IN THE EMPLOYMENT COURT
AUCKLAND

AC 15A/08
ARC 23/08

IN THE MATTER OF	a de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	RICHARD RUSSELL POTTER Plaintiff
AND	AUSTRALIAN CONSOLIDATED PRESS NZ LTD Defendant

Hearing: 15 May 2008
Subsequent affidavit filed on 29 May 2008 by the plaintiff and affidavit in reply filed on 12 June 2008 by the defendant
(Heard at Auckland)

Appearances: Mr M Price, advocate for plaintiff and Mr R Potter, plaintiff in person
Mr D Alderslade, counsel for defendant

Judgment: 3 July 2008

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff was six days late in filing a challenge to a determination of the Employment Relations Authority issued on 11 March 2008. Section 179 of the Employment Relations Act 2000 (the Act) required the challenge to have been filed by 8 April. The plaintiff filed his application for leave to challenge out of time on 14 April 2008. The application has been strenuously opposed.

Principles

[2] There is no issue between the parties that the Court has jurisdiction to grant leave to extend time pursuant to a discretion granted by s219 of the Act. The discretion conferred by s219 is not subject to any statutory criteria but must be exercised judicially, in accordance with established principles and the fundamental principle of the interests of justice: *An Employee v An Employer* [2007] ERNZ 295.

[3] A helpful set of criteria providing useful headings can be extracted from *Day v Whitcoulls Group Ltd* [1997] ERNZ 541:

> *(1) The reason for the omission to bring the appeal within time.*
>
> *(2) The length of the delay.*
>
> *(3) Any prejudice or hardship to any other person.*
>
> *(4) The effect on the rights and liabilities of the parties.*
>
> *(5) Subsequent events.*
>
> *(6) The merits.*

[4] It is accepted that this is not an exhaustive list but an indication of the elements which can have a bearing, see *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103.

The reason for the omission to bring the challenge within time

[5] The plaintiff initially filed a very brief affidavit stating that he only had four working days to prepare the challenge, was not advised of the deadline of 28 days, had difficult family circumstances with two sick children and had a lack of time because he was contracting to three different companies. At the hearing of the matter the plaintiff sought to introduce other material which was not contained in his affidavit. By consent two additional emails were provided to the Court. At the

conclusion of the submissions I granted the plaintiff leave to file and serve a further affidavit with the defendant having leave to file and serve affidavits in response. The case would then be determined on the basis of the submissions already made. This leave was granted principally because the parties had concentrated on the merits of the case as well as the reasons for the delay in filing the challenge and these matters had not been adequately dealt with in the plaintiff's first affidavit.

[6] From the much fuller affidavit filed by Mr Potter I derived the following as the reasons for the delay in filing the challenge. The plaintiff states that on 11 March 2008, the date of the determination, he was emailed a copy by his lawyer, Mark Ryan. The email stated "*you may want to give me a call and discuss the result*"**.** The plaintiff claims that he was not aware that there was any deadline for filing an appeal and that he believed his lawyer would have told him of his rights and of any deadlines if there were any. He claims that the email did not indicate any urgency in the matter. The plaintiff deposes that he was deeply disappointed with the outcome of the determination and with the representation he had received. On 24 March he asked his friend Martin Price, a human resources consultant, to look at the determination and review it. Mr Price came back to him several days later and said that he had a strong case. On 2 April they discussed the details of the determination. He claims that neither he nor Mr Price knew about the 28 day deadline at this point of time. They left a message for Mr Ryan to call the plaintiff. Mr Price followed this up with an email to Mr Ryan setting out the reasons why they thought the outcome was unfair and requested a copy of the evidence that had been put before the Authority. Mr Ryan responded on the evening of 2 April by email, agreed to the request and concluded his email "*please note that Richard has 28 dyas (sic) from the date of the determination to file a challenge in the Employment Court*".

[7] The plaintiff deposes that at that point he did not know what to do as he had received no legal advice as to the steps he should have taken. The plaintiff claims that he did not receive the material requested from Mr Ryan until 7 April. In the interim he spent many hours with Mr Price, including the time travelling from where Mr Price lives in Mt Eden and where the plaintiff lives on Waiheke Island, assembling his material, considering the determination and researching on the internet. He was also working late during the same period on other matters including

up to 9.30pm on weeknights. He claimed to have worked extremely hard to meet the 28 day deadline without the assistance of legal representation which he cannot now afford.

[8] The subsequent affidavit does not refer to the difficulties he was having with sick children and sleepless nights but, on the assumption that both affidavits are to be read together, those are matters which I will take into account. The plaintiff complained there was no mention of the 28 day deadline in the Authority's determination. He noticed that the determination contained a 28 day deadline in relation to submissions on costs but it made no mention of the rights of challenge. There is of course no requirement for determinations to refer to challenges and I am not aware of any determinations that have set out the process of appeal.

[9] Mr Alderslade for the defendant, submitted at the hearing that the excuses advanced by the plaintiff for not filing the challenge in time were unconvincing and that it appeared that he had adopted a lackadaisical response to the determination. He referred to the failure on the part of the plaintiff to take up the invitation of Mr Ryan to discuss the determination contained in the email on the very day that the determination was issued.

[10] The plaintiff's subsequent affidavit makes it clear how Mr Price became involved and why the subsequent advice of the 28 day period was sent to Mr Price rather than to the plaintiff. The subsequent material also provides a fuller explanation of the circumstances which led to the delay. Whilst I have sympathy for the plaintiff and his family circumstances it is clear he did know of the deadline six days before it expired. His reasons for his failure to file even a bare outline of a challenge within that time period are not particularly adequate. They do not of themselves provide sufficiently compelling reasons for the delay in filing the challenge which would of themselves justify the granting of the leave now sought.

The length of the delay

[11] From the authorities assembled in *Peoples v Accident Compensation Corporation* CC 3/07, 13 February 2007, it appears that, with one exception, the

longest extension of time granted for a challenge or appeal was 14 days. In the one exceptional case, an extension of 20 days was granted. I conclude that the six days which expired in this case were not so excessive as of themselves to bar the granting of leave.

Prejudice

[12] Mr Alderslade did not rely on this factor but, as noted in a recent decision of the Court in *Monteith v Eagle* WC 10/08, 17 June 2008, a party to a litigation who is successful at first instance will always have a period of uncertainty until the time for a challenge has expired. After that time has passed with no steps being taken, the successful party is entitled to certainty of the result. To grant the extension sought is therefore a detriment which can amount to prejudice.

The merits

[13] I note that the factors involving the rights and liabilities of the parties in subsequent events do not seem to be of relevance in the present case. Most time was directed towards the merits of the proposed challenge. Mr Potter had claimed in the Authority he was disadvantaged in his employment by unjustified actions of the defendant and that he was constructively dismissed. The Authority dismissed these grievances and the plaintiff does not seek to challenge that part of the determination. He also claimed $21,962.38 for outstanding commissions. The Authority correctly observed that the plaintiff bears the onus of proof of this claim. The plaintiff had claimed that his employment agreement provided for commissions to be calculated on all sales, including all Australian, direct and agency and advertising sales. The Authority found that the most important document produced to it was a memorandum dated 11 November 2001 which stated:

> *Display advertising is clearly defined as advertising on the correct display rate card sold and booked directly by yourself. This does not include Australian bookings or advertisers on brokerage rates.*

[14] The Authority found that there was no evidence from the plaintiff to suggest that he had disputed this notification as incorrect and concluded the plaintiff had wrongly claimed revenue commissions for Australian bookings. The Authority found the defendant had significantly overpaid the plaintiff between $15,000 and $24,000 which the defendant's evidence made clear that the defendant was not requiring the plaintiff to repay. It found that the plaintiff had not met the onus of proving he was owed the outstanding commission. It is this aspect of the determination which the plaintiff has elected to challenge.

[15] The plaintiff noted that these commissions had been under dispute for some four years and Mr Price on his behalf argued that the defendant had no right to change the plaintiff's commission structure without his agreement. It is not disputed that the defendant's representative, Lee Williams who swore the affidavit in opposition, decided from a management point of view that there should be a change in commission, that he discussed it with the plaintiff and sent him documents confirming the change. Mr Price advised that the plaintiff was contesting the defendant's legal right to do so. The plaintiff acknowledged that he had received the memorandum and had the discussion but claimed the outcome of the discussion was different to how the defendant viewed the matter. The plaintiff was paid commission on Australian sales after the memorandum. He contended there was nothing in the employment agreement which permitted the defendant to change commission sales and that these could not be changed without the plaintiff's consent.

[16] Mr Alderslade relied on a provision in the employment agreement which allowed for commissions to be reviewed on a quarterly basis. This, he submitted, gave the defendant the ability and the power to review the commissions and to adjust them as appropriate. He examined the exchange of emails between Mr Williams and the plaintiff and submitted these confirmed that the parties had agreed on the new commission structure. He fell back on the submission that, in any event, the defendant did not require the consent of the plaintiff to implement the change. The defendant accepted that by mistake it did pay the plaintiff commission in circumstances where it expressly said he was not entitled to them. He observed that the defendant could have counter-claimed for up to $20,000 but has waived that claim.

[17] The plaintiff's further affidavit has set out in far more detail the basis for his challenge. He claims that after the 11 November 2001 document was emailed to him by Mr Williams, they discussed the position and they agreed that it made sense to pay him commissions on Australian advertising as this would provide him an incentive to grow this new part of the business. Mr Williams, in his affidavit says the plaintiff is incorrect. There is clearly an issue between the plaintiff and Mr Williams as to whether this is correct, but this is not a matter that can be resolved in the application for leave. It is an issue for trial. If the plaintiff's evidence is accepted he may be successful in his challenge.

[18] The plaintiff further supports his claim by reference to subsequent documents which may have contradicted the 11 November memorandum. These matters are arguable and would also be the proper subject of the plaintiff's challenge.

[19] At this stage I am unable to say that the plaintiff's challenge is without merit. On the allegations he had made the matter should proceed to trial.

Conclusion

[20] For all these reasons I consider the justice of the case requires that the extension of time sought ought to be granted.

[21] The granting of leave is subject to the plaintiff paying the filing fee and filing his statement of claim in the Court within 7 days from the date of this judgment.

[22] Once the statement of claim has been filed and endorsed by the Registrar it is immediately to be served on the defendant's address for service.

[23] The defendant is allowed 30 days in which to file a statement of defence from the date of service of the statement of claim upon it.

Costs

[24] The plaintiff has been granted an indulgence and I am of the view that he ought to pay a contribution towards the defendant's reasonable costs of defending the application. If the parties cannot agree on the amount of those costs, the defendant should file and serve a brief memorandum within 21 days of the date of this decision. The plaintiff will then have a further 21 days to file and serve any memorandum in reply.

B S Travis
Judge

Judgment signed at 3.45pm on 3 July 2008