IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 59
CRC 6/11

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	ZACHARY PETER COSTLEY Plaintiff
AND	WAIMEA NURSERIES LIMITED Defendant

Hearing: (by way of submissions filed on 23 March, 6 and 13 April 2011)

Counsel: Steven Zindel, counsel for the plaintiff
Nicole Ironside, counsel for the defendant

Judgment: 9 June 2011

JUDGMENT OF JUDGE A D FORD

The application

[1] The plaintiff, Mr Costley, has applied for leave to extend the time for filing his challenge to a determination[1] of the Employment Relations Authority issued on 10 January 2011. The application is strongly opposed. It is common ground that the 28-day period prescribed in s 179(2) of the Employment Relations Act 2000 (the Act) for challenging a determination of the Authority expired on 7 February 2011. Counsel for the plaintiff attempted to file a statement of claim on 8 February 2011 but the Registry correctly rejected the pleadings as being one day out of time.

[2] Under s 219 of the Act the Court has a discretion to make orders extending time but there are well established principles for the exercise of such discretion which include, where relevant:

[1] [2011] NZERA Christchurch 1.

1. The reason for the omission to bring the case within time.
2. The length of the delay.
3. Any prejudice or hardship to any other person.
4. The effect on the rights and liabilities of the parties.
5. Subsequent events.
6. The merits.

That list is not exhaustive and in any given situation the overriding consideration must always be the justice of the case, – see *Day v Whitcoulls Group Ltd*.[2]

[3] The categories listed in *Day* assist the Court in making an overall judgment about where the interests of justice lie. In such a balancing exercise it is unlikely that any one factor will be decisive. As Judge Perkins pointed out in *Clear v Waikato District Health Board*,[3] "it is not necessarily appropriate to give more emphasis to one of the categories than the other." Chief Judge Colgan also made the observation in *Pani v Transportation Auckland Corporation Ltd*[4] that decisions in other cases, even where the facts may appear to be similar, are of limited assistance because the rights, obligations and interests of the particular parties will need to be weighed in relation to the facts of each case.

The relevant facts

[4] Mr Costley was employed by the defendant as a nursery worker from August 2006 until his dismissal on 24 April 2009. He claimed that his dismissal was unjustified. The Authority found in his favour in that regard on account of significant procedural flaws in the dismissal process but it also found, pursuant to s 124 of the Act, that Mr Costley had contributed 100 per cent towards the situation that gave rise to his personal grievance and, therefore, it disallowed him any remedies.

[2] [1997] ERNZ 541at 548.
[3] [2007] ERNZ 338 at [8].
[4] ARC 85/09, 3 December 2009 at [6].

[5] Mr Costley's dismissal was based on his employer's conclusion that he was using cannabis at work. Waimea Nurseries has a drug and alcohol policy which centres on the issue of workplace safety and efficiency. It states materially:

> Where an employee is seen taking ...drugs ...this is serious misconduct and may result in summary dismissal. In these circumstances no test is required if the employee acknowledges they were taking ...illicit drugs. If there is uncertainty about the substance being taken, an alcohol or drug test may be required.

Mr Costley denied any drug use at work but admits that he was a regular and heavy user of cannabis outside work hours.

[6] After suspicions had been raised about Mr Costley and a fellow employee, Mr Vaikai, taking drugs at work, the defendant conducted an investigation. The defendant began the investigation by interviewing Mr Vaikai who, after some hesitation, admitted using cannabis at lunchtime with the plaintiff outside work premises. Next, the defendant interviewed the plaintiff who denied using cannabis at work. The plaintiff was not informed of the source of the allegation. The plaintiff agreed to undergo two drug tests a month apart. There is a dispute about whether the plaintiff was required to pass both tests or only one. After failing the first test, the plaintiff was dismissed.

Discussion of criteria

The reason for the omission and the length of delay

[7] The delay of only one day is, by definition, the minimum delay that a party to proceedings could create or could encounter. Ms Ironside in her submissions for the defendant accepted that the delay was "minimal".

[8] Mr Zindel, for the plaintiff, described the circumstances in which the delay occurred:

> 2. Counsel who had acted for the plaintiff in the Employment Relations Authority had left the law firm in November 2010.
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> 3. The plaintiff gave instructions to take the challenge on 14 January 2011.

> 4. Counsel was on holiday from 22 – 31 January (including Nelson Anniversary Day). Anniversary Day is not counted as a day under Rule 3.2 of the High Court Rules but does appear to count as a day in section 179 of the Employment Relations Act 2000. [Counsel] wrongly gave priority to other pressing work before and after that period of holiday and had left the matter with a colleague.
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> 5. The plaintiff's application for legal aid was sent on 4 February 2011.
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> 6. The plaintiff was able to pay his solicitors a personal cheque for the filing fee on Monday, 7 February 2011 and confirmed that he wished to proceed.
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> 7. The plaintiff's counsel miscalculated the appeal period so that he saw the period for filing the challenge as expiring on Tuesday, 8 February 2011.
>
> ...

[9] Ms Ironside submitted that the failure to file the statement of claim on time indicated a "careless, indifferent or cavalier attitude to time limits" on the part of Mr Zindel who she correctly described as a senior practitioner well experienced in employment law. Mr Zindel's failure to file the challenge on time was clearly an avoidable error. However, it is not the function of the Court to discipline or disadvantage counsel who appear before it without sound reason and I accept that the mistake on Mr Zindel's part was genuine and explicable. In the circumstances, it would be a rather Draconian outcome to close the door of the Court to the plaintiff because of such an oversight on the part of his counsel. As Gault J expressed it in *Sutton v New Zealand Guardian Trust Co Ltd*:[5]

> [T]he Court always is reluctant to deprive litigants of their rights because of decisions incorrectly made by their [legal] advisers. Further, there is the overriding principle that a proceeding should not be struck out if it is possible still to do justice between the parties.

Prejudice

[10] Ms Ironside accepted that the delay of one day did not, of itself, cause any significant prejudice to the defendant. However, she did argue that the defendant has suffered a loss of certainty in that it could normally rely on the 28-day limitation. Prejudice can arise from the loss of certainty of an Authority determination which has not been challenged in time and which can therefore, with justification, be

[5] (1989) 2 PRNZ 111 at 117.

regarded by the successful party as finalising the matter. Ms Ironside also made the point that she was not informed by Mr Zindel of the plaintiff's intent to apply for leave to challenge out of time until 11 February; three days after counsel had been notified by the Registry of his mistake. She submitted that she should have been informed immediately of the non-compliance and that the plaintiff intended to file a leave application.

[11] There is no doubt that there is prejudice to a party who reasonably believes stressful and potentially costly litigation is over until being disabused by notification of an application to extend the time for filing a challenge. In addition, I agree that such prejudice would have been lessened by prompt notification of the intention to apply for leave. As Chief Judge Colgan observed in the *Pani* case,[6] "prompt and candid" notification of such an error is required by both professional practice and the party's obligation to minimise prejudice in the balancing calculation the Court must perform.

[12] The three day delay on Mr Zindel's part in giving notice after having been informed of his error is, nevertheless, minimal and there is no suggestion that that additional delay prejudiced in any way the defendant's ability to make its case. While immediate notification was called for, I do not consider the delay in notification to be fatal to the plaintiff's case.

Merits

[13] The bulk of Ms Ironside's 84 paragraph initial submissions in opposition to the application for leave to file the challenge out of time concentrated on the merits of the case. Counsel emphasised that whatever the failings of the employer, the Authority was correct to find contribution of 100 per cent because the applicant did use cannabis at work. In these circumstances, it was submitted, there was nothing to suggest that the applicant would have a reasonable prospect of gaining a remedy and to that extent the continuation of the case would be pointless.

[14] In *Clear*, Judge Perkins stated, in relation to merits, that:[7]

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[6] At [8].
[7] At [20]–[21].

> I am of the view that the Court needs to be careful not to place too much emphasis on this aspect, which is just one of the several issues to be considered in the assessment of overall justice. Judge Shaw in *Stevenson* dealt with the issue as being "the absence of any realistic prospect of success". Judge Travis in *McDonald* spoke of the challenge as being "unlikely to have succeeded". ... The Court needs to take care that in considering this issue of the merits, it is not led into an over-detailed and wide-ranging analysis of the reasoning and determination of the Authority in a situation where no record of the evidence is kept. Nevertheless, the Court can make an assessment at a reasonably basic threshold.

[15] I respectfully agree with those observations. In *Pani* Chief Judge Colgan indicated that the merits criterion involved an assessment as to whether the case was so weak "that it is just to extinguish it without further consideration."[8] To this extent, the relevant principles are akin to those involved in the consideration of an application to strike out a cause of action. After all, there would be no point in permitting an out of time challenge to proceed if it were only to be later struck out as disclosing no tenable cause of action. In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*,[9] Casey J made the point that the discretion to strike out is one to be "sparingly exercised" and would be justified only, if on material before the Court, "the case as pleaded is so clearly untenable that the plaintiff cannot possibly succeed".[10]

[16] Although Ms Ironside's submissions in opposition to the application for leave are of a high standard, they fall down when dealing with the merits in that they appear to proceed on the basis that the facts of the case are set in stone and the Authority's factual findings will be upheld on challenge. That may well, of course, turn out to be the case but the plaintiff has challenged the whole of the Authority's determination and seeks a complete de novo hearing. In those circumstances, it is not appropriate for the Court at this stage to attempt to make firm findings as to the merits when the Court has not heard from witnesses in person nor had the benefit of full legal submissions. As indicated earlier, the merits are but one factor among several in the balancing exercise and because it is possible to make only a basic assessment of their strength at this stage, the merits of the case should never be over-emphasised in the balancing exercise.

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[8] At [26].
[9] [1992] 2 NZLR 282 (CA).
[10] At 311.

[17] Nevertheless, having said that, some assessment is still necessary. For the purpose of this application it is sufficient to examine the issue of contribution. The Authority's decision on contribution, which Ms Ironside seeks to uphold, is contained in one paragraph of its determination:[11]

> Mr Costley is not entitled to any remedies because of the significant level of his contribution to the situation. Despite the clear contractual requirement that he not work while under the influence of drugs, for a period of time he used cannabis during lunch breaks and returned to work. He exposed himself and others to a significant risk given the work environment.

[18] Mr Zindel criticised the Authority's determination in this regard as "slipshod" because it relied for its conclusion on the evidence of a co-worker, Mr Vaikai, who did not appear at the Authority's investigation. I accept that it would have been preferable had the Authority made direct and clear factual findings based upon identifiable evidence in relation to this issue. As the Court does not have direct access to the evidence and information given in the Authority, it is difficult to assess the strength of the contribution issue. It is important to note that under s 124 of the Act, the Authority and Court must be satisfied on the balance of probabilities that the employee's action contributed to the situation which gave rise to the personal grievance. This involves the need for an examination of the evidence and then a finding on the facts. It is a far different test from that in s 103A (as it then stood) which required the Authority or Court to ask only if the action taken was one which a fair and reasonable employer would take in all the circumstances.

[19] The reduction of remedies by 100 per cent is a significant step. No doubt it is occasionally justified and is not, as Ms Ironside pointed out, unusual. After consideration of the evidence, it may be appropriate in this case. But it seems that the Court would need to be satisfied that the plaintiff did in fact use cannabis at work. That is an issue which is hotly in contention and will need to be the subject of evidence at any hearing if leave is granted. The defendant will have the onus of establishing cannabis use at work. There is also the issue of the extent of the contribution and the appropriate percentage reduction of any remedy. These are all issues very much in dispute. For these reasons, it does not seem to me that this is one of those cases where the Court can conclude on the pleadings before it that the

[11] At [28].

challenge is so clearly untenable or so weak that the applicant could not possibly succeed.

Conclusions

[20] In ruling upon this application, I reiterate that the fundamental consideration must always be whether the interests of justice require the time for filing the challenge to be extended. An evaluation of the first three categories from *Day* points strongly towards the granting of leave. The delay was minimal; indeed it was the least delay possible. The delay resulted from a genuine error by plaintiff's counsel. As was said by the High Court in *Sutton*, the Court is reluctant to punish parties for the errors of their legal advisors. The respondent was informed relatively promptly of the application for leave. There is no prejudice specifically related to either delay in making the application or in the late notification to the defendant of the application. In the end, the defendant and its witnesses are in the same position they would have been in had the challenge been lodged in time.

[21] Turning to the merits, as I have indicated, having read the determination and carefully considered the submissions of counsel, I cannot say that the plaintiff's case, particularly in regard to the issue of contribution, is so clearly untenable that he could not possibly succeed. I am also mindful that the merits category should not be over-emphasised at the expense of any other category. This is particularly so in a case such as the present where the delay is minimal and any prejudice to the defendant is confined to a loss of certainty of outcome. Given that some loss of certainty of outcome is a factor in every case involving leave for an extension of time, this element cannot be decisive in itself otherwise leave would never be granted.

[22] For these reasons I am persuaded that it is in the interests of justice in the present case that leave should be granted and I so order. As requested by the plaintiff, the challenge shall proceed by way of a de novo hearing. The plaintiff's draft statement of claim will, when the filing fee is paid, become the operative statement of claim. From notification of payment of the filing fee, the defendant will then have 21 days in which to file and serve a statement of defence.

[23] Costs on this application are reserved.

A D Ford

Judge

This judgment was signed at 11.30 am on 9 June 2011