IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 254
EMPC 411/2024

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	CINDY ROOKES Applicant
AND	TILLMANS FINE FURNITURE LIMITED Respondent

Hearing: On the papers

Appearances: A Kersjes, advocate for applicant
K Dalziel, counsel for defendant

Judgment: 20 December 2024

JUDGMENT OF JUDGE K G SMITH
(Application for an extension of time to challenge a determination)

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[1] On 22 August 2024, the Employment Relations Authority determined that Cindy Rookes was unjustifiably dismissed by her employer, Tillmans Fine Furniture Ltd.[1] The Authority ordered Tillmans to pay to Ms Rookes $15,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and $2,625 gross for three weeks' wages.

[2] Ms Rookes has applied for an extension of time to challenge the determination. If she succeeds her intention is to seek to increase the compensation awarded to her.

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1 *Rookes v Tillmans Fine Furniture Ltd* [2024] NZERA 504 (Member Vincent).

[3] The reason Ms Rookes now wants to challenge the determination is because Tillmans has challenged it but in a limited way.

[4] To place this application into context it is necessary to say a little more about the determination and the underlying dispute. While the parties filed affidavits, they did not address the evidence in any detail because it was common ground that the determination accurately recorded what happened.

The determination

[5] The Authority's determination dealt with two periods of employment between Ms Rookes and Tillmans. Tillmans sells high-quality furniture in Christchurch. On 16 September 2022, Tillmans and Ms Rookes entered into an individual employment agreement for her to work as a sales consultant. The agreement contained a 90-day trial provision as provided for by ss 67A and 67B of the Act.[2]

[6] Tillmans dismissed Ms Rookes on 13 December 2022 and her last day of employment was on 17 December 2022. The dismissal letter relied on the trial provision. The company gave as its reason for the dismissal that her product knowledge was not up to the standard required.[3]

[7] Ms Rookes disputed the lawfulness of the trial provision. She considered the company could not rely on it because she began working before the employment agreement containing the provision was signed. The prior work she relied on was two very lengthy interviews each lasting several hours.

[8] The Authority rejected Ms Rookes' claim about the trial provision.[4]

[9] A few days after Ms Rookes' employment ended, the parties agreed to a two-month fixed term employment agreement.[5] That agreement specified it would start on

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2 At [12].
3 At [37].
4 At [36].
5 At [41].

20 December 2022 and end automatically on 25 February 2023. It stated that there was a genuine reason for its existence:[6]

> …The reason for [the agreement] being fixed term, and finishing at the end of the term, is the [employee] will have a reasonable amount of time to search for a new job after the Christmas / New Year holiday season finishes.

[10] The Authority examined the requirements for a fixed-term employment agreement in s 66 of the Act and was not satisfied that they were met.[7] That conclusion opened the door for the Authority to decide that, by allowing the agreement to expire, Tillmans could not satisfy s 103A of the Act. That is, it could not show that the termination of employment was justified on an objective basis as required by s 103A(2).

Tillmans' challenge

[11] Tillmans' challenge maintains that the determination contains errors of law. It seeks to set aside only those parts of it where the Authority held that:

(a) the reasons for the fixed-term agreement were not genuine and not based on reasonable grounds;

(b) Tillmans' views about Ms Rookes performance and its decision to terminate employment under the 90-day trial period invalidated the fixed-term agreement; and

(c) employment was ongoing.

[12] On Tillmans' behalf, Ms Dalziel indicated the challenge could be dealt with on the papers and by relying on the Authority's findings of fact which are not disputed.

Ms Rookes' application

[13] On 16 October 2024, Ms Rookes applied for leave to extend time for her to challenge the determination. The application was supported by a brief affidavit and

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6 At [45].
7 At [50].

draft statement of claim. That draft proposes to uplift compensation under s 123(1)(c)(i) of the Act to $25,000 and to overturn the conclusion that the 90-day trial provision was lawful and could be relied on.

[14] With commendable frankness Ms Rookes stated in her application that while she was dissatisfied with the determination she had originally decided not to challenge it, to "let the matter rest", and avoid further expense. Her evidence was that she was devastated by Tillmans' Challenge but realised she was out of time to file her own challenge. On receiving it she changed her mind and decided to file a challenge herself.

[15] In opposing the application, Tillmans took the position that Ms Rookes provided an inadequate explanation for delaying taking steps to challenge the determination, it criticised the length of the delay as significant and considered it would suffer prejudice if an extension of time was granted.

Extension of time

[16] Section 219 of the Act provides the Court with a discretion to extend time. The discretion is broad but it has to be exercised in a principled way and in the interests of justice. When considering exercising the discretion factors usually taken into account include the reason for the omission to file the challenge within time, the length of the delay, any prejudice or hardship to the other party, the effect on the rights and liabilities of the parties, and subsequent events.[8] Until the Supreme Court's judgment in *Almond v Read* the merits of the proposed challenge were sometimes considered.[9] They are now only looked at with caution. The merits are not usually relevant where there has been an insignificant delay and there is no prejudice to the other party. Further, given the necessarily superficial examination of the merits possible at an interlocutory stage the Supreme Court held that they should only be taken into account when obviously very strong or very weak.

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8 *An Employee v An Employer* [2007] ERNZ 295 at [9].
9 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [36]-[39].

The reasons for the omission to bring the case within time

[17] Mr Kersjes, who acts for Ms Rookes, acknowledged her decision not to pursue a challenge, but submitted she should be able to reconsider her position given Tillmans' challenge. He pointed out that Tillmans' challenge was filed on the last possible day to do so as of right and Ms Rookes needed time to consider her response.

[18] The elapsed time until Ms Rookes filed her application was explained by the need to decide on an appropriate course of action and for the necessary papers to be prepared. Mr Kersjes described Tillmans' challenge as having a narrow basis which, if successful, would mean the remedies awarded by the Authority would be removed. He submitted that, in those circumstances, it was appropriate for Ms Rookes to have the opportunity to consider what means were available to her to support the Authority's finding of unjustified dismissal. Being able to raise the validity of the trial provision was, therefore, important.

[19] In response, Ms Dalziel made the obvious point that Ms Rookes consciously allowed time to pass and then changed her mind. That explanation was submitted to be similar to the circumstances in *HST v KAG*, where it was held to be inadequate.[10]

[20] Section 179(1) of the Act provides the right for any party to a matter before the Authority to elect to challenge the determination within 28 days. That election may be about the whole determination, in which case the plaintiff seeks a full hearing and the matter is fully reconsidered. Alternatively, a challenge may be about part of the determination, specifying any errors of fact or law alleged to have been made.[11] The Act and Employment Court Regulations 2000 do not provide for what may be called in other jurisdictions a cross-appeal (or cross-challenge), enabling a defendant to respond with a challenge that would otherwise be out of time.

[21] Tillmans' challenge was limited, crafted so that it preserved those parts of the determination where it succeeded and disputed only those parts where it failed. The

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10 *HST v KAG* [2020] NZEmpC 122 at [8].

11 *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC) at [7]; *Xtreme Dining t/a Think Steel v Dewar* [2016] NZEmpC 136 at [16].

cases for and against the trial provision, which Ms Rookes wants to include in proceedings before the Court, are irrelevant to Tillmans' challenge.

[22] The time did not elapse through some omission. A conscious decision was made to accept the determination's outcome which undermines the application.[12] The application is also weakened by Ms Rookes being on notice that Tillmans intended to challenge the determination. The time to file a challenge expired on 19 September 2024. On 2 September 2022, Ms Dalziel informed Mr Kersjes that Tillmans had decided to file a challenge, which information should have prompted Ms Rookes to consider her position before the time expired.

[23] Despite suggestions to the contrary, an implicit part of Ms Rookes' application was that it would be just for the Court to hear the whole dispute that was before the Authority. There are cases where the Court has been prepared to grant an extension of time to ensure the issues raised in the Authority were able to be fully reconsidered.[13] Those cases have tended to be where there was such a connection between an existing challenge and a proposed one that it would be unjust to decline to hear the proposed challenge. This is not one of those cases. The proposed dispute about the validity of the trial provision and the one about the fixed term agreement are discrete.

[24] This factor points away from granting the application.

Length of the delay

[25] Ms Rookes' application for an extension of time was filed 27 days late, on 16 October 2024. She deposed to deciding to challenge the determination on 25 September 2024. The balance of the time until mid-October was taken up with preparing the application.

[26] Mr Kersjes submitted that the delay was of less significance given that Tillmans had already filed its challenge.[14] He acknowledged that Ms Rookes was on

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12 *Almond v Read*, above n 9, at [38]; see also *Hadfield v Atlas Concrete* Ltd [2024] NZEmpC 87 at [8],

13 See for example *Crest Commercial Cleaning Ltd v Total Property Services (Canterbury) Ltd* [2022] NZEmpC 85.

14 Relying on *An Employee v An Employer*, above n 8, at [17].

notice about Tillmans' intentions having been informed about them on 2 September 2024. The submission was that, despite having advance warning, there was no indication before Tillmans' statement of claim was served that it would be on what was described as a "narrow basis".

[27] Mr Kersjes accepted responsibility for that part of the delay between late-September and mid-October. The total elapsed time was acknowledged by him as being at the "longer end" of a "moderate" delay but he submitted that was neutral, or at worst to only slightly count against an extension of time being granted.[15] A comparison was made with the 35-day delay in *Talent Propeller Ltd v UXK* which was found to not be at the higher end of the scale.[16]

[28] Ms Dalziel submitted that the longer the delay the more an indulgence is being sought, requiring stronger grounds for an extension.[17] She relied on the advance notice given by Tillmans as providing plenty of time for Ms Rookes to evaluate her position and criticised the further time taken as therefore unexplained.

[29] Implicit in Ms Dalziel's submissions was that the time from when Ms Rookes became aware of Tillmans' intentions should be taken into account in calculating the length of the delay. That submission is unpersuasive. Conventionally, what is considered is the time between when the right to challenge expired and when steps were taken by the party seeking an extension. That time is measured from 19 September 2024.

[30] Obviously, the context in which the delay occurs is material. On any view the time taken for Ms Rookes to decide to act, six days, is modest but it is more than modest if the time to 16 October 2024 is taken into account. Despite Mr Kersjes accepting responsibility for the entire delay from late September, Ms Rookes still bore some responsibility to ensure her agent moved as quickly as possible. However, having made that comment, I am prepared to treat this delay as falling between modest and the "longer end" of moderate Mr Kersjes referred to.

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15 Relying on *Duncan v Southern Milk Transport Ltd* [2019] NZEmpC 183 at [9].
16 *Talent Propeller Ltd v UXK* [2021] NZEmpC 2 at [5].
17 *Almond v Read*, above n 9, at [38].

[31] For completeness, I do not accept Mr Kersjes' submission that the scope of Tillmans' challenge has any relevance. Given that Tillmans succeeded over the trial provision, the notice it gave to Ms Rookes on 2 September 2024 could only have been about its failure to persuade the Authority that the fixed term was lawful. It ought to have been apparent to Ms Rookes that, if she wanted to protect or improve her position, she would need to concentrate on those aspects of the determination where she was unsuccessful. Grappling with the scope of Tillmans' challenge would not have been a significant issue contributing to the length of the delay.

[32] This assessment points towards granting the application but only weakly.

Prejudice or hardship to the other party

[33] Mr Kersjes submitted that a hearing involving Ms Rookes' proposed claims would, at the most, only be slightly more involved than one confined to Tillmans' challenge and there would be no prejudice to the company. To support the submission, he argued that the validity of the trial provision could be dealt with by an agreed statement of facts and might be capable of being resolved on the papers. As to seeking enhanced compensation, he accepted some evidence would be needed but considered the subject might also be dealt with on the papers.

[34] In these submissions, any prejudice to Tillmans would be offset against what would be suffered by Ms Rookes if she could not challenge the determination. She would be defending the one claim where she succeeded while not being able to revisit aspects of her claim where she failed. However, being able to revisit that failed claim may, if successful, protect or enhance her position.

[35] Ms Dalziel submitted that Tillmans would suffer prejudice. If Ms Rookes' challenge proceeded, it would introduce issues unrelated to the narrow scope of the company's case. In contrast, she submitted Ms Rookes' proposed challenge could not realistically be dealt with without hearing evidence.

[36] I consider Tillmans would be prejudiced if Ms Rookes' application is granted. Any hearing involving Ms Rookes' claims is likely to be quite different from one dealing only with Tillmans' claim. Instead of concentrating on a discrete legal point

about s 66 of the Act, Ms Rookes' challenge necessarily involves hearing about what happened in the prolonged interviews, a topic unlikely to be confined to a judgment based on the Authority's findings. Such a hearing must attract additional cost for the parties.

[37] This factor points away from granting the application.

The effects on the rights and liabilities of the parties

[38] Mr Kersjes submitted that there would be no impact on Tillmans' rights and liabilities if leave is granted. He relied on the fact that Tillmans has already challenged the determination. The only impact, he argued, is the potential exposure to a greater amount of compensation. Conversely, not granting leave was submitted to have a significant effect of Ms Rookes because it would deprive her of the ability to challenge the determination and to have the employment relationship problem heard again.

[39] This argument is unpersuasive. There is an effect on Tillmans because the subject matter of Ms Rookes' proposed challenge extends beyond the scope of the company's challenge, widening the matters in dispute and potentially increasing costs. There is also an impact on Tillmans if it is exposed, through the granting of an extension of time, to potential liability for more than it currently faces.

[40] This factor points away from granting the application.

Merits of the proposed challenge

[41] Mr Kersjes and Ms Dalziel acknowledged the restrictions on considering the merits of the proposed challenge discussed in *Almond v Read*.[18] Nevertheless, Mr Kersjes submitted that the merits ought to be taken into account because Ms Rookes' case over the trial provision in the employment agreement is very strong. To support that submission, he argued that it was difficult to see how Tillmans could have "two bites of the cherry" by determining Ms Rookes' suitability for permanent employment through two lengthy interviews while she had no protection against unjustified dismissal.

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[18] *Almond v Read*, above n 9.

[42] Ms Dalziel's response seems to have been that the Authority's determination was clear and there is no indication of new evidence or legal grounds that would suggest otherwise.

[43] The position is not as clear-cut as Mr Kersjes submissions suggest. The Authority accepted evidence from Tillmans to the effect that it was unusual to have two long interviews.[19] However, the Authority held that the second of those interviews occurred because Ms Rookes asked for another chance after being told the first interview was unsuccessful. The Authority concluded that the number and length of the interviews stretched what would normally be considered to be a reasonable time for an interview or workplace observation, but decided the context had to be taken into account. That context was Ms Rookes persuading Tillmans to give her "a second shot".[20] The situation was more nuanced than Mr Kersjes' submission allowed for and, in the circumstances described by the Authority, it could not now confidently be said that the challenge to the trial provision is obviously strong.

[44] The best that might be said from Ms Rookes' perspective is that this factor is neutral.

Overall justice of the application

[45] Stepping back to look at the application overall, the factors that tell against granting the application significantly outweigh one factor that points only weakly in favour of granting it. Ms Rookes has not established that the circumstances justify enlarging the scope of issues before the Court in the way she anticipated in her draft statement of claim. I am not satisfied that granting an extension of time is in the interests of justice.

Conclusion

[46] The application for an extension of time is unsuccessful and it is dismissed.

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19 *Rookes v Tillmans Fine Furniture Ltd*, above n 1, at [32].
20 At [33].

[47] Costs are reserved. If they cannot be agreed, memoranda may be filed.

K G Smith
Judge

Judgment signed at 11.30 am on 20 December 2024