

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 87
EMPC 123/2024**

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

BETWEEN SHANE HADFIELD
 Applicant

AND ATLAS CONCRETE LIMITED
 Respondent

Hearing: On the papers

Appearances: P Cranney and G Liu, counsel for applicant
 J D Turner, counsel for respondent

Judgment: 23 May 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] Mr Hadfield has applied for leave to extend the timeframe for filing a challenge to a determination of the Employment Relations Authority (the Authority).¹ A challenge to the determination is already before the Court. It is being pursued on a non de novo basis by the company, Atlas Concrete Ltd. Mr Hadfield is out of time for filing a challenge and requires leave to do so. This judgment deals with that issue.

[2] The background to the current application for leave emerges from the Court's interlocutory judgment of 22 March 2024.² One of the issues addressed in the judgment related to whether Mr Hadfield required leave to pursue a cross-challenge

¹ *Hadfield v Atlas Concrete Ltd* [2023] NZERA 470 (Member Blick).

² *Atlas Concrete Ltd v Hadfield* [2024] NZEmpC 50.

to the determination of the Authority (as the company contended) or whether he could effectively do so via a positive defence, which is the procedural route he had gone down. I held that leave was required and made timetabling orders for an application to be advanced. Mr Hadfield has now sought leave, which the company opposes.

[3] The Court has a discretion to grant an extension of time to take various steps, including to file a challenge.³ The discretion is to be exercised in accordance with principle. The overarching consideration is the interests of justice.

[4] The usual factors that will be considered are:⁴ the reasons for the omission to file 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; and subsequent events. The merits of the proposed challenge may be relevant but caution is required, for reasons I come to.

[5] The reasons for the omission to file within time can be summarised as follows. In essence it was considered that a challenge could appropriately be pursued through a positive defence, which Mr Hadfield advanced in his statement of defence to the company's statement of claim. The statement of defence was filed within the statutory timeframe for doing so. The positive defence sparked an objection by the company, and orders were sought that it be struck out. That application was actively defended on Mr Hadfield's behalf, but it was made clear throughout that if the Court determined that leave was required an application would be advanced. In the event I concluded that leave was required. It is against that backdrop that Mr Hadfield now applies for leave.

[6] I am unable to discern any potential prejudice to the company other than to face a cross-challenge which, for a brief period of time (namely the time between the 28-day period for filing and the filing of the statement of defence containing the positive defence) it did not think Mr Hadfield was seeking to advance. The affidavit of Mr Stewart, on behalf of the company, confirms that the only prejudice is in the

³ Employment Relations Act 2000, s 219.

⁴ *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8]; see generally *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [35]–[40].

form of increasing the litigation costs in having to defend Mr Hadfield's challenge at the same time as advancing its own. This is, however, a natural consequence of any cross-challenge, not merely one that was brought out of time.

[7] On the other hand, Mr Hadfield would be prejudiced if leave was declined. He would be unable to pursue a challenge to the Authority's determination, which he would otherwise be entitled to do as of right, on the basis of what might be termed a procedural hiccup which was not (it appears) of his making.

[8] There is a range of reasons why a party may omit to file a challenge within the statutory time limit. As the cases reflect, leave may more readily be granted in circumstances where the omission is not caused directly by the party concerned, such as where the party's representative has overlooked or miscalculated the timeframe for filing.⁵ While not on all fours, there are analogies with what occurred in this case.

[9] Whether the omission to file within time, once discovered, has been promptly addressed will also be relevant to the weighting exercise. Once the Court concluded that Mr Hadfield could not pursue a challenge via a positive defence, an application was filed according to the timetabling directions which had been made. In other words, when the issue as to correct procedural route was resolved, Mr Hadfield took timely steps to progress an application for leave.

[10] Counsel for the company, Mr Turner, submits that Mr Hadfield's proposed challenge is devoid of merit. In *Almond v Read* the Supreme Court made it clear that there is difficulty in assessing the merits of an application at an early stage and that the exercise should be approached with caution,⁶ observing that:

[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

⁵ *Almond*, above n 4, at [37].

⁶ At [39].

be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[11] The Court's observations have particular relevance given the background to the late filing I have described above.

[12] In the circumstances it is appropriate to exercise the Court's discretion to grant leave to extend time to file a challenge. A statement of claim is to be filed and served within 10 working days of the date of this judgment, together with the applicable filing fee. The company will have the usual time to file and serve any statement of defence to the statement of claim.

[13] A telephone directions conference is to be scheduled promptly after the expiration of the timeframe for filing a statement of defence. Counsel should confer and identify in advance of the conference any outstanding issues and if there are none proposed timetabling orders to progress this matter through to a hearing.

[14] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 2.15 pm on 23 May 2024