## IN THE EMPLOYMENT COURT WELLINGTON

## [2012] NZEmpC 178 WRC 8/12

	IN THE MATTER OF	an application for leave to file a challenge out of time
	BETWEEN	PETER DOHERTY & NATUSCH GROUP LIMITED Applicants
	AND	ROBERT RIMENE Respondent
Hearing:	(by submissions of counsel for the respondent filed 27 August 2012)	
Counsel:	The applicants in person Adam Parker, counsel for the respondent	
Judgment:	10 October 2012	

## INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

[1] In a judgment<sup>1</sup> in proceeding WRC 14/12, issued contemporaneously with this interlocutory judgment, I record that both parties sought to challenge by way of non-de novo challenge different parts of a determination<sup>2</sup> of the Employment Relations Authority (the Authority) dated 4 April 2012. For different reasons, both parties found themselves in the position of needing to seek leave under s 219 of the Employment Relations Act 2000 (the Act) for an order extending the 28-day limitation period prescribed in s 179(2) for commencing a challenge. In my judgment in WRC 14/12, I granted Mr Rimene's application and I now turn to consider Mr Doherty's application for leave.

[2] The reason why it is necessary for Mr Doherty to obtain leave in the present case is because the 28-day limitation period expired 2 May 2012 but his statement of

<sup>&</sup>lt;sup>1</sup> [2012] NZEmpC 177.

<sup>&</sup>lt;sup>2</sup> [2012] NZERA Wellington 32.

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claim was not filed until 4 May 2012 and the filing fee was not received by the Registry until 9 May 2012. Leave is, therefore, required to commence the challenge out of time.

[3] In my judgment in WRC 14/12, I summarised the facts of the case and the Authority's conclusions. There is no need for me to repeat what I said. The particular facts of the Authority's determination Mr Doherty seeks to challenge are its findings that he was Mr Rimene's employer and not Natusch Group Limited and its failure to take into account monies allegedly owed by Mr Rimene to both Mr Doherty and Natusch Group Limited.

[4] In his supporting affidavit Mr Doherty, who is domiciled in New South Wales, Australia, states:

- 2. I forwarded a Statement of Claim, a copy of the determination of the Employment Relations Authority and an Australian bank draft for the filing fee by international courier on 2 May 2012 (within 28 days of the original decision)
- 3. I also forwarded a copy of the Statement of Claim, a copy of an international bank draft for the filing fee and receipt for the international courier by email on the same day.
- 4. I am informed by the Registry that although they received the Statement [of] Claim within the prescribed time they did not receive the international bank draft within the required time.

[5] In his submissions in opposition to Mr Doherty's application, Mr Parker, counsel for the respondent states:

- 4. The respondent submits that the applicants' Statement of Claim was filed out of time, as was their own, and that this was no more than an oversight by the applicants, as in fact it was for the respondent.
- 5. Mr Doherty is, or at least was, a practising solicitor in Australia and is fully aware that representing himself in these proceedings in New Zealand creates for him the risk that he will be unfamiliar with law and practices in New Zealand, and that in order to safeguard against those differences he needs to retain New Zealand counsel in relation to this matter. During the hearing in the Authority of this matter it was also stated on at least one occasion that he should have retained New Zealand counsel given his unfamiliarity with New Zealand Employment Law. Notwithstanding this Mr Doherty has decided to proceed with self-representation all throughout this matter including the election to take this matter to the Employment Court.

- 6. The respondent submits that given the above Mr Doherty cannot now rely on his assertions that his situation should be treated any differently to any other represented person dealing with the Court.
- 7. The respondent submits that it would be inequitable and unjust to allow the applicants' appeal to proceed without allowing its own application to proceed. Both parties have filed their elections out of time in error and both sought to correct the matter without delay.

[6] As noted in my contemporaneous judgment in WRC 14/12, the Court has a broad discretion under s 219 of the Act to make an order extending the 28-day limitation period prescribed in s 179(2) for commencing a challenge but, as with all discretions, it must be exercised judicially and in accordance with established principles. As in the case of Mr Rimene, the delay on Mr Doherty's part was absolutely minimal and, although he could be criticised for not forwarding the documentation by international courier from Australia until the very last day, no resulting prejudice is claimed by the respondent.

[7] The thrust of Mr Parker's submissions appears to be that the delay in both cases was the result of an oversight and that it would be unjust to allow one party to challenge out of time and not the other. I agree. Mr Doherty's application for leave is accordingly granted. Costs are reserved.

[8] I draw the attention of both parties to the concluding paragraphs of my judgment in WRC 14/12. They can now expect to be contacted by the Registrar to arrange a further telephone conference in order to progress the proceedings.

A D Ford Judge

Judgment signed at 9.30 am on 10 October 2012