IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 3/07
CRC 22/06

IN THE MATTER OF	an application to extend time
BETWEEN	KAREN LYNETTE PEOPLES Applicant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: Written submissions received on 10 and 24 November and 1 December 2006

Appearances: A C Shaw, Counsel for Applicant
R H Gibson, Advocate for Respondent

Judgment: 13 February 2007

JUDGMENT OF JUDGE A A COUCH

---

[1] Ms Peoples was employed by the Accident Compensation Corporation ("ACC") for 9 years. In January 2004 she was dismissed. In September 2005, Ms Peoples lodged a statement of problem with the Employment Relations Authority alleging that her dismissal was unjustifiable. On 4 April 2006, the Authority conducted an investigation meeting. On 9 June 2006, the Authority gave its determination, concluding that Ms Peoples had been justifiably dismissed.

[2] Section 179(1) of the Employment Relations Act 2000 provides that a party to a matter before the Authority who is dissatisfied with its determination may elect to have the matter heard by the Court. That right of challenge is, however, qualified by subsection (2) of s179 which provides that every election to have a matter heard by the Court must be made "*within 28 days after the date of the determination of the Authority.*" It follows that, in this case, Ms Peoples' right to challenge the Authority's determination expired on 7 July 2006.

[3] Ms Peoples did not exercise her right to challenge the determination within that time period. Accordingly, she was no longer entitled to challenge the determination as of right.

[4] On 3 August 2006, counsel for Ms Peoples filed in the Court a document described as an application for leave to challenge the Authority's determination out of time. Although it is not uncommon for would-be plaintiffs to make an application in this form, the appropriate process is an application for an extension of time within which to make an election under s179. I have regarded Ms Peoples' application as such. The Court's jurisdiction to extend time is conferred by s221 of the Employment Relations Act 2000 which provides:

> ***221 Joinder, waiver, and extension of time***
> *In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—*
> …
> *(c) subject to section 114(4), extend the time within which anything is to or may be done; and*
> …

Principles

[5] The discretion conferred by s221 is not subject to any statutory criteria. Like any other discretion conferred upon the Court, however, it must be exercised judicially and in accordance with established principles.

[6] Mr Shaw and Ms Gibson were largely in agreement about the relevant principles to be applied. Ms Gibson helpfully referred me to the sources of two fundamental principles applicable to applications for extensions of time generally. The first is the decision of the Privy Council in *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935:

> *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] The second general principle is that summarised by Richmond J in *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 91:

> *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.*

[8] The fundamental principle which must guide the exercise of my discretion is what I perceive to be the interests of justice. In their detailed submissions about what the interests of justice are in this case, both Mr Shaw and Ms Gibson adopted the headings used by Shaw J in *Stevenson v Hato Paora College* [2002] 2 ERNZ 103:

1 The reason for the omission to bring the case 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 of the proposed challenge.

I agree that these are convenient and appropriate headings under which to consider the matters relevant to the exercise of my discretion. I note, however, that there were no relevant subsequent events affecting this application and that it was not suggested that there would be any prejudice or hardship to any other person. I therefore do not refer to those factors.

Extent of delay

[9] The application for extension of time was made 27 days after the expiry of the 28-day period for a challenge prescribed in s179(2).

[10] In my view, a delay of this extent must be regarded as substantial and significant. I am reinforced in this view by an analysis of the decisions of this Court over many years in comparable cases. In *Bilderbeck v Brighouse Ltd* [1993] 2

ERNZ 74, Goddard CJ extended time by 20 days but it is apparent from the analysis of previous decisions he conducted that an extension of time of this length was exceptional and that the next longest period of delay in which an extension of time was granted was 2 weeks.

[11] In *Bacon v NZ Post Ltd* [1999] 2 ERNZ 1, Palmer J adopted the submission of counsel extending that analysis to include cases decided since the *Bilderbeck* decision. During that time, there was one decision in which leave had been granted to file a statement of defence 6 weeks late but the greatest extension of time granted to file an appeal appears to have been 10 days.

[12] Since 1999, there have been more than 20 applications to the Court for an extension of time in which to lodge an appeal against the decision of the Employment Tribunal or to challenge a determination of the Employment Relations Authority. The longest extension of time granted seems to have been 14 days.

[13] In *Bilderbeck* at p88, the former Chief Judge described the significance of the length of delay as follows:

> *Plainly, where the delay is slight and the merits great they will outweigh the delay. Where, however, the delay is substantial the consideration that an appellant may succeed if allowed to proceed may carry less weight. The Court should not encourage stale appeals or come to the aid of appellants who are less than vigilant in the safekeeping of their own rights and interests.*

Reasons for delay

[14] Evidence about the reasons for delay was contained in the final part of the affidavit sworn by Ms Peoples in support of her application. She said:

> *59. I represented myself at the Employment Relations Authority investigation, as a cost saving measure. I returned from Sydney for the hearing, and went back there immediately after it was finished.*
>
> *60. Although the Authority's Determination is dated 9 June 2006, I do not think I received it in Sydney until about 14 June 2006. The copy of the Determination that I received gave me no advice as to dates or contacts for how or when to proceed with a challenge to the decision.*
>
> *61. To further complicate the matter, I started a new job on 20 June 2006. From 20 June 2006 to 23 June 2006, I was sent to Melbourne for induction training at the head office of my new*

employer. Accordingly, for 10 days after it was delivered to me, I was unable to commit any time to resolving that issue.

62. *I was very busy at work from 26 June to 7 July 2006. We were setting up new clients in New South Wales, and I was attending and presenting roll-out presentations to branches for our new clients. However, from about 24 June 2006, I phoned a contact in New Zealand, to seek advice as to who I should contact for legal assistance. I also attempted to get more information about the process from the Department of Labour website, but I was unable to find anything.*

63. *On or about 13 July 2006, someone gave me the phone for Mr James Wilson, in the Employment Relations Authority in Auckland. I phoned him and found Mr Wilson very helpful. He advised me that the next step was not with the Department of Labour, but through the Justice Department. He referred me to a Auckland Justice Department office.*

64. *I phoned the Justice Department in Auckland on 13 July 2006. A person there advised me to email to her confirmation of my intention to lodge a challenge application and she said that she was going to send me some forms. Unfortunately, the email failed (which I realised on 14 July 2006). Accordingly, on 17 July 2006, I phoned the Justice Department again. The woman I had spoken to on the first occasion was no longer there, so another woman emailed me the application forms.*

65. *As I had had a demanding week at work, I commenced work on the application form during the weekend of 22 and 23 July 2006. At this point, I realised that the forms were too complex, and I went to the Justice Department website, which recommended that the application should be completed with legal advice.*

66. *Because of this, on Monday 24 July 2006, I phoned Lane Neave, Lawyers in Christchurch. They responded to my call on 25 July 2006. They considered my material, provided advice to me and now I have instructed them to prepare this application for me.*

67. *If I had initially known that there was a deadline, I would have acted hastily to meet it. Unfortunately, I had no idea, and work was too busy to allow me to focus my attention on this matter.*

[15] In his submissions, Mr Shaw relied on four aspects of the circumstances disclosed by Ms Peoples' affidavit. Firstly, he referred to the fact that Ms Peoples was unrepresented at the Authority's investigation meeting. By implication, I was invited to infer that this meant she was unaware of her right to challenge the Authority's determination and of the time limit for exercising that right.

[16] I find that explanation unconvincing. I was informed by Ms Gibson that, while it was correct that Ms Peoples had been unrepresented in the course of the proceedings before the Authority, she had instructed solicitors to represent her during the disciplinary process which led to her dismissal and subsequently. Ms Peoples therefore had ready access to legal advice about the continuing conduct of her personal grievance had she chosen to seek it. It may well be that Ms Peoples did not immediately seek advice from the lawyers she had previously instructed because she did not wish to incur the cost involved. That would be consistent with what she says in paragraph 59 of her affidavit that she represented herself before the Authority as a "*cost saving measure.*" Having elected to proceed in this way, Ms Peoples must be taken to have assumed responsibility for knowing what her rights and responsibilities as a litigant were. In such circumstances, it is not a convincing explanation for delay that it took Ms Peoples more than a month from 14 June to 13 July 2006 to find out what steps she needed to take to challenge the Authority's determination.

[17] The second circumstance relied on by Ms Peoples was that she was living in Sydney during the relevant time. Mr Shaw referred to what he described as "*the geographical and time zone difference*" between Sydney and New Zealand in his submission that Ms Peoples' opportunity to obtain information and advice was restricted and, to some extent, reasonably explained the delay. I am unable to place any significant weight on that submission. The time difference between the east coast of Australia and New Zealand in winter is 2 hours. Such a time difference would not normally be a significant impediment to obtaining information and advice and I note that, in her affidavit, Ms Peoples does not suggest that it did so in her case. Indeed, it is apparent from Ms Peoples' affidavit that she made several telephone calls to New Zealand during business hours to obtain advice. She also had access to the internet on which information is continuously available.

[18] The third point emphasised by Mr Shaw in his submissions was that, when the Authority sent its determination to Ms Peoples, it did not include any advice about her right to challenge that determination and how to go about making such a challenge. Mr Shaw referred me to the decision of Colgan J in *Weston v Warwick Henderson Gallery* [2003] 2 ERNZ 723 where, at page 728, he suggested that it

might be helpful if the Authority did advise parties of their right of challenge when sending its determination to them. While I agree with the comments made by Colgan J in that decision, the fact that the Authority does not currently provide such information as a matter of course does not relieve the parties of the obligation to find out what their rights and obligations are. In this case, it can go only a small way to explaining Ms Peoples' substantial delay.

[19] The fourth aspect of the matter relied on by Mr Shaw was that, shortly after receiving the Authority's determination, Ms Peoples began a new job and was engrossed in her work. He submitted that Ms Peoples' commitment to her new job "*prevented her from investigating challenge options earlier.*" I cannot accept that submission. Any conclusions of fact I reach must be based on evidence. On the evidence contained in Ms Peoples' affidavit, I can properly conclude that she was focussed on making a successful start in a new job and that this required a good deal of her time and energy but the evidence does not go far enough to support the proposition that the demands of her new position prevented Ms Peoples from making relatively straightforward enquiries about her rights.

[20] The information provided in Ms Peoples' affidavit is sparse and, in many respects, vague. Where an extension of time is sought, the onus is on the applicant to provide the evidence necessary to explain the delay as fully as possible. Ms Peoples' affidavit does not do this. The period from 14 June 2006 when she said she received the determination until 20 June 2006 when she started her new job is entirely unexplained. Ms Peoples said that she began contacting people in New Zealand on 24 June 2006 but provides no detail of the steps she took during the following 3 weeks until 13 July 2006 when she spoke to Mr Wilson. Having received advice on 13 July 2006 and having obtained the copies of the necessary forms on 17 July 2006, Ms Peoples apparently did not turn her mind to the matter again until the weekend of 22 and 23 July 2006. She says that this was because she had "*a demanding week at work*". In the absence of any further detail, such an explanation is inadequate.

[21] Overall, I find the reasons given by Ms Peoples far from sufficient to explain the substantial delay. Ms Gibson acknowledged that ACC would not be prejudiced

by the delay in the sense that it would still be in a position to call the necessary witnesses and produce relevant documentation. She submitted, however, that ACC would be prejudiced because it was entitled to conclude that Ms Peoples' failure to challenge the Authority's determination within the statutory 28-day time period meant that her personal grievance was finally resolved. She referred me to a passage from the decision in the *Bilderbeck* case where Goddard CJ said at pp86-7:

> *There is clearly no prejudice in the delay that has occurred to their ability to resist the appeal and to defend the decision but the same could have been said if the delay had been far far greater. That is not the kind of prejudice that is especially relevant in this case. Rather, it is the prejudice arising from their losing the certainty of a decision of the Tribunal which has not been appealed and which, upon the expiration of the time for appeal, could with justification be regarded by them as final and available for immediate enforcement. Any disruption to that finality is in itself a serious detriment capable of being regarded as prejudicial. However, if application had been made promptly, even within a day of receipt of the decision by the appellant, the respondents would still have suffered the prejudice of defeat of their expectations of certainty if the application had been granted – as it almost certainly would have been at that stage. That circumstance also goes into the balance. So does the consideration that with every day that goes past without an appeal being signalled, confidence in the certainty and finality of the decision grows stronger. At the end of the day the presence or absence of prejudice, while a matter to be taken into account, is not conclusive either way.*

[22] I adopt this view. In many cases where a would-be plaintiff delays in taking the formal step of filing an appeal or challenge, the prejudice resulting from that delay is greatly reduced by informing the intended defendant promptly of the intention to appeal or challenge. There is no suggestion that any such informal notice was given in this case although there was clearly ample opportunity to do so. Once she had decided to challenge the Authority's determination, it would have been a straightforward matter for Ms Peoples to have sent a letter or an e-mail to ACC or to Ms Gibson as its advocate. Even a telephone call would have sufficed. Equally, when Ms Peoples instructed solicitors to prepare and file a challenge for her, it would have reduced the prejudice to ACC if they had immediately told Ms Gibson that they had received such instructions. By allowing ACC to believe that the matter was at an end right up until the time the Court proceedings were served, which I infer would have been no earlier than 4 August 2006, the prejudice to ACC was substantially increased. It is a factor which must weigh against granting the application but I agree with the view of Goddard CJ in the passage above that it is not conclusive.

Effect on rights and liabilities of the parties

[23] Under this heading, Mr Shaw noted that s179 of the Employment Relations Act 2000 confers a broad right of challenge on parties to a determination by the Authority and submitted "*that the statutory scheme would prefer the granting of an application for leave where a reasonable application is made.*" As Ms Gibson correctly submitted in response, the right to challenge is lost if it is not exercised within the statutory 28-day time period. It follows that, once the 28-day time period has expired, the scheme of the statute is that no challenge may be brought unless a judicial decision is made to extend time.

[24] The rights and liabilities of the parties which are relevant to the exercise of the discretion under s221 will be those which are affected by the delay. No such rights or liabilities were identified in this case.

The merits of the proposed challenge

[25] Ms Peoples was dismissed by ACC for entering false information into its database which had the effect of enhancing her apparent performance. After investigating the matter, ACC concluded that what Ms Peoples had done constituted serious misconduct. In its determination, the Authority concluded:

> *[27] ACC's investigation cannot be faulted in any significant way. Ms Peoples had a full opportunity to explain herself knowing the potential outcome. There was no predetermination and Mr Riley properly considered the things said by Ms Peoples including the few disputed points about the notes. I conclude that the investigation disclosed conduct capable of being regarded as serious misconduct. Indeed there can be no serious challenge to the conclusion that Ms Peoples entered false information into* Pathway*; that it impacted on her KPIs which go towards assessing her performance and her salary level; and that this was a serious breach of Ms Peoples' obligations to ACC in light of the potential risk.*

[26] In her affidavit Ms Peoples did not dispute the two key findings by the Authority in this passage: that ACC had conducted a full and fair investigaton and that her conduct was capable of being regarded as serious misconduct. The basis of her proposed challenge is that the Authority failed to give proper consideration to the effect of work related stress on her and that there was disparity of treatment by ACC between her and other employees of ACC who behaved in a similar manner.

[27] Ms Peoples did not suggest in her affidavit that she intends to provide the Court with any evidence relating to these two issues which was not provided to the Authority. Rather, her case is that the Authority failed to give proper weight to the evidence or misunderstood it.

[28] The Authority devoted about one quarter of its determination to discussion of the evidence relating to Ms Peoples' history of stress while working for ACC. Most of this concerned events which occurred during 2003, culminating in an assessment by a psychiatrist obtained at ACC's cost. In a report dated 20 November 2003, the psychiatrist concluded:

> *…since the crisis in October, and a change of team manager, I gather from Karen that she has overcome her backlog, and feels that she is again in charge of her workload, and is settled back into her employment. Thus I don't think any other particular interventions are appropriate or necessary at the present.*

[29] In her affidavit, Ms Peoples did not challenge that conclusion by the psychiatrist which was given less than 2 months prior to the investigation which led to Ms Peoples' dismissal. Equally, Ms Peoples did not say in her affidavit that she raised with ACC any further concerns relating to workplace stress following that report and prior to her dismissal. Neither did Ms Peoples contradict the finding of fact made by the Authority in paragraph [17] of the determination that Ms Peoples told her team leader in late November 2003 that her stress levels were "*okay*".

[30] On the information available to me, I think it distinctly unlikely that the Court would find Ms Peoples' dismissal unjustifiable on the grounds that ACC failed to have proper regard to work related stress suffered by her.

[31] On the issue of disparity of treatment, Mr Shaw submitted that "*the Authority gave only scant consideration to the issue*" and failed to understand Ms Peoples' case in this regard.

[32] In her affidavit, Ms Peoples referred only briefly to this issue. She said that, during the investigation process, she provided management of ACC with documents showing that other staff had engaged in misconduct similar to hers. She then said "*In the meeting, I told them that I did not believe this was serious misconduct, because it was a widespread practice, that was tolerated by ACC.*"

[33] It is apparent from paragraph [30] of the Authority's determination that ACC's response to this statement by Ms Peoples was to investigate the conduct of other employees and to take disciplinary action against one of them.

[34] Mr Shaw submitted that the Authority misunderstood Ms Peoples' case by regarding it as an allegation of disparity of treatment as between her and the other staff who were disciplined less severely than she was whereas the true nature of her case was that her actions should not have been regarded as serious misconduct because ACC had condoned other employees acting in a similar way.

[35] This submission overlooks paragraph [20] of the determination where the Authority specifically recorded evidence, presumably given by Ms Peoples, to the effect that she "*conducted her own review of other case managers' files in order to establish that her practice in respect of dating IRPs in* Pathway *was common place in the office.*" This confirms that the Authority considered the evidence given about the conduct of other staff not only in the context of disparity of treatment in subsequent disciplinary action but also in the context of Ms Peoples' suggestion that ACC condoned the conduct in question.

[36] On the information available to me, it seems unlikely that the Court would conclude that Ms Peoples genuinely believed on reasonable grounds that her conduct in falsifying entries in the database was acceptable to ACC. The only evidence it appears she would put forward in support of that proposition is that other staff members had engaged in similar misconduct. There is no suggestion in Ms Peoples' affidavit or in the Authority's determination that management of ACC were aware of such misconduct by other staff members prior to Ms Peoples raising it in the course of her disciplinary investigation. The fact that ACC responded to this information by immediately instigating an investigation of the conduct of those other staff members and disciplining one of them suggests that such behaviour was not condoned by ACC.

[37] Overall, my conclusion is that Ms Peoples would have little prospect of success in challenging the Authority's determination if she were granted an extension of time to do so.

Decision

[38] In determining this application, I reiterate that the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted.

[39] In this case, the statutory time period of 28 days was exceeded by 27 days. Viewed in the light of the numerous previous decisions of the Court in comparable cases, the extent of the delay must be regarded as substantial and significant.

[40] The evidence of the reasons for delay is not convincing and falls well short of explaining the whole of the delay.

[41] The prejudice to ACC in being led to believe for nearly a month that the matter was at an end was relatively significant. I do not, however, place great weight on this factor.

[42] On the information available to me, Ms Peoples has little prospect of success in challenging the Authority's determination were she permitted to do so.

[43] On this basis, I conclude that it is not in the interests of justice to extend the time for filing a challenge by the 27 days sought. Accordingly, the application is refused.

Costs

[44] If ACC wishes to have an order for costs, Ms Gibson should file and serve a memorandum within 21 days after the date of this decision. Mr Shaw will then have a further 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at 9am on 13 February 2007