IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 63
EMPC 400/2022

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	KIRSTY HILFORD Applicant
AND	BOARD OF TRUSTEES OF WHĀNGAREI BOYS' HIGH SCHOOL Respondent

Hearing: On the papers

Appearances: A Halse, advocate for applicant
R M Harrison, counsel for respondent

Judgment: 24 April 2023

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves Mrs Kirsty Hilford's application for leave to extend time to file a de novo challenge to a determination of the Employment Relations Authority issued on 29 August 2022.[1]

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[1] *Hilford v Whangarei Boys' High School Board of Trustees* [2022] NZERA 425 (Member Dumbleton).

[2] In its determination, the Authority concluded that Mrs Hilford had not raised an unjustified disadvantage grievance with her employer, the Whangārei Boys' High School Board of Trustees (WBHS), within the statutory 90-day time limit.

[3] The Authority found that Mrs Hilford had, however, raised an unjustified dismissal personal grievance within the 90 days which followed termination of her employment.[2] Accordingly, the Authority said it would investigate that particular grievance, and if necessary, the remedies to settle it. Costs were reserved.

[4] An application for leave to challenge part of the determination should have been brought on or before 26 September 2022, but it was not instituted until 14 November 2022, approximately one and a half months out of time.

[5] In summary, it is argued for Mrs Hilford that she did not become aware of the existence of the determination until about 6 November 2022. Her evidence is on 4 November 2022 she had a catch-up with Mr Halse. On 6 November 2022, Mr Halse discovered the determination had been issued by looking at the Authority's website. He advised Mrs Hilford accordingly. Mr Halse submitted that the determination must have been sent to a defunct email address which he had formerly operated.

[6] It is submitted for Mrs Hilford that in these unusual circumstances, there was a short period of approximately a week within which her application for leave and proposed statement of claim were drafted and filed, and that she thus raised the challenge in a timely way once she became aware of the Authority's determination.

Background

[7] The present application relates to an investigation meeting which was held on 17 June 2022 and the subsequent determination of 29 August 2022.

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2 At [58].

[8] The Court has already been required to consider aspects of that particular hearing, which culminated in certain orders being made as to the destruction of documents. These issues are canvassed in *Hilford v Board of Trustees of Whangarei Boys' High School*.[3]

[9] It is unnecessary to repeat the details about that issue, other than to observe that Mrs Hilford challenged the Authority's order to destroy documents. That challenge resulted in a hearing in which I received evidence as to what occurred thereafter. The parties agreed that this evidence could be considered by the Court for the purposes of the present application.

[10] Mrs Hilford said she initially thought the Authority's proceedings were on hold because of the related proceedings in the Court involving the destruction of evidence. She visited Mr Halse in his office when in Hamilton on 4 November 2022 and asked him if he had received any information from the Authority. He told her he had not. She understood that after she left his office to attend a local event, he had located the Authority's determination online, and then telephoned her on 6 November 2022 to inform her of its existence.

[11] As noted earlier, the Authority concluded Mrs Hilford had not raised her disadvantage grievance in time but had raised her dismissal grievance in time, which it said it would investigate.

[12] The Authority issued a minute 25 November 2022. It recorded that on 21 September 2022 the Authority gave notice that the investigation meeting would be held on 17 November 2022, and that this occurred "after the parties' representatives Mr Halse and Mr Harrison had been consulted".[4]

[13] The minute went on to record that Mr Halse and Mrs Hilford did not attend the investigation meeting scheduled for 17 November 2022. Mr Halse emailed the Authority that day saying he had advised Mrs Hilford not to attend. The Authority recorded that Mr Halse's advice was based on his understanding that all matters

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3 *Hilford v Board of Trustees of Whangarei Boys' High School* [2023] NZEmpC 36.

4 *Hilford v Whangarei Boys' High School Board of Trustees* ERA Auckland 3156381, 25 November 2022 at [1].

relating to Mrs Hilford's grievances against WBHS "are currently before the Employment Court".

[14] The Authority went on to note that no orders had been made by the Court, or the Authority, removing or transferring any matters from the Authority to the Court, or staying the Authority from continuing its investigation. It concluded that Mr Halse could not reasonably have formed the view that all matters were before the Court and that he was mistaken in this respect.

[15] The Authority then considered the information it had been given and made further directions as to how the balance of the investigation would be undertaken.

Legal principles

[16] The Court has jurisdiction under s 219 of the Employment Relations Act 2000 (the Act) to extend time for filing a challenge. The relevant factors were described as follows in *An Employee v An Employer*:[5]

> [9] ...
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> (1) The reason for the omission to bring the case within time.
>
> (2) The length of the delay.
>
> (3) Any prejudice or hardship to any other person.
>
> (4) The effect on the rights and liabilities of the parties.
>
> (5) Subsequent events.
>
> (6) The merits of the proposed challenge.

[17] As Judge Perkins noted in *P v A*,[6] the statements in *An Employee v An Employer* must now be read in light of the Supreme Court's judgment in *Almond v Read*.[7] In that judgment, the Supreme Court emphasised that the ultimate question in such a case is what the interests of justice require. It modified the approach which needs to be

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5 *An Employee v An Employer* [2007] ERNZ 295 (EmpC).
6 *P v A* [2017] NZEmpC 92, [2017] ERNZ 504 at [21].
7 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

taken as to the merits of the claims of the party seeking exercise of the discretion to extend time:[8]

> [36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs or non-compliance with directions). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able to have them heard on the merits. We think that this is an important part of the background against which extension applications must be determined.
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> [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 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.
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> (footnotes omitted)

[18] The Supreme Court also examined the extent to which the merits of the appeal may be relevant when leave is sought.[9] It accepted that these may, in principle, be relevant, but made three qualifications. First, the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. Thus, the court should discourage much argument on the merits and reach a view about them only where they are obviously very strong or very weak.

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8 At [36]–[37] (footnote omitted).
9 At [39].

[19] Although these observations regarded applications for leave to appeal to the Court of Appeal, in my view these factors are applicable to cases under s 219 of the Act, particularly those involving a minor delay.

[20] I proceed to consider the factors in light of the principles in *Almond v Read*.[10]

Analysis

The reason for the omission to bring the case within time/the length of the delay

[21] Based on the evidence presented to the Court, the reason that the challenge was not brought within the 28-day time limit was because Mrs Hilford did not learn of its existence until on or about 6 November 2022.

[22] An application for leave was brought within a relatively short period thereafter.

[23] It was submitted by Mr Harrison, counsel for WBHS, that Mr Halse's explanation given by Mr Halse that the document must have been sent to a defunct email address was not a sufficient excuse to explain the delay.

[24] Mr Harrison submitted that Mr Halse had a responsibility, as Mrs Hilford's representative, to inform the Authority if he ceased using an email address which he had nominated for communication purposes. I agree. As the Court has noted previously, representatives in employment law matters have a considerable responsibility to the people or businesses they represent.[11]

[25] In addition, the Authority said Mr Halse had been consulted about a suitable date for the resumed investigation. This was formalised by a notice of meeting issued by it on 21 September 2022, approximately one month after the determination had issued, and well over six weeks before, on Mrs Hilford's evidence, Mr Halse had learned of the existence of the determination. It is surprising that it was not appreciated at the time that the determination had been issued.

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10 *Almond v Read*, above n [7].

11 *Bennett v Employment Relations Authority* [2020] NZEmpC 54, [2020] ERNZ 136 at [55]; and *Goldie v Chief Executive of the Department of Corrections* [2023] NZEmpC 30 at [47].

[26] Be that as it may, the Court must accept Mrs Hilford's evidence that she, as the employee involved, did not learn of the existence of the determination until 6 November 2022. The delay in raising the challenge was primarily due to this factor.

Any prejudice or hardship to any other person

[27] The unjustified disadvantage grievance concerned a complaint of bullying in 2020, which the Authority said had not been raised within 90 days as it was not raised until she sent a letter to the principal in April 2021.

[28] Mr Harrison submitted that the school would be prejudiced by allowing leave to be granted. He said defending bullying allegations said to have occurred three years ago would require significant school resources which are already strained. He submitted it would likely be difficult to locate and/or recall evidence from existing and former staff pertaining to a 2020 claim that WBHS was not notified of until 2021.

[29] However, Mr Harrison also submitted that allegations of bullying could still be raised in the context of Mrs Hilford's unjustified dismissal claim, but not as a standalone unjustified disadvantage claim.

[30] This proper concession mitigates the apparent prejudice which might otherwise be thought to exist.

Subsequent events/conduct of the parties

[31] Mr Harrison submitted that the failure on the part of Mrs Hilford and Mr Halse to attend the investigation meeting on 17 November 2022 was a matter of conduct which should inform the Court's discretion to consider the granting of leave. It was submitted that Mr Halse had not been constructive or acted in good faith in the Authority's process, rather he had hindered and been unjustifiably critical of it by making disparaging comments, late requests and complaints. Mr Harrison submitted that the motive and the primary reason for the avoidant conduct and the application was to remove matters to the Court and circumvent the Authority's process.

[32] Two points should be made about these assertions. Firstly, a purported breach of good faith regarding the conduct at the investigation stage is, at least to this point, a matter between the parties and the Authority. The Court's ability to consider this issue is provided for under s 181 of the Employment Relations Act 2000, but the provisions of that section do not currently apply. The Court is unassisted by these issues when considering the possibility of granting leave.

[33] Second, there is no evidence to support the proposition that the failure to participate in the Authority's process, and the application for leave, were tactical moves to bring the entire relationship problem to the Court. Mrs Hilford gave evidence that these circumstances were brought about by an erroneous belief that all matters were now before the Court and a mistaken assumption the Authority would not be issuing a determination in the meantime, respectively. This is insufficient evidence to conclude that these steps were taken to intentionally derail the investigation process being conducted by the Authority.

[34] Accordingly, I place these considerations to one side.

The merits of the proposed challenge

[35] I do not consider the merits of the bullying allegations to be a matter which I can or should look at closely, in light of the dicta of the Supreme Court in *Almond v Read*.[12] The only evidence the Court has on this topic is as summarised by the Authority in its determination. With no disrespect to the Authority, that summary does not allow the Court to undertake a detailed assessment of the relevant evidence of the parties, and/or of the merits.

[36] This issue should also be placed to one side.

Overall justice

[37] The late discovery of the fact the determination had been issued on 29 August 2022 is a significant aspect of this application.

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[12] *Almond v Read,* above n 7.

[38] I have already discussed how this came about. Whilst that circumstance is unfortunate, it is not a matter for which Mrs Hilford can, or should, be held responsible.

[39] Access to justice considerations point strongly therefore to the granting of leave. The prejudice issue, as discussed earlier, is insufficient to outweigh that factor.

[40] Accordingly, I conclude that leave should be granted.

Result

[41] I grant Mrs Hilford's application for leave. Her statement of claim raising the unjustified action grievance is to be filed and served, together with payment of the relevant fee, within seven days of the date of this judgment.

[42] For the avoidance of doubt, the filing of this application will not result in the entire relationship problem being placed before the Court. In *Abernethy v Dynea New Zealand Ltd*, the Court found that: "where a party elects to challenge a preliminary determination of the Authority which has had the effect of resolving the employment relationship problem before it, the entire employment relationship problem is then before the Court for resolution".[13]

[43] As numerous subsequent decisions have made clear, where the determination does not dispose of the proceeding at first instance, it cannot be said that the Authority's involvement has ceased.[14] Nor is this a case where, because part of the relationship problem is still clearly before the Authority, it is appropriate that the entire employment relationship problem be located there at this stage.[15] Such a step would render the challenge to the unjustified action determination nugatory.

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13 *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [59].

14 See *Bay of Plenty District Health Board v Breeze* EmpC Auckland AC28/08, 29 August 2008 at [9] and [11]; *Ale v Kids at Home* [2015] NZEmpC 209, [2015] ERNZ 1021 at [43]; and *Sinton v Coatesville Motors 2013 Ltd* [2020] NZEmpC 137 at [19].

15 This can be compared with the Court's conclusion that the Authority did have jurisdiction to entertain the plaintiff's statement of problem as drafted, and returned the entire matter to the Authority since part of the matter was still clearly before it: *WN v Auckland International Airport Ltd* [2021] NZEmpC 153, [2021] ERNZ 684 at [32] and [35].

[44] I reserve costs for consideration after the challenge in respect of the unjustified action grievance has been considered. My provisional view, however, is that Mrs Hilford has been granted an indulgence, that the school resisted the application for leave unsuccessfully, and that costs should accordingly lie where they fall.[16]

B A Corkill
Judge

Judgment signed at 1.20 pm on 24 April 2023

[16] *Advance International Cleaning Systems (NZ) Ltd v Hamilton* [2016] NZEmpC 34 at [45].