



Employment Court of New Zealand

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Hawkes Bay District Health Board v Trewick [2019] NZEmpC 11 (11 February 2019)

Last Updated: 16 February 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

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

[\[2019\] NZEmpC 11](#)

EMPC 27/2019

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	HAWKES BAY DISTRICT HEALTH BOARD Applicant
AND	JOHN TREWICK Respondent

Hearing: On the papers

Appearances: P Chemis, counsel for applicant
P Cranney, counsel for respondent

Judgment: 11 February 2019

JUDGMENT OF JUDGE B A CORKILL

[1] The Hawkes Bay District Health Board (the Board) has applied to the Court for leave to file a challenge out of time.

[2] The determination of the Employment Relations Authority (the Authority) was issued on 3 January 2019.¹

[3] The Board sought to file a statement of claim raising a de novo challenge on 1 February 2019, believing that the 28-day limitation period expired on 4 February 2019, having regard to the applicable legislative provisions.

1 *Trewick v Hawkes Bay District Health Board* [2019] NZERA Wellington 2.

HAWKES BAY DISTRICT HEALTH BOARD v JOHN TREWICK [\[2019\] NZEmpC 11](#) [11 February 2019]

[4] The Employment Court registries were closed from 24 December 2018 to 3 January 2019; those days are not working days, and do not count for the purposes of the applicable calculation. Accordingly, time commenced running on 4 January 2019, and expired on 31 January 2019. This calculation accords with the analysis of the legislative provisions and case law in *Performance Cleaners All Property Services Wellington Ltd v Chinan*.² Thus, the challenge was filed one day late.

[5] The position of Mr John Trewick is that he does not oppose the application, although he has not consented.

[6] In my view, the position should be considered in light of the statement of the Supreme Court in *Almond v Read*, where it was emphasised that the ultimate question in such a case is what the interests of justice require.³ It modified the approach which needs to be taken as to the merits of the claims of the party seeking exercise of the discretion to extend time, in these paragraphs:

[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.

[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.

(footnotes omitted)

2 *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2018] NZEmpC 6.

3 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

[7] I find that the error arose through an inadvertent, and incorrect understanding of the provisions relating to the correct calculation of time. The delay is minimal, there is no prejudice, and Mr Trewick does not oppose the application.

[8] In these circumstances, I grant the application.

[9] The Board is directed to file its statement of claim by 16 February 2019.

[10] There will be no order as to costs.

B A Corkill Judge

Judgment signed at 2.45 pm on 11 February 2019

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