

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

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

**[2024] NZEmpC 55
EMPC 243/2023**

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 extend the time
for filing a notice of opposition

BETWEEN JACOB ALEXANDER
Applicant

AND ANDREW THORN
Respondent

EMPC 324/2023

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 non-publication order and
stay of proceedings

AND IN THE MATTER OF an application for leave to extend time for
filing a notice of opposition

BETWEEN ANDREW THORN
Applicant

AND JACOB ALEXANDER
Respondent

Hearing: On the papers

Appearances: J Alexander, applicant (EMPC 243/2023) and respondent
(EMPC 324/2023) in person
A Thorn, respondent (EMPC 243/2023) and applicant
(EMPC 324/2023) in person

Judgment: 25 March 2024

INTERLOCUTORY JUDGMENT OF JUDGE M S KING
(Applications for leave to extend time to file notice of opposition)

Background

[1] Mr Alexander seeks leave to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority).¹ In the Authority, Mr Alexander successfully argued that he was an employee of Greenback Ecommerce Ltd (Greenback) and not an independent contractor. However, Greenback went into liquidation and was accordingly struck out as a party. Mr Alexander amended his claim to argue that Greenback's director, Mr Thorn, was his employer, or was involved in any breaches of employment standards against him.

[2] The Authority rejected Mr Alexander's claim that Mr Thorn was his employer. However, it concluded that Mr Thorn was involved in any breach regarding non-payment of the minimum wage and holidays to Mr Alexander. The Authority also determined that Mr Alexander could continue his minimum wage and holiday pay claims against Mr Thorn, but that he could not continue his claim for unjustified dismissal or his claim for penalties.

[3] Mr Alexander now wishes to challenge that determination on a non-de novo basis but requires leave from the Court as his challenge was not filed within the statutory timeframe. Mr Thorn wishes to oppose Mr Alexander's application for leave. However, Mr Thorn did not file his notice of opposition within the statutory timeframe. Mr Thorn seeks leave from the Court to file his notice of opposition out of time. Mr Alexander opposes Mr Thorn's leave application.

[4] Mr Thorn has separately filed an application for leave to extend time to file a challenge of his own, which is opposed by Mr Alexander. Mr Thorn has also filed an application for non-publication orders and a stay. Mr Alexander wishes to oppose Mr Thorn's application for non-publication and stay orders. However, his notice of

¹ *Alexander v Thorn* [2023] NZERA 192 (Member Craig).

opposition was not filed within the statutory timeframe. Mr Alexander seeks leave from the Court to file his notice of opposition out of time. Mr Thorn opposes Mr Alexander's leave application.

[5] This judgment considers two of the above applications, being:

- (a) the application by Mr Thorn for leave to extend time to file a notice of opposition to Mr Alexander's application for leave to extend time to file a challenge; and
- (b) the application by Mr Alexander for leave to extend time to file a notice of opposition to Mr Thorn's application for non-publication and a stay.

[6] Both applications are opposed.

Applicable legal principles

[7] In cases where the statutory timeframe has elapsed, the Court has discretion to extend the time for filing.² That discretion is exercised in accordance with established principles. The overarching consideration is the interests of justice.³ The usual factors that will be considered are:⁴

- (a) the reason for the omission to bring the case within time;
- (b) the length of the delay;
- (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) the merits of the proposed challenge.

² Employment Relations Act 2000, s 219.

³ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

⁴ *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8].

Mr Thorn's application for leave to extend time

[8] Mr Alexander filed his application for leave to extend time to file a challenge on 19 July 2023. Mr Thorn had 14 days within which to file his notice of opposition to that application. The statutory timeframe closed on 2 August 2023. No notice of opposition was filed within that timeframe. Mr Thorn filed an application for leave to extend time to file a notice of opposition on 9 August 2023. The application for leave was filed seven days after the due date for filing the notice of opposition. If his application for leave is not granted, Mr Thorn will not be able to oppose Mr Alexander's application.

Reasons for the delay

[9] Mr Thorn submits that the delay is short and was inadvertent. Mr Thorn claims that he misunderstood the meaning of "clear days" which resulted in him miscalculating the time he had for filing a notice of opposition. Mr Thorn had understood "clear days" to mean working days, and he excluded weekends from his calculation of the statutory timeframe for filing. Mr Thorn submits that as a lay person he is unfamiliar with Court filing timeframes. He submits that the meaning is ambiguous and that he had difficulty finding public information to help him understand the meaning. Mr Thorn also referred to doubt over the correct address for service for Mr Alexander.

[10] Mr Alexander disputes that Mr Thorn is a lay person who is unfamiliar with Court proceedings. His evidence refers to previous representations Mr Thorn had purportedly made about his knowledge of the judicial system and his successful appearances in a wide variety of Courts across New Zealand. Mr Alexander considers that the meaning of "clear days" is not difficult to understand, and that it was not difficult for Mr Thorn to clarify the meaning of "clear days". Mr Thorn disputes the evidence provided by Mr Alexander.

[11] Both parties have referred to Mr Thorn's 3 August 2023 email correspondence with the Court registry where he was informed that he missed the statutory deadline of 2 August 2023 and that he would need to apply for leave to file any notice of

opposition. However, Mr Thorn did not file and serve his application for leave until 9 August 2023.

[12] I am not persuaded by Mr Thorn's explanations for the delay. Mr Alexander's application expressly stated that Mr Thorn had "14 clear days" to file any notice of opposition to the application. It also stated Mr Alexander's address for service. I do not consider it credible that Mr Thorn could confuse the concept of "clear days" with that of "business days". While Mr Thorn may have been unsure what the statutory timeframe for filing was, this doubt was removed when the registry informed him on 3 August 2023 that the statutory timeframe had expired. However, Mr Thorn took a further six days to file and serve his application for leave without providing any explanation for this further delay. I am not satisfied that the application was brought with an appropriate level of urgency. This factor weighs away from granting leave.

The length of the delay

[13] Mr Thorn filed his leave application six days after being advised that the time to file his notice of opposition had passed. The length of the delay is modest; however, it must be considered within the context of the substantive proceeding. Both parties have missed statutory timeframes for filing applications and are seeking indulgences from the Court with regard to these deadlines. Further, no steps have been taken by Mr Alexander to progress his application. Overall, I do not consider the delay to be so great as to be weighed against Mr Thorn. I regard this factor as neutral.

Rights and liabilities of parties

[14] I consider there would be prejudice to Mr Thorn, who has a legitimate interest in the outcome of Mr Alexander's leave application if leave is refused and he is not granted the right to oppose the application. I also consider that Mr Alexander was aware of Mr Thorn's intention to seek leave to file a notice of opposition on 3 August 2023, as he was copied into Mr Thorn's emails with the registry which he later responded to indicating that he would be opposing his application.

[15] I do not consider there would be prejudice to Mr Alexander arising from the prolongation of the dispute by seven days. Seven days is not significant, particularly given the delays to date and the number of applications for leave filed by both parties due to their failures to comply with the statutory timeframes or Court timetable directions. Moreover, whether or not Mr Thorn is granted leave, Mr Alexander will still need to establish that there is sufficient basis for his leave application. I do not consider the effect of granting leave to be significant on Mr Alexander. This factor points towards granting leave.

Prejudice/subsequent events or conduct

[16] Neither party has suggested that granting leave will impact on any other party.

[17] Neither party has referred to any subsequent events which are material to the issue before the Court.

Merits

[18] The Supreme Court in *Almond v Read* held that an application for an extension of time in a case such as the present should focus on the issue of delay, rather than on the issue of merits and should only reach a view about them where they are obviously strong or weak.⁵ Given the nature of these proceedings it is not possible to make more than a superficial assessment of the merits of the case, and there is insufficient evidence before the Court to assess the strength of Mr Thorn's opposition to Mr Alexander's application for leave to extend time to file a challenge. I regard this factor as neutral for present purposes.

Application granted

[19] Standing back, I consider Mr Thorn's application to be very finely balanced. However, that balance should be resolved in his favour, having regard to the overall interests of justice.

⁵ *Almond v Read*, above n 3, at [39(c)].

[20] Accordingly, the application for leave to extend the time for the filing of the notice of opposition to an application for leave to extend time to file a challenge is granted.

Mr Alexander's application for leave to extend time

[21] Mr Thorn filed his application for non-publication and stay orders on 14 September 2023. Mr Alexander had 14 days within which to file his notice of opposition to that application. The statutory timeframe closed on 28 September 2023. No notice of opposition was filed within that timeframe. Mr Alexander filed an application for leave to extend time to file a notice of opposition on 26 October 2023. He filed 42 days after the notice of opposition was due. If his application for leave is not granted, Mr Alexander would not be able to oppose Mr Thorn's application.

Reasons for the delay

[22] The delay was caused by Mr Alexander seeking evidence to support the grounds for his opposition to Mr Thorn's application. His evidence is that he filed the application "as soon as possible to the courts and caused no purposeful delay". His submissions primarily focus on the merits of Mr Thorn's application, as opposed to his own application for leave to extend time to file a notice of opposition and the reasons for the delay in filing. Mr Thorn submits that Mr Alexander has failed to provide an evidential basis for why his notice of opposition was not filed within time.

[23] I consider that Mr Alexander's drafting of the notice of opposition took much longer than it should have, although the Court recognises that Mr Alexander is not a lawyer and that there were various challenges in obtaining evidence to support his notice of opposition to the application. Overall, I am not satisfied that the application for leave was brought with an appropriate level of urgency. This factor points away from granting leave.

The length of the delay

[24] Mr Alexander filed his leave application 42 days after the notice of opposition was due. The length of the delay is not minor, nor is it insignificant. However, as

noted above, this issue must be viewed within the context of this proceeding. Both parties have missed statutory timeframes and are seeking indulgences from the Court. Mr Thorn has also not taken any steps to progress his application despite the lengthy delay. I consider the length of the delay, in and of itself, is not a factor which could tip the scales against Mr Alexander in the circumstances of the case.

Rights and liabilities of the parties

[25] I consider Mr Alexander has a legitimate interest in the outcome of Mr Thorn's application for non-publication orders and a stay.

[26] While I consider the length of the delay to be significant, I find that if Mr Alexander had filed and served his notice of opposition in time, Mr Thorn would have found himself in precisely the same position which would apply if leave were granted. Moreover, whether or not Mr Alexander is granted leave, Mr Thorn will still need to establish a basis for his non-publication and stay application. I accept that granting leave will cause inconvenience and frustration for Mr Thorn. However, I do not consider he will suffer a level of prejudice sufficient to count against granting leave.

Prejudice/subsequent events or conduct

[27] Mr Alexander wishes to oppose Mr Thorn's application for non-publication orders. Mr Thorn is seeking the non-publication orders for the benefit of a witness he proposes to call to support his case in the substantive proceedings. As the application for non-publication has not yet been determined by the Court, for the purposes of this judgment I will refer to the person Mr Thorn is seeking to have to non-publication orders over their identity as the "witness".

[28] Mr Thorn alleges that Mr Alexander has harassed the witness and made defamatory statements about them. Mr Thorn has also produced an affidavit from a Ms Peters, who gave evidence that she assisted Mr Alexander in obtaining evidence about the witness, which Mr Alexander included in his affidavit in support of his application for leave. Ms Peters' evidence is that she was misled by Mr Alexander

into providing him with the information, and she opposes the public disclosure of the information as she believes it infringes on the witness's privacy. The witness has not filed any evidence on their position on the application for non-publication and will not have standing to challenge the outcome of the non-publication application. However, these are matters that can be advanced by the parties when the application for non-publication is before the Court.

[29] Mr Alexander disputes the evidence given by Ms Peters. He also disputes Mr Thorn's claims that he has harassed the witness or said anything defamatory about the witness.

[30] The Court is unable to determine based on the untested affidavit evidence before it whether Mr Alexander misled Ms Peters to obtain information about the witness and whether this conduct would factor against the grant of leave.

[31] I accept that the witness is an innocent third party, who is caught up in a dispute between the parties and that the witness could be adversely impacted if a judgment identified the witness and the allegations about them. However, at this early stage in the proceedings and with the limited evidence before the Court, I take this opportunity to signal to the parties that the allegations relating to the witness's past activities do not seem particularly relevant to the matters before the Court. If repeating of such allegations to the Court continues to be the case, any irrelevant information would not be included in the judgment of the Court.

[32] My overall assessment is that the factors of prejudice and subsequent events or conduct are neutral.

Merits

[33] The Supreme Court in *Almond v Read* referred to the fact that an application for an extension of time in a case such as the present should focus on the issue of delay, rather than on the issue of merits and only reach a view about them where they are obviously strong or weak.⁶

⁶ *Almond v Read*, above n 3, at [39(c)].

[34] Mr Thorn has applied for an application for a stay and non-publication orders. Mr Alexander submits that the Authority has not made any determination as to remedies, as it is awaiting the determination of this Court before doing so. In effect there is no determination to stay, as there is no determination that can be enforced. Mr Thorn's application for stay does not appear to have any merit and is obviously weak.

[35] In regard to the application for non-publication orders, I consider that there is insufficient evidence before the Court to assess whether non-publication orders are justified or not. I would expect the evidence to be teased out when determining the application for non-publication. I cannot at this stage conclude that the non-publication application or Mr Alexander's opposition to this element of the application is obviously strong or weak. Overall, I consider this factor to be neutral.

Application granted

[36] Standing back, I consider Mr Alexander's application is also finely balanced. However, that balance should be resolved in his favour, having regard to the overall interests of justice and the prejudice to Mr Alexander if leave is not granted.

[37] Accordingly, the application for leave to extend the time for the filing of the notice of opposition to an application for a stay and non-publication orders is granted.

Orders

[38] Both of the applications for leave are granted:

- (a) Mr Thorn is directed to file and serve his notice of opposition to Mr Alexander's application for leave to extend time to file a challenge within three working days of this judgment.
- (b) Mr Alexander is directed to file and serve his notice of opposition to Mr Thorn's application for a stay and non-publication orders within three working days of this judgment.

[39] Once these documents have been filed a telephone directions conference is to be scheduled to progress the application for non-publication order and stay.

[40] Both parties have been successful in their respective applications for leave to extend time to file a notice of opposition. Both parties are self-represented and would only be entitled to claim disbursements. In the circumstances, it is appropriate to let costs lie where they fall.

M S King
Judge

Judgment signed at 2 pm on 25 March 2024