IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 22
EMPC 371/2018

IN THE MATTER OF	an application to file a challenge out of time
BETWEEN	YAN ZHANG Applicant
AND	TELCO ASSET MANAGEMENT LIMITED Respondent

Hearing:	14 February 2019 (Heard at Wellington)
Appearances:	A Espie, counsel for the applicant T Cleary, counsel for the respondent
Judgment:	4 March 2019

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves Mr Zhang's application for leave to extend time for bringing a non-de novo challenge to a determination of the Employment Relations Authority (the Authority).[1] It was filed some 23 days after the expiration of the 28-day period allowed for bringing challenges under the Employment Relations Act 2000 (the Act).[2]

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1 *Zhang v Telco Asset Management Ltd* [2018] NZERA Wellington 84.
2 Employment Relations Act 2000, s 179(2).

The Authority's findings

[2] The Authority found that Mr Zhang had been employed by Telco Asset Management Ltd (Telco) as a Financial Assistant for more than five years, until his position was disestablished on 14 April 2017. The disestablishment took place after the Chief Financial Controller (the CFC) undertook an evaluation of workload of the finance team in which Mr Zhang worked. As a result of the divesting of companies allied to Telco, it was considered that there had been a reduction in work. A process of consultation was commenced with Mr Zhang, but not with any other member of the finance team. An issue arose as to the breakdown of the work Mr Zhang was undertaking. He described his concerns in detail. He also made a number of accusations against the CFC.

[3] The Authority found that Telco, when faced with a significant disparity between its own analysis and that of Mr Zhang did not review its own assessment to ensure it was correct. The only available data was in fact unreliable. Thus Telco was unable to establish substantive grounds for the dismissal.

[4] The Authority considered there was an additional flaw in the restructuring process. Rather than focus on one employee only in the finance team, a better approach would have been for it to notify all team members of the prospect of restructure, the reasons for it, and then allow all staff to comment on the proposal and suggest alternatives. By focusing on Mr Zhang only, Telco did not conduct a transparent selection process.

[5] These actions were not those which a fair and reasonable employer could have undertaken, and they were found not to be justified.

[6] In considering remedies, the Authority noted Mr Zhang sought six months' lost wages. It was satisfied mitigation for this period was established. However, it was not prepared to extend any order for lost wages beyond the three-month period allowed for in s 128(2) of the Act. This was because Mr Zhang had made allegations of professional impropriety about the CFC. Telco would have been entitled, the Authority found, to commence a disciplinary inquiry into that issue. If this had

occurred, it was unlikely the employment relationship would have lasted beyond the three-month time period; it was unlikely any additional wages would have been lost as a result of a personal grievance.

[7] The Authority awarded Mr Zhang $10,000 for humiliation, loss of dignity and injury to feelings, subject to contribution.

[8] On that topic, the Authority concluded that Mr Zhang's allegations against the CFC, coupled with threats and inferences to report her to external bodies, were malicious and inexcusable. It found they were aimed to intimidate and discredit her.

[9] Because these allegations sat alongside his analysis, it was necessary for Mr Zhang to take responsibility for creating a situation where it was reasonable for Telco to conclude he was unwilling to engage with it in good faith when consulting on the possibility of redundancy. His conduct was both blameworthy, and in part, causative, of his dismissal. Contribution was assessed at 50 per cent.

[10] The Authority dismissed an application for a penalty on the basis that Telco had failed to conduct a remuneration review in 2016, since no evidence of harm was provided; no other employee had received a salary increase in that year. A further application for a penalty, relating to an analysis of Mr Zhang's workload by the Managing Director of the group in which he worked, was also dismissed.

[11] In the result, Telco was ordered to pay Mr Zhang:

a) $6,115.26, minus PAYE and any other lawful deductions agreed between the parties, as reimbursement of lost wages; and

b) $5,000 for humiliation, loss of dignity and injury to feelings.

Chronology following the issuing of the determination

[12] The determination was issued on 25 September 2018. It was sent out by email to Mr Zhang, who had appeared in person at the investigation meeting. On the day he

received the determination, he sent a reply email to the Authority, copied to Telco's representative, stating that he would "challenge the determination in court".

[13] A fact that assumes some relevance when considering the chronology which followed, is that English is Mr Zhang's second language; he has difficulty using it. It was necessary for a translator to be present at the investigation meeting. Also relevant is that at all material times, Mr Zhang was a primary caregiver for his two-year old son; and was attempting to obtain employment.

[14] As far as a challenge was concerned, he decided he needed legal advice having regard to the more complex processes of the Court.

[15] On 26 September 2018, Mr Zhang contacted a practitioner whose name he obtained from a judgment of the Court. That practitioner stated he was about to commence a long fixture, and that time might be against Mr Zhang in engaging the firm, but he would revert the following day. The practitioner did not do so.

[16] On 1 October 2018, Mr Zhang emailed another lawyer. Unfortunately, the practitioner was about to go away on leave. Mr Zhang forwarded relevant materials to him. The lawyer eventually responded on 12 October 2018, stating that he had looked at the paperwork quickly, and would revert on the following Monday. Regrettably, he did not.

[17] On 16 October 2018, Mr Zhang contacted a third lawyer. That person did not respond until 23 October 2018, stating that his case load was full and that he could not assist.

[18] In the meantime, on 18 October 2018, Mr Zhang contacted a yet further law firm, asking to see a named lawyer to discuss how to prepare a statement of claim. After an exchange of further emails, he was told that the firm was not taking on new clients for another week, due to workload. He was told that if he could not locate a lawyer at short notice, he should contact the Community Law Centre.

[19] On the same day, he also contacted the law firm Dundas Street asking to see Mr Blair Scotland. In the course of advancing his request to see Mr Scotland, he stated that there was a deadline to file a challenge in the following week. Mr Scotland was on leave at the time; Mr Zhang was told it may be possible to meet him during the following week.

[20] By 19 October 2018, Mr Zhang concluded he may not be able to file a challenge within 28 days. Accordingly, he sent two emails to the Court attaching what he described as "Draft Form 2A", which appears to have been an application for leave to extend time.

[21] There was a response to each email by two members of the Registry. The first response explained that if the time for filing a challenge had expired, an application for leave to file a challenge out of time with an affidavit in support, a draft statement of claim and a copy of the Authority's determination would be required. If the time for filing the challenge had not expired, then Mr Zhang would need to file a statement of claim, and the determination.

[22] The second response contained similar advice. Mr Zhang was also told that an application for leave had to be accompanied by a draft statement of claim. In that regard, reference was made to Form 1 of the Employment Court Regulations 2000, as found on the Court's website. The form provides the format for a statement of claim.

[23] The 28-day period for filing a statement of claim raising a challenge expired on 23 October 2018. On that day, Mr Zhang consulted another lawyer, using the script of Mr Zhang's first language. Mr Zhang said he then established this particular lawyer was on leave, and later advised him to find another lawyer.

[24] On 26 October 2018, Mr Zhang met Mr Scotland. It appears Mr Zhang was given advice as to how to prepare a statement of claim himself, because that is what happened. It does not appear that he was advised to file a pro forma statement of claim, because that did not happen and there is no suggestion that such a step would be taken. This point is relevant to a submission I will need to consider shortly.

[25] Mr Zhang said that he had difficulty preparing the statement of claim himself. He needed time to organise English words so as to make his points. Also relevant at this time were his childcare responsibilities, and the fact he was looking for work.

[26] These factors meant it took him until 11 November 2018 to prepare a draft statement of claim. On the following day he met Mr Espie from Dundas Street, seeking advice on the draft. Changes were needed, and he instructed Mr Espie to complete those.

[27] His newly appointed lawyer filed his application for leave to file a statement of claim out of time on 15 November 2018. It was supported by an affidavit, which set out the chronology to which I have just referred.

[28] Attached was a draft statement of claim, which made it clear that he wished to bring a non-de novo challenge. Mr Zhang wishes to argue that insufficient remedies were awarded. He said the Authority had made incorrect conclusions that impacted on him financially; but he was also concerned at potential harm to his reputation because of what he considered were unjustified and adverse comments about his conduct.

Overview of each party's case

[29] At the hearing, comprehensive submissions were given by counsel for each party.

[30] In essence, Mr Espie agreed that the delay was properly explained by the extensive efforts Mr Zhang undertook to obtain legal assistance, that the respondent could not be surprised by the fact he wished to bring a challenge given his advice to that effect on the day the determination issued, and that, to the extent these are relevant, the merits of the proposed challenge are strong.

[31] Telco strongly disputes each of these points. It contends that in the face of the difficulties Mr Zhang encountered to obtain legal advice, he should have filed a pro forma statement of claim; and that in light of that failure, the delay is not adequately explained.

[32] Counsel for Telco, Mr Cleary, submitted that the key question was whether it was reasonable in the circumstances for Mr Zhang to have taken the view that he would not file a statement of claim before engaging a lawyer. He also argued that the extent of the delay was not insignificant. He said that prejudice would be caused to Telco in having now to face a challenge. Finally, he submitted that since a non-de novo challenge was being raised, the Court could realistically make an assessment of the merits by reference to the Authority's determination, and that this exercise would confirm that Mr Zhang's case is weak.

[33] I will elaborate on these submissions where relevant later.

Legal principles

[34] The Court has jurisdiction under s 219 of the Act to extend time. The relevant criteria are contained in the following paragraphs from *An Employee v An Employer*:[3]

> [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 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:
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> (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.

[35] As Judge Perkins noted in *P v A*,[4] the statements in *An Employee v An Employer* must now be read in light of the Supreme Court's judgment in *Almond v Read*.[5] In that judgment, the Supreme Court emphasised that the ultimate question in such a case is what the interests of justice require. It modified the approach which needs to be

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3 *An Employee v An Employer* [2007] ERNZ 295 (EmpC).
4 *P v A* [2017] NZEmpC 92 at [21].
5 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

taken as to the merits of the claims of the party seeking exercise of the discretion to extend time, in these paragraphs:

> [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)

[36] The Supreme Court also examined the extent to which the issue of merits may be relevant when leave is sought. 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 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.

[37] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal, in my view there are cases under s 219 of the Act where such factors are potentially relevant, particularly if delay is minor.

[38] I proceed in light of these principles.

Analysis

The reason for the omission to bring the case within time

[39] Mr Zhang concluded soon after receiving the determination that he needed to obtain legal advice, since he anticipated the processes of the Court would be more formal and complicated than those in the Authority, and that it would be difficult to represent himself whilst requiring an interpreter.

[40] He went to considerable lengths to obtain legal assistance during the four weeks following the issuing of the determination. It is regrettable that on two occasions, lawyers who indicated they would revert to Mr Zhang after he requested legal assistance, did not.

[41] It was also unfortunate that other lawyers whom he approached were not for one reason or another available to assist promptly. I do not criticise those lawyers, since practitioners cannot always accept a retainer immediately upon being asked, having regard to existing professional commitments.

[42] Eight days before the expiration of the 28-day period for initiating a challenge, Mr Zhang realised he was running out of time, and took the step of attempting to apply for an extension of time within which to commence proceedings. He was properly advised that additional documents would be necessary, including a draft statement of claim. At that point, then, he understandably became focused on the need to draft such a document.

[43] Three days after the expiration of the 28-day period, he was able to obtain legal advice from Mr Scotland. I infer from the material before the Court that he was unwilling to instruct a lawyer to act for him on all matters at that time, preferring to attempt to draft a statement of claim himself.

[44] Mr Cleary was critical as to what occurred at this point for two reasons. First, he argued by reference to *Parker v Silver Fern Farms Ltd,* that affidavit evidence by

instructed solicitors as to the reasons for apparent inactivity should be provided.[6] That case involved a delay of some nine months where there were legal aid issues for the employee, and where there were lawyers ready to act once legal aid was granted. The Court stated that in that instance there were "gross, largely unexplained and inexcusable delays".[7]

[45] The circumstances of that case are significantly different from those in the present case. The sequence of events from 26 October 2018 onward are reasonably clear, and no undue criticism need be made as to the extent of evidence given by Mr Zhang.

[46] A second point was made by Mr Cleary with regard to the findings made in *Parker*. In the circumstances of the case, Chief Judge Colgan stated that a lawyer having accepted a retainer to act for a legally aided client, and aware of the time limits, should act to protect the client's rights of appeal. He alluded to the possibility of filing a pro forma statement of claim.[8] Mr Cleary argued that such a step should have been taken in the present case.

[47] Again, the circumstances in *Parker* were different from those which apply here. In the absence of any evidence that Mr Scotland had accepted a retainer, I do not consider this was a case where there was an ethical obligation on him to be proactive. At the end of the day, a lawyer can only give advice according to his or her instructions. If those instructions do not amount to an instruction to institute proceedings, he or she must accept that position.

[48] Nor is there evidence that Mr Zhang was aware of the process known to lawyers, namely the filing of the pro forma statement of claim. In any event, the drafting of a pro forma statement of claim would not have been much less of a challenge to Mr Zhang than was the drafting of a full form of such a pleading.

[49] Mr Zhang continued to be unrepresented until he had completed the drafting of a statement of claim. Unfortunately, this took longer than it should have, although

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6 *Parker v Silver Fern Farms Ltd* [2009] ERNZ 301 (EmpC).
7 At [30].
8 At [34].

the Court recognises that there were various challenges, including language, child-minding responsibilities, and time devoted to seeking employment.

[50] The period of delay for which Mr Zhang is most open to criticism, is the period from 26 October to 15 November 2018. It is regrettable that it took as long as it did to prepare the draft statement of claim which Mr Zhang knew had to be prepared, and that once he instructed Mr Espie, it was then necessary not only to finalise the pleading, but also prepare a comprehensive affidavit in support of an application for leave.

[51] In summary, I am largely satisfied with the explanation proffered by Mr Zhang as to how the unfortunate delay arose in this case. This is not a case where a potential challenger has sat on his or her hands and done nothing for at least the 28-day period for raising a challenge. On the whole, Mr Zhang was diligent in attempting to obtain advice. It is unfortunate that he did not receive that advice much earlier.

[52] Although the latter aspects of the chronology are less satisfactorily explained, overall the delay is understandable. This factor points towards the granting of leave.

Length of delay

[53] The application for leave was filed 23 days late. That is not a minor period, but it is not an insignificant one either.

[54] There are cases where leave has been declined for a shorter period of delay.[9] There are other cases where leave has been granted for longer periods of delay.[10] Delay is but one aspect of the range of factors which the Court must consider. Obviously, the totality of relevant circumstances may vary.

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9 *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 (EmpC), seven or 10 days out of time; *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC), 12 days out of time.

10 *Advance International Cleaning Systems (NZ) Ltd v Hamilton* [2016] NZEmpC 34, 48 days out of time; *Kocatürk v Zara's Turkish Ltd* [2018] NZEmpC 51, 36 days out of time.

[55] Having regard to the comments made by the Supreme Court in *Almond*, the delay in this case means that rather greater scrutiny must be given to the application for leave, than a case where slippage of one or two days has occurred.[11]

[56] But the length of delay, in and of itself, is not a factor which could tip the scales against Mr Zhang in the circumstances of this case.

Prejudice

[57] Evidence has been placed before the Court by Telco. The company was relieved when the 28-day period expired, and no challenge had been brought. The Managing Director of Telco, Mr Mitchell, said that whilst the company was not happy with the outcome, it was thought that it could move on.

[58] He also provided documents to the Court illustrating remarks which Mr Zhang had made in the course of his employment, where he had attacked the integrity of the CFC. He explained that the CFC was hurt and stressed by unfounded accusations and worried about her reputation as a result. These factors would most likely be reignited or worsened if Mr Zhang was able to continue litigating his claim.

[59] Mr Espie argued that had Mr Zhang brought his proceeding in time, the company would have found itself in precisely the same position which would apply if leave is granted.

[60] That is not correct, because a party to a determination which is not challenged is entitled to conclude that the litigation is over. That party knows where they stand, and can anticipate moving on.

[61] This factor is entitled to some weight, but it is not dispositive of Mr Zhang's application.

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11 *Almond v Read*, above n 5.

Rights and liabilities/subsequent events

[62] Mr Cleary stressed that Mr Zhang received some monetary awards, and simply wants more. The somewhat narrow focus of the challenge told against the possibility of granting leave.

[63] However, the Court is advised that the challenge is to be brought not only for the purpose of reviewing remedies, but also to address the claim that Mr Zhang's reputation would be adversely affected by the findings should the determination stand.

[64] Mr Cleary is right to say that Mr Zhang runs a risk that the adverse findings may not be reversed, and that further adverse comments may be made. However, the Court cannot sensibly predict the outcome of a review of the findings made as to contribution, as I elaborate below.

[65] In short, I consider that these factors are neutral as far as the application for leave is concerned.

Merits

[66] Mr Cleary submitted that the comments of the Supreme Court as to the weight to be given to an assessment of the merits were not necessarily applicable in the present circumstances. This is because Mr Zhang was proposing to advance a non-de novo challenge, where the focus would be whether the Authority was wrong in fact or in law. He said the Court, on an application for leave, was well placed to assess the merits, and could do so by analysing the determination. Such an analysis, he said, would show there were no errors, whether in fact or in law.

[67] The proposed statement of claim raises various assertions as to how the remedies were assessed and is particularly critical of the way in which conduct issues were treated. The strong findings made by the Authority on that topic were relevant to the quantum of the remedies which were awarded. But they are also potentially relevant to reputation since the determination is a public document.

[68] Mr Espie submitted that it would be necessary for the Court to receive evidence in order to evaluate these matters satisfactorily. The extent of evidence which might

be adduced cannot be accurately assessed at present because the Court is not yet in a position to make a direction as to the nature and extent of the hearing. For present purposes, I cannot rule out the possibility of the Court receiving evidence which could require detailed credibility findings as to Mr Zhang's conduct.

[69] In these circumstances, I do not consider this is a case where the Court can proceed on the basis that the facts are evident from the Authority's determination; or that an accurate assessment of outcome can be made.

[70] This is not a case where I am prepared to conclude at this provisional stage that Mr Zhang's potential case is "clearly hopeless", which was Mr Cleary's submission; or that it is "strong", which was Mr Espie's submission.

[71] Cognisant of the Supreme Court's discussion as to the relevance of merits when leave is sought, I regard this factor as neutral, for present purposes.

Disposition

[72] Standing back, I consider the application to be finely balanced. However, that balance should be resolved in favour of the applicant, having regard to the overall interests of justice.

[73] Accordingly, the application for leave to extend the time for the filing of the challenge is granted.

[74] Mr Zhang is directed to file and serve his statement of claim, and pay any necessary fee by 8 March 2019.

[75] Mr Zhang has been granted an indulgence. Telco was unsuccessful in opposing the application. Accordingly, costs are to lie where they fall.

B A Corkill
Judge

Judgment signed at 3.40 pm on 4 March 2019