



Employment Court of New Zealand

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Drivesure Limited v McQuillan [2022] NZEmpC 24 (15 February 2022)

Last Updated: 21 February 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 24](#)

EMPC 407/2021

IN THE MATTER OF an application for leave to extend
 time to file a challenge to a
 determination of the Employment
 Relations Authority

BETWEEN DRIVESURE LIMITED
 Applicant

AND MATTHEW SCOTT MCQUILLAN
 First Respondent

AND SACHIN CHANDAR RAJ
 Second Respondent

AND MOHAMMED MUZAMMIL RAFIQ
 Third Respondent

Hearing: On the papers

Appearances: N Tetzlaff, counsel for applicant
 R Narayan, advocate for
 respondents

Judgment: 15 February 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] The applicant company seeks leave to extend time to file a challenge to a determination of the Employment Relations Authority.¹ The Authority had found that the three respondent employees, whose employment had been terminated for redundancy on 25 March 2020 during the first COVID-19 Alert Level 4 lockdown (“the first lockdown”), had been unjustifiably disadvantaged by their employer.

¹ *McQuillan v Drivesure Ltd* [\[2021\] NZERA 445 \(Member Urlich\)](#).

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[2] The company wishes to challenge the Authority’s determination (and its subsequent costs determination) on a non-de novo basis. Because it did not file its challenge within time, for reasons I will return to, it is required to apply for leave to extend the time for doing so.² The three respondents oppose the grant of leave.

[3] The parties have filed material in support of their respective positions and agreed that the matter could be dealt with on the papers.

Framework for analysis

[4] The approach to applications of this sort is not in dispute. It can be summarised as follows.

[5] The Court has a discretion to grant an extension of time to file a challenge. 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:³

- (a) the reasons for the omission to bring the case within time;
- (b) the length of the delay;
- (c) any prejudice or hardship to any other person;
- (d) the effect on the rights and liabilities of the parties;
- (e) subsequent events; and
- (f) the merits of the proposed challenge (though this factor is now to be approached with caution, for reasons which I come to).

I deal with each factor in turn.

² [Employment Relations Act 2000, s 219](#).

³ *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 (EmpC) at [8].

Reason for the delay

[6] The delay was occasioned by an oversight by the lawyer who had carriage of the file at the time. Responsibility for the delay is accepted, and the reasons for it are fully set out in an affidavit filed in support of the application, setting out the difficulties they were confronting at the time, attempting to work from home during lockdown and having regard to a significant pressure of work. Steps were taken promptly to address the issue as soon as counsel became aware that the timeframe for filing a challenge had expired.

[7] While the explanation for the delay is criticised by the respondents as “unsatisfactory”, I accept (having regard to the affidavit evidence) that the reasons for the delay were inadvertent, resulted from lawyer oversight (and not a failure by the applicant personally), and must be seen in the context of what was a particularly difficult time.

[8] In the present case the reasons for the delay weigh in favour of the grant of leave.⁴

The length of the delay

[9] The delay was modest – two days. As I have said, counsel took immediate steps to rectify the situation as soon as they became aware of the timing issue.

[10] The short duration of the delay weighs in favour of the grant of leave.⁵

Prejudice

[11] The respondents say that they will be prejudiced if leave is granted, as it will exacerbate the cost, stress and delay already experienced with the litigation by further delaying a conclusion to it. It is also asserted that prejudice includes the unavailability

⁴ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [37].

⁵ See *Almond v Read*, above n 4, at [37]-[38].

of witnesses or the loss of recall given the significant period of time that has now elapsed since the events complained of.

[12] While I accept that granting leave means the respondents will need to face a challenge they would otherwise not have had to face, the prejudice associated with the grant of leave itself is minimal – namely, the fact that for two days the respondents were not confronted with the spectre of a challenge. The alleged difficulties in witness availability and recall were not expanded on and cannot fairly be attributed to the two day delay in filing the proposed challenge.

[13] I am not satisfied that the respondents would be unfairly prejudiced if leave is granted.

Impact on party rights and liabilities

[14] If leave is declined, the company will be unable to pursue a challenge; if leave is granted, the respondents will face a challenge they would have faced if it had been filed two days earlier.

[15] The balance weighs in favour of the grant of leave.

Subsequent events or conduct

[16] As I have already observed, once the error was realised prompt steps were taken to address it. None of the parties refer to any other subsequent issues or conduct which would factor against a grant of leave.

Merits

[17] The respondents strongly submit that the proposed challenge lacks merit and that leave ought to be declined on this basis.

[18] The Supreme Court has made it clear that there is difficulty in assessing the merits of an application at an early stage and the exercise should be approached with caution. Particularly relevant to this case is the Supreme Court's observation that the

merits will not generally be relevant where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice, beyond the fact of an appeal.⁶ I do not consider the merits, in so far as they can be discerned, as relevant in this case. While the parties focussed much attention on what they saw as the merits or otherwise of the proposed challenge, the short point is that the proposed challenge cannot be dismissed as being devoid of merit.⁷

Additional consideration

[19] The applicant makes an additional point in support of the application which I consider to be relevant, and to weigh in favour of the grant of leave having regard to the broader interests of justice. The challenge relates to the steps that might reasonably be taken by an employer during a lockdown and the associated rights and interests of affected employees.

[20] While the matters at issue in this matter arose during the first lockdown, over two years ago, I agree with counsel for the applicant that there is likely to be some broader public interest in consideration of the substantive legal issues raised by the proposed challenge by the Court. That weighs in favour of the grant of leave.

Conclusion

[21] Having regard to the above factors, and the overarching consideration of the interests of justice, I am satisfied that leave should be granted. The relatively short delay, counsel's error that led to it, the lack of any real prejudice to the respondents, and the fact that to deny leave would extinguish the company's ability to challenge support this conclusion.

[22] Leave is accordingly granted for the applicant to file a statement of claim challenging the determination of the Authority within five working days of the date of this judgment.

⁶ *Almond v Read*, above n 4, at [39].

⁷ See *Almond v Read*, above n 4, at [31].

[23] The respondents are to file and serve any statement of defence within the usual timeframes and the matter is then to be referred to a Judge for further directions to be made to progress the challenge.

Christina Inglis Chief Judge

Judgment signed at 4.00 pm on 15 February 2022