

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUTAHI**

**[2019] NZEmpC 69  
EMPC 33/2019**

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

AND IN THE MATTER of an application for leave to extend time for  
filing a challenge

AND IN THE MATTER of an application to vary a stay

BETWEEN GOLEMAN WELLINGTON CLEANING  
LIMITED  
Plaintiff

AND MICHAEL NICOLLE  
Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for plaintiff  
J Sanders, counsel for defendant

Judgment: 4 June 2019

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**INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH  
(Application for leave to extend time for filing a challenge and to vary a stay)**

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[1] On 21 January 2019 the Employment Relations Authority issued a determination imposing a penalty on Goleman Wellington Cleaning Ltd for its actions in breaching a record of settlement the company had entered into with Michael Nicolle.<sup>1</sup>

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<sup>1</sup> *Nicolle v Goleman Wellington Cleaning Ltd* [2019] NZERA 26.

[2] The Authority reserved the issue of costs. On 28 February 2019 the Authority issued a determination on costs because the parties had been unable to reach an agreement about them. Goleman was ordered pay Mr Nicolle \$4,500 as a contribution to his costs plus \$71.56 to reimburse him for the lodgement fee he had paid. Payment within 14 days was ordered.<sup>2</sup>

[3] On 7 February 2019 Goleman challenged the Authority's substantive determination imposing a penalty on it and applied for orders of its own against Mr Nicolle. The challenge was filed before the Authority's costs determination was issued, but the statement of claim anticipated that eventuality by purporting to make an election challenging the substantive determination and any costs determination when it was issued.

[4] Goleman did not challenge the costs determination within the time allowed under s 179(2) of the Employment Relations Act 2000, either by amending its existing pleading to incorporate costs or by filing a further challenge.

[5] Belatedly, following the Court's interlocutory judgment granting Goleman's application for a stay of the penalty determination, the company realised it had not succeeded in filing timely challenges to both determinations.<sup>3</sup> It has now applied for leave to extend the time within which it can file a challenge to the costs determination and to vary the stay by extending it to incorporate the amount of costs and disbursements awarded by the Authority.

[6] The application is based on three grounds:

- (a) there is no material prejudice to Mr Nicolle if it is granted;
- (b) the balance of convenience favours granting leave; and
- (c) the interests of justice favour granting leave.

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<sup>2</sup> *Nicolle v Goleman Wellington Cleaning Ltd* [2019] NZERA 113.

<sup>3</sup> *Goleman Wellington Cleaning Ltd v Nicolle* [2019] NZEmpC 51.

[7] The application was supported by an affidavit from David Fuimaono, Goleman's National Human Resources and Compliance Manager. The reason given for this delay in seeking to challenge the costs determination was explained by Mr Fuimaono as an error by Goleman's advocate. Mr Fuimaono said he instructed Mr Pa'u to challenge the costs determination when it was issued. He went on to say that the advice he received, in response to this instruction, was that it had already been challenged as part of the earlier proceeding. He said it was not until the Court's interlocutory judgment, dated 3 May 2019, that the company realised this mistake had occurred.

[8] Mr Sanders, counsel for Mr Nicolle, filed a memorandum in response to the application. He confirmed that the defendant does not object to orders being made as sought and will abide the decision of the Court.

### **Analysis**

[9] The Court has jurisdiction to extend the time within which a challenge may be filed if doing so is in the interests of justice.<sup>4</sup> The criteria usually applied were summarised by Judge Perkins in *P v A*, and include the reason for the omission to bring the case within time, the length of the delay, any prejudice or hardship, the effect on the rights and liabilities of the parties, subsequent events and the merits.<sup>5</sup>

[10] The reason for the omission to file a challenge within time has been adequately explained and was not caused by any action or inaction by Goleman. The length of the delay is unhelpful to Goleman but was ameliorated to some extent by Mr Nicolle being on notice that a challenge was intended, there is no prejudice to him and the rights and liabilities of the parties will not be unfairly compromised if leave is granted. This is not a case where an evaluation of the merits is appropriate.

[11] A stay of execution of the penalty determination was granted subject to the amount the Authority ordered to be paid being held by the Registrar of this Court on interest bearing deposit.<sup>6</sup> In this application Goleman has applied for what was

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<sup>4</sup> Employment Relations Act 2000, s 219.

<sup>5</sup> *P v A* [2017] NZEmpC 92; see also *An Employee v An Employer* [2007] ERNZ 295. In relation to considering the merits see the limitations in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

<sup>6</sup> *Goleman Wellington Cleaning Ltd v Nicolle*, above n 3, at [20].

described as a variation to that stay. In reality, its application was for a further stay. However, I am satisfied that the parties knew and understood the nature of the application and the grounds on which it was based. Mr Fuimaono's affidavit did not discuss the reason for seeking a stay of the costs determination, but it is reasonably apparent that it is based on the same grounds relied on previously. This application was not opposed by Mr Nicolle. In all of the circumstances I am satisfied that a stay of the costs determination is appropriate.

### **Conclusion**

[12] The application for an extension of time to file a challenge is granted. A statement of claim must be filed and served within seven days of the date of this judgment.

[13] The application for a stay of the costs determination is granted subject to the amount of \$4,571.56 being paid to the Registrar of this Court within seven days of the date of this judgment.

[14] The amount referred to in [13] is to be held by the Registrar on interest-bearing deposit pending further order of the Court or agreement in writing by the parties.

[15] There is no order of costs.

K G Smith  
Judge

Judgment signed at 3.00 pm on 4 June 2019