IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 48
CRC 29/12

IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	DAVID HUGH WAREING Plaintiff
AND	TYCO NEW ZEALAND LIMITED Defendant

Hearing: By telephone conference call on 20 September 2012 and by memoranda of submissions filed on 9 and 31 October 2012, 11 and 17 December 2012, and 26 and 27 March 2013

Appearances: Kathryn Dalziel, counsel for intending plaintiff
Scott Wilson, counsel for intended defendant

Judgment: 4 April 2013

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN

---

[1] The issue for decision is whether David Wareing should have leave to extend the time for filing his challenge to a determination of the Employment Relations Authority.[1] By agreement, this has been dealt with on the papers filed. The delays are attributable to the particular and sensitive circumstances of which the parties are aware but about which it is unnecessary to say more except that they are specific to many residents of Christchurch and not unique to the people involved in this case.

[2] The Authority issued its determination in the matter of Mr Wareing's grievance on 22 May 2012. It found that he had not been unjustifiably dismissed and reserved costs. Mr Wareing's lawyer (to whom I will refer as "Z")[2] had acted for Mr Wareing in the Authority and was responsible for dealing with his wish to

[1] [2012] NZERA Christchurch 99.
[2] Not Ms Dalziel who is counsel now representing Mr Wareing.

challenge the Authority's determination by hearing de novo. Z purported to file a statement of claim initiating the challenge on 25 June 2012, some six days late. It was not until almost two months later, on 20 August 2012, that the intending plaintiff's application for leave to extend time was filed. Even then, neither the intended challenge nor the application for leave was brought to the attention of Tyco New Zealand Limited or its solicitors. The first time that they were aware that Mr Wareing was seeking to challenge the Authority's determination was on 21 August 2012 when a copy of the Court's minute of 20 August 2012, directing how the application was to be dealt with, was sent to Tyco's solicitors by the Court. The intended defendant was not served with the application for leave until 28 August 2012.

[3] Z, Mr Wareing's lawyer, accepts sole responsibility for these failures. He says that he erred in calculating the 28 day period for filing a challenge, resulting in what he said was a delay of four days after its expiry.

[4] Z blames the effects of the February 2011 Christchurch earthquake and a recently discovered medical condition for these failures. He was acquainted with three people who died in that event which, he says, has caused "a range of issues in counsels personal and professional life." One of these is said to be a difficulty with decision-making, notwithstanding what he accepts are clear and well-established timeframes for various matters. Z was receiving and continues with counselling from a registered psychologist and other medical treatment to address these and other issues.

[5] The application for leave initially suffered from a number of deficiencies and was not then a strong one. There was, for example, no explanation at all for the not insignificant further delays that followed the late filing of the challenge and the absence of any notification of it to the intended defendant. The medical evidence tendered to support the explanation for Z's confusion was initially so bare that it was unhelpful. There was no analysis of the merit of the intending plaintiff's challenge. Really the only factor then in favour of the intending plaintiff's position was the equally unsubstantiated assertion by the intended defendant that it has suffered prejudice and a loss of certainty as a result of the intending plaintiff's delays. Those

deficiencies in the plaintiff's case have now been addressed, I imagine with Ms Dalziel's involvement. There is no suggestion of responsibility for his unfortunate circumstances being Mr Wareing's personally.

[6] As has no doubt been said before, the 28 day period under s 179 within which to challenge an Authority determination as of right is, if not the shortest appeal period in New Zealand law, then amongst such periods. It is, effectively, shorter than 28 days because the period runs from the delivery by the Authority of its determination rather than its receipt by the parties which may be up to several days after delivery. Determinations are received by parties' representatives who must then communicate with their clients. A proper opportunity to reflect on the determination, to take advice about the serious step of bringing a challenge to it, and formulating a proper statement of claim, are all matters that should not be rushed but must nevertheless be fitted into that period. Notwithstanding this, Parliament has determined that this must be so and it is not for the Court to rule otherwise.

[7] Mr Wilson's strongest argument for Tyco is the significant delay after the six days' delay in Mr Wareing's attempt to file his challenge which was rejected by the Court. Counsel submits that this further period began to run shortly after 25 June 2012 when Z would have received notification from the Registry that the challenge was rejected and the reasons for its rejection. Mr Wilson points out that it was not until 20 August 2012 that Mr Wareing's application for leave (dated 16 August 2012) was filed, that is the period of 61 days after the end of the 28 day period, and 55 days after the statement of claim was filed out of time. As Mr Wilson points out, the overall delay was over nine weeks and, indeed, the intended defendant was not notified of Mr Wareing's intention to challenge until its counsel received a copy of the Court's minute dated 20 August 2012, inviting the intended defendant to indicate its attitude to Mr Wareing's application.

[8] Mr Wilson contrasts this delay of 61 days with a number of cases in which even shorter delays were the subject of refusals of leave. Although comparisons of facts in such cases are useful to an extent, each is going to depend on its own particular circumstances, especially if there are extraordinary circumstances which may affect what would otherwise appear to be comparative merits.

The reasons for the omission

[9] These are the psychological effects on Z of the Christchurch earthquakes and his consequent disabilities in performing his role as the intending plaintiff's solicitor. As noted, these events identified another medical condition in Z that has contributed to his disability. Z's evidence was confirmed by professional evidence of his state and assistance and treatment. It explains why Z failed to take timely steps on behalf of his client. As Ms Dalziel has acknowledged, the intended defendant has commendably not challenged this evidence.

The length of the delay

[10] At six days before Z attempted to file Mr Wareing's statement of claim, it is, in the circumstances, minor and explicable. Although it took Z another three weeks to file Mr Wareing's application for leave, the important period is that before Tyco became aware of Mr Wareing's intention to challenge the Authority's determination. Six days is not among the longer periods seen by this Court in such applications. But the delay until 20 August 2012 is lengthy and significant, as is the further delay before Tyco was notified of Mr Wareing's intention to appeal.

Prejudice to Tyco?

[11] Although the intended defendant asserts that it is prejudiced by this delay, what must be looked at is the prejudice arising from the period between the expiry of the statutory period and the notification to Tyco of an intention to challenge. Any prejudice arising in the 28 day statutory period after delivery of the Authority's determination cannot be relevant because it would not be able to be asserted justifiably if a challenge had been brought in a timely way. The intended defendant's prejudice is said to be a loss of certainty of the result of the litigation. That is true and not to be understated, but is equally a loss suffered by all respondents in circumstances such as these.

[12] I conclude that there is no particular prejudice to Tyco, at least that cannot be compensated eventually and if this is warranted by an award of costs.

Effects on rights and liabilities of others

[13] There is none.

Subsequent events

[14] There is likewise none.

Merits of the intended challenge

[15] This is often a difficult exercise to undertake in the absence of a full hearing. As was noted in *Pollett v Browns Real Estate Ltd*:[3]

> … the Court must make such assessment as it can of the merits of the proposed challenge. That is a relatively low threshold test based on the Authority's reasoning and on the grounds of challenge put forward by the intending plaintiff.

[16] As Ms Dalziel has pointed out, the relevant events leading to Mr Wareing's dismissal appear to be that he got into a heated discussion with his team leader in the course of which he used inappropriate words and following which he left the employer's premises in a fit of anger. Upon his return to work, there were a number of meetings about the incident following which he was dismissed for serious misconduct. Mr Wareing had worked for Tyco for 11 years. As the Authority acknowledged, there were issues of stress upon the plaintiff as a result of his workload, arising from the Christchurch earthquake and, he claims, brought about by the company's wrong prioritisation of his work. Mr Wareing was approaching retirement when he lost his job. The Authority's determination records that in his 11 years of employment he only received one written warning for misconduct arising out of a disagreement with a colleague a number of years before his dismissal.

[17] Ms Dalziel argues that the Authority placed no or insufficient weight on the earthquake stress elements despite the events that led to the dismissal having taken place shortly after the major Christchurch earthquake on 22 February 2011. Counsel for Mr Wareing accepts that his behaviour was inappropriate but says that in all the

[3] [2011] NZEmpC 116 at [15].

relevant circumstances he should not have been dismissed. If leave is granted, the challenge will focus on whether Mr Wareing's conduct was sufficient to destroy his employment relationship with Tyco, so justifying his dismissal. Ms Dalziel submits that the Authority's determination does not analyse relevant factors including Mr Wareing's role in the company or the background to his working life there. Counsel argues that although the determination assesses the company's policies and procedures, it failed to analyse such relevant evidence as the company culture and the promotion of those policies.

[18] Further, Ms Dalziel submits that there is an important element of public interest in a judicial assessment of this case. She submits:

> The situation in Christchurch is unprecedented. The levels of stress and tension within all workplaces, are palpable. The principles under the s 103A justification test, which was amended last year, are going to be challenged by this complexity.

[19] I infer that counsel will invite the Court, if leave is granted, to provide guidance to employers and employees generally, not to mention to the Employment Relations Authority, the Mediation Service and to others involved in employment relations generally, about the effects of these factors which are or may be unique in Canterbury but are more widespread than in this particular case. Nevertheless, the intending plaintiff will have to establish a sufficient sense of lack of justification for his dismissal before the onus of establishing it shifts to Tyco.

[20] There is a further issue identified by Ms Dalziel. That refers to the Authority's conclusion about Mr Wareing's time off work following the February 2011 earthquake and whose rights and responsibilities under the Holidays Act 2003 were at issue.

[21] Mr Wilson says that the Authority dealt with the broader issues of post-earthquake responsibilities of the employer comprehensively so that there is no need for the Court to do as Ms Dalziel proposes. Authority determinations are, however, party-specific and, as such, are not generally regarded as being of precedential value. That is not to cast aspersions on the quality of Authority determinations but is, rather,

to emphasise that Parliament intends these to be particular problem resolution mechanisms, leaving the courts to determine broader matters of policy and guidance.

[22] The further and better medical-associated evidence now provided by Z explains not only his error in not lodging an appeal within time, but his inaction in failing to move more promptly to apply for leave and to notify the intended defendant of his errors after he became aware of them. This is a truly extraordinary case in which, but for those circumstances, leave would probably not have been granted.

[23] For the reasons set out above, I grant Mr Wareing leave to bring his challenge to the Authority's determination out of time. The draft statement of claim should now be treated as the plaintiff's statement of claim and the defendant may have the period of 30 days to file and serve a statement of defence to it.

[24] Once the statement of defence has been filed and served, the Registrar should arrange promptly for a telephone directions conference with counsel so that the hearing of the challenge may be set down and any outstanding interlocutory issues (which I encourage counsel to discuss and hopefully resolve between themselves informally) decided.

[25] I reserve questions of costs on this application for leave.

[26] Finally, I confirm formally that there is a permanent order prohibiting from publication the name of the plaintiff's lawyer (referred to in this judgment as "Z") or any information which may lead to Z's identification. There is a further order prohibiting from publication the evidence of Z's medical and psychological conditions which have been put before the Court in affidavit and on which this judgment relies.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Thursday 4 April 2013