

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 40/07  
ARC 17/07**

IN THE MATTER OF      application for leave to file challenge out of  
time

BETWEEN                WENDY ANNE CLEAR  
Plaintiff

AND                      WAIKATO DISTRICT HEALTH BOARD  
Defendant

Hearing:      15 June 2007  
(Heard at Auckland)

Appearances: Mark Hammond, counsel for plaintiff  
Geoff Bevan, counsel for defendant

Judgment:      28 June 2007

---

**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS**

---

**Introduction**

[1]      The plaintiff seeks leave to commence a challenge by way of a de novo hearing against a determination of the Employment Relations Authority at Hamilton on 13 February 2007. Through oversight on behalf of both the plaintiff and her counsel, Mr Hammond, the period of time for filing a challenge against the determination was allowed to expire. The Court has a discretion to grant leave conferred by s219 of the Employment Relations Act 2000. In anticipation of leave being granted, the plaintiff has filed with the Court proposed proceedings attaching the Authority's determination.

[2] The defendant opposes leave being granted. This is on the grounds that the merits of the case do not justify such leave and that such leave is not in the overall interests of justice.

### **Principles applying**

[3] The right to challenge a determination of the Authority is contained in s179(1) of the Employment Relations Act 2000. The right is qualified by subsection (2). This provides that every election to have the matter heard by the Court must be made within 28 days of the date of the determination. In this case the right to challenge expired on 13 March 2007. The application for leave to challenge out of time was filed on 4 April 2007. This was 22 days after the time limit had expired, not 20 days as submitted by Mr Hammond.

[4] Section 219 of the Act provides:

**219 Validation of informal proceedings, etc**

- (1) *If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*
- (2) *Nothing in this section authorises the Court to make any such order in respect of judicial proceedings then already instituted in any court other than the Court.*

[5] The Court's jurisdiction to exercise a discretion to extend time by the granting of leave is derived from this provision.

[6] The exercise of the discretion under this and predecessor legislation has been the subject of a number of decisions of this Court. Principles were established by Chief Judge Goddard in *Day v Whitcoulls Group Ltd* [1997] ERNZ 541, which have been adopted in numerous decisions since that time, including *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103. In *Day* the Chief Judge of the Employment Court stated (p548):

*I prefer to leave this discussion on the basis that the overriding consideration is the justice of the case and that an applicant for leave must have some onus of persuasion, but there should be no predisposition to refuse leave. As I indicated in Lavery, it is for the Court to do whatever the justice of the case requires.*

*Under this heading it further seems to me that the following matters are material to the exercise of the discretion:*

- (1) The reason for the omission to bring the appeal 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.*

*This is not an exhaustive list but only a list of those elements which seem to have a bearing on the present case.*

[7] Wider and well established principles are also applicable to a case such as this. In *Ratnam v Cumarasamy* [1964] 3 All ER 933, the Privy Council's opinion at page 935 stated:

*The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.*

In *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 Richmond J (as he then was) stated at 91:

*When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.*

[8] As Chief Judge Goddard said in *Day*, the list of matters to be considered is not exhaustive. In addition, it is not necessarily appropriate to give more emphasis to one of the categories than the other. All are relevant in considering each individual case, where overall justice lies and how the discretion should be exercised against that overriding principle. Judge Couch in *An Employee v An Employer* unreported, 15 May 2007, CC 8/07 referred to the categories in *Day*, at paragraph [10], as “convenient and appropriate headings under which to consider the matters relevant to the exercise of [the] discretion”. I agree that that is the approach, which I should adopt in this case.

## Discussion of criteria

### (a) *The reason for the omission and length of delay*

[9] There is no dispute between the parties about this. The period of delay was 22 days. The entire period of delay has been explained as an oversight of both the plaintiff and her counsel. This arose by virtue of the circumstances in which the Authority Member made findings on liability and then referred the matter to mediation to see whether the parties could resolve remedies by agreement. Miss Clear in her affidavit asserts that it was her intention to endeavour to resolve all matters finally at mediation as she had by that time decided to dispute all of the findings of the Authority not favourable to her.

[10] Mr Hammond in his submissions has referred to *Woud v Department of Corrections* unreported, Judge Travis, 31 August 2004, AC 37A/04. This case involved a very similar fact situation to the present case. The period of delay was 20 days. The Authority had referred the matter of remedies to mediation. Where that case differs from the present is that by the time the application for leave was dealt with the determinations on remedies had been made and the challenge and cross-challenge filed within time. Nevertheless, similar considerations arise in the present case on this point, because, the mediation having failed, the Authority is shortly to conduct its investigation into remedies. Hopefully, a determination will be issued shortly thereafter. It is very likely, having regard to the nature of the dispute, that Miss Clear will file a challenge to that determination. It is possible there will be a cross-challenge. The scope of any evidence to be heard by the Court on such a challenge or cross-challenge will inevitably give rise to the issue of whether the Court would effectively need to conduct what amounts to a de novo hearing. The relevance of such an eventuality to the application for leave in the present case, where almost identical considerations apply, is made plain in the following statement of Judge Travis in *Woud*:

*[17] What saves the matter in the present case was the fact that the determination was not complete until the final determination and the challenge against the determination of remedies was filed in a timely fashion. I also take into account that in order to deal with both the cross-challenge, filed on behalf of the Department, and the amended statement of claim challenging the application as to remedies, a de novo hearing has been sought which must, of necessity, canvass the issues that Mr Woud*

*wished to challenge in the original determination. The Authority, in the second determination, determined that there be a 50 percent contribution for serious misconduct, a challenge to that finding would necessarily open up for enquiry in the de novo hearing, the alleged misconduct. For these reasons I concluded that leave ought to be granted.*

[11] The issue of whether leave should be granted in situations where time has elapsed through error made by legal advisors, has also recently been considered by the High Court in *Peters v Television New Zealand* unreported, High Court Auckland, Cooper J, 1 May 2007, CIV 2004-404-003311. Cooper J stated as follows:

*[39] Notwithstanding the comprehensive submissions made by Ms Baigent and Ms Dwight, I have decided that it is appropriate for leave to be granted in this case. The situation has arisen because of the error of counsel. Mr Henry has explained the position. It is perhaps surprising that counsel as experienced as Mr Henry overlooked that the matter had been heard by an Associate Judge, as he said in his memorandum of 25 September 2006. Nevertheless, that is what he said occurred, and neither counsel for the first nor fourth defendant has questioned that statement. As Gault J said in Sutton v New Zealand Guardian Trust, the Court is reluctant to penalise parties for errors made by their legal advisors.*

**(b) Prejudice**

[12] Mrs Margaret Parata, who is the mid-wife/clinical midwifery manager based at Tokoroa Hospital, swore an affidavit in support of the notice of opposition. In addition there was an affidavit in support from Mr Gregory John Peploe, employment relations consultant, who is employed by the defendant Board. Both affidavits set out circumstances claiming to give rise to prejudice, which will be suffered by the defendant if leave is granted.

[13] Mrs Parata sets out a little of the background to her relationship with Miss Clear and the deterioration in that relationship leading to these proceedings. She refers to the impact the process has had on her and will continue to have if leave is granted. She refers also to the daunting effect on witnesses who “*have had to be involved in the hearings*”. She states she would not like them to have to do this again “*on my behalf*”. That statement raises a basic misconception as to the nature of these proceedings and the challenge, which will be heard if leave is granted. Mr Hammond was at pains to stress this point in his submissions. The proceedings are against the Board and the manner in which it dealt with the complaints of Miss Clear

against Mrs Parata. It is true that much of the evidence was directly aimed at the alleged relationship difficulties between Miss Clear and Mrs Parata. Nevertheless, the fact must not be lost sight of that this is a claim against the employer. The witnesses did not give evidence on Mrs Parata's behalf. They gave evidence on behalf of the Board.

[14] Mr Peploe's affidavit dealt with the fact that the Board has incurred substantial costs already and will incur further substantial costs if leave is granted. Mr Bevan, counsel for the Board, advanced on this by pointing out in his submissions that the Board is publicly funded, and diverting funds to a matter such as this has a debilitating effect on the ability of the Board to provide for the needs of the public and patients. Mr Peploe also properly expressed concern as to the impact a continuation of the proceedings is likely to have on Mrs Parata. However, in weighing up this aspect of the matter and the effect not only on Mrs Parata but also the other witnesses, I have regard to the effect and scope of the evidence if a challenge is subsequently lodged against the determinations on remedies. I shall consider this more fully shortly.

[15] In support of this aspect of alleged prejudice, Mr Bevan referred me to *McDonald v Raukura Haurora O Tainui* [2003] 2 ERNZ 322. The Court there considered the issue of the defendant being concerned with health delivery and the effect of the costs on its ability to do that. However, in that case, Judge Travis clearly placed emphasis in addition on the plaintiff's challenge being unlikely to succeed on its merits, the excessive period of the delay and that the relief already granted by the Authority was unlikely to be increased. Those factors distinguish *McDonald* from the present case.

[16] All of the facts, which are raised in the affidavits of Mrs Parata and Mr Peploe, would have existed if Miss Clear had filed her challenge within time. While they are no doubt galling and concerning for the defendant Board, they are not matters of prejudice arising directly from the delay itself. The point is raised by Mr Bevan that, as was the finding on the position in *McDonald*, so too in the present case, the employer is entitled to assume that the plaintiff's failure to challenge in time meant the Authority's determinations were being accepted. I do not accept that particular finding of Judge Travis in *McDonald* applies in the present case. First, the

matter of remedies remains to be decided and there is no certainty that will be an end of the proceedings. More importantly, however, the parties embarked on mediation following the determination. While I am not permitted to know what transpired there, it is likely that at the mediation Miss Clear would have made her dissatisfaction with the determinations known.

**(c) *Effect on rights and liabilities of the parties***

[17] In this case this amounts to a balancing exercise. Clearly, the effect on both parties will be substantial depending upon whether the leave is granted or not. If leave is refused, Miss Clear will be deprived of her rights to challenge several findings on her disadvantage grievances and lose the substantial right to challenge the finding that she was justifiably dismissed. The effect on the Board, if leave is granted, will be the need to then face the prospect of findings favourable to it being reversed. Presently it faces the likelihood of remedies arising from one determination against it. In an assessment of the overall justice of the matter it appears that each of the parties' rights will be affected one way or another depending upon the outcome of the application. On balance Miss Clear stands to suffer the greater deprivation if leave is not granted.

**(d) *Subsequent events***

[18] This is a case where there are subsequent events, which bear on the discretion. I have already adverted to these. The unusual circumstance in this case is the referral to mediation following the liability findings. The consequences of this, as I have already stated, are that, while Miss Clear has failed to challenge the present determination in time, her rights remain preserved in respect of the yet to be issued determination on remedies. If leave is now refused but she exercises her right to challenge the remedies she can elect a hearing *de novo*. Even if she chooses to elect what is euphemistically referred to as a "*non de novo challenge*" the Court will be called upon to determine the scope of evidence for such a challenge. In dealing with a challenge to remedies the Court is compelled to consider any contributory conduct of Miss Clear and whether such conduct should result in reduction of remedies if granted. The Authority Member of course has had the advantage of hearing and enquiring into all matters on liability before embarking on a determination on remedies. However, the Court will not be in that position and will

undoubtedly require to hear a substantial amount of the evidence again even though remedies on only one disadvantage grievance will be in issue. The effect therefore, of the prejudicial issues raised by Mrs Parata and Mr Peploe in their affidavits will remain whether or not leave is granted to Miss Clear to challenge the liability determinations. In other words, regardless of the findings on leave, the witnesses and the Board will finish up in no different position. It is likely that the same witnesses will be required to give evidence and the costs are likely to be similar.

*(e) Merits*

[19] I now turn to the question of merits, which occupied a substantial part of the submissions by each counsel. While both Mr Bevan and Mr Hammond spent considerable time on this issue I do not propose to consider the matter at length. Mr Bevan dealt comprehensively with the pleadings and the evidence and determination on each of the grievances. He submitted that what Miss Clear is really aiming to do with the proceedings is to have her allegations of bullying against Mrs Parata upheld. That is her one focus he submits. He fairly conceded that if the test for this particular aspect of the exercise of the discretion is that Miss Clear has no chance of success then he could not submit that. He submitted, however, that the threshold is much higher than that and the Court is required to make a reasonably thorough examination of the merits. As an example he referred to the quite detailed examination of the merits made in *Bilderbeck v Brighthouse Ltd* [1993] 2 ERNZ 74. He submitted that is appropriate in this case as well. That, however, was a decision made under the now repealed Employment Contracts Act 1991 where leave was sought to appeal against the Employment Tribunal's decision out of time. For reasons, which I mention shortly, the ability of the Court to make an assessment on the merits where the challenge is from a tribunal where there is no record is a little different from the situation prevailing under the Employment Contracts Act. With appeals under that Act a full record of evidence from the lower tribunal was available to the Court.

[20] I am of the view that the Court needs to be careful not to place too much emphasis on this aspect, which is just one of the several issues to be considered in the assessment of overall justice. Judge Shaw in *Stevenson* dealt with the issue as being "*the absence of any realistic prospect of success*". Judge Travis in *McDonald*



spoke of the challenge as being “*unlikely to have succeeded*”. He referred to the observation of Judge Colgan in *SAS Technologies Ltd v Hollis* [2003] 2 ERNZ 98:

*In light of the new regime and its institutional and procedural arrangements, I would prefer to address this consideration as the prospects or chances of success on the challenge rather than the merits of the case that have been traditionally only been able to be assessed by a full hearing of an appeal. It is significant that, unlike the previous legislative regime, a challenge to the Employment Relations Authority's determination is the first opportunity that a party has for a judicial consideration of the case by traditional adversarial litigation. As the Judge noted in Stevenson, the previous restrictions under s 95(4) Employment Contracts Act 1991 no longer confine the scope or content of a hearing in this Court, at least when a hearing de novo of the challenge is elected under s 179 of the 2000 Act.*

[21] From these observations I do not regard the threshold to be reached to be quite as high as Mr Bevan has suggested. In this case after all, Miss Clear has succeeded in one of her claims to disadvantage – perhaps the most substantial of the three. In addition she has been dismissed, she claims, unjustifiably. The Court needs to take care that in considering this issue of the merits, it is not led into an over-detailed and wide-ranging analysis of the reasoning and determination of the Authority in a situation where no record of the evidence is kept. Nevertheless, the Court can make an assessment at a reasonably basic threshold. There will be cases where the Court will be able to find that the chances of success are plainly remote, as Judge Shaw in *Stevenson* and Judge Travis in *McDonald* were able to do. However, where, as I believe exists in the present case, an applicant for leave can demonstrate reasonable prospects of success, they should not readily be deprived of their rights of appeal.

## **Conclusions**

[22] As was said by Cooper J in *Peters*, the Court is reluctant to penalise parties for the errors of their legal advisors. The reasons for delay in this case are well explained and arise from the unusual circumstances of the referral to mediation on remedies. In similar circumstances this Court has previously granted leave (*Woud*). The delay in this case was not excessive and counsel moved to remedy the position by filing the present application immediately the error was discovered. Insofar as

allegations of prejudice are concerned, having read the lengthy determination one cannot help but have considerable sympathy for the witnesses for the Board who will have to re-traverse the entire matter. This case involves a very difficult employment relationship problem. However, that would have been the situation in any event if Miss Clear had filed her challenge in time as was her right. There is no prejudice in this case specifically related to the period of delay. In the end the defendant and its witnesses would have been in the same position had steps been taken in time.

[23] Clearly in this case the rights and liabilities of the parties will be respectively affected whichever decision is reached. However, the position of the defendant is not so adversely affected that Miss Clear should be deprived of a fundamental right of appeal and to have her grievances reheard in a Court of record.

[24] Subsequent events in this matter are significant. As I have discussed, the reservation of a determination on remedies pending mediation has led to the position where, even if I refused leave, the scope of any challenge on remedies may result in the same liability issues and evidence needing to be heard. An equally lengthy hearing is likely to be required to that, which will eventuate with leave granted. The one disadvantage grievance, which will be covered by the further determination on remedies, is of a substantial nature and in my view is likely to require the canvassing of a large portion of the evidence heard by the Authority Member.

[25] As far as merits are concerned I cannot say, having read the determination on liability carefully and giving proper consideration to matters raised by counsel, that Miss Clear has no “*realistic prospect of success*” or that she is “*unlikely to have succeeded*” with her challenge.

### **Disposition**

[26] For these reasons I am persuaded that the justice of the case requires Miss Clear to be granted leave to challenge the Authority’s determination out of time. The challenge shall be by way of a de novo hearing as sought. The statement of claim already filed is to be treated as the plaintiff’s pleadings in the challenge. The appropriate filing fees are to be paid, if they have not already been paid. The defendant is to have 30 days from the date of this judgment to file a statement of defence.

[27] That raises a further issue, which Mr Bevan mentioned in a separate memorandum, to be considered in the event leave was granted. Miss Clear in her statement of claim had elected to challenge the issues unfavourable to her, but to not challenge the one issue in her favour. Section 179(3) of the Act requires the election to specify the determination or the part of the determination to which the election relates and then to state whether or not the party making that election is seeking a full hearing of the matter, referred to as a hearing de novo. There is some dispute arising from Mr Bevan's memorandum as to whether the plaintiff, Miss Clear, is entitled to proceed in that way. The issue would be resolved if the defendant were to file a cross-challenge, which it is now entitled to do, by including it in the statement of defence (see Practice Direction, Chief Judge Goddard [2005] 1 ERNZ 60 at paragraph [21]). However, if the defendant chooses not to deal with the matter in that way, then it will need to be the subject of a further interlocutory application if it is to be dealt with prior to trial commencing.

### **Costs**

[28] Mr Bevan sought costs in favour of his client in respect of the application for leave, even if leave was granted. Mr Hammond submitted that, while it is common that even a successful applicant for leave faces an award of costs, this is not an appropriate case to award costs against Miss Clear. The defendant has been put to considerable expense in taking steps to oppose the application and appear in support of the notice of opposition. My assessment of the matter was that it was appropriate for the defendant to oppose the application. However, in the circumstances prevailing in this case there are mitigating circumstances. In *Woud* Judge Travis pointed out that where this type of procedure is adopted by the Authority the preliminary determination does not determine the employment relationship problem. While technically leave is required he pointed to good reasons why in the context of mediation being unfettered, the filing of a challenge should be delayed. In this case the oversight by Ms Hammond and Miss Clear is understandable. I am of the view that it would be preferable to await the outcome of the entire matter on its merits before awarding any costs. Accordingly, costs on the present application are reserved.

### **Hearing of challenge**

[29] As I have indicated the employment relationship problem is currently before the Authority for remedies to be determined. I am informed this will soon be dealt with. Any remaining interlocutory matters arising from the challenge as it presently stands before the Court can be continued. However, the challenge (and any cross-challenge, which may now be filed) is not to be set down for hearing until the determination on remedies has been issued and any further challenge and cross-challenge filed or the time for doing so has expired. In that way all matters can be dealt with at the one hearing.

M E Perkins  
Judge

Judgment signed at 10.15am on Thursday 28 June 2007