Employment Court of New Zealand

Kiwi Ink Construction Limited v Hughes [2018] NZEmpC 124 (23 October 2018)

Last Updated: 28 October 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 124
EMPC 166/2018

IN THE MATTER OF	an application to file a challenge out of time
BETWEEN	KIWI INK CONSTRUCTION LIMITED Applicant
AND	DYLAN HUGHES Respondent

Hearing:	On the papers
Appearances:	G Ropiha, agent for applicant No appearance for respondent
Judgment:	23 October 2018

JUDGMENT OF JUDGE M E PERKINS

[1] Kiwi Ink Construction Ltd (Kiwi) has applied for leave to extend the time for filing a de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 31 January 2018.1 By virtue of s 179(2) of the Employment Relations Act 2000 (the Act) a challenge must be made in the prescribed manner and within 28 days of the date of the determination.

[2] The limitation period was not complied with by Kiwi. Kiwi filed its application for leave on 8 June 2018. The application was accompanied by a draft statement of claim to be filed if leave was granted. An affidavit in support by George Paul Ropiha was sworn on 6 June 2018 and filed on 8 June 2018. The application was served on the respondent Dylan Hughes on 18 June 2018. An affidavit of service was not sworn until 31 August 2018. The original of the affidavit of service was not filed until 11 October after prompting from the Court.

1 *Hughes v Kiwi Ink Construction Ltd* [2018] NZERA Auckland 34.

[3] Kiwi failed to participate at all in the investigation by the Authority. No statement in reply was filed to the statement of problem filed by Mr Hughes (who was the applicant in the Authority). Kiwi did not attend the investigation meeting. It refused to engage in mediation with Mr Hughes prior to the investigation. Perhaps inevitably Mr Hughes was successful before the Authority and received monetary awards for unpaid wages, holiday pay, reimbursement of an invalid deduction from his wages and a filing fee. The total sum awarded was $1,600.08.

[4] Mr Hughes has taken no steps in these proceedings now before the Court. While the application is therefore not opposed, the Court nevertheless needs to consider the matter in a principled manner and in accordance with established precedent. Mr Hughes represented himself before the Authority and obviously is now prepared to abide the decision of the Court on the application for leave.

[5] The jurisdiction to extend time for filing a challenge is contained in s 219(1) of the Act which provides, as far as is

material to the present application, as follows:

If anything which is required ... to be done by this Act is not done within the time allowed, ... 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.

[6] In the exercise of the broad discretion contained in s 219 of the Act, the Court must be guided by several factors. This has been well established in previous decisions of the Court.2

[7] The six fundamental factors established in these authorities, while not exclusive, were summarised by Judge Couch in *An Employee* as being:

1. The reason for the omission to bring the case within time.
2. The length of the delay.
3. Any prejudice or hardship to any other person.
4. The effect on the rights and liabilities of the parties.

2. *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]; *Day v Whitcoulls Group Ltd* [1997] NZEmpC 152; [1997] ERNZ 541 (EmpC) at 548; *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 (EmpC) at [8].

5. Subsequent events.
6. The merits of the proposed challenge.

[8] If the period of the delay is only a matter of days caused by administrative oversight, and the person applies for an extension of time promptly on learning of the error, then an extension of time should generally be granted without looking closely at the merits and without expectation that there would be opposition from the opposing party.3 As will be seen, this is not the case here.

[9] The application in the present case has been filed by Mr Ropiha who is a co- director of Kiwi. As indicated, he has also sworn and filed the affidavit in support and appears to have drafted the proposed statement of claim. Prior to the Court dealing with the application, Mr Ropiha was given the opportunity of filing submissions in support of the application and he has done so.

[10] The primary allegation by the applicant is that Mr Hughes was not an employee of Kiwi. One would have thought that with such a substantial ground of opposition to Mr Hughes' claim, Kiwi would have participated in the investigation meeting before the Authority and certainly have filed a statement in reply. Also, on the basis that the position if properly presented at mediation might have resolved the matter amicably, it is surprising that Kiwi refused to participate in the mediation process.

[11] Apart from setting out at some length the basis of opposing Mr Hughes' claims and the alleged facts relating to the employment relationship, very little else is presented by Kiwi as grounds for the application. Presumably the matters which have been presented are for the purposes of endeavouring to demonstrate the merits of the proposed challenge. Insofar as the omission to bring a challenge within time is concerned, the application simply states that the applicant's director was unable to meet the deadline due to personal and working commitments as alleged in his supporting affidavit. In his affidavit Mr Ropiha refers to health difficulties on the part of his partner and her father as affecting the company's ability to respond. No supporting evidence is provided. It is somewhat unconvincing particularly when, in another paragraph of his affidavit, Mr Ropiha indicates that the claims to the

3 *Almond v Read* [2017] NZSC 80 at [37].

Employment Court (he means the Authority) were initially ignored because he was of the view that Mr Hughes was a contractor to the company. Once again that would be a somewhat unconvincing basis for not taking steps to present what he clearly considered was a valid defence.

[12] Turning to the factors set out in *An Employee,* the following position emerges in this case. There are insufficient reasons put forward by Kiwi for the omission to bring the challenge within time. The length of the delay is substantial and is simply not explained in the material presented to the Court. A delay of more than four months is excessive. In addition, there is the further delay on the part of the applicant in proving service so that the Court could progress the matter. Insofar as any prejudice is concerned, Mr Hughes would certainly be prejudiced by the delay if leave was granted. He has had the benefit of the monetary awards of the Authority for a considerable period. During that period, he has been entitled to take steps to enforce the awards against Kiwi. He would incur costs in doing so. The effect upon the rights and liabilities of the parties if leave is granted will also be significant in this case, particularly for Mr Hughes. While a challenge does not operate as a stay pending the hearing of the challenge, such leave would potentially interfere with the orders made in the determination which has now subsisted for over eight months. An application for stay of enforcement may be open to Kiwi. This would again be unfair to Mr Hughes.

[13] Even though Kiwi took no part in the investigation meeting, in her determination the Authority Member considered the issue of whether Mr Hughes was an employee and found in his favour; the monetary awards followed. Even though the potential merits of the proposed challenge need to be considered as part of the exercise of the discretion, it is only one of six factors to be considered. In the present case, I do not assess the merits of the proposed challenge as being particularly strong. Even if they were, that ground is substantially outweighed by the other factors which the Court now needs to consider, including the length of the delay and the inadequate grounds put forward for it occurring.

[14] As stated by Judge Holden in a recent decision of the Court:4

[24] In considering whether the Court should exercise its discretion pursuant to s 219 of the Act to allow an extension of time within which to file a challenge, the fundamental principle that must guide the Court is whether the justice of the case requires the extension of time to be granted.5

[15] In considering the overall justice in the present case, it must strongly favour the position of Mr Hughes and require the application to be declined. Even if the challenge had been allowed to proceed on a de novo basis, the Court would have required the Authority to provide a good faith report pursuant to s 181 of the Act, in view of the indications that Kiwi did not facilitate the Authority's investigation, nor does it appear to have acted in good faith towards Mr Hughes. This in turn, would likely have resulted in the Court disallowing the matter to proceed on a de novo basis. The issues to be decided and the evidence to be presented would then have been limited. If Mr Hughes had decided to participate in the substantive hearing and be represented, then Kiwi would also likely have faced an order for costs well in excess of the amounts awarded by the Authority.

[16] In conclusion therefore, the application for leave is declined. As Mr Hughes did not participate in the application before the Court, no order for costs is necessary.

M E Perkins Judge

Judgment signed at 12 noon on 23 October 2018

4 *Hollinshead v Davey* [2018] NZEmpC 116.

5 See, for example, *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA) at 91.
