

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

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

**[2025] NZEmpC 139
EMPC 23/2025**

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

BETWEEN EPIPHANY DONUTS NEWTOWN LIMITED
First Applicant

AND EPIPHANY DONUTS WAIKANAE LIMITED
Second Applicant

AND IVY CRISELDA TAN-AZUCENA
Third Applicant

AND OTTO AZUCENA
Fourth Applicant

AND VISHAL SATIJA
Respondent

Hearing: On the papers

Appearances: O Azucena, agent for applicants
J Wood, advocate for respondent

Judgment: 8 July 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The applicants seek leave to extend time to file a challenge to a costs determination of the Employment Relations Authority (the Authority).¹ Leave is

¹ *Satija v Epiphany Donuts Newtown Ltd* [2024] NZERA 727.

required because the challenge was not filed within the statutory time period for doing so.² The respondent opposes the application.

[2] The background can be summarised as follows. The respondent was employed by Epiphany Donuts Newtown Ltd. The parties entered into a settlement agreement. The respondent sought orders from the Authority in respect of an alleged breach of the agreement. The Authority determined that the applicants were obliged to make outstanding payments to the respondent under the settlement agreement. The issue of costs then arose. The Authority found that the respondent was entitled to costs as the successful party, and ordered \$4,500 in their favour. It is the costs determination that the applicants wish to challenge.

[3] The Authority's costs determination was issued on 5 December 2024. That means that the statutory timeframe for filing a challenge expired on 14 January 2025.

[4] On 6 January 2025 Mr Azucena, fourth applicant and agent for the applicants, filed an application for leave to extend time to file a challenge. A review of the Registry file reflects that the application was rejected because it was not accompanied by an affidavit. The same day Registry staff explained that the applicants were within time to file a challenge but went on to say that if they wished to file an application for leave to extend time it must be filed with an affidavit, along with a draft statement of claim. On 17 January 2025 Mr Azucena responded by saying he was having difficulty finding a lawyer, because of cost.

[5] On 23 January 2025 Mr Azucena filed an application for leave to extend time, a supporting affidavit and a draft statement of claim.

[6] The draft statement of claim seeks to pursue a de novo challenge against the Authority's costs determination. It states that the applicants should have been considered the successful parties because the respondent proceeded in the Authority despite the fact that there was a settlement agreement in place; that they should be compensated as the respondent has allegedly harassed and bullied them; and the alleged harassment and bullying impacted the ability to file a challenge within time.

² Employment Relations Act 2000, s 179(2).

[7] Timetabling orders were made at a telephone directions conference. I set out the issues that would be the focus of the Court’s attention, and each of the factors generally considered relevant, in a minute following the conference. It was agreed that the application could be dealt with on the papers.

Framework for analysis

[8] The applicants seek leave to extend time to file a challenge under s 219 of the Employment Relations Act 2000 (the Act). Section 219 provides that:

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 ... 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.

[9] As will be apparent, s 219 confers two procedural routes on the Court. The first is to extend time to do something when the statutory timeframe has expired; the second is to validate things that have been done informally.

[10] Given the circumstances of this case, as outlined above, I consider (without deciding) that validation would likely have been an available option. And while reg 13A of the Employment Court Regulations 2000 provides that an application for leave in any proceedings must be accompanied by an affidavit verifying the grounds on which the application is made, it is doubtful that the word “must” is to be read as mandatory in every circumstance,³ or that a failure to file an affidavit with an application is to be regarded as fatal to the application itself.⁴

[11] It is well established that the powers contained in regulations are subject to statutory powers, and are to be interpreted consistently with the empowering statute’s underlying purposes. A focus on substance over form is an ingrained feature of the

³ *Simpson v Attorney-General* [1955] NZLR 271 (CA) at 281.

⁴ While Mr Azucena was advised that a draft statement of claim would need to be filed with the application for leave to extend time reg 13A does not require a draft statement of claim to be filed; rather it is referred to in the Court’s practice directions: see Employment Court of New Zealand “Practice Directions” (1 September 2024) <employmentcourt.govt.nz> at No 7.

Act, reflected in various provisions, including s 219 itself (validation of informal proceedings); s 189 (court’s equity and good conscience jurisdiction) and s 221 (court to more effectually dispose of any matter before it according to the substantial merits and equities, including by waiving any error or defect). It might be said that an undue focus on procedural compliance has the potential to undermine the underlying statutory intent of this specialist court, which explicitly permits parties to be represented by non-lawyers.

[12] Moving beyond the employment jurisdiction, it is notable that in *Fuimaono v Housing NZ Ltd*, the High Court held that it was not a function of the Registry to decide whether or not the filing of a particular document was out of time; it should be accepted and left to the parties to object and the Court to decide.⁵ The Court went on to observe that the position might be different where the deficiencies were “gross and palpable” and the documents a party was seeking to file were “not capable of giving rise to legal consequences”.⁶

[13] In this case, the issue of whether the original application for leave (which was within the timeframe for filing a challenge) ought to have been rejected for filing has not been argued, and there is no need to express a concluded view on the point. Nor do I need to express a concluded view on whether it would have been open to the Court to validate the original application, because of the conclusion I have reached on the application for leave to extend time, which I now turn to.

Application to extend time

[14] The factors usually applied when assessing an application to extend time to file a challenge are well established. They include:⁷

- (a) The length of the delay.
- (b) The reasons for the delay.

⁵ *Fuimaono v Housing New Zealand Ltd* (2000) 15 PRNZ 115 (HC) at [7].

⁶ See, for example, *Haden v Wells* [2012] NZHC 31, and the authorities cited at [7].

⁷ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

- (c) The conduct of the parties, and particularly the applicant.
- (d) Any prejudice or hardship to the respondent or other affected parties.
- (e) The significance of the issues raised by the challenge, including to the parties and the general public.

[15] Insofar as an application to extend time to file a challenge is concerned, the Court has previously had regard to the merits of the proposed challenge. This factor is now approached with caution.⁸

Length of delay

[16] The delay in filing was moderate. The Authority's determination was issued on 5 December 2024. That means that the last day to file a challenge was 14 January 2025.⁹ The application for leave to extend time to file the challenge was accepted for filing on 23 January 2025, so a delay of nine days.

Reasons for delay

[17] The reasons for the delay emerge, at least to some extent, from the background.

[18] It is clear that the applicants wished to challenge the Authority's costs determination but struggled with the process for doing so. Mr Azucena confirms that he was having difficulties obtaining legal assistance given the costs involved and in light of the Christmas vacation period. That appears to be reflected in the fact that steps were taken to challenge the determination as early as 6 January 2025, so well within time. It was, as explained above, the way in which they sought to pursue the challenge which was problematic. If they had filed a statement of claim on 6 January, rather than an application to extend time to file a statement of claim (which was rejected for filing), no issue would have arisen.

⁸ *Rookes v Tillmans Fine Furniture Ltd* [2024] NZEmpC 254 at [16]; *Almond*, above n 7, at [39]–[40].

⁹ See *Grigorovich v Precise Ltd* [2020] NZEmpC 71; *New Zealand Air Line Pilots' Assoc v Airways Corp of New Zealand Ltd* [2014] NZEmpC 90, [2014] ERNZ 654.

[19] There were delays between the date on which the application for leave to extend time to challenge was rejected for filing (6 January) and the date on which the application was re-presented for filing on 23 January (this time with an affidavit in support and a draft statement of claim). The delays need to be viewed in context. While an explanation was provided to Mr Azucena as to the available procedural options, they may not have seemed straightforward to a person unfamiliar with legal procedure. It is notable too that Mr Azucena said that he had been having difficulty obtaining legal advice and assistance at the time he refiled.

Applicants' conduct

[20] The respondent says that the applicants have failed to act promptly in these proceedings, including by failing to file documents ahead of the directions conference. It is also noted that the debt owed to the respondent has been outstanding for years. The delay in filing is said to be symptomatic of ongoing delay tactics to avoid or put off payment. While I have some sympathy for the respondent, and the points they make, they need to be considered in light of the apparent reasons for the delay in filing on time, and the steps that were taken (within time) to challenge the Authority's costs determination.

Prejudice

[21] As the Court has previously pointed out, a successful party is entitled to finality once the limitation period for filing a challenge has expired, and it is considered prejudicial to deprive it of that finality.¹⁰ Further, and as Mr Wood, advocate for the respondent, observes, if leave is granted the respondent will face further delays.

[22] All of this must, however, be weighed against the fact that if leave is not granted the applicants will not be able to challenge the Authority's determination which they would have a right to challenge if they had filed within time.

¹⁰ *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [43]–[44].

Significance of issues on proposed challenge

[23] While I accept that the applicants have a strong view about where the merits lie and wish to have the opportunity to air their claim at the Court level, the proposed challenge does not engage any broader public interest.

Merits

[24] 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.¹¹

[25] As I have said, much of the material filed in support of the application is focussed on alleged deficiencies in the substantive determination of the Authority. It is the costs determination which will be at issue on any challenge. Determination of the costs challenge appears to centre on narrow issues – who was the successful party? If it was the respondent, should costs follow the event? If so, in what quantum? Based on the material currently before the Court, the proposed challenge appears weak.

Conclusion on application for leave to extend time

[26] The applicants are not represented by a lawyer and say, in affidavit evidence filed in support, that they have had difficulties obtaining such assistance. Further, they have plainly had challenges with the procedural requirements relating to the challenge.

[27] As against this, the delay in filing after various issues were brought to the applicants' attention by Registry staff on 6 January 2025 is not fully explained, and a number of matters said to support the application are not relevant or are inadequately supported such that any weight can appropriately be placed on them (for example, references to harassing and bullying conduct).

[28] The Court must ultimately be guided by the principles of equity and good conscience. Weighing the matters before the Court, I am satisfied that it is in the

¹¹ *Almond*, above n 7, at [39](c).

interests of justice to grant the application, but subject to conditions (which are set out below).

Orders

[29] The application for an extension of time to file a challenge to the Authority's costs determination is granted, subject to the following conditions:

- (a) The draft statement of claim dated 23 January 2025 is to be accepted for filing on payment of the applicable filing fee, no later than 4.00 pm on 16 July 2025.
- (b) The challenge is to be pursued diligently.
- (c) The applicants are to strictly comply with all timetabling directions and orders of the Court in respect of the challenge.

Costs

[30] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 8 July 2025