

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2011] NZEmpC 97
WRC 41/10**

IN THE MATTER OF an application for leave to file a statement
of defence out of time

BETWEEN QUAN ENTERPRISES LTD
Plaintiff

AND ZHAOQIN FAIR
Defendant

Hearing: (on the papers by written submissions received 20 and 27 May, 13 and
17 June and additional affidavit received 7 July 2011)

Counsel: Ms Jennifer Wickes, counsel for the plaintiff
Ms Julie Olds, counsel for the defendant

Judgment: 1 August 2011

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] The issue in this interlocutory matter is whether the defendant, Mrs Fair, should be granted leave under s 219 of the Employment Relations Act 2000 (the Act) to file her statement of defence out of time. Her application is opposed by the plaintiff.

[2] The background to the case is that in April 2010, Mrs Fair was dismissed from her employment at the Masterton Noodle Canteen. With the assistance of her husband, she proceeded to file a statement of problem with the Employment Relations Authority (the Authority). The Authority was confronted with a number of difficulties in carrying out its investigation. Mrs Fair was unsure who her employer had been and so, along with the plaintiff, she had cited a Mr Ying Wang as another respondent. The Authority found that the employer was the plaintiff but there was no employment agreement or job description, no proper wage and time records and no

record of any holiday pay having been paid to the defendant. There was even a dispute over Mrs Fair's wage entitlement.

[3] In its determination,¹ the Authority upheld Mrs Fair's claim finding that her dismissal by the plaintiff had been unjustified. She was awarded a total of \$15,459.15 for wage arrears, holiday pay and loss of wages resulting from her dismissal along with compensation of \$1,000 for non-economic loss. On 23 December 2010, the plaintiff filed its statement of claim challenging the whole of the Authority's determination and seeking a hearing de novo.

[4] The next development in the proceeding occurred on 11 April 2011 when Ms Olds, on behalf of Mrs Fair, made application for leave to file a statement of defence out of time. An affidavit from Mrs Fair was filed in support and subsequently an additional affidavit was filed in support by the defendant's husband, Mr Steven Fair. The affidavits are helpful and explain the relevant factual background and the reasons for the delay.

[5] Mr and Mrs Fair are employed by Sanford Limited on the deep sea fishing trawler, San Enterprise. Mr Fair is employed as a general hand. At the time the statement of claim was filed, the couple was at sea. They were at sea from 9 December 2010 to 18 January 2011 and then again from 20 January 2011 to 1 March 2011. On 18 January 2011 the vessel docked at the Port of Timaru for a three-day break between trips. Mr Fair went to Sanford's main office in Timaru to collect the couple's mail but there was nothing for them. He then contacted his sister-in-law who was responsible for forwarding their mail. She confirmed that mail had been sent and she suggested that he should check the office again in two day's time.

[6] The couple then travelled to Dunedin and when they returned to Timaru at approximately midday on 20 January 2011 they received their mail. Mrs Fair opened a letter from the Authority which contained the Authority's determination. Up to that time, she did not know the level of the awards she had received. She then asked her husband to telephone the Authority to find out why the money awarded her

¹ WA 199/10, 15 December 2010.

had not yet been paid. Mr Fair did so and he was advised by the person he spoke to at the Authority's office that a statement of claim had been filed in the Employment Court and they would need to contact the Employment Court directly.

[7] Mrs Fair then telephoned the Employment Court and explained her position. She was told to contact the plaintiff's solicitor and explain that she had not received the statement of claim because she was working at sea. Mr Fair deposed that he contacted the plaintiff's solicitor but had to leave a message explaining their working arrangements and the difficulty they had in receiving communications. Mr Fair explained in his affidavit that communications on the vessel are extremely difficult and they do not have access to email communication. He said that a satellite phone is available but it is extremely expensive and its use is discouraged by management.

[8] On 20 January 2011, Mr and Mrs Fair departed the Port of Timaru on their next 42-day fishing trip. They returned to New Zealand on 3 March 2011 and received the statement of claim on that same day. Upon their return to Masterton Mrs Fair engaged counsel to assist in relation to the litigation and her counsel wrote to the plaintiff's solicitor seeking consent to file a statement of defence out of time. No response was received from the plaintiff or its solicitor.

[9] There is one important finding in the above narrative of facts which needs further explanation. It relates to the date of service of the statement of claim. It was not clear from the application for leave or from Mrs Fair's affidavit in support exactly when she had received the statement of claim. In her notice of opposition to the application, dated 12 April 2011, Ms Wickes, on behalf of the plaintiff, stated:

2. It appears from the affidavit sworn by the Defendant, she received that statement of claim on 18 January 2011 yet took no steps to file a defence at that stage.

[10] Subsequently, the Court requested a further affidavit clarifying certain factual matters and it was not until that affidavit from Mr Fair was received on 7 July 2011 that it became clear that all Mrs Fair had received on 18 January 2011 had been the determination of the Authority. She did not receive the statement of claim until 3 March 2011. Although it is not obvious from the documentation before the Court, the plaintiff may well have taken a different view of the application had the true

position been known earlier. That may be a relevant factor when it comes to the issue of costs.

[11] It is against that background that Mrs Fair now seeks leave to file her defence out of time. The 30-day period for filing the statement of defence expired on 2 April 2011 which was a Saturday. Under reg 74A of the Employment Court Regulations 2000, therefore, the defence should have been filed on Monday, 4 April 2011. Application for leave was made to the Court on Monday, 11 April 2011, seven days after the expiration of the 30-day limitation period.

[12] The principles pertinent to applications to extend time under s 219 of the Act are well established – see *Bentan Twisted Ltd v Stevenson*.² The Court has a discretion which is to be exercised according to recognised judicial principles but the overriding consideration is always the justice of the case.³

[13] It seems that both parties may have initially proceeded on the false assumption that the statement of claim had been served on the defendant on 18 January 2011 and the defendant's counsel went to some lengths to explain the reasons for the delay as from that date. No doubt as a result of the confusion in this regard, very limited information has been provided to the Court to explain the delay between the actual date of service and the date of filing the application for leave. It is not clear, for example, exactly when Mrs Fair returned to Masterton and instructed her counsel. What is also not clear is when Ms Olds sent her letter to the plaintiff's counsel seeking her consent to file the statement of defence out of time. Those are important events which should have been clearly documented. In all the circumstances, however, particularly given the initial confusion over the date of service, I am prepared to accept that the delay the Court is concerned with was minimal and that it has been adequately explained. There is no evidence that the plaintiff has suffered any prejudice.

² WC 15/09, 11 June 2009.

³ At [9].

[14] Turning to the merits of the defence and overall justice of the case, Ms Olds has referred the Court to *Watha Management Ltd v Tindall*,⁴ where Judge Colgan had to consider a not dissimilar application for leave to file a statement of defence out of time. In considering the merits of the defence, Judge Colgan noted that while it is always difficult to assess merits at this stage of the proceedings:⁵

... logic dictates that the defendants' position must have had merit because they were successful before the Employment Relations Authority. That is not to say that the plaintiff may not succeed on the challenge: rather, the defendants at this stage are entitled to a presumption of merit for the purposes of this application.

[15] In relation to the overall justice of the case, Judge Colgan found that this clearly favoured the defendants' position noting: "It would be unsatisfactory to have an undefended challenge to the Authority's determination when the defendants want, and are prepared, to defend."⁶

[16] With respect, I find the observations of Judge Colgan in the *Watha Management* case to be persuasive and highly relevant to the facts of the present case. I am satisfied that the justice of the case requires leave to be granted to the defendant for her statement of defence to be filed out of time. The draft statement of defence filed with the application for leave will now be regarded as the statement of defence. The Registrar is directed to arrange a telephone conference with counsel to progress the matter.

[17] Costs on the application are reserved.

A D Ford
Judge

Judgment signed at 9.30 am on 1 August 2011

⁴ AC 1/05, 3 February 2005.

⁵ At [10].

⁶ At [11].