



Employment Court of New Zealand

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Kocaturk v Zara's Turkish Limited [2018] NZEmpC 51 (21 May 2018)

Last Updated: 25 May 2018

IN THE EMPLOYMENT COURT
CHRISTCHURCH

[\[2018\] NZEmpC 51](#)
EMPC 328/2017

IN THE MATTER OF an application for leave to extend time to
 file a challenge
BETWEEN IBRAHIM KOCATÜRK
 First Applicant
AND GÜLER KOCATÜRK
 Second Applicant
AND ZARA'S TURKISH LIMITED
 Respondent

Hearing: On the papers filed on 6, 19 and 27 April
 2018
Appearances: A Sharma, counsel for the applicants B
 Buckett, counsel for the respondent
Judgment: 21 May 2018

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH APPLICATION TO EXTEND TIME

[1] Ibrahim Kocatürk and Güler Kocatürk issued proceedings in the Employment Relations Authority against Zara's Turkish Ltd claiming personal grievances for unjustified dismissal, unpaid wages and holiday pay. The Authority awarded them unpaid wages and holiday pay, and found that Mrs Kocatürk was an employee who had been unjustifiably dismissed. It held that Mr Kocatürk had left his employment and had not been dismissed.¹

[2] Zara's Turkish was ordered to pay Mr Kocatürk gross sums of \$16,194.36 for arrears of wages and \$4,766.76 for holiday pay, and statutory holiday pay. It was ordered to pay Mrs Kocatürk gross sums of \$35,822.47 for arrears of wages, \$5,652.60

¹ *Kocatürk v Zara's Turkish Ltd* [2017] NZERA Christchurch 145.

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for holiday pay, and statutory holiday pay, \$13,338 for lost wages arising from her unjustified dismissal and a compensatory sum of \$7,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).

[3] In calculating unpaid wages, the Authority relied on the [Minimum Wage Act 1983](#) and relevant Minimum Wage orders.² It declined to consider any application for arrears that arose more than six years before Mr and Mrs Kocatürk lodged their statement of problem.³

[4] Zara's Turkish accepted the determination in relation to Mr Kocatürk and has paid him the amount ordered. It disputed the determination about Mrs Kocatürk and, on 27 September 2017, challenged it in a separate proceeding. In that proceeding Zara's Turkish has pleaded that Mrs Kocatürk was not employed by it during the period of 1 October 2010 to June 2011, she did not work the number of hours claimed to have been worked and resigned. The company has also pleaded that a personal grievance was not raised on her behalf within the 90 days allowed by s 114(1) of the Act.

This application

[5] On 6 November 2017, Mr and Mrs Kocatürk applied for leave to extend the time within which they could challenge the determination. At the same time, they applied for leave to join another company to the proceeding but that application has been discontinued.

[6] The grounds of the application were only generally stated; the overall interests of justice, lack of prejudice to Zara's Turkish, and because the proposed proceeding is said to be "integrally associated" with Zara's Turkish's challenge to the determination. A draft statement of claim and a joint affidavit by Mr and Mrs Kocatürk supported the application.

2 At [47].

3 At [48].

[7] If this application succeeds Mr Kocatürk intends to challenge the determination that he was not unjustifiably dismissed and the method used by the Authority to calculate arrears of wages and holiday pay, he says, are due to him. Mrs Kocatürk intends to challenge remedies awarded to her.

[8] Zara's Turkish has opposed the application.

Section 219 of the Act

[9] This application relies on the Court exercising the discretion to extend the time to challenge a determination under s 219 of the Act, which reads:

219 Validation of informal proceedings, etc

(1) 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, or the Authority, as the case may be, 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.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[10] There is agreement between Ms Sharma for the applicants, and Ms Buckett for the respondent, that this discretion must be exercised judicially, in accordance with established principles and in the interests of justice. The following matters are usually considered in assessing an application:⁴

- (a) the reason 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;

4. See: *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 (EmpC), *An Employee v An Employer* [2007] ERNZ 295 (EmpC) and *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91, (2012) 10 NZELR 84.

- (e) subsequent events; and
- (f) the merits.

Reason for omission to bring the case

[11] In their joint affidavit Mr and Mrs Kocatürk deposed to speaking and reading very little English. Their lack of English and lack of knowledge about the time allowed to file a challenge, was the explanation relied on for the omission to file within time. The Authority also commented on the language difficulties and their evidence was presented to the investigation meeting with the help of an interpreter appointed by the Ministry of Business, Innovation and Employment.⁵

[12] Their lack of English led Mr Kocatürk to contact the interpreter, Mr Yanbakan, by telephone to get an explanation of the determination. Mr Yanbakan provided an overview of it but did not mention the 28-day time limit to challenge the determination as of right. Mr and Mrs Kocatürk said that while they were pleased with the determination there were aspects of it they disagreed with. Steps were not taken to address what they disagreed with, however, because they believed there was no alternative other than to accept the outcome. They said they did not understand the process and waited for Zara's Turkish to pay the money awarded to them.

[13] On 6 October 2017, Zara's Turkish challenge was served on Mrs Kocatürk. Ms Sharma was instructed on 12 October 2017. On 13 October 2017, she sought a copy of the Authority's file. On 19 October 2017, Ms Sharma filed and served a memorandum advising that an application for an extension of time was to be made.

[14] Zara's Turkish disputes the contention that the omission to file on time has been adequately explained. The reason for that dispute was a belief by the directors of the company that Mr and Mrs Kocatürk must have known about the time limit. One of its directors, Mrs Hanife Kokcu, swore an affidavit stating that Mr and Mrs Kocatürk had a support person who also represented them at the investigation meeting. She invited an adverse inference to be drawn that Mr and Mrs Kocatürk were not

5 *Kocatürk v Zara's Turkish Ltd*, above n 1, at [5].

disadvantaged by their difficulty in understanding English because of this assistance. She produced an email dated 1 September 2017, from the Authority's Support Officer who sent a copy of the determination to counsel then acting for Zara's Turkish and the person described as a representative. The email unambiguously referred to the 28-day time limit to file a challenge as of right.

[15] Another email was produced addressed to the same person where the Support Officer explained the function of a certificate of determination for enforcement purposes. This email contained advice that Zara's Turkish had 21 days to pay or the certificate could be used to enforce the Authority's orders through the District Court. Reliance was also placed on an email sent to Zara's Turkish's former counsel by this person, passing on the content of a text message from Mr Kocatürk. The message was that he wanted full payment by 25 September 2017 and, if he did not receive it, he would apply to the Court to enforce the determination.

[16] From those exchanges Ms Buckett submitted Mr and Mrs Kocatürk were being advised and, therefore, must have been aware of the 28-day time limit. An invitation was extended to disregard Mr Yanbakan's evidence as lacking credibility based on the proposition that an experienced interpreter, with his extensive background, would have informed the person relying on him of something as important as a deadline.

[17] Mr and Mrs Kocatürk denied they were represented, but accepted being accompanied by a friend, as a supporter. However, they maintained they were not advised about the time limit to challenge the determination as of right.

[18] In *An Employee v An Employer* the Court held that where an extension of time is sought the applicant has an onus to provide evidence necessary to explain the delay as fully as possible.⁶ In this case the omission to file is explained as a combination of Mr and Mrs Kocatürk's severe language difficulties and being unrepresented at crucial times.

[19] I accept that the applicants' difficulties with English explain why the time to file a challenge as of right elapsed without them taking steps. In the context of an

6 *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [39].

application such as this it is not possible to resolve potential conflicts in the evidence of the sort identified in the contested matters in the affidavits. However, for the purposes of this application, I accept that Mr and Mrs Kocatürk were not represented or advised about the time limit. While Ms Kokcu expressed misgivings about the role played by the friend there is no basis on which to reject what was said by Mr and Mrs Kocatürk. There is no evidence from which it could be reliably said that she represented them.

[20] The Authority also considered they were unrepresented and the determination does not name their friend in any capacity. Mr Yanbakan's evidence is also highly persuasive.

[21] Weighing up all of those matters the omission to file on time has been explained.

The length of the delay

[22] The delay was 36 days. That is a significant delay as Ms Sharma conceded. It falls into two parts. The first part was up until 12 October 2017 when advice was sought from Ms Sharma. The second part was from 12 October 2017 until this application was filed on 6 November 2017. Despite the overall length of the delay Ms Sharma submitted that, by itself, it was not so serious as to be determinative of the application.

[23] Ms Buckett submitted the delay was unacceptably long and was enough to be fatal. She relied on *Weston v Warwick Henderson Gallery Ltd* where the Court expressed hesitation in granting an extension for a three-day delay⁷ and *McDonald v Raukura Haurora O Tainui* where a 36-day delay was far in excess of anything previously allowed. That application was declined.⁸

[24] The delay was significant and has only been partly explained. From 12 October 2017 onwards, the delay was either

caused or contributed to by the time taken

7 *Weston v Warwick Henderson Gallery Ltd* [2003] NZEmpC 111; [2003] 2 ERNZ 723 (EmpC) at [16].

8 *McDonald v Raukura Haurora O Tainui* [2003] NZEmpC 144; [2003] 2 ERNZ 322 (EmpC) at [31].

to obtain a copy of the Authority's file. The file was large comprising about 500 documents, which may explain time taken to copy it. However, in their affidavit Mr and Mrs Kocatürk did not explain what documents they needed to obtain from that file, or why it was necessary to wait for all of it to be copied, before making this application. They deposed to having some documents in their possession but without elaboration, leaving open a possible inference that other documents considered to be relevant remained in the possession of the Authority.

[25] No detail was provided to help assess the relevance of copying the file to the length of the delay. I am prepared to accept that some part of the delay is explained by the need to take informed advice and that may have been reliant on information from the Authority file. However, this lack of information about why so much time elapsed points towards this aspect of the test under s 219 of the Act not being satisfied.

Prejudice

[26] Ms Buckett did not make submissions about potential prejudice to Zara's Turkish, if this application is granted, beyond the company being entitled to rely on the finality of the determination.

[27] In *An Employee v An Employer* the Court referred to the certainty that a party to litigation is entitled to have when a determination has been issued and the time to challenge as of right has elapsed. The Court referred, with approval, to the general principle summarised in *Avery v No 2 Public Service Appeal Board* where the Court of Appeal discussed the radical change that occurs when the time to file an appeal has passed. Once the time has passed the change is that rights to challenge have been lost and an indulgence is sought.⁹ The Court also observed that the prejudice resulting from the delay might be greatly reduced by promptly informing the intended defendant of the intention to appeal.¹⁰ That happened in this case.

[28] Beyond no longer having the certainty of the outcome from the determination there is no other prejudice to Zara's Turkish if Mrs Kocatürk is able to challenge the

9 *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA) at 91.

10 *An Employee v An Employer*, above n 6, at [44].

determination. The subjects of her employment status, the ending of her employment and the remedies that were awarded to her have already been placed in issue by Zara's Turkish's challenge.

[29] That leaves for consideration whether there would be any prejudice if Mr Kocatürk is able to pursue his claim for a personal grievance and an increase in the remedies awarded. Nothing further was advanced by Zara's Turkish to show that it would suffer any prejudice from this application being granted and it is difficult to see that any would arise. The overall impression is that the evidence on all issues touching on the putative challenge by Mr and Mrs Kocatürk, and what is raised by Zara's Turkish's challenge, are intertwined.

[30] On balance, any prejudice arising to Zara's Turkish is insufficient to lead this application being dismissed.

Rights, liabilities or subsequent events and merits

[31] There are no other rights, liabilities or subsequent events which would either support or undermine this application. The current state of the pleadings and the extent of the dispute makes any attempt to consider the merits a fruitless exercise. As will be apparent from the earlier description of the dispute between Mr and Mrs Kocatürk and Zara's Turkish, there are likely to be substantial issues about credibility and a robust disagreement about what happened. Saying anything about the merits of the proposed proceeding would be inappropriate.

Overall interests of justice

[32] The overall interests of justice favour granting the application. The reason for the omission to file the challenge on time has been explained, the length of the delay has been partly explained and there is no prejudice to Zara's Turkish.

[33] The application for leave seeking to extend the time to file a challenge to the Authority's determination is granted. A

statement of claim complying with the

[Employment Court Regulations 2000](#) is to be filed and served no later than 10 working-days from the date of this judgment.

[34] Costs are reserved.

K G Smith Judge

This judgment signed at 10:00 am on 21 May 2018

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