IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 125
ARC 67/10

IN THE MATTER OF	an application for leave to challenge out of time
BETWEEN	DOUG BEHAN-KITTO Intending Plaintiff
AND	NEW ZEALAND POST LIMITED Intended Defendant

Hearing: By memoranda of submissions filed on 20 August, 3 and 13 September 2010

Appearances: Paul Blair, Advocate for Intending Plaintiff
Penny Swarbrick, Counsel for Intended Defendant

Judgment: 20 September 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Should Doug Behan-Kitto have leave to challenge out of time the determination of the Employment Relations Authority dismissing his claims?

[2] The Authority's determination[1] was issued on 29 April 2010. Mr Behan-Kitto applied for leave on 16 June 2010 following e-mailed receipt of the papers by the registry on the previous day. Mr Behan-Kitto's application for leave to challenge out of time was accompanied by an affidavit explaining the circumstances and a draft statement of claim.

[3] The statutory period for challenging determinations of the Authority by right is 28 days from the date of its determinations. The delay in this case between its expiry and the application to the Court was almost three weeks.

[1] AA 196/10.

[4] The explanation for the delay comes from the person who accepts responsibility for it, a volunteer worker at the Rotorua People's Advocacy Union. Ryan Blair says that he received three similar and associated Authority determinations at about the same time and, although he was instructed by Mr Behan-Kitto's advocate, Paul Blair, to calculate the 28 day appeal period of two of those determinations, he calculated the period for this case incorrectly for reasons that he cannot now explain.

[5] The intended defendant opposes the application for leave so it is necessary to consider the parties' arguments for and against.

[6] Mr Paul Blair for the intending plaintiff relies on the judgment of this Court in *Ellis v Telecom NZ Ltd*[2] which distinguishes simple inadvertence from reasons including elements of deliberation. Also distinguished (following the judgment of this Court in *Motorpol Australasia Ltd v Roche*)[3] is the issue of "carelessness" which Mr Blair submits is not present here. Mr Blair also distinguishes the facts in *Motorpol* in which the delay was of 63 days which could not be explained satisfactorily by any other means than carelessness.

[7] Mr Blair emphasises that as soon as the error was discovered that the deadline had been passed (on about 1 June 2010), the plaintiff's advocate contacted both the Court and the intended defendant's solicitor about the error and about Mr Behan-Kitto's intention to lodge a challenge, arranged for an affidavit dealing with the issue to be sworn on 4 June 2010, and then tried unsuccessfully to obtain the consent of the intended defendant for the late filing of a challenge. Mr Blair submits that this case does not include either a careless or a "cavalier" attitude to the time limits.[4]

[8] The intending plaintiff submits that there will be no prejudice or hardship to the intended defendant as a result of the delay, more particularly when New Zealand

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[2] [1994] 1 ERNZ 309.
[3] [2006] ERNZ 253.
[4] *Masta Maintenance Services NZ Ltd v Page* [2006] ERNZ 260.

Post Limited (NZ Post) had been put on notice by e-mail as from 5 June 2010 that this application would be made. Mr Blair submits that any prejudice that might be established can be compensated for by costs if the challenge is allowed but is ultimately unsuccessful.

[9] Next, Mr Blair points out that there is a judgment of this Court, the benefit of which the Authority may not have had when determining this case. That is *Shortland v Alexander Construction Company Ltd.*[5] *Shortland* was an oral judgment delivered on 13 April 2010. The Authority investigated Mr Behan-Kitto's case on 4 February 2010 and delivered its determination on 29 April 2010. I accept that it is distinctly possible that the Authority was not aware of the *Shortland* judgment when it delivered its determination. Both cases involve fixed term employment agreements, one of the issues on which the decision on Mr Behan-Kitto's case turned.

[10] Turning to the merits of the intended challenge, Mr Blair submits that the Authority erred in law in finding that there had been what it described as a "technical breach" of the requirements of s 66 of the Employment Relations Act 2000 (the Act). In *Shortland*, Judge AA Couch found that the minimum requirements of a fixed term employment agreement under s 66 of the Act cannot be implied where they are not in writing. As the Judge held in *Shortland*, the statute requires the reasons for an agreement for a fixed term to be in writing to ensure absolute clarity and certainty. Mr Blair submits that the case, if permitted to go to a hearing on a challenge, will clarify an important question of interpretation, operation and application of a collective agreement involving substantial numbers of postal workers and NZ Post.

[11] Finally, Mr Blair emphasises that the overall test for such applications is the justice of the particular case between the parties and that this is a proper instance for the exercise of the Court's discretion under s 219 of the Act.

[12] In opposing the application for leave to challenge out of time, the intended defendant's counsel, Ms Swarbrick, makes the following points. First, she says that the plaintiff has not explained adequately the length of the delay. Next, she submits

[5] [2010] NZEmpC 41.

that the intended challenge has insufficient merits. Finally, counsel submits that the overall justice of the case points away from the grant of the Court's discretion.

[13] While Ms Swarbrick accepts that Mr Ryan Blair's error may have been genuine, she says, nevertheless, that it was a mistake that ought not to have been made. That is, of course, the position with all mistakes, especially viewed with the benefit of hindsight, but mistakes are made and it is both futile to argue that they will not be from time to time or, more relevantly, to argue against any leniency at all because the mistake ought not to have been made.

[14] More significantly, the intended defendant submits that only a small part of the delay has been explained adequately by Mr Ryan Blair. I agree with Ms Swarbrick's calculation of the time periods, that is that a challenge should have been filed on 27 May 2010 at the latest and not 1 June 2010 as the plaintiff claims. It follows that it was a week after the expiry of the appeal period and not three days, when the affidavit in support of the application for leave was sworn. Next, Ms Swarbrick points out that the intending plaintiff's position was first made known to the intended defendant's solicitors by e-mail sent on 5 June 2010. The first working day after that was Tuesday 8 June (Monday 7 June being the Queen's birthday holiday) and the plaintiff's representative was advised on 8 June that there would be no consent to the challenge being filed out of time. Notwithstanding that advice, Ms Swarbrick points out that the application for leave was still not filed until 15 or 16 June 2010 without any explanation for the further 12 day delay.

[15] Ms Swarbrick submits that the intending plaintiff's failure was not only to file within the statutory timeframe but then also to move within a reasonable time following his realisation of that. Counsel submits that in these circumstances her client was entitled reasonably to believe that the Authority's determination in its favour was final and that the litigation was at an end.

[16] Ms Swarbrick submits that the delay of 19 days must be more than "significant" as a delay of 11 days was described in *Trans Otway v Hall*.[6] She

[6] [2010] NZEmpC 76 at para [19].

emphasises her client's entitlement to rely on the provisions of s 179 of the Act that challenges must be filed within 28 days of the Authority's determination.

[17] Counsel submits that if leave is granted, her client will be put to the expense and inconvenience of litigation which it considers to be unmeritorious and has already been determined by the Authority. Although that may be so, the same opposition to a challenge as of right within the statutory period would be ineffectual and Parliament has decreed that it is important that parties to employment litigation in the Employment Relations Authority have access to an appellate system.

[18] As to the merits of Mr Behan-Kitto's case, Ms Swarbrick submits that there is no apparent error of law by the Authority, despite its finding that there had not been what it described as "technical compliance" with the requirements of ss 66(2)(b) and 66(4)(b) of the Act. Counsel submits that the Authority took into account properly at para [13](c) of its determination that earlier related correspondence between the parties fulfilled the requirements of those subsections. Ms Swarbrick points out the Authority's conclusion that her client complied with the spirit or purpose of s 66 and, in particular, relevant matters have been recorded in writing. She submits that Mr Behan-Kitto was aware of both the reason for the fixed term nature of his employment and the way in which it would end. The Authority's finding of technical non-compliance turned on the fact that this information was not contained in the body of the employment agreement as the statute requires. It found, however, that because there was a variation to an earlier form of agreement which did comply with the statute, there was no breach.

[19] Counsel for the intended defendant submits that the challenge, if permitted to be heard, will not clarify an important question of interpretation, operation and application of the relevant collective agreement between the parties for the future. Ms Swarbrick accepts that Part M of the collective agreement is subject to s 66 and indeed has never asserted to the contrary. Rather, counsel submits, it is a question of fact whether there has been compliance with s 66 in each case. She contends that there is nothing in s 66 or otherwise which prohibits the terms of an employment agreement from being recorded in more than one document, especially in a situation of variation. Counsel submits that there has been clear compliance with s 66 in this

case. It seems to me, however, that there may be a novel and important question about compliance with s 66 in these circumstances that has not yet been tested in this Court.

Decision

[20] I conclude that overall justice requires that leave be granted to challenge out of time. That is for the following reasons. The initial delay before realisation of error is explained reasonably in all the circumstances. The subsequent delay before filing, although lengthy for an experienced lawyer, is not so unreasonable for a union advocate as to be determinative against the grant of leave.

[21] The intended defendant was on notice, as soon as practicable after the error was realised, that an application would be brought. It could not reasonably have assumed thereafter that the plaintiff would abandon that intention. There is no prejudice caused by the delay, at least that cannot be compensated by costs later if required.

[22] The issues on the challenge cannot be said to be unarguable for the intending plaintiff. Indeed, they appear to raise important questions, not only between these immediate parties but also more generally, requiring an authoritative judgment for the benefit of both NZ Post and the Postal Workers Union of Aotearoa.

[23] The intending plaintiff's draft statement of claim is henceforth to be treated as his operative statement of claim. The intended defendant may have the period of 30 days within which to file and serve a statement of defence. Once the pleadings are in order, the case should be called over in the usual way.

GL Colgan
Chief Judge

Judgment signed at 10.30 am on Monday 20 September 2010