



# Employment Court of New Zealand

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## Invacare New Zealand Limited v Pyne [2022] NZEmpC 175 (22 September 2022)

Last Updated: 28 September 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKAURAU

[\[2022\] NZEmpC 175](#)  
EMPC 231/2022

IN THE MATTER OF an application for leave to extend time to  
file a challenge to a determination of the  
Employment Relations Authority  
BETWEEN INVACARE NEW ZEALAND LIMITED  
Applicant  
AND DARREN PYNE  
Respondent

**EMPC 212/2022**  
IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND IN THE MATTER of an application for a stay of  
execution  
BETWEEN DARREN PYNE  
Plaintiff  
AND INVACARE NEW ZEALAND LIMITED  
Defendant

Hearing: 12 September 2022 (heard by telephone)  
Appearances: P Pa'u, advocate for Darren Pyne  
E Butcher and C Joy, counsel for Invacare NZ  
Limited  
Judgment: 22 September 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

**(Application for leave to extend time to file a challenge) (Application for a stay of execution)**

INVACARE NEW ZEALAND LIMITED v DARREN PYNE [\[2022\] NZEmpC 175](#) [22 September 2022]

### Introduction

[1] Mr Pyne was employed by Invacare New Zealand Limited (the company). He was subsequently dismissed for redundancy. The Employment Relations Authority found that the dismissal was unjustified because the decision to disestablish Mr Pyne's role arose primarily because of performance issues, rather than to improve efficiency.<sup>1</sup> The Authority awarded Mr Pyne \$27,500 compensation for lost wages and \$8,500 compensation under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the compensation figure having been reduced by 15 per cent for contribution).

[2] Mr Pyne filed a non-de novo challenge in the Court, claiming that the Authority erred in fact and law in its approach to the calculation of non-pecuniary loss under [s 123\(1\)\(c\)\(i\)](#). The challenge was filed on 1 July 2022, which was 24 days after the date of the Authority's determination. This was within the statutory timeframe.<sup>2</sup>

[3] The company did not file a challenge within 28 days. It now seeks an extension of time to do so. That application is opposed. The company also seeks an order staying execution of the monetary awards made in Mr Pyne's favour by the Authority. That application is also opposed. Ms Butcher, counsel for the company, accepted in oral argument that if the Court declines leave to extend time the company's application for a stay of execution does not need to be dealt with.

### **Application for leave to extend time to file a cross challenge**

[4] The Court has a discretion to grant an extension of time to take various steps, including to file a challenge.<sup>3</sup> 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:<sup>4</sup>

- the reasons for the omission to file within time;

1 *Pyne v Invacare New Zealand Ltd* [2022] NZERA 240 (Member Arthur).

2 [Employment Relations Act 2000, s 179\(2\)](#).

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

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

- the length of the delay;
- any prejudice or hardship to any other person;
- the effect on the rights and liabilities of the parties; and
- subsequent events.

[5] 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, for reasons which I will come to.

#### *Why the challenge was not filed within time*

[6] There are a range of reasons why a party may omit to file a challenge within the statutory time limit. As the cases reflect, leave may more readily be granted in circumstances where the omission is not caused directly by the party concerned, such as where the party's representative has overlooked or miscalculated the timeframe for filing. Whether the omission, once discovered, has been promptly addressed will also be relevant to the weighting exercise.

[7] The omission to file within time in this case has been explained in an affidavit. Mr Purtill, senior vice president and general manager, says that he was disappointed when he received the Authority's determination. However, after taking advice, it was agreed not to pursue a challenge and to arrange payment to Mr Pyne of the amounts ordered in his favour. Mr Purtill says that he was surprised to receive a copy of Mr Pyne's statement of claim, which was served one day before the last day for filing a challenge.

[8] Having received the statement of claim Mr Purtill sought further advice from the company's legal counsel and then sought additional input from a human resources manager and others within the organisation. He later gave instructions to seek leave to file a cross challenge out of time. An application for leave was filed nine days after the statement of claim was served on the company.

[9] The documentation before the Court reveals that the company had written to Mr Pyne's representative on 30 June 2022 requesting bank details for payment of remedies. On 4 July 2022, a day before the last day for filing, Mr Pa'u, Mr Pyne's representative, emailed Ms Butcher advising that a non-de novo challenge had been filed in relation to remedies and asking whether she was authorised to accept service. That email was sent at 9.27 am. Confirmation as to authorisation was given at 10.16 am the same day, and the statement of claim was served via email at 10.48 am.

[10] While I accept that Mr Purtill was surprised to learn that Mr Pyne was pursuing a challenge, the company became aware of that fact (via counsel) by the morning of the day before the last day for filing. The company then had over a day and a half to take steps (which would not have been onerous or legally complex) to protect its position and had access to legal advice during that timeframe. I do not accept that the omission to file within time has been adequately explained.

[11] Nor do I consider that the company took prompt steps thereafter to deal with the omission it had allowed to occur. It remains unclear why the process to file an application for leave to extend the time for filing a cross challenge took nine days. Mr Purtill's affidavit lacks specificity in this regard. In particular, he does not explain why it took nine days for the company to seek and receive legal advice or to obtain advice internally from company staff.

[12] The omission to file within time, and the subsequent failure to take prompt steps to address the omission, weigh against the grant of leave.<sup>5</sup>

## *Length of the delay*

[13] I was referred to a number of cases where varying lengths of time have been characterised in different ways (minor, moderate, excessive and the like). Generally, the number of days of delay is likely to be less important than the reasons for the delay, which I have already referred to. In any event, I do not regard the delay in this case as minor in the circumstances.

5 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [37] - [38].

[14] The length of the delay weighs against the grant of leave.

## *Prejudice and/or hardship*

[15] If leave is not granted, the company says that important questions that would otherwise arise for determination will not be before the Court and the company will be denied the opportunity to challenge the Authority's finding that the dismissal was unjustified. It is further said that the issues that arise on Mr Pyne's non-de novo challenge in respect of remedies will not be able to be supported by adequate evidence.

[16] I accept that if leave is not granted, the Authority's finding as to justification stands and issues which the company now wishes to pursue about "mixed motives" (when a dismissal occurs in the context of a restructuring) cases will not fall for consideration by the Court. The first will undoubtedly cause prejudice to the company; I am not persuaded that the second issue is "important" so as to otherwise warrant the grant of leave. As is evident from the Authority's determination, the justification or otherwise for a decision to dismiss for redundancy will require an assessment of the decision in its own factual context. The Authority found that the company did have mixed motives but does not appear to have been suggesting that the mere existence of mixed motives rendered a dismissal for redundancy unjustified. In other words, where the line is drawn in a mixed motive case will necessarily be fact dependant.

[17] The concerns raised by the company in respect of the sufficiency or otherwise of the evidential basis for Mr Pyne's non-de novo challenge do not need to be addressed by allowing it to proceed with a de novo challenge. The point is that the Court is required, on a non-de novo challenge, to direct the nature and scope of the hearing. The Court not infrequently directs that evidence relevant to the particular alleged errors pleaded (in this case the Authority's factual and legal findings in respect of non-pecuniary loss) will need to be heard afresh. Those are issues which will need to be traversed in a case management conference but do not of themselves warrant the grant of leave.

[18] If leave is granted, Mr Pyne will be prejudiced as he will be obliged to meet a wider claim, and he will face the additional costs, time and inconvenience in doing so.

[19] This factor is, in the circumstances, neutral.

## *Merits*

[20] 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.<sup>6</sup>

[21] Mr Pa'u submitted that the company's proposed challenge plainly lacks merit, and refers to the Authority's findings and documentation in support. All of this, it is said, clearly reflects predetermination on the part of the company. Ms Butcher readily accepts that the dismissal was underpinned by mixed motives, in that the company was not solely considering business efficiency issues when deciding to disestablish Mr Pyne's position. As she points out, the mere fact that the company executed its restructuring process for mixed motives does not mean the dismissal was unjustified, or that Mr Pyne suffered unjustified disadvantage. That is true but it does affect the likely merits of the proposed challenge.

[22] All that can really be said with any degree of confidence at this stage is that the proposed challenge cannot be dismissed as being devoid of merit.<sup>7</sup>

## **Conclusion**

[23] Having regard to the above factors and the overarching consideration of the interests of justice, I decline leave to the company to file a cross challenge. It follows that the application for a stay of execution does not need to be dealt with. For completeness, I record that I would not have ordered a stay of execution as I was not satisfied that it was appropriate in the circumstances to deny Mr Pyne access to the fruits of his success in the Authority pending the outcome of the challenge.

7 At [39].

[24] Mr Pyne is entitled to costs on the application. I anticipate that the representatives will be able to agree costs. If that does not prove possible, I will receive memoranda.

Christina Inglis Chief Judge

Judgment signed at 9.20 am on 22 September 2022

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