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An Employee v An Employer CC 8/07 [2007] NZEmpC 52 (15 May 2007)

Last Updated: 25 May 2007

SUPPRESSION ORDER PROHIBITING THE PUBLICATION OF THE NAMES OF THE PARTIES OR OF ANY OTHER INFORMATION WHICH MIGHT TEND TO IDENTIFY THEM.

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**CC 8/07
CRC 3/06**

IN THE MATTER OF an application to extend time in which to file a challenge

BETWEEN AN EMPLOYEE

Applicant

AND AN EMPLOYER

Respondent

Hearing: On papers filed on 19 February and 1 March 2007

Appearances: D G Beck, Counsel for Applicant
C R French, Counsel for Respondent

Judgment: 15 May 2007

JUDGMENT OF JUDGE A A COUCH

- [1] The applicant failed to exercise her right to challenge a determination of the Employment Relations Authority within the statutory 28-day time limit. She now seeks an extension of time within which to lodge a challenge. The issue is whether such an extension should be granted.
- [2] The applicant is employed by the respondent as a secondary school teacher. That employment began in 2001 and remains ongoing. Because the parties remain in an employment relationship, it is in the interests of justice that the employment relationship problem which has existed between them for the last several years not be made public. These proceedings will therefore be subject to an order prohibiting the publication of the names of the parties or of any other information which might tend to identify them. Consistent with that order, this judgment will simply refer to the parties as "the applicant" and "the respondent".
- [3] The applicant lodged an initial statement of problem with the Employment Relations Authority in September 2003. In it, she made a series of allegations that her employment had been affected to her disadvantage by unjustifiable actions on the part of the respondent. In February 2005, a second statement of problem was lodged containing further similar allegations. All of these allegations were considered by the Authority in the course of a single investigation. That investigation began with an interview of the applicant by the Authority on 22 March 2005. There followed an investigation meeting on 1 August 2005 which involved both parties. The Authority gave its determination on 21 October 2005 in which it decided that the applicant's personal grievances were unfounded and dismissed her claims. On 27 January 2006, the Authority issued a costs determination in which it ordered the applicant to pay the respondent \$5,000 by way of costs.
- [4] The applicant is dissatisfied with both determinations of the Authority and wishes to challenge them.
- [5] [Section 179\(1\)](#) of the [Employment Relations Act 2000](#) 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, the applicant's right to challenge the Authority's substantive determination expired on 18 November 2005. The situation with respect to the costs determination is different and I deal with that separately at the end of this decision.

[6] The applicant did not exercise her right to challenge the substantive determination within that time period. Accordingly, she was no longer entitled to challenge the determination as of right.

[7] On 2 February 2006, counsel for the applicant filed in the Court a document described as an application for leave to challenge the Authority's determination out of time. I have regarded this application as one for an extension of time within which to make an election under [s179](#). The Court's jurisdiction to extend time in such circumstances is conferred by [s219\(1\)](#) of the [Employment Relations Act 2000](#) which provides:

219 Validation of informal proceedings, etc

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[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.

[9] The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. Does the justice of the case require that the extension of time sought be granted? In their detailed submissions about what the interests of justice are in this case, both Mr Beck and Ms French adopted the headings used by Goddard CJ in *Day v Whitcoulls Group Ltd* [[1997](#)] NZEmpC 152; [[1997](#)] ERNZ 541 and by Shaw J in *Stevenson v Hato Paora College* [[2002](#)] NZEmpC 39; [[2002](#)] 2 ERNZ 103:

- 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.

[10] I agree that these are convenient and appropriate headings under which to consider the matters relevant to the exercise of my discretion in this case, albeit that I do so in a different order.

[11] In addition to those factors which the Court has found it appropriate to consider in considering whether to extend time for filing a challenge under [s179](#), I also have regard to the well established principles applicable to applications for extensions of time generally. In *Ratnam v Cumarasamy* [[1964](#)] 3 All ER 933, the Privy Council said 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.

[12] 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.

Extent of delay

[13] The application for extension of time was made 75 days after the expiry of the 28-day period for a challenge which is prescribed in [s179\(2\)](#).

[14] This included the Christmas and New Year period when the Court is closed and when legal advisors tend to be unavailable, or at least less available. In her first affidavit, the applicant said that she decided to instruct Mr Beck on 21 December 2005 but that the intervention of the holiday period meant that she could not see him until "*mid-January 2006*". Regulation 74B of the [Employment Court Regulations 2000](#) provides that, for the

purpose of calculating when an act must be done, the 12 days starting with 25 December and ending with 5 January should not be counted. Given that the time within which the applicant could initiate a challenge as of right expired well before that period began, the regulation has no direct application to this case but I have considered whether the policy underlying it should be applied by regarding the length of the delay as being shorter. In terms of the final outcome, it does not matter under which heading this aspect of the evidence is considered but it seems to me more natural to discuss it in the context of the reasons for delay than to regard it as truncating the period of delay which actually occurred. While the applicant may have been unable to instruct the lawyer of her choice during that period, other processes relevant to the overall justice of the matter, such as reinforcement of the respondent's understanding that the matter was at an end, continued throughout this period.

[15] On any view of it, a delay of more than 2 months must be regarded as very substantial or even gross. In *Peoples v Accident Compensation Corporation unreported*, 13 February 2007, CC 3/07, I analysed the decisions of this Court over many years in comparable cases. This showed that, with one exception, the longest extension of time granted for an appeal or challenge to the Employment Court was 14 days. The one exception was in *Bilderbeck v Brighthouse Ltd* [1993] NZEmpC 77; [1993] 2 ERNZ 74 where Goddard CJ extended time by 20 days.

[16] In *Bilderbeck* at p88, the former Chief Judge 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.

[17] This may be contrasted with the significance of delay in taking interlocutory steps in proceedings which have already been commenced. As I noted in *Peoples*, the Court on one occasion granted an extension of 6 weeks of the time for filing a statement of defence. Very recently, in *Otago Taxis Ltd v Strong unreported*, 2 March 2007, CC 6/07, I extended time for filing a statement of defence by 87 days. That was, however, in the context of extensions of time being sought by both parties to take interlocutory steps. In that decision, I also discussed the differing significance of delay in initiating proceedings and in taking steps in proceedings already properly initiated:

[30] The final factor I take into account is the length of the delay which, in this case, is at least 87 days. Such a delay in making application for an extension of time to file a challenge would be regarded as very substantial and, in most cases, fatal to the application. Where the application is for an extension of time to file a statement of defence, the importance of this factor is very much less. This is because the interests of justice are different. Permitting a party to participate in the resolution of a dispute which is already properly before the Court is fundamentally different to permitting a party to renew a dispute before the Court which the other party is entitled to believe has been finally determined by the Authority in its favour.

Reasons for delay

[18] The principal ground relied on by the applicant was that she had a history of depressive illness related to employment relationship problems and that receipt of the Authority's determination triggered an acute episode of this illness which rendered her unable to make the decisions necessary to initiate a challenge.

[19] Initially, the only material offered in support of this proposition was a brief letter to Mr Beck from a psychiatrist who had been treating the applicant. He concluded:

It is entirely possible that [the applicant] responded to the decision from the Employment Relations Authority with a worsening of the depression, an inability to communicate appropriately and to make decisions that were in her best interests.

[20] This letter was plainly inadequate to justify the extension of time sought by the applicant. Apparently recognising this, Mr Beck filed an affidavit of the applicant on 8 March 2006. In this, she deposed to suffering from depression since early 2001, shortly after she began employment with the respondent. She referred to having had sick leave for 11 weeks in mid 2001 and taking medication for a further 4 years. When she received the Authority's determination, the applicant said that she had "a feeling of psychological numbness", that she put the determination in a drawer and that she put it out of her mind. She said that the decision "triggered a feeling of extreme hopelessness" which led her to cope by not dealing with the determination. According to the applicant, she did not discuss the determination with friends or family for some time.

[21] The applicant then said:

15. It was not until late November 2005, more than one month after my receiving the decision, that I

recovered sufficiently from this psychological shock to be able to contemplate dealing with the Employment Relations Authority determination. This recovery was due to the fact that one of my sisters came to stay with me for two weeks from 19 November. Once she learned of the decision, she took the role of counsellor, forcing me to talk about it and about what I might do in response.

16. It was a few days after I decided I should make enquiries as to my options regarding an appeal that I received the initial demand for costs from the school's lawyer. I felt deeply saddened by this demand as I felt that if the school had not asked for costs, it was at least acknowledging by such omission that it was to some extent to blame for the events of the past five years. After initial feelings of fear and helplessness about the costs demand, it then strengthened my resolve to pursue further options.

[22] In August 2001, the applicant engaged a lawyer to advise and represent her in pursuing her personal grievances against the respondent. That lawyer continued to represent the applicant until March 2005 when the applicant dispensed with her services. That was at a point part way through the Authority's investigation. From that point on, the applicant was unrepresented. In her first affidavit, the applicant said that she dismissed the lawyer who had represented her because she believed her to be incompetent and unprofessional. She then said that, against this background, she was very cautious about engaging another lawyer to represent her after she resolved in late November 2005 to challenge the Authority's determination. The applicant said that she sought advice from a relative who was a lawyer and accepted that person's recommendation of a suitable person to represent her.

[23] The applicant did not say in her affidavit when she engaged that second lawyer but I infer from the evidence before me that this occurred in very late November or early December 2005. By that time, counsel for the respondent had written to the applicant seeking a contribution to the school's costs in the Authority. The second lawyer represented the applicant in responding to that claim. This included drafting a memorandum to the Authority which was filed on 22 December 2005.

[24] According to the applicant the second lawyer "*did not know if there was a mechanism for appealing out of time after a determination by the Employment Relations Authority.*" The applicant said that she was advised to contact the Registrar of the Employment Court which she initially tried to do by telephone and then did by writing a letter on 12 December 2005. The applicant said that she received a letter from the Registrar in reply on 21 December 2005 "*by which time it was too late to lodge the necessary documents before the Christmas closure.*" I infer from this latter statement that the applicant was fully informed of the process by the Registrar's letter.

[25] As noted earlier, the applicant said that she instructed Mr Beck "*once law offices opened in mid-January 2006*" but did not specify the date on which this occurred. Equally, the applicant did not say when she first contacted Mr Beck and I am unable to infer from the evidence whether this was before or after Christmas 2005.

[26] In the penultimate paragraph of her first affidavit, the applicant said:

22. That I did not appeal the determination within the 28-day period was I believe due to psychological shock on receipt of the Employment Relations Authority determination and to having no legal counsel who could have advised me of my options in respect of that decision and forced me to deal with it. Following my recovery and decision to take the matter further, the delay of some additional weeks has been a combination of factors including the Christmas closure and my need to find suitable counsel as I did not wish to experience again the futility and humiliation of retaining a lawyer who was incompetent to deal with my case.

[27] The applicant concluded her first affidavit by saying that she intended to consult a specialist psychiatrist with a view to that person providing the Court with a report.

[28] On 31 July 2006, Mr Beck provided the Court with a copy of a psychiatric assessment of the applicant dated 3 July 2006. This assessment was carried out by Dr du Fresne, an appropriately qualified consultant psychiatrist. She concluded that the applicant's condition had been wrongly diagnosed as depression and that her response to the employment relationship problems was "*more typical of post-traumatic stress disorder.*" Dr du Fresne characterised the applicant's reaction to the Authority's determination as "*re-traumatising*" and that the applicant responded by "*near-dissociation and avoidance of any consideration of the ruling or action in response to it*" until her sister's visit gave her "*the support and impetus she needed to actually confront the situation.*"

[29] In response to Dr du Fresne's assessment, the respondent filed an affidavit by Dr Brinded, a consultant forensic psychiatrist and associate professor. Dr Brinded concluded that, on the information provided by the applicant and recorded in Dr du Fresne's assessment, a diagnosis of post-traumatic stress disorder was neither appropriate nor available. Dr Brinded concluded:

Based on the documentation, the much more likely explanation is that [the applicant] was suffering from depression

which while it may have impacted on her level of motivation would not have rendered her incapable of thinking rationally about the adverse decision and its implications. It is also possible that her response to the contents of the ERA document resulted in the normal human reaction of avoidance, given her distress that her grievance was not upheld.

[30] On behalf of the applicant, Mr Beck then provided the Court with a second psychiatric report on the applicant. This was provided by Dr Earthrowl, a consultant forensic psychiatrist. It is apparent from Dr Earthrowl's report that, in addition to conducting a psychiatric examination of the applicant, he also had access to all of her medical records for the period from May 2001 onwards and to the assessment notes made by Dr du Fresne.

[31] Dr Earthrowl concurred in Dr Brinded's view that it was inappropriate to have diagnosed the applicant as suffering from post-traumatic stress disorder. Interestingly, he quoted from the notes made by Dr du Fresne of her psychiatric assessment of the applicant on 22 March 2006 when she recorded a diagnosis of "*major depressive episode, now in full remission*". Dr Earthrowl's opinion was that the applicant had "*exhibited symptoms consistent with a Major Depressive Episode of mild to moderate severity*." He then went on to say:

I would concur with the view of Dr Brinded that the level of severity of [the applicant]'s depression and anxiety symptoms of themselves, would not have been sufficient enough to render her unable to make decision in regard to the lodgement of an appeal within the appropriate timeframe.

[32] Dr Earthrowl went on to suggest that the context in which the applicant experienced symptoms of depression and anxiety may have been such that her decision-making ability was impaired for a time. In his view, this was consistent with the applicant's statement that she had initially put the Authority's determination away and not considered it rationally until visited by her sister in late November 2005. Dr Earthrowl concluded in this regard by saying:

In my view, the cumulative effects of the context and her perception of them, would suggest that [the applicant]'s judgement in this respect could be considered impaired, however I cannot state definitively that purely in relation to psychiatric diagnoses, she would have been incapable of such decision making competency.

[33] As an accompaniment to Dr Earthrowl's report, Mr Beck filed a further affidavit by the applicant. This confirmed two events in the applicant's past which had been referred to by Dr Earthrowl in his report.

[34] On 12 March 2007, Ms French filed a further affidavit from Dr Brinded. In this affidavit he highlighted the conclusions reached by Dr Earthrowl which were consistent with his own. He also explained the term "*disociation*" which had been used by all three psychiatrists. He said:

Whilst it is an unconscious response to stress, it is not evidence of illness or pathology. We are all capable of such a response. People commonly put off or avoid doing something about a matter because it is upsetting to think about it. The "disociation" does not mean that [the applicant] was unable to understand the import of the adverse Authority determination or mentally incapable of making a decision about lodging an appeal.

[35] Although I have reproduced in this judgment only selected portions of the expert evidence provided to the Court, I have carefully considered all of it in reaching my decision.

[36] The expert evidence does not establish that the applicant's delay in taking steps to challenge the Authority's determination is fully explained by any psychiatric condition she may have experienced. At most, it may be said that receipt of the Authority's determination triggered a depressive episode which impaired the applicant's decision-making ability for a few weeks. On the applicant's own evidence, she faced up to the reality of the determination during the 2-week visit by her sister which began on 19 November 2005. It was during this period that the applicant said she made a decision to seek legal advice about her options for challenging the determination. The applicant did not say in her evidence when she made that decision but I infer from other evidence that it was during the last week of November 2005.

[37] On this basis, I conclude that, even viewing the expert evidence in the light most favourable to the applicant, it only provides an explanation for her failure to take steps within the statutory 28-day time period and, perhaps, for a week or so after that. From late November 2005, the applicant's ability to address the issues, to make decisions and to act on those decisions was not significantly impaired by her mental state.

[38] I am reinforced in this conclusion by the evidence of the actions taken by the applicant after the end of November 2005. In early December, she instructed a lawyer to represent her in response to the claim for costs by the respondent. She discussed with that lawyer the prospect of challenging the Authority's substantive determination. She made an assessment of that lawyer's capabilities and decided to find a different lawyer to instruct with respect to a challenge. She was aware that the time period for lodging a challenge as of right had expired and acquainted herself with the process for seeking an extension of time. She assessed Mr Beck's

ability, decided to instruct him and did instruct him. What this evidence demonstrates is that, from late November 2005 at the latest, the applicant was aware of the significance of the Authority's determination, aware of her rights with respect to a challenge and capable of making the decisions necessary to exercise those rights. That being so, it raises the question why the applicant delayed more than 2 months after the end of November 2005 before initiating proceedings.

[39] Where an extension of time is sought, the onus is on the applicant to provide the evidence necessary to explain the delay as fully as possible. With respect to the period from the end of November 2005 onwards, the applicant's affidavits do not do this. Indeed, the evidence supporting reasons for the delay other than her mental illness is sparse and, in many respects, vague. Even making generous allowance for the Christmas and New Year period, the evidence falls well short of an adequate explanation for the very substantial delay which occurred. Indeed, the evidence discloses no acceptable reason why the Applicant could not have filed proceedings in the Court well before Christmas 2005.

Prejudice

[40] In her submissions on behalf of the respondent, Ms French acknowledged that the school would not be prejudiced by the delay in the sense that the witnesses who gave evidence in the course of the Authority's investigation are still available. Ms French submitted, however, that the respondent has been prejudiced in other respects by the delay which has occurred so far and would be prejudiced further if an extension of time were granted.

[41] The first point made by Ms French is that, had the applicant lodged her challenge in time, it is highly probable that the proceedings as a whole would have been disposed of last year. As things now stand, if the applicant is granted an extension of time, the matter may not be finalised until late this year or early 2008. In his affidavit, the current school principal spoke of the effect the litigation has had on the day to day running of the school. He described relationships between the applicant and senior management as "*inevitably strained*" and said that "*it has come to the point where the continuation of the claim is beginning to impact on the efficient administration of the school.*" If an extension of time is granted, these negative effects upon the school are likely to be perpetuated for 2 years longer than if a challenge had been lodged in time. There is force in this submission and I take it into account.

[42] The second factor raised by Ms French relates to the content of the proposed statement of claim. In paragraph 8, the applicant alleges that "*insufficient support and guidance was provided during the first school term to allow her to address identified problems.*" Ms French aptly described this pleading as "*very vague and generalised*" and expressed concern that it might signal an attempt by the applicant to reshape her claim based on events during the first school term of 2001. The person who was principal of the school at that time died in 2003. This inevitably prejudiced the respondent's ability to respond to allegations about the principal's conduct which were dealt with by the Authority in its investigation. Ms French's concern is that the respondent would be further prejudiced if the applicant was permitted to pursue fresh allegations about the conduct of the principal which had not been raised before the Authority. It seems to me, however, that such further prejudice could be avoided by a direction from the Court restricting the scope of the challenge to matters which were before the Authority. I therefore do not take this factor into account in the exercise of my discretion whether to extend time for lodging a challenge.

[43] Although not referred to by counsel in their submissions, there is another factor relating to prejudice which I should properly take into account. In *Bilderbeck*, Goddard CJ said at pages 86-87:

There is clearly no prejudice in the delay that has occurred to their ability to resist the appeal and to defend the decision but the same could have been said if the delay had been far far greater. That is not the kind of prejudice that is especially relevant in this case. Rather, it is the prejudice arising from their losing the certainty of a decision of the Tribunal which has not been appealed and which, upon the expiration of the time for appeal, could with justification be regarded by them as final and available for immediate enforcement. Any disruption to that finality is in itself a serious detriment capable of being regarded as prejudicial. However, if application had been made promptly, even within a day of receipt of the decision by the appellant, the respondents would still have suffered the prejudice of defeat of their expectations of certainty if the application had been granted – as it almost certainly would have been at that stage. That circumstance also goes into the balance. So does the consideration that with every day that goes past without an appeal being signalled, confidence in the certainty and finality of the decision grows stronger. At the end of the day the presence or absence of prejudice, while a matter to be taken into account, is not conclusive either way.

[44] I adopt that view. In many cases where a would-be plaintiff delays in taking the formal step of filing an appeal or challenge, the prejudice resulting from that delay is greatly reduced by informing the intended defendant promptly of the intention to appeal or challenge. There is no suggestion that any such informal notice was given in this case although there was clearly ample opportunity to do so. Once she had decided in late November 2005 that she wished to challenge the Authority's substantive determination, it would have been a straightforward matter for the applicant to have told the respondent of this decision. She could have

done this personally or through counsel whom she instructed to represent her on the issue of costs. There is no evidence that she did so. Equally, when the applicant instructed Mr Beck to prepare and file an application for extension of time, it would have reduced the prejudice to the respondent if he had immediately told Ms French that he had received such instructions. Again, there is no evidence that this occurred. By allowing the respondent to believe that the matter was at an end right up until the time the Court proceedings were served, the prejudice to the respondent was substantially increased.

[45] In this case, there are further issues of prejudice affecting not only the respondent, being the Board of Trustees of the school, but also third parties in the form of the staff and pupils of the school. As noted earlier, the current principal has deplored the impact on the administration of the school as a whole of the continuing dispute between the applicant and the respondent. In his view, "*the time, energy, and resources expended to defend the ongoing litigation is making it difficult for the school to move forward.*" I accept that evidence not only because it was uncontradicted but also because it seems to me to reflect the reality of the situation likely to occur where the parties remain in an employment relationship and the dispute between them remains unresolved for an extended period. I take this factor into account.

The merits of the proposed challenge

[46] The general nature of the claim advanced by the applicant to the Employment Relations Authority was that the respondent, through the principal and deputy principal of the school, had breached its duty to her to be a good employer. The applicant relied on a number of specific incidents which she said had been handled inappropriately by management and which had resulted in disadvantage to her in her employment. These included claims that she had been indirectly misled prior to commencing her employment, that she had been given insufficient notice of her teaching responsibilities and that the school had inappropriately initiated a review of her competence following concerns expressed by the Education Review Office. In the second statement of problem lodged in February 2005, the applicant further alleged that she had been subjected to bullying and abuse in the course of her employment and that she had not been properly supported in dealing with classroom discipline. The applicant said that, as a result of what she believed to be the inappropriate actions of the principal in particular, she developed the depressive illness which affected her for several years.

[47] It is clear that the Authority investigated the applicant's claims thoroughly. It took the relatively unusual, but in my view appropriate, step of initially interviewing the applicant separately. This enabled the applicant to fully explain the employment relationship problem to the Authority as she saw it and for the Authority to gain a full appreciation of her perception. The Authority's understanding of the applicant's position was further enhanced by reading the large volume of written material provided by the applicant. The Authority then conducted a conventional investigation meeting in which both the applicant and the respondent participated fully.

[48] It seems to me that, through this process, the applicant's claims were clearly understood and that she received a full hearing. The applicant does not dispute this. There is no suggestion in the proposed statement of claim or in the applicant's affidavits that she believed she was misunderstood or unable to present her case fully. Equally, there is no suggestion in the applicant's affidavits that there is any further evidence she could make available to the Court which was not considered by the Authority.

[49] The Authority determined the applicant's claims on 3 bases. It found that the applicant's claim that she had been indirectly misled prior to commencing employment could not amount to a disadvantage personal grievance because it related to events said to have occurred prior to the establishment of the employment relationship between the parties. The Authority also dismissed that claim on the basis that it relied on a statement said to have been made to a third party, not the applicant herself. The principles relied on by the Authority for this aspect of its determination were conventional and supported by authority.

[50] In dealing with the allegation of bullying, the Authority relied principally on the applicant's failure to raise such matters with her employer within the statutory 90-day period for initiation of a personal grievance. The Authority noted in this regard that the respondent would be seriously prejudiced in responding to claims made in 2005 about the actions of the principal in 2001 given that he died in 2003. This stark sequence of dates dramatically demonstrated the significance of the applicant's failure to comply with the 90-day rule.

[51] The Authority determined the applicant's other claims on their merits based on the evidence before it. In respect of each issue, the Authority summarised the relevant evidence and recorded the analysis leading to its conclusion. As set out in the determination, the Authority's conclusions are well supported by reasons and consistent with the weight of evidence.

[52] [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. That right, however, must be exercised within the 28-day period provided for in [s179\(2\)](#). Where a party fails to comply with [s179\(2\)](#), 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. If there is a significant error of law or reasoning apparent on the face of the determination, that may suffice. Otherwise, there will almost always need to be evidence which persuades the Court that the proposed challenge has a reasonable prospect of success.

[53] There was no such evidence in this case. The applicant simply seeks an opportunity to present the same case to the Court that was considered by the Authority, apparently in the hope that the Court might reach a different conclusion. In the absence of any error on the face of the determination and in the absence of any evidence suggesting why the Court should differ from the Authority's view of the matter, I am left with no reason to suppose that it would.

Decision

[54] In determining 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.

[55] In this case, the statutory time period of 28 days was exceeded by 75 days. Viewed in the light of the numerous previous decisions of the Court in comparable case, the extent of the delay must be regarded as very substantial and significant.

[56] The evidence of the reasons for delay establishes, at best, a satisfactory explanation for the first 5 weeks. The explanation offered for the balance of more than 2 months is unconvincing and falls well short of explaining it.

[57] The respondent has been prejudiced by being led to believe for more than 2 months that the matter was at an end. While I take this factor into account, I do not place great weight on it.

[58] If the extension of time sought is granted, the prejudice to the school community as a whole arising from the prolongation of the dispute will be significant.

[59] There is nothing to suggest that the applicant would have a reasonable prospect of success in challenging the Authority's substantive determination were she permitted to do so.

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

Costs determination

[61] In the bulk of this judgment, I have dealt with the applicant's proposed challenge to the substantive determination of the Authority dated 21 October 2005. In her application, the applicant also sought an extension of time within which to challenge the subsequent costs determination of the Authority. As that costs determination was dated 27 January 2006, the applicant could have challenged it as of right on 2 February 2006 when the application for extension of time was made. I was not told why a challenge was not filed then while the applicant had an absolute right to do so. Assuming as I do that the applicant was properly advised by Mr Beck, the only sensible construction I can place on her decision is that the applicant wished to challenge the Authority's costs determination only in conjunction with a challenge to the substantive determination.

[62] If that is incorrect and the applicant would wish to challenge the costs determination alone, it seems to me that it is not in the interests of justice to grant the extension of time now necessary for her to do so. This is principally because the Court has been provided with no material on which my discretion to extend time could be based. In the proposed statement of claim, it is alleged "*that the costs award of \$5,000 is excessive and manifestly unfair for a one day ERA hearing where the applicant was unrepresented.*" This was not supported, however, by any evidence or by any submissions.

[63] On the face of it, there is no obvious error of law or reasoning in the Authority's costs determination. Although the amount of costs awarded was relatively large for a case in which the investigation meeting was completed in one day, the Authority recorded the unusual circumstances of the case and gave reasons for exercising its discretion as it did. It also had regard to the appropriate principles as set out in *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808.

[64] While the prejudice to the respondent arising from an extension of time for challenging the costs determination would be very much less than that associated with a challenge to the substantive determination, the absence of any basis on which to find that the applicant would have a reasonable chance of successfully challenging the costs determination leads me to the conclusion that the interests of justice require that the dispute between the parties should now come to a final end. The application for an extension of time to challenge the costs determination is also refused.

Costs

[65] The respondent is entitled to a reasonable contribution to the costs incurred in resisting this application. The parties are encouraged to agree on costs if possible. If an order is required, Ms French is to file and serve a

memorandum within 28 days after the date of this judgment. Mr Beck will then have a further 14 days to file and serve a memorandum in reply.

A A Couch
Judge

Judgment signed at noon on 15 May 2007

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