IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 120
WRC 1/12

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	SUSAN MCLEOD Applicant
AND	NATIONAL HEARING CARE (NZ) LTD Respondent

Hearing: (on the papers - affidavits dated 25 January 2012, 18 May 2012 and submissions filed 21, 28 May 2012 and 12 June)

Counsel: David McLeod, representative for the applicant
Richard Harrison, counsel for the respondent

Judgment: 27 July 2012

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] The applicant has filed an application seeking an extension of time within which to lodge a challenge to a determination[1] of the Employment Relations Authority (the Authority) which was issued on 21 December 2011. The statutory 28-day limit for raising such a challenge expired on 18 January 2012. The application for extension of time was filed by email on 25 January, seven days after the last date for filing a challenge. On 20 February the respondent filed a notice of opposition opposing the application for leave to raise a challenge out of time.

[2] In the course of a telephone directions conference held on 16 April 2012, it was agreed between the parties that the application could be dealt with on the papers by way of an exchange of written submissions. Mr Harrison, counsel for the

[1] [2011] NZERA Wellington 206.

respondent, sought and was granted leave to file affidavit evidence in support of the respondent's opposition. At the same time, a timetabling order was made for the filing of submissions. It was agreed that Mr Harrison would present his written submissions first and he was ordered to do so by 7 May 2012. Unfortunately, through an oversight, Mr Harrison failed to file his submissions on time and at his request the Court subsequently had to issue a further minute containing a revised timetabling order for the filing of submissions.

The background

[3] In brief, the events leading up to this litigation can be summarised reasonably neutrally in these terms. Ms Susan McLeod held a certificate in hearing therapy and had been employed by Audiology Hawke's Bay as an audiometrist since April 2007. In her draft statement of claim it is alleged that her audiology career spanned 20 years. Her role was to assess a client's hearing and hearing needs and then under the supervision of Ms Lisa Thompson, a fully qualified audiologist, she would participate in the selection, setting up and fitting of appropriate hearing aids. In early 2009, Audiology Hawke's Bay was purchased by the respondent but Ms McLeod continued in her previous role.

[4] In May 2011, the Crown issued a notice under the New Zealand Public Health and Disability Act 2000 advising the terms and conditions under which payments would be made for hearing aid services to eligible persons. One of the requirements of the notice was that a fully qualified audiologist needed to assess an eligible person's hearing and hearing needs. The respondent's interpretation of that requirement was that Ms McLeod could no longer carry out her duties unless she was constantly supervised and that effectively required two people to do the work of one which made her continued employment untenable. Ms McLeod contended that the status quo, with her receiving supervision from Ms Thompson, could have continued.

[5] The Authority conducted its investigation on 2 September 2011 and found in favour of the respondent concluding that the level of supervision Ms McLeod was receiving from Ms Thompson did not meet the requirements of the Crown notice and, therefore, the respondent's decision to disestablish her role as from 1 July 2011

was substantively justified. The Authority also held that the respondent had complied with the relevant procedural requirements.

The case for the applicant

[6] In her affidavit filed in support of her application for leave dated 25 January 2012, Ms McLeod explained in the following paragraphs the reasons for the delay in challenging the Authority's determination:

> 7. The Authority's determination of my case was issued on 21st December 2011, and I was told verbally about the outcome the next day.
>
> 8. This was a very busy time for me, being just before Christmas, and I found it difficult to comprehend during this time given the other pressures I had during that time.
>
> 9. I have been forced to take up employment at a Camping Ground and this along with some Audiology work means that I work six days per week to earn enough money to make ends meet.
>
> 10. This period is also a very busy time for the Camping Ground because of the summer break and I found it very difficult to focus on the issues covered and determined by the Authority.
>
> 11. Once I did focus on the determination and the impact for me personally the 28 days provided for me to challenge this decision had passed.
>
> 12. I am of very limited finances also because of the impact this has had on me and the decision to move to a challenge in the Court has been very difficult and stressful.

The case for the respondent

[7] In his extensive submissions in response, Mr Harrison relied on one authority only, namely the decision in this Court in *Stevenson v Hato Paora College Trust Board*.[2] Counsel noted that in that case Judge Shaw held, "that a delay of 12 days (which involved the Christmas period and counsel miscalculation) was neither so minimal nor so substantial as to be the main deciding factor in the application." Mr Harrison explained that the respondent's opposition to the present application centred primarily "... around the reason for the omission, prejudice/costs and the merits of the challenge." In support of his submissions, Mr Harrison filed a

[2] [2002] 2 ERNZ 103.

28-paragraph affidavit from the respondent's Managing Director, Mr James Whittaker, which included a number of annexures.

[8] In relation to the reasons for the delay, Mr Harrison submitted that the allegation that Ms McLeod's work commitments at the camping ground over the summer break prevented her from focusing on the issues covered and determined by the Authority until after the 28-day limitation period had expired was "not credible" nor was it an acceptable reason for the delay. Counsel referred to an exchange of emails between the parties over the issue of costs which he submitted indicated that Ms McLeod was aware of the 28-day limitation period and he noted that there was no suggestion that there had been a miscalculation or oversight on the part of her advocate at the Authority investigation which would explain the delay.

[9] The relevance of the costs issue was that the Authority had reserved costs in its determination but ruled that if the respondent sought a costs order then, failing resolution of the issue between the parties, it was required to file its application within 28 days of the date of the determination. What appears to have happened is that on 19 January 2012, Ms McLeod's advocate, Mr Taylor, and Mr Harrison reached agreement by telephone that costs would not be sought by the respondent on the basis that the agreement was in "full and final settlement of any outstanding claim that either party may have against the other including any payments." It seems, however, that Mr Taylor had not obtained Ms McLeod's prior consent to the settlement and on 20 January 2012 he advised Mr Harrison by email that the offer he had agreed to had been rejected by Ms McLeod. From that point in time Mr Taylor withdrew as Ms McLeod's advocate and she has been represented in the matter by her husband.

[10] Mr Harrison submitted that "the real reason for the delay is that the challenge is a response to the respondent's costs application." In this regard, reliance was placed on a statement made in Mr Whittaker's affidavit that he believed the reason for the filing of the challenge (and its delay) was "more as a bargaining position and possibly to get out of the costs award, having reneged on the earlier agreement."

[11] In relation to Ms McLeod's camping ground employment, Mr Harrison submitted:

> 9. Ms McLeod's affidavit does not make any reference to the hours/days that she was working or why being busy in her Summer job would prevent her from considering a challenge and discussing this with either of her two representatives. This, it is submitted, is simply not a reason that could justify delay.

Mr Harrison submitted that it was "simply not credible that the applicant had not 'focused' on the Determination earlier".

[12] Mr Harrison made no specific claim of prejudice apart from referring to the costs of the litigation to date. He noted that Ms McLeod stated that she was of "very limited finances" and she had not yet made payment of the $3,500 costs award eventually fixed by the Authority. What the Court looks for, however, is prejudice that has been occasioned by the delay itself and, in that sense, the costs considerations raised by counsel cannot be categorised as prejudicial. In any event, given the substantially longer delay resulting from counsel's oversight as identified in [2] above, it would be difficult for the respondent to now substantiate an allegation of prejudice resulting from the applicant's delay. Mr Harrison's principal submissions in opposition, however, related to the merits, or more accurately the alleged lack of merit in the applicant's challenge. In counsel's words:

> 13. The central issue was (and remains) whether the applicant's dismissal was justifiable on the grounds that the respondent could no longer employ Ms McLeod to undertake much of the work which she previously undertook and that no alternatives were available (Determination paragraph 39).

[13] Under the heading "**Merits**" in his submissions, Mr Harrison went into considerable detail in summarising the Authority's findings and he then went on to refer to various evidentiary matters contained in Mr Whittaker's affidavit and the attached exhibits including the 46-page "Hearing Aid Services Notice 2011" which is the notice referred to in [4] above. Mr Harrison described the findings of the Authority as "quite emphatic in relation to substantive justification; there being 'no qualms' in reaching this conclusion." He further submitted that there were strong findings by the Authority confirming that "the Section 88 Notice is clear and unambiguous as to its meaning and application." In his conclusions under this head, counsel submitted:

> 21. It is submitted there is no merit in expending considerable resource and time in a challenge to the Authority's determination which is primarily built around the interpretation of the Section 88 Notice.

Response

[14] Further submissions were filed in response and in reply. Mr McLeod submitted that the applicant became busy over the Christmas/New Year period and she had not spoken to her advocate, Mr Taylor, between 22 December 2011 when she received the determination and 19 January 2012 when she learned that he "had accepted an offer for settlement on her behalf" which she then rejected. Mr McLeod submitted:

> 6. It was at this point that Ms McLeod focused on whether or not to challenge the determination of the Authority issued on 21st December 2011.
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> 7. It was calculated then that the 28 days had passed and the Applicant asked David McLeod to make the necessary application for her.

Ms McLeod also presented submissions relating to the merits of the case.

[15] In further submissions in reply, Mr Harrison stressed the fact that there was no evidence confirming when Ms McLeod had "focused" on whether to challenge the determination or "why she had left it so late given that the decision was received by her on 21/22 December 2011." And there was no evidence supporting Mr McLeod's submission as to when the applicant had given instructions to challenge the Authority's determination. Mr Harrison also made further submissions relating to the merits.

Discussion

[16] The statutory provision under which the Court can make an order extending the 28-day limitation period for commencing a challenge under s 179(2) of the Employment Relations Act 2000 (the Act) is s 219(1) which provides:

> **219 Validation of informal proceedings, etc**
>
> (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time

> within which the thing may be done, or validating the thing so informally done.
>
> ...

[17] As can be seen, the Court has a broad discretion under this statutory provision to extend time but, as with all discretions, it must be exercised judicially and in accordance with established principles. The overriding consideration will always be the interests of justice.

[18] The relevant provisions in s 179 of the Act which fix the limitation period for lodging a challenge state:

> **179 Challenges to determinations of Authority**
>
> (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the court.
>
> (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.
>
> ...

[19] The effect of s 179(2) is that every challenge must be made "within 28 days" of the Authority's determination. This is echoed in reg 7(1) of the Employment Court Regulations 2000 (the regulations) which provides:

> **7 Challenges to determinations of Authority**
>
> (1) An election under section 179 of the Act is made by filing with the Registrar of the court, within the time prescribed by section 179(2) of the Act, 3 copies of a statement of claim in form 1.

[20] Rather surprisingly perhaps, the applicant's representative made no reference to reg 74B which was inserted in the regulations by the Employment Court Amendment Regulations 2004. That regulation provides:

> **74B What happens to timing in Christmas period**
>
> (1) This regulation applies when the period of time within which an act must be done is calculated.
>
> (2) The 12 days starting with 25 December in 1 year and ending with the close of 5 January in the next year are not counted.

(3) Subclause (2) is subject to—

(a) an express provision in any Act; or

(b) an express provision in these regulations; or

(c) a direction of the Court.

[21] Regulation 74B would appear to have been designed to ameliorate any unfairness that might otherwise result if the Christmas/New Year period was to be included in the calculation of time limitations under the Act. It was introduced shortly after, and most likely in response to, the decision of this Court in *Shepherd v Glenview Electrical Services Ltd*[3] where Chief Judge Colgan noted that: "However desirable it might be to have a 'grace period'" during the Christmas break, "I do not think it is possible for the Court to impose by itself a variation to the statutory limitation period contained in s 179(2) and reg 7(1)."[4]

[22] If reg 74B was applied to the facts of the present case then the 28-day limitation period would not have expired until 30 January 2012 and the applicant's statement of claim would have been filed within that time period.

[23] The effect of reg 74B was considered by Judge Couch in *Vice-Chancellor of Lincoln University v Stewart (No 1)*[5] where the Court held that, for two reasons, the regulation did not apply to the 28-day time period prescribed by s 179(2). First the Court found that s 179(2) is "clear, explicit and unqualified. For the purposes of reg 74B(3) it is an 'express' provision of an Act."[6] Thus, where the application of reg 74B(2) would have the effect of extending the 28-day time period, it did not apply. Secondly, the Court found that reg 74B was inconsistent with the statute and therefore ultra vires.[7]

[24] In *Trans Otway Ltd v Hall*,[8] Judge Couch revisited his decision in *Lincoln University* but considered that the earlier case was correctly decided. The Court rejected the three submissions advanced by the applicant which sought to question

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[3] [2004] 2 ERNZ 118.
[4] At [22].
[5] [2008] ERNZ 132.
[6] At [10].
[7] At [13].
[8] [2010] NZEmpC 76, (2010) 7 NZELR 560.

the correctness of *Lincoln University*. First, the applicant argued for a purposive interpretation of reg 74B submitting that its purpose was to overturn *Shepherd*. Secondly, the applicant argued that the approach of the Court in *Lincoln University* rendered the regulation meaningless as it would never apply. Thirdly, the applicant contended that s 179 simply states the time limit and does not say that any variation is impermissible. In rejecting these submissions, the Court relied on the clear wording of s 179 and did not consider that the potential non-application of reg 74B gave rise to an absurdity, as had been suggested by counsel.

[25] The fundamental question is whether reg 74B can be read consistently with the primary legislation. As noted in *Bennion on Statutory Interpretation*[9] there is a presumption of validity and "delegated legislation must be presumed to be valid unless and until declared invalid." The principle was recognised by the Court of Appeal in *Harness Racing New Zealand v Kotzikas*[10] in these terms:

> [62] At the level of fundamental principle, what is termed the presumption of validity also needs to be kept firmly in view. In the area of delegated legislation, matters are presumed to have been done regularly and lawfully, and Courts will only interfere in a clear case: *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA). That said, an improper purpose will override this presumption of validity.

[26] There is also a well established principle that a regulation must be interpreted so as to be reconciled with its empowering statute, or if it cannot be reconciled, the rule must give way to the plain terms of the Act.[11] In *Wielgus v Removal Review Authority*,[12] Fisher J made the comment that an "interpretation which preserves the validity of the regulation is plainly to be preferred."[13]

[27] Against that background, conceivably it may have been possible for the applicant in this case to have presented a submission based on the argument that reg 74B and s 179 of the Act can be reconciled or read consistently in that the regulation is expressed to apply only to the calculation of time and not to the number of days or the amount of time given. In that way, the 28-day time limit is not

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[9] (4th ed, LexisNexis, London, 2008) at 257.
[10] [2005] NZAR 268 (CA).
[11] *Ex parte Davis, In re Davis* (1872) 7 Ch App 526.
[12] [1994] 1 NZLR 73 (HC).
[13] At 81.

extended but some days simply do not count in the calculation of the 28 days. In this regard, there may be relevance in r 27 of the former Court of Appeal Rules 1955 which appeared to recognise that a distinction can be drawn between a limitation period described in terms of a certain number of days and the actual computation of that prescribed number of days. The rule was referred to in *New Zealand Printing and Related Trades IUOW v Nelson Evening Mail Ltd (No 2)*.[14] It provided that without special leave, no appeal could be brought after the expiration of 28 days but the rule also contained the following proviso:

> Provided that the time of the vacation up to and including the 10th day of January shall not be reckoned in the computation of the said period of 28 days.

[28] The approach postulated would have the advantage of giving effect to reg 74B rather than having it declared ultra vires with the attendant resulting potential confusion to would-be litigants who may not have access to relevant judgments on the issue.

[29] Against that, however, are the strong countervailing considerations identified by Judge Couch in the two cases cited above along with the added consequence that, if valid, reg 74B would have application to the calculation of all periods of time under the Act, not simply to the 28-day limitation period for raising a challenge to a determination. Not having heard argument on the issue, I am not prepared in this judgment to depart from the cogent reasoning of Judge Couch and, therefore, the applicant does require leave to proceed.

[30] Turning to the reasons for the delay in the present case and the extent of the delay itself, I regard the period in question of seven days as being relatively minimal, particularly having regard to the fact that it occurred during what is commonly referred to as the holiday season. I reject the valiant efforts of Mr Harrison in endeavouring to establish an ulterior motive for the delay, namely, as a "strategy of avoiding any contribution to the respondent's costs." I accept Mr McLeod's submission that the applicant did not focus on whether or not to challenge the determination of the Authority until she was contacted by her advocate on 19 January 2012 and told about the settlement he had reached with Mr Harrison. It is

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[14] [1992] 2 ERNZ 756.

clear from the email exchange that she immediately rejected the settlement, the terms of which would appear to have precluded her from lodging any challenge to the Authority's determination. I have no reason to doubt her sworn testimony that up until that time her employment at the camping ground had made it "very difficult to focus on the issues covered and determined by the Authority."

[31] I have some disquiet over the obviously considerable amount of effort the respondent has put into dealing with the merits of the case. I refer in this regard to both Mr Harrison's comprehensive submissions and to the equally comprehensive affidavit from Mr Whittaker dealing with the background facts. The merits of the proposed challenge are just one of the factors this Court has historically taken into consideration in reaching its conclusion on the fundamental issue which is the justice of the case. Its significance, however, should not be overvalued particularly when the Court is no longer dealing with a traditional appeal type situation as under the Employment Contracts Act 1991 but, as in this case, with an intended challenge under s 179(3)(b) of the Act involving a complete rehearing. The more relevant considerations under the existing regime, in my view, are the reasons for the delay, the length of the delay and any resulting prejudice to the respondent.

[32] In any event, in carrying out the necessary balancing exercise involving the traditional guidelines, the justice of the case between the parties must always be the principal consideration. This old and well-established principle was emphasised by the Court of Appeal in *Thompson v Turbott*,[15] a case which dealt with a similar discretionary power:

> The discretion given by the Rule as it now stands is in the widest terms. Where such a discretion is given, it is not desirable for the Court to attempt to lay down any general rules which will tend to fetter the discretion in other cases. The dangers of such a course were pointed out by Sir William Baliol Brett M.R. in *In re Manchester Economic Building Society* (1883) 24 Ch.D. 488 where he said: "... it is the most unsafe thing for the Court to use any expressions other than the expressions which are in the Rule, because it is impossible for anybody who attempts to alter the wording of that Rule by other interpretive words to foresee all the cases which might arise.
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> Again, it was said by Bowen L.J. in *Weldon v de Bathe* (1887) 3 T.L.R. 445: 'The Court ought not to fetter its discretion ... but 'would always exercise its discretion for the purpose of doing justice.'.

[15] [1963] NZLR 71at 80.

[33] In reference to the merits factor, in *Costley v Waimea Nurseries Ltd*,[16] I adopted the approach of Judge Perkins in *Clear v Waikato District Health Board*[17] which recognised that any evaluation of the merits or chances of success can only be at a relatively basic threshold. I stated:

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

[34] In *Costley*, I went on to compare the merits factor with the approach to strike out applications in civil litigation. That comparison was subsequently criticised by Chief Judge Colgan in *Liu v South Pacific Timber (1990) Ltd*[18] and Judge Travis in *Hurst v Eagle Equipment Ltd*,[19] on the grounds that the civil standard was so low that a respondent would never succeed in showing that the case was meritless. I can understand the criticism. With respect to those opinions, however, in *Costley* I was making the point that "the relevant principles are akin to those involved in the consideration of an application to strike out a cause of action"[20] but, in fact, I was applying the test from *Clear* as to the merits issue, not the strike out formulation.

[35] Turning to the merits factor in the present case, I accept Mr Harrison's observations that in its determination the Authority made "strong findings" on a number of issues. There is also an indication that in terms of credibility the Authority may have preferred the evidence of Mr Whittaker to that of the applicant. The applicant if granted leave, however, seeks a de novo hearing and, as I have sought to emphasise, in that situation this Court will not be bound by any of the findings or conclusions of the Authority. The conclusions reached by the Authority

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[16] [2011] NZEmpC 59.
[17] [2007] ERNZ 338.
[18] [2011] NZEmpC 100.
[19] [2011] NZEmpC 110.
[20] *Costley* at [15].

may well turn out to be correct in the end but, at this stage, I am satisfied that the case involves serious issues and is not devoid of merit.

Conclusions

[36] For the foregoing reasons, I have concluded that the justice of the case requires that an extension of time be granted so as to allow the applicant to proceed with a challenge against the Authority's determination. The draft statement of claim filed by Mr McLeod is defective in that it does not specify the relief sought as is required under reg 11 of the regulations.

[37] The applicant now has 21 days in which to file and serve a statement of claim that complies with the regulations. The respondent will have 30 days in which to file and serve a statement of defence.

[38] Costs on the application are reserved.

A D Ford
Judge

Judgment signed at 12.45 pm on 27 July 2012