

IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 131
EMPC 419/2023

IN THE MATTER OF an application for leave to extend time to file
challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN MURRAY ALEXANDER BOYD
Applicant

AND OJI
Respondent

Hearing: On the papers

Appearances: GP Davis, counsel for applicant
A Fechney, advocate for respondent

Judgment: 19 July 2024

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Two applications require resolution. An employer seeks leave to challenge five determinations and seeks a stay of those determinations.¹ The employee opposes both applications.²

¹ *OJI v Boyd* [2023] NZERA 144 (Member Vincent) [First determination]; *OJI v Boyd* [2023] NZERA 267 (Member Vincent) [Second determination]; *Boyd v OJI* [2023] NZERA 332 (Member Doyle) [Third determination]; *Boyd v OJI* [2023] NZERA 425 (Member Doyle) [Fourth determination]; and *OJI v Boyd* [2023] NZERA 579 (Member Doyle) [Fifth determination].

² Her name and identifying information are the subject of AN interim non-publication order in this Court: *Boyd v OJI* [2023] NZEmpC 231.

[2] I record that the employee has brought a separate claim against the employer for sanctions for failing to comply with a compliance order. This judgment is not concerned with that matter.

[3] Two admissibility issues arose. On 17 June 2024, I issued a minute to the parties where I ruled that a decision of the Kaikōura District Licensing Committee was not legally relevant and was inadmissible. In the same minute, I also ruled that a string of emails from Mr Boyd between 8 August 2023 and 12 September 2023 were not protected by the settlement privilege rules in s 57 of the Evidence Act 2006, although the appropriate weight to be attributed to these communications was a different question which would need evaluation.

[4] I begin by describing the somewhat complicated background on the basis of the content of the determinations and the evidence of the parties.

History of events

The employment relationship problem

[5] The Employment Relations Authority (the Authority) recorded that the genesis of the employment relationship problem followed OJI working in Kaikōura for Mr Boyd in his Irish hotel, accommodation, restaurant and bar, known as Donegal House, in late January 2021.³

[6] OJI was offered a role as a bar person/waitress on an hourly rate with accommodation and food included. She eventually took the role and moved from elsewhere to do so.⁴ Although OJI and Mr Boyd were amicable to begin with, the working relationship quickly deteriorated. OJI said she experienced inappropriate behaviour from Mr Boyd, including him touching her on intimate areas of her body from her first day, causing her to feel unsafe. She also said she was provided inadequate breaks. She resigned and left Kaikōura within weeks.⁵

³ *First determination*, above n 1, at [7].

⁴ At [8].

⁵ At [9].

[7] Mr Boyd said OJI left because she fell out with other members of staff. The Authority also recorded his position that Donegal House operated on the basis of informality, humour, good relationships, some hugging in appropriate circumstances, and touching to move past other staff in a relatively confined space behind the bar – a culture OJI knew about before accepting her role.⁶

[8] In its summary, the Authority concluded that in legal terms, OJI was asserting Mr Boyd sexually harassed her, failed to provide breaks, and created an unsafe work environment that caused her unjustified (constructive) dismissal. Mr Boyd rejected that any sexual harassment had occurred and said that breaks had been provided and that OJI resigned voluntarily.⁷

First determination – resolution of OJI’s employment relationship problem

[9] The Authority issued its first determination, which was its substantive determination, on 22 March 2023.

[10] After describing the different accounts given by OJI on the one hand, and Mr Boyd on the other, and in the absence of any other witnesses who saw what OJI said occurred, the Authority assessed credibility. Ultimately, OJI’s account was preferred for a range of reasons that included inferences that were available from contemporaneous texts and notes made by OJI.⁸

[11] Relevant for present purposes is the Authority’s reference to Mr Boyd’s suspicion that OJI was under the influence of “something”, based on what he observed about her and her room after she left. The Authority found that he was mistaken on this point.⁹

[12] Having considered credibility issues, the Authority found that Mr Boyd’s behaviour was of sexual nature.¹⁰ The behaviour was unwelcome and offensive.¹¹

⁶ At [10].

⁷ At [11].

⁸ At [21]–[32].

⁹ At [32].

¹⁰ At [34]–[42].

¹¹ At [44].

Mr Boyd's language and behaviour detrimentally affected OJI's employment and satisfaction at work.¹² Thus, sexual harassment as defined in the Employment Relations Act 2000 (the Act) was established.¹³

[13] After concluding that breaks had been provided and/or paid for by Mr Boyd,¹⁴ the Authority considered whether an unjustifiable constructive dismissal had occurred. It did not accept that OJI had resigned because of any conflict with other staff, nor that she wished to leave the hospitality sector irrespective of her employment at Donegal House. The Authority noted that although OJI agreed she had some conflict with some members of staff and that this was a stressor, it was not the reason she left. She resigned because of the sexual harassment and would otherwise have remained working at Donegal House for longer than she did.¹⁵

[14] The Authority concluded that OJI was unjustifiably (constructively) dismissed due to Mr Boyd's unfair and unreasonable sexual harassment of her. She accordingly had a personal grievance in terms of s 103(1)(a) of the Act.¹⁶ After considering each party's respective positions as to remedies, the Authority ordered Mr Boyd to pay OJI, within 28 days of the determination:

- (a) eight weeks' wages totalling \$9,476 (gross); and
- (b) compensation for humiliation, loss of dignity and injury to feelings of \$35,000.

[15] The Authority recommended that Mr Boyd undertake a policy review together with training. It also prohibited publication of any identifying details and references to OJI's name and medical information on a permanent basis.¹⁷

[16] The determination was issued to the parties under a standard form email sent by an applicable Authority officer, which included a statement that if either party was

¹² At [46].

¹³ At [47].

¹⁴ At [48]–[53].

¹⁵ At [56]–[57].

¹⁶ At [58].

¹⁷ At [80]–[82].

unhappy with the determination, they had 28 calendar days to challenge it to the Employment Court. This meant that any challenge needed to be brought by 19 April 2023.

[17] On 3 April 2023, an email was sent by the law firm of Mr Hardy-Jones, who had appeared as counsel for Mr Boyd at the investigation meeting, to Ms Fechny, advocate for OJI. It stated that the firm's relationship with Mr Boyd had been terminated and that Ms Fechny should contact Mr Boyd directly about the matter.

[18] As a result, Ms Fechny wrote immediately to Mr Boyd, asking whether he was engaging alternative representation. If so, she would direct communications to that representative. She also requested payment of the sums which had been directed by the Authority.

[19] Mr Boyd responded, stating that everything was opposed, and that a "huge claim is coming from us for everything that did happen, plus the [d]rugs that ruined our two rooms for two months".

[20] Shortly afterwards, Ms Fechny responded to Mr Boyd as follows:

The fact that you are potentially challenging the decision to the Employment Court, does not change the fact that you are required to pay the sums ordered by the Employment Relations Authority. You are required to pay the sums ordered, and in the unlikely event you're successful in the Employment Court, you would then seek for my client to repay that sum of money.

[21] Mr Boyd responded by stating: "My two solicitors have told me different."

[22] The exchanges continued. Ms Fechny asked for details of Mr Boyd's solicitors. She said again that if he was legally represented, she was required to correspond directly with them about the matter.

[23] Ms Fechny also referred to s 180 of the Act which provides that a challenge to the Employment Court does not automatically operate as a stay of the determination. She explained that a challenge to the Employment Court would not automatically mean that Mr Boyd would not have to pay the sums ordered by the Authority. Ms Fechny also said that if a challenge was filed at the Employment Court and an

application for stay was made, the most likely outcome would be that Mr Boyd would have to pay the sums of money to either OJI or to the Employment Court's bank account.

Second determination – costs

[24] On 4 April 2023, Ms Fechney wrote to Mr Boyd, stating that she would be filing submissions on costs the following day; she again requested details of his solicitors so that she could copy them into her correspondence with the Authority. There is no evidence of a reply.

[25] OJI's application for costs was filed on 5 April 2023. On 20 April 2023, Kaikoura Taxation Ltd filed a response to OJI's costs application, on behalf of Mr Boyd.

[26] On 9 May 2023, the representative of Kaikoura Taxation Ltd stated that he had concluded his work with Mr Boyd and Donegal House and that he was moving away from the area.

[27] On 25 May 2023, the costs determination was issued by the Authority. Mr Boyd was ordered to pay costs of \$4,552.30 and disbursements totalling \$224.89.¹⁸

Third determination – application to reopen substantive investigation

[28] On 16 May 2023, Mr Boyd applied to the Authority to reopen the substantive investigation. Subsequently, the Authority noted that Mr Boyd previously signed and dated the document on 19 April 2023.¹⁹ On 30 May 2023, OJI filed an application to strike out Mr Boyd's application.

[29] A case management meeting was held on 23 June 2023, at which Mr Boyd was unrepresented.²⁰ He provided further information in support of his application on 15 June 2023.²¹

¹⁸ *Second determination*, above n 1, at [15].

¹⁹ *Fifth determination*, above n 1, at [5].

²⁰ *Third determination*, above n 1, at [9].

²¹ At [10].

[30] The Authority recorded that there had been no objection to the matter being determined on the papers. It decided to resolve matters under the application to reopen, for which there was jurisdiction under sch 2 cl 4 of the Act. In those circumstances, it was not necessary to consider the strike-out application.²²

[31] The Authority referred to applicable principles which the Court identified in *Randle v The Warehouse Ltd*, where the Court held:²³

(a) The jurisdiction is not to be exercised for the purposes of re-agitating arguments already considered or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

(b) Some special or unusual circumstances must be found to exist to warrant the reopening, such as that fresh or new evidence has been discovered which is material to the outcome of the case and that could not have been given at the hearing.

(c) The mere possibility of a miscarriage of justice is not a sufficient ground for granting a reopening. What is required is an actual miscarriage of justice, or at least a substantial risk of a miscarriage of justice, if the determination were allowed to stand.

...

[32] Dealing with the points raised by Mr Boyd, the Authority found that Mr Boyd's statements that OJI had lied at the original investigation meeting, and that what Mr Boyd had been accused of was false, were consistent with the statement in reply which had been lodged on his behalf and his defence at the investigation meeting. The substantive determination recorded that Mr Boyd had denied allegations of sexual harassment, and that his actions and interactions with OJI were sexual in nature or inappropriate. The Authority said there had been a detailed assessment of credibility in the substantive determination. It concluded Mr Boyd was not raising new evidence on these matters.²⁴

[33] Next, the Authority referred to the fact that Mr Boyd had contended there was another person who had made a particular comment to OJI, rather than him. However,

²² At [12]–[13].

²³ *Randle v The Warehouse Ltd* [2019] NZEmpC 68 at [15]–[18].

²⁴ At [19].

the Authority said this had been recorded in the substantive determination and was not accepted. This too was not new evidence.²⁵

[34] Mr Boyd also said in his application that OJI was under the influence of “something”. The Authority said this had been specifically referred to in the substantive determination, which had also referred to evidence from OJI’s witnesses that she had abstained from alcohol and drugs for as long as they had known her. The determination also stated that Mr Boyd had conceded after this evidence that he could have been mistaken. Again, there was no new evidence on this point.²⁶

[35] Mr Boyd referred to the names of seven people in his application who he said would give evidence. The Authority found that one of those was a person who had provided a statement to it for the substantive investigation, which included evidence about his partner and OJI. In the substantive determination, the Authority found that although OJI accepted she had some conflict with members of staff, and that this was a stressor, that was not why she had left. The Authority had concluded that any such conflict was immaterial and that OJI’s reason for resignation was sexual harassment by Mr Boyd. Accordingly, on the application to reopen, this person’s evidence was not shown to be new.²⁷

[36] Two further persons were described by Mr Boyd as being new witnesses. One had provided a statement to the Authority at the substantive investigation in which he referred to his partner, and made some comments about the state of rooms OJI had stayed in. The Authority was not satisfied this evidence was new.²⁸

[37] Two of the remaining three people seemed to be a chef and his partner. Issues as to the relationship between the two of them and OJI was not new evidence because Mr Boyd had referred to these in his statement of evidence provided to the Authority. This evidence was accordingly not new.²⁹

²⁵ At [20].

²⁶ At [21].

²⁷ At [23]–[24].

²⁸ At [26].

²⁹ At [26].

[38] The Authority said it was unclear what sort of evidence the final person named could give.³⁰

[39] The Authority concluded that, in any event, it was not satisfied that the evidence which Mr Boyd wished to rely on could not, with reasonable diligence, have been obtained prior to the substantive investigation meeting. Mr Boyd had been represented by experienced counsel who could have obtained evidence from the additional persons to whom Mr Boyd referred. Specific accommodation had been made by the Authority to allow this to occur, because the investigation meeting had been rescheduled from its original date by some months.³¹

[40] The application also referred to the fact that OJI had been in a “secretive relationship” when staying in accommodation at Donegal House. The Authority found that this issue had broadly been referred to in Mr Boyd’s statement of evidence for the substantive investigation meeting.³²

[41] It was also recorded that Mr Boyd asserted that OJI had not been truthful about any relationship she had, and that this impacted her credibility. The Authority did not consider that this evidence would likely have had an important influence on the credibility findings and the result of the case. It also noted that such evidence could potentially have infringed s 116 of the Act.³³

[42] The Authority also said that Mr Boyd had suggested he felt restricted in what he could say at the investigation meeting. It was not satisfied that Mr Boyd was constrained in giving evidence that was material or likely to be influential.³⁴

[43] The Authority considered a question raised by Mr Boyd as to whether there was a claim from him for damages before it. It noted that there was no “counterclaim

³⁰ At [27].

³¹ At [31].

³² At [34].

³³ At [35]. Section 116 of the Employment Relations Act 2000 applies where there are allegations of sexual harassment; no account may be taken of the complainant’s sexual experience or reputation.

³⁴ At [37].

for damages” at the time of the substantive investigation and that a reopening application was not an opportunity to advance a new claim.³⁵

[44] The Authority then recorded that Mr Boyd was dissatisfied with conclusions that were reached in the determination. It said he had not taken the step of challenging these matters to the Employment Court under s 179 of the Act. Instead of a challenge, he had tried to achieve the same result through a reopening application.³⁶

[45] The Authority concluded that there had not been an actual miscarriage of justice, nor was there a substantial risk of a miscarriage of justice which would justify the application to reopen being granted. There was a public interest in ensuring the finality of litigation that needed to be weighed in the overall interests of justice. OJI was entitled to certainty and to the benefits of her successful claim.³⁷

[46] The determination was issued on Friday, 23 June 2023. There was a covering email from an Authority officer in standard form, which referred to the fact that a party unhappy with the determination had 28 calendar days to challenge it to the Employment Court. That meant any challenge would need to have been brought by 21 July 2023.

[47] On the same day, Ms Fechny forwarded the email to Mr Boyd attaching the determination which had just been released, seeking the amounts that were directed for payment under the substantive determination, and also noting that a contribution to legal fees would also need to be made as a result of Mr Boyd’s unsuccessful application to reopen.

[48] Mr Boyd responded, stating that he was disgusted. He said Ms Fechny had not listened to any of the six witnesses or met them. He said he would get a solicitor “to reapply” and that he would be claiming a huge amount.

³⁵ At [39].

³⁶ At [40].

³⁷ At [41]–[44].

[49] Ms Fechney replied, stating that Mr Boyd had his chance and the Authority had made its decision. She informed him she would start preparing an enforcement process.

[50] Mr Boyd responded, stating that he had been applying for a hearing with six witnesses and that “you have turned that down”. He referred to damage which he said OJI had caused at Donegal House, which he claimed had to be paid for. He said that “We will start again [on] Monday.”

[51] Ms Fechney replied stating that OJI would progress compliance through the Authority and the Court. She recommended that Mr Boyd obtain legal advice so as to clarify his position.

[52] On Monday, 26 June 2023, Mr Boyd told Ms Fechney that he had a “new solicitor, Ross”. On 28 June 2023, Ross Keenan of Mount Pleasant Law Ltd confirmed to Ms Fechney that he had been asked to act for Mr Boyd.

[53] On 29 June 2023, Mr Boyd emailed Ms Fechney, stating he was asking a solicitor to “take [OJI] to court, as she owes us \$30,000.00 [p]lus [expenses]”. He said he owed OJI nothing and that he had “about eight staff or friends” who saw what happened.

[54] Ms Fechney responded to Mr Boyd, stating that she was in contact with his lawyer. There is no evidence that Mr Keenan was instructed to commence a damages claim at this time.

Fourth determination – costs with regard to application to reopen

[55] On 8 August 2023, the Authority issued a determination, dealing with costs in connection with the application to reopen. This was dealt with on the papers.

[56] Mr Boyd was self-represented.

[57] He was ordered to pay OJI costs of \$1,303.³⁸

[58] A standard form email accompanied the determination, stating that if a party was unhappy with it, they would have 28 calendar days to challenge it to the Employment Court.

[59] The 28 days expired on 5 September 2023.

Fifth determination – application for compliance order

[60] On 6 July 2023, OJI applied for a compliance order in respect of the sums directed for payment in the first determination; payment was to have been made by 19 April 2023.³⁹

[61] On 21 July 2023, Mr Boyd, who was self-represented at the time, filed a statement in reply. That statement repeated the concerns he had raised at the time of the application to reopen, both as to the way the sexual harassment allegations had been considered and as to his assertion that OJI owed him monies in respect of alleged damage that had occurred when residing at Donegal House.

[62] From 8 August 2023, a series of email messages took place between Mr Boyd and Ms Fechny. The string commenced with Mr Boyd telling Ms Fechny that he wanted help sorting out the problem. He said he knew he had to pay OJI and he would, but he contended she also owed him and that he could take her to court “for what she did to Donegal House.” He suggested a reduction of \$15,000.

[63] On 11 August 2023, Sharan Mavi and Quentin Davies of Gascoigne Wicks wrote to the Authority, stating that they had been instructed to act for Mr Boyd in relation to the employment relationship problem between himself and OJI.

[64] A case management conference for the application for a compliance order was conducted on 16 August 2023, where Mr Boyd was represented by counsel.⁴⁰ I

³⁸ *Fourth determination*, above n 1, at [24].

³⁹ *Fifth determination*, above n 1, at [4].

⁴⁰ *Fifth determination*, above n 1, at [8].

interpolate that on 12 September 2023, counsel sought leave to withdraw; that application was granted.

[65] On 6 September 2023, Mr Boyd emailed Ms Fechney modifying his position by stating that the damage inflicted at Donegal House had been invoiced to him for a total of \$40,000. Accordingly, he said he did not owe OJI anything.

[66] On 11 September 2023, Mr Boyd said he had paid \$10,000 to OJI's bank account. He implied that any further sum was not owing and said that, if necessary, he would issue proceedings "for all the damage and lies done to us".

[67] On the same day, Ms Fechney said that whilst the payment was appreciated, the remainder needed to be paid. She provided details for making the payment.

[68] On 12 September 2023, after his counsel had sought leave to withdraw, there was a series of text exchanges between Mr Boyd and Ms Fechney as to whether a payment plan for the balance could be agreed. He variously suggested monthly payments and a lump sum payment of \$3,000. Ms Fechney did not engage over these suggestions, saying they were not genuine. She said Mr Boyd had many months to pay and he had been adamant he would not.

[69] The application for a compliance order proceeded to an investigation on 2 October 2023, by audio-visual link. Mr Boyd was not represented.

[70] The Authority recorded Mr Boyd as saying he would not pay anything further over and above the \$10,000 he had paid.⁴¹ The Authority said it was unable to be satisfied that if a compliance order was not made, the balance of \$34,476 owed to OJI would be paid.⁴² It directed payment of this sum within 20 days.⁴³ Mr Boyd was also ordered to pay interest totalling \$635.34, and costs and disbursements of \$771.55.⁴⁴

⁴¹ At [16].

⁴² At [17].

⁴³ At [19].

⁴⁴ At [24].

[71] The determination was issued on 5 October 2023 along with a covering email from an Authority officer, stating that if a party was unhappy with it, they had 28 calendar days to challenge it to the Employment Court.

[72] The final date for challenging this determination was accordingly 2 November 2023.

The filing of application for leave and stay orders in the Employment Court

[73] On 17 October 2023, Ms Fechney emailed Mr Boyd, reminding him that the Authority had directed the outstanding balance to be paid by 26 October 2023. She said that if such payment was not made, then OJI's claim would be escalated to the Employment Court the following week, where her client "will be seeking 'imprisonment' as a potential consequence of your failure to comply with the compliance order of the Employment Relations Authority." I assume this was a reference to an application for a sanction under s 140 of the Act.

[74] On the same day, Mr Boyd responded, stating that the Authority officer had told him he had 28 days from 5 October 2023 to oppose the recent decision.

[75] Mr Boyd said he spoke to Mr Keenan "on or around 31 October 2023", who then instructed Mr Boyd's current counsel, Mr Davis.

[76] Mr Davis was unable to prepare a challenge on short notice. He advised Mr Boyd that he would need to challenge the substantive determination as well as the subsequent ones and that he would need to apply for an extension of time in the Employment Court to do so. He also advised that a stay would be necessary in the circumstances.

[77] On 15 November 2023, the two applications, an affidavit in support, and a memorandum signed by counsel were filed in the Court. Subsequently, a draft statement of claim was filed on 20 November 2023.

Application for leave to extend time

Submissions

[78] In his submissions supporting Mr Boyd's application for leave to extend time, Mr Davis confirmed that reliance was placed on s 221 of the Act, which provides a discretion to extend time, and reg 13A of the Employment Court Regulations 2000 (the Regulations), which provides for the filing of applications for leave. He then referred to the well-established factors which fall for consideration on this topic, and leading authorities, to which I will return shortly.

[79] Applying those principles, he said that the reason for the delay, as Mr Boyd had deposed, was that he was unsure of the correct process for filing a challenge and was unable to secure legal representation before 2 November 2023, which was the last day to challenge the last of the Authority's determinations. The situation was, he said, similar to that which fell for consideration in *Herrett v Eco Frame and Mirror Ltd*.⁴⁵

[80] He submitted that in these circumstances, it was appropriate to count the days of delay from 2 November 2023. He submitted that the delay was less than two weeks and was accordingly modest.

[81] He said it would be unfair to Mr Boyd to count the delay from anything other than the fifth determination. The five determinations were essentially a continuation of the same proceeding. Mr Boyd was largely unrepresented throughout the process and simply did the best he could to challenge the decisions he was faced with. Mr Davis submitted that Mr Boyd did not know, until so advised by the Authority after the fifth determination was issued, that he could have had the matter considered de novo by this Court at an earlier stage.

[82] Moreover, it was submitted that if he was too significantly out of time to challenge anything other than the fifth determinations, an irrational outcome would result wherein he could challenge the costs on the application for compliance orders,

⁴⁵ *Herrett v Eco Frame and Mirror Ltd* [2023] NZEmpC 184.

but nothing else. It would also mean he would lose any ability to make his claim against OJI for the damage he says she caused to the hotel premises.

[83] Mr Davis argued there was no evidence that granting leave would cause prejudice or hardship to any other person. Any claim to prejudice by OJI would be nothing more than the usual inconvenience of being a party to litigation. He said there was no “extraordinary hardship” outside of the usual pressures of litigation and the claimed subject matter of the personal grievance. He submitted it would be wrong to find that extraordinary hardship or prejudice resulted per se from a case involving allegations of sexual harassment, asserting that this would set a dangerous precedent which could lead to injustice.

[84] Next, Mr Davis submitted Mr Boyd would be unable to bring his challenge if leave were not granted and that this factor supported leave being granted.

[85] Dealing with subsequent events, it was submitted Mr Boyd had proceeded with all reasonable haste, both in seeking and eventually obtaining representation, and then filing his applications in draft form. There were no subsequent events that would count against leave being granted.

[86] On the issue of merits, it was submitted that a more than cursory review of them would be inappropriate at this stage. There would likely be much evidence in the substantive challenge from various witnesses and a high degree of disagreement between the parties on the facts. It was the factual findings of the Authority that Mr Boyd wished to challenge. The contest was likely to be intensive. It could not be said that the challenge obviously lacked merit, which turned entirely on findings of fact.

[87] On behalf of OJI, Ms Fechny submitted that Mr Boyd’s challenge to the Authority’s compliance order would ultimately hinge on the success of a challenge to the Authority’s substantive determination issued on 22 March 2023. Such challenge should have been filed by 19 April 2023; the current application was 210 days/30 weeks out of time. She submitted that is a significant delay. The Supreme Court has

noted that 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.⁴⁶

[88] Ms Fechney went on to argue that the assertions that Mr Boyd was unsure of the correct processes for filing a challenge, and that he was unable to secure legal representation, were mischaracterisations of the facts, which she outlined in detail. Based on that review, she submitted Mr Boyd had been suitably represented at all key stages of the proceedings and had ample opportunities to explore his options to challenge the determination and to file an application for leave to extend time if necessary. Delay was caused entirely by Mr Boyd, and not by OJI. This was not a case of practitioner fault. She referred to dicta from Chief Judge Goddard in *Bilderbeck v Brighouse Ltd*, to the effect that the Court should not come to the aid of appellants who are less than vigilant in the safekeeping of their own rights and interests.⁴⁷

[89] She went on to say that there would be extreme hardship for OJI were the challenges to proceed. The level of prejudice and hardship was, on the basis of their evidence, more than “the usual inconvenience”. The delay would result in more difficulties for OJI in assembling evidence, witnesses and other materials to defend Mr Boyd’s claims than if the application for leave to extend time had been made in a timely fashion. Mr Boyd had not conducted himself in a reasonable manner throughout the process, and there were real risks that it would prevent OJI from being able to heal and move on.

[90] OJI’s affidavit had outlined significant mental harm as a result of both the sexual harassment and of the way in which Mr Boyd had conducted himself throughout the proceeding. Ms Fechney said that on any view, the texts considered by the Authority confirmed a sexual motivation. That category of evidence did not turn on the verbal evidence of the parties. It was evidence which was documented and indisputable.

⁴⁶ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

⁴⁷ *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74 (EmpC) at 88.

[91] Finally, Ms Fechney said there was no jurisdiction for the Court to hear the applicant's claim in relation to damages. The counterclaim Mr Boyd wished to raise had not been before the Authority and could not therefore be the subject of any challenge. The appropriate process would be for him to file a fresh claim with the Authority. He could apply for removal. Even if such a step did not occur, he had not lost his rights in respect of his separate claim.

[92] Mr Davis, in response, emphasised the difficulties Mr Boyd had suffered in obtaining representation. This was not a case where he had been "less than vigilant". He reiterated that it would be wrong to conclude that OJI was within a class of persons who should be "protected from the harm of a litigious process".

[93] On the issue of jurisdiction, Mr Davis submitted that Mr Boyd had a counterclaim for compensation for damages caused by OJI during the course of her employment and in breach of her employment agreement. These were matters raised in defence of the personal grievance before the Authority, albeit unsuccessfully. The only difference was that in the Court, Mr Boyd rather than OJI was the party seeking relief. Mr Davis argued that Mr Boyd was specifically empowered by reg 11(1)(d) of the Regulations to seek monetary relief in the statement of claim raising his challenge.

Analysis

[94] The Court has a discretion to extend the time within which a challenge may be filed. The discretion is broad, but it has to be exercised in a principled way and in the interests of justice. Factors usually taken into account when considering the exercise of the discretion include the reason for the omission to bring the challenge within time, the length of the delay, any prejudice or hardship to any other person, the effect on the rights and liabilities of the parties, subsequent events and, depending on the circumstances, the merits of the case.⁴⁸

⁴⁸ *An employee v An employer* [2007] ERNZ 295 (EmpC) at [9]; and see *Almond v Read*, above n 46, at [39] concerning the limitations of any analysis of the merits of a possible challenge.

Preliminary point

[95] The first point I must discuss is whether there is jurisdiction for the Court to consider an application for leave to extend time to file a challenge in respect of multiple determinations solely on the basis of the dates relating to the issuing of a final determination. It has been argued for Mr Boyd that, to all intents and purposes, the fifth determination should be regarded as the only relevant one when considering leave because the previous determinations were all a continuation of the same proceeding.

[96] Section 179 of the Act provides that a party to a matter before the Authority who is dissatisfied with “a written determination” may elect to have the matter heard by the Court. The section does not provide for a global approach as to multiple determinations.

[97] Each of the determinations dealt with discrete issues. Therefore, on each occasion when the Authority issued a determination, it provided a covering email in which it stated that if either party was dissatisfied with the determination, that party had 28 calendar days to file a challenge. It was correct to do so.

[98] That said, it is well established that the language of s 221, on which the application for leave is based, is “broad and untechnical”.⁴⁹ The Court could conceivably focus on a particular period of delay if the interests of justice required it to do so. I will return to this possibility shortly.

Reasons for delay

[99] Mr Boyd’s application is put on the basis that he was unsure of the correct process for filing a challenge and was unable to secure legal representation before the deadline for the filing of a challenge in respect of the fifth determination.

[100] The evidence which I outlined earlier establishes the following:

- (a) On each occasion when a determination was issued, express reference was made by the Authority officer to the fact that a right of challenge

⁴⁹ *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452 at [12].

to the Employment Court existed, which was to be commenced within 28 days. Mr Boyd has accepted that this was the case.

- (b) Moreover, Ms Fechny reinforced this fact more than once. On 3 April 2023, she expressly referred to Mr Boyd's right to bring a challenge to the Employment Court, also noting that such a step would not operate as an automatic stay. After the issuing of the third determination, she emailed a copy of that determination to Mr Boyd, seeking payment of the sums due to OJI. Attached to her email was a yet further copy of the covering email from the Authority officer which, as noted, referred to the right to bring a challenge to the Employment Court.
- (c) In the third determination, the Authority itself expressly recorded that Mr Boyd was dissatisfied with the conclusions reached in the first determination. In light of that fact, it referred to his right to commence a challenge in the Employment Court under s 179 of the Act.⁵⁰
- (d) At various times, Mr Boyd had legal representation. Mr Hardy-Jones, who represented him at the substantive investigation meeting, did not notify any discontinuation of the solicitor-client relationship until 3 April 2023. On 26 June 2023, Mr Boyd confirmed that Mr Keenan had been appointed as his new solicitor. On 11 August 2023, Ms Mavi and Mr Davies confirmed they had been instructed to act for Mr Boyd. Whilst there is no evidence as to whether rights of challenge were or were not discussed with any of those legal representatives (and in any event, legal professional privilege may have applied to such discussions), there was plainly an obvious opportunity for legal advice to be given on the topic.

[101] Given the evidence of the express references that were made to the right of challenge that existed, I am not persuaded that Mr Boyd was unaware of his rights, and I am not persuaded that he did not have the means to obtain information as to the correct process for filing a challenge.

⁵⁰ *Third determination*, above n 1, at [40].

[102] Coming forward to the period of delay following the fifth determination, Mr Davis was briefed on or about 31 October 2023, but was unable to prepare the relevant documents prior to 3 November 2023 — the last date to bring a challenge to the Employment Court. They were filed on 15 November 2023.

[103] Mr Boyd has not explained why he did not contact Mr Keenan for representation purposes until three working days before a challenge was due. It would have been difficult for counsel to properly prepare and to have signed and filed applications pertaining to no fewer than five determinations within such a confined timeframe. The history was complicated, and Mr Boyd must have appreciated this.

[104] In summary, I am not persuaded that a proper explanation has been given for the delay arising in respect of any of the determinations.

The length of the delay

[105] The delay for each of the four determinations was very significant in the circumstances.⁵¹

[106] Whilst Mr Boyd said he wished to bring claims for damage to the accommodation in which OJI resided, and for loss of use of the room she had occupied for a period due to its state, he also said OJI had lied at the original investigation meeting, and that what he had been accused of was false and inconsistent with the defence which he had raised at the investigation meeting. Even when the Authority considered the application to reopen, determining that there was no basis in law for doing so, Mr Boyd did not take the obvious step of considering the alternative of bringing a challenge at that point, an option which had been expressly referred to by the Authority in its third determination.

[107] For completeness, I have considered whether the delay up to the issuing of the third determination, which dismissed Mr Boyd's application to reopen, was excusable because he had been self-represented. Should the Court exercise its s 221 discretion

⁵¹ 210 days for first determination; 146 days for second determination; 117 days for third determination; 71 days for fourth determination. The delay for the fifth determination was 13 days.

to in effect regard the delay to that point as not being a significant consideration? Even if this had been argued, I would have concluded that in fact the right of challenge to the Court had been clearly notified to Mr Boyd previously; moreover, the delay which arose subsequent to the 28 days after the date of the third determination (that is from 21 July 2023) was in itself very serious in the circumstances. Such an approach would not have led to a conclusion that the delay was excusable.

[108] From that point, Mr Boyd's position focused on the possibility of him exercising a setoff against the established liability. However, the Authority had made it clear in the third determination that there had been no counterclaim for damages by Mr Boyd at the time of the substantive investigation and that a reopening was not an opportunity to advance a new claim.⁵² Notwithstanding that Ms Fechny made it clear that the only issue for OJI, absent a claim in contract, was compliance with the orders the Authority had made, Mr Boyd continued to assert that he was entitled to a setoff. He claimed that the effect of that setoff was that he either did not owe OJI any monies at all,⁵³ or later, that he did not owe her more than the \$10,000 which he paid on 11 September 2023.⁵⁴

[109] In summary, Mr Boyd had initially said he was dissatisfied with the conclusions reached about sexual harassment so that he would not pay, and then broadened his objection to payment by relying on an apparent setoff.

[110] Mr Davis relied on statements made by the Court in *Herrett v Eco Frame and Mirror Ltd.*⁵⁵ Applications of this kind are fact specific. In *Herrett*, the Court was required to consider a very different set of circumstances – a late application for leave in respect of a single determination where the party seeking leave in fact filed a pro forma application before the expiry of time for lodging a challenge.

[111] The period of delay following the fifth determination arose through Mr Boyd's inactivity until shortly before the period for challenging expired.

⁵² *Third determination*, above n 1, at [39].

⁵³ See above at [53], [61], [62], and [65]–[66].

⁵⁴ *Fifth determination*, above n 1, at [13].

⁵⁵ *Herrett v Eco Frame and Mirror Ltd*, above n 45.

[112] I conclude that the overall length of delay was egregious and points strongly away from a grant of leave to extend time to file multiple challenges out of time. The position for the fifth determination is less serious, although Mr Boyd contributed to that particular phase of the delay because of his very late request for legal representation.

The effect of the rights and liabilities of the parties

[113] The time limits for initiating an appeal or challenge reinforce the rights of a successful party to finality of litigation and to recovering of the benefits of a successful outcome. A party who is not diligent in pursuing any right of appeal or challenge faces a significant threshold for taking the matter further. I respectfully agree with Chief Judge Goddard that the Court should not come to the aid of an appellant who has been less than vigilant in pursuing any right that may be possessed.⁵⁶ This is the context within which this subtopic must be considered.

[114] Mr Davis submitted that as far as OJI's position was concerned, there was nothing above "the usual inconveniences of being a party to litigation".

[115] OJI filed evidence outlining the significant stress she suffered following the issuing of the first determination. This was in the context of a continuing pattern of non-compliance of both the substantive awards made in the first determination and the subsequent costs orders.

[116] I find that OJI suffered significant prejudice by having to deal with repeated non-compliance, notwithstanding the consistent attempts that were made to enforce the judgment debts. That prejudice would increase were leave granted to Mr Boyd to file challenges out of time.

[117] I make this finding not because of the nature of the personal grievance, which was upheld, but because the orders of the Authority were not appropriately challenged and have not been satisfied in a timely way.

⁵⁶ *Bilderbeck v Brighthouse Ltd*, above n 47, at 88.

[118] Mr Davis also submitted that Mr Boyd would be unable to bring his challenge were leave not granted and that this factor supports the application.

[119] For the purposes of this submission, it is necessary to refer to Mr Boyd's wish to advance a "counterclaim" in connection with his challenge.

[120] As noted, this matter was commented on in the third determination, with the Authority finding there had been no counterclaim for damages by Mr Boyd at the time of the substantive investigation and that a reopening was not an opportunity to advance a new claim.⁵⁷

[121] This was a reference to the fact that no statement of problem had been filed by Mr Boyd for an actionable breach of an employment agreement, giving rise to a claim for damages.

[122] As Ms Fechny accepted, Mr Boyd had the right to advance such a claim, and still could, subject to the relevant provisions of the Act and the Regulations

[123] As far as a challenge to this Court is concerned, there is no provision under the Act or the Regulations for a "counterclaim" where that claim was not dealt with by the Authority. Mr Davis particularly relied on reg 11(1)(d) of the Regulations that states a statement of claim must specify the relief sought, including, in the case of money, the method by which the claim is calculated. Whilst reg 11 describes the necessary prerequisites of a statement of claim, it is subject to the provisions of the Act which describe the circumstances as to when a challenge may be brought.

[124] Section 179 of the Act makes it clear that a challenge can be brought by a party "to a matter before the Authority" who is dissatisfied. It is well established that although the subsection is to be construed broadly, there must nonetheless have been a relevant matter before the Authority.⁵⁸ It is apparent that there was no relevant statement of problem raising a claim in contract, and the Authority, in investigating the employment relationship problem, did not proceed on the basis there was.

⁵⁷ Third determination, above n 1, at [39].

⁵⁸ *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [33].

[125] Thus, the sole question for present purposes is whether the fact that Mr Boyd would be unable to bring a challenge to OJI's established personal grievance and remedies, indicates that leave should be granted. The question of whether he might bring a claim in contract is a separate question which does not fall for consideration at this stage.

[126] Given the history, I am not persuaded that the impact of not granting leave on Mr Boyd's rights and liabilities is a significant consideration in his favour. It is, however, a significant factor in respect of OJI's rights and liabilities.

The merits

[127] This is an unusual case where the length of the delay is so significant that a consideration of merits is necessary, albeit on a provisional basis. My consideration of this topic must begin by referring to the substantive determination because unless leave is granted to challenge it, the case for permitting challenges to the subsequent determinations becomes weak, as I will explain.

[128] My initial assessment is that Mr Boyd's prospects of success in challenging the key findings in the first determination are not strong.

[129] It is not suggested that an incorrect legal approach to a sexual harassment claim was exercised by the Authority. My preliminary view is that a correct understanding of the law was adopted and then applied.

[130] The key issues were, as Mr Davis submits, the credibility contest between OJI on the one hand and Mr Boyd on the other.

[131] The first determination demonstrates a careful evaluation of the evidence that was placed before the Authority and then the making of conclusions that were open to it on the basis of that material.

[132] Mr Davis referred to further evidence that would be available to Mr Boyd for consideration at the hearing of a de novo challenge. However, the Court has not been presented with an affidavit outlining that evidence, or even a summary of evidence

that would be given by named individuals. It may be the case that Mr Boyd would rely on the details which were considered by the Authority in the third determination. At this stage, that material does not seem determinative.

[133] Standing back, my assessment at this stage is that Mr Boyd has only moderate prospects of successfully challenging the findings made in the first determination.

[134] A potential challenge of the third determination, which concerned the possibility of reopening the original investigation, would be unrealistic if no challenge could be brought to the first determination.

[135] No submissions were advanced in respect of the costs determinations, which are the second and fourth determinations. I infer they were included in the leave application so that costs could be reconsidered if the challenges to the first and third determinations succeeded.

[136] Nor would there be any point in permitting a challenge to the fifth determination, relating to the compliance order, if there was no challenge to the first determination which established the sums to be paid by Mr Boyd. Absent a successful challenge to that determination, a challenge against a compliance order would have poor prospects of success.

[137] In summary, the assessment of the merits of the proposed challenges turns primarily on whether a challenge to the substantive determination should be permitted. If so, all subsequent determinations should be considered for leave purposes. If not, there is little point in granting leave for the remaining determinations.

Hardship to any other person

[138] There is no evidence of hardship to any other person.

Subsequent events

[139] There are no relevant subsequent events.

Overall justice

[140] There is no single consideration which points positively to the granting of leave. There are many against doing so. The most significant are: the length of the delay following the issuing of each determination, particularly the first four; the failure to take any steps notwithstanding the clear advice given by the Authority and by OJI's advocate; the availability of legal advice; and the fact that bringing a breach of contract claim was a step never taken even when it was pointed out that such claim had never been before the Authority; and only moderate prospects of success were a challenge to the substantive determination to proceed.

[141] The Court is left with the clear impression that Mr Boyd simply did not wish to pay the amount he had been ordered to pay. He has not acted with the necessary degree of diligence to protect relevant rights. It is not in the interests of justice to grant the significant indulgence which is sought.

[142] For all these reasons, the application for leave to extend time to bring multiple challenges is dismissed.

Application for stay

[143] Mr Davis accepted that the application for a stay of the Authority's orders is necessarily contingent on the outcome of the leave application. He properly acknowledged that were leave to be refused, the reasons for seeking a stay fall away.

[144] I accept this submission and dismiss the application for a stay.

Costs

[145] OJI has succeeded in opposing the applications brought by Mr Boyd. She is entitled to costs. Any memorandum as to costs on her behalf is to be filed and served within 14 days, and a response from Mr Boyd is to be filed and served within 14 days

thereafter. At the same time, the parties should make submissions as to whether the interim non-publication order should be made permanent.

B A Corkill
Judge

Judgment signed at 4 pm on 19 July 2024