

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2023] NZEmpC 184
EMPC 164/2023**

IN THE MATTER OF an application for leave to extend time to file
 a challenge to a determination of the
 Employment Relations Authority

BETWEEN JOHN ROTHWELL HERRETT
 Applicant

AND ECO FRAME AND MIRROR LIMITED
 Respondent

Hearing: On the papers

Appearances: T Mackenzie and AJ McInnes, counsel for applicant
 G Patching, agent for respondent

Judgment: 27 October 2023

JUDGMENT OF JUDGE KATHRYN BECK

[1] The applicant, Mr Herrett, seeks leave to extend time to file a challenge to a determination of the Employment Relations Authority.¹ In the Authority, Mr Herrett unsuccessfully argued that the respondent's redundancy process resulted in an unjustifiable dismissal.

[2] The applicant now wishes to challenge that determination on a de novo basis, but requires a grant of leave from the Court, as the challenge was not filed within the statutory timeframe. The application is opposed by the respondent.

¹ *Herrett v Frame and Mirror Ltd* [2023] NZERA 145 (Member van Keulen).

Leave to extend time

[3] The Authority's determination was issued on 23 March 2023. Thus, the 28-day time period within which a challenge could be filed ended on 21 April 2023. The applicant filed his application for leave to extend time, but not the challenge itself, within this 28-day period.

[4] Mr Herrett has filed an affidavit in this proceeding. His evidence is that after receiving the determination of the Authority, he contacted his representative, Mr McInnes, on 6 April 2023, to advise him that he wanted to challenge the determination. Mr McInnes advised that he no longer worked for the firm I.R. Thompson but would be starting a new role at Cameron & Co, lawyers, on 17 April 2023. However, he would not be able to meet with Mr Herrett until after 20 April 2023 as he had training in his first week.

[5] Mr Herrett was concerned about this because the deadline for filing a challenge was 21 April 2023 and so took matters into his own hands. On 20 April 2023, he filed this application for leave to extend time to file the challenge. He filed a draft statement of claim on 5 May 2023.

[6] In late June 2023, he engaged Mr McInnes at Cameron & Co to represent him and, shortly thereafter, Mr Mackenzie, barrister.

[7] The draft statement of claim would seek to challenge the Authority's determination on a de novo basis; that is, a full hearing of the entire matter. Mr Herrett claims he was unjustifiably dismissed by the respondent, Eco Frame and Mirror Ltd (Eco Frame). He seeks compensation, lost wages and a penalty for breaches of the Holidays Act 2003.

[8] In such a case where the statutory timeframe has elapsed, the Court has discretion to extend the time for filing.² That discretion is exercised in accordance

² Employment Relations Act 2000, s 219.

with established principles. The overarching consideration is the interests of justice.³
The usual factors that will be considered are:

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

[9] The application is opposed by Eco Frame. Mr Patching, the agent for the company, submits that Mr Herrett could have filed the challenge in time and that the respondent is suffering as a result of the continuation of this case which has no merit.

Reasons for the delay

[10] Mr Herrett has clearly set out the reasons for the delay. This proceeding is unusual in that the application for leave was filed within the timeframe allowable for filing a challenge. This appears to have arisen out of an abundance of caution on Mr Herrett's part in not wanting to file an erroneous document. As it transpired, the draft statement of claim was then filed two weeks later.

[11] The respondent is critical of Mr Herrett's reason for the late filing. The essence of its submissions is that it ought to have been able to rely on the timeframe and the finality of litigation, and that to continue, in circumstances where it considers there is no merit to the proceedings, is unfair.

[12] Mr Herrett's prompt action in filing the application for an extension, however, put the company on notice that the proceeding was not at an end. Having been

³ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

represented in the past, his reluctance to file a statement of claim without the assistance of counsel is understandable but was an error. That said, I do not consider that the reasons for delay factor against the grant of leave.

The length of the delay

[13] The longer the delay, the more an applicant would be seeking an indulgence from the Court and the stronger the case for an extension for leave would need to be. How quickly any slipup is rectified by the applicant will be relevant.⁴

[14] As noted above, Mr Herrett filed his application within time but the draft statement of claim was filed two weeks out of time. The delay is modest in the circumstances and falls into the category of extensions that the Supreme Court has indicated should generally be granted, desirably without opposition.⁵

Prejudice

[15] Mr Patching says that to grant leave and enable the continuation of the claim would be unfair. However, he has not set out how the company would be prejudiced, particularly given that notice of the challenge, via an application for leave to extend time, was made within 28 days.

[16] While I accept that the company will not have the certainty it desired, I do not think its position would differ materially, if leave was granted now, from the position it would have been in had the challenge been filed on time.

[17] I accept that this will cause inconvenience and frustration for Mr Patching and the company. However, I do not consider it will suffer a level of prejudice sufficient to count against the granting of leave.

Impact on party rights and liabilities

[18] Mr Herrett is clearly dissatisfied with the Authority's determination. He will be unable to bring a challenge should leave not be granted.

⁴ At [38(a)].

⁵ At [37].

[19] I consider this factor counts towards a grant of leave.

Subsequent events or conduct

[20] Once Mr Herrett was able to obtain advice, he filed a draft statement of claim. Overall, I am satisfied that the application was brought within an appropriate level of promptness.

[21] I am not aware of any other issues or conduct which would factor against a grant of leave.

Merits

[22] There is difficulty in assessing the merits of an application at an early stage, and the exercise should be approached with caution. In *Almond v Read*, the Supreme Court noted that the merits will not generally be relevant where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondent has suffered no prejudice (beyond the fact of an appeal).⁶

[23] While the delay was not the result of a legal adviser's error, it was the result of Mr Herrett being unable to obtain advice from his existing adviser. The situation is similar enough that the principles are helpful in this instance.

[24] The question is whether there is an obvious lack of merit here.⁷

[25] Mr Patching has submitted that the proposed challenge has no merit. Mr Herrett considers otherwise. Mr Patching has cited aspects of the determination that he considers support his opposition.

[26] To look into the substance of the determination, as suggested by Mr Patching, would invite the Court to undertake a more detailed look at the merits than is appropriate at this point. Lack of merit as a decisive consideration is reserved for

⁶ At [39(b)].

⁷ *Baylis v Chief Executive of the Porirua City Council* [2021] NZEmpC 213 at [32].

situations where there is an obvious problem with the proposed claim, such as a lack of jurisdiction, a legally untenable claim or if the claim is an abuse of process.⁸

[27] Even if I was to consider the proposed claim to be weak on its merits, it would not be to the extent considered relevant by the Supreme Court.

[28] Further, Mr Patching relies on findings made by the Authority as to the genuineness of the redundancy and the fairness of the process. Mr Herrett has filed a de novo challenge, meaning that the matter is to be heard afresh. It cannot be taken for granted that the Court would be of the same view as the Authority on those matters.

[29] I do not accept that there is an obvious lack of merit.

Summary

[30] Taking into account the above factors and the overarching consideration of the interests of justice, I am satisfied that leave should be granted. The relatively short delay, the reasons that led to it, the lack of any real prejudice to the company, and the fact that to deny leave would extinguish Mr Herrett's ability to challenge, support this conclusion.

[31] Leave is accordingly granted for Mr Herrett to file a statement of claim challenging the determination of the Authority within 10 working days of the date of this judgment. That challenge is to be a de novo challenge to the Authority's determination.

[32] Eco Frame is to file and serve a statement of defence in the usual way and thereafter there will be a directions conference to progress the challenge.

[33] Mr Herrett is entitled to costs on this application. Those costs ought to be able to be agreed. If that does not prove possible, Mr Herrett may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. Eco Frame is to respond by memorandum filed and served within 14 days thereafter with any

⁸ *Almond v Read*, above n 3, at [31].

reply from Mr Herrett filed and served within a further seven days. Costs will then be determined on the papers.

Kathryn Beck
Judge

Judgment signed at 2.30 pm on 27 October 2023