IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 92
EMPC 62/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application by the defendant for leave to extend time to file a statement of defence
BETWEEN	P Plaintiff
AND	A Defendant

EMPC 170/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND BETWEEN	P Plaintiff
AND	A Defendant

Hearing:	On the papers filed on 3, 17 May and 23 June 2017
Appearances:	P, plaintiff in person J Douglas, counsel for defendant
Judgment:	28 July 2017

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

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[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 1 March 2017. The plaintiff seeks a hearing de novo. P has now filed a second challenge in which an interim prohibition

on publication order is in place. Accordingly, the parties' names in this case have been anonymised pending the outcome of P's application for a permanent order.

[2] P filed the statement of claim commencing his challenge on 29 March 2017. The Court records disclose that the statement of claim was served on the defendant by registered post on 30 March 2017. The defendant did not file a statement of defence to the statement of claim within 30 clear days after the date of service of the statement of claim, as specified in the Employment Court Regulations 2000 (the Regulations).[1] That 30 day period would have expired on 29 April 2017. That date being a Saturday, the date of expiry for the filing of the statement of defence was 1 May 2017.

[3] Being out of time, the defendant filed a draft statement of defence on 3 May 2017 together with an application seeking leave of the Court extending the time for the filing of a statement of defence. The period of delay is therefore two days.

[4] The grounds for the defendant's application are as follows:

(a) the defendant was not aware that it had been served with the statement of claim until 2 May 2017 when advice was given by the Employment Court;

(b) the application has been filed promptly and without undue delay once the defendant realised it had been served with a statement of claim;

(c) there is no prejudice to the plaintiff if leave is granted to the defendant to file its statement of defence to the claim;

(d) the overall justice of the case.

[5] In support of the application, the defendant has filed an affidavit from C dated 3 May 2017. C is the People and Culture Manager for A. She is based in the

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1 Employment Court Regulations 2000, r 19(2).

New Plymouth branch of the defendant company, but her role is to perform the human resources function for the defendant on a national basis.

[6] In C's affidavit, she sets out the circumstances surrounding the defendant's delay in filing a statement of defence to the plaintiff's claim. The plaintiff clearly served the defendant at its registered office in Auckland by Courierpost. The plaintiff was entitled to do that. However, from the description of the sequence of events contained in C's affidavit, it is clear that at some stage, the statement of claim was sent to her at the New Plymouth branch. As she says in her affidavit, she had previously thought that the documents held on her file related to the Authority proceedings without realising that the statement of claim (which was also on her file) related to the challenge to the Employment Court.

[7] Having located the document on her file, and realising that it was a fresh claim in the Employment Court, she took steps to try and confirm when the defendant had received the documents. Her enquiries, at head office, could not ascertain the exact date when the document had been served.

[8] C also refers to further proceedings, which the plaintiff filed with the Authority, in which the plaintiff sought to reopen the Authority's investigation. It is now known that the plaintiff was also seeking from the Authority orders prohibiting publication. The further determination of the Authority in respect of the further applications made to the Authority by the plaintiff are now the subject of a second challenge to the Court by P. As C states in her affidavit, the defendant did not expect to have to respond to a review of the earlier determination of the Authority in two different forums at the same time, and this has clearly confused the matter.

[9] The defendant has paid the sums due under the Authority determination dated 1 March 2017 to the plaintiff, as he was successful with some of his claims there.

[10] Finally in her affidavit, C states that as soon as the defendant became aware that it was out of time to file a statement of defence, an application for leave to file a statement of defence out of time was filed, along with a draft statement of defence in

the event that the application was granted. As indicated earlier, the period of delay is a matter of two days.

[11] In his notice of opposition, P maintains that the grounds for leave set out in C's affidavit in support are "quite weak and shaky". P then proceeds to oppose the application on technical grounds related to whether C, who has sworn the affidavit in support, and Ms Douglas, who is counsel for the defendant, were respectively authorised to give evidence on behalf of the defendant and act as counsel. No grounds are raised in the notice of opposition that he has been prejudiced by the delay or that it would not be in the interests of justice for the leave to be granted.

[12] In timetabling directions in respect of the application, I required P to have his submissions which were to be filed, sworn and affirmed. This was in view of the fact that he was representing himself and had not filed any affidavit in support of his notice of opposition. In his submissions which were subsequently filed in the Court in accordance with the timetabling directions, P again repeats the matters contained in the opposition as to the authority of C making an affidavit on behalf the defendant. He withdraws the dispute as to Ms Douglas' authority to represent the defendant as counsel. The plaintiff raises a submission as to previous extensions of time sought by the defendant in the Authority proceedings. The plaintiff not refer to any prejudice apart from the fact that he has had to attend to the expenditure of time and costs of dealing with the application for leave and the fact that delay has now been occasioned in his pressing on with his challenge. He then proceeds to set out grounds for criticising the statement of defence which will be filed if leave is granted.

[13] His assertion that the failure to file a statement of defence within time has created delays in his ability to press on with his challenge needs to be considered in context. The fact is that independently of the challenge to the first determination of the Authority, he then proceeded to seek a review by way of a rehearing of the investigation meeting and filed his application for orders prohibiting publication of name and details. These applications were filed with the Authority. Even if the statement of defence had been filed within time in respect of the first challenge, it was unlikely that the first challenge would have been able to be progressed until

such time as the Authority had issued its determination in respect of the applications for rehearing and prohibition on publication. Much of the delay has therefore been caused by his own actions.

[14] In her submissions in support of the application, Ms Douglas points to the fact that the delay in filing the statement of defence was due to administrative oversight and that the period of delay in filing the application for leave after the date of expiry was a significantly short period. She points to the fact that P has given no evidence that he is prejudiced by the delay and that his notice of opposition and submissions in support rely upon technical points which are irrelevant to the grounds upon which the Court must consider the present application and exercise its discretion. She also points to the fact that P took a year after the events giving rise to his claims to file his proceedings in the Authority, and that as a result of delay caused by further submissions and information being given to the Authority after its investigation meeting had concluded, there was a substantial delay in its determination being issued.

[15] Insofar as the merits of the defence are concerned, Ms Douglas submits that the defendant's case must have some merit, as it successfully defended part of the case before the Authority. The defendant maintains that it has a strong case in respect of the personal grievance claims which have been put at issue by P's challenge; that P rejected offers by the defendant to attempt to place him in work; and that at all material times, it acted as a fair and reasonable employer. Insofar as the unlawful discrimination claim is concerned, Ms Douglas submits that the facts do not support any kind of discrimination at all of P.

[16] In view of the delays of over two and a half years which have occurred since the events took place, Ms Douglas makes the further submission that the delay has caused prejudice to the defendant in defending the matter, in view of the fact that there will be difficulties in locating witnesses. There might be some point in that submission, having regard to the fact that the Authority's investigation meeting took place on 2 June 2016, and the determination was not issued until 1 March 2017. As indicated, that delay was occasioned not through any fault of the Authority, but rather the forwarding of further information from P between June and November

2016 and the need of the defendant to respond to some of that material. Nevertheless, a significant period of time has elapsed. Further delays will now be occasioned by the fact that P has filed the second challenge in relation to the Authority's determination that it would not reopen the investigation meeting and would not make an order prohibiting publication of his name and details of the case. Both the challenges filed with the Court, being related to the same circumstances, will need to be heard together.

[17] The principles which need to be applied in considering an application of this nature have been well established in previous decisions of the Court.

[18] The Court has jurisdiction pursuant to s 219 of the Employment Relations Act 2000 (the Act) to extend time. The exercise of the discretion conferred by s 219 is not subject to any statutory criteria, and like any other discretion conferred upon the Court, it must be exercised judicially in accordance with established principles.

[19] These were discussed in the following paragraphs from *An Employee v An Employer*:[2]

> [9] The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. Does the justice of the case require that the extension of time sought be granted? In their detailed submissions about what the interests of justice are in this case, both Mr Beck and Ms French adopted the headings used by Goddard CJ in *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 and by Shaw J in *Stevenson v Hato Paora College* [2002] 2 ERNZ 103:
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> 1 The reason for the omission to bring the case within time.
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> 2 The length of the delay.
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> 3 Any prejudice or hardship to any other person.
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> 4 The effect on the rights and liabilities of the parties.
>
> 5 Subsequent events.
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> 6 The merits of the proposed challenge.
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> [10] I agree that these are convenient and appropriate headings under which to consider the matters relevant to the exercise of my discretion in this case, albeit that I do so in a different order.

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2 *An Employee v An Employer* [2007] ERNZ 295 (EmpC).

> [11] In addition to those factors which the Court has found it appropriate to consider in considering whether to extend time for filing a challenge under s179, I also have regard to the well established principles applicable to applications for extensions of time generally. In *Ratnam v Cumarasamy* [1964] 3 All ER 933, the Privy Council said at page 935:
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> > *The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.*
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> [12] I also have regard to the general principle summarised by Richmond J in *Avery v No* 2 *Public Service Appeal Board* [1973] 2 NZLR 86 at 91:
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> > *When once an appellant allows the time for appealing to* go *by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.*

[20] *An Employee v An Employer* involved an application by a plaintiff for an extension of the time within which to lodge a challenge. However, the principles apply equally to a defendant seeking leave to extend the time for filing a defence.[3] The exception is the length of the delay, which is less significant in such a case.[4]

[21] The statements in *An Employee v An Employer* must now be read in the light of the Supreme Court's judgment in *Almond v Read*.[5] The Supreme Court iterated that the ultimate question when considering the matter is what the interests of justice require. It considered those factors which have been set out in cases such as *An Employee v An Employer*, but modified the approach which needs to be taken as to the merits of the claims of the party seeking exercise of the discretion to extend time. The following passages from the Supreme Court's judgment are relevant.

> [36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs[6] or non-compliance with

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3 See *Bentan Twisted Ltd v Stevenson* EmpC Wellington WRC 7/09, 11 June 2009.
4 *An Employee v An Employer*, above n 2, at [17].
5 *Almond v Read* [2017] NZSC 80.
6 Court of Appeal (Civil) Rules 2005, r 37.

> directions[7]). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able to have them heard on the merits.[8] We think that this is an important part of the background against which extension applications must be determined.
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> [37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[22] The Supreme Court was not stating that consideration of the merits of a proposed appeal will never be relevant. As it stated in the judgment, there will be occasions in which the Court will risk facilitating unjustifiable delaying tactics if it does not consider the merits. Even if the merits are to be considered, such analysis must be relatively superficial in view of the fact that the Court will be considering a case on a purely inferential basis at the stage of the proceedings where the application for leave is being made.

[23] Those further factors do not apply in the present case, where it is clear that the delay has been occasioned by misunderstandings and administrative oversight within the defendant company, and the period of delay is minimal.

[24] Turning to the six criteria set out *An Employee v An Employer*[9] and confirmed in a different format in *Almond* by the Supreme Court,[10] the following comments can be made in respect of the present application. Clearly there are valid reasons put

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7 Rule 6(2).

8 The extent of the Court of Appeal's power to strike out timely appeals was not argued and is not something that we need to resolve. We note, however, that the Court has struck out appeals on abuse of process or similar grounds: see, for example, *Clark v Libra Developments Ltd* [2008] NZCA 416, where an appeal was struck out on the basis that the appellant was seeking to re-litigate issues which had already been conclusively determined against him. The respondents' application to strike out in that case was framed in abuse of process terms: at [7]. In *Siemer v Stiassny* [2009] NZCA 624 an appeal was struck out in part, for reasons analogous to abuse of process.

9 *An Employee v An Employer*, above n 2.

10 *Almond v Read*, above n 5.

forward for the omission to file the statement of defence within time. The plaintiff's secondary applications, which have now been rejected by the Authority, have also introduced a confusion which might not otherwise have existed. As far as the length of delay is concerned, it is minimal. No prejudice or hardship has been occasioned to the plaintiff, other than the delay caused in proceeding with the challenge. As explained in *An Employee v An Employer*, delay is not significant in a case such as this one, where it is a statement of defence being filed and proceedings have already been commenced.[11] Part of that overall delay has been occasioned, in any event, by the plaintiff's own actions. In granting the application for leave, there will be no effect on the rights and liabilities of the parties. Insofar as "subsequent events" are concerned, there have in fact been subsequent events in this case, namely the further applications which the plaintiff has made to the Authority and which have now been rejected but are subject to a further challenge. Finally, in the light of *Almond*, this is clearly a case where the Court does not need to deal with the merits of the proposed defence. The somewhat rigid position taken in cases such as *Ratnam v Cumarasamy*[12] and *Avery v No 2 Public Service Appeal Board*,[13] has now been modified by the Supreme Court.

[25] Even though there is no need to consider the merits of the defendant's defence in the present case, if that had been necessary, I would have decided on the basis of the inferential case presented that the defence had merit and that the defendant should not be deprived of its entitlement to defend the challenge.

[26] For these reasons, the application seeking leave to file a statement of defence out of time is granted, and there will be an order accordingly. The defendant should now formally file a statement of defence in the form set out in the draft which was filed in support of the application. This is to be filed and served on or before 4 pm on 1 August 2017.

[27] No issues as to costs arise in this case, in view of the fact that P is representing himself. He does mention some expenses which have been incurred in having to defend the application, but in view of the circumstances relating to the

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11 *An Employee v An Employer*, above n 2, at [17].
12 *Ratnam v Cumarasamy* [1964] 3 All ER 933 (PC).
13 *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA).

need for the defendant to apply for leave, which were well set out, I regard P's opposition to the application as being unwarranted, and I make no order reimbursing him for those expenses. Time is presently running for the defendant to file a statement of defence to the further challenge. There will also need to be an interlocutory hearing in respect of P's application for an order extending the interim prohibition on publication order made by the Authority to preserve his rights of appeal. It is probably appropriate at this stage that a telephone directions conference be convened, and the Registrar will contact the parties for that purpose.

M E Perkins
Judge

Judgment signed at 4.30 pm on 28 July 2017