IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 74
EMPC 100/2021

IN THE MATTER OF	an application for leave to extend time to file a challenge
BETWEEN	AHMED ALKAZAZ Applicant
AND	ENTERPRISE IT LIMITED Respondent

Hearing: 1 April 2022
(Heard at Auckland, via VMR)

Appearances: A AlKazaz, applicant in person
R Bryant, counsel for respondent

Judgment: 6 May 2022

JUDGMENT OF JUDGE J C HOLDEN

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[1] Mr AlKazaz applies for leave to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority). The determination was issued on 22 December 2017 (the substantive determination).[1] The application for leave was filed in the Court on 19 March 2021.

[2] The Authority had found that Mr AlKazaz was unjustifiably dismissed by Enterprise IT Ltd (Enterprise IT). It assessed lost earnings at $28,749.99 (being three months' remuneration) and humiliation, loss of dignity and injury to Mr AlKazaz's

[1] *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig) [*substantive determination*].

feelings to merit the amount claimed by Mr AlKazaz of $15,000.[2] It then reduced the amount of compensation payable by Enterprise IT by 20 per cent, so that the awards were $22,999.99 as lost remuneration and $12,000 as compensation for humiliation, loss of dignity and injury to feelings.[3] It did this to take account of what it assessed to be Mr AlKazaz's contribution to the situation that gave rise to his personal grievance.[4]

[3] Mr AlKazaz wishes to challenge the determination on a non-de novo basis. He says he ought to have been awarded five months lost wages, and he also seeks an additional $20,000 for compensation for humiliation, loss of dignity and injury to his feelings. Mr AlKazaz is hoping that the negative remarks made by the Authority in relation to his own performance are effectively overruled by the Court. He claims that the evidence from Enterprise IT was obtained by perjury and fabrication. In making that claim, Mr AlKazaz says that there is evidence that ought to have been before the Authority but which was not provided to the Authority by Enterprise IT.

The explanation for the delay

[4] The delay in filing the application for leave can be broken down into two time periods.

December 2017 to April 2018

[5] In late 2017 and early 2018, Mr AlKazaz was suffering from psychological health issues for which he was obtaining counselling. He also was dealing with his wife and baby's health issues following a difficult pregnancy and birth.[5] This included Mr AlKazaz and his wife returning to Egypt in February 2018 for her to receive further care.

[6] In addition, Mr AlKazaz understood from media reports that Enterprise IT would itself challenge the determination and therefore he would be able to raise his issues in the context of that challenge. This understanding arose from an article in *The New Zealand Herald* on 27 December 2017 in which an Enterprise IT director

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2 At [41] and [47].
3 At [66].
4 Employment Relations Act 2000, s 124.
5 Mr AlKazaz's first child was born in October 2017.

was quoted as saying "We are very disappointed with the ERA's decision and are considering challenging it to the Employment Court".

April 2018 to March 2021

[7] In the time period from April 2018 until March 2021, Mr AlKazaz was actively pursuing the matter but he says that for most of that time he did not realise he could apply for leave to extend time to file a challenge and so was proceeding along an incorrect route. The key actions that Mr AlKazaz took in this matter from April 2018 were:

(a) In April 2018 Mr AlKazaz became aware that he could make Privacy Act requests and started doing so, initially to Enterprise IT. From May 2018, he made a series of requests to Air New Zealand and he obtained certain documentation. Air New Zealand was a client of Enterprise IT for whom Mr AlKazaz had performed some work.

(b) By email dated 27 June 2018, Mr AlKazaz approached the Authority expressing concerns about the evidence of Enterprise IT at the investigation meeting and saying he would like to raise an application for the Authority to consider those matters. He asked what the correct procedure for doing so would be. Mr Alkazaz had been represented by counsel at the Authority investigation meeting but, by this time, he was acting for himself. On 3 July 2018, an Authority support manager advised Mr AlKazaz that, if he wished to lodge an application to reopen the Authority's investigation he may do so, in which case his application would generally be heard by the same Member who carried out the original investigation. Mr AlKazaz was advised that it is very rare for investigations to be reopened.

(c) Mr AlKazaz filed an application to reopen the Authority's investigation on 14 August 2018. That application was unsuccessful, with a

determination being issued on 30 September 2019 (the reopening determination).[6]

(d) Mr AlKazaz then filed a challenge to the reopening determination. The Employment Court judgment dismissing the challenge was dated 22 October 2020 (the reopening judgment).[7]

(e) Mr AlKazaz filed an application for leave to appeal the reopening judgment in the Court of Appeal. That application was dismissed in a judgment dated 15 February 2021 (the CA judgment).[8]

[8] Between April 2018 and March 2021 Mr AlKazaz also has been involved in numerous other proceedings and interlocutory applications. A number of those have involved Enterprise IT but others have involved different entities.

Mr AlKazaz's misunderstanding

[9] Mr AlKazaz says it was not until he received the reopening judgment that he realised he could have applied to the Employment Court for an extension of time within which to file his challenge.[9] Mr AlKazaz says that, even then, he misunderstood the correct process and filed the application for leave to appeal in the Court of Appeal. One of the remedies he sought from the Court of Appeal was that it grant him leave to challenge the Authority's determination in the Employment Court. He says it was not until he received the CA judgment that he realised he ought to have filed his application for leave to extend time in the Employment Court, which he then did. He has since applied to the Supreme Court for an extension of time to apply for leave to appeal directly against the Employment Court's reopening judgment, which the Supreme Court declined on 16 August 2021 (the SC judgment).[10]

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6 *AlKazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig) [*reopening determination*].
7 *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171 [*reopening judgment*].
8 *AlKazaz v Enterprise IT Ltd* [2021] NZCA 13 [*CA judgment*].
9 *Reopening judgment*, above n 7, at [24].
10 *AlKazaz v Enterprise IT Ltd* [2021] NZSC 101 [*SC judgment*].

The parties agree on factors to be considered

[10] As both parties note, in dealing with an application for leave to extend time, the overarching consideration is the interests of justice.[11] The specific factors the Court generally considers are:[12]

(a) the reason for the omission in bringing the case within time;

(b) the nature of the delays;

(c) any prejudice or hardship to any other person;

(d) the effect on the rights and liabilities of the parties;

(e) subsequent events; and

(f) to a limited extent, the merits of the proposed appeal.

The initial delay may have been understandable, but not the full period

[11] The starting point is that any party that wishes to challenge a determination must do so within the 28-day timeframe specified in s 179(2) of the Employment Relations Act 2000 (the Act). All parties to a determination therefore are expected to turn their minds to whether they wish to challenge all or part of a determination, and to file any challenge within the 28-day timeframe. If Mr AlKazaz wanted to challenge the remedies awarded, he ought to have filed his own challenge and not waited to see whether Enterprise IT filed a challenge. Further, the article on which Mr AlKazaz relied was published just a few days after the determination and only recorded that Enterprise IT was "considering" a challenge. There was no basis for Mr AlKazaz to have assumed that a challenge would necessarily follow. In any event, even after the 28-day time period had lapsed with no challenge being filed by Enterprise IT, Mr AlKazaz did not pursue his challenge.

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11 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].
12 *An Employee v An Employer* [2007] ERNZ 295 (EmpC).

[12] There were, however, personal circumstances affecting Mr AlKazaz at the time. These included Mr AlKazaz's own health issues, the health issues of his wife and child and the perceived need to return to Egypt in February 2018. If he had been applying for leave to extend time in, say, March or early April 2018, then those considerations would have been in Mr AlKazaz's favour in considering his application.

[13] However, from April 2018, Mr AlKazaz was certainly capable of pursuing an application for leave to extend time. He was actively pursuing many legal proceedings and processes. As noted by Chief Judge Inglis in the reopening judgment, there is publicly available information on both the Authority's and the Court's websites in relation to the options available, including the option to seek leave to extend time for filing a challenge.[13] A delay of approximately three years on this ground and in these circumstances is extraordinary. In a previous decision, a delay of more than two months was regarded as "very substantial or even gross".[14] In another case, the Court noted that the longest extension of time granted for an appeal or challenge to the Employment Court was 20 days.[15] More recently, a delay of "almost three years" was not seen as a complete barrier. A high standard of proof, however, would be required to address the circumstances that brought about the totality of the delay.[16]

[14] Mr AlKazaz's claim that he did not know the correct process for bringing the matter to the Court does not justify the delay that arose in this case.

[15] This factor very strongly goes against Mr AlKazaz's application for leave to extend time.

No significant prejudice to Enterprise IT

[16] Enterprise IT notes that it has already incurred significant financial costs in defending the many proceedings pursued by Mr AlKazaz in the Authority, the Employment Court, the Court of Appeal and the Supreme Court. It says that, whilst Mr AlKazaz has provided some security for costs, Enterprise IT's costs will be higher

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13 *Reopening judgment*, above n 7, at [24].
14 *An Employee*, above n 12, at [15].
15 *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74 (EmpC) (actually one month).
16 *AFT v BCM* [2015] NZEmpC 234 at [81].

than the security provided. It notes Mr AlKazaz is currently resident overseas and therefore it would be difficult to pursue any costs award.[17]

[17] Enterprise IT also expresses concern that its witnesses would be required to give evidence about events that occurred over four years ago.

[18] While Enterprise IT's concerns are noted, they are not unusual. Mr AlKazaz has, by consent, provided security for costs and there is no evidence that he would disobey any Court order for costs that may be made. While I acknowledge that providing evidence some years after events is difficult, it is not uncommon for witnesses to have to recall events from four years previously.

[19] There is no significant prejudice to Enterprise IT caused by the delay.

Some effect on Mr AlKazaz's rights

[20] Of course, if Mr AlKazaz is unable to pursue the challenge, he would be unable to proceed with his arguments on the remedies awarded but that has to be seen in context. He was successful in the Authority and the difference between what he was awarded in the Authority and what he might expect to receive should he be successful in the Court is, in the scheme of things, relatively modest. While he is hopeful that the Court would make different factual findings that are less critical of him, there is, of course, no guarantee that would occur.

[21] While this factor is in Mr AlKazaz's favour, it is by no means determinative.

Subsequent events point against the application being successful

[22] Mr AlKazaz has undertaken extensive litigation against Enterprise IT for some years now. That litigation has led to more than 20 separate determinations or judgments after the substantive determination, at all levels in the Court system. That counts against him being granted leave to pursue his challenge.

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[17] Mr AlKazaz currently resides in Dubai.

Merits uncertain

[23] The merits of the proceeding are difficult to assess. Only a superficial assessment can be made at this stage.

[24] Mr AlKazaz relies on a paragraph in the reopening judgment:[18]

> [10] As I have said, there are two interrelated threads to Mr AlKazaz's argument that the Authority's substantive investigation ought to be reopened. The first relates to alleged false evidence given by witnesses for the company in the Authority. That evidence centred on performance concerns, later referred to by the Authority in reducing remedies by 20 per cent for contribution. A reopening of the investigation is said to be necessary to enable the truth to come out, presumably via cross-examination. *The truth, I infer, would be that the company did not have legitimate performance concerns about Mr AlKazaz; that he was performing well throughout his time with the company; and that he did accept constructive criticism, contrary to the Authority Member's findings.*

[25] Mr AlKazaz has read that paragraph, and the sentence emphasised, as Chief Judge Inglis accepting his point. The sentence has to be read in the context of the case generally and [10] specifically; the Chief Judge is simply recording what she infers Mr AlKazaz's case would be. It is not an endorsement of that case.

[26] I accept that Mr AlKazaz is genuine and that he considers material was not provided to the Authority that ought to have been so provided. But it is not possible to find that the case is strong. This factor is neutral.

Not in the interest of justice to grant leave

[27] I turn then to the ultimate question of the interests of justice.

[28] Mr AlKazaz was employed by Enterprise IT for around 90 days from September until December 2016. That short period of employment over five years ago has led to extensive litigation on Mr AlKazaz's part.

[29] As noted in the reopening judgment, in this jurisdiction, the desirability of dealing with issues at an early stage and resolving matters quickly is reflected in a

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[18] *Reopening judgment*, above n 7, at [10] (emphasis added).

number of provisions in the Act.[19] This includes the 28-day period within which a challenge is to be filed.[20]

[30] The delay in bringing this application and the events since the issue of the determination, and, in particular, since April 2018, are determinative of this matter. It is not in the interests of justice for Enterprise IT to have to continue to face litigation brought by Mr AlKazaz. The application fails.

[31] This judgment means that, as far as this Court is concerned, Mr AlKazaz has reached the end of the road in relation to his claims against Enterprise IT.[21]

Costs

[32] Costs are reserved. If Enterprise IT seeks costs and those cannot be agreed with Mr AlKazaz, it may make application by way of a memorandum filed and served within 21 days of the date of this judgment. Mr AlKazaz then has 21 days within which to file and serve his memorandum in response and Enterprise IT has a further seven days thereafter to file and serve any memorandum in reply. Any such application for costs would then be determined on the papers.

J C Holden
Judge

Judgment signed at 11 am on 6 May 2022

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19 *Reopening judgment*, above n 7, at [5].
20 Employment Relations Act 2000, s 179(2).
21 Mr AlKazaz referred in submissions to judicial review. He said it is "a term he has read about". There is nothing in the material before the Court that suggests there is any basis for either of the determinations of the Authority to be judicially reviewed.