IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 122
EMPC 49/2019

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER	of an application for leave to extend time to file a statement of defence
BETWEEN	BAY OF PLENTY DISTRICT HEALTH BOARD Plaintiff
AND	CULTURESAFE NZ LIMITED First Defendant
AND	ALLAN HALSE Second Defendant
AND	ANA SHAW Third Defendant

Hearing: On the papers

Appearances: C Goodspeed, counsel for the plaintiff
A Halse, advocate for first and third defendants, and in person

Judgment: 6 September 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:
(Application for leave to extend time to file and serve a statement of defence)

Introduction

[1] This judgment resolves an issue as to time, where an attempt to file a statement of defence eight days late was made; an application for leave to file the pleading notwithstanding the delay then followed.

[2] Briefly, the background is that the Employment Relations Authority (the Authority) removed a matter to the Court by a determination of 25 February 2019.[1]

[3] The Bay of Plenty District Health Board (the DHB) had placed an employment relationship problem before the Authority. It raised assertions that the defendants had breached certain directions and compliance orders made by the Authority. The DHB sought penalties, orders that the defendants be held in contempt of the Authority, an urgent takedown order in relation to certain social media posts, and costs on an indemnity basis. The defendants filed a statement of reply, asserting that none of these orders should be made. It was at that point that the Authority removed the matter to the Court.

[4] On 4 March 2019, I held a telephone directions conference with counsel for the DHB, and with Mr Halse, on behalf of the defendants and himself. I recorded that in accordance with normal practice, the parties needed to file and serve pleadings in this Court.

[5] I directed that the DHB's statement of claim be filed and served on or before 1 April 2019; this occurred.

[6] I also directed that a statement of defence be filed and served by 29 April 2019. I said that if any party were to be separately represented, that party's statement of defence be filed and served within the same timeframe; this direction was made to deal with any conflicts of interest.

[7] No statement of defence was filed by 29 April 2019. On 8 May 2019 the defendants filed an application for leave to file their pleading out of time, an affidavit in support, and a draft statement of defence.

[8] The DHB filed a notice of opposition and an affidavit. Also filed was a memorandum of counsel stating that the draft statement of defence was deficient and did not meet the requirements spelt out in reg 20 of the Employment Court Regulations 2000 (the regulations).

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1 *Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2019] NZERA 101.

[9] I have also received and considered submissions filed for each party.

Overview of the parties' cases

[10] In support of the defendants' application for leave, Ms Weatherly-Hull, an employee of the first defendant CultureSafe NZ Ltd (CultureSafe), stated that on 23 April 2019, Mr Halse, the second defendant who represented Ms Shaw in the Authority, had travelled overseas. Before departing, Mr Halse had instructed a CultureSafe employee who had worked on Ms Shaw's case to ensure that appropriate documentation was filed with the Court whilst he was absent.

[11] On 2 May 2019, Mr Halse, then still overseas, was informed that the deadline for the filing of the statement of defence had been missed. He returned to New Zealand on 4 May 2019. The application for leave was filed four days later. In a memorandum filed in support of an application, Mr Halse stated that CultureSafe is a relatively small employment advocacy company and that through inadvertence the necessary statement of defence had not been filed. The Court was also advised that Ms Shaw suffers ill health which makes it particularly difficult for her to take any steps herself, and that she consequently relies on those representing her.

[12] The DHB, in opposition, submitted that the defendants had considerable notice of the timeframe for the filing of a statement of defence, that the proposed statement of defence lacks merit and fails to demonstrate an arguable defence, and asserts that because delay would be caused by allowing an extension, there would be potential prejudice to the plaintiff.

Applicable principles

[13] The Court has jurisdiction under s 219 of the Employment Relations Act 2000 (the Act) to extend time. The well known criteria were conveniently summarised by Judge Couch in *An Employee v An Employer*:[2]

> [9] The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. Does the justice of the case require that the extension of time sought be granted? In their detailed submissions

[2] *An Employee v An Employer* [2007] ERNZ 295.

about what the interests of justice are in this case, both Mr Beck and Ms French adopted the headings used by Chief Judge Goddard in *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 and by Judge Shaw 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.

[14] As has been noted previously,[3] the statements in *An Employee v An Employer* must now be read in light of the Supreme Court's judgment in *Almond v Read*.[4] In that judgment, the Supreme Court emphasised that the ultimate question in such a case is what the interests of justice require. It explained the correct approach where there is short inadvertent delay:

> [36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs or non-compliance with directions). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able to have them heard on the merits. We think that this is an important part of the background against which extension applications must be determined.
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> [37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.
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> (footnotes omitted)

[15] The Supreme Court elaborated on the issue of the relevance of analysis of the merits. It referred to three particular problems. First, issues as to the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice

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3 *P v A* [2017] NZEmpC 92 at [21]; *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 22 at [35].

4 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. That meant there would be cases where the court should discourage argument on the merits and reach a view about them only where they are obviously very strong or very weak. Thus, the issue of merits could be determinative where the proceeding is clearly hopeless.

[16] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal where there has been inadvertence on the party of a lawyer, in my view there are cases under s 219 of the Act where these observations may be relevant to delay on the part of a non-lawyer such as an advocate, particularly if delay is minor.

[17] As already observed, the application for leave was filed some eight days after the due date for the filing of the statement of defence. That is not a minor period, but it is not a significant one either.

[18] I bear all these authorities in mind.

Analysis

[19] The reason for the omission to file and serve the statement of defence within the time described by the Court is one of inadvertence. Mr Halse is said to have provided appropriate instructions to a CultureSafe employee to cover his absence. According to the evidence there was a misunderstanding as to which particular proceeding he was referring to, there being more than one relating to Ms Shaw. As soon as the omission was discovered, a reasonably prompt application for leave was made, which was supported by an affidavit and a draft statement of defence.

[20] In my view, these circumstances fall within the circumstances discussed in *Almond* by the Supreme Court, so that it is not necessary to look closely at the merits of the proposed defence.[5] Rather, there has been a modest slip up in the exercise of the obligation to file a statement of defence.

[21] It is also relevant to note that the defendants had already filed and served a statement of reply in respect of the removed matter in the Authority, so that their position was already known to the plaintiff.

[22] Reference was made for the plaintiff to the prospect of delay being created by the failure to file the statement of defence on time, but against that must be weighed the full range of other factors I am required to assess.

[23] One of those factors relates to the nature of the relief which is sought against the defendants. As already recorded, they include penalties against each defendant, remedies for contempt, and a takedown order. Whilst I make no comment as to the likelihood of orders being made, the claims are potentially very serious. In my view, it is in the interests of justice that the defendants should have the right to respond properly and fully to these significant claims.

[24] Standing back, I do not consider that any undue hardship would be caused to the plaintiff for a statement of defence in proper form to be filed and served.

[25] For these reasons, the application seeking leave to file a statement of defence out of time is granted, and I make an order accordingly. The defendants should now formally file a statement of defence in proper form within 14 days after the issuing of this judgment.

[26] When doing so, reference should be made to the requirements for a statement of defence as described in reg 20 of the regulations. Those regulations are available on the Court's and the New Zealand Parliamentary Counsel Office's website.[6]

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5 *Almond v Read,* above n 4, at [39].

6 <http://www.legislation.govt.nz/regulation/public/2000/0250/latest/whole.html>

[27] I reserve costs, which are to be determined following the resolution of the removed proceeding in conjunction with such other issues as to costs as may by that time have arisen.

B A Corkill
Judge

Judgment signed at 10.55 am on 6 September 2019