IN THE EMPLOYMENT COURT
WELLINGTON

WC 23/09
WRC 17/09

IN THE MATTER OF	an application for an extension of time in which to file a challenge
BETWEEN	JOANNE SANDILANDS Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: On the papers received 7, 24 and 25 August 2009

Appearances: Alan Knowsley and Fiona McGeorge, counsel for the applicant
Steve Wragg, counsel for the respondent

Judgment: 14 October 2009

JUDGMENT OF JUDGE A A COUCH

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[1] In the Employment Relations Authority, Ms Sandilands sought an extension of the 3-year time limit for commencing proceedings based on her personal grievances. The Authority declined that application (WA 67/09, 25 May 2009). She decided to challenge that determination but failed to file a statement of claim in the Court within the 28-day time limit for doing so. Ms Sandilands now seeks an extension of time in the Court.

Background

[2] The essential factual background is recorded in the opening part of the Authority's determination:

> *[1] Ms Sandilands and Corrections are in an on-going employment relationship. During her employment, Ms Sandilands raised two personal grievances. The first was raised on 2 March 2005 concerning allegations about the conduct and attitude of two other employees while undertaking her duties as a union delegate for CANZ. The second was raised on 13 September 2005 concerning her being assaulted and alleging failures in Correction's investigation about the assault in May of 2005.*
>
> *[2] Both personal grievances went to mediation. Mediation for the first personal grievance occurred in mid 2005 and on 27 June 2006 following which there were further meetings held between various parties. Except for a letter dated 14 January 2007, nothing further appears to have happened until the statement of problem was filed in the Authority on 20 October 2008.*
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> *[3] The second personal grievance involved mediation on 14 May 2007. This followed an investigation (the first investigation), the result of which was conveyed to Ms Sandilands on 16 September 2006, but because of the allegations raised in Ms Sandilands' personal grievance Corrections decided to carry out another investigation. She was refused a copy of the first investigation report. Time was then spent getting terms of reference finalised. A draft report of the investigation was provided to Ms Sandilands in September 2006. The final investigation report was made in December 2006. On 14 January 2007 Corrections wrote to Ms Sandilands' lawyers aiming to bring matters to a close.*
>
> *[5] In June 2007 Corrections considered the matter closed and Ms Sandilands' union was informed. Nothing further was heard of the matter until the statement of problem was filed on 20 October 2008.*

[3] As indicated in paragraphs [2] and [5] of this passage, Ms Sandilands first sought to lodge her personal grievances with the Authority on 20 October 2008. In both cases, this was more than 3 years after the personal grievances had been raised with Corrections. This brought into play s114(6) of the Employment Relations Act 2000 ("the Act") which provides:

> *(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.*

[4] In an effort to overcome the bar to her claims in s114(6), Ms Sandilands applied to the Authority for an extension of the 3-year time limit imposed by it. The Authority refused that application and it is the determination to that effect that she then sought to challenge.

[5] The Authority's determination was given on 25 May 2009. Section 179(1) of the Act provides that a party to a matter before the Authority who is dissatisfied with its

determination may elect to have the matter heard by the Court. That right of challenge is, however, qualified by subsection (2) of s179 which provides that every election to have a matter heard by the Court must be made "*within 28 days after the date of the determination of the Authority.*" It follows that, in this case, Ms Sandilands' right to challenge the Authority's determination expired on 22 June 2009.

[6] Through her solicitor, Ms Sandilands purported to file a challenge in the Court on 23 June 2009. It was 1 day out of time. The effect of that delay was that Ms Sandilands lost her right to challenge the Authority's determination. In an effort to regain that right, Ms Sandilands now asks the Court to extend the time prescribed by s179(2).

Principles

[7] Both the Authority and the Court have a discretion under s219 to retrospectively extend time limits imposed by the Act. It was that discretion which Ms Sandilands asked the Authority to exercise in relation to s114(6) and which she now asks the Court to exercise in relation to s179(2).

[8] The discretion conferred by s219 is not subject to any statutory criteria. Like any other discretion conferred upon the Court, however, it must be exercised judicially and in accordance with established principles. The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case.

[9] The factors which are often considered in deciding where the justice of the case lies have been set out in cases such as *Day v Whitcoulls Group Ltd* [1997] ERNZ 541, *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 and *An Employee v An Employer* [2007] ERNZ 295. Those which are relevant to this case include:

a) The length of the delay.

b) The explanation given for the delay.

c) Any prejudice to the respondent.

d) The surrounding circumstances.

e) The merits of the proposed challenge.

[10] I also have regard to the general principle summarised by Richmond J in *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 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.*

[11] A further issue in this case is that the application to extend time was not accompanied by an affidavit or any other form of evidence. Rather, Ms McGeorge simply referred to unsubstantiated propositions of fact put forward in her submissions. Even when this lack of evidence was highlighted in the submissions made by Mr Wragg, no affidavits were filed. I note that, in submissions in reply, Mr Knowsley said: *"If the Court considers that an affidavit from Counsel is required then that can be arranged."* This position was entirely misconceived. It is not for the Court to tell the parties what evidence should be provided. That is a matter for the parties, as advised by counsel.

[12] This lack of evidence poses significant problems for Ms Sandilands' application. Firstly, it may be said that the application as a whole was improper because it failed to comply with regulation 13A of the Employment Court Regulations 2000 which requires every application for leave to be accompanied by an affidavit verifying the grounds relied on. I do not, however, regard that as decisive.

[13] At a more fundamental level, I must have regard to the well-established principle enunciated by the Privy Council in *Ratnam v Cumarasamy* [1964] 3 All ER 933 at page 935:

> *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.*

[14] In the absence of any evidence, the only material available to me on which I can exercise the discretion under s219 is the contents of the Authority's determination. I proceed on that basis.

Delay

[15] Ms Sandilands' solicitor presented a statement of claim for filing the day after the right to challenge expired. This initial delay of 1 day was therefore minimal. The application for an extension of time, however, was not filed until 14 days later. Where an application of time is sought, it is incumbent on the applicant to make that application promptly.

Explanation for the delay

[16] In the absence of any evidence, it cannot be said that there was any explanation offered for the delay.

Prejudice

[17] For Corrections, Mr Wragg responsibly accepted that the delay in placing the matter before the Court did not, of itself, cause any significant prejudice or hardship. Obviously, if the extension of time sought was granted, that would result in a measure of prejudice to Corrections because it would have to expend time and money in responding to the challenge.

Surrounding circumstances

[18] The most striking circumstance of this case is that Ms Sandilands now seeks an extension of time to challenge in the Court the determination of an application to the Authority for an extension of time. Given her experience with time limits in the Authority, Ms Sandilands should have been particularly astute about time limits in the Court. Her failure to do so was foolhardy.

Merits of the proposed challenge

[19] Section 179 of the Employment Relations Act 2000 gives a party to proceedings before the Authority a right to challenge its determination regardless of the merits of that challenge. Where that right is not exercised within time, however, the merits of the proposed challenge become a significant factor in the exercise of the Court's discretion whether to grant an extension of time. A party seeking such an extension of time must persuade the Court that the proposed challenge has a realistic prospect of success. That may be because further evidence is available or the Court can be persuaded that the Authority failed to have proper regard to the evidence which was before it. Any such arguments would need to be supported by evidence in support of the application for an extension of time. In the absence of such evidence, the Court must be persuaded that there is a significant error of law or reasoning apparent on the face of the determination.

[20] It is apparent from the Authority's determination that its investigation process was conventional and appropriate. A meeting was held at which the parties, presumably though counsel, were heard in person. Counsel were then given an opportunity to provide written submissions which they did some days later. It is equally apparent that the Authority applied the correct principles in deciding how to exercise the discretion conferred by s219.

[21] In her proposed statement of claim, Ms Sandilands accepts the Authority's determination in relation to her first personal grievance raised on 2 March 2005 and restricts the challenge she wishes to pursue to the second personal grievance raised on 13 September 2005.

[22] In respect of that second personal grievance, the Authority said:

> *[18] The second personal grievance is also out of time, but much less so than the first grievance. It is out of time by five weeks. The delay has been explained by the involvement of Ms Sandilands' counsel addressing a complex matter, and as a result of the solicitor responsible for the work becoming ill there was no hand over or bring up to identify the time limitation about to expire. Ms Sandilands cannot be faulted for that situation occurring as the solicitor had been instructed to prepare and file the statement of problem in the Authority in July 2008, which was more than two months before the expiry of the three years limitation period.*

> *[19] Ms Sandilands could not satisfactorily explain why she did not meet the three year time limitation period for filing, especially since there was inaction between the mediation taking place and the expiry of the limitation period. She is a union delegate. She has been represented by her union at least since 2 May 2005 and represented by lawyers since 23 November 2005. It is not unreasonable to have expected in those circumstances for Ms Sandilands to be aware of the limitation period, and the desirability to move to have the personal grievance dealt with speedily and quickly under the Act.*

[23] Ms McGeorge submits that what the Authority said in these two paragraphs was inconsistent. Specifically, she submits that the conclusion in paragraph [18] that Ms Sandilands *"cannot be faulted"* was inconsistent with the conclusion in paragraph [19] that Ms Sandilands *"could not satisfactorily explain why she did not meet the three year time limitation period for filing."* I see no inconsistency in the Authority's conclusions and therefore do not accept this submission. In paragraph [18], the Authority was discussing the period of 5 weeks after the limitation period in s114(6) had expired. In paragraph [19], the Authority discussed the 3-year period itself. Both are relevant to the exercise of discretion to extend time. On the facts accepted by the Authority, Corrections sought to end discussion of the second personal grievance in January 2007 and informed Ms Sandilands in June 2007 that it considered the matter closed. The point the Authority made in paragraph [19] is that there was no explanation by Ms Sandilands of her failure to commence proceedings during the period of more than a year after June 2007 and before the limitation period expired in September 2008. That was undoubtedly a factor relevant to the overall justice of the matter.

[24] Another aspect of the determination Ms McGeorge criticises in her submissions is paragraph [20] in which the Authority concluded that there would be *"a real sense of prejudice"* in allowing the extension of time sought. This was followed by a list of six reasons for the conclusion. Ms McGeorge submits that the Authority ought not to have taken those factors into account because the situation would have been the same had the statement of problem been filed 5 weeks earlier and in time. I do not accept this submission because it proceeds on a misunderstanding of the principles involved. Once a party abandons a right by failing to exercise it in time, it is appropriate to have regard to all of the consequences in fact of granting an extension of time, not just those which may have arisen since the time period expired.

[25] Ms McGeorge's final submission was that the Authority erred in taking into account that *"There has already been an investigation so it is not as if Ms Sandilands has not had an opportunity to be heard."* The investigation referred to appears to be the second investigation conducted by Corrections into Ms Sandilands' allegations that she was assaulted. Ms McGeorge submits that it was part of Ms Sandilands' second personal grievance that the investigation was inadequate and that it was therefore inappropriate for the Authority to rely on it as having provided Ms Sandilands with an opportunity to be heard. In the absence of any evidence, it is not possible to say what the nature of the second investigation conducted by Corrections was. It is therefore not possible to reach any conclusion about whether the Authority's understanding of that investigation was correct.

[26] Putting the details of this case to one side, the scope for an extension of the 3-year time period imposed by s114(6) must be very limited indeed. It is a limitation period whose purpose is to prevent stale grievances from being litigated. Particularly where there is an ongoing relationship between the parties, it is in both their interests and in the public interest that disputes be resolved promptly.

[27] On the material before me, I can see no real prospect of Ms Sandilands successfully pursuing a challenge against the Authority's determination.

Decision

[28] In deciding this application, I reiterate that the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted. In making that assessment, the most significant factor is that the proposed challenge has little if any chance of success. While none of the other factors mitigate strongly against granting the extension of time sought, in my view it is not in the interests of justice to permit a party to prolong litigation without a real prospect of success. The application for extension of time is refused.

Comment

[29] In this judgment, I have referred consistently to actions taken on behalf of Ms Sandilands by counsel as being her actions. That is not the result of any confusion

on my part. Rather, it reflects the principle that counsel are presumed to be acting on the instructions of the party they represent. To the extent that counsel act in a manner inconsistent with their instructions, that is a matter between solicitor and client.

Costs

[30] The established principle is that costs usually follow the event in litigation. If that principle is applied, Corrections would be entitled to a reasonable contribution to its costs of responding to this application. In this case, however, where the effect of my decision is to bring a long-standing dispute to an end and the parties remain in an ongoing employment relationship, I suggest that Corrections may wish to consider allowing costs to lie where they fall. If costs are to be sought, Mr Wragg should file and serve a memorandum within 28 days after the date of this judgment. Mr Knowsley and Ms McGeorge are then to have 21 days to file and serve any memorandum in response.

A A Couch
Judge

Signed at 3.30 pm on 14 October 2009