IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1291

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	JOHN HOWARD Respondent

Hearing: 19 February 2009

Counsel: C R Gwyn for the Appellant
F Joychild for the Respondent
A S Butler and S P Elliot for Human Rights Review Tribunal

Judgment: 7 April 2009

RESERVED JUDGMENT OF JOSEPH WILLIAMS J

This judgment was delivered by the Hon. Justice Joseph Williams
on 7 April 2009 at 4.30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] On 15 May 2008 the Human Rights Review Tribunal (HRRT) issued a decision on an application by John Howard for a declaration that clause 52 of the First Schedule to the Injury Prevention Rehabilitation and Compensation Act 2001 (the IPRC Act) was inconsistent with s 19 of the Bill of Rights Act 1990. The alleged inconsistency was that the IPRC Act discriminated against those who were near or older than 65 years in the area of vocational rehabilitation following injury. The HRRT granted the declaration sought by Mr Howard.

[2] On 16 June 2008, the Attorney-General purported to appeal pursuant to s 123(4) of the Human Rights Act 1993 (the HRA). I will set out the specific provision below when I analyse its effect in more detail, but for present purposes it is sufficient to note that the subsection requires any appeal to be "made" within 30 days of the HRRT's decision.

[3] The appellant filed his Notice of Appeal (the Notice) in the High Court on 16 June. This was the last possible day of the 30-day statutory period provided by s 123(4). He mailed a copy of it to the respondent, John Howard, at his address in Ohura in the King Country on the same day but Mr Howard did not receive it until a few days later. The appellant also failed to file a copy of the Notice in the administrative office of the HRRT within the 30-day period. This occurred as a result of an oversight. Three days later, on 19 June 2008, counsel for the appellant filed the Notice at the administrative office of HRRT and then applied for an order curing the two irregularities – that is the late receipt of the Notice by Mr Howard and the late filing of it in the HRRT.

[4] The appellant argued that filing the Notice at the office of the HRRT and serving the respondent are technical service requirements only and time for service could be extended in accordance with the jurisdiction of this Court in r 5 of the High Court Rules. Rule 5 provides:

> (1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form, or content or in any other respect, the failure -
>
> (a) Shall be treated as an irregularity; and
>
> (b) Shall not nullify –
>
> (i) The proceeding; or
>
> (ii) Any step taken in the proceeding; or
>
> (iii) Any document, judgment, or order in the proceeding.

> (2) Subject to subclauses (3) and (4), the Court may, on the ground that there has been such a failure as is mentioned in subclause (1), and on such terms as to costs or otherwise as it thinks just, -
>
> (a) Set aside, either wholly or in part, -
>
> (i) The proceeding in which the failure occurred; or
>
> (ii) Any step taken in the proceeding in which the failure occurred; or
>
> (iii) Any document, judgment, or order in the proceeding in which the failure occurred; or
>
> (b) Exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceeding generally as it thinks fit.

[5] On 26 June 2008, the appellant and respondent filed a joint memorandum consenting to the orders sought under r 5. At that stage, Mr Howard was unrepresented and signed the memorandum without the advice of legal counsel.

[6] On 11 July 2008, Associate Judge Gendall, seeing that all was apparently in order, made the orders by consent accordingly.

[7] But on 7 August 2008, the HRRT itself entered the fray as it were and counsel raised the issue of the Court's jurisdiction to cure the defect under r 5.

[8] In the meantime Mr Howard's case was taken up by the Director of Proceedings at the Human Rights Commission, and on 17 October 2008, Director Hesketh filed a memorandum formally rescinding Mr Howard's original consent. His counsel now argues that filing in the office of the Tribunal and actual service on the respondent are necessary components of making an appeal within the meaning of s 123(4), and the time for doing so cannot be extended because there is no power for this under the provision. Thus, it is argued that unless all steps are completed within the statutory timeframe under s 123(4), no appeal against the decision of the HRRT can be entertained by this Court.

[9] On 16 February 2009 counsel for Mr Howard made a formal application to set aside the relevant consent orders of Associate Judge Gendall and strike out the appeal.

[10] Ms Gwyn for the appellant offered comprehensive and careful argument in response. Her submission was pitched at three levels:

(a) the first, the Court has no jurisdiction to entertain the respondent's application because only the Court of Appeal has the power to overturn an order of an Associate Judge made by consent;

(b) second, if that is wrong, the respondent and his counsel waived any requirement of compliance with the statutory time limits by consenting to the remedial order of the Associate Judge;

(c) third, if that is also wrong, s 123(4) of the Human Rights Act should be read as if the mandatory 30-day time requirement applies only to filing the appeal in the High Court and not to giving notice to the respondent or the HRRT.

[11] Although the application before me was brought by the respondent, it makes sense to structure these reasons using the approach advanced by Crown counsel.

Can this Court revisit the 2008 consent orders?

[12] The appellant's argument was based on the jurisdiction of Associate Judges under ss 26I and 26J of the Judicature Act 1908. The short point was that under s 26I(1)(e) orders made by consent are deemed to be within the Associate Judge's "Court" jurisdiction as opposed to his or her "Chambers" jurisdiction. Under s 26P(1) there is a power in the High Court to review orders of Associate Judges only when they are made in Chambers. Where they are made in "Court", the correction process is appeal to the Court of Appeal under s 26P(2).

[13] One would ordinarily consider these provisions to be a complete answer to the application by the respondent except that it is clear that this Court also has an inherent jurisdiction to correct orders that are wrong, even when made by consent if the interests of justice require it. As the Court of Appeal said in *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135:

> It is well settled that the High Court has an inherent jurisdiction to set aside a consent order if the interests of justice require it, but good ground must be established to warrant that course.
>
> (at p139 per Richardson J for the Court)

[14] The interests of justice have been said to include contractual principles but broader principles and considerations are also relevant (see generally *Ryde Holdings v Sorenson* (1995) 8 PRNZ 339).

[15] In the end, whether justice requires that the orders be set aside must depend on a consideration of the other two heads of argument advanced by the appellant in this case – namely whether the respondent waived compliance and whether the Court had jurisdiction to make them in the first place. Thus before I consider whether to invoke the Court's inherent jurisdiction to correct orders, I must first consider the other arguments advanced by the appellant.

Was compliance with the time limit waived?

[16] The appellant argues that either because the respondent consented in writing on his own behalf to the orders, or because his counsel (who was instructed five days before the orders were made) failed to intervene in time to prevent them being made, he cannot now insist on compliance with the notice requirements of s 123(4) HRA. This raises two distinct questions:

(a) Is it possible to waive a mandatory statutory time limit?

(b) If it is, was there such waiver here?

Is waiver possible?

[17] On the first question the authorities are in conflict. At a general level there is *Morris v Templeton* (2000) 14 PRNZ 397 cited by counsel for the HRRT. In that case it was discovered on a second appeal to the Court of Appeal (after hearings in the District and High Courts) that the District Court had no jurisdiction under s 73 of

the Trustee Act 1956 to grant the relief awarded. It was discovered that jurisdiction under that provision belonged instead to the High Court. The original decision was therefore a nullity. The respondent contended that the appellant had waived the issue of jurisdiction by taking the steps they had and it was too late to challenge jurisdiction. The Court of Appeal held:

> … even if the applicants [respondents] could be said to have waived the jurisdiction point (which we very much doubt) such a waiver could not make the judgment of the District Court valid.
>
> (at p14)

And further:

> … it cannot be too late to raise a point of jurisdiction in a case where the original decision is a nullity …
>
> (at p15)

[18] On the other hand, there is a line of High Court decisions dealing with the question of non-compliance with mandatory statutory requirements for mounting appeals that suggest those requirements can be waived. *Gaynor v Lacy* [1920] NZLR 235 concerned an agreement by solicitors for the respondent to extend time for appeal from a decision of the Magistrate Court. Section 153(1)(d) entitled any party to appeal a Magistrate's determination provided:

> The appellant gives notice of appeal within seven days after such determination.

[19] According to subsection (2):

> Notice shall be given by leaving with the clerk and serving on the opposite party a notice in writing …

[20] It is not clear on the facts in that case whether both filing and service were late, but the respondent solicitors agreed to the extension before notice was given. Sim J confirmed the requirement could be waived.

[21] In *Donnelly v Orr* [1999] NZFLR 545; (1999) 13 PRNZ 190, the appellant filed outside the time for appeals in Family Protection Act proceedings. Randerson J

also accepted that there was no dispute that the parties may agree to extend time or waive the requirements of an Act (at p196).

[22] Finally in *Meeks v Hull* (1999) 12 PRNZ 606, Paterson J considered an appeal under s 72 of the District Courts Act 1947 in which the appeal was lodged with the Registrar of the High Court as required by s 72(1) but not served on affected parties either before or immediately after lodgement in the High Court as required by s 72(3). Paterson J held that by the terms of s 72(3) the appeal was brought by lodging the appeal documents in the High Court. He considered it was not logical to treat a failure of service as nullifying the appeal because the Court would not know when the service had occurred unless it is put in issue by one of the parties in the appeal (at p611). Compliance with the s 72(3) service requirement was therefore mandatory but the appeal must logically remain on foot until the point is taken.

[23] At a conceptual level, I prefer the reasoning of the Court of Appeal in *Morris v Templeton*. I cannot see how, even by consent, the parties can effectively amend the statute. I would also distinguish *Meeks v Hull* on the basis that in that case Paterson J drew a distinction between filing where compliance can be supervised by Court staff, and service where it cannot. Since the appeal was "brought" by filing, it was possible to take a more relaxed approach to collateral service without undermining the spirit of the regime. In the case of service, practical enforcement could only depend on the existence of a complaint anyway. In this case, s 123(4) HRA draws no distinction between filing and service. The requirement is simply "giving notice", as we shall see below.

[24] Having said that, I do acknowledge that *Gaynor v Lacy* and its modern application in *Donnelly v Orr* represent a line of authority that, if thin, is right on point. It may be that a distinction should be drawn between proceedings in which the Court could never have made the orders sought under any circumstances and those in which the orders might have been possible if the relevant party had not been out of time. Section 3(4) of the Inferior Courts Procedure Act 1909 draws that same distinction in express statutory language but that Act has no direct application to this case because the HRRT is not an inferior Court within its meaning (see generally *Siola'a v Wellington District Court* [2009] NZAR 23 (CA). In any event I accept on

the strength of the earlier cited cases that waiver of mandatory filing requirements is possible, at least in theory.

Was there waiver in this case?

[25] The authorities are ambivalent about whether ignorance of the legal consequences of consent can vitiate that consent (see the reasoning of Paterson J in *Meeks v Hull* at 612) but any waiver must be clear and unequivocal. As Randerson J said in *Donnelly v Orr* at 552:

> … in my opinion there must be conduct which shows unequivocally that the time limit was intended to be waived. Conduct which is capable of more than one interpretation will not ordinarily be regarded as sufficiently clear to amount to a waiver.

[26] In this case, a joint memorandum was signed by the respondent in person on 26 June 2008 and filed on that day. On the same day, the Director of Proceedings at the Human Rights Commission (the Director) took the brief. He communicated that fact to Crown counsel by email at 5:16pm. He said:

> One matter about which I have a little, but not much, information, is that your Notice of Appeal may be deficient for being both out of time and not properly served in accordance with the High Court Rules. As his counsel, my position about both of these matters at this stage is that any interlocutory application seeking leave to cure those defects will be opposed. I mention this now out of an abundance of caution.

[27] Crown counsel replied that the consent memorandum had been filed that day and that counsel was "happy to discuss".

[28] The HRRT was not served with the interlocutory application and took no part in exchanges.

[29] The orders sought were made on 1 July 2008 and this fact was communicated to the Director by Crown counsel on the same day. On 9 July 2008, the Director emailed Crown counsel confirming receipt of the advice. He said:

> I note that the HC (sic) has made the remedial orders you sought as to the filing/service of your notice of appeal, so there's no need to dwell upon that.

[30] I do not think it appropriate for the appellant to rely on the respondent's personal consent when on the day that it was filed, his newly appointed legal counsel expressly confirmed his opposition for the record even if that was intended only as a holding position until further consideration. The later communication of Mr Hesketh following advice that the orders had been made anyway indicated that he "would not dwell upon" the issue. This statement is the closest we get to a waiver. I do not think those words are sufficiently unequivocal in terms of the ratio in *Donnelly v Orr*. They do not in my view amount to a clear and unambiguous declaration that the point would no longer be taken under any circumstances, especially when seen in the context of express opposition two weeks earlier. Not dwelling upon something does not preclude a later return to the subject for further consideration.

[31] Even if I am wrong in that, it seems to me that the failure to secure the additional consent of the HRRT must be fatal to a waiver argument. Ordinarily of course Tribunals take no active role in argument on the merits of appeals from their decisions. The views of the Tribunal will normally be irrelevant unless the appeal raises an issue of actual bias or one likely to affect the way the Tribunal carries out its task in the future. This appeal does not raise issues in those categories. But it does raise an issue in relation to an obligation owed by the appellant directly to the HRRT. That is the obligation to give the HRRT notice of any appeal under s 123(4) HRA. It seems to me that there are sound reasons why the HRRT should have been served with the application and its consent or waiver sought in respect of any departure from the procedure set out in s 123(4). The timing of notice to the HRRT will affect its ability to plan for an appropriate level of participation in the appeal or to prepare arguments for the High Court as to what that level of participation should be. This is supported by the structure of the Rules themselves. Rule 717 (now r 20.17) entitles the HRRT to be represented and heard on all matters in an appeal unless the Court directs otherwise. The HRRT is therefore a party to any appeal in terms of r 3 and is entitled to be served with any application under r 243 (now r 7.22).

[32] In the absence of any contrary direction from this Court, the consent of the HRRT was required to support any waiver of the relevant time limit by consent. In this case, there was no order limiting the role of the HRRT and the default position

ought to have applied. This was after all a matter involving a direct obligation owed to the HRRT.

[33] I consider therefore that neither the respondent nor the HRRT waived a requirement to comply with the time limits imposed.

[34] I turn therefore to consider the third argument advanced by the appellant. This is the argument that goes to the substantive issue of interpretation in the case.

Does the time limit apply only to filing the Notice of Appeal in the High Court?

[35] Section 123(4) of the HRA provides for appeals in this way:

> Every appeal under this section shall be made by giving notice of appeal within 30 days after the date of the giving by the Tribunal in writing of the decision to which the appeal relates.

[36] This procedure for mounting appeals is then connected to the High Court Rules in subsection (8) of s 123 as follows:

> Subject to the provisions of this Act, the procedure in respect of any such appeal shall be in accordance with the rules of Court.

[37] Because the appeal was filed before the new Rules came into force on 1 February 2009, the old Rules still apply and I will refer to them throughout.

[38] Rule 704 provides:

> (1) This rule applies when a party has a right of appeal to the Court.
>
> (2) An appeal must be brought, -
>
> (a) if the enactment that confers the right of appeal specifies a period within which the appeal must be brought, within that period;
>
> (b) in every other case, within 20 working days after the decision appealed against given.

[39] Rule 706(1) defines when an appeal is "brought". It says:

> (1) An appeal is brought when the appellant -

(a) files a notice of appeal in the High Court; and

(b) files a copy of the notice of appeal in the administrative office; and

(c) serves a copy of the notice of appeal on every other party directly affected by the appeal.

[40] The issue as correctly identified by counsel for the Tribunal is whether an appeal is properly "made" under s 123(4) HRA, by filing a Notice of Appeal in the High Court within 30 days, or alternatively, must the appellant also give notice to the HRRT and the respondent within the time limit?

[41] This is the issue because the authorities are generally agreed that the Court can only cure breaches of the Rules under r 5. The remedial power does not extend to non-compliance with procedural requirements for bringing appeals that are found in the governing statute itself. As Holland J said in *UIG House v Canoustie Holdings* (HC, Christchurch, AP 336-93, April 28 1994):

> A power given in the rules cannot defeat a time limit contained in a statute where the statute itself does not give any power to extend time.

[42] Thus, if "giving notice of appeal" in s 123(4) includes filing the Notice of Appeal at the office of the HRRT and serving the respondent, this Court has no power to cure the appellant's failure to do so within the 30-day limit provided by s 123(4). If, on the other hand, "giving notice of appeal" requires only filing the Notice of Appeal in the High Court, then the late filing of that notice at the office of the HRRT and late service on the respondent can be cured by r 5 because it is not a requirement of the HRA but one imported by r 704(2)(b).

[43] The complication in what should otherwise be a straightforward question of statutory interpretation is in the fact that the HRA and the Rules do not use the same language in describing what steps are necessary to perfect an appeal.

[44] In the HRA, s 123(4) speaks of the appeal being "made", but s 92K(2) in the same Act refers to the expiry of the time for "lodging" an appeal. The Rules on the other hand, refer to an appeal being "brought" rather than made. They describe the circumstances in which the Court can extend time for bringing an appeal (r 704(2)

and (3)) and the tasks that must be completed in order for the Court to be satisfied that the appeal has indeed been "brought" (r 706(1)). To make matters worse, under s 123(4) an appeal is "made" by "giving notice" of it – but the provision is silent as to the correct recipient of the notice! One can either infer the correct class of recipients by adopting a purposive approach to construction of the relevant provision or look for more express supplementary directions in the Rules. Whichever approach is taken the answer appears to be the same.

[45] The simpler and, in my view preferable approach, is to construe s 123(4) so as to require all those with a clear interest in the appeal to be given notice of it within the 30-day appeal period. That would obviously include the High Court, the Tribunal at first instance and the parties to the dispute. Such an approach would meet the intent of the provision which is self evidently to ensure that those with an interest in the appeal find out about it as soon as possible. It does not really make sense to construe it as if prompt filing in the High Court is all that is required. That would be to diminish the interests of the litigants before the HRRT. They would after all have at least as great a stake as the High Court itself, in knowing of an appeal.

[46] On the other hand I cannot see the justification for reading the subsection down as the appellant suggests. The only real argument in favour of it is to preserve access to justice for appellant by adopting a less stringent approach to the requirements for appeals. In support the appellant referred to s 105(1) HRA requiring the HRRT to act according to the substantive merits of a case and avoid technicalities. Counsel also pointed to s 106(1) which relaxes the usual constraints on admissibility. These obligations also fall on the High Court on appeal by virtue of s 123(5). I am not persuaded by that argument. In my view the underlying purpose of the HRA is to provide a broad non-technical 'equity and good conscience' approach to disputes before the HRRT and on appeal while establishing at the same time a strictly controlled gate for re-litigating disputes beyond the HRRT. These two ideals are not in my view in conflict. The interest of litigants – especially lay litigants as is common under the HRA – is as much in having procedural certainty and finality as it is in encouraging a focus on the real dispute.

[47] As I read it, this was the conclusion of Thorp J in *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404, a case that dealt with the meaning of s 63(3) of the Human Rights Commission Act 1977 whose terms were identical to s 123(4) HRA.

[48] The alternative argument put by the appellant was that s 123(4) was not intended to be complete in itself but was to be supplemented by further detail from rr 704 and 706. The argument was that it is actually r 706(1) that defines the list of recipients of Notices of Appeal. It is that provision rather than s 123(4) that requires the intending appellant to file notice in this Court and the HRRT and serve all directly affected parties because s 123(4) is silent on the intended recipients. Accordingly, the appellant argued the r 706(1) requirements may be relaxed pursuant to r 5(1) and (2)(b).

[49] I prefer the perspective that the detailed requirements in r 706(1) do no more than affirm the meaning and intent of s 123(4). I do not think it is necessary to import r 706(1) in order to complete s 123(4) because the provision lacks sufficient meaning without it. It is possible, indeed sensible, to read the two provisions harmoniously, so that an appeal is "made" under s 123(4) and 'brought" under r 706(1) in exactly the same way. But that does not mean that the source of the list of recipients of notice for appeals from the HRRT is r 706(1).

Conclusion

[50] I conclude accordingly that the 30-day notice requirement is mandatory and applies to this Court, the HRRT and Mr Howard. I also conclude that neither the HRRT nor Mr Howard waived the jurisdictional point and both are entitled to argue it now. On that basis it is appropriate in the interests of justice for me to set aside the consent order made by Associate Judge Gendall on 11 July 2008 in accordance with the principle in *Auckland Regional Services Trust v Lark* to which I earlier made reference.

[51] It is my view therefore that the appeals have not been properly brought because they are out of time and I have no power to correct that flaw. They are

dismissed accordingly. Costs are reserved and may be dealt with by memoranda if necessary.

"Joseph Williams J"

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