

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

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

**[2020] NZEmpC 87  
EMPC 446/2019**

IN THE MATTER OF	an application for leave to extend time to file a challenge
BETWEEN	KATIE FREEBORN Applicant
AND	SFIZIO LIMITED First Respondent
AND	CURTIS GREGORASH Second Respondent
AND	KATHRYN PARFITT Third Respondent

Hearing: (on the papers)

Appearances: F Lear, counsel for applicant  
C Gregorash, agent for first respondent  
No appearance for second and third respondents

Judgment: 18 June 2020

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**JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1] This judgment resolves Ms Katie Freeborn’s application for leave to extend time for bringing a non-de novo challenge to a determination of the Employment Relations Authority issued on 14 December 2018.<sup>1</sup> The application was brought on 28 November 2019. Having regard to the statutory timeframe for bringing a challenge,

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<sup>1</sup> *Freeborn v Sfizio Ltd* [2018] NZERA Wellington 112 (Member Loftus).

there was a delay of 10 months and two weeks. However, there is a somewhat complex procedural history which provides the context for this delay.

[2] The first respondent, Sfizio Ltd, filed a memorandum opposing the application, contending in essence it would be unfair to grant leave in all the circumstances.

## **Background**

[3] In the Authority, Ms Freeborn asserted she had been unjustifiably dismissed. Initially, her statement of problem cited the second and third respondents, Mr Curtis Gregorash and Ms Kathryn Parfitt, as her employer.

[4] According to the determination, the statement in reply identified the employer as being Wadestown Kitchen. The Authority stated the individual employment agreement identified the employer party as Regulatory Compliance Solutions Ltd trading as Wadestown Kitchen. The Authority considered that Mr Gregorash and Ms Parfitt were the sole directors and shareholders of that company, now known as Sfizio. The Authority then substituted the name of the employing party to Sfizio, stating that this was by agreement. Ms Freeborn was at this stage unrepresented.<sup>2</sup>

[5] When considering Ms Freeborn's personal grievance, the Authority concluded that the dismissal was unjustified and that Sfizio should pay her \$2,000 as compensation for humiliation, loss of dignity and injury to feelings; \$640 gross as recompense for wages lost as a result of the dismissal; \$112 gross being wages payable for working on a particular day; and a filing fee reimbursement of \$71.56.<sup>3</sup>

[6] The Authority's determination cited Sfizio only as the respondent. The determination, as noted, was issued on 14 December 2018. Sfizio filed a de novo challenge on 11 January 2019. The 28-day filing period for challenging the determination ended on 23 January 2019.

[7] Ms Freeborn continued to represent herself, initially filing a statement of defence. However, she engaged counsel in May 2019. An amended statement of

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<sup>2</sup> At [5].

<sup>3</sup> At [43].

defence was then filed for Ms Freeborn. An application was also made for an order joining Mr Gregorash and Ms Parfitt as third parties. It was her case that these persons should be joined as third parties so that all potential parties were before the Court when determining who Ms Freeborn's employer was at the material time.

[8] Sfizio opposed the application, essentially on the grounds that the company was obviously the employer, that joinder of Mr Gregorash and Ms Parfitt would amount to joining shareholders of an employing entity and would breach company law principles that the corporate veil may not be pierced; and that in any event, Ms Freeborn's employment agreement was validly terminated under a 90-day trial provision.

[9] This application was resolved by a judgment which I issued on 11 October 2019.<sup>4</sup>

[10] I stated I was satisfied that the issue of identity of parties were such that joinder was appropriate. I noted it had originally been alleged that Mr Gregorash and Ms Parfitt were the employer. I recorded that Ms Freeborn had wished to assert that her relevant dealings were only with those persons, and that she did not understand that a company called Regulatory Compliance Solutions Ltd was an entity engaged in running the café at which she worked. Accordingly, she brought her claims on the basis that the proposed third parties, Mr Gregorash and Ms Parfitt, rather than Sfizio, were potentially liable for her disadvantage and dismissal grievances. I held that joinder would enable the Court to dispose of the matter according to the substantial merits and equities of the case. In short, the issue of employer identity should be considered not only between Ms Freeborn and Sfizio, but also between her and Mr Gregorash and Ms Parfitt.

[11] I granted the application and made relevant directions, including that Ms Freeborn was to serve Mr Gregorash and Ms Parfitt as third parties with relevant documents within 25 working days of the judgment being issued.<sup>5</sup>

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<sup>4</sup> *Sfizio Ltd v Freeborn* [2019] NZEmpC 143.

<sup>5</sup> At [33(b)].

[12] On 5 November 2019, Mr Gregorash sent an email to the Registrar stating that the challenge would be withdrawn, advising a memorandum to this effect would be sent to the Court the following day. He was informed that if the proceedings were no longer to be advanced by Sfizio, a notice of discontinuance would be necessary.

[13] On 11 November 2019, the third-party proceeding brought by Ms Freeborn against Mr Gregorash and Ms Parfitt was filed and served, in accordance with the directions contained in the Court's judgment.

[14] On 18 November 2019, Sfizio filed a notice of discontinuance of its challenge.

[15] Three days later, on 21 November 2019, Ms Freeborn through her lawyers, gave notice of an intention to file an application on her behalf for leave to extend time to file a challenge to the Authority's determination citing Sfizio, as well as Mr Gregorash and Ms Parfitt, as respondents.

[16] That application was filed on 28 November 2019, supported by an affidavit from Ms Freeborn, which summarised the history just described.

[17] Initially, there was an issue as to whether service had been effected. In a minute of 17 February 2020, I ruled that service occurred by, at least, 19 December 2019; and I extended time for the filing and service of notices of opposition by each respondent to 3 March 2020.

[18] On 2 March 2020, Sfizio filed a memorandum opposing the application for leave, essentially on the grounds that Ms Freeborn should have issued the challenge within the 28 days allowed for doing so, under the Employment Relations Act 2000 (the Act). No notice of opposition was filed by Mr Gregorash or Ms Parfitt.

[19] Submissions were subsequently filed on behalf of Ms Freeborn by her counsel, Ms Lear; and on behalf of Sfizio by its agent, Mr Gregorash.

## Legal Principles

[20] The Court has jurisdiction under s 219 of the Act to extend time in circumstances such as the present. The relevant criteria were described as follows in *An Employee v An Employer*:<sup>6</sup>

[9] ...

- (1) The reason for the omission to bring the case within time.
- (2) The length of the delay.
- (3) Any prejudice or hardship to any other person.
- (4) The effect on the rights and liabilities of the parties.
- (5) Subsequent events.
- (6) The merits of the proposed challenge.

[21] As Judge Perkins noted in *P v A*,<sup>7</sup> the statements in *An Employee v An Employer* must now be read in light of the Supreme Court's judgment in *Almond v Read*.<sup>8</sup> In that judgment, the Supreme Court emphasised that the ultimate question in such a case is what the interests of justice require. It modified the approach which needs to be taken as to the merits of the claims of the party seeking exercise of the discretion to extend time, in these paragraphs:

[36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs or non-compliance with directions). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able to have them heard on the merits. We think that this is an important part of the background against which extension applications must be determined.

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed

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<sup>6</sup> *An Employee v An Employer* [2007] ERNZ 295 (EmpC).

<sup>7</sup> *P v A* [2017] NZEmpC 92, [2017] ERNZ 504 at [21].

<sup>8</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

(footnotes omitted)

[22] The Supreme Court also examined the extent to which the issue of merits may be relevant when leave is sought.<sup>9</sup> It referred to three particular problems. First, issues as to the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. That meant there would be cases where the court should discourage argument on the merits and reach a view about them only where they are obviously very strong or very weak.

[23] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal, in my view there are cases under s 219 of the Act where such factors are potentially relevant, particularly if the delay is minor.

[24] I proceed in light of these principles.

## **Analysis**

### *The reason for the omission to bring the case within time*

[25] As noted, the delay, if measured from the date when a challenge should have been brought against the determination, is a little over 10 months.

[26] As conceded by Ms Lear, if viewed in isolation such a period would be considered very significant.<sup>10</sup>

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<sup>9</sup> At [39].

<sup>10</sup> She referred to *My Noodle Ltd v Queenstown Lakes District Ltd* [2009] NZCA 224, (2009) 19 PRNZ 518 in which the Court stated that a delay of three and a half months was significant, at [21]; and to several other examples referred to in *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 22 at [54].

[27] However, it is necessary in this case to consider the reason for the delay. Ms Freeborn did not initially bring her own challenge, because shortly before the period expired for doing so, Sfizio did, bringing a de novo challenge. At that stage, she was self-represented and filed a statement of defence.

[28] When she retained counsel, it was clarified that there was an issue as to identity of employer. At that stage, Mr Gregorash and Ms Parfitt were not parties to the proceeding, and no challenge had been issued against them. It was considered preferable to seek joinder of those persons, rather than an application for leave to bring a separate challenge out of time.

[29] This approach had the obvious advantage of ensuring that all issues would be resolved in one proceeding. The Court granted leave for joinder, as already summarised.

[30] Ultimately, the company decided to discontinue the challenge, which had the effect of collapsing the third-party claim brought by Ms Freeborn against Mr Gregorash and Ms Parfitt.

[31] Timely notice of an intention to bring the present application for leave was given, and the relevant application was made a few days later.

[32] In these unusual circumstances, I conclude that although Ms Freeborn was in fact required to bring her application for leave to challenge out of time, the focus must be on the period following the discontinuance. She acted in a timely way at that point. This consideration strongly suggests that leave should be granted.

### *Prejudice*

[33] No prejudice was identified by Mr Gregorash in the memoranda he filed.

[34] Sfizio's own proceeding was live until it filed a notice of discontinuance and as already noted, only a few days later the present application was brought. That is the relevant timeframe for measuring prejudice. There is no evidence that any

respondent took any step at that point in reliance on the fact that the litigation was apparently over.

[35] It is also to be noted that the issues in the present non-de novo challenge are narrower than those of the discontinued proceedings. The discontinued challenge was brought on a de novo basis. The proposed statement of claim indicates that a non-de novo claim is to be brought, relating to two issues only – the identity of the employer, and as to quantum of compensation for humiliation, loss of dignity and injury to feelings.

[36] If leave is granted, the respondents will be free to assert that the company was the employer, which was its position for the purposes of the challenge it brought. On the other hand, Ms Freeborn will be free to argue that the employers were in fact Mr Gregorash and Ms Parfitt.

[37] I find there is no material prejudice which tells against the application for the grant of leave.

#### *Merits*

[38] Mr Gregorash did not address any submissions as to the prospect of success on the two points which Ms Freeborn proposes to raise.

[39] Both the question of identity of employer, and the issue as to the extent of remedies, are largely factual. I express no view as to the likely outcome on either of these issues. In the particular circumstances, and in light of the guidance given by the Supreme Court in *Almond v Read*, I do not consider the issue of merits to be a persuasive factor one way or the other on this application for leave.<sup>11</sup>

#### *Overall justice*

[40] In assessing overall justice, there are two factors referred to by Mr Gregorash which should be considered. The first is his point that the intended proceeding against himself and Ms Parfitt is inappropriate, since those persons were not in fact party to

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<sup>11</sup> *Almond v Read*, above n 8.



the case decided by the Authority. It was his point that Sfizio was substituted as the employer by the Authority, and the determination cited the company only, as the respondent party. The orders that were made were confined to the company.

[41] Section 187 of the Act describes the Court's jurisdiction, which includes the capacity to hear and determine elections under s 179 for the hearing of a matter previously determined by the Authority. Under s 179 of the Act, a party to a matter which was before the Authority who is dissatisfied with its determination may bring an election to have the matter heard by the Court; this includes a non-de novo challenge as is proposed in the present case.

[42] In *Abernethy v Dynea New Zealand Ltd*, a full Court stated that the words in s 187(1)(a), "a matter previously determined by the Authority", referred to the whole employment relationship problem which has been determined by the Authority.<sup>12</sup> It went on to state that, similarly, a wide interpretation of the words "to hear and determine elections under s 179" means that all matters which were before the Authority and which are the subject of an election, are to be heard and determined by the Court.<sup>13</sup>

[43] Here, the Authority received a statement of problem which pleaded that Mr Gregorash and Ms Parfitt were the employers; and then at the investigation meeting substituted another party, Sfizio, finding that it was the employer. Although the Authority stated this step was taken with the agreement of the parties, Ms Freeborn was unrepresented, and it is doubtful that the significance of the step was apparent to her.

[44] An aspect of the matter which was before the Authority obviously related to the identity of the employer; it is accordingly competent for the applicant to cite the three respondents in her intended statement of claim as defendants, thereby placing the same issue of identity before the Court.

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<sup>12</sup> *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [34].

<sup>13</sup> At [35].

[45] Mr Gregorash also referred to the fact that when the Court considered Ms Freeborn's application for joinder of third parties to the challenge brought by Sfizio, a question had arisen as to whether Ms Freeborn intended to raise her own cross-challenge; on her behalf Ms Lear had confirmed in submissions that Ms Freeborn would not raise a cross-challenge.

[46] This was a topic I considered in the interlocutory judgment relating to joinder.<sup>14</sup> At that stage, there was a consensus that the appropriate procedure was to consider the joinder of third parties, rather than an application to bring a late challenge. It had the advantage, as already observed, of ensuring that the issue of identity could be resolved in one proceeding. It could not, in my view, preclude an application for leave being brought in the unusual circumstances which developed subsequently. This is not a disentitling factor.

[47] Standing back, in my view overall justice favours the granting of leave.

### **Outcome**

[48] The application for leave to extend the time for filing of Ms Freeborn's challenge is granted.

[49] She is directed to file and serve her statement of claim and pay any necessary fee by 25 June 2020.

[50] I reserve costs.

B A Corkill

Judge

Judgment signed at 2.30 pm on 18 June 2020

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<sup>14</sup> *Sfizio Ltd v Freeborn*, above n 4, at [22]–[23].