IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY

[2014] NZEmpC 2
CRC 51/13

IN THE MATTER OF	an application to extend time to commence a challenge against a determination of the Employment Relations Authority
AND	an application for stay of enforcement proceedings
BETWEEN	CHERIE COTTRELL Applicant
AND	THE NELSON SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS INCORPORATED Respondent

Hearing: on the papers - documents received 20 November, 26 November and 4 December 2013

Appearances: Luke Acland, counsel for the applicant
Kay Chapman, advocate for the respondent

Judgment: 13 January 2014

JUDGMENT OF JUDGE A A COUCH

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[1] For about two years, the applicant was employed by the respondent at its premises in Nelson. In February 2013, the applicant resigned. She regarded the termination of her employment as a constructive dismissal and pursued a personal grievance alleging that she had been unjustifiably dismissed.

[2] The applicant's grievance was investigated by the Employment Relations Authority which determined[1] that she had not been dismissed and therefore had no basis for her claims. Subsequently, the Authority issued a supplementary

[1] [2013] NZERA Christchurch 215 dated 16 October 2013.

determination[2] in which the applicant was ordered to pay the respondent $4,250 as a contribution to its costs.

[3] The applicant decided to challenge the Authority's substantive determination. To do so as of right, she had to file a statement of claim in the Court within 28 days after the date of the determination.[3] That meant the last day for filing was Wednesday 13 November 2013. The applicant missed that deadline. The current application for an extension of time, together with an application for stay of execution of the costs determination and two brief affidavits in support, was filed on 20 November 2013.

[4] For the respondent, Ms Chapman has filed a memorandum in which she records that the respondent neither opposes nor consents to either of the applications and will abide by the decision of the Court.

Application to extend time

[5] The lack of opposition to the application to extend time does not necessarily mean that 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. In *Avery v No 2 Public Service Appeal Board*,[4] Richmond J summarised the general principle this way:

> 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.

[6] The use of the term "indulgence" is perhaps inapt today but the fundamental principle that an applicant for an extension of time must show that it is in the interests of justice to allow the original decision to be challenged remains entirely

[2] [2013] NZERA Christchurch 238 dated 15 November 2013.
[3] Section 179(2) of the Employment Relations Act 2000.
[4] [1973] 2 NZLR 86 (CA) at 91.

valid. In assessing whether that is so, the Court must have regard to the fundamental principle enunciated in *Ratnam v Cumarasamy*[5]

> 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.

[7] Of significance in this case are the extent of the delay, the explanation for it, the potential merits of the proposed challenge and the extent of any prejudice to the respondent or other parties.

[8] The extent of the delay was seven days. That is more than a brief delay and is significant.

[9] The only explanation for the delay is given in a very brief affidavit of Ms Lyall, a solicitor employed by Bamford Law, the firm representing the applicant. The entire text of her affidavit is:

> 1. When working out the last day for filing this matter, I either miscalculated the date, or entered the date into my digital calendar incorrectly.
> 2. I had entered 20 November 2013, when in fact it should have been 13 November 2013.
> 3. I double checked the date before going to file the documents and realised my error.
> 4. The documents have been filed with an application for leave as soon as the error was realised.

[10] While this provides some explanation for the delay, it is far from a complete explanation. In particular, there is no evidence of when the respondent gave instructions to her solicitors to commence a challenge, whether the respondent was informed of the applicant's intention prior to the expiry of the time for filing as of right and the reasons why filing of the proposed challenge was delayed until what was understood to be the last possible day.

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[5] [1964] 3 All ER 933(PC) at 935.

[11] Turning to the prospects of success if the challenge proceeds, there is nothing in the affidavits to suggest 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 to reach a different conclusion to that reached by the Authority on essentially the same evidence. In such cases, the potential merits of the proposed challenge can only be assessed on the Authority's record of the evidence in its determination and the reasoning given by the Authority for its conclusions.

[12] I have read the determination carefully. There was no obvious error made by the Authority. Its investigation covered the relevant issues. The appropriate legal tests and principles were applied. Although the final determination relied on a number of findings of fact, the Court has been given no reason to believe that any of those findings was inconsistent with the evidence.

[13] The respondent has not provided any affidavits in opposition. Accordingly, there is no basis on which to believe that the respondent would suffer any specific prejudice as a result of the applicant's delay. I note, however, that the respondent is a well known and respected charity whose work is in the public interest. Money spent on defending a challenge would not be spent on that charitable work.

[14] I also have regard to the prejudice that inevitably results from losing the certainty of the Authority's determination. Once the time for challenging that determination as of right had passed, the respondent was entitled to regard the whole matter as over and its confidence in that finality would have increased with every day which passed without action by the applicant. That prejudice could have been avoided by the applicant signalling at an early stage that a challenge was to be pursued but there is no evidence that this occurred.

[15] Taking into account all the relevant factors, I am not satisfied that it would be in the interests of justice to grant an extension of time for a challenge in this case. The application is refused.

Application for a stay of proceedings

[16] As my decision to refuse an extension of time means that there will be no substantive proceedings before the Court, there is no reason to grant a stay of proceedings for execution of the Authority's costs order. Accordingly, the application for stay is also refused.

Costs

[17] Although the respondent has taken a neutral stance in this matter, it has had to consider the applications and has filed a brief memorandum. It will have incurred some cost in doing so. The applicant is ordered to pay the respondent $300 for costs on this application.

A A Couch
Judge

Signed at 12.30 pm on 13 January 2014.