IN THE EMPLOYMENT COURT
WELLINGTON

WC 26/09
WRC 30/09

	IN THE MATTER OF	an application for leave to extend time
	BETWEEN	JONATHON PARKER Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Hearing: 16 November 2009
(Heard at Wellington)

Appearances: A, Counsel for Applicant
T P Cleary, Counsel for Respondent

Judgment: 18 November 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] For reasons set out in a subsequent judgment given on 1 December 2009 and for the reasons for that judgment given on 4 December 2009 (WC 26A/09), an order prohibiting publication of counsel's name or other identifying details means that this copy of the judgment for public distribution will refer to counsel by the letter "A".

[2] The sole but intensely contested question for preliminary decision is whether Jonathon Parker should have leave to extend the time within which to file and serve his challenge to the determination of the Employment Relations Authority dated 7 November 2008 (WA 148/08) rejecting his claim that he was dismissed unjustifiably.

[3] The 28-day period under s179 of the Employment Relations Act 2000 ("the Act") for filing a challenge expired on 8 December 2008. This application was filed on 11 September 2009. The delay is therefore of about 9 months.

[4] A brief and neutral summary of relevant events follows. Mr Parker was employed by Silver Fern Farms at one of its meat works. He was a member of the NZ Meat Workers and Related Trades Union Inc ("the union") and the relevant collective agreement incorporated expressly the employer's drug and alcohol policy. Mr Parker's car was searched by a private investigator acting on behalf of the employer and a quantity of plant material was found in the vehicle. Mr Parker left the works before the employer's inquiries could proceed and he was absent on medical advice for about 5 weeks. Other employees admitted to possessing cannabis although, because there was uncertainty about whether the car park was part of the meat works, all employees were simply warned.

[5] When Mr Parker eventually sought to return to work, his employer made it a condition of his return that he undergo a test for drugs. After taking advice, Mr Parker declined to do so, alleging that the employer's drug and alcohol policy did not allow it to make this a condition of returning to work or permitting the company to sanction by dismissal Mr Parker for his refusal. The applicant brought proceedings in the Employment Relations Authority challenging the justification for his dismissal but these were rejected roundly by the Authority. Mr Parker failed to have his challenge to the Authority's determination brought within the statutory time limit.

[6] The applicant's explanation for the delay is that it was brought about by circumstances beyond his control, namely the length of time taken by the Legal Services Agency to approve a grant of legal aid. The applicant also says that there are other circumstances in which it will be just to extend time. These include allegations that:

- the Employment Relations Authority's investigation was conducted unfairly;

- the Authority's decision is erroneous in fact and in law;

- the determination has affected adversely his rights and reputation;

- the challenge raises important questions of law and it is in the public interest that these be answered;

- Mr Parker's challenge is meritorious and there will be no prejudice to the respondent other than what was described as "*the normal cost and inconvenience"* of having to defend a proceeding; and

- The justice of the case requires that leave be granted.

[7] The respondent opposes the application to extend time. It did not become aware that a challenge was contemplated until 8 September 2009, 10 months after the determination was issued, and in spite of communications with Mr Parker's advocate including dealing with costs which were determined by the Authority on 4 February 2009. The respondent says that, if leave is granted, it will be prejudiced as a result of the delay. It says that it has, since the Authority's determination, dealt with a number of similar instances at its plant in reliance on the Authority's determination in this case relating to the company's drugs and alcohol policy. Next, it says that the substance found in Mr Parker's car (said to be cannabis but now the subject of dispute by Mr Parker) has been destroyed after the expiry of the appeal period. It says that key witnesses have changed jobs and vocations. It says that there would be material disputes of facts dating back to the period between October and December 2007 and that accurate recollections of this time are likely to be affected adversely by the time that a challenge could come on for hearing in early 2010.

[8] Contrary to the applicant's assertion, the respondent says his case is without merit. It points out that Mr Parker accepted in the Authority's investigation that he consented to a search of his car because, he said, he had nothing to hide; he did not deny that the substance found in his car was cannabis; and has not disputed, at least until now, subsequent expert analysis of it. The respondent says that Mr Parker was, as a union member, bound by the drug and alcohol policy that was agreed between the union and the company including that it was to be regarded as serious misconduct when an employee refused to undergo testing. Finally, in this regard, the respondent points out that the Legal Aid Review decision relies on pleadings which are inconsistent with evidence given at the Authority.

[9] The respondent says that there are discretionary factors that favour its position. These include that Mr Parker has not, despite demand, paid the costs awarded by the Authority on 4 February 2009 (WA 12/09). Although it accepts that the applicant may have disagreed strongly with the Authority's determination and taken steps after it was issued to have it challenged, he did not either notify the respondent or lodge a pro forma challenge with the Court within time as he could easily have done.

[10] The respondent relies on the reasoning in a judgment of this Court, *An Employee v An Employer*[1]. In that case the applicant took no steps after receiving the Authority's determination and, after the expiry of the appeal period, engaged a lawyer to both challenge the determination and act on the issue of costs in the Authority. No application was made and a second lawyer was engaged who filed the application after a delay of 75 days or about 2 and a half months. The applicant claimed that the principal reason for delay was that receipt of the substantive determination in the Authority triggered an acute episode of depressive illness caused originally by the employment relationship problems, making her unable to take the necessary steps to initiate a challenge until she received assistance from a relative.

[11] Subsequent delays were said to have been caused by the need to find a suitable lawyer and the closure of law offices over the Christmas holiday period. The Court held that a delay of more than 2 months was *"very substantial or even gross."* Expert evidence did not substantiate the contentions of psychiatric illness having precluded the applicant from taking steps, at least for more than a few weeks. The applicant had failed to explain fully the delay including the delay after the expiry of the appeal period. The Court considered that the merits of the proposed challenge would be a significant factor in the exercise of the Court's discretion including, especially if there may be discerned a significant error of law or reasoning on the face of the determination. The application for leave to extend the time for challenging was disallowed.

[1] [2007] ERNZ 295

[12] In this case, of course, the delay is much more substantial, 9 months as opposed to 2 and a half months. That is, however, only one factor of many and the particular facts of different cases are themselves so diverse that each must really be decided on its own merits and justice. The Court should not be dazzled by the extreme length of the delay alone. Overall justice must determine the application by weighing all relevant criteria.

[13] The statutory provision allowing an extension of time to challenge is s219(1) of the Act that 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.*

[14] The ultimate test is the interests of justice for both parties. The applicant bears an onus of persuading the Court that it will be in the interests of justice to extend time in all the circumstances. A series of useful guidelines has been provided by this Court in *Stevenson v Hato Paora College Trust Board*[2] and I will address those that are relevant in assessing the overall justice of the application.

[15] It must be remembered that Mr Parker was dismissed not for possession of cannabis (there was only a warning for this) but, rather, for refusing to accept as a condition for returning to work weeks later the employer's requirement of him to provide a urine specimen for drug analysis. There does not appear to be any dispute that this was a requirement for returning to work that the employer purported to impose and that Mr Parker refused to agree to that condition. The question of justification for his dismissal would turn largely upon whether that was a lawful and reasonable instruction which will be a matter of analysis of documentary evidence and submissions rather than recollection of disputed facts by witnesses, or indeed analysis of plant material.

The delay

[2] [2002] 2 ERNZ 103

[16] The following are the uncontested although materially incomplete facts about the delay in lodging a challenge. Mr Parker received the Authority's determination, which was dated 7 November 2008, 2 days later on 9 November. His advocate, Claudene Greenwood, assisted him to find a lawyer to challenge the determination. A Napier lawyer[3] was instructed and an application for legal aid was signed by Mr Parker on 14 November. Mr Parker was told by C that he had 28 days from the date of the Authority's determination within which to challenge. Mr Parker had the court filing fee and, having had no response to his application for legal aid on the day before the expiry of the limitation period, he contacted his advocate seeking to give her the filing fee to enable a challenge to be filed on time. Mr Parker says that Ms Greenwood told him she had been advised by C not to file a challenge until there had been a response to his application for legal aid from the Legal Services Agency ("LSA").

[17] The LSA responded to the application for legal aid on 6 January 2009 declining it on the grounds that Mr Parker had "*no prospect of success*". Mr Parker asked his advocate to help him find another lawyer but at that time most legal offices were closed for the holidays and he says that many were uninterested in undertaking his case on legal aid. Mr Parker says that although C had prepared a basic statement of claim, his understanding was that he needed considerably more work done on his case to persuade the LSA to make a grant. Mr Parker says that Ms Greenwood told him that C had told her that he was not permitted by his firm to perform the work to a standard that would be acceptable to the LSA without proper funding for this being in place. He says that other lawyers that he approached were similarly unprepared to perform the preliminary work without a guarantee of payment. On the evidence before me, C had agreed to act for Mr Parker, that is he had accepted a retainer to act.

[18] Eventually, although when is not stated, Mr Parker located his current solicitor, A, who prepared (for legal aid purposes) a more extensive and detailed statement of claim. On 27 April 2009 A applied to the LSA for a reconsideration of its decision not to grant the plaintiff legal aid and, in support of this application,

[3] I will refer to him as "C" as he has not had an opportunity to give his account of what may be serious allegations of professional negligence against him.

attached a new statement of claim. The LSA declined this further application by letter dated 5 June 2009, again on the grounds that his *"prospects of success [were] not sufficient to justify a grant of aid"* and that the case was uneconomic. The LSA advised that what was by then the necessary application for leave would be *"marginal and … expensive to bring."*

[19] On 16 June 2009 Mr Parker wrote to the Legal Aid Review Panel expressing his disappointment at its decision and, on 29 June 2009, received a letter from the panel requesting copies of his employment agreement and the drug and alcohol policy. Mr Parker forwarded this to his advocate who still held his file and asked her to respond on his behalf.

[20] By decision dated 2 September 2009 the Legal Aid Review Panel reversed the LSA's decision to refuse the plaintiff aid.

[21] This application and a draft statement of claim were filed on 11 September 2009. Mr Parker's intentions to challenge were first conveyed to the intended defendant at about that time.

Reasons for omission

[22] These are scant and in the form of double hearsay as to the initial failure to lodge a challenge within time, and almost non-existent as to the significant ongoing delay of about 9 months after the case fell out of time. It is surprising that there is no affidavit evidence by either of Mr Parker's solicitors who were responsible, sequentially, for ensuring that a challenge had been filed in a timely way and, after it had not, for applying to extend the time, by leave, as soon as possible and alerting the employer to that state of affairs. Mr Parker has explained his instructions to C but not to A. The solicitors have not explained their apparent inactivity. I raised with A my expectation that he should have been a witness (and therefore not counsel) but he elected to continue in the latter role. Mr Parker was not present in Court.

Prejudice or hardship to others

[23] This is said to be specific in one instance and general in others. First, the intended defendant says that the material tested scientifically and analysed as cannabis, has been destroyed so that it is no longer available for a second analysis to prove or disprove Mr Parker's election to put the respondent to the proof that it was cannabis.

[24] To the extent that the destruction of the plant material is now prejudicial to the intended defendant (bearing in mind that Mr Parker was not dismissed for possession or use of that material), that prejudice can be mitigated significantly, and perhaps even eliminated, by disallowing the plaintiff to assert that the plant material analysed was not cannabis. This would not disqualify Mr Parker from arguing that the material seized was not his or attributable to him, or even that a chain of secure custody to the point of analysis cannot be established.

[25] The less specific prejudice alleged is that potential witnesses have now moved on to other places and jobs and that the recollections of witnesses will probably be dimmed by the passage of time. That is no doubt so. Those arguments can, however, be met by the analysis of the case which shows that the decision is unlikely to turn significantly, or perhaps even at all, on disputed factual evidence of witnesses. Rather, Mr Parker was dismissed after being asked to undergo a drugs test which he refused to do. That was on advice, because he disputed the employer's entitlement in law to require him to do so and, therefore, to impose sanctions including the sanction of dismissal for his refusal. That is what the case will turn on. Apart from relevant documents and some evidence which was the subject of written briefs prepared for the Employment Relations Authority that can be used to refresh the memories of witnesses, the challenge will turn principally on questions of law applied to largely agreed facts. So I conclude that any prejudice to be suffered by the intended defendant will not be significant.

Merits of proposed challenge

[26] My assessment at this point is that Mr Parker's challenge has merit. Whether he was dismissed justifiably will turn on whether the employer's condition for him to return to work, that is to undergo a drugs test, was a lawful and reasonable instruction. It will not be, as the Authority appears to have found in its determination, whether the Authority considered it was fair and reasonable for the employer to demand a negative drugs test as a condition of a return to work. Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly. A fair and reasonable employer in all the particular circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or unreasonable direction to an employee.

[27] Mr Parker has a substantial arguable case that the employer's policy, incorporated as part of the collective agreement to which he was subject, did not permit the employer to demand lawfully that he undergo a drug test as a condition of returning to work. Further, Mr Parker's case is that there was a genuine dispute between the parties as to the interpretation and operation of the drug testing policy. This should not have been resolved unilaterally by the employer dismissing the employee summarily for asserting his rights to compliance by the employer with its policy. The collective agreement included a disputes procedure which ought to have been followed in these circumstances: *Sky Network Television Ltd v Duncan*[4].

Criticism of Authority

[28] Much of the applicant's effort in supporting this application was devoted to very serious criticism of the fairness of the Employment Relations Authority's investigation meeting. Although, if leave is granted, this will be a challenge by hearing de novo in which event the Authority's manner of investigating Mr Parker's

problem will be irrelevant, the grant of leave to extend time is discretionary. In this regard, one relevant element may be whether the applicant has had his case dealt with fairly. In these circumstances, and because of the severity of the criticism of the Authority member, I directed that all affidavits be provided to the Authority member as a matter of natural justice and allowed him the opportunity to respond by memorandum, which he took.

[29] The result of this has been a further plethora of evidence, both repetitive and new, answering the Authority member's defence of his position. In the end, other factors decide the application for leave and I have determined not to embark upon what would have to have been an extensive consideration of, first, the truth of what happened during the investigation meeting and then the rights and wrongs of it. This is not an application for judicial review of the Authority member as could have been brought by Mr Parker and would indeed have been the appropriate vehicle for the serious and sustained criticisms that he and his advocate have levelled at the Authority. Although perhaps unsatisfactorily for both the applicant and the Authority, I have, for these reasons, decided not to determine that aspect of the case.

Decision of application

[30] This is a finely balanced case. Despite the long delays and inadequate and non-existent explanations for them, Mr Parker has a substantial arguable case of unjustified dismissal. It would, nevertheless, be unjust for the respondent to have to defend a challenge after such a delay. Mr Parker's claimed remedies are for money. Any prospective success enjoyed by Mr Parker, had his challenge been prosecuted promptly, would almost certainly have had to have been tempered by application of s124 of the Act. It is clear that there was significant disentitling contributory conduct by the plaintiff on the day when his vehicle was searched which would have to reduce significantly any monetary remedies to which he might be entitled. Had reinstatement been sought and a viable remedy, it is likely that I would have granted leave, although on strict terms and on conditions as to costs. In my assessment, however, the applicant can be compensated adequately if those responsible for these gross, largely unexplained and inexcusable delays, were negligent.

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[4] [1998] 3 ERNZ 917 (CA)

[31] In these unusual circumstances, therefore, the application to extend time for filing a challenge is refused. The respondent is entitled to costs although Mr Cleary conceded that s40 of the Legal Services Act makes recovery against a legally aided party, such as Mr Parker, difficult. If an application is to be made, that should be by memorandum filed and served within 28 days of the date of this judgment with the applicant having a like period to reply.

[32] There are three further points I should add. One of the respondent's grounds of opposing the extension of time is that it has relied on the Authority's determination in this case in justification for other actions taken under its drug and alcohol policy. Although the Court has not decided the justification for Mr Parker's challenge to the lawfulness of the condition the respondent purported to place on his return, the company should not necessarily take comfort from the Authority's determination. As already mentioned, even where granted by contract, requirements to submit to drug testing are significant invasions of personal privacy and autonomy and will be construed strictly.

[33] Further, and as already noted, where a genuine dispute, objectively provable as such, arises about the application, interpretation or operation of an employment agreement, the law requires that this be resolved otherwise than by unilateral self-help methods, including summary dismissal of employees. Rather, resolution should be achieved by an application of the disputes procedure that the legislation requires be contained in every employment agreement. Either party can invoke that procedure. Prompt access to mediation assistance and the Employment Relations Authority exists to resolve such disputes on their merits and guide employers and employees in their conduct of their relations.

[34] Finally, although it is not for this Court to determine issues of ethical professional responsibility between lawyers and clients, I am concerned about one of the submissions made to me by A. That was that, in the absence of an assurance of payment, Mr Parker's lawyers were under no obligation to protect his position in litigation, even to the extent of notifying the company of his intention to challenge, and/or filing the pro forma statement of claim that had been drawn up, or making a pro forma application for leave to extend the time for challenging. That was

especially so when the client had, and had tendered, the court filing fee. Without deprecating the importance of fees for services, it is one of the hallmarks of a profession that its members are driven not by remuneration considerations but by an ethic of service to client. A lawyer having accepted a retainer to act for a legally aided client and aware of the time limits should in my view act to protect the client's rights of appeal even if this means that payment of the modest cost of doing so is delayed.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 18 November 2009