

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 50/09  
ARC 16/09**

IN THE MATTER OF a challenge to determination of  
Employment Relations Authority

BETWEEN ORAKEI KORAKO GEYSERLAND  
RESORT (2000) LIMITED  
Plaintiff

AND QUENTIN UNSWORTH  
Defendant

Hearing: 10 December 2009  
(Heard at Hamilton)

Appearances: Brendan Wall, Counsel for Plaintiff  
Defendant in person

Judgment: 17 December 2009

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**JUDGMENT OF JUDGE M E PERKINS**

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[1] Mr Unsworth was formerly an employee of the plaintiff, Orakei Korako Geyslerland Resort (2000) Limited (Orakei Korako). He alleges that he was dismissed from his employment on 26 September 2005. On 19 December 2005 he raised a personal grievance for unjustified dismissal with Orakei Korako. That was never resolved. He alleges that he requested mediation, which was declined by Orakei Korako. On 17 December 2008, within the period prescribed by s114(6) of the Employment Relations Act 2000 (the Act), Mr Unsworth posted for filing a statement of problem to the Employment Relations Authority (the Authority) in Wellington. The Authority returned the papers to Mr Unsworth without having recorded them as accepted for filing. The basis for this was that the documents were not correctly completed and were not filed with the correct office of the Authority,

that being Auckland. The Support Officer at the Wellington office also advised Mr Unsworth that he should seek legal advice and suggested that he contact his local Community Law Centre.

[2] Mr Unsworth clearly sought advice and on 13 January 2009 he lodged corrected documents with the Authority in Auckland. Orakei Korako then raised a challenge to jurisdiction based on limitation in that the statement of problem was filed with the Authority outside the three year period prescribed in s114(6) of the Act.

[3] The Authority, in a determination dated 20 March 2009, extended by 13 days the time for commencing the proceedings. This was on the basis that the Authority calculated that, when the statement of problem was filed in Auckland, it was 13 days over the prescribed time limit.

[4] Orakei Korako filed a challenge to the Authority's decision. This was filed on 7 April 2009 with the Court. Mr Unsworth then failed to comply with the Court rules because he omitted filing a statement of defence. As a result, he was compelled to seek leave to file a defence out of time. His statement of defence was finally filed on 1 October 2009, one day before expiry of the time limit set by the Court for him to do so.

[5] The challenge to the Authority's determination extending time is not to be heard by way of a hearing de novo. The plaintiff sought a hearing primarily in relation to the following issues:

- a) Whether the Authority erred in law in exercising its discretion under s219 of the Act in favour of the defendant.
- b) Whether the justice of the case requires the time for commencing the defendant's action be extended or not.

[6] The plaintiff's statement of claim encompassing the challenge sets out grounds related to matters, which this Court in previous decisions has specified are to be taken into account in exercising the discretion. Mr Wall also elaborated upon these grounds in his written and oral submissions at the hearing.

[7] No evidence was led at the hearing of the challenge before me. Mr Wall and Mr Unsworth spoke to written submissions. I did ask Mr Unsworth at the conclusion of his submissions why, when he knew that time limits apply under the Act, he had failed to file a statement of defence within time. He indicated that, as a lay person in such matters, he believed he could simply rely upon the determination as a defence. That is a misunderstanding commonly held by self-representing litigants in matters such as this coming before the Court.

[8] Mr Wall, in speaking to his written submissions, raised some objection to Mr Unsworth endeavouring to have a brief of evidence placed before the Court containing factual allegations relating to the dismissal. This objection was on the basis that the challenge is limited to the issue of extension of limitation only. There is some point to Mr Wall's objection except that, in deciding whether time should be extended, the Court (and the Authority) may take into account the ultimate merits. In any event, the agreed bundle of documents contains Mr Unsworth's statement of problem to the Authority, which annexes a similar outline of facts as that contained in the proposed brief. While I understand Mr Wall's objection, procedurally based, the brief summary of facts is before me in any event. No weight can be attached to the brief as the allegations as they presently stand are not on oath nor have they at this stage been tested by cross-examination or rebuttal evidence.

[9] I agree with Mr Wall's submission that the points presently at issue are narrow. He provided an analysis of the principles enunciated in decisions of this Court such as *Pacific Plastic Recyclers Limited v Foo*<sup>1</sup> and *Day v Whitcoulls Group Limited*<sup>2</sup> (a decision considering identical issues under the predecessor legislation). The jurisprudence applying to matters of this kind is well established and does not require repetition. The Authority and the Court have jurisdiction to extend time. In a situation, which is not at the time "before" the Authority or the Court, the jurisdiction to extend time is derived from s219 of the Act rather than s221. The exercise of the discretion vested in the Authority and the Court to extend time may take consideration of the following:

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<sup>1</sup> [2002] 2 ERNZ 75

<sup>2</sup> [1997] ERNZ 541

- a) The reason for the omission to file the statement of problem within time and the reasons for delay.
- b) The length of the delay.
- c) Any prejudicial hardship to any other person.
- d) The effect on the rights and liabilities of the parties.
- e) Subsequent events.
- f) The merits.

[10] As has been stated in the Authority, the overriding consideration is the justice of the case. Some onus of persuasion rests upon the party seeking the indulgence. There is to be no predisposition toward refusal of leave.

[11] In his oral and written submissions, Mr Unsworth effectively reiterated the historical matters, which I have set out in the opening paragraphs of this decision. He reiterated pertinent parts of the determination of the Authority. He referred to the merits of the matter, although I perceive that from the way that that is worded in his written submissions, he has misunderstood the relevance or significance of that particular factor.

[12] Mr Wall, in his written submissions, has helpfully related the particular circumstances of this case to the six criteria to be taken into account in the exercise of the discretion to which I have referred.

[13] So far as the reasons for delay are concerned he submitted that those presented are inadequate. He submitted that the reasons for the delay in filing the proceedings with the Authority arise from the defendant's own shortcomings.

[14] So far as the length of delay is concerned, Mr Wall submitted with some point, that there has been no explanation given by the defendant for the extraordinary delay in commencing the proceedings. He refers in his submissions to the 13 day period found by the Authority to be the period of delay beyond the expiry date as being right at the outer limit of acceptable delay. He submitted that the delay is effectively 25 rather than 13 days because the Authority has wrongly deducted a

period of 12 days to take account of the Christmas/New Year vacation period. In respect of this particular submission, I am of the view that in any event, the Authority has incorrectly regarded the expiry date of the three year time limit as 18 December 2008. Section 114(6) states as follows:

*No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years **after** the date on which the personal grievance was raised in accordance with this section.*

(Emphasis added)

[15] If Mr Unsworth raised his personal grievance on 19 December 2005 then a correct interpretation of that section would mean that the time for him to file a proceeding with the Authority would have expired by the end of 20 December 2008. That is also consistent with s35 of the Interpretation Act 1999. Section 35(2) provides:

*A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.*

[16] In this particular case the incorrect expiry date adopted by the Authority in its determination was not particularly significant because in any event Mr Unsworth did not re-file the proceedings with the Authority until 13 January 2009. I am not sure that the Authority Member's calculation of the period of delay by deducting a holiday period is soundly based. I do not understand the Authority offices to be closed for the period starting with 25 December 2008 and ending with 5 January 2009. Obviously, if a time limit expired on a public holiday or weekend day then the expiry date would be extended to the next day when the office was open. That however, is a different point, and the basis upon which the determination makes a deduction for that entire holiday period is incorrect.

[17] So far as prejudice is concerned, Mr Wall relied upon inherent prejudice suffered by the plaintiff from the delay. There is no evidence of any special prejudice being suffered by the plaintiff from the delay. Mr Wall, however, submitted that with the total effluxion of time from the date of the raising of the personal grievance there will now be difficulties in the plaintiff presenting its case. This is because the witnesses will have difficulty recalling events. That of course

would have been the position in any event, even if Mr Unsworth had filed the proceedings within time but at the very end of the limitation period of three years.

[18] Mr Wall correctly pointed out that the Court is not assisted either way in this particular case as to any effect on rights and liabilities of the parties.

[19] So far as subsequent events are concerned, Mr Wall referred to the further delay occasioned by the defendant failing to file a statement of defence within time and having to apply for leave, and then filing the statement of defence at the very end of the extension granted by the Court. It is not a significant point but may be indicative of an overall attitude of dilatory conduct on behalf of the defendant.

[20] So far as the merits are concerned, there is really little information upon which a Court could consider this issue beyond deciding whether there is a sufficient inferential case. It is not a point in my view which should weigh in the overall consideration of the discretion.

[21] The Court, like the Authority, has an overriding consideration as to the overall justice of the case. That is something which has to be weighed up, having regard to the position of both parties. Mr Wall submitted that having regard to the defendant's deficiencies, the Authority should have exercised its consideration of the overall justice of the case in favour of the plaintiff employer.

[22] The Authority, while being critical of Mr Unsworth, nevertheless points out that he was an unrepresented applicant. It accepted that when he lodged his statement of problem in Wellington he believed that he had commenced his proceedings. The Authority Member held that while there is some inherent prejudice to be suffered by the plaintiff from the delay, there is nothing to suggest that documents or witnesses will not be available. The employer effectively remained on notice from the original raising of the personal grievance and knew that the defendant, Mr Unsworth, at least in the early stages, was legally represented. The Authority considered that the overriding consideration as to the justice of the case fell in favour of Mr Unsworth. I am of the same view. Mr Unsworth was aware that the three year limitation period applied. That is clear from the fact that he

endeavoured to file the proceedings with the Authority on 17 December 2008. The reasons for the subsequent delay are explained. If the documents had been filed in the Auckland office of the Authority, then no argument could have been made. It seems to me to be quite unfortunate that the Support Officer in Wellington chose not to accept the documents for filing and instead returned them to Mr Unsworth. Under reg 13 of the Employment Relations Authority Regulations 2000, if Mr Unsworth considered the Wellington office the nearest office to where the events arose then it was open to him to file the documents in Wellington. If the Support Officer considered, after filing, that Auckland was the correct office then the proceedings could be transferred there pursuant to reg 13(2). It would have been possible in my view for the Wellington office of the Authority to have accepted the documents for filing and transferred them to Auckland. Deficiencies in the documents could then have been dealt with by an Authority Member giving directions to Mr Unsworth. While it is not the function of the Court to advise or direct the Authority as to its procedure, it would seem to me to be better practice and indeed compliance with the regulations for the course I have suggested to be followed, particularly where documents are received right on the cusp of expiry of time limitation.

[23] In a situation such as the present, the Court should err in favour of allowing a litigant to have their case heard. While the extension of time is, as the Authority Member stated “*right at the outer limit of an acceptable delay*”, quite unusual circumstances prevail in this case. This is not a case of a litigant deliberately or negligently allowing a time limit to expire. Mr Unsworth made every effort to commence the proceedings with the Authority within the three year period. The Employment Relations Authority is designed as a low cost tribunal and, while rules and regulations have been established to ensure orderly procedure, the fact of the matter is that many litigants before the Authority are self-represented. This would generally be as a result of economic considerations. It seems to me to be unfortunate and contrary to the overall considerations of justice in this matter, if Mr Unsworth is deprived of his rights by virtue of the fact that a Support Officer in apparent breach of the Authority’s own regulations chose not to accept his documents for filing.

[24] Accordingly, the challenge by the plaintiff to the determination of the Authority is dismissed. Time is extended. There is no need for any further time to

be extended to enable Mr Unsworth to lodge his statement of problem with the Authority as it has already been accepted by its Auckland office. What is now required is for the Authority to refer the matter to mediation in the usual way and if it cannot be settled then an investigation will be necessary.

[25] So far as costs are concerned, costs are reserved pending ultimate determination on the merits of this matter.

M E Perkins  
Judge

Judgment signed at 12.15pm on 17 December 2009