



commenced by a statement of claim on 7 May 2014; Ms Brown filed a statement of defence on 10 June 2014.

[3] In this proceeding (CRC 17/14), the applicant filed an application for leave to file a cross-challenge out of time on 10 June 2014 supported by two affidavits. The respondent has filed a notice of opposition dated 12 June 2014 supported by a memorandum.

[4] Although a non de novo challenge has been advanced by the respondent in CRC 11/14, the applicant wishes to raise issues that perhaps are outside the scope of that challenge, for example the finding in the Authority's determination that there was unjustified disadvantage to the applicant by reason of her suspension. The applicant also wishes to seek higher remedies than those which were awarded by the Authority.

[5] The grounds of the application for leave are:

- Initially the applicant thought she would accept the Authority's decision, and move on.
- In the week of 28 April 2014, she learned that it was possible that the matter would go further. She did not believe this would occur.
- However, on the evening of 4 May 2014, she learned that the employer had received advice as to a challenge. She decided then that she would have to consider bringing her own challenge.
- There is no real prejudice in granting leave, since such would result in all aspects of the personal grievance being reheard.

[6] The respondent's grounds of opposition to the application are:

- a) The cross-challenge is out of time, and the appropriate time thresholds have not been met.
- b) The interests of justice do not require leave to be granted.

- c) The applicant is not prosecuting her cross-challenge in good faith and is using the application as a bargaining tool.
- d) There will be prejudice to the respondent in that there will be additional costs of preparation.

[7] A final contextual matter to mention is that prior to 1 May 2014, a Practice Note of the Court provided that a cross-challenge could be included in a defendant's statement of defence, in much the same way as a counter-claim in civil proceedings.<sup>2</sup> As from 1 May 2014, that Practice Note was of no further effect. If either party wished to bring a challenge to a determination of the Authority, that challenge had to be instituted within the 28-day period provided for any challenge under s 179 of the Employment Relations Act 2000 (the Act); or an application for leave would have to be made.

## Principles

[8] The provisions of s 219 and 221 of the Act permit the Court to extend time in a situation such as the present. The criteria were set out as follows in *Stevenson v Hato Paora College Trust Board*:<sup>3</sup>

There are well-established principles for the exercise of the Court's discretion to make orders extending time. The jurisdiction is derived from s 219 of the Employment Relations Act 2000 which, apart from a style change, is identical to s 138 of the Employment Contracts Act 1991. ... The overriding consideration is the justice of the case.

## Discussion

[9] The chronology for this matter is as follows:

- a) On 10 April 2014, the Authority's determination was issued.
- b) By 1 May 2014, the provisions of the Practice Note for cross-challenges had expired.
- c) On 7 May 2014, the respondent's challenge was filed.

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<sup>2</sup> Practice Direction – Cross-challenges [2005] ERNZ 60 at [22].

<sup>3</sup> *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8].

- d) On 8 May 2014, the Court completed the notice to defendant page on the statement of claim, and returned the document to the respondent's lawyers for service. Assuming three working days for the sending of the document to the applicant's lawyers, the document would have been received by them on or about 11 May 2014. The Court has no evidence as to when the statement of claim was actually served on the applicant, and therefore no evidence as to when the statement of defence was due.
- e) On 10 May 2014, the period within which either party could have filed a challenge expired.
- f) On 10 June 2014, the statement of defence was filed; on the same date the present application for leave was also filed.

[10] Had the Practice Note applied, the applicant would have been able to file a statement of defence in relation to the respondent's challenge, which included her cross-challenge.

[11] The present circumstances arise during what was effectively the phase when the Practice Note expired. For part of the period of 28 days within which consideration could be given to a challenge, the former Practice Note applied. Until 1 May 2014, the applicant was entitled to assume that if, against her hopes, a challenge to the Authority's determination was filed; she would be able to raise a cross-challenge when filing her statement of defence. However, on 1 May 2014, the position changed due to the expiry of the Practice Note. If she herself did not institute a challenge during the remaining days that the statute permitted for the instituting of a challenge (that is up until 20 May 2014), she would have to seek leave.

[12] Because I have no evidence as to when the challenge instituted by the respondent (CRC 11/14) was served, the Court does not know whether the applicant was on notice of the respondent's challenge before or after the expiration of the 28-day period. The applicant in this proceeding must have the benefit of that doubt.

[13] This case is unusual because of the particular time period within which the circumstances fall for consideration.

### **Conclusion**

[14] I consider that in all the circumstances leave should be granted.

[15] Time for filing a statement of claim by the applicant is extended to a date which is seven days after the date of this judgment, providing the filing fee for doing so is also paid by that date.

[16] If this condition is not satisfied the extension of time will not be effective. If it is, the respondent must file and serve a statement of defence no later than 28 days after the date of this judgment.

[17] Although costs usually follow the event, because an indulgence has been granted to the applicant costs are to lie where they fall.

B A Corkill  
Judge

Judgment signed at 2.45 pm on 31 July 2014