Difficulty in tracing a witness - a former officer of the Department of Labour.

I note from the plaintiff's affidavit that his first solicitor, Mr Ryan, wrote to the second defendant on 9 November 1977 and received a reply on 18 November 1977. There is no evidence of when he ceased practice and no evidence as to when legal aid was applied for or granted. The refusal of the Department of Labour to disclose evidence may have taken some time to deal with but three and a half years from the cause of action arising until the writ was issued is a very long time. Had the plaintiff and his advisers acted with diligence then I am sure that all necessary steps and inquiries could have been completed far more expeditiously. However that may be, the plaintiff was well within the limitation period of six years when he issued the writ. But once having issued the writ then

he should have moved diligently. There was six months of activity after the writ was issued and then no further procedural steps for two and three quarter years in spite of warnings from the defendants' solicitors about the delays. In the whole of that time the only active step taken so far as the defendants were aware was that the plaintiff's solicitors wrote to the defendants' solicitors on 8 March 1982 and 26 July 1982 indicating that it was the plaintiff's intention that the action should proceed. Nothing further was done, however, until 28 February 1984 - two months after the defendants had filed their motion to strike out.

Mr Goddard argued that the delay was excusable and referred to -

1. The difficulties of the action; proving the words allegedly used; and proving publication:

2. The time taken to obtain legal aid:

3. Difficulties with the Department of Labour due to the secrecy provisions of the Act.

4. The finding of a witness:

5. The way the defendants dealt with interrogatory No 4.

Even allowing for the fact that there were problems associated with the action, I would have thought that the three and a half years which elapsed prior to the issue of the writ would have been ample time to deal with those matters. The delays following the issue of the writ are, in my view, not able to be excused by the excuses given. They are too long. There has been no attempt made to give any timetable for the various matters which are alleged to have caused the delays. The whole question has been dealt with lightly by a broad brush approach which I find unsatisfactory when it is necessary for a plaintiff to show that delays - substantial delays - should be excused.

The delays in the present case have not been satisfactorily accounted for and are, in my view, inexcusable and indicate that "the plaintiff must be regarded as having inexcusably slept on his rights" per Turner J. Wall v Caldow [1964] NZLR 539, 544.

ARE THE DEFENDANTS SERIOUSLY PREJUDICED?

Mr Mathieson for the defendants submitted that the delays had seriously prejudiced the defendants for the following reasons:

1. The plaintiff's action alleging defamation alleges a slander and depends on what was said and to whom over six years ago.

2. The exact words used will be important because the plaintiff alleges that it was said of him that he was "a violent person". The defendant said in its letter of 18 November 1977:

> " If the term 'violent' has been used, it would not be in the physical sense, but rather to indicate that Mr Parker had been involved in a number of violent altercations with senior officers of this Department. "

3. The trial of the action will involve, in respect of the first alleged publication, proof of what (if anything) was said by some officer of the second defendant to some officer of the Department of Labour. In respect of the alleged republication, it will involve what was said, if anything, by an officer or officers of the Department of Labour to possible or prospective employers of the plaintiff. Whether or not there is any record within the Department evidencing any of those matters is unknown. The issues will probably depend on the recollections of witnesses which have undoubtedly dimmed over the years to the point where they can not be expected to recall accurately incidents which would have occurred in the course of their ordinary work and which they would have had no special reason to keep in their memories.

4. The first defendant has sworn on oath in his answers to interrogatories that he has no personal recollection of ever discussing the plaintiff with any officer of the Department of Labour and will be quite unable to deal now with allegations to the effect that he did so and to recall what was said.

5. In relation to the defendants' defence of qualified privilege, the matter of the recollection of witnesses will be critical when dealing with the particulars of malice alleged by the plaintiff.

Mr Goddard for the plaintiff, however, argued that the defendants have suffered no serious prejudice. He said:

1. The combined effect of the interrogatories and pleadings is that what is alleged was said or nothing at all was said.

2. The Department of Labour file will show what was the conversation between an officer of the second defendant and an officer of the Department of Labour.

3. The alleged republication is unlikely to feature greatly at the trial.

4. There is no serious prejudice by having the action hanging over the heads of the defendants.

5. There is no likelihood of serious prejudice which would not have existed had the trial taken place in 1982.

I do not accept that the combined effect of the interrogatories and the pleadings necessarily resolves the question of what if anything was said. That issue will depend on the oral evidence at the trial. Further,

I do not accept that the Department of Labour file will surely show what the alleged conversations were. That seems to me to be pure speculation. Then, had the trial taken place in 1982, there would have been two years less over which memories of events might be dimmed.

This is an action which depends almost entirely on detailed recollection of words used and events which took place over six years ago in circumstances where witnesses would be unlikely to have had any special reason to retain such matters in the memory.

There was no indication from the plaintiff that he was ever contemplating proceedings for defamation based on oral statements for some three and a half years after those statements were allegedly made, so there was no opportunity closer to the events for possible witnesses to try to recall them.

It is no doubt correct that had the plaintiff waited until just before the period of limitation expired before issuing his writ and had he then proceeded diligently and brought the action on for trial, the same problems of the recollection of witnesses would have existed, but the defendants could not have moved to strike out the proceedings. But the plaintiff did not act in that way, and once having delayed for some three and a half years in issuing proceedings, he must thereafter act diligently or face the consequences. I think there has been serious prejudice to the defendants in this case.

CAN JUSTICE BE DONE DESPITE THE DELAY?

The six year period of limitation expired in November 1983 at a time when the plaintiff was quite inactive in the proceedings. That is a material matter which normally leads to a striking out. However, in deciding whether justice can be done despite the delay, it might be helpful to consider the likely course of the trial if allowed to proceed.

1. The plaintiff will require to prove the words allegedly spoken by some officer of the second defendant to an officer of the Department of Labour. It is alleged that the words were spoken by the first defendant who was the City Engineer. The plaintiff must then prove the words used and the publication of them. He would no doubt endeavour to call as a witness an officer of the Department of Labour to say that he spoke to the first defendant or some other officer of the second defendant and was told in the course of conversation that the plaintiff was "a violent person".

There may or may not be a note or memorandum on the Department of Labour file made by the officer at the time of the conversation. If there is not, he would have to rely upon memory and may remember the word "violent" but may not remember the context in which it was used, i.e. as alleged by the defendants as being other than physical violence. If there is a memorandum then the accuracy of that memorandum would be in issue.

To the extent that there is a memorandum, a jury may well be inclined to accept the truth and accuracy of the memorandum in the face of the first defendant having no recollection of ever having said the words allegedly spoken by him. The delay affecting the first defendant's recollection may well tell against the defendants.

2. The plaintiff will require to prove the republication of the alleged words to possible prospective employers of the plaintiff. How will he do that? Presumably by calling some one or more persons to say what they told such employers when discussing the plaintiff. Now their evidence will be based on recollection possibly assisted by reference to what may or may not be a Department of Labour file. Who were the employers to whom the words were spoken, the defendants do not know so they cannot check on the statements made. Whether the names of the employers would ever be known at the trial would presumably depend on whether there was any record of their names on a Department file. These are all matters quite unknown to the defendants.

3. In relation to the Particulars of Malice filed by the plaintiff, it is alleged that the defendants -

> " stated contrary to fact that the plaintiff had been unable to accept instructions from his immediate superiors and that he did not cooperate with the other members of his section in their effort to provide a high standard of service to the public. "

Although the burden is upon the plaintiff to prove express malice and thus to rebut the defendants' plea of qualified privilege, the defendants may well require to call some evidence on the matter and the difficulties with recollection will no doubt arise.

4. In the cross-examination of the plaintiff's witnesses - particularly the officer or officers of the Department of Labour to whom publication is alleged to have been made by the first defendant, the inability of the first defendant now (as stated on oath) to recollect ever discussing the plaintiff with any such officer will greatly inhibit counsel for the defendants in effectively dealing with the matter.

5. In the presentation of their cases the defendants have no records of any of the alleged conversations. The first defendant has no recollection of the alleged publication of the words and can give no evidence in answer.

This is not the type of case where the matters in issue are substantially covered by documentary proof or where they are matters which can be dealt with by examination and inspection. This action depends upon the spoken word. It is one of those cases where the allegations are so affected by the mere passage of time that an order can be made on that ground alone: N.Z.I.G. Ltd v Andersons Ltd (ante) p 63.

I do not think that justice can be done at a trial in spite of the delay. The delay has so fundamentally affected trial of the essential issues of the case - the words allegedly spoken and the accuracy of them - that it would be unjust to require the defendants to proceed to trial after this length of time.

The action is dismissed. The question of costs is reserved.

Solicitors for the plaintiff	Goddard Moran Finlayson & Co (Wellington)
Solicitors for the first and second defendants	Hogg Gillespie Carter & Oakley (Wellington)