

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**[2012] NZEmpC 46  
WRC 32/11**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

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

BETWEEN PROGRESSIVE MEATS LIMITED  
Plaintiff

AND TOM POHIO, ERU TE RITO, CARL  
BERG, KEVIN BLANE, WAYNE  
GERBES, PAUL COOKE, HAMISH  
WALDON, JAMES CAMPBELL,  
ROBERT AIRD, DAVID BLUE BROWN,  
SHANE STEPHENS, SONYA WALLACE  
AND RIKI HILTON  
Defendant

Hearing: (on the papers)

Counsel: Tim Cleary, counsel for the plaintiff  
Simon Mitchell, counsel for the defendant

Judgment: 9 March 2012

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**INTERLOCUTORY JUDGMENT OF JUDGE A D FORD**

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[1] The defendants have applied for leave to file their statement of defence out of time. Regulation 19(2) of the Employment Court Regulations 2000 requires a statement of defence to be filed within 30 clear days after the date of service of the statement of claim on the defendants. In this case the statement of claim was served on 28 October 2011, which meant that the time expired on Monday, 28 November 2011. Application for leave was eventually filed on 8 March 2012 which means that there has been more than three months' delay in filing. To be fair,

PROGRESSIVE MEATS LIMITED V TOM POHIO, ERU TE RITO, CARL BERG, KEVIN BLANE, WAYNE GERBES, PAUL COOKE, HAMISH WALDON, JAMES CAMPBELL, ROBERT AIRD, DAVID BLUE BROWN, SHANE STEPHENS, SONYA WALLACE AND RIKI HILTON NZEmpC WN [2012] NZEmpC 46 [9 March 2012]

however, counsel for the defendants, Mr Mitchell, did advise the Court in the course of a telephone directions conference in February that application was going to be made for leave and at that stage Mr Cleary, counsel for the plaintiff, indicated that he would need to take instructions in the matter.

[2] The Court has a broad discretion under s 219(1) of the Employment Relations Act 2000 in which to extend time. In *Bentan Twisted Ltd v Stevenson*,<sup>1</sup> Judge Couch correctly identified the issues relevant to the exercise of such discretion. The principal considerations are the reason for the delay, the length of the delay and whether there is any prejudice. In all cases, however, the overriding consideration must be the interests of justice.

[3] In this case, the reason for the delay has been described as an oversight in confirming instructions to counsel.

[4] The issue which came before the Employment Relations Authority (the Authority) was whether the 13 defendants who are all employed by the plaintiff at its Hastings processing plant were laid off in August 2010 in a manner that complied with the relevant clause in the collective employment agreement. The Authority concluded, in a determination<sup>2</sup> dated 30 September 2011, that neither party succeeded with their respective competing positions. In its statement of claim, the plaintiff challenged the whole of the determination.

[5] An affidavit from Mr Eric Mischefski, a full-time organiser with the New Zealand Meat Workers & Related Trades Union Inc, has been filed in support of the application for leave. Mr Mischefski deposed that he had been involved in representing the defendants in relation to their claim that they had been unfairly laid off in August 2010. He said that both parties were dissatisfied with the outcome of the Authority hearing. He attached as an exhibit an email exchange he had with Mr Mitchell in which counsel correctly informed him of the deadline for filing a statement of defence. He continued:

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<sup>1</sup> WRC 7/09.

<sup>2</sup> [2011] NZERA Wellington 151.

7. By that time, we had concluded a new Collective Agreement. The provisions that were applicable to layoff in 2010 were not contained in the Collective Agreement moving forward. Therefore the issue in dispute has been resolved in future. In effect, there is a grievance arising for the Defendants, that relates to the events of 2010, but will not be ongoing.

[6] Against that background, I accept that the circumstances resulting in the oversight in relation to the filing of the statement of defence are unusual. Mr Mischefski, understandably perhaps, appears to have become more preoccupied with sorting out the position of his Union members for the future under the new collective agreement rather than with their past grievance.

[7] To the plaintiff's credit, it appears to have accepted the position in this regard and its counsel, Mr Cleary, has filed a memorandum confirming that the plaintiff consents to the late filing of the statement of defence subject to the Court being satisfied that leave should otherwise be granted.

[8] I am satisfied that the justice of the case requires that the extension of time sought should be granted and I order accordingly. The statement of defence is to be filed and served within 10 days of the date of this judgment. Costs are reserved.

A D Ford  
Judge

Judgment signed at 12.45pm on 9 March 2012