**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**AC 45/09**
**ARC 85/09**

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| IN THE MATTER OF | an application for leave to challenge out of time |
| BETWEEN | LOUIS CHIANG KAI SHEK APOLOSI TUIPULOTU PANI<br>Applicant |
| AND | TRANSPORTATION AUCKLAND CORPORATION LIMITED TRADING AS STAGECOACH AUCKLAND<br>Respondent |

Hearing: 30 November 2009
(Heard at Auckland)

Appearances: Greg Lloyd, Counsel for Applicant
Rachel Larmer and Rebecca Frost, Counsel for Respondent

Judgment: 3 December 2009

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## JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The question for decision is whether Louis Pani should have extended, by 5 days, the time for filing his challenge to the Employment Relations Authority's determination dismissing his personal grievance for unjustified dismissal. His application is opposed.

[2] The relevant facts are these. Mr Pani was dismissed summarily from his employment as a coach builder on 23 January 2009 in effect for being a party to the theft of the contents of Christmas hampers, the property of his employer, Transportation Auckland Corporation Limited (TACL), which were intended to be given to staff. Following an investigation meeting in early August 2009 the Employment Relations Authority released its determination on 10 September 2009,

finding that Mr Pani was dismissed justifiably. The Authority subsequently awarded costs against Mr Pani of $2,500.

[3] Mr Pani instructed his union on 1 October 2009 to challenge this determination, well within the 28-day period from the date of the Authority's determination. That 28-day period expired on Thursday 8 October 2009. Although clearly in error by referring to this as *"28"* October 2009, the union's solicitor deposes to having made arrangements for the statement of claim to be filed with the Court and the filing fee paid electronically on 8 October 2009, being the last working day of that period. It appears that the electronic payment could not be processed on that day and the solicitor then, having miscalculated the limitation period, arranged for the statement of claim to be held back and filed on the following working day, Friday 9 October 2009, by which time it was late. Upon receipt of the statement of claim on 9 October 2009, the Registrar returned this to the solicitor as being out of time and requiring that this application be made. All papers including the application for leave to extend time and affidavit evidence in support were filed on the following Tuesday, 13 October 2009. That application was then served on the respondent.

[4] Mr Pani has not yet paid the costs awarded by the Authority although he has offered to pay them to the respondent's solicitors' trust account to be held on interest bearing deposit until the outcome of this application and challenge are known. That proposal has not been accepted by the respondent.

[5] The company's opposition to the extension of time has raised every conceivable ground and the volume of material filed in support of that exhaustive opposition, dealing principally with the merits of Mr Pani's grievance, is enormous.

[6] Under s219 of the Employment Relations Act 2000 the Court has a broad discretion to be exercised in the interests of justice overall to extend the time for filing a challenge. The applicable criteria have been summed up usefully in the judgment in *Stevenson v Hato Paora College Trust Board*[1]. Decisions in other cases, even where the facts may appear to be similar, are of limited assistance

[1] [2002] 2 ERNZ 103

because the rights, obligations and interests of the particular parties will need to be weighed in each case.

[7] First is the extent of the delay. Although strictly 5 days, the real delay is effectively shorter. Following the electronic failure of the system for payment of filing fees, the applicant's solicitor sent the statement of claim and payment of the filing fee to the Employment Court Registry on the day after the limitation period expired in the mistaken belief that the last day of the limitation period was Friday 9 October 2009. The Registrar returned the documents as being out of time, and if by post, this written advice would have reached the applicant's solicitor on the following Monday 12 October 2009. By the time the application for leave to extend time was prepared and filed, a further day had passed although this cannot be said to have been unreasonable in all the circumstances. Two of the 5 days were a weekend. So the delay is, in reality, not excessive.

[8] What does concern the Court more is the failure of the solicitor to notify the respondent of her errors and of the applicant's intentions so as to minimise any possible prejudice to the respondent. Professional practice, not to mention discretionary considerations to be exercised on applications such as this, require prompt and candid notification to parties affected by such errors. Mr Lloyd for the applicant conceded that no advice was given to the respondent until the application for leave to extend time was served and that the applicant's solicitor ought not to have delayed in advising the respondent. That oversight will not be fatal to the applicant's case but should be noted as a matter of best practice.

[9] Next are the reasons for the delay. These have been explained satisfactorily, albeit briefly. No responsibility for not challenging in time rests with Mr Pani himself. The solicitor confesses to a miscalculation of time which, when combined with an unexpected inability to transfer funds electronically, brought about the delay. The Registry enforces Regulation 5 of the Employment Court Regulations 2000 requiring payment of the filing fee at the time of filing a challenge. The oversight was remedied expeditiously.

[10] The respondent's claims of prejudice relate to two witnesses who no longer work for it. It is unclear when each ceased employment with the company but it is very unlikely to have been, in both cases, between the expiry of the appeal period and the bringing of notice of the challenge to the company. Its allegation of prejudice is only speculative in the sense that the company has not attempted to ascertain the whereabouts of these two former employees or their availability to give evidence. At best, it can really only say that it cannot locate these people as easily as it could have had they still been working for the company. There is nothing to say, however, that this was not the position when the Authority conducted its investigation meeting. There is, in short, no evidence that this very modest potential prejudice has arisen as a result of the delay in filing the challenge.

[11] At the hearing, Ms Larmer advised me that there will be further prejudice to the respondent because its human resources manager, who has overseen not only the events that led to Mr Pani's dismissal but also the subsequent litigation, will be on parental leave from the company from February 2010. While that may create some difficulties in having the manager's evidence heard and may require either her alternate or another responsible manager to instruct counsel, I do not think it can be said that this is prejudice that is caused by the delay. Had Mr Pani challenged within time, his case could not have been set down for hearing until after February 2010 in any event. There would simply not have been sufficient hearing time available. It is important to link prejudice to the delay and that link is not able to be made in this instance. The same arrangements to accommodate the manager's difficulties will have to be made as they would have been if Mr Pani had challenged within time.

[12] The company complains that it has already spent a significant sum on legal associated costs in defending its position in the Employment Relations Authority. It says that it would be unreasonable to expect it to outlay more money to defend a challenge, especially as only a modest percentage of that has been awarded in costs by the Authority. It complains, justifiably in my view, that Mr Pani has not met the order for costs to be paid by him to the company. It is also correct that even if, at worst from its point of view, leave is granted and Mr Pani is successful, it is well able to repay those costs awarded to it by the Authority.

[13] Next, the respondent submitted that the prospects of a successful challenge by Mr Pani are so negligible that discretion should be exercised against extending time allowing this. This is always a difficult test to apply in practice when an application for leave to extend time is heard as a preliminary issue. The Court has a limited ability to determine the merits of the parties' positions and can, at best, only make an overall broad assessment of those merits by reference to the determination sought to be appealed from and other material placed before the Court. Courts are always reluctant to conclude that a case is so devoid of merit on its facts that it does not deserve to be heard unless that can be established clearly at this stage. That is particularly so where, as here, the proceeding is not a conventional appeal but a challenge by hearing de novo.

[14] I have reviewed the Authority's determination and the voluminous material proffered by the respondent in opposition which includes, in effect, most, if not all, of the evidence and submissions the company put before the Authority. The allegations effectively of theft, either as a principal or a party, were denied consistently by Mr Pani. Applying the s103A test, it could probably be said that a fair and reasonable employer, satisfied to the requisite standard that an employee had been a party to the theft of items of property that the employer intended to be given to other staff, would justifiably have dismissed the employee. Mr Lloyd did not disagree with this proposition. The question in the case has been, and would continue to be, whether the employer was properly satisfied to that standard of the misconduct having taken place.

[15] Some of the respondent's arguments to support both the correctness of its conclusion that Mr Pani was guilty of serious misconduct, and the Authority's determination finding dismissal justified, are inferential at best and, in some instances, circular. I have to say, also, that it does not assist the respondent in relying on briefs of evidence which include self-assessments of the witnesses' fairness and reasonableness and other matters that are more properly ones of submission on the issue for the Court to decide. Parts of those briefs of evidence appear to have been written by lawyers aware of the legal issues and the legalese that describe them. These are not matters, however, that affect the matter for decision now: rather, they are comments on good litigation practice.

[16] When it comes to hard probative evidence that Mr Pani had unlawful possession of his employer's property (although in reality this allegation is one of theft as a principal or as a party to another's theft of that property), the following was before the Authority. One witness, a work colleague, reported seeing Mr Pani in the vehicle where the hampers were stored in the company of a tyre repair contractor and, subsequently, seeing Mr Pani dressed in his work overalls in which a number of unusual items appeared to have been placed. Items being identical to others subsequently found to be missing from a number of hampers were seen in the tyre contractor's vehicle. Both Mr Pani and the tyre contractor denied unlawfully taking items from the Christmas hampers. The case for the company will really turn on the credibility of the applicant and his work colleague who reported seeing these things, and other evidence tending to confirm or contradict these observations.

[17] There are several matters on the face of the Authority's determination that may indicate an arguably erroneous approach by it to the determination of the issues.

[18] Mr Pani's case criticises the employer's failure or refusal to make inquiries of other employees working in the same area at the same time who may or may not have seen what occurred. It appears that the employer's investigating managers concluded that such other employees would not have seen anything of these events despite being asked to make such inquiries by Mr Pani's union representative during the course of the company's investigations. The Authority did not disagree with the company's assessment.

[19] Mr Lloyd pointed to paragraph [41] of the Authority's determination where it found that the employer was entitled to conclude, on the balance of probabilities, that Mr Pani was on the hamper bus and removed or aided in the tyre contractor employee's removal of the property of the employer from that bus. As Mr Lloyd submitted, on its face, this application of the balance of probabilities test and conclusion by the Authority may not have had regard to the necessarily higher standard of proof required for summary dismissal for the grave misconduct of what was in effect theft of the employer's property.

[20] Mr Pani denied any wrongdoing and provided an alibi for the relevant time at which it was alleged he participated in the unlawful taking of products and, in particular, when he was seen in the hamper bus. Mr Pani said that he was working elsewhere in the bus maintenance workshops at that time and also provided an account of his subsequent movements when he was seen in the vicinity of the hamper buses and the tyre contractor's vehicle.

[21] Despite being asked to do so by Mr Pani's representative during the company's investigation, the employer decided that nothing could be gained by interviewing others because of its view that they could not have observed anything relevant to its inquiry. The Authority found that the employer was justified in so concluding. In her submissions to me, Ms Larmer likewise rejected this ground of challenge as involving an unnecessary and inappropriate "fishing expedition" by the respondent.

[22] The next point for the applicant is that, although the Authority acknowledged that, in cases of possible dismissal for very serious misconduct in employment, the evidence against the employee must be as convincing as the allegation is serious, it is arguable that it did not apply that standard to the decision of the case. Its reasons for its determination emphasise a balance of probabilities approach to determining the s103A test of justification. Although it is simply not possible to determine that issue further at this stage, I conclude that it is arguable that the Authority applied a low threshold of proof of very serious allegations of misconduct in employment.

[23] The next matter is not unassociated with the second but is arguably distinct. There is the following passage at paragraph [36] of the Authority's determination that raises a question about the correct approach to its task by the Authority:

> *It is possible that someone entered the hamper buses unobserved and took the items. It is however probability and not possibility that I have to consider.*

[24] Whilst the Authority correctly directs itself to ascertaining what the employer concluded as a matter of probability and the fairness and reasonableness of this, it would not be correct to ignore factual possibilities as the Authority may arguably

have done. Possibilities of occurrences should, whether alone or cumulatively, form part of the Authority's consideration of the employer's case for justification.

[25] Mr Pani's challenge includes an assertion that his employer made inadequate inquiries of the person Mr Lloyd described as the *"prime suspect"* in the unlawful taking of the property. This was an employee of a specialist tyre firm that performed work at the depot on contract to the respondent. Mr Lloyd identified that the respondent's human resources manager confirmed to the contract employee's manager the importance of the provision to TACL of the contract employee's account of events given in the course of the contractor's inquiry into alleged misconduct by its employee. Counsel submitted that despite the insistence by the respondent's human resources manager upon having proper detailed information, Mr Pani was dismissed allegedly without the respondent having received this.

[26] Although I think it is clear that Mr Pani may have his work cut out to succeed in showing that he was dismissed unjustifiably, that is not the same thing as, and falls short of, an assessment that his case is so weak that it is just to extinguish it without further consideration.

[27] The respondent's next point is that it is not in the interests of justice for litigation to be prolonged. That is true, but unlikely to be so in this case. The challenge was filed 5 days late. There is a draft statement of claim already before the Court which is unlikely to be varied significantly if at all so that the case can be timetabled to a hearing promptly, probably only a month or so later than would have been possible but for the need to hear and decide this application. The parties do not face any unusual prolongation of their litigation.

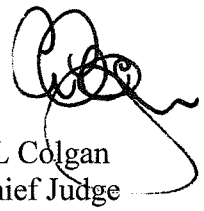
[28] The respondent has signalled its intention, if leave is granted, to apply for security for costs in the sum of $10,000 against Mr Pani. It is, of course, entitled to do so. However, on the track record of such applications where the applicant is resident in New Zealand and impecuniosity has been brought about or at least contributed to by the dismissal the subject of the challenge, TACL will have an uphill battle, at least on the circumstances of the case now before the Court. But, as I

have said, it is entitled to do so and that application should not be prejudged, especially if there may be factors of which the Court is not aware.

[29] I am satisfied that it is in the interests of justice that the applicant should have the time for filing his challenge extended to 13 October 2009. This will be on the condition, however, that the he pays the costs awarded by the Authority to the respondent within 7 days. No conditions will attach to that payment and it must be made as Mr Lloyd agreed. I consider that the most just course is for the parties to meet their own costs on this interlocutory application.

[30] The plaintiff's draft statement of claim will, when the filing fee is paid, become the operative statement of claim. The respondent may then have the period of 21 days within which to file and serve a statement of defence. The case will then be called over in the usual way for the allocation of a fixture and other interlocutory directions. Leave is reserved for either party to apply for any further orders or directions on reasonable notice.

[31] I reserve costs on this application.



GL Colgan
Chief Judge

Judgment signed at 9 am on Thursday 3 December 2009