IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 192
WRC 25/12

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	JOHN SAYERS Applicant
AND	S B MCPHERSON HOLDINGS LIMITED T/A BOULEVARD SERVICES Respondent

Hearing: (on the papers)

Counsel: Piers Hunt, legal advocate for the applicant
Doug Abraham, advocate for the respondent

Judgment: 14 November 2012

JUDGMENT OF JUDGE A D FORD

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[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) dated 27 August 2012. It was agreed by the parties that the application could be dealt with on the papers.

[2] The statutory 28-day limitation period prescribed by s 179 of the Employment Relations Act 2000 for filing a statement of claim challenging the Authority's determination expired on 24 September 2012. The Court file shows that the statement of claim was received by the Court in electronic format on 26 September 2012. As it was then out of time by two days, the Registry received it as a "draft" and recorded a notation to that effect on the face of the document.

[1] [2012] NZERA Wellington 96.

[3] In an email to the Registrar dated 26 September 2012 which accompanied the statement of claim, Mr Hunt, legal advocate for the applicant, stated:

> My client, John Sayers wishes to bring a challenge to decision [2012] NZERA Wellington 96 5368301.
>
> I have attached to this email a copy of the statement of claim. The decision is dated 27 August 2012 and by my calculation today is the 28th day after the decision so I wish to file by email. 3 copies of the statement claim accompanied by the filing fee are being mailed today.
>
> Yours faithfully
>
> ...
>
> Piers D.Hunt LLB
> PO Box 662
> Napier, 4140

[4] In his formal application for leave to file the challenge out of time, which was filed on 8 October 2012, Mr Hunt stated:

> The ERA decision being challenged is dated 27 August 2012. If the time for filing is counted from the first day following the decision being 28 August then 25 September is the 28th day.

[5] The calculation of the relevant 28-day limitation period is not a complicated matter - time clearly expired on 24 September 2012. It is of some concern, therefore, to note that in both of the communications referred to above Mr Hunt incorrectly misrepresented the position to the Court. In its notice of opposition, the respondent submits at one point that the application "smacks of a casual approach to a strict formal process." I agree with that observation in relation to the applicant's calculation of the 28-day limitation period.

[6] The following is intended to be a brief neutral summary of the relevant facts taken from the Authority's determination. The respondent, which is based in Napier, provides commercial and industrial cleaning services to various customers. One of its customers is Pan Pac's pulp and paper mill in Whirinaki, north of Napier. Mr Sayers was employed by the respondent as a supervisor based at the Pan Pac mill. He worked nightshift and was responsible for supervising between two and five of the respondent's other employees based at the mill. On 12 November 2011,

Mr Duston, one of the other employees who reported to Mr Sayers, suffered a minor injury to his leg when his right foot went through a small hole in a grilled platform.

[7] Mr Sayers did not report the accident to his employer, the respondent. In essence, he alleged that he understood the respondent's policy was that he did not need to report minor accidents and that he had discretion as to what should or should not be reported. He claimed to have formed this view based on what he said was 'common knowledge' and on certain instructions that had been given to him by his predecessor, Mr Graham Rubick.

[8] After an investigation, Mr Sayers was informed on 17 November 2011 that his employment was terminated with immediate effect. The Authority noted that, although there was no misconduct involved, it was Mr Sayers' alleged reasoning for not reporting the accident that was of concern to his employer. After examining in some detail the procedure followed by the respondent in carrying out its investigation into the incident, the Authority concluded that the respondent had not acted unreasonably in refusing to accept Mr Sayers' 'common knowledge' explanation for not reporting the accident and it determined that in all the circumstances he did not have a personal grievance.

[9] The statutory provision under which the Court can make an order extending the 28-day limitation period for commencing a challenge to a determination of the Authority is s 219 of the Act 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.

[10] 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. In dealing with an application for an extension of time under s 219, the principal factors this Court has regard to are: the extent of the delay, the reasons for the delay, any resulting prejudice to the respondent and the

merits. However, in my judgment in *McLeod v National Hearing Care (NZ) Ltd*,[2] I made the observation that, in my view, in cases like the present where the Court is dealing with a hearing de novo rather than with a traditional type of appeal, the significance of the merits factor should not be overstated.

[11] The principal reason for the delay is explained in the application for leave in these terms:

> A witness for whom a summons had been issued for the ERA hearing but could not be located for the service of the summons was not heard at the ERA hearing. The witness was located on or about 24 September 2012 and expressed willingness to give evidence before the Employment Court. A statement of claim was prepared and emailed to the Employment Court on 25 September 2012 as being the first practical date after receiving the further evidence.

[12] In a supporting affidavit, Mr Sayers deposed that the witness in question was Mr Rubik. Mr Rubik was Mr Sayers' predecessor. Mr Sayers described him as a "crucial witness" because "he could give evidence that he had received the same instructions from the employer as had been given to me when he was employed in the same role as me prior to my appointment." Mr Sayers went on to depose that:

> [5] A summons was issued for Graham to appear as a witness at the ERA hearing but it could not be served on him because he was travelling in a house bus and could not be located for service of the summons.

[13] In its notice of opposition, the respondent accused the applicant of "misleading the Court" in that Mr Rubik had not been served with a summons issued by the Authority and the respondent claimed that Mr Rubik was a "willing witness ... who simply didn't turn up at the investigation." The respondent produced a signed statement from Mr Rubik dated 26 April 2012 which had been produced at the Authority investigation by the applicant's representative. The respondent noted that the Authority incorrectly stated in paragraph 50 of its determination that Mr Rubik had been summoned to appear.

[14] The respondent has produced an email dated 31 October 2012 from the Wellington Employment Relations Authority's Senior Support Officer to Mr Abraham confirming that a summons had been requested by Mr Hunt for

[2] [2012] NZEmpC 120.

Mr Rubik but it could not be issued because "witness summonses must be served to (sic) the person at a physical address" and Mr Hunt had been unable to provide the Authority with that information.

[15] There is no evidence before me, however, which would support the allegation made by the respondent that Mr Rubik simply did not turn up at the Authority investigation. The Authority specifically noted that, "... Mr Rubik does not have a fixed address and the summons had not been effected. Efforts to contact Mr Rubik by phone were unsuccessful." In other words, there is nothing to rebut Mr Sayers' sworn evidence that Mr Rubik could not be located for service of the summons because he was travelling in a house bus at the time.

[16] The Authority certainly spent time considering Mr Rubik's signed statement and it noted that, as he had not attended the investigation, the contents of his statement were not able to be tested. It went on to say:

> In these circumstances I am unable to give weight to his purported evidence although I have referred to information contained within his statement to give context to evidence given on behalf of both Mr Sayers and Boulevard Services.

[17] The respondent submitted that, "the reasons for the delay had not been properly explained and are based on false information provided to the Court." For the reasons mentioned above, I do not accept that allegation. Although there was obviously some confusion during the investigation as to whether a witness summons had been issued in respect of Mr Rubik, it is clear from what is said about his signed statement in the Authority's determination that he was potentially a significant witness for the applicant. I accept that Mr Rubik was not able to give evidence in person because he could not be located at the time of the investigation.

[18] I find that the delay in filing the statement of claim was minimal and I am satisfied that an explanation has been provided for its occurrence. I accept, however, that the applicant's representative can be properly criticised for his subsequent delay in attending to the filing of the formal application for leave. The reason for that delay should have been explained but it was not. On balance, however, I do not accept that it was sufficient to refuse the application for leave.

[19] In terms of prejudice, the respondent claimed that it suffered the "loss of certainty to which it was entitled after the expiry of the challenge period." In this regard, it placed particular reliance on the fact that on 12 September 2012 the applicant's representative had emailed the respondent's representative indicating that it was then considering challenging the determination but no subsequent challenge was made within the limitation period. I accept that the respondent suffered the loss of certainty it described but, in terms of the overall justice of the case, I consider that any resulting injustice would be relatively slight when weighed against the significant injustice the applicant would sustain should his application for leave be declined.

[20] The application is, therefore, granted. The applicant is to file and serve his statement of claim with the filing fee of $204.44 within 10 days from the date of this interlocutory judgment. The respondent's statement of defence is to be filed within 30 days of service. Costs on the application are reserved.

A D Ford
Judge

Judgment signed at 12.15 pm on 14 November 2012