

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

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

**[2020] NZEmpC 118  
EMPC 492/2019**

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	SANDRA SAVRIM Applicant
AND	WELLINGTON HOSPITALITY GROUP LTD Respondent

Hearing: On the papers

Appearances: P McBride, counsel for applicant until 6 August 2020, thereafter  
plaintiff in person  
J Sumner, counsel for respondent

Judgment: 10 August 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] The applicant, Ms Savrim, applies for leave to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority).<sup>1</sup> For the reasons set out in this judgment, leave is not granted.

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<sup>1</sup> *Savrim v Wellington Hospitality Group Ltd* [2019] NZERA 419 (Member MacKinnon).

## **Ms Savrim offered employment**

[2] The background to this matter is set out in the Authority's determination.<sup>2</sup> In short, Ms Savrim was offered employment with the respondent, Wellington Hospitality Group Ltd (Wellington Hospitality), in December 2016 with an initial start date of 1 February 2017.

[3] Ms Savrim never started employment with Wellington Hospitality. Immigration issues prevented her from starting when expected, and, while Wellington Hospitality remained open to her joining it, disagreements arose in relation to her employment agreement.

[4] Applications were filed in the Authority in 2017. Ms Savrim claimed that Wellington Hospitality had breached her employment agreement by not allowing her to commence work. She sought remedies of specific performance and damages as well as reimbursement of lost wages and damages for non-economic loss, plus costs.

[5] There were delays in setting the matter down for an investigation meeting, the details of which are set out in the Authority's determination.<sup>3</sup> In the end the investigation meeting proceeded on 10 October 2018. Despite being notified of the date for the investigation meeting, and attempts being made by an Authority Officer to contact her on the day, there was no appearance by or for Ms Savrim.<sup>4</sup>

[6] The Authority's determination was issued on 16 July 2019 and found against Ms Savrim.

[7] Ms Savrim did not file a challenge to the determination within the time allowed and filed her application for leave on 20 December 2019, being more than four months past the date by which any challenge ought to have been filed.<sup>5</sup>

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<sup>2</sup> At [11]–[34].

<sup>3</sup> At [36]–[49].

<sup>4</sup> At [7].

<sup>5</sup> Employment Relations Act 2000, s 179(2).

## **Court has discretion to extend the time for filing**

[8] While the Act prescribes a timeframe within which challenges are to be filed, the Court retains a discretion to extend the time for filing.<sup>6</sup> In exercising that discretion, the Court must act in accordance with principle, with the overarching consideration being the interests of justice.

[9] The factors that the Court likely should consider in such an application are:<sup>7</sup>

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, especially the applicant;
- (d) any prejudice or hardship to the respondent; and
- (e) the significance of the issues raised.

[10] The merits of the case may be relevant but may be overwhelmed by other factors. Any assessment of the merits must necessarily be relatively superficial. Further, for a decision to refuse an extension of time to be based substantially on the lack of merit of a proposed appeal (or challenge), that lack of merit must be plain. It should be made only where the appeal is clearly hopeless.<sup>8</sup>

## **The delay is lengthy**

[11] The longer the delay in bringing an appeal, the more the applicant will be seeking an “indulgence” from the Court and the stronger the case for an extension will need to be.<sup>9</sup>

[12] A delay of over four months in circumstances where the statutory requirement is that challenges are filed within 28 days is very significant. It is not the kind of delay

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<sup>6</sup> Employment Relations Act, s 221(c).

<sup>7</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

<sup>8</sup> At [39].

<sup>9</sup> At [38(a)].

the Supreme Court was referring to in *Almond v Read* where there has been a slip up and an appeal date has been inadvertently missed by one or two days.<sup>10</sup>

### **Ms Savrim said she was unaware of the determination**

[13] Ms Savrim says that she did not challenge the determination within time because she was not aware that it had been issued. She says that, as soon as she became aware of the determination, she promptly instructed her representative to seek leave to extend time to file a challenge.

[14] Ms Savrim was deported from New Zealand to her home country of Mauritius on 9 May 2019. She is challenging that deportation in separate proceedings. On 16 August 2019 she received from Immigration New Zealand (INZ) what she says was heavily redacted information, which included communications that had taken place without her knowledge between Wellington Hospitality and INZ. She says that lawyers reviewing her immigration file advised her that they learnt of the decision of the Authority “while investigating the immigration matters”. Their advice to her of the Authority’s determination was, she says, when she first found out about it. She says she learned of the determination on 3 December 2019 and instructed Mr McBride on 11 December 2019. She says she did not receive a copy of the determination earlier because her email address had been locked shortly after she returned to Mauritius and she no longer had access to her New Zealand mobile telephone number to enter the code needed to unlock it.

[15] The first difficulty with the points Ms Savrim makes is that it is not at all clear that she was indeed locked out of her email account in the way she suggests. She sent an email from her Yahoo account on 30 May 2019, being three weeks after her deportation. That email asked for copies of documents filed in the Authority. After Wellington Hospitality referred to the email of 30 May in its submissions in opposition to the application, Ms Savrim acknowledged that she accessed her Yahoo account from Mauritius on 30 May, when her email was sent, but says that was the only time she was able to do so, as the account was then locked.

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<sup>10</sup> At [37].

[16] In any event, if her address for receipt of documents was changed, then it was incumbent on Ms Savrim to advise the Authority of that. There was no evidence that she did so at any time.

[17] The evidence about the discovery of the determination also is ambiguous. Although Ms Savrim says she learned of the determination in early December 2019, it seems it was included, or referred to, in the material received from INZ in August 2019.

[18] Of course, the determination also would have been available online shortly after its release.

[19] There is no adequate explanation for Ms Savrim failing to find out about the determination and challenging it much sooner than she did.

### **Ms Savrim's conduct has been problematic throughout**

[20] A history of non-cooperation and/or delay by an applicant may be relevant when considering an application such as this.<sup>11</sup>

[21] The history of these proceedings shows considerable delay caused by Ms Savrim. The failure to attend the Authority's investigation meeting means that she did not properly co-operate with the Authority in resolving the employment relationship problem.

[22] An order of costs was made against Ms Savrim by the Authority but remains unpaid. No stay has been granted.

[23] Another concern is that Ms Savrim's affidavits in support of this application are unpersuasive and evasive. Wellington Hospitality has pointed out discrepancies between the two affidavits filed by Ms Savrim and also between what she has said in her affidavits and other documentary evidence. The way in which she described the

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<sup>11</sup> *Almond v Read*, above n 7, at [38(c)].

discovery of the Authority determination is an example of evasive and vague evidence on what is a key issue.

### **No specific prejudice**

[24] Wellington Hospitality could be expected to have regarded this matter as finally completed once the period for filing a challenge had expired. Ms Savrim claims that it was well aware that she was going to be filing a challenge by virtue of receipt of a copy of the email of May 2019. That is not clear from the email, which predated the determination.

[25] However, there is no specific prejudice claimed as a result of the delay between the end of the 28-day period in August 2019 and the application for leave being filed in December 2019.

### **Issues not significant; the challenge not strong but not hopeless**

[26] Neither party suggests the case raises issues of significance beyond the parties to it. Further, given Ms Savrim never started working for Wellington Hospitality, in large part because of her own circumstances, any award of damages or compensation likely would be relatively small.<sup>12</sup>

[27] Based on a relatively superficial review of the statement of claim and the determination of the Authority, the case Ms Savrim wishes to bring is not strong. However, the challenge is not hopeless in the sense described by the Supreme Court in *Almond v Read*.<sup>13</sup>

### **Overall justice means leave declined**

[28] Standing back and looking at the application in context, the length of the delay and the reasons for it, together with Ms Savrim's conduct in the Authority and this Court, the overall justice does not support the application for leave being granted.

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<sup>12</sup> In the draft statement of claim Ms Savrim no longer seeks specific performance.

<sup>13</sup> *Almond v Read*, above n 7, at [39(c)].

[29] Accordingly, leave is declined.

**Ms Savrim must pay costs**

[30] Wellington Hospitality seeks costs on this application on a 2B basis. It is entitled to costs, which I fix at \$7,000. Those costs are to be paid by Ms Savrim to Wellington Hospitality within 14 days of this judgment.

J C Holden  
Judge

Judgment signed at 4 pm on 10 August 2020