IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 29
CRC 4/13

IN THE MATTER OF	an application for an extension of time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	BRIGHTWATER ENGINEERS LIMITED Applicant
AND	BRIAN ARROWSMITH, STUART ARROWSMITH, ANDREW DOOCEY and MICHAEL COLOQUHOUN Respondents

Hearing: on the papers - memoranda and affidavits received 25 January, 15 February, 19 February, 20 February and 1 March 2013.

Appearances: Phil Butler, advocate for the applicant.
Anjela Sharma, counsel for the respondents.

Judgment: 12 March 2013

JUDGMENT OF JUDGE A A COUCH

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[1] The issue decided in this judgment is whether the applicant should be granted an extension of time in which to challenge a determination of the Employment Relations Authority.

[2] The respondents were employed by the applicant in its engineering business based in Nelson. In February and March 2010, they were dismissed on grounds of redundancy. The Employment Relations Authority determined[1] that those dismissals were unjustifiable and awarded the respondents remedies including reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to their feelings. The Authority's determination was issued on 17 December 2012.

[1] [2012] NZERA Christchurch 275.

[3] Section 179 of the Employment Relations Act 2000 (the Act) provides:

> **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

[4] Applying the time limit in s 179(2) to this case, the last day on which the applicant could commence a challenge as of right was 14 January 2013, being the 28th day after 17 December 2012.

[5] On 18 January 2013, Mr Butler sent a statement of claim to the Court for filing. It was rejected as being out of time. On 25 January 2013, Mr Butler filed an application to extend the time for filing a statement of claim together with two affidavits in support. That application is opposed by the respondents. On their behalf, Ms Sharma has filed a notice of opposition and an affidavit in opposition. That affidavit was sworn by Mr Brian Arrowsmith on behalf of all four respondents. An affidavit in reply was subsequently filed on behalf of the applicant..

[6] At a directions conference on 8 February 2013, it was agreed that the application should be decided on the papers after the parties' representatives had an opportunity to provide written submissions. Ms Sharma provided a memorandum of submissions but Mr Butler elected not to do so.

Sequence of events

[7] What emerges from the affidavits is the following sequence of events.

[8] The Authority's investigation meeting took place on 2 April and 3 August 2012. Throughout that investigation, the applicant was represented by Ralph Webster, a professional advocate based in Christchurch.

[9] The Authority gave its determination on 17 December 2012. In that determination, the Authority found that all four of the respondents had been

unjustifiably dismissed. The applicant was ordered to reimburse three of the respondents for lost wages and to pay compensation to all of them. Two awards of compensation were of $12,000. The other two were of $10,000.

[10] After receiving the determination on 19 December 2013, Mr Webster had a brief discussion about it with Michael Simm, the chairman of the applicant company who was then acting in an executive capacity. Mr Simm was concerned about the level of awards made by the Authority.

[11] On 21 December 2012, the Nelson Evening Mail newspaper published a report of the Authority's determination. The following day, the same newspaper published an article reporting that Mr Simm had "confirmed the company would appeal" the Authority's determination. This was noticed by the respondents at the time.

[12] Mr Webster had a more detailed discussion with Mr Simm on 8 January 2013. They decided to get advice about the extent of the challenge from Mr Butler, another professional advocate in Christchurch. Mr Webster put this into effect by sending Mr Butler an email that day.

[13] Having received no response to his email for several days, Mr Webster tried to telephone Mr Butler but was unsuccessful. On Monday 14 January 2013, Mr Webster telephoned the Court and spoke to the Acting Registrar in Wellington. Mr Webster enquired about the start of the 28 day time period for commencing a challenge and the effect on that time period of the public holidays which had intervened. Mr Webster was told that, although he may not have received the determination until 19 December 2012, the 28 day period commenced on 18 December 2012, the day after the date of the determination. Mr Webster was also told that, because of the public holidays, three days ought not to be counted in calculating the 28 day period.

[14] Later that day, 14 January 2013, Mr Webster was able to make contact with Mr Butler who said it was the first day he had been in his office since Christmas. In

the course of their conversation, Mr Webster relayed to Mr Butler what he had been told by the Acting Registrar about the time for filing a challenge.

[15] The next day, 15 January 2013, Mr Webster received advice from Mr Butler. As a result, it was decided that the challenge would be made only to the quantum of the awards of compensation made by the Authority. Later that day, Mr Webster reported to Mr Simm in an email which was copied to Mr Butler. In that email, Mr Webster said that the challenge had to be filed by the following day, 16 January 2013.

[16] Mr Butler sent a statement of claim and filing fee to the Court on Friday 18 January 2013. That was rejected as being out of time.

[17] The current application for extension of time was filed on 25 January 2013.

Principles

[18] Section 219(1) of the Act confers on the Court a general discretion to extend time, including the 28 day period in s 179(2). The principles applicable to the exercise of that discretion are settled and well known[2] The overriding consideration must be the interests of justice. In deciding where that lies, the Court will generally have regard to the following factors:

(a) The extent of the delay.

(b) Any explanation for the delay both before and after the time for filing as of right expired.

(c) The nature and extent of prejudice to the proposed defendant and to third parties.

(d) The prospects of success of the proposed challenge.

[2] See, for example, *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 and *An Employee v An Employer* [2007] ERNZ 295.

Extent of delay

[19] The last day of the 28 day period prescribed by s 179(2) was 14 January 2013. Mr Butler attempted to file a statement of claim on 18 January 2013. The delay in taking the steps necessary to commence a challenge was therefore four days. It was a further seven days before the application to extend time was made.

[20] On the face of it, this would not seem to be substantial delay but it must be put into the context of such cases generally. In *Peoples v Accident Compensation Corporation*,[3] I analysed the decisions of this Court over the previous 20 years in cases involving applications for extension of time to commence proceedings. This showed that, with one exception, the longest extension of time granted was 14 days. In the exceptional case, time was extended by 20 days.

[21] An analysis of the comparable cases decided since February 2007 shows a similar pattern. Some 17 applications for extension of the time prescribed by s 179(2) have been decided. Extensions of 20 and 22 days were granted in particular cases. Otherwise, the maximum additional time allowed was 12 days.

[22] In this context, the delay in this case can properly be described as small but more than minimal.

Explanation for delay

[23] In considering the reasons for delay, the Court must have regard to both the period before and the period after the time for filing proceedings as of right expired. In some cases, there is good reason why proceedings were not brought within time. For example, there may have been a delay in the determination being received by the party seeking to challenge. There is no suggestion of that sort in this case. Mr Webster acknowledges that he received the determination on 19 December 2012.

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[3] CC3/07, 13 February 2007.

[24] Both the Christmas and New Year holidays occurred during the 28 day period applicable to this case. Difficulties in obtaining legal advice during this period have been taken into account as a mitigating factor in some cases. While the delay in obtaining a response from Mr Butler during the first two weeks of January 2013 is mentioned in Mr Webster's affidavit, it appears the applicant does not seek to rely on it.

[25] That is appropriate. Mr Simm made a public statement on 22 December 2012 that the applicant intended to challenge the determination. The only advice the applicant sought after that was about the extent of the challenge. Mr Webster does not say in his affidavit why he took no steps to advise Mr Simm prior to Christmas 2012 or, if he felt unable to do so, why he did not seek external advice prior to Christmas. The matter just seems to have been allowed to lie while Mr Webster "closed for business over the Christmas and New Year period."

[26] When Mr Webster returned to his office on 8 January 2013, he received clear instructions from Mr Simm to obtain external advice about the extent of the challenge to be made. Mr Webster's efforts to do so were limited. He sent an email to Mr Butler but, when he received no reply and his telephone calls were unanswered, he let the matter lie again until 14 January 2013. That was the last day on which a challenge could have been made as of right. No explanation is offered for Mr Webster's decision to leave the matter to the last minute in this way.

[27] During the week beginning 7 January 2013, Mr Webster had ample opportunity to seek advice from another quarter in Mr Butler's absence. Alternatively, if advice was wanted from Mr Butler and no-one else, Mr Webster could have drafted and filed a statement of claim which preserved the applicant's rights. As noted below, Mr Webster is an experienced professional employment law advocate. The statement of claim which Mr Butler subsequently attempted to file was very brief indeed, the particulars occupying only three paragraphs.

[28] There is no doubt that, when Mr Webster telephoned the Court registry on 14 January 2013, one aspect of the advice he was given was incorrect. The time limit imposed by s 179(2) is not affected by public holidays which are wholly included in

the period. The only significance of public holidays is that, when the final day of the period falls on a day which is not a working day, such as a public holiday, it is permissible to file on the next working day.

[29] What is not explained is why Mr Webster sought this advice from the registry at all He is a professional employment advocate offering advice on employment law. He has been in that business for at least 13 years and appears regularly in the Authority. The correct information is readily available. Section 179(2) itself is clear and unequivocal. To the extent there may have been any doubt about the effect of public holidays on the time period set by s 179(2), it was dispelled several years ago in a reported decision of the Court.[4]

[30] What is even more surprising is that Mr Butler apparently accepted this advice. He has been in business as an employment law adviser and advocate for more than 20 years. He has appeared in the Authority, the Court and the Employment Tribunal in well over 100 cases and has a well deserved reputation for his knowledge and experience.

[31] The only explanation offered is the suggestion by Mr Webster that Mr Butler confused advice about the start of the 28 day period with the date on which it ended. Mr Webster said in his affidavit dated 24 January 2013:

> 13. When I spoke to Mr Butler on 14 January 2012 I told him about the conversation with Mr Buckton. I mentioned the 18 and 19th and yesterday discovered that Mr Butler concluded I was referring to the 18th of January as the last day for filing.

[32] This explanation is problematic for several reasons. Firstly, in his discussion with Mr Webster, the Acting Registrar did not say anything about the date on which the 28 day period would end. Secondly, a date of 18 January was inconsistent with the suggestion that three days ought not to be counted in calculating the end of the 28 day period. Omitting three days from the count would produce an end date of 17 January 2013. Thirdly, Mr Webster sent an email to Mr Butler on 15 January 2013 saying that proceedings needed to be filed by 16 January 2013. It is entirely inconsistent to suggest that Mr Butler was relying on what Mr Webster told him but

[4] *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 132.

disregarded this advice. Fourthly, this evidence comes as hearsay from Mr Webster rather than directly from Mr Butler, who did not swear an affidavit This is significant when the events in question suggest that Mr Butler erred.

[33] On any view of the matter, the delay is not fully explained and the explanation which is offered is not entirely satisfactory as far as it goes.

[34] There is no explanation offered for the further seven days taken to file the current application for extension of time.

Prejudice

[35] The respondents are not prejudiced by the delay in the sense that the witnesses who gave evidence before the Authority are still available. Ms Sharma submits, however, that two of the respondents would be unduly prejudiced if the matter were now to proceed to a further hearing.

[36] In his affidavit, Brian Arrowsmith says that, on 9 January 2013, he suffered a head injury which has affected his ability to concentrate and made him anxious. There is also evidence that Andrew Doccey has moved to the North Island in order to find work and that to return to Nelson to give evidence would be a hardship to him. In addition, it would undoubtedly be a considerable imposition on all of the respondents if they had to go through the process of a Court hearing.

[37] These are all matters which the respondents could not avoid if the applicant had commenced its challenge within time and are not matters which have arisen during the period of delay since time ran out. They are, however, matters which do affect where the overall justice of the application to extend time lies.

[38] Another factor commonly taken into account relating to prejudice is that the failure to commence a challenge in time allows the respondent to falsely believe that the determination of the Authority is final.[5] That is not a significant factor in this

[5] See *Brighouse Ltd v Bilderbeck* [1993] 2 ERNZ 74 at 86-87.

case as the public announcement by Mr Simm that the applicant proposed to pursue a challenge was published within five days of the determination being given.

Prospects of success

[39] The proposed challenge is limited to the quantum of the awards of compensation for distress made by the Authority. It is implicit in this limitation that the applicant accepts the Authority's findings that the dismissals were unjustifiable and that the other remedies awarded, including substantial arrears of wages, were appropriate.

[40] In the proposed statement of claim, it is recorded "The plaintiff seeks a full hearing of that part of the decision relating to compensation (a hearing de novo)." This involves a misunderstanding of the term "hearing de novo" which is defined in s 179(3) as "a full hearing of the entire matter". That is clearly not what the applicant wants and it follows that any hearing would be non de novo. The significance of this distinction is the nature of the consideration for the Court. Adopting the approach described in *Jerram v Franklin Veterinary Services (1977) Ltd*,[6] the applicant would have the onus of persuading the Court of the existence of an error of law and/or fact by the Authority in its determination and that the correct conclusion was something other than that determined by the Authority.

[41] In this case, I am in a good position to assess whether the awards of compensation made by the Authority were appropriate. Annexed to Mr Arrowsmith's affidavit are those parts of the briefs of evidence of all four respondents provided to the Authority relating to their distress. That evidence is detailed and compelling. Mr Arrowsmith deposes that it was not challenged before the Authority. On its face, that evidence amply justifies the awards made by the Authority.

[42] The only evidence provided on behalf of the applicant which touches on this issue is in Mr Simm's affidavit. He says:

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[6] [2001] ERNZ 157.

> 6. I was very concerned with aspects of the decision including what I considered was the failure of the Authority to factor in sufficiently the very difficult financial position of the company and to award remedies that were substantially higher than I expected and seemed to be out of kilter with the evidence. While I accept that the men were upset by the decision and the process I was particularly disturbed by the use of the word devastated.

[43] I am not assisted by this bare expression of opinion, unsupported by any evidence. It is also apparent that Mr Simm incorrectly assumes that the Authority should take into account an employer's ability to pay when assessing the quantum of remedies. I can place no weight on this statement by Mr Simm.

[44] As noted earlier, Mr Butler elected not to make submissions in the usual way. Rather he invited me to regard the grounds set out in the application as submissions. I have done so but they are not evidence. For the most part, they are expressions of opinion by Mr Butler which cannot assist me. At best, what the applicant appears to rely on is the hope that cross examination of the respondents may lead them to resile from the evidence they gave to the Authority.

[45] It follows that there is nothing before me which would suggest that the Authority erred in fact or law in its determination or that the Court might reach a different conclusion to that reached by the Authority.

Discussion and Decision

[46] In deciding this application, I reiterate that the overriding consideration must be whether the overall justice of the case requires that the extension of time sought be granted.

[47] The delay in this case was small but the explanation of it was unsatisfactory. In the overall balance, this must be given some weight but not a great deal. The very fact that the applicant failed to commence proceedings within the statutory time allowed, however, is very significant. As Richardson J said in *Avery v No 2 Public Service Appeal Board*:[7]

[7] [1973] 2 NZLR 86 (CA) at 91.

> When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

[48] That brings into consideration another fundamental principle, enunciated by the Privy Council in *Ratnam v Cumarasamy*:[8]

> The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

[49] In this case, the material before the Court does not persuade me that the applicant would have any real chance of success if the extension of time sought was granted. In such circumstances, it would be unjust to subject the respondents to the stress and cost of a further hearing in the Court.

[50] The application for extension of time is dismissed.

Costs

[51] The respondents are entitled to an award of costs. If the amount cannot be agreed, Ms Sharma should file and serve a memorandum within 15 working days after the date of this judgment. Mr Butler will then have a further 15 working days in which to respond.

A A Couch
Judge

Signed at 10.30 am on 12 March 2013.

[8] [1964] 3 All ER 933 (PC) at 935.