

**IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY**

**[2014] NZEmpC 1
CRC 47/13**

IN THE MATTER OF	an application to extend time for filing a challenge to a determination of the Employment Relations Authority
BETWEEN	DEAN HOWARD Applicant
AND	CARTER HOLT HARVEY PACKAGING LIMITED Respondent

Hearing: on the papers - documents received 7 October, 21 October and 27 November 2013.

Appearances: David Beck, counsel for the applicant
David France, counsel for the respondent

Judgment: 9 January 2014

JUDGMENT OF JUDGE A A COUCH

[1] The applicant was employed by the respondent at its Hornby factory for 25 years. On 17 July 2012, the applicant was hit in the eye by a rubber band which came from work being done by another employee. The applicant immediately struck that man in the face. He was subsequently dismissed.

[2] The applicant pursued a personal grievance alleging unjustifiable dismissal but, in its determination dated 5 September 2013,¹ the Employment Relations Authority found that the dismissal was justifiable.

[3] The applicant decided to challenge the Authority's determination. To do so as of right, he had to file a statement of claim in the Court within 28 days after the

¹ [2013] NZERA Christchurch 186.

date of the determination.² That meant the last day for filing was Thursday 3 October 2013. The applicant missed that deadline. The current application, together with two affidavits in support and a draft statement of claim, were filed by email on Monday 7 October 2013. The application seeks “leave to file a challenge out of time” . That is not an outcome contemplated by current legislation but I interpret this as an application for an order of the Court pursuant to s 219 of the Employment Relations Act 2000 extending the time for filing the statement of claim necessary to commence a challenge.

[4] For the respondent, Mr France has filed a succinct memorandum in which he records the following. He was sent a copy of the draft statement of claim by email on 7 October 2013 and a copy of the current application on 15 October 2013. The respondent neither consents to the application nor opposes it and will abide the decision of the Court. The respondent seeks costs on the application.

[5] The lack of opposition to the application does not necessarily mean it ought to be granted. The Court must be satisfied that it is in the interests of justice to do so. That involves considerations other than the respondent’s attitude to it. Of particular significance in this case are the extent of the delay, the explanation for it and the potential merits of the proposed challenge.

[6] The extent of the delay was four days although it can also be seen as two working days. That is relatively brief but not insignificant.

[7] The delay is explained in the affidavits sworn by the applicant and Mr Beck.³ The determination was sent to the applicant as an attachment to an email from Mr Beck on Monday 9 September 2013. In the email, Mr Beck raised the possibility of a challenge and told the applicant that he had “4 weeks to decide”. The applicant says that he received this message at a time when he was pre-occupied with preparation for an overseas trip and did not read the determination. He believed Mr

² Section 179(2) of the Employment Relations Act 2000.

³ It was irregular for Mr Beck to both swear an affidavit and appear as counsel in this aspect of the matter but, as the application is not opposed, his evidence can be regarded as non-controversial and I have read his affidavit on that basis.

Beck's reference to "4 weeks" meant a period of four weeks from the date of the email, that is from 9 September 2013.

[8] The applicant was overseas from Friday 13 September until Sunday 29 September 2013. On his return, he read the determination but not until Tuesday 1 October 2013. He consulted Mr Beck later that day and received detailed advice about the merits of a challenge. Mr Beck told the applicant that he should "get back to him on Thursday so he could file it". The applicant says that he still believed then that the time for filing did not expire until the following Monday, 7 October 2013. Following that meeting, Mr Beck sent an email to Mr France saying "Met with client today & I have instructions to explore filing with Court. I will update you later in the week."

[9] The applicant telephoned Mr Beck's office on Thursday 3 October 2013 and eventually spoke to Mr Beck at 4.30pm. It was then that he gave Mr Beck instructions to commence a challenge. Immediately after receiving those instructions, Mr Beck sent an email to Mr France saying "Our client has confirmed he wants to file an application with the Court that we will file tomorrow."

[10] While this evidence explains the delay to an extent, it does not explain it fully and certainly does not excuse it. Both the applicant and Mr Beck appear to have taken a casual attitude to the passing of strictly limited time. By his own admission, Mr Beck gave the applicant ambiguous advice and did not seek firm instructions in time to meet the statutory deadline. For his part, the applicant avoided considering the matter properly until two days prior to the deadline.

[11] Where proceedings are not commenced as of right, it is not in the interests of justice for the Court to entertain claims which have no realistic prospect of success. The affidavits filed in support of the present application contain no suggestion that any additional evidence would be available to the Court which was not considered by the Authority. Rather, it appears this is a case where the applicant hopes to persuade the Court that it should reach a different conclusion to that reached by the Authority on essentially the same evidence. In such cases, the merits of the

challenge can only be assessed on the basis of the Authority's record of that evidence in its determination.

[12] I have read the determination carefully. There was no obvious error made by the Authority. Its investigation was thorough and detailed. The conclusions reached were open to the Authority on the evidence adduced and proper reasons for those conclusions were given. I am satisfied, however, that the evidence could have supported contrary conclusions on several of the key issues. In a de novo hearing by the Court, therefore, it cannot be said that there is no realistic prospect of the challenge succeeding.

[13] Having regard to all the relevant factors, I find that it is in the interests of justice that the applicant be permitted to pursue his challenge. I reach that conclusion, however, by a narrow margin. Three factors have tipped the balance in favour of this outcome. The first is the importance of the matter to the applicant. He was dismissed from very longstanding employment and seeks reinstatement. The second factor is that the respondent was told of the applicant's intention to pursue a challenge before the time for doing so as of right had expired. Thus, the respondent was not led to believe that the matter was over. Following on from that, there is no suggestion that the respondent is prejudiced by the delay.

[14] Although time will be extended to allow the challenge to proceed, the current application has been necessitated entirely by the failure of the applicant and his counsel to act in a timely way. As a result, the respondent has been put to the trouble of considering and responding to this application. While the cost of doing so has probably been modest, it is not a cost the respondent should bear. I therefore make it a condition of the order that the applicant pay the respondent \$400 for costs on the application and that he do so promptly.

[15] Subject to the following conditions, time for filing a statement of claim in this matter is extended to validate the filing of the draft statement of claim on 7 October 2013. The conditions of that order are:

- (a) The filing fee for the statement of claim is to be paid no later than Friday 24 January 2014.

- (b) The applicant is to pay the respondent \$400 for costs on this application, that sum to be paid no later than Friday 24 January 2014.

[16] If these conditions are not satisfied, the extension of time will not be effective. If these conditions are satisfied, the respondent must file and serve a statement of defence no later than Friday 21 February 2014.

AA Couch
Judge

Signed at 11.30 am on 9 January 2014.