



# Employment Court of New Zealand

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## Atkinson v Phoenix Commercial Cleaners Limited [2014] NZEmpC 115 (2 July 2014)

Last Updated: 5 July 2014

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2014\] NZEmpC 115](#)

ARC 14/14

IN THE MATTER OF     an application for leave to file  
                                  challenge  
                                  out of time

BETWEEN               MARION HELENA ATKINSON  
                                  Applicant

AND                     PHOENIX COMMERCIAL CLEANERS  
                                  LIMITED  
                                  Respondent

Hearing:               On the papers filed on 18 February, 18 March, 14 and  
                                  23 May  
                                  and 13 and 20 June 2014

Appearances:       D Prasad, counsel for applicant  
                                  D Hall, counsel for respondent

Judgment:            2 July 2014

### JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The applicant wishes to pursue a de novo challenge to a determination of the Employment Relations Authority (the Authority), which was issued on 11 December 2013.<sup>1</sup> The 28 day timeframe for bringing a challenge expired on 20 January 2014.<sup>2</sup>

She filed an application for leave to pursue her challenge out of time on 18 February

2014. More properly, such an application is for an extension of time for filing a challenge, for the reasons set out in *An Employee v An Employer*.<sup>3</sup> I deal with the application on this basis.

[2] The applicant's application is opposed by the respondent. The parties agreed that the application could be dealt with on the papers and extensive written

submissions and affidavits have been filed in support of their respective positions.

<sup>1</sup> *Atkinson v Phoenix Commercial Cleaners Ltd* [2013] NZERA Auckland 569.

<sup>2</sup> Applying *New Zealand Air Line Pilots' Association v Airways Corporation of New Zealand Ltd*

[2014] NZEmpC 90 at [30].

<sup>3</sup> *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [7].

[3] The right to challenge a determination of the Authority is provided for under [s 179\(1\)](#) of the [Employment Relations Act 2000](#) (the Act), but any such challenge must be made within 28 days of the date of the determination. 4 A litigant's right of challenge expires with the conclusion of the 28 day timeframe. It can only be resuscitated by the grant of an extension of time.<sup>5</sup>

[4] The principles applicable to the exercise of the Court's discretion to extend time are well established.<sup>6</sup> The reasons for the failure to file within time, the extent of the delay, prejudice and the merits of the proposed challenge are to be considered having regard to the overriding interests of justice.

[5] The extent of delay in this case was 29 days. The reasons for the delay are set out in the applicant's affidavit. She confirms that she was not in a position to pay privately for legal assistance and accordingly sought legal aid. She applied for a legal aid grant on 18 December 2013. In the event, her application for legal aid was not approved until 17 February 2014. It appears that during this period there was a request for further information by the Legal Services Agency, which she duly responded to.

[6] The respondent takes issue with the extent of the delay. In particular it is submitted that the period between receipt of the Authority's determination (11

December) and the application for legal aid (18 December) was unexplained and unreasonable. It appears from the documentation before the Court that Ms Atkinson took prompt steps to progress a possible challenge, including by advising her counsel that she wished to do so the day after the determination was issued. An application for legal aid, filed by her counsel, followed. The respondent further submits that there were delays, occasioned by the applicant, in providing further information to progress her legal aid application. It is apparent that the legal aid application was being dealt with by counsel on Ms Atkinson's behalf, and that a request for additional information by the Legal Services Agency was made on 17 January 2014, the information was collated and then provided to the Agency by counsel on 28

January 2014. The Christmas period also intervened, evidently increasing the time

<sup>4</sup> [Employment Relations Act 2000, s 179\(2\)](#).

<sup>5</sup> [Section 219](#).

<sup>6</sup> See, for example, *An Employee v An Employer*, above n 3, at [8]-[12].

that might otherwise have been taken to process the application. In these circumstances I do not consider that the respondent's criticisms about unexplained delays carry much weight.

[7] The respondent says that it will suffer prejudice if leave is granted. Mr Shayne Thomson, the sole director of the respondent company, sets out why that is said to be so in an affidavit filed in opposition to the application. He says that the respondent proceeded with business decisions on the basis that there would be no further action taken by the applicant after the timeframe for pursuing a challenge had expired and that:

... the cash flow of the business will now be severely disrupted as income that was dedicated to critical aspects of the business will now have to be redirected to funding more litigation.

[8] The claim of prejudice is somewhat diluted by the fact that the applicant's counsel advised the respondent that Ms Atkinson intended to seek leave to challenge the Authority's determination if her application for legal aid was granted, and no objection or concern was raised at that time.

[9] The parties are, perhaps not surprisingly, at odds over the merits of the challenge. The issue before the Authority related to whether the applicant was an employee. The Authority determined that she was not an employee. The assessment of employment status is an intensely factual one. Much will depend on the way in which the evidence comes out at any hearing. There appear to be indicators both ways. Having considered the Authority's determination and the material before the Court I do not accept the respondent's characterisation of the intended challenge as too weak to have any realistic chance of success.

[10] The overall consideration for the exercise of the Court's discretion is the interests of justice. In deciding where that lies, I have regard to the factors discussed above. I also have regard to the fact if an extension of time is not granted Ms Atkinson's grievance will be at an end, not having overcome the first hurdle of establishing that she is an employee and accordingly entitled to bring a grievance.

[11] I am satisfied that the interests of justice favour granting an extension of time.

[12] Accordingly, I make the following orders:

(a) The time within which Ms Atkinson may commence a challenge to the Authority's determination is extended to 4.00 pm on 11 July 2014. At the same time Ms Atkinson should pay the required filing fee.

(b) When the filing fee payable on filing a statement of claim has been paid, the statement of claim provided to the Court by Ms Atkinson on

18 February 2014 shall be effective and may be signed and sealed by the Registrar.

(c) The regulations regarding service and the provision of a statement of defence shall then apply in the usual way.

[13] Costs relating to this application are reserved pending resolution of the substantive challenge.

Judgment signed at 11.50 am on Wednesday 2 July 2014

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