

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

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

**[2023] NZEmpC 104
EMPC 167/2023**

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

BETWEEN ATTAPORN CHANTAMA
 Applicant

AND MCKERCHAR LAMB LIMITED
 Respondent

Hearing: On the papers

Appearances: PJ Brown, counsel for applicant
 A Mackenzie, counsel for respondent

Judgment: 12 July 2023

JUDGMENT OF JUDGE B A CORKILL

[1] Mr Chantama seeks leave to extend time to challenge a determination of the Employment Relations Authority.¹

[2] The delay was one day and resulted from a miscalculation by counsel for the applicant, Mr Brown, compounded by difficulties in arranging an interpreter for Mr Chantama to confirm his instructions. The statement of claim raising the challenge was filed the day those instructions were finalised.

[3] Initially, Mr McKerchar, on behalf of the respondent, McKerchar Lamb Ltd (MLL), said he would oppose the application. Accordingly, I timetabled the matter

¹ *Chantama v McKerchar Lamb Ltd* [2023] NZERA 169 (Member van Keulen).

for the filing of a notice of opposition and submissions. Then, Mr McKerchar, who is not legally trained, obtained legal advice from Ms Mackenzie. She informed the Court she had been instructed to act and that Mr McKerchar had not understood the situation fully. Once representation was obtained, it was decided that the company would not oppose the application.

[4] Since the application is not opposed, my consideration of it can be brief.

The application

[5] The Authority issued its determination on 6 April 2023. Mr Chantama's claim for wages arrears succeeded. MLL was directed to pay him \$3,970.60. His claim for unjustifiable dismissal, however, was unsuccessful. He had also sought a penalty to be paid by MLL for failing to keep wage and time records, but as this had not been commenced within the 12-month period, that application was dismissed.²

[6] Mr Chantama wished to bring a challenge because he considered the Authority had erred, both with regard to the calculation of wages, including whether there were inappropriate deductions, and as to the outcome of his personal grievance. He accordingly wanted to bring a non-de novo challenge on these topics.

[7] In his supporting affidavit, Mr Chantama said that after the determination was issued, he discussed with Mr Brown the possibility of bringing a challenge. He understood that he had 28 days to do so and that the last day for filing the challenge would be 5 May 2023. In fact, the correct day for filing was a day earlier.

[8] Mr Chantama said he is from Thailand and English is not his first language. He asked Mr Brown to meet with him and an interpreter on 5 May 2023 to discuss some questions he had regarding the proposed challenge. This was the first available date when both Mr Chantama and his interpreter could attend. The meeting proceeded on that day. Mr Chantama confirmed that the proposed

² At [44]–[46].

challenge should proceed. It was filed that day on an understanding this was the final day of the period for bringing a challenge.

Discussion

[9] It is well established that the Court has jurisdiction to extend time under s 219 of the Employment Relations Act 2000, and that there are established principles for the exercising of the Court's discretion, the overarching consideration being the interests of justice.³

[10] I am satisfied that a misunderstanding arose as to the correct calculation of the time period to bring a challenge. It is accepted that the error was that of counsel, rather than of Mr Chantama himself. The length of the delay is obviously minimal.

[11] I consider the prejudice to Mr Chantama, if leave is not granted, outweighs the potential prejudice to MLL, if leave is granted. Mr Chantama possessed a right of challenge which he wished to exercise, and but for the inadvertent error would have done so as a matter of right.

[12] Finally, with regard to the merits of the matter, I follow the dicta of the Supreme Court in *Almond v Read*,⁴ where it was made clear that the merits are generally not relevant where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice, beyond the fact of the appeal itself.⁵ Accordingly, I do not regard a consideration of the merits as being relevant to this application.

Result

[13] In the circumstances, leave is granted. Mr Chantama's claim is to be filed and served within seven days of the date of this judgment.

³ *Baylis v Chief Executive of the Porirua City Council* [2021] NZEmpC 213 at [9]–[11].

⁴ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39].

⁵ See also *Drivesure Ltd v McQuillan* [2022] NZEmpC 24 at [18].

Costs

[14] Mr Brown sought costs. However, given that an indulgence has been granted as a result of counsel's error, and that the application was not ultimately opposed, costs are to lie where they fall.

B A Corkill
Judge

Judgment signed at 12.20 pm on 12 July 2023