

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

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

**[2020] NZEmpC 122
EMPC 111/2020**

IN THE MATTER OF	an application for leave to extend time to file a challenge
BETWEEN	HST Applicant
AND	KAG Respondent

Hearing: On the papers

Appearances: A Riches, counsel for applicant
J Lovely, counsel for respondent

Judgment: 10 August 2020

JUDGMENT OF JUDGE K G SMITH

[1] On 28 January 2020 the Employment Relations Authority issued a determination resolving HST's personal grievance claims against her former employer, KAG.¹

[2] The Authority's determination recorded that HST raised a personal grievance with her employer on 1 August 2018 before resigning a few days later, on 23 August 2018. The proceedings before the Authority were for alleged constructive dismissal, unjustified action causing disadvantage, discrimination, breach of contract and breach of the duty of good faith.

[3] In an extensive determination the Authority assessed all of those claims before concluding that KAG acted in an unjustified manner causing disadvantage to HST.

¹ *HST v KAG* [2020] NZERA 33 (Member van Keulen).

KAG was ordered to pay \$14,000 to HST pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000. All of the other claims were dismissed.

[4] HST did not challenge the determination. However, in February 2020, her former employer challenged the determination and a full rehearing was sought. Subsequently, on 22 April 2020, the Authority issued a costs determination in HST's favour.² KAG did not challenge that determination within time and, of necessity, it was compelled to seek an extension of time to do so.

[5] KAG's challenge has spurred HST into applying for an extension of time to challenge the substantive determination as well, to pursue her claims that were unsuccessful. The grounds relied on in this application were that, initially, she did not wish to challenge the determination because she did not have the means to do so and had decided to move on with her life. The application candidly acknowledged that, since her former employer had filed a challenge, she now wanted to do the same.

[6] The application was supported by a very brief affidavit that did no more than repeat the grounds of the application. It was opposed by KAG as being well out of time, that the reason relied on was inadequate, and that the overall merits favoured KAG.

[7] The Court has a discretion to extend the time within which a challenge may be filed. The discretion is broad but it has to be exercised in a principled way and in the interests of justice. Factors usually taken into account when considering exercising this discretion include the reason for the omission to bring the challenge within time, the length of the delay, any prejudice or hardship to the other party, the effect on the rights and liabilities of the parties, subsequent events and, depending on the circumstances, the merits of the case.³

[8] There are two significant impediments to the application being granted. The first of them is that the reason offered is inadequate. The applicant had decided to accept the Authority's determination and must, therefore, have consciously allowed

² *HST v KAG* [2020] NZERA 160 (Member van Keulen).

³ As described in *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]; in relation to considering the merits see the limitations expressed by the Supreme Court in *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

the time to challenge to elapse. She has changed her mind simply because her former employer has challenged the determination. A change of mind, without more, would not usually be a sufficient reason to justify an extension of time. The second impediment is delay that is lengthy, two months after the time to challenge as of right expired.

[9] The other factors usually considered do not have any significant bearing on the application, except to consider if there is any prejudice to KAG. I doubt there will be any prejudice to the company. KAG challenged the determination and what it is likely to traverse will necessarily involve a consideration of HST's whole employment and will, almost certainly, be closely connected to the claims she wants to pursue. This factor points towards granting the application but would, probably, be outweighed by the lengthy delay were it not for one other factor.

[10] That factor is that KAG has successfully applied to extend the time to challenge the Authority's costs determination.⁴ In opposing HST's application KAG placed itself in an awkward position, of seeking an extension of time for its own purposes while opposing the application for an extension of time by her.

[11] In those circumstances, I have reached the conclusion that it would not be consistent with equity and good conscience to deny HST an opportunity to pursue a challenge while granting her former employer an extension of time to pursue a related challenge.

[12] The application is granted and HST is to file a statement of claim within 14 days of the date of this judgment.

[13] Costs are reserved.

K G Smith
Judge

Judgment signed at 4.15 pm on 10 August 2020

⁴ *KAG v HST* [2020] NZEmpC 121.