



Employment Court of New Zealand

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Talent Propeller Limited v UXK [2021] NZEmpC 75 (21 May 2021)

Last Updated: 27 May 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 75](#)

EMPC 224/2020

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER an application for an extension of time
OF to file costs application

BETWEEN TALENT PROPELLER LIMITED
 Plaintiff

AND UXK
 Defendant

EMPC 29/2021

BETWEEN UXK
 Plaintiff

AND TALENT PROPELLER LIMITED
 Defendant

Hearing: On the papers

Appearances: R Upton, counsel for Talent Propeller
 Limited A Fechny, advocate for UXK

Judgment: 21 May 2021

INTERLOCUTORY JUDGMENT (NO 2) OF CHIEF JUDGE CHRISTINA INGLIS

(Application for an extension of time to file costs application)

[1] Talent Propeller Limited has applied for an extension of time for filing an application for costs. The application is opposed by UXK.

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[2] The application arises against the following backdrop. A judgment was issued by consent on 12 March 2021,¹ recording that the parties had resolved the proceedings by agreement, subject to costs. The following order was made in respect of costs:

(c) issues as to costs in relation to the challenge and cross-challenge remains live: any party seeking an order as to costs are to file and serve a memorandum within 14 days of 29 March 2021 (being the date on which the parties are scheduled to attend mediation); any response is to be filed and served within seven days; and any reply is to be filed and served within seven days.

[3] The parties attended mediation on 29 March 2021. On 9 April 2021 the company applied for an extension of time to file and serve any application for costs. The application was not opposed and was granted, the Court directing that any costs application was to be filed and served by 5pm on 27 April 2021. That timeframe came and went with no application being advanced. Counsel for the company says that this was due to an oversight, contributed to by the fact that the timeframe for

filing any application had changed and by a period of annual leave. It is said that when the oversight was discovered the Court and UXK were advised that counsel was on annual leave and the issue would be progressed the week he returned from leave. An application for an extension was subsequently filed on 5 May 2021. The delay in filing is described as not unreasonable, nor excessive, particularly when UXK was aware that an extension of time would be sought.

[4] UXK opposes the application. In summary it is submitted that UXK would be prejudiced if an extension of time was granted; that UXK is concerned that the company may seek an order that they contribute to costs despite being legally aided;² that the ongoing issues relating to potential costs liability are causing stress and anxiety; and granting the application would send a signal that timeframes directed by the Court need not be respected. It is also said that the delay that occurred should be viewed in context, namely that the amended date of 27 April 2021 had followed earlier extensions and was almost seven weeks after the filing of a joint memorandum which had given rise to the consent judgment reserving costs.

1 *Talent Propeller Ltd v UXK* [2021] NZEmpC 26.

2 Refer [Legal Services Act 2011, s 45\(3\)](#).

[5] The Court has a broad discretion to extend timeframes for filing applications.³ It is to be exercised in accordance with the interests of justice.⁴ The factors which will generally be considered relevant are well established and include (for present purposes) the reasons for the omission to bring the application within time, the length of the delay, any prejudice or hardship to any other person with a legitimate interest in the outcome, and the effect on the rights and liabilities of the parties.⁵

[6] The application was not filed and served within time because of an oversight by counsel. In *Almond v Read* the Supreme Court observed that:⁶

[37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[7] The delay in this case was caused by an error of counsel and steps were taken to contact the Court and UXK's representative once it came to light. However, the delay was not "a day or so" (as in *Almond v Read*) – it was one week from 27 April 2021, came on top of an earlier extension and was around five weeks after the original date for filing. The fact that an extension had already been granted ought reasonably have highlighted the new date, rather than contributing to the oversight that occurred. It is true that, if the application is declined, the company loses an ability to seek an order for costs which would have been made, pursuant to [s 45\(5\)](#) of the [Legal Services Act 2011](#). However, the ultimate outcome of any application advanced by the company is far from certain. In any event the company would retain the ability to take steps to recover any loss via other means, in light of the reason for the omission and if it considered it appropriate to do so.

3 [Employment Relations Act 2000, s 221](#).

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

5. *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]-[10]; *Almond v Read*, above n 4, at [38]-[39].

6 *Almond v Read*, above n 4.

[8] The interests of the company need to be weighed against UXK's interests. I accept that the ongoing uncertainty is likely to be stressful and difficult for UXK and that there is an interest in bringing matters to a conclusion.

[9] There are factors weighing both in favour of and against the grant of leave. Ultimately I must be guided by the overall interests of justice. Having regard to the length of the delay, the context in which it has occurred, the prejudice to UXK and the limits on the potential prejudice to the company, I consider it appropriate to exercise my discretion against granting leave. The application is accordingly dismissed.

[10] UXK is entitled to a reasonable contribution to costs on the company's unsuccessful application. I anticipate that they can be agreed. If not I will receive memoranda.

Christina Inglis Chief Judge

Judgment signed at 2.40 pm on 21 May 2021

