

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2012] NZEmpC 177
WRC 14/12**

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

BETWEEN ROBERT RIMENE
Applicant

AND P J DOHERTY & NATUSCH GROUP
LIMITED
Respondents

Hearing: (by memorandum filed 24 July 2012 and minute dated 13 August
2012)

Counsel: Adam Parker, counsel for the applicant
The respondents in person

Judgment: 10 October 2012

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] Section 179 of the Employment Relations Act 2000 (the Act) provides that any party to a matter before the Employment Relations Authority (the Authority) who is dissatisfied with the determination of the Authority or any part of such determination may elect to have the matter heard by the Court by filing a statement of claim in the prescribed manner within 28 days after the date of the determination in question.

[2] In a minute dated 24 May 2012, Chief Judge Colgan confirmed that Mr Rimene had filed an application seeking an extension of time in which to challenge parts of the determination¹ of the Authority dated 4 April 2012. The matter was complicated because the respondent, Mr Doherty, had also made an application seeking an extension of time in which to challenge parts of the

¹ [2012] NZERA Wellington 32.

Authority's determination in separate proceedings (Court file WRC 8/12). Another potential complication Chief Judge Colgan identified was that as Mr Doherty is domiciled in Australia, there could be issues arising relating to service that needed to be addressed before matters could progress.

[3] I propose to issue this judgment in relation to Mr Rimene's application for leave contemporaneously with my judgment on Mr Doherty's application in his separate proceedings.

[4] In its determination, the Authority described the case as being about "a relationship between Mr Rimene and Mr Doherty that has turned sour. There is a lot of money at stake that has become an issue between them both." The Authority identified a number of issues which needed to be addressed including whether Mr Rimene was an independent contractor or an employee and, in the latter event, whether his employer was Mr Doherty personally or the company, Natusch Group Limited. Mr Doherty and Natusch Group Limited were engaged in the purchase and renovation of properties in New Zealand for rental.

[5] The Authority concluded that Mr Rimene was employed by Mr Doherty personally but it also concluded that he had not properly raised a personal grievance for unjustified dismissal nor had he sought leave to raise a grievance outside the 90-day limitation period. The Authority also rejected Mr Rimene's claim for arrears of wages and other expenses but it did uphold his claim for holiday pay in the sum of \$7,497.60. That was the only remedy the Authority awarded.

[6] In his draft statement of claim filed in support of his application to challenge out of time, Mr Rimene challenges the finding that he had not established that he was owed the amount of wages claimed. He also seeks an order that his rental accommodation in Masterton was included as one of his employment benefits and he claims that he continued to work for Mr Doherty beyond 1 June 2009 which was the date the Authority found that the employment relationship had ended. He seeks an award in the sum of \$25,399.13.

[7] In an affidavit in support of Mr Rimene's application for leave to apply out of time, Ms Kay-Anne van Zyl, a law clerk employed by Mr Rimene's solicitors, deposed:

3. The Applicant indicated to us that he would appeal certain parts of the Determination shortly after it was issued. A Statement of Claim was drafted and instructions were finalised to file at the Employment Court.
4. The Registrar has advised that the Statement of Claim should have been filed on or before 2 May 2012, being 28 days after the Determination as per section 179(2) of The Employment Relations Act 2000.
5. When calculating the 28 day appeal period the days of Good Friday, Easter Sunday and Anzac Day were not counted as “days”, giving a final date of 4 May 2012 to file the Statement of Claim.
6. Consequently, the Statement of Claim was not placed in a Document Exchange facility until 3 May 2012. The Statement of Claim should have been received by the Registrar on 4 May 2012. However, the documents received back from the Registrar were stamped 7 May 2012. There has thus been an unexplained delay in the DX system.

[8] As anticipated by Chief Judge Colgan, a complication arose over service of Mr Rimene’s application for leave to challenge out of time. On 14 June 2012, counsel for Mr Rimene advised the Registrar that the application had been posted to Mr Doherty at his “address for service in New Zealand” on 24 May 2012 and counsel claimed that as he had not responded, Mr Doherty was out of time to challenge Mr Rimene’s application for leave. The difficulty with that application, however, was that Mr Doherty is resident in Australia and there was no evidence on the Court file that he had ever provided a New Zealand address for service in respect of this particular proposed proceeding.

[9] On 26 June 2012, I issued a minute confirming that leave of the Court was required under cl 5A(a) of sch 3 of the Act to serve the relevant documents out of New Zealand. As there had been a recent email exchange on the subject with the Registrar, I also took the opportunity of directing that, until further order of the Court, service of all documentation between the parties in this proceeding could be effected by way of email. I invited the parties to consider whether the matter could be resolved by way of a consent order under which leave could be granted to proceed out of time in both sets of proceedings.

[10] On 30 July 2012, Mr Parker, counsel for the applicant filed a memorandum confirming that the parties had not been able to reach agreement on the matter. Mr Parker suggested the scheduling of a telephone conference to progress the matter.

[11] A telephone conference was duly convened for 13 August 2012. Mr Doherty confirmed that he did not intend to file any submissions in opposition to the applicant's application for leave to lodge his challenge out of time but he was content to leave it to the Court to determine whether or not it was appropriate for the application to be granted.

[12] Under s 219 of the Act, the Court has a broad discretion to make an order extending the 28-day limitation period prescribed in s 179(2) of the Act for commencing a challenge but, as with all discretions, it must be exercised judicially and in accordance with established principles. The delay in this case was absolutely minimal and has been adequately explained. No resulting prejudice is claimed by the respondents.

[13] The application for leave to file a challenge out of time is, therefore, granted and costs are reserved.

[14] Finally, I record that both this challenge and the challenge Mr Doherty seeks leave to commence out of time, which I deal with in a separate judgment of today's date, are non-de novo challenges. As I indicated to the parties in the course of the telephone conference on 13 August 2012, proceeding by way of two separate non-de novo challenges (on matters of substance) to different parts of the one determination is likely to be a cumbersome and unwieldy process. Almost inevitably procedural and practical complications are likely to arise in correlating the various parts of the determination under challenge with the remaining findings made by the Authority.

[15] Quite apart from the foregoing observations, there is the added complication that in his draft statement of claim in his proposed action (WRC 8/12), Mr Doherty has failed to specify the particulars required by s 179(4) of the Act. As I propose granting leave to Mr Doherty to proceed with his challenge out of time, those particulars will need to be provided before the Court can give directions under s 182(3)(b) of the Act as to the nature and extent of the hearing.

[16] To advance the matter, the Registrar is requested to schedule a telephone directions conference with the parties in the near future to enable the Court to deal with these issues. Conceivably, one option the parties may wish to explore is joinder

of both actions and proceeding by way of a hearing de novo. In all events, appropriate directions will be given, a fixture will be allocated and a timetabling order will be finalised leading up to the hearing date.

A D Ford

Judge

Judgment signed at 9.30 am on 10 October 2012