

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

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

**[2022] NZEmpC 85
EMPC 423/2021**

IN THE MATTER OF an application for leave to extend time to file
 a challenge to a determination of the
 Employment Relations Authority

BETWEEN CREST COMMERCIAL CLEANING
 LIMITED
 Applicant

AND TOTAL PROPERTY SERVICES
 (CANTERBURY) LIMITED
 Respondent

Hearing: On the papers

Appearances: C McGuinness, counsel for applicant
 P McBride, counsel for respondent

Judgment: 19 May 2022

**JUDGMENT OF JUDGE K G SMITH
(Application to extend time to challenge a determination)**

[1] On 13 September 2021, the Employment Relations Authority imposed a penalty on Total Property Services (Canterbury) Ltd payable to the Crown.¹ The penalty arose from a claim by Crest Commercial Cleaning Ltd against Total Property alleging breaches of s 69OEA of the Employment Relations Act 2000 (the Act). Crest also unsuccessfully sought a compliance order.²

¹ *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2021] NZERA 402 (Member Beck) at [61] and [63].

² At [62].

[2] Crest and Total Property are competitors providing cleaning services. The catalyst for this dispute was Crest’s success in securing a contract to provide cleaning services for a Christchurch high school, displacing Total Property.³

[3] Crest’s success triggered pt 6A of the Act providing for the continuity of employment for certain employees. The protection provided to them by pt 6A enabled the affected employees to elect to transfer their employment from Total Property to Crest on the same terms and conditions of employment.⁴ Where such an election is made, s 69OEA of the Act requires information pertaining to the transferring employees to be supplied by the former employer to the new employer.

[4] The dispute arose because Crest and Total Property disagreed about the information required to be supplied to comply with the Act. In addressing Crest’s application, the Authority posed two questions to answer. The first one was whether Total Property provided the information in a timely fashion. The second question was whether what was provided was comprehensive enough to ensure “a smooth transition”, alternatively expressed as providing a “seamless” process.⁵

[5] The Authority accepted that Crest’s request for information was made in good faith. It concluded sufficient information was provided to it by Total Property, but in a piecemeal way.⁶ However, it held that Total Property was “inexplicably slow” in providing what it was required to supply.⁷ That conclusion led to a finding that s 69OEA was breached.⁸ As a consequence, Total Property was ordered to pay a penalty of \$1,000 to the Crown within 28 days.⁹ Subsequently, it was ordered to pay Crest \$3,000 as a contribution to its legal costs and to reimburse that company for its filing fee of \$71.56.¹⁰

³ At [13].

⁴ Employment Relations Act 2000, s 69A(3)(a).

⁵ At [36]; and citing *Pacific Flight Catering Ltd v LSG Sky Chefs New Zealand Ltd* [2013] NZCA 386, [2014] 2 NZLR 1 at [32].

⁶ *Crest*, above n 1, at [47].

⁷ At [37] and [47].

⁸ At [38].

⁹ At [63].

¹⁰ *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2021] NZERA 481 (Member Beck) at [16].

Application to extend time

[6] Although Crest was only partially successful it did not challenge the determination.¹¹ Instead it made a considered decision to move on. Crest changed its mind when Total Property elected to challenge the determination in a limited way, as will be discussed shortly.

[7] In a lengthy application containing submissions about the test to apply, Crest sought an extension of time to file a challenge to the determination.

[8] Crest's application claimed that the overall interests of justice supported granting an extension. It argued that the disadvantage it would suffer by not being able to file a challenge would be greater than the disadvantage Total Property may suffer if an extension of time is granted. This proceeding was described as a test case because s 69OEA has not previously been considered by the Court.

[9] The application was accompanied by a draft statement of claim. The proposed pleading asserts that Total Property breached ss 69OEA(2), 69OEA(3)(a) and (b)(i) and 69OEA(5) of the Act.¹² The claim is that despite iterative requests for information, Total Property did not provide what was required and that the cost apportionment allowed by s 69LA has never been settled.

[10] The draft claim, if filed, seeks a full rehearing of the entire matter. The claimed remedies are a finding that there was a breach, or breaches, by Total Property and for a penalty to be imposed of \$20,000 for each breach, accompanied by a request that the whole penalty, or as much as is directed by the Court, be paid to Crest. Additionally, a compliance order is to be sought requiring Total Property to comply with s 69OEA(2).¹³

[11] The application for an extension of time is opposed by Total Property.

¹¹ Employment Relations Act 2000, s 179(2).

¹² Respectively an obligation to provide the new employer with individualised information about an employee, to do so as soon as practicable but no later than the date on which the restructuring takes effect and to provide updating information if there is a change.

¹³ Section 140A.

[12] To place this application into context it is necessary to briefly discuss Total Property's challenge.

Total Property's challenge

[13] Total Property challenged both the Authority's substantive determination and the subsequent costs determination. The challenge to the substantive determination is confined to putting in issue paragraphs [13], [14], [35], [36], [37], [38], [43] and [46].

[14] In a general way Total Property's challenge alleged that the Authority conflated the scope of information to be provided with when it was to be provided. The challenge also took issue with the Authority's approach to analysing pt 6A, where the conclusion was reached that Total Property was obliged to provide information to facilitate a "seamless" transfer of employees.¹⁴

[15] There are two pleadings in the challenge calling into question whether the investigation was conducted fairly, pleading that adverse conclusions were drawn from the Authority's own investigations that were not put to Total Property for comment. The claim is that a quote relied on in the determination, and attributed to Total Property, was from a website operated by another company with a similar name.¹⁵

[16] As to the penalty, the challenge was that the Authority fell into error by not first considering if the circumstances justified imposing one, before considering what it ought to be. The amount of the penalty is not challenged.

[17] The challenge to the costs determination sought a full rehearing and to set aside the orders made.

[18] Crest responded to the challenge and filed a statement of defence.

¹⁴ *Crest*, above n 1, at [36].

¹⁵ At [13].

Analysis

[19] The Court has a discretion to extend time to enable a challenge to be filed.¹⁶ The overarching consideration is whether granting an extension is in the interests of justice. Factors to be considered when assessing an application include:¹⁷

- (a) The length of the delay.
- (b) The reasons for the delay.
- (c) The conduct of the parties, particularly the applicant.
- (d) Any prejudice or hardship to the respondent or any other interested person.
- (e) The significance of the issues raised by the proposed challenge both to the parties and more generally.

The length of the delay and the reasons for it

[20] Where the delay is brief, leave is usually granted without considering the merits of the proposed challenge.¹⁸ Where the delay is more than brief, the merits may be considered. However, a decision declining an extension of time based on the claim lacking merit should only be made where the case is clearly hopeless.¹⁹

[21] Where there has been a slip, so that the date to file an appeal has been inadvertently, missed and steps are taken to rectify that mistake quickly, the delay is likely to be inconsequential. Conversely, the longer the delay the more the applicant is seeking an indulgence and the stronger the case for an extension of time will need to be.²⁰

¹⁶ Employment Relations Act 2000, s 221(c).

¹⁷ *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801 at [38]; and see *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]–[10].

¹⁸ *Almond*, above n 17, at [37].

¹⁹ At [39](c).

²⁰ At [38](a).

[22] Mr McGuinness acknowledged that the last day to file a challenge as of right was 11 October 2021. The application for an extension of time was not filed until 25 November 2021, 45 days later. Preparation of the application for an extension of time, and the draft statement of claim accompanying it, occurred alongside drafting Crest's statement of defence to Total Property's challenge. The statement of defence was filed on 23 November 2021 and the present application was made two days later. Crest was on notice, from at least the date of service of the statement of claim on 22 October 2021, that Total Property had challenged the determination.

[23] Mr McLauchlan, Crest's Managing Director, explained that the company's initial decision not to challenge the determination was made taking into account the costs and time involved. That decision was revisited when Total Property filed its challenge but by then the time for Crest to file a challenge as of right had passed. His concern was that even though Total Property's challenge is limited the matters placed in issue by it mean the Court will effectively hear the whole case again but without access to the remedies Crest seeks. Crest's decision to apply for an extension of time was described by him as pragmatic, responsible and a proper course to take so that the Court hears the whole matter with Crest being able to address and deal with all of the issues it originally raised.

[24] Mr McGuinness accepted the delay was "not a brief" one but submitted that, when seen in context, that was not a significant factor. There was, he argued, no suggestion the delay was due to bad faith or for an ulterior motive. He submitted that the length of the delay needed to be considered in tandem with the reason for it. He was careful to point out that the Court had previously observed that delays must necessarily be viewed in context and the length of them is not determinative, drawing on comments from *Waikato District Health Board v Dent*, *Talent Propeller Ltd v UXK* and *OSS Ltd v Arthur*.²¹

[25] In *Dent*, the Court rejected an argument that the DHB's application should be declined because of a delay of about three months. The reason for the delay was a misapprehension by the DHB that it could file a cross-challenge when it filed the

²¹ *Waikato District Health Board v Dent* [2015] NZEmpC 72 at [13]; *Talent Propeller Ltd v UXK* [2021] NZEmpC 2 at [7]; *OSS Ltd v Arthur* [2021] NZEmpC 90.

statement of defence. That misapprehension arose from wrongly relying on a superseded Court practice direction. The absence of bad faith or an ulterior motive were important considerations in favour of the application.

[26] A significant part of the decision in *Dent* was that the plaintiff had sought to build on her success in the Authority by challenging those parts of the determination that went against her.²² The Court held that it would be unjust and inequitable to hear only part of the employment relationship problem between the parties and granted the application.²³

[27] *Talent Propeller* was a case challenging a determination about a non-publication order relating to the defendant's identity.²⁴ Delays occurred in processing an application for legal aid which precluded a timely challenge.²⁵ The Court referred to the delay of a month as being not at the higher end of the scale but not short either.²⁶

[28] In that case the Court considered it was desirable for the defendant to have an opportunity to support the Authority's determination on other grounds so that the real controversy between the parties would be grappled with.²⁷ The Court accepted that, while there is value in finality, there was no real prejudice created by having to deal with a challenge on a wider basis than anticipated.

[29] *Arthur* involved a short delay of seven days.²⁸ The limited nature of the employer's challenge precluded the employee from arguing that there was no genuine business reason for the restructuring that led to his dismissal, an argument not accepted by the Authority. The Court concluded an unfairness would result if the remedies awarded could be challenged by the employer without providing the employee with an opportunity to bolster his case by presenting all available arguments that he was unjustifiably dismissed.

²² *Almond*, above n 17, at [17].

²³ At [17].

²⁴ *Talent Propeller Ltd*, above n 21, at [1].

²⁵ At [4].

²⁶ At [5].

²⁷ At [9].

²⁸ *Arthur*, above n 21.

[30] In each of those cases the Court was confronted with the absence of an ability to file a cross-challenge and a real risk of unfairness, caused by not being able to deal with and consider the whole of the issues between the parties.

[31] From Crest's perspective its proposed challenge provides an opportunity to seek a compliance order and increased penalties without which the issues between the parties would not be able to be properly considered.

[32] The difficulty with Crest's application is that there was in fact no delay in filing a challenge, in the sense that it made a considered business decision to accept the Authority's determination and to take no further action. It has done as Mr McBride submitted, which is to have a change of mind about the litigation once on notice that Total Property intended to dispute the imposition of a penalty.

[33] What needed to be explained by Crest was the length of time it took to apply for an extension of time once it was served with Total Property's challenge. While Mr McGuinness acknowledged the delay as 45 days, there is a discrete part of that delay, from 22 October 2021 onwards, that has not been adequately explained and weighs against granting leave.

[34] There is, however, one matter that comes to Crest's assistance and was touched on by Mr McLauchlan. While Total Property wants to concentrate on the timeliness of its responses to Crest measured against the requirements of the Act, that assessment cannot be divorced from inquiring into what was supplied. That is essentially what Crest wants to challenge the determination about.²⁹

[35] If only Total Property's challenge is heard an unsatisfactory situation could be created if, for example, after hearing the evidence the Court considers the information provided did not comply with pt 6A. It would not be appropriate, in such a case, to conclude a breach or breaches had occurred but for the Court then to be unable to make orders that would otherwise be justified.

²⁹ *Crest*, above n 1, at [36]–[38].

[36] While Crest has not adequately explained its delay the ability to be able to present the whole case assists its application.

The conduct of the parties

[37] The conduct of the parties may be relevant, such as a history of non-cooperation and/or delay by an applicant.³⁰ Mr McBride argued Crest's conduct was relevant by reference to other Authority determinations involving that company.³¹ He went so far as to comment that, when pt 6A was introduced in Parliament, Crest was referred to in Hansard. An adverse inference was invited to be drawn from that happening.

[38] Allegations were also made about Crest's behaviour in the transition of employees between companies. Mr Emery, Managing Director for Total Property, referred to the following four events:

- (a) Crest requiring pre-employment drug testing of transferring employees before allowing them to transfer.
- (b) Crest requiring pre-employment induction at a remote location and outside work hours before it would allow transfer.
- (c) Changing terms of staff engagement.
- (d) When staff did not transfer, deducting wage/holiday pay entitlements due to them said to be because they had not given the required notice.

[39] Crest's response was that the matters raised are not relevant.

[40] I prefer to see the issue of the conduct of the parties as being about how they participated in the litigation giving rise to the challenge. Attempting to consider their

³⁰ *Almond*, above n 17, at [38].

³¹ See *Fotu v Crest Commercial Cleaning Ltd* [2012] NZERA Auckland 307 (Member Dumbleton); *Doran v Crest Commercial Cleaning Ltd* [2012] NZEmpC 97, [2012] ERNZ 161; *Gibbs v Crest Commercial Cleaning Ltd* [2005] ERNZ 399 (EmpC).

actions in other proceedings could be fraught with difficulties, for example where the Court may not have sufficient information to gain a complete picture about what happened and why.

[41] As to the incidents referred to by Mr Emery, they are not immediately connected to the steps required to be taken by Total Property (and for that matter Crest) and do not carry any weight in this assessment.

[42] This factor is neutral.

Any prejudice or hardship

[43] Mr McGuinness submitted there would be no prejudice to Total Property if Crest's application succeeded. First, because Total Property has already filed a challenge and committed itself to re-litigating the matters in issue between it and Crest. Second, because Crest seeks only to widen the challenge's scope to "ensure justice can properly be done, and in the public interest". Third, the expenditure considerations identified by Total Property are not significant or persuasive, because they can be addressed as costs of the proceeding.³²

[44] Mr McBride submitted that there would be prejudice to Total Property in four ways:

- (a) Rendering the challenge to date as time wasted.
- (b) Rendering Total Property liable to defending multiple maximum penalty claims.
- (c) Rendering it liable to defending compliance order claims dismissed by the Authority.
- (d) Obscuring the breaches of natural justice by the Authority.

³² See *Arthur*, above n 21, at [41].

[45] I agree with Mr McGuinness that Total Property cannot show a prejudice arising from possible increased costs to point towards declining this application. Total Property is already committed to the expense of this litigation. It has challenged the determination as having conflated the scope of the information to be provided with the time to provide it. Both subjects will need to be canvased and it is difficult to see that having to respond to Crest's challenge will materially impact on the preparation and presentation of its case. If there is additional expenditure or wasted cost that can be dealt with in a future costs application.

[46] I do not accept that the fact that Total Property will be exposed to other or increased sanctions is sufficient to amount to the sort of prejudice or hardship that would count against granting the application. What needs to be taken into account is whether there is any prejudice or hardship to Total Property arising from the delay rather than the fact that if leave is granted it will need to respond to Crest's claims.³³ There was no evidence of any other difficulty of that sort such as, for example, the unavailability of material witnesses.

[47] Finally, I do not accept Mr McBride's submission to the effect that, in some way, Total Property's natural justice point will be obscured if Crest is allowed to challenge the determination. Since that subject is part of Total Property's challenge it is reasonable to assume it will present whatever evidence is considered relevant to support it, so an ability to pursue that argument is not affected in any way by Crest being able to pursue its own challenge. I note, in passing, that the Court is required to reach its own decision in relation to the challenge and that is likely to have a strong bearing on this argument at the hearing.³⁴

[48] This assessment points towards granting the application.

³³ See for example *Singh v Compass Group New Zealand Ltd* [2016] NZEmpC 63 at [31]. See also *Lewis v Immigration Guru Ltd* [2017] NZEmpC 13 at [7].

³⁴ Employment Relations Act 2000, s 183.

The significance of the issues raised by the proposed challenge

[49] If there is public interest in the issue in the proposed proceeding, the case for an extension of time is likely to be stronger than if there is no such interest.³⁵

[50] Mr McGuinness submitted that there is a matter of significance arising from the challenge because it will allow the true nature of the dispute and available remedies to be before the Court. I agree, but aside from that there are no particular issues identified in the proposed challenge that will not already be before the Court in Total Property's challenge and Crest's defence of it.

[51] This factor is neutral.

Outcome

[52] Weighing up those evaluative factors, I have reached the conclusion that it would be wrong to preclude Crest from challenging the substantive determination.

[53] The application is granted. Crest is to file its statement of claim within seven days of the date of this judgment.

[54] Costs are reserved.

KG Smith
Judge

Judgment signed at 3.15 pm on 19 May 2022

³⁵ *Almond*, above n 17, at [38](e).