

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 16  
EMPC 213/2019**

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| IN THE MATTER OF | an application for leave to extend time to file<br>a challenge |
| BETWEEN          | SHAUN EVANS<br>Applicant                                       |
| AND              | JNJ MANAGEMENT LIMITED<br>Respondent                           |

Hearing: On the papers

Appearances: N Tu’itahi, advocate for applicant  
M Kirkland and J Leenoh, counsel for respondent

Judgment: 2 March 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1] Mr Evans, the applicant in this matter, wishes to file a non-de novo challenge to a determination of the Employment Relations Authority (the Authority).<sup>1</sup> Before the Authority, Mr Evans claimed the respondent, JNJ Management Limited (JNJ) unjustifiably disadvantaged and unjustifiably dismissed him. The Authority found that the trial period provision in Mr Evans’ employment agreement with JNJ was valid; JNJ terminated Mr Evans’ employment in accordance with its contractual notice obligations; and Mr Evans therefore was statute-barred from bringing a personal grievance claim for unjustifiable dismissal. Mr Evans does not seek to challenge any of those findings. The Authority also found that Mr Evans’ disadvantage grievance was so intrinsically linked to his dismissal grievance that it could not succeed because

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<sup>1</sup> *Evans v JNJ Management Ltd* [2019] NZERA 337.

the Authority could not investigate his dismissal grievance.<sup>2</sup> It is that finding that Mr Evans wishes to challenge.

[2] Although Mr Evans apparently instructed an advocate, Mr Mapu, to lodge a challenge to the determination, that was not done within the prescribed time limits. The delay in filing was one day only.

[3] Mr Evans, therefore, applies to the Employment Court for an extension of time to file his challenge.

[4] Mr Evans has provided the Court and JNJ with a draft of the statement of claim that he intends to file should leave be granted.

[5] Mr Evans wishes to pursue disadvantage claims that:

- (a) JNJ covertly restructured its business at least a month prior without Mr Evans' knowledge.<sup>3</sup>
- (b) Mr Evans was entitled to be informed and consulted about the restructuring.
- (c) Mr Evans found out what JNJ was doing and raised these concerns in writing but JNJ failed to address them.
- (d) JNJ breached its employees' privacy by allowing CCTV footage to record audio, despite advice from Mr Evans that this was illegal.
- (e) JNJ breached the "employment protections provisions" clause in Mr Evans' employment agreement.
- (f) JNJ failed to follow the "resolution of employment relationship problems" clause in Mr Evans' employment agreement.

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<sup>2</sup> At [12].

<sup>3</sup> Presumably prior to his dismissal.

- (g) The covert restructure and subsequent actions caused Mr Evans to suffer hurt and humiliation.
- (h) JNJ did not deal with Mr Evans in good faith in relation to all these matters.<sup>4</sup>

[6] Mr Evans seeks compensation for humiliation, loss of dignity and injury to feelings, reimbursement of lost wages plus interest, reimbursement of his advocates' fees, Authority and Court fees, and any other costs incidental to his claim.

[7] When this matter was considered in a directions conference, I referred the parties to the Supreme Court's decision in *Almond v Read*, in which the Supreme Court addressed minor delays in filing appeals, saying that, in such cases, applications for an extension of time should generally be granted, desirably without opposition from the respondent.<sup>5</sup>

[8] Nevertheless, JNJ opposes leave being granted here. Two grounds for opposition are given. First, JNJ says that Mr Evans has failed to provide adequate reasons to explain the delay in filing the application; and, second, it says the proposed challenge lacks merit and has no realistic prospects of success. JNJ also seeks increased and/or indemnity costs against Mr Evans.

[9] It says there is a significant lack of evidence supporting the challenge. It therefore says that this situation falls within an exception to the general principle identified in *Almond*.

[10] Essentially it says that the first issue that Mr Evans wishes to bring before the Court, involving the restructuring, was intrinsically linked to the dismissal and so cannot be considered as a separate issue, and that the second issue, involving alleged privacy breaches, does not come within the jurisdiction of the Court.

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<sup>4</sup> The employment agreement required each party to deal with the other "in good faith".

<sup>5</sup> *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801 at [37].

[11] The relief currently sought in the draft statement of claim includes reimbursement of lost wages, which would not seem to be available for Mr Evans' claims of unjustifiable disadvantage.

### **Mr Evans had right to challenge determination**

[12] The starting point for my consideration is that, up until the day before this application was made, Mr Evans had the right to challenge the determination. He would have been able to proceed with his claim unless it otherwise was struck out by the Court.

[13] Here, the missing of the deadline for filing a challenge by one day, acknowledged to be the fault of Mr Evans' advocate,<sup>6</sup> and the prompt application for an extension of time for filing the challenge puts this application into the category identified by the Supreme Court in *Almond* that generally should be granted.

[14] While JNJ says that hopeless cases are an exception, recognised by the Supreme Court in *Almond*, that is a very narrow exception. It was identified by the Supreme Court as being in instances where the delay is short and there is no prejudice to the respondent, but the lack of merit is so obvious (for example, the claim is legally untenable) that the Court is justified in refusing to extend time.<sup>7</sup>

[15] This exception has to be considered in the context that consideration of the merits of an appeal must necessarily be relatively superficial.<sup>8</sup> If anything, the limits to consideration of the merits could apply more with a challenge than an appeal, as the Court must make its own decision on the matter before it, including on facts.<sup>9</sup> This contrasts with appeals, where findings of fact of the lower court generally are undisturbed on appeal. I say 'could' because, with non-de novo challenges, the nature and extent of the hearing, as directed by the Court, will affect what, if any, facts will

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<sup>6</sup> Mr Mapu has filed an affidavit saying the delay in filing the challenge was his mistake.

<sup>7</sup> At [39(b)], n 91.

<sup>8</sup> At [39(c)].

<sup>9</sup> Employment Relations Act 2000, s 183(1).

be in issue in the Court.<sup>10</sup> However, in this case, it might be expected that the Court will need to make factual findings.

### **The approach should be like that in strike out applications**

[16] There are similarities here with an application to strike out and I consider the same approach ought to be adopted. This means the Court must be satisfied that the applicant's causes of action are clearly untenable – the Court must be certain the challenge cannot succeed.<sup>11</sup> Further, it would be inappropriate to reject the application if the defects in the applicant's proposed case could be remedied by an amendment to the draft statement of claim.<sup>12</sup>

[17] In the present case, there likely are some issues as to the extent to which the disadvantage grievances pleaded in relation to the restructure are merely part of the process that led to the dismissal. However, the applicant makes the point that the letter of termination, which is before the Court, advised Mr Evans that the reason for the dismissal was that "[his] performance in the past few months has not met our expectations".

[18] It cannot be said that it is so obvious that the actions around the restructure are so connected to Mr Evans' dismissal that he should not be able to proceed with his challenge in respect of the claimed disadvantage.

[19] There also may be issues of jurisdiction around the alleged disadvantage arising from the way JNJ handled Mr Evans' concerns over the CCTV recordings, but again, it cannot be said at this stage that a disadvantage claim based on the employer's actions is hopeless.

[20] Accordingly, the extension of time sought by Mr Evans is granted. He is to file and serve his statement of claim and pay the filing fee within 10 working days of the date of this judgment.

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<sup>10</sup> Employment Relations Act 2000, s 182(3)(b).

<sup>11</sup> *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

<sup>12</sup> *Marshall Futures Ltd (in liq) v Marshall* [1992] 1 NZLR 316, (1991) 3 PRNZ 200 at 207.

[21] A statement of defence will need to be filed in the usual way, following which there will be a directions conference. As it is anticipated this is a non-de novo challenge to the determination, one of the issues for discussion at the directions conference will be the nature and extent of the hearing.<sup>13</sup>

[22] Costs on this application are reserved.

J C Holden  
Judge

Judgment signed at 11 am on 2 March 2020

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<sup>13</sup> Employment Relations Act 2000, s 182(3)(b).