# Employment Court of New Zealand



## Lewis v Immigration Guru Limited [2017] NZEmpC 13 (16 February 2017)

Last Updated: 21 February 2017

**IN THE EMPLOYMENT COURT AUCKLAND**

**[2017] NZEmpC 13**

**EMPC 300/2016**

| | |
|---|---|
| IN THE MATTER OF | an application for leave to file a challenge to a determination out of time |
| BETWEEN | MARILOU RABAJANTE LEWIS<br>Applicant |
| AND | IMMIGRATION GURU LIMITED<br>Respondent |

| | |
|---|---|
| Hearing: | 10 February 2017<br>(Heard at Auckland) |
| Appearances: | J Lewis, advocate for applicant<br>J Bath, appearing as director of and representing the respondent |
| Judgment: | 16 February 2017 |

**INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS**

[1] The applicant, Marilou Rabajante Lewis, wishes to challenge a determination of the Employment Relations Authority dated 13 October 2016.1 In that determination, her claims against the respondent that she had been subjected to racial discrimination and unjustifiable disadvantage were dismissed. She was also held not to have been unjustifiably dismissed. A 90-day trial period clause contained in her employment agreement was held to be valid.

[2] Under s 179(2) of the Employment Relations Act 2000 (the Act) any challenge must be filed within 28 days of the date of the determination. This period expired in this case on 10 November 2016. An attempt was made by Ms Lewis to file her challenge in the Court on 11 November 2016 which was therefore one day

out of time. She now makes an application for leave to file the challenge out of time.

1 *Lewis v Immigration Guru Ltd* [2016] NZERA Auckland 349.



[3] The respondent, Immigration Guru Ltd, (Immigration Guru) opposes the application. In support of the application by Ms Lewis is an affidavit from her husband, James Lewis, who is also acting as her advocate in this matter. In addition to that, the Court has a copy of the statement of claim which Ms Lewis will file if she is granted leave to do so. Attached to the proposed statement of claim is a copy of the Authority's determination.

[4] In his affidavit Mr Lewis explains that he miscalculated the time for filing as a result of his belief that the 28-day period prescribed in s 179(2) of the Act meant 28 working days rather than 28 consecutive calendar days. No further evidence is before the Court in support of the application for leave but obviously Ms Lewis relies upon the proposed statement of claim and the matters set out in the determination as providing grounds that she has an arguable case on appeal and it is not devoid of merit. If granted leave to file a challenge out of time, Ms Lewis will be seeking a hearing de novo.

[5] Immigration Guru has filed a notice of opposition to the application for leave. The grounds of opposition are:

(a) Ms Lewis has failed to provide any evidence in her application for leave to file out of time that the proposed challenge has a realistic prospect of success, even though this is a significant factor in the exercise of the Court's discretion whether to grant the extension of time.

(b) There are a plethora of claims by Ms Lewis against Immigration Guru which are all unsupported and without merit.

(c) Ms Lewis unreasonably delayed the bringing of the challenge.

(d) Ms Lewis's explanation for the delay is not reasonable in the circumstances.

(e) There will be undue prejudice to Immigration Guru if leave is granted.

(f) For the reasons set out in the affidavit of Jasmine Bath, filed in support of the opposition.

[6] In Ms Bath's affidavit in support of the opposition she, as a co-director of Immigration Guru, alleges that there will be prejudice to her and the respondent company both personally and financially if leave is granted. She also alleges that the claims by Ms Lewis in the proposed challenge are without merit. She alleges that the reasons put forward for the one-day delay in filing the challenge do not amount to a reasonable excuse.

[7] It needs to be said that the reasons put forward by Ms Bath alleging prejudice are consequences and hardship she and her company would suffer even if the challenge had been filed within time. No real prejudice is alleged to arise discretely from the delay in filing, for example that witnesses are unavailable or memories are dimmed or matters of that nature. Ms Bath conceded during the hearing of the application that this was so.

[8] This Court has jurisdiction to extend time. This is specifically provided in s 219 of the Act which reads as follows:

**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.

[9] Applications such as this have been considered by the Court on numerous occasions. Two such authorities are referred to by the respondent in its notice of opposition: *Sandilands v Chief Executive of the Department of Corrections*2 and *Hurst v Eagle Equipment Ltd.*3 The delay in both of those cases was the same as in

the present case: that is, one day.

2 *Sandilands v Chief Executive of the Department of Corrections* NZEmpC, WC23/09, 14 October

2009.

3 *Hurst v Eagle Equipment Ltd* [2011] NZEmpC 110.

[10] The principles which apply in cases such as this are set out in *Sandilands* as follows:

[7] Both the Authority and the Court have a discretion under s219 to retrospectively extend time limits imposed by the Act. It was that discretion which Ms Sandilands asked the Authority to exercise in relation to s114(6) and which she now asks the Court to exercise in relation to s179(2).

[8] The discretion conferred by s219 is not subject to any statutory criteria. Like any other discretion conferred upon the Court, however, it must be exercised judicially and in accordance with established principles. The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case.

[9] The factors which are often considered in deciding where the justice of the case lies have been set out in cases such as *Day v Whitcoulls Group Ltd* [1997] NZEmpC 152; [1997] ERNZ 541, *Stevenson v Hato Paora College Trust Board* [2002] 2

ERNZ 103 and *An Employee v An Employer* [2007] ERNZ 295. Those which are relevant to this case include:

a) The length of the delay.

b) The explanation given for the delay. c) Any prejudice to the respondent.

d) The surrounding circumstances.

e) The merits of the proposed challenge.

[10] I also have regard to the general principle summarised by Richmond J

in *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 91:

*When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.*

[11] When considering the issue of the merits of the proposed challenge, Judge Couch in *Sandilands* stated as follows:

[19] Section 179 of the Employment Relations Act 2000 gives a party to proceedings before the Authority a right to challenge its determination regardless of the merits of that challenge. Where that right is not exercised within time, however, the merits of the proposed challenge become a significant factor in the exercise of the Court's discretion whether to grant an extension of time. A party seeking such an extension of time must persuade the Court that the proposed challenge has a realistic prospect of success. That may be because further evidence is available or the Court can be persuaded that the Authority failed to have proper regard to the evidence

which was before it. Any such arguments would need to be supported by evidence in support of the application for an extension of time. In the absence of such evidence, the Court must be persuaded that there is a significant error of law or reasoning apparent on the face of the determination.

[12] These statements of principle were subsequently reiterated by Judge Travis in the *Hurst* case.4

[13] Finally as a statement of principle in the *Sandilands* case, Judge Couch stated as follows in reaching his decision:

[28] In deciding this application, I reiterate that the overriding consideration must be whether the justice of the case requires that the extension of time sought be granted. In making that assessment, the most significant factor is that the proposed challenge has little if any chance of success. While none of the other factors mitigate strongly against granting the extension of time sought, in my view it is not in the interests of justice to permit a party to prolong litigation without a real prospect of success. The application for extension of time is refused.

[14] Applying those principles to the present case, the length of the delay was effectively one day although the application for leave was filed on 14 November

2016, three days after the attempt was made to file the challenge on 11 November

2016. I am of the view that Mr Lewis made a genuine mistake in calculating the time for appeal and that there was accordingly a reasonable explanation given. As he stated in his submissions, there are other instances in law where such time limits have been taken to mean working days rather than sequential calendar days. In addition as he pointed out in his submissions, the Act and the Employment Court Regulations 2000 contain provisions relating to calculation of time limits when the Court is closed during weekends, public holidays or over the Christmas period which are confusing to a layperson. No real prejudice can have been suffered by the respondent by the delay, even though having to now defend a challenge would be time consuming and inconvenient for Ms Bath and her company. As I have indicated earlier these consequences would in any event have arisen if the challenge had been

filed in time.

4 At [4].

[15] There are no other surrounding circumstances which need to be taken into account in this case.

[16] Where the difficulty lies with Ms Lewis's application is as to the alleged merits of her challenge. On the face of it the determination of the Authority was thoroughly and well reasoned, and until I heard from Mr Lewis at the hearing no significant error of law or reasoning was immediately apparent. The Authority held that the 90-day trial period was valid. The Authority Member held that the 90-day trial period complied with the requirements of the Act and it was contained in a written employment agreement considered by both Mr and Ms Lewis before it was executed. As stated by Ms Lewis in her proposed statement of claim she regarded the agreement to be without fault.

[17] The determination also considered in a conscientious way Ms Lewis's allegations as to discrimination and disadvantage before dismissing them. The Authority Member carefully considered discrimination and disadvantage, weighing the evidence against the statutory requirements. The Authority Member considered the evidence at length and her analysis was comprehensive. In respect of the claim by Ms Lewis to have been unjustifiably dismissed, the Authority Member determined that once the 90-day trial period was held to be valid, no basis could exist to pursue a personal grievance on the grounds of the unjustifiable dismissal.

[18] Clearly, as Judge Couch stated in *Sandilands*, it is not in the interests of justice to permit a party to prolong litigation without a real prospect of success. However, in this particular case Mr Lewis in his submissions has referred to a number of matters which in my view should entitle Ms Lewis to have her case reconsidered on the merits by way of a challenge. The first relates to the issue of whether the 90-day trial period provision contained in the employment agreement was valid. Ms Bath conceded at the hearing of the application, that while the employment agreement stated that it was to commence on Monday 16 November

2015, it had in fact been signed 12 days prior to the commencement date. In addition, the specific provision in the agreement containing the 90-day trial period did not specify a starting date. A starting date was contained in an earlier provision in the agreement stating that the agreement was an individual agreement of ongoing

and indefinite duration. Mr Lewis submitted that this meant the clause containing the trial period should have independently specified its starting date.

[19] While this may seem to be a particularly technical point, as the Authority Member in her determination stated, the sections in the Act entitling inclusion into employment agreements of a 90-day trial period remove longstanding employee protections and access to dispute resolution and justice. They should therefore be interpreted strictly and not liberally.5

[20] After the investigation Mr Lewis apparently discovered a group of previous determinations of the Authority where similar technical points arose, which he refers to in his submission as the "*Lighthouse* series of cases".6 Ms Lewis's case is slightly different from the *Lighthouse* decisions in that in those cases the commencement date for the agreement was contained in a schedule attached to the employment agreement, whereas in Ms Lewis's case the commencement date is contained in a

separate but arguably unrelated provision of the employment agreement from that containing the 90-day trial period. Where, as in this case, the commencement date is contained in a provision referring to the open-ended nature of the employment agreement, that would appear to be inconsistent with the provisions specifically providing the 90-day trial period.

[21] Mr Lewis in his submissions informed the Court that he had applied to the Authority for leave to make further submissions on this issue at a time when the Authority Member was still deliberating upon the determination. Mr Lewis was not granted leave to file further submissions on behalf of his wife. He submitted that that was unfair in the circumstances as the Authority Member allowed the respondent to file further documentation after the conclusion of that meeting in order to respond to matters raised by Ms Lewis at the investigation meeting. This was conceded by Ms Bath at the hearing before me. The determination does not refer to the *Lighthouse* decisions so I must presume the Authority Member did not have

regard to them in her deliberations.

5 Referring to *Smith v Stokes Valley Pharmacy* [2010] NZEmpC 111 at [48].

6 *Clark v Lighthouse ECE Ltd* [2016] NZERA Auckland 281, *Du Plooy v Lighthouse ECE Ltd* [2016] NZERA Auckland 282; *Baxter v Lighthouse ECE Ltd* [2016] NZERA Auckland 283; and *Honey v Lighthouse ECE Ltd* [2016] NZERA Auckland 284.

[22] The second point upon which I am persuaded that Ms Lewis's challenge prima facie has merit relates to her disadvantage claim concerning the nature of receipt of her wages during her employment with Immigration Guru. Ms Lewis consistently maintained that even though Immigration Guru may have paid her wages on the date specified in the agreement, she always received the wages in two tranches. The wages were apparently paid by Immigration Guru by way of automatic bank transfer. The bank's statements themselves and upon which the Authority Member relied, showed one payment being made and one payment being received on each pay day. On the face of it those documents certainly would not confirm Ms Lewis's assertion that she always received her wages in two tranches. However, it appears that there may have been a fault either by Immigration Guru's bank or Ms Lewis's own bank in the way that the transfer of funds was treated. Ms Lewis apparently took the matter up with Ms Bath on two separate occasions to try and have it resolved and it appears that Ms Bath genuinely endeavoured to resolve the problem with the banks. Ms Lewis made no further complaint about the matter even though she now maintains that the problem persisted. However, having received no further complaint, Ms Bath did not take the matter up again with her bank. Nevertheless, Ms Lewis was entitled to have access to her wages on the day when payment of wages was agreed to have been made and if she was not receiving them in their entirety on that date and the fault lies with the employer, then on the face of it she may have a grievance. It is not possible to resolve the issue now but Ms Lewis should be given the opportunity of presenting further evidence from representatives of the banks.

[23] As to the discrimination allegation, on the face of it I consider that the Authority Member has dealt with this properly and Ms Lewis's challenge on this point would appear to have little merit. However, in view of the fact that I intend to grant her leave to file her challenge out of time and it will be heard on a de novo basis, she will have the opportunity to re-argue her alleged discrimination grievance.

[24] Accordingly, the application for leave is granted. It is emphasised that in granting the application the Court is not making any concluded findings; simply that on an inferential or prima facie basis there are arguable issues. The time for filing a statement of claim in this matter is extended to validate the filing of the draft

statement of claim on 14 November 2016 which will now be treated as Ms Lewis's formal pleadings in the matter. It appears that the defendant has already been served with the draft statement of claim but if not, Ms Lewis will need to attend to formal service. The defendant will then have 30 days to file a statement of defence. If the draft statement of claim has already been served then the 30 days will run from the date of this judgment. If not then it will run from the date of formal service.

[25] Insofar as costs are concerned, both parties represented themselves at the hearing. Nevertheless, on the basis that Immigration Guru may have incurred some litigation costs in preparing and filing the notice of opposition and supporting documents, costs will be reserved and considered along with any final costs order in this matter.

M E Perkins

Judge

Judgment signed at 4.15pm on 16 February 2017