

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

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

**[2020] NZEmpC 71
EMPC 49/2020**

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to adduce further evidence
BETWEEN	IGOR GRIGOROVICH Applicant
AND	PRECISE LIMITED Respondent

Hearing: On the papers

Appearances: Applicant in person
SF Martin, counsel for respondent

Judgment: 27 May 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] The applicant has applied for leave to extend time to file a challenge to a determination of the Employment Relations Authority.¹ The intended challenge is to a preliminary determination declining Mr Grigorovich's application to join another company, HRL Holdings Ltd, as second respondent to the challenge.

[2] The parties agreed that the application could be dealt with on the papers and timetabling orders were made on 20 March 2020. The applicant subsequently sought leave to file further evidence in support of the original application, namely an affidavit. He also referred to an audio recording which he offered to make available to the Court.

¹ *Grigorovich v Precise Ltd* [2019] NZERA 724 (Member Robinson).

The recording was said to corroborate the sequence of events referred to in the affidavit, in particular the date on which the Authority's determination had been received.

[3] The respondent opposed the most recent application on the basis that the proposed evidence was out of time and contained nothing new or substantive. Mr Grigorovich says that leave is necessary to enable him to respond to allegations advanced on behalf of the respondent in its submissions opposing an extension of time to file the challenge. I am prepared to admit the affidavit insofar as it contains relevant material, including having regard to the lack of demonstrable prejudice to the respondent in doing so. However, it makes no material difference to the conclusions I have reached, for reasons which will become apparent. I do not propose to take up Mr Grigorovich's offer in relation to the audio, including because it is apparent that it would add nothing to the evidence before the Court.

[4] The primary ground for the application for leave to extend time is that Mr Grigorovich's previous representatives failed to provide him with a copy of the determination to enable him to file a challenge within the statutory timeframe for doing so, although a number of additional points emerge from the documentation he has filed.

[5] A party has 28 days to file a challenge to a determination of the Authority, under s 179(2) of the Employment Relations Act 2000 (the Act). Where the statutory timeframe has elapsed, the Court has the discretion to extend the time for filing.² The discretion must be exercised in accordance with principle. The overarching consideration is the interests of justice. The usual factors that will be considered are:³

- The reasons for the omission to bring the case within time;
- the length of the delay;
- any prejudice or hardship to any other person;

² Section 221(c).

³ See, for example, *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].

- the effect on the rights and liabilities of the parties;
- subsequent events; and
- the merits of the proposed challenge.

[6] I deal with each factor in turn.

Reasons for the delay

[7] As I have said, the main point advanced by Mr Grigorovich in support of his application, and reiterated in the most recent material filed, is representative error. That, on its face, is a factor which generally weighs in favour of the grant of leave.

[8] Mr Grigorovich says that he wrote to his representatives on 17 January 2020, following difficulties in extracting a response from them in relation to earlier correspondence. He requested a meeting and one was offered for 24 January 2020. Mr Grigorovich then contacted the Authority. A copy of the determination was emailed to him on 23 January 2020. The email referred to the determination having been issued to the parties on 19 December 2019. Mr Grigorovich says that his representative advised him that he had not received the determination until 23 January 2020. On 1 February 2020 Mr Grigorovich wrote to the Authority asking for evidence of service of the determination, to confirm what his representative had told him. It appears that the Authority did not reply to Mr Grigorovich directly. Rather an email was sent to Mr Grigorovich's representative on 3 February 2020 attaching the emailed request and advising that the Authority's record showed that the determination had been issued to the parties on 19 December 2019. Mr Grigorovich was not copied into the email.

[9] Mr Grigorovich says that, having heard nothing further, he wrote to his representative again on 5 February 2020 advising that he was working on his application for leave to extend time to file a challenge and asking that an affidavit be provided confirming that the representative had not received the determination on 19 December 2019. It appears that no affidavit was forthcoming. Rather Mr Grigorovich

received a very brief response the same day, noting receipt of the email and suggesting that Mr Grigorovich would need to be guided by the legal advice he was receiving.

[10] An application for leave to file a challenge was filed on 24 February 2020. Even accepting that the period of delay, for present purposes, ran from the date Mr Grigorovich says he personally received the determination (namely 23 January 2020) and he then took reasonable steps to try to get evidence together (including from his representative) to support an application for leave, there is no adequate explanation for the delay between the last date on which he communicated with his representative (5 February) and the date on which the application was eventually filed.

[11] In short, I do not accept that a sufficient explanation has been provided to explain the delays that have occurred.

Length of the delay

[12] The determination is dated 19 December 2019. As s 179 makes clear, the timeframe for filing a challenge runs from that date, rather than the date on which a determination is received by the parties.

[13] An issue has previously arisen in relation to calculating time over the Christmas period. Regulation 74B(2) of the Employment Court Regulations 2000 (“What happens to timing in Christmas period”) provides that the 12 days starting with 25 December and ending with the close of 5 January are not counted for the purposes of calculating the time within which an act must be done. Regulation 74B(3) provides that sub-cl (2) is subject to an express provision in any Act. In a relatively early judgment in *Vice-Chancellor of Lincoln University v Stewart* it was held that reg 74B could not be read consistently with s 179 and was ultra vires.⁴

[14] I prefer Judge Ford’s subsequent analysis in *New Zealand Air Line Pilots’ Assoc v Airways Corp of New Zealand Ltd*.⁵ As he observed, the starting point is the

⁴ *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 132 (EmpC).

⁵ *New Zealand Air Line Pilots’ Assoc v Airways Corp of New Zealand Ltd* [2014] NZEmpC 90, [2014] ERNZ 654. See too Judge Ford’s earlier obiter observations in *McLeod v National Hearing Care (NZ) Ltd* [2012] NZEmpC 120, [2012] ERNZ 466.

presumption of validity.⁶ That means that an interpretation which preserves the validity of reg 74B is to be preferred. Regulation 74B is, he held, directed at the calculation of time, rather than the number of days to be factored into the calculation.⁷ That means that the 12 days over the Christmas period are ignored, not counted. The same analysis was later applied by Judge Corkill in *Performance Cleaners All Property Services Wellington Ltd v Chinan*.⁸ I respectfully agree with, and adopt, the interpretation of reg 74B reflected in these two judgments. It follows that 28 days from the date of the determination (namely 19 December 2019) is 28 January 2020. The application for leave was filed just under one month later.⁹

[15] As has previously been pointed out, the longer the delay, the more an applicant would be seeking an “indulgence”, and the stronger the case for leave would need to be.¹⁰ The length of the delay in this case (between the date the Authority issued its determination and the date the application for leave was filed) weighs against the grant of leave.

Prejudice

[16] The respondent says that it will be substantially prejudiced if leave is granted. Essentially it would be obliged to defend a challenge it thought, at the expiration of the statutory 28-day timeframe, it would not have to face. I do not regard that as substantial prejudice, and do not perceive there to be any broader prejudice which would be occasioned by the grant of leave (such as, for example, difficulties with the availability of potential witnesses and the like).

Impact on rights and interests

[17] If leave is declined, Mr Grigorovich will remain able to proceed with his claim against the respondent in the Authority. The only thing that will not happen is that HRL Holdings Ltd will not be added as second respondent. That is likely to make no

⁶ At [26].

⁷ At [25] and [28].

⁸ *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2018] NZEmpC 6.

⁹ In any event, the approach to calculation makes little difference in this case. The 28-day deadline for filing (applying the approach in *Stewart*, above n 4) was 3 February 2020.

¹⁰ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38(a)].

material difference to the outcome, as his claim of unjustified dismissal is against his employer. However, in pursuing his claim Mr Grigorovich will be entitled to test the basis on which decisions relating to his dismissal were made and by whom, and what liabilities (if any) should be imposed as a result of any established breaches. For these reasons I do not accept that declining leave would materially impact on Mr Grigorovich's rights and interests.

[18] If leave is granted, the challenge will proceed and HRL Holdings Ltd will be put in a position of deciding what steps, if any, it wishes to take.

Subsequent (and previous) events (and conduct)

[19] I have been unable to identify any subsequent events which are of material relevance.

[20] I accept that the previous conduct of a party, particularly an applicant for leave, may be a relevant factor.¹¹ The respondent refers to the applicant failing to meet Authority deadlines on a number of occasions and invites the Court to conclude that the current application is simply another example of the applicant's unwillingness to progress these proceedings reasonably or in a timely manner. All of this, it is said, should weigh heavily in favour of the application being declined. The difficulty with this submission is that details of the applicant's alleged procedural failures in the Authority are not before the Court. In these circumstances I do not propose to have regard to this factor in the exercise of the Court's discretion.

[21] The respondent further submits that the application is an abuse of process, and ought to be dismissed on this basis. In this regard reference is made to earlier correspondence which Mr Grigorovich has put before the Court which the respondent says is reflective of an attempt to use his legal aid status as a mechanism for forcing the company to settle an unmeritorious claim. That correspondence (which I accept should not have been put before the Court) appears to predate the making of the application and while Mr Grigorovich was represented. I do not consider that it

¹¹ *Almond v Read*, above n 10 at [38(c)].

materially assists in deciding whether the application should or should not be granted in the exercise of the Court's discretion.

Merits assessment

[22] This part of the analysis is directed at considering the likely merits of the challenge; not the likely merits of Mr Grigorovich's substantive claim. The challenge relates to the narrow issue of whether HRL Holdings Ltd is appropriately added as second respondent to the claim. That is essentially a legal issue.

[23] There are often difficulties with assessing the merits at this early stage of a challenge. That is because the Court does not have the benefit of full facts and argument, as it would have on a hearing of the challenge itself. However, in the present case the applicant's challenge appears to be weak. As I understand it, what Mr Grigorovich is seeking to do is join HRL Holdings Ltd because he says that the company's Chief Executive Officer played a key role in the events that led to Mr Grigorovich's dismissal. Joining HRL Holdings Ltd will, it is said, ensure that liability is appropriately sheeted home for the deficiencies that Mr Grigorovich says arose during the decision-making process. The likely legal difficulty with this is that the Act only enables employees to pursue personal grievances against their employer. Mr Grigorovich does not appear to be arguing that HRL Holdings Ltd was his employer; rather he acknowledges that his employer was the company. As employer, it is the company that must respond to the claim against it if it wishes to do so.

[24] The fact that someone from HRL Holdings Ltd may have played a key role in the process leading to Mr Grigorovich's dismissal may well be relevant to an assessment of whether what the company did and how it did it was what a fair and reasonable employer could have done in the circumstances, but it does not follow that there is a basis for joining HRL Holdings Ltd as second respondent to the claim.

[25] There is another factor identified by the respondent that is said to be relevant to the likely merits of the challenge. It relates to the bar in s 179(5) of the Act on challenging a determination about the procedure that the Authority has followed, is following or is intending to follow. As counsel for the company observes, in the

relatively recent case of *Tradefog Global Co Ltd v Bartholomeusz* Judge Smith held that challenges in relation to a decision as to the joinder of parties were precluded by s 179(5).¹² Counsel also responsibly points out that the matter (whether a decision declining joinder is procedural and therefore barred from challenge) is not without doubt. Judge Ford reached a different view in an earlier judgment, in *Sai Systems Ltd v Bird*.¹³

[26] Mr Grigorovich submits that s 179(5) is not engaged because the Authority acted in bad faith. The submission appears to be based on mere assertion. In any event, it does not assist in weighing the merits insofar as the application or otherwise of the bar in s 179(5) is concerned.

[27] The key point is that the s 179(5) issue is arguable. The relative merits of each line of caselaw are not sufficiently clear cut to weigh firmly in favour of or against the grant of leave on this basis.

Conclusion

[28] I am not satisfied that it is in the overall interests of justice that leave is granted to extend the time to file a challenge, and I decline to do so.

[29] The respondent is entitled to costs. If costs cannot be agreed I will receive memoranda, with the respondent filing and serving within 14 days of the date of this judgment; the applicant filing and serving within a further 14 days; and anything strictly in reply within a further seven days.

Christina Inglis
Chief Judge

Judgment signed at 2 pm on 27 May 2020

¹² *Tradefog Global Co Ltd v Bartholomeusz* [2017] NZEmpC 24 at [33].

¹³ *Sai Systems Ltd v Bird* [2014] NZEmpC 177 at [17].