IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2023] NZEmpC 59
EMPC 405/2022

IN THE MATTER OF	an application to extend time to file a challenge
BETWEEN	HAMILTON CIVIL PLANT LIMITED Applicant
AND	HARRY CARR Respondent

Hearing:	On the papers
Appearances:	R Negri, agent for the applicant G Ogilvie, advocate for the respondent
Judgment:	18 April 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Hamilton Civil Plant Ltd (the company) has filed an application to extend time to file a challenge. The application is necessary because it wishes to challenge a determination of the Employment Relations Authority, and the statutory timeframe for doing so has elapsed. The application is opposed by Mr Carr.

[2] I indicated that I proposed to deal with the application on the papers and provided the parties with an opportunity to file material in support of, and in opposition to, the application.

Background

[3] The background can be summarised as follows. Mr Carr was employed by the company. Issues arose which were dealt with at mediation, resulting in a Record of Settlement being entered into. The Record of Settlement was certified by a mediator pursuant to s 149 of the Employment Relations Act 2000. Mr Carr subsequently sought orders from the Authority over alleged non-compliance with the terms of settlement. The Authority investigated the matter and concluded that the company had breached the terms of settlement and made compliance orders against it.[1] The orders required the company to pay to Mr Carr the outstanding amounts within 21 days of the date of the determination. These amounts were $9,250 (compensation), $684.80 (holiday pay) and $3000 (costs).[2] The company was also ordered to pay a contribution to costs on the application for a compliance order and the filing fee.[3]

[4] The company did not comply with the Authority's compliance order, did not pay the costs and disbursements ordered against it, and did not file a challenge to the Authority's determination within the 28-day statutory timeframe for doing so.[4] That timeframe expired on 8 November 2022.

[5] The documentation annexed to affidavits in support of, and in opposition to, the application reflects the following sequence of events. The Authority forwarded Mr Negri a copy of the determination on 11 October 2022. The cover email from the Authority advised that:

> Please find attached your Determination. If you are unhappy with the determination, you have 28 calendar days to challenge it to the Employment Court.

[6] 28 calendar days later Mr Negri wrote to the Authority as follows:

> Further to your email on 11 October 2022, we respectfully request that there is a Employment Relationship problem with this recent determination and request that the matter is reopened as noted in your attached correspondence for the right to challenge the determination in the Employment Court within

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1 *Carr v Hamilton Civil Plant Ltd* [2022] NZERA 423 (Member Kennedy).
2 At [23]–[25].
3 At [29].
4 Employment Relations Act 2000, s 179(2).

> 28 days after the date of the determination being available on 11 October 2022
>
> …
>
> We await your advice accordingly.

[7] A Senior Authority Adviser responded the next day (9 November 2022) at 2.33pm advising:

> If you wish to challenge the determination issued by the Employment Relations Authority then you need to do this through the Employment Court.
>
> Below is the contact details for the Employment Court.

[8] Mr Negri says that he attempted to file the challenge with the Court on 10 November 2022 and was asked to resubmit it, which was done the next day. He was again asked to re-submit the application, and this occurred on 14 November 2022. Mr Negri says that on 15 November 2022 another Court Registry Officer contacted him to advise that some minor changes were required and that an affidavit ought to be filed in support of the application. The application was re-submitted on 15 November 2022, together with an affidavit.

[9] Mr Ogilvie, who represents Mr Carr, says that insufficient reasons have been provided for the late filing and the application is, in any event, without merit and ought to be declined.

Analysis

[10] The Court has a discretion to grant an extension of time to take various steps, including to file a challenge.[5] The discretion is to be exercised in accordance with principle. The overarching consideration is the interests of justice. The usual factors that will be considered are:[6]

- the reasons for the omission to file within time;
- the length of the delay;

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5 Employment Relations Act, s 219.

6 *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8]; see generally *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [35]–[40].

- any prejudice or hardship to any other person;
- the effect on the rights and liabilities of the parties;
- subsequent events; and
- the merits of the proposed challenge.

[11] As the correspondence makes clear, Mr Negri took steps to advance a challenge to the Authority's determination on 8 November 2022. Those steps were ineffective because the proper forum for filing was the Court. When advised of this Mr Negri took prompt steps to pursue the challenge in the correct place. By this time leave was required to extend time to file the challenge, and Mr Negri was asked to resubmit the necessary documentation a number of times. Each time he was asked to resubmit the documentation he responded promptly. Filing took place on 15 November 2022, seven days late.

[12] There is a range of reasons why a party may omit to file a challenge within the statutory time limit. As the cases reflect, leave may more readily be granted in circumstances where the omission is not caused directly by the party concerned, such as where the party's representative has overlooked or miscalculated the timeframe for filing.[7]

[13] In this case it is clear that the applicant caused the omission to file out of time. The applicant (which is not represented by a lawyer or advocate) took steps to pursue a challenge on the last day for filing but failed to follow the correct procedure for doing so.

[14] Whether the omission to file within time, once discovered, has been promptly addressed will also be relevant to the weighting exercise. In this case I accept, based on the material before the Court, that prompt steps were taken between the expiry of the 28-day period and the date on which filing occurred (namely 15 November 2022).

[15] The delay was a week, so it was not minor, but it must be viewed within the context of the steps that were being taken within that time to file a challenge. There

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7 *Almond v Read*, above n 6, at [37].

is, however, also a need to have regard to the broader context – Mr Carr has been waiting three years for a payment that the company agreed to make him in April 2020.

[16] If leave is not granted, the company will not be able to challenge the Authority's compliance orders which it would otherwise be entitled to do. If leave is granted, Mr Carr's interests will be impacted. On one level the impact may be said to be relatively minor, namely having to respond to a challenge he did not think was being pursued because it was not filed within time. The impact is however more significant. Mr Carr will continue to be unwillingly engaged in this long-running matter; he will be obliged to continue his efforts to enforce terms of settlement entered into a considerable period of time ago, in respect of an employment relationship that ended well prior to that. The reality is that Mr Carr finds himself in an invidious situation which is not of his making.

[17] Mr Ogilvie submits that the company's proposed challenge is devoid of merit. In *Almond v Read* the Supreme Court made it clear that there is difficulty in assessing the merits of an application at an early stage and that the exercise should be approached with caution.[8]

[18] The formulation of s 149 and the caselaw decided under it presents very significant hurdles for the proposed challenge. Therefore, while the applicant contends, for example, that there was no agreement under s 149 because "no reasonable person or parties to an agreement would agree to a condition whilst all of the facts were unknown", that will likely be of little assistance to the applicant if the challenge was allowed to proceed. I accept that, insofar as the merits can be assessed at this stage, they weigh against the grant of leave.

[19] I return to the Supreme Court's judgment in *Almond v Read*. There it was observed that:

> [37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the

[8] *Almond v Read*, above n 6, at [39].

> giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[20] While the circumstances of this case are not on all fours with the factual context the Supreme Court was concerned with, the Court's observations do have particular relevance given the background to the late filing I have described above. I accept that the company, which is not legally represented, made a slip-up in seeking to exercise an otherwise unconstrained right of challenge.

[21] I note, for completeness, that the sums ordered by the Authority remain payable absent a stay. I note too that any prejudice to Mr Carr may be addressed, at least to some extent, by other interlocutory means, and by costs in the event that the company fails on its challenge.

Conclusion

[22] There are considerations which go both ways. In the particular circumstances, and having regard to the broader interests of justice, I consider it appropriate to exercise the Court's discretion to grant leave to extend time to file a challenge.

[23] The draft statement of claim is to be treated as having been filed. The filing fee on the statement of claim is to be paid within seven days of the date of this judgment. Mr Carr will have the usual time (which will run from the date of this judgment) to file and serve a statement of defence to the statement of claim. The company must pursue its challenge diligently. A telephone directions conference is to be scheduled by the Registrar promptly after the statement of defence is filed.

[24] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.15 pm on 18 April 2023