

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

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

**[2025] NZEmpC 127
EMPC 230/2025**

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	MARITIME UNION OF NEW ZEALAND First Applicant
AND	RAIL AND MARITIME TRANSPORT UNION Second Applicant
AND	LYTTELTON PORT COMPANY LIMITED Respondent

Hearing: 25 June 2025 (via Audio Visual Link)

Appearances: S Mitchell KC and A Drumm, counsel for the applicants
R Wooders and Z Fong, counsel for the respondent

Judgment: 26 June 2025

JUDGMENT OF JUDGE J C HOLDEN

The unions apply for leave to file a challenge out of time

[1] This judgment resolves an application by the Maritime Union of New Zealand and the Rail and Maritime Transport Union for leave to file a non-de novo challenge to a determination of the Employment Relations Authority.¹

[2] The Authority found that, while Lyttelton Port Company Ltd had breached its obligations to the unions in the course of developing a restructuring proposal, it had

¹ *Maritime Union of New Zealand v Rail and Maritime Transport Union* [2025] NZERA 231.

not breached cl 2 of the applicable collective agreements, as contended by the unions.² It is that finding that the unions wish to challenge on a non-de novo basis.

[3] Lyttelton Port Company has filed a non-de novo challenge to the determination, challenging the finding that it should have developed its restructuring proposal with the unions prior to it being presented for formal consultation with all workers, and that this was in breach of the collective agreements that it had with the unions and its good faith obligations to the unions.

[4] Lyttelton Port Company's challenge was filed on the 28th day following the issuing of the Authority's determination and seeks orders that the relevant findings of the Authority be set aside, including the order made by the Authority directing Lyttelton Port Company to immediately halt current direct consultation with the workers who are the subject of union coverage, and engage in structured consultation on the proposal entitled "Container Terminal Operations Changes Proposal" as soon as practicable, to allow constructive engagement and debate with the unions on the efficacy or otherwise of the proposal advanced, including seeking to secure an agreement with the unions on any changes to the current coverage provisions and existing collective agreements.³

[5] The unions' application for leave was filed the day after Lyttelton Port Company filed and served its challenge. It therefore was one day late.

[6] The unions say that, following the issuing of the Authority's determination, the parties met on several occasions to attempt to give effect to the determination. They say that they were meeting with Lyttelton Port Company on the day that its challenge was filed and served.

[7] As noted, the challenge by Lyttelton Port Company is non-de novo; it does not relate to cl 2 of the collective agreements.

² At [57].

³ At [64].

[8] The unions say that, although they considered the Authority was in error when it found that cl 2 of the collective agreements had not been breached, they did not immediately challenge that finding because they presumed that Lyttelton Port Company was committed to adhering to the determination, which was the purpose of the engagements that were occurring between the unions and Lyttelton Port Company.

[9] As there is now a challenge from Lyttelton Port Company, the unions seek the opportunity to not only defend the findings of the Authority that Lyttelton Port Company is challenging, but also to challenge the errors they consider the Authority made.

[10] Lyttelton Port Company opposes leave being granted. It says:

- (a) the unions do not have a good reason for the delay in filing their challenge to the determination; it was filed in response to Lyttelton Port Company's challenge;
- (b) there will be no prejudice or hardship to the unions or their members if their application is not granted;
- (c) Lyttelton Port Company would be prejudiced by the delay if the unions' application was granted;
- (d) the issues raised by the unions' proposed challenge are not significant;
- (e) the merits of the unions' claim are weak;
- (f) subsequent events also support not granting the unions' application; and
- (g) the overall justice of the matter does not support the unions' application for leave being granted to file a challenge out of time.

The test is not in dispute

[11] The question for the Court when considering whether to grant leave to extend time to file a challenge is well-established. The parties point to the legal principles that apply.

[12] The ultimate question for the Court is what the interests of justice require.⁴ This requires an assessment of relevant factors, which include:⁵

- (a) the length of the delay;
- (b) the reason for the delay;
- (c) any prejudice caused by the delay;
- (d) effects on rights and liabilities;
- (e) subsequent events; and
- (f) the merits of the proposed challenge.

The delay was minor and not unreasonable

[13] The delay in filing the challenge was very minor, just one day. Leave in respect of that short a delay would usually be granted, desirably without opposition from the respondent. Lyttelton Port Company says, however, the delay here resulted from a change of mind, rather than from error or inadvertence, and that where the delay arises because of a change of mind, there is less justification for an extension than where the delay results from error or inadvertence.⁶

[14] The unions have been candid in their reasons for filing the challenge when they did; it was not a result of a miscalculation or error as is sometimes the case, but was because Lyttelton Port Company filed a non-de novo challenge on the last day on

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

⁵ *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103.

⁶ *Almond v Read*, above n 4, at [38](b).

which the parties could file a challenge as of right. The unions say there was a change of circumstances.

[15] While parties are expected to independently assess whether they wish to challenge a determination, and not simply wait to see what the other party does, there are particular features of this case that are relevant.

[16] In particular, the unions obtained a compliance order in the Authority and all parties were working together in light of that order; Lyttelton Port Company says that it has complied with the compliance order made by the Authority, and its challenge is therefore moot. It says it seeks to challenge the Authority's determination not to disrupt the current process, but rather to clarify Lyttelton Port Company's consultation obligations in respect of future restructuring proposals.

[17] I consider the unions were appropriately focussed on working through the current matters, as Lyttelton Port Company was ordered to do. In that context, their decision not to file a challenge over that part of the determination that they were unhappy with was in accordance with the objects of the Employment Relations Act 2000, which include that parties work together to problem-solve issues and to reduce the need for judicial intervention.⁷

[18] The unions say, however, that, as the matter is now before the Court, and focussed on future proposals, it would also be of benefit to all parties for the Court to consider the proposed challenge by the unions.

[19] In the particular circumstances of this case, the position taken by the unions that they would focus on working with Lyttelton Port Company to give effect to the compliance order was not unreasonable and explained why the challenge was not filed within time.

⁷ Sections 3(a) and 4(1A)(b).

Lyttelton Port Company is not prejudiced by the one-day delay

[20] Lyttelton Port Company submits that it would be prejudiced if leave is granted. However, it points to broader issues that come with facing a challenge; it accepts that there is no prejudice caused by a one-day delay in filing a challenge, which is the delay that the Court is concerned with on the application for leave.

[21] Lyttelton Port Company submits there would be no prejudice or hardship to the unions, or their members should their application be declined. It says that it has complied with the order made by the Authority, and that it has complied with what the unions say is required by cl 2 of the collective agreements. This is disputed by the unions. The unions strongly assert that they would be prejudiced if they are unable to have their challenge regarding cl 2 considered by the Court alongside the issues raised by Lyttelton Port Company. They say, and I accept, that only considering Lyttelton Port Company's challenge would be artificial, particularly as Lyttelton Port Company is primarily concerned with the future application of the collective agreements.

[22] The addition of the unions' challenge to the scheduled hearing, commencing on 14 July 2025, would not unduly extend the hearing; the issue concerning the application of cl 2 of the collective agreements is primarily a legal one.

Subsequent actions of Lyttelton Port Company were done knowing of the application for leave

[23] Lyttelton Port Company also says that since 27 May 2025, it has made a decision regarding its restructuring proposal, which it promulgated on 9 June 2025. I do not consider that to be a significant issue. At the time the decision was made, Lyttelton Port Company knew that the unions were seeking leave to challenge the determination on a non-de novo basis in respect of the findings on cl 2.

Not a case where there is no realistic chance of success

[24] Lyttelton Port Company says that the unions' claim is weak; it has no realistic chance of success. The unions would need to persuade the Court that their interpretation of cl 2 is correct. That may, as submitted by Lyttelton Port Company,

present some difficulties, but I do not accept that there is no realistic chance of success, which is the relevant standard.

Application for leave granted

[25] For the reasons outlined, I consider that the interests of justice require the unions' application for leave to file a challenge out of time to be granted.

[26] Accordingly, the statement of claim is accepted for filing. Lyttelton Port Company's statement of defence is to be filed and served by 4 pm on 7 July 2025. The unions' challenge will be heard with the challenge brought by Lyttelton Port Company.

[27] Costs are reserved.

J C Holden
Judge

Judgment signed at 4.15 pm on 26 June 2025