

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2013] NZEmpC 61
WRC 4/13**

IN THE MATTER OF an application for leave to file a challenge
out of time

BETWEEN WILLIE ALATIPI
Intending Plaintiff

AND CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Intended Defendant

Hearing: By memoranda of submissions dated 4 and 13 March 2013

Counsel: Gregory Bennett, advocate for the plaintiff
Juliet Dobson, counsel for the defendant

Judgment: 15 April 2013

JUDGMENT OF JUDGE A D FORD

[1] Mr Willie Alatipi has made application for leave to challenge a determination¹ of the Employment Relations Authority (the Authority) which was issued on 28 January 2013. The application is necessary because Mr Alatipi failed to file his challenge to the Authority's determination within the statutory period of 28 days allowed for raising such a challenge. The 28-day period expired on Monday, 25 February 2013. The statement of claim challenging the Authority's determination was filed on Wednesday, 27 February 2013. It was accepted by the Court Registry as a "draft statement of claim" pending the outcome of Mr Alatipi's formal application for leave.

[2] Mr Alatipi had been employed by the intended defendant (Corrections) as a Corrections officer at Rimutaka Prison for approximately 11 years. He was

¹ [2013] NZERA Wellington 9.

summarily dismissed from his employment on 22 November 2011 on the grounds that he had allegedly assaulted an inmate in a prison cell. Mr Alatipi claimed before the Authority that his dismissal was substantively and procedurally unjustified but the Authority rejected his claim concluding in its determination that Corrections had acted in a way that was fairly and reasonably open to it. Mr Alatipi now seeks leave to challenge de novo the whole of the Authority's determination.

[3] In a memorandum filed in support of the application for leave, Mr Bennett, advocate for the plaintiff, explained why the challenge was not made in time. He said, for reasons I need not go into, that the week leading up to the weekend of 23/24 February 2013 was "hectic" and then on Sunday, 24 February 2013 he had to travel to Gisborne for a two-day fixture. Mr Bennett believed that he posted the statement of claim to the Registry office on Saturday, 23 February 2013. He frankly acknowledged that the late filing was entirely his fault and he submitted that, "The plaintiff should not lose his opportunity to seek to have his matter heard because of counsel's inadvertence."

[4] In a minute dated 5 March 2013, Chief Judge Colgan sought confirmation as to whether Mr Alatipi's application for leave was to be opposed by Corrections. The Chief Judge pointed out that if the application was opposed then it would be necessary for affidavit evidence to be filed and served in support of the application for leave because a memorandum from the applicant's advocate would not be sufficient for an opposed application.

[5] Ms Dobson, counsel for the defendant, filed a memorandum in response confirming that Corrections did not oppose the application for leave to file the challenge out of time but counsel specifically drew the Court's attention to a number of paragraphs in the Authority's determination which she submitted, "may assist the Court when considering the Plaintiff's Application." The paragraphs in question essentially related to the Authority's conclusions, including findings on credibility and the weight given to the evidence of particular witnesses.

[6] The factors to be considered and weighed by the Court on an application for leave to file a challenge out of time are well established. In this case the delay was minimal and the explanation for the omission to bring the case in time has not been

challenged in any way. The intended defendant does not claim prejudice and no other parties are affected by the application. The only issue, raised by the intended defendant in a rather tentative way, relates to the merits of the intended challenge.

[7] As the Court observed in the recent decision of *Wareing v Tyco New Zealand Ltd*,² any consideration of the merits of an intended challenge is often a difficult exercise to undertake in the absence of a full hearing. In support, Chief Judge Colgan cited the Court's earlier decision of *Pollett v Browns Real Estate Ltd*³ in which it was stated that:

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

[8] There may be cases where the Court is able, at the application for leave stage, to make a reasonably informed decision about the merits of a challenge on the papers but it becomes a more difficult exercise when, as in this case, the challenge involves issues of credibility and an assessment of the weight to be given to the evidence of various witnesses. In this regard, for example, one of the allegations made in the draft statement of claim is that Corrections took into account the fact that Mr Alatipi refused an interview about the incident in question. Mr Alatipi claims that his refusal to comment was based on the fact that the police were also investigating the alleged assault and he was exercising his right under the New Zealand Bill of Rights Act 1990 to remain silent. Allegations of that nature and their significance can only be fully explored in the usual way through evidence on oath and cross-examination.

[9] I consider that the intending plaintiff has established that his proposed challenge has merit, in terms of the relatively low threshold test referred to in *Wareing*, and I am also satisfied that the intending plaintiff has satisfied the other recognised criteria the Court is required to have regard to in its consideration of an application for leave to file a challenge out of time.

[10] Mr Alatipi's application for leave to bring his challenge out of time is accordingly granted. On payment of the appropriate filing fee the draft statement of

² [2013] NZEmpC 48 at [15].

³ [2011] NZEmpC 116 at [15].

claim already with the Court will be treated as the plaintiff's statement of claim and the defendant will then have 30 days from the date it receives confirmation from the Registrar of the payment of the filing fee in which to file its defence. Costs on the application for leave are reserved.

A D Ford

Judge

Judgment signed at 10.00 am on 15 April 2013