

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 222
EMPC 214/2022**

IN THE MATTER OF an application for leave to extend time to file
 a challenge to a determination of the
 Employment Relations Authority

BETWEEN BIGSON GUMBEZE
 Applicant

AND THE CHIEF EXECUTIVE OF ORANGA
 TAMARIKI – MINISTRY FOR
 CHILDREN
 Respondent

Hearing: On the papers

Appearances: D Fleming and S Beshay, counsel for applicant
 RM Butler and K Alexander, counsel for respondent

Judgment: 5 December 2022

JUDGMENT OF JUDGE K G SMITH

[1] Bigson Gumbeze was employed as a registered social worker by the Chief Executive of Oranga Tamariki – Ministry for Children until he was dismissed on 15 December 2017.

[2] In the Employment Relations Authority Mr Gumbeze’s personal grievance claim was unsuccessful.¹

¹ *Gumbeze v Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZERA 232 (Member Cheyne).

[3] The Authority’s determination was dated 2 June 2022. The time available to Mr Gumbeze to file a challenge as of right expired on 30 June 2022.² He did not do that and has applied for an extension of time to allow his challenge to be filed.

What happened?

[4] On 30 June 2022, Mr Gumbeze sent an email to the Authority attached to which was an application for leave to file “a challenge out of time” in the Court, a supporting affidavit and an application for the Authority’s investigation of costs to be stayed. On the same day he served those documents on Oranga Tamariki’s lawyers.

[5] The Authority realised Mr Gumbeze had made a mistake and promptly referred him to the Employment Court’s website. On the afternoon of 30 June 2022, he filed the same documents in the Court by email. In response to that email he was advised that to perfect an application for leave to extend time he needed to file a draft statement of claim. The next day, 1 July 2022, Mr Gumbeze filed an application for leave, an affidavit in support, and a draft statement of claim dated the previous day. On 2 July 2022, those documents were served on Oranga Tamariki’s lawyers.

[6] Mr Gumbeze’s application for an extension of time was brief. He raised a concern about being disadvantaged by Oranga Tamariki and pleaded that the investigation meeting was held without full legal representation. That was because his then lawyer had trouble being connected to the investigation meeting remotely and was distracted. The application stated an intention to challenge the determination and included a comment that he would appoint new counsel to file a full statement of claim and “grounds of appeal”.

[7] The draft statement of claim was equally brief. In eight short paragraphs Mr Gumbeze elected to challenge the whole determination. The relief pleaded was for reinstatement to his former position, compensation for lost income, compensation for “hurt and humiliation” and costs. No other information was provided about the proposed claim. In one sentence, the draft stated that comprehensive details of the claim would be provided by Mr Gumbeze’s legal representative.

² Employment Relations Act 2000, s 179(2).

[8] Mr Gumbeze instructed new lawyers to act for him after he had filed his application. On 21 July 2022, a further application prepared by his lawyers was filed setting out the grounds relied on in more detail, a revised draft statement of claim and Mr Gumbeze's second affidavit.

[9] The application for an extension of time is opposed.

Analysis

[10] Where an extension of time to file a challenge is sought, the Court must consider whether granting it is in the interests of justice. In that exercise factors that are likely to require consideration include:³

- (a) the length of the delay in seeking to challenge the determination;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly the applicant;
- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome;
- (e) the significance of the issues raised, both to the parties and more generally; and
- (f) the merits of the proposed challenge, where appropriate.

[11] In *Almond v Read*, the Supreme Court examined the extent to which the merits of a proposed appeal may be relevant where an extension of time is sought. The Court accepted that the merits may be taken into account but with three qualifications.

[12] The first qualification was that issues about the merits may be overwhelmed by other factors such as the length of the delay or prejudice to the respondent. The second qualification was that the merits would not generally be relevant where the

³ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

delay was insignificant and occasioned because of a legal advisor's error where there has been no prejudice. The third qualification was that any assessment of the merits on an interlocutory application must inevitably be superficial. That means the merits ought to be taken into account only where they are very obviously strong or very weak.⁴ It follows that a decision to refuse an extension of time based substantially on a lack of merit should be made only where the challenge is clearly hopeless.⁵

Length of the delay

[13] Mr Fleming, counsel for Mr Gumbeze, submitted that the length of the delay was for all practical purposes brief. He referred to Mr Gumbeze's attempt to file a complying application on 1 July 2022 including what was described as a pro forma draft statement of claim accepted for filing by the Court one day after the challenge could have been filed as of right. The elapsed time between 1 July 2022 and when a more detailed application was filed on 21 July 2022 was described as not unreasonable. Examples of cases where the Court has accepted longer delays as not fatal were relied on.⁶

[14] Ms Butler, counsel for Oranga Tamariki, submitted that the delay should be measured from 30 June 2022 until 21 July 2022. Her submission was that where a date was missed the time taken to rectify the failure is relevant.⁷ In this case the failure was only rectified on 21 July 2022, and it is that delay that must be explained and had not been.

[15] The basis for Ms Butler's submission was that Mr Gumbeze's application on 1 July was non-complying because the draft statement of claim did not satisfy reg 11 of the Employment Court Regulations 2000; it did not, for example, state the facts on which it was based, the grounds of the claim, or the way in which the claimed monetary relief was calculated.

⁴ At [39].

⁵ At [39].

⁶ *Ling v Super Cuisine Group Ltd* [2021] NZEmpC 204; and *Hurst v Hodgson* [2020] NZEmpC 83.

⁷ *Baylis v Chief Executive of the Porirua City Council* [2021] NZEmpC 213 at [16].

[16] I do not accept as a starting point for this analysis the delay being from 30 June until 21 July 2022. To adopt that starting point would mean completely putting aside the initial steps taken by Mr Gumbeze only because the draft statement of claim did not comply with reg 11. Such an outcome would not be consistent with the Court's equity and good conscience jurisdiction.⁸

[17] Mr Gumbeze's application identified itself as one seeking an extension of time. Read together with the affidavit, and the admittedly spartan draft statement of claim, it was sufficient to inform the Court and Oranga Tamariki that a challenge was intended and that an extension of time was being sought. Its deficiencies could not be interpreted as so severe that they undermined the whole application.

[18] Measured against steps taken by Mr Gumbeze on 1 July the delay was very brief. Even if Ms Butler's starting point was accepted, I would not regard that delay as excessive given what was attempted to be done on 30 June and 1 July 2022.

[19] This factor points towards granting leave.

The reason for the delay

[20] Mr Gumbeze knew the deadline to file the challenge but explained that he was confused about what to do. By the end of June 2022 he was acting for himself having become dissatisfied with his previous lawyer.

[21] Mr Gumbeze's relationship with his former lawyer ended shortly after the Authority's determination was issued. At some unspecified time after the determination was issued the lawyer invited Mr Gumbeze to take alternative advice. At the latest the professional relationship ended on 23 June 2022 when his lawyer filed a notice in the Authority stating he no longer acted. However, the relationship may have ended as early as 14 June 2022 because that date was mentioned in the lawyer's notice as being when he ceased to act.

⁸ Employment Relations Act 2000, s 189.

[22] Assuming Mr Gumbeze knew that the relationship had ended, or was to end, on 14 June 2022 that leaves for consideration what steps he took from then until the end of the month. Mr Gumbeze has limited financial resources. He struggled to find a replacement lawyer in that time who was able to undertake work for the fee he could afford to pay. He did not, however, remain idle. He approached Waitemata Community Law Centre for advice and attempted to file his application on 30 June 2022, as previously described.

[23] Oranga Tamariki accepted Mr Gumbeze was unfamiliar with what was required but submitted that the true reason for the delay was that, despite being aware of the deadline, he did not take positive steps to appoint a new lawyer or to file a challenge until the last minute.

[24] The criticism was largely that Mr Gumbeze did not adequately prepare for an adverse outcome or deal with replacing the lawyer he had become dissatisfied with. In a nutshell, Mr Gumbeze should have taken better steps to protect himself than he did.

[25] These criticisms set the bar too high. I do not accept that Mr Gumbeze failed to act quickly enough. It is not unreasonable for a party to await the outcome of a decision before considering further options. There remained a prospect that he would succeed in the Authority and, if he had, the additional expense in changing lawyers would have been incurred for no reason. An unsuccessful attempt was made to get advice about a challenge from his former lawyer and, as soon as that relationship ended, steps were taken to obtain alternative advice and to attempt to preserve his position.

[26] The reason for the delay has been adequately explained and this factor points towards granting the application.

Conduct of the parties

[27] Ms Butler submitted that Mr Gumbeze's conduct should count against granting the application.⁹ She attributed to him delays in progressing his claim which were argued to have contributed to the litigation continuing more than four years after he was dismissed.

[28] In response, Mr Fleming pointed out that a personal grievance claim was brought within time.

[29] There are no features here of the sort referred to in *Read v Almond* that would point against granting the application.

Prejudice

[30] Delay causing prejudice to a respondent can weigh against granting an application for an extension of time. The prejudice relied on by Oranga Tamariki was that since the investigation its witnesses have been promoted and requiring them to be available to give evidence would have a deleterious impact on the performance of their new jobs. Anna Palmer, Oranga Tamariki's Regional Manager for Central, North and West Auckland, explained that its witnesses now hold senior roles with increased responsibilities.

[31] Ms Palmer explained that all three witnesses invested a lot of time on the case in the Authority, prepared lengthy witness statements, reviewed a substantial number of documents, and participated in the three-day investigation. Her concern was that if Mr Gumbeze is allowed to proceed with his challenge, that will require additional and significant time investment from those senior employees. They will, in her view, be taken away from their substantive roles.

[32] I take from Ms Palmer's evidence a concern that busy people may be required to pay attention to decisions they made several years ago, diverting them from their present responsibilities.

⁹ Relying on *Read v Almond*, above n 3, at [38](c).

[33] I do not accept that the promotions the witnesses have obtained is relevant. The demands of their new positions are insufficient to amount to prejudice that Oranga Tamariki might suffer if leave is granted. The witnesses are available, and it follows that Oranga Tamariki will be able to rely on their evidence if leave is granted.

[34] The last part of this submission was a claim that Mr Gumbeze had alleged another employee of Oranga Tamariki had discriminated against him on the basis of race. An affidavit from the other employee was not provided but Ms Palmer submitted that the allegations were baseless and were raised by Mr Gumbeze for the first time during the Authority investigation. That employee was granted name suppression.

[35] It is difficult to see how the claim could amount to prejudice to Oranga Tamariki of the sort that would count against granting the application.

[36] I am not satisfied that there would be any prejudice to Oranga Tamariki if the application is granted.

Significance of the issues to the parties

[37] This issue is significant to Mr Gumbeze. This factor points in favour of granting the application.

Merits of the case

[38] Ms Butler submitted that the merits of the case are relevant. She relied on the comprehensive findings made by the Authority when it rejected Mr Gumbeze's personal grievance.

[39] The application has more in common with the short delay referred to in *Almond v Read*, such that the merits ought not to be taken into account. Even if the merits were considered, on the information currently available they could not be determined to be either very strong or very weak. Ms Butler's submissions relied on the Authority's findings but those are precisely what Mr Gumbeze seeks to overturn and there was no other material from which an assessment could be made.

Overall interests of justice

[40] I am satisfied that it is in the overall interests of justice to grant the application.

Conclusion

[41] The application for an extension of time for leave to challenge the Authority's determination is granted. A statement of claim in the form of the draft filed with the application is to be filed no later than 4 pm on 12 December 2022.

[42] Costs are reserved. If the parties are unable to reach agreement on costs memoranda may be filed.

K G Smith
Judge

Judgment signed at 12.30 pm on 5 December 2022