

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**WC 10/08  
WRC 33/07**

IN THE MATTER OF      an application to extend time within which  
   to challenge a determination of the  
   Employment Relations Authority

BETWEEN                      ESTHER JOHANNA MONTEITH  
   Applicant

AND                              ABBY LEIGH EAGLE  
   Respondent

Hearing:              On the papers

Appearances: The Applicant in person  
                                 Tony Snell, Counsel for Respondent

Judgment:              17 June 2008

---

**JUDGMENT OF JUDGE A A COUCH**

---

[1]      This decision concerns an application for an extension of the 28-day time period for challenging a determination of the Employment Relations Authority. The determination was given on 25 July 2007 (WA 103/07). Mrs Monteith attempted to file a challenge on 6 September 2007, which was 15 days late. She filed an application for extension of time on 5 October 2007.

**Sequence of events**

[2]      The employment relationship between the parties began in January 2006 and ended on 22 September 2006 when Mrs Monteith dismissed Ms Eagle.

[3]      Ms Eagle promptly raised a personal grievance alleging that her dismissal was unjustifiable. She also made claims relating to arrears of wages and outstanding

holiday pay. These claims were lodged with the Employment Relations Authority in November 2006 together with claims for penalties for breaches of the Minimum Wage Act 1983 and the Employment Relations Act 2000.

[4] The Authority conducted an investigation meeting on 29 May 2007. Both parties attended and were fully heard. Mrs Monteith chose to appear in person. Ms Eagle was represented by counsel.

[5] The Authority gave its determination on 25 July 2007. It upheld all of Ms Eagle's claims. Mrs Monteith was ordered to pay Ms Eagle \$5,000 compensation for distress, \$1,435 in reimbursement of lost wages, arrears of wages totalling \$2007.25, and \$677.78 for unpaid holiday pay. The Authority also found that the claims for breaches of the Employment Relations Act 2000 were substantiated and imposed a global penalty of \$500 on Mrs Monteith.

[6] On 6 September 2007, Mrs Monteith attempted to file a challenge to that determination in the Employment Court. As the documents were received outside the 28-day time limit imposed by s179(2) of the Employment Relations Act 2000, the registrar returned them to Mrs Monteith the same day with a letter advising her that she was out of time and would need to file an application for leave and an affidavit in support.

[7] On 14 September 2007, Mrs Monteith faxed a letter to the registrar questioning whether she was out of time and saying that she had counted "28 *working days*". The registrar responded by telephone on 17 September 2007 explaining to Mrs Monteith that the 28-day period referred to in s179(2) was not "28 *working days*" and confirming that the 28-day period had expired on 22 August 2007.

[8] On 5 October 2007, Mrs Monteith filed the application for extension of time currently before the Court. It appears this was served on Ms Eagle shortly afterwards but the registrar was not advised of the date.

[9] Ms Eagle initially took no steps in response to the application although it followed the standard form including a notice advising Ms Eagle that, if she wished to oppose the application, she must file written notice to that effect within 14 days.

[10] In the absence of a response from Ms Eagle or any further communication from Mrs Monteith, the matter then went into limbo until 3 January 2008 when the registrar wrote to Mrs Monteith to say that no notice of opposition had been filed and asking Mrs Monteith to provide proof of service. Mrs Monteith did not respond.

[11] On 8 February 2008, the registrar telephoned Mrs Monteith who said she had not received the letter of 3 January 2008. The registrar sent her a further copy. On 19 February 2008, Mrs Monteith provided the registrar with a copy of an invoice from a process server who reported having served the application for extension of time on Ms Eagle on or about 9 October 2007.

[12] The registrar then referred the file to Judge Shaw who directed that a letter be sent to Ms Eagle reiterating that, if she wished to oppose the application, she should file a notice of opposition. That letter was sent on 21 February 2008 but was returned unclaimed.

[13] The file was subsequently referred to me and I directed that inquiries be made of Mr Snell who had appeared before the Authority as counsel for Ms Eagle. Mr Snell was unaware of the application for leave or of Mrs Monteith's wish to challenge the Authority's determination but undertook to seek instructions from Ms Eagle. On 16 April 2008, Mr Snell filed a notice of opposition and a memorandum in support of that opposition.

## **Principles**

[14] Section 219 of the Employment Relations Act 2000 confers on the Court a general discretion to extend time in circumstances such as those in this case. The principles applicable to the exercise of that discretion are well established. The fundamental principle which must guide the Court is the justice of the case - see the dictum of Richmond J in *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA), at p91:

*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.*

[15] Does the justice of the case require that the extension of time sought be granted? Factors which are frequently taken into account in answering that question include the reason for omitting to file the challenge within time, the length of the delay, the reasons for delay, the merits of the proposed challenge and the effect of the delay on the respondent. In particular cases, other factors may also be relevant. In this case, a significant factor is that Mrs Monteith was in the process of pursuing an identical application in earlier proceedings when she received the Authority's determination in this case. I discuss this in detail subsequently.

### **Discussion of factors relevant to discretion**

[16] The provisions of s179 conferring the right to elect a hearing in the Court and prescribing the time limit for doing so are expressed in clear terms:

#### ***179 Challenges to determinations of Authority***

- (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.*
- (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.*

...

[17] In her affidavit in support of the application, Mrs Monteith says that she understood the reference to "28 days" to mean 28 working days rather than 28 calendar days. She then goes on to say:

- 7. I have been in business for many years and as such all of my business has always been done in terms of business days, and as this matter relates to the operation of a business ie employment issues I assumed that the counting of days would be business days as is my usual practice.*

[18] I am not impressed by that explanation for three reasons. Firstly, the words of s179(2) are clear and unambiguous. They contain nothing to suggest that “*days*” should be construed as working days. Neither does anything else in the Employment Relations Act 2000. A party who assumes that a statute means something other than the plain meaning of the words used takes a grave risk and must assume responsibility for doing so.

[19] Secondly, even if that were a genuine mistake made by Mrs Monteith, it does not explain her failure to commence proceedings in time. The period of 28 working days after the date of the Authority’s determination expired on 3 September 2007. She did not attempt to file a challenge until 6 September 2007.

[20] The third factor I take into account in this regard is that, at the time in question, Mrs Monteith had just finished going through an identical exercise with respect to an earlier determination of the Authority. In that case, the Authority’s determination was given on 1 May 2007. The 28-day period for commencing a challenge therefore expired on 29 May 2007. Despite having obtained information from the registrar about the procedure for filing a challenge, Mrs Monteith did not attempt to do so until 5 June 2007. When advised that the challenge was out of time, Mrs Monteith then made an application for extension of time. She first did that on 19 June 2007. Although this application was accepted for filing, it was clearly deficient and it was suggested to Mrs Monteith that she take advice and file an amended application. Mrs Monteith did that and, after filing another deficient document on 11 July 2007, eventually filed an application in the appropriate form on 25 July 2007. In the course of that process, the appropriate procedure and statutory provisions were drawn to her attention on several occasions.

[21] If Mrs Monteith did not understand the correct procedure and the statutory time limits for filing a challenge before May 2007, she can have been in no doubt by the time she filed her second amended application for leave on 25 July 2007. She must also have understood the importance of compliance and the consequences of non-compliance. All this occurred prior to Mrs Monteith receiving the Authority’s determination in this proceeding.

[22] In explaining her failure to file a challenge in time in that earlier proceeding, Mrs Monteith did not suggest that she had any misunderstanding about the meaning of s179(2), even though her attempt to file a challenge on 5 June 2007 would have been within “28 working days”.

[23] I turn next to the extent of the delay. This is the time period from the expiry of the statutory time period until an application for extension of time is made. In this case that was 43 days comprising 14 days from the expiry of the 28-day period on 22 August 2007 until Mrs Monteith attempted to file a challenge on 6 September 2007 together with a further 29 days until she filed her application for extension of time on 5 October 2007.

[24] In *Peoples v Accident Compensation Corporation*, CC3/07, 13 February 2007, I analysed the decisions of this Court over many years in cases such as this. With one exception, the longest extension of time granted for a challenge or appeal was 14 days. In the one exceptional case, an extension of 20 days was granted.

[25] Against that background, the delay in this case must be regarded as very substantial. For the reasons given above, I place little weight on Mrs Monteith’s explanation for the initial delay of 14 days and she offered no explanation for the subsequent delay.

[26] In *Bilderbeck v Brighthouse Ltd* [1993] 2 ERNZ 74, Chief Judge Goddard described the significance of the length of delay as follows:

*Plainly, where the delay is slight and the merits great they will outweigh the delay. Where, however, the delay is substantial the consideration that an appellant may succeed if allowed to proceed may carry less weight. The Court should not encourage stale appeals or come to the aid of appellants who are less than vigilant in the safekeeping of their own rights and interests.*

[27] That brings me to the merits of the proposed challenge. While it is usually not possible to predict the outcome of a challenge before it is heard, the potential strength of a would-be plaintiff’s case can be assessed to some extent by considering the determination in question, the proposed statement of claim and the nature of any additional evidence it is said will be adduced.

[28] In this case, the determination contains no obvious errors of law and the conclusions reached are supported by reasons. It is apparent that, on certain key issues, there was a conflict of evidence before the Authority which it has resolved in a reasoned and conventional way. It is suggested by Mr Snell in his memorandum that, in reaching its conclusions on several of the key issues, the Authority in fact relied on the evidence of Mrs Monteith but that is not apparent from the determination itself. Mr Snell's submissions are not evidence and I therefore put that contention to one side.

[29] There is no suggestion by Mrs Monteith that new evidence is available to be provided to the Court. Rather, the basis on which Mrs Monteith seeks to challenge the Authority's determination is that she hopes the Court might make different findings of credibility to those made by the Authority in respect of the same witnesses giving essentially the same evidence.

[30] On the material before me there is nothing to suggest that the proposed challenge has a realistic prospect of success.

[31] In his memorandum, Mr Snell records that Ms Eagle is impecunious and has been unable to pay for the costs of representation before the Authority. On this basis, Mr Snell submits that granting the extension of time sought would unduly prejudice Ms Eagle by compelling her to incur further costs of representation she cannot afford. While I broadly accept that submission, I do not place great weight on it. I can only infer that Ms Eagle has not taken any steps to enforce the orders of the Authority as, had she done so, she would have had ample funds with which to meet her outstanding costs and those she might incur in resisting a challenge.

[32] Although not referred to in Mr Snell's submissions, there is another factor relating to prejudice which I should properly take into account. A party to litigation who is successful at first instance will always have a period of uncertainty until the time period for an appeal or challenge has expired. After that time has passed without steps being taken, the successful party is entitled to certainty of the result. Allowing an extension of time robs that party of the certainty to which they are otherwise entitled and is a serious detriment capable of amounting to prejudice. In

this case, Ms Eagle was entitled to believe the orders of the Authority were final after 22 August 2007 and was unaware of the possibility of that not being so until served with the application for extension of time on or about 9 October 2007.

### **Decision**

[33] In reaching a decision on this matter, I reiterate that the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted.

[34] The key factors in this case are these. The delay was substantial. An explanation was offered for only part of that delay and that explanation was unconvincing. There is nothing to suggest that Mrs Monteith would have a reasonable prospect of success in challenging the Authority's determination were she permitted to do so.

[35] While I have discussed other factors and found some of them to be relevant, I place relatively little weight on them.

[36] Overall, I find that it is not in the interests of justice to extend the time for filing a challenge to the Authority's determination. Accordingly, the application is refused.

### **Comment**

[37] Where a party appears in person, some allowance is usually made for the fact that he or she is unlikely to be familiar with the applicable law and procedure. That is particularly so in a jurisdiction such as this where the Court is directed by the statute to exercise its jurisdiction in equity and good conscience. In this case, however, I make little such allowance in favour of Mrs Monteith. That is because, as a result of her experience in the previous proceeding which was then very recent and still before the Court, she knew or ought to have known what she needed to do to exercise her right to challenge the Authority's determination. If, despite that experience, she was uncertain, Mrs Monteith was reckless in not verifying what was required of her.



[38] I have not overlooked the fact that Ms Eagle failed to respond in a timely way to the application for extension of time. As that did not affect any of the key factors influencing the exercise of my discretion or prejudice Mrs Monteith, however, it is of relatively little importance.

### **Costs**

[39] In all the circumstances, Ms Eagle is entitled to a modest contribution to the costs she has incurred in responding to this application. Mr Snell should file and serve a brief memorandum within 21 days after the date of this decision. Mrs Monteith will then have a further 21 days to file and serve any memorandum in reply.

A A Couch  
**Judge**

Judgment signed at 3.00pm on 17 June 2008