



# Employment Court of New Zealand

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## Marra Construction (2004) Pretorius [2015] NZEmpC 222 (11 December 2015)

Last Updated: 18 December 2015

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2015\] NZEmpC 222](#)

EMPC 342/2015

IN THE MATTER OF an application for leave to file a challenge out of time

BETWEEN MARRA CONSTRUCTION (2004) LIMITED

Applicant

AND FREDRICK PRETORIUS Respondent

Hearing: (on the papers dated 12, 13 and 26 November 2015) Counsel: K Patterson, counsel for the applicant

D Jacobson, counsel for the respondent

Judgment: 11 December 2015

### JUDGMENT OF JUDGE B A CORKILL

#### Introduction

[1] Mr Fredrick Pretorius lodged a challenge within time in respect of a determination of the Employment Relations Authority (the Authority) on a preliminary issue.<sup>1</sup> Marra Construction (2004) Limited (Marra) wished also to challenge an aspect of that determination, but failed to do so within the statutory

28-day time limit. Marra now seeks an extension of time within which to do so. The issue is whether such an extension should be granted.

#### The Authority's determination

[2] The Authority found that in mid-2004 Mr Pretorius commenced employment as a Quantity Surveyor for Marra, which is a construction company. No employment

<sup>1</sup> *Pretorius v Marra Construction (2004) Ltd* [2015] NZERA Auckland 314.

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agreement was signed at that date, but there was an oral agreement that an annual salary of \$55,000 would be paid. During 2007, Marra entered an agreement with another company to construct a multi-level apartment building. Mr Pretorius claims he was told at the time that he would be working on the building site and would receive the same conditions as employees of the third party company, which he claimed included enhanced remuneration because of the extra hours to be worked, as well as a bonus. He commenced working on the site in December 2007. His work at that location was substantially completed by May 2010. He says he understood he would be paid the increased remuneration and the bonus once work was completed. Those payments were not forthcoming. The Authority recorded that Mr Pretorius

accordingly lodged a claim for:

- \$125,000, to include increased salary and bonus; or

alternatively

- payment on a quantum meruit basis for all hours worked in excess of a 40-hour week; or
- a payment for extra hours under the Minimum Wage Provisions of the

[Minimum Wage Act 1983](#) (MW Act).

[3] The Authority concluded that any claims had to arise on or after 3 March 2008 since the statement of problem was filed on 3 March 2014. Then the Authority held:

a) The claim for honouring the oral understandings of late 2007 was outside the limitation period and could not be pursued since all the elements necessary for prosecuting the claim had come into existence by 3 March 2008.

b) Since it was possible that liability for a bonus payment would not crystallise until the conclusion of a project, the bonus claim was not time-barred.

c) [Section 11B\(2\)](#) was a potentially applicable provision of the MW Act, and Mr Pretorius was not time-barred from pursuing a claim under that

section for unpaid wages in excess of 40 per week where those arose after 3 March 2008.

### **Procedural history**

[4] The determination was issued on 8 October 2015.

[5] On 3 November 2015, Mr Pretorius filed a de novo challenge in respect of the determination, even although the challenge specifically focused on one only of the three issues which had been resolved by the Authority, which related to the finding as to the enhanced salary claim.

[6] Counsel acting for Marra, Mr Patterson, who practices in Tauranga, was instructed to bring a challenge in respect of those parts of the determination which were adverse to it; that is, those which related to whether the claim for bonus and under the MW Act were within time.

[7] The time limit for challenging the determination expired on

5 November 2015. That day, Mr Patterson finalised a statement of claim incorporating Marra's intended challenge. He initially assumed that the proceeding could be filed at the High Court in Tauranga, and intended to file the documentation that day. However, late in the day he established this was incorrect and that the documentation needed to be filed with the Registrar of the Employment Court in Auckland. He did so electronically, dispatching the original documents and the appropriate filing fee by post on the same day.

[8] Mr Patterson was absent from his office on Friday, 6 November 2015 when a member of the Registry attempted to contact him with regard to the filing fee (attaching an information sheet pertaining to payment of filing fees by direct credit either using electronic banking or across the counter at any Westpac Branch). That message was confirmed by email.

[9] On attending his office on Monday, 9 November 2015, Mr Patterson saw the email which had been sent to him on 6 November 2015 along with a further email of

9 November 2015 confirming that hardcopies and the fee had not yet been received.

The email from the Registry stated that because the fee had to be paid within the

28-day period allowed for the filing of a challenge (which had expired on

5 November 2015) the challenge could not be accepted and an application for leave would need to be filed instead.

[10] On 10 November 2015, the documents and filing fee were received by the Auckland Registry.

[11] On 12 November 2015, Marra filed an application which requested in effect an extension of time for filing its challenge;

the supporting material asserted that the documents had been filed within time, but the filing fee had not.

[12] On 26 November 2015, counsel for the defendant, Mr Jacobson, filed a memorandum indicating that Mr Pretorius would abide by the Court's decision with regard to Marra's application.

## Discussion

[13] It is well established that the fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. Often the Court will be assisted by considering such factors as:<sup>2</sup>

- the reason for the omission to bring the case in time;
- the length of delay;
- any prejudice or hardship;
- the effect on the rights and liabilities of the parties;
- subsequent events; and
- the merits of the proposed challenge.

*2 An Employee v An Employer* [2007] ERNZ 295 at [9]; *Stevenson v Hato Paora College Trust Board* [2002] NZEmpC 39; [2002] 2 ERNZ 103 at [8].

[14] It is worth drawing attention to the Consolidated Practice Directions of the Employment Court, which states with regard to electronic filing:<sup>3</sup>

Until the Court's obligations under the [Electronic Transactions Act 2002](#) and under the Judicature Modernisation Bill 2014 (if and when enacted) are clarified, the following 2005 Practice Direction will remain in force, affecting the electronic filing of documents:

(a) The court's Registries will accept or continue to accept for filing documents transmitted by facsimile or email. Such documents shall be deemed to have been received at the time of actual receipt or, if that occurs during days or hours when the Court office is closed, then as soon as it reopens and, if priority of receipt is an issue, then in the order of actual receipt while the Court office was closed.

(b) Where a document requires a signature, that requirement is met by an electronic signature if it adequately identifies the signatory's approval of the contents and is as reliable as is appropriate in the circumstances including any subsequent confirmation by means of paper-based copies.

(c) In any case in which a document requires to be accompanied by a payment, that payment will need to be made before the transmission of the document as already contemplated by the [Employment Court Regulations 2000](#).

[15] In this case, reg 7(3) of the [Employment Court Regulations 2000](#) (the Regulations) is relevant; it states that the prescribed fee must be paid at or before the time at which a statement of claim is filed.

[16] It is clear that the statement of claim was filed electronically within time, but the filing fee was not paid according to the requirements of reg 7(3). I find that was due to Marra's lawyer not having established the correct procedure, so that there was a delay of some five days.

[17] However, the delay has caused no prejudice to Mr Pretorius. This is apparent for the following reasons:

- a. Had no challenge been filed by Marra, the effect of Mr Pretorius' de novo challenge would have been that all matters were at large. It would

have been possible for the parties to agree that Mr Pretorius' challenge

3 Employment Court Consolidated Practice Directions, 1 July 2015

<<http://www.justice.govt.nz/courts/employment-court>> .

would be limited to the two parts of the determination he wished to challenge, or the Court could have made a direction to that effect.<sup>4</sup>

However, neither such possibility had arisen by the time Marra initiated its challenge so that all issues were at large including the matter which Marra wished to raise.

b) Since Mr Pretorius' position on the current application is that he abides the decision of the Court, I infer that he accepts there is no prejudice occasioned by the short delay occasioned by the late payment of the filing fee.

[18] In the present case, there was partial compliance with the relevant requirements. The statement of claim was filed in time, but the fee was paid late.

[19] In those circumstances it is unnecessary to evaluate the merits in any depth. The reality is that Mr Pretorius wishes to challenge the time-limitation conclusions reached by the Authority, and so does Marra. In my view, where Marra clearly intended to raise a challenge on the point which affected it, it would be unfair for it to be denied that possibility while Mr Pretorius' challenge proceeds. In the circumstances, it is appropriate for the Court to reconsider all three time-limitation issues.

### **Conclusion**

[20] I consider that leave to extend time should be granted.

[21] I direct that the filing fee which was tendered to the Registrar on

10 November 2015 be accepted, which will establish the challenge as being effective from today's date. I also direct that Mr Pretorius' statement of defence be filed and served by 11 January 2016. The proceeding will then be the subject of a telephone directions conference with counsel on a date to be fixed by the Registrar.

4 [Employment Relations Act 2000, s 182\(1\)](#).

[22] Although costs usually follow the event, because Marra has been granted an indulgence costs are to lie where they fall.

B A Corkill

Judge

Judgment signed at 11.45 am on 11 December 2015

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