

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

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

**[2020] NZEmpC 103  
EMPC 421/2019**

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| IN THE MATTER OF | an application for leave to extend time to file<br>challenge to a determination of the<br>Employment Relations Authority |
| BETWEEN          | KIM ELIZABETH ASHBY<br>Applicant   |
| AND              | NIWA VESSEL MANAGEMENT<br>LIMITED<br>Respondent  |

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| Hearing:     | On the papers   |
| Appearances: | A Halse, advocate for applicant<br>P Shaw, counsel for respondent |
| Judgment:    | 13 July 2020  |

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] The applicant, Ms Ashby, applies for leave to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority).<sup>1</sup> In the Authority, Ms Ashby succeeded in her claim that she was unjustifiably dismissed and the respondent, NIWA Vessel Management Ltd (NIWA), was ordered to pay her an amount equivalent to three months lost wages together with compensation of \$20,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). In the Court, Ms Ashby wishes to challenge the remedies, seeking loss of earnings since December 2015 and compensation of \$150,000 under s 123(1)(c)(i) of the Act.

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<sup>1</sup> *Ashby v NIWA Vessel Management Ltd* [2019] NZERA 571 (Member Campbell).

[2] As the determination was issued on 7 October 2019, Ms Ashby's challenge was to be filed by 4 November 2019.<sup>2</sup> Her application for leave was received on 14 November 2019, ten days out of time. Where, as here, the statutory time frame has elapsed, the Court has discretion to extend the time for filing.<sup>3</sup> In exercising that discretion, the Court must act in accordance with principle. The overarching consideration is the interests of justice. The usual factors that will be considered are:<sup>4</sup>

- (a) the reasons for the omission to bring the case within time;
- (b) the length of the delay;
- (c) any prejudice or hardship to any other person;
- (d) the effect on the rights and liabilities of the parties;
- (e) subsequent events; and
- (f) the merits of the proposed challenge.

### **Ms Ashby explains the reasons for the delay**

[3] There are two principal reasons that Ms Ashby says caused her to fail to file her challenge within time; first her mother was seriously unwell with a life-threatening illness, which required Ms Ashby to become her primary carer; and second, Ms Ashby's then lawyer was unwilling to file a challenge to the determination.

[4] Ms Ashby initially acted for herself in the Court but now has engaged Mr Halse of CultureSafe Ltd to represent her in the Court.

[5] Ms Ashby has filed three affidavits in support of her application. She gives evidence regarding her mother's illness and her own stress in dealing with that illness. Ms Ashby's mother was admitted to hospital on 20 October 2019. Ms Ashby says her

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<sup>2</sup> Employment Relations Act 2000, s 179(2).

<sup>3</sup> Section 221(c).

<sup>4</sup> *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].

mother was in hospital for nearly a week. Ms Ashby has moved into her parents' home to be her mother's caregiver as her father was unable to care for her mother at that time.

[6] Her evidence regarding her interactions with her solicitor included that he was not prepared to continue to represent her given she had succeeded in the Authority, and that he had not told her that his firm had received the sums ordered to be paid by the Authority.

[7] The evidence from NIWA is that it continued to engage with Ms Ashby's solicitor up until 2 November 2019 and were not advised that he was no longer acting.

[8] I am satisfied that there were circumstances that impacted on Ms Ashby filing her challenge within the prescribed time.

### **Length of the delay not significant**

[9] The longer the delay, the more an applicant would be seeking an indulgence from the court and the stronger the case for an extension for leave would need to be.<sup>5</sup> While the delay here is not the one or two days that would make it trivial, it is not a significant delay in the circumstances.

### **Delay in filing challenge did not, in itself, prejudice the position of NIWA**

[10] In the affidavit filed in opposition to the application, NIWA's People and Capability Manager notes the history of these proceedings, which is lengthy. Ms Ashby was dismissed on 15 December 2015. The time taken to get this far poses obvious difficulties for witnesses and organisations. However, the prejudice that is relevant in an application for leave to extend time is the prejudice that is caused by the delay in filing the challenge, in this case, ten days. There was no evidence that the delay in filing the challenge caused any additional difficulties for NIWA.

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<sup>5</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38(a)].

### **Not granting leave would prevent Ms Ashby from pursuing her challenge**

[11] If leave is not granted, Ms Ashby would be unable to take this matter further. As noted, she was successful in the Authority and remedies were awarded to her. However, she claims those remedies are insufficient and wishes to challenge them. Not granting her leave would prevent her from doing so.

### **No subsequent events or conduct are material**

[12] Having filed the application for leave, this matter has proceeded reasonably promptly, bearing in mind that Ms Ashby initially was acting for herself. There are no other subsequent events or conduct of any relevance.

### **Some question as to the merits of the proposed challenge**

[13] An application for a short extension of time will not usually be the occasion for a close look at the merits of a proposed case.<sup>6</sup> There also are difficulties with assessing merits at an early stage of a proceeding. What can be said here is that, although it cannot be discounted that there is a basis for an increase in remedies, the case is not one that is clearly strong.

[14] The award of three months' loss of remuneration is a fairly standard one. It is the period recognised by s 128(2) of the Act. Nonetheless, the Authority (or the Court on a challenge) in its discretion may order an employer to pay to an employee an award for lost remuneration greater than that.<sup>7</sup>

[15] In the Authority, Ms Ashby sought \$20,000 as compensation under s 123(1)(c)(i) of the Act, and that was what she was awarded. There is no support in the case law for an award anything like the \$150,000 she now seeks.

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<sup>6</sup> At [37].

<sup>7</sup> Employment Relations Act 2000, s 128(3).

## **Leave is granted**

[16] Having regard to the relevant factors, I consider it appropriate for leave to be granted. Although Ms Ashby may have unrealistic expectations as to what she may achieve in the Court, she is entitled to bring her case. The relatively short length of the delay, in view of the reasons for it, and the lack of prejudice to NIWA support such a conclusion.

[17] Leave is accordingly granted for Ms Ashby to file a statement of claim challenging the determination of the Authority within 15 working days of the date of this judgment. NIWA is to file and serve a statement of defence in the usual way and thereafter there will be a directions conference to progress this matter.

[18] Costs are reserved.

J C Holden  
Judge

Judgment signed at 3 pm on 13 July 2020