

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

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

**[2025] NZEmpC 39
EMPC 243/2023**

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

BETWEEN JACOB ALEXANDER
Applicant

AND ANDREW THORN
Respondent

EMPC 324/2023

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

AND IN THE MATTER OF an application for non-publication order and
stay of proceedings

BETWEEN ANDREW THORN
Applicant

AND JACOB ALEXANDER
Respondent

Hearing: 8 November 2024
(Heard at Auckland via Audio-Visual Link)

Appearances: J Alexander, applicant (EMPC 243/2023) and respondent
(EMPC 324/2023) in person
A Thorn, respondent (EMPC 243/2023) and applicant
(EMPC 324/2023) in person

Judgment: 11 March 2025

JUDGMENT OF JUDGE M S KING

[1] The parties to these proceedings seek leave to extend time to file challenges to a determination of the Employment Relations Authority (the Authority) dated 18 April 2023.¹

[2] The Authority found that Mr Alexander was an employee but that he was an employee of Greenback Ecommerce Ltd (Greenback), which has been liquidated, rather than an employee of Mr Thorn. On the other hand, the Authority concluded that Mr Thorn was involved in any breach relating to non-payment of the minimum wage and holiday pay and permitted Mr Alexander to continue his claim against Mr Thorn on those grounds. The Authority did not permit him to pursue his claims for unjustified dismissal and penalties.

[3] Mr Alexander wishes to file a non de novo challenge in which he will seek an order that he was an employee of Mr Thorn. His application for leave to extend time was filed on 19 July 2023, approximately two months after the deadline for filing a challenge.

[4] On his part, Mr Thorn wishes to file a non de novo challenge in which he will seek an order that Mr Alexander was an independent contractor and not an employee. His application for leave to extend time was filed on 13 September 2023, approximately four months after the deadline for filing a challenge.

Mr Thorn applies for non-publication orders

[5] Before turning to consider the parties' applications, there is a preliminary matter to consider.² Mr Thorn seeks non-publication orders over the identity of one of Greenback's employees. In particular, Mr Thorn seeks two orders to protect that employee's identity, namely:

- (a) that the files in these matters not be searched without leave of the Court;
- and

¹ *Alexander v Thorn* [2023] NZERA 192 (Member Craig).

² An application for a stay of proceedings was originally sought; however, as the Authority has stayed its investigation pending the resolution of these matters, Mr Thorn indicated that this application was no longer being pursued.

- (b) that references to the employee in any future document filed or published in this proceeding be anonymised.

[6] The identity of the employee in question is not relevant to these proceedings, and it is not necessary for them to be referred to in this judgment. Given the amount of irrelevant and potentially prejudicial material filed in these proceedings, I accept that it is appropriate to order that the files in this matter not be searched without leave of the Court. On the other hand, it is not necessary to anonymise references to the employee on the Court files if there is an order in place limiting searches of those files.

[7] For completeness, this order is not a non-publication order; there are other legal means to protect the individual in question from harassment or defamation.

The Court may permit a challenge to be filed out of time

[8] Section 179(2) of the Employment Relations Act 2000 (the Act) states that a challenge must be filed within 28 days after the date of the Authority's determination. However, pursuant to s 219 of the Act, the Court has jurisdiction to make orders extending time. The overriding consideration is the justice of the case. The following matters, where relevant, are material to the exercise of the discretion:³

- (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.
- (f) The merits.

³ *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8]; and *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38]–[39].

Mr Alexander's application for leave to file a challenge out of time

Submissions

[9] Mr Alexander submitted that he had indicated his intention to file a challenge on 16 May 2023, which was the last day to file a challenge. His primary submission was that although his challenge is two months late, he was sick during that period. He has provided some medical certificates in support of that claim. He also claims that he was confused about his responsibilities to file documents, partially as a result of having either no advice or poor advice and partially as a result of being on the medication tramadol. In terms of failures to file documents on time in the context of the present application, he submitted that he filed everything as soon as he could given these constraints. He also submitted that the merits of his challenge are strong.

[10] Mr Ballantyne, counsel recently appointed for Mr Thorn, submitted that there was a lengthy period of delay and that the medical certificates provided by Mr Alexander have flaws. He pointed to Mr Alexander being seen attending Court for another matter during the period one of those certificates provided that he was unfit to attend work. He also noted that when the Authority delivered its determination, an advocate, Paul Brown, was representing Mr Alexander, meaning that he may have had legal advice. On the other hand, he acknowledged that Mr Alexander had taken steps on 16 May 2023, the last day for filing a challenge with the Court. He submitted that Mr Thorn would suffer prejudice if leave was granted because Mr Alexander had originally been pursuing Greenback but has now pivoted to pursue Mr Thorn as a result of the company being liquidated.

[11] Mr Alexander submitted in response that Mr Thorn was joined at a relatively early stage in the Authority proceedings and that he will not suffer prejudice as a result of a new claim coming against him because the claim is not new.

Analysis

[12] The last day for filing a challenge was 16 May 2023. Mr Alexander purported to file a document in the Authority on that date by way of email. His email included Mr Thorn and Mr Alexander's own representative as recipients. It is not clear what

the document attached to that email was or how the Authority responded. I accept that his actions on that date show that Mr Alexander intended to challenge the determination, but that only makes the ensuing delay all the more inexplicable.

[13] Having sent material to the Authority, Mr Alexander then took another two months to file an application for leave to extend time to file a challenge. He provided medical certificates, but for the reasons set out below, I do not find that those certificates are sufficient to justify the delay.

[14] The first certificate, which was from a dentist and was dated 23 May 2023, certified that Mr Alexander was not fit for work for the period 13 May 2023 to 20 May 2023. Given that Mr Alexander had emailed the Authority on 16 May 2023, it appears that whatever his condition was at the time of the first certificate, it did not prevent him from filing documents in the Authority, and it would not have prevented him from filing a challenge with the Court in a timely manner.

[15] The second certificate is from a doctor and is dated 25 May 2023. It stated that Mr Alexander had been medically unfit from 22 May 2023 but that he would be fit to resume work on 27 May 2023. However, Mr Alexander has not provided any evidence explaining what his condition was or explaining how that condition prevented him from initiating proceedings. He made a vague reference to being on tramadol, but he has not provided any evidence of that, nor has he explained why he was on tramadol or why being on tramadol prevented him from filing documents. In the absence of further evidence, I cannot place any weight on the second medical certificate.

[16] The third certificate is also from a doctor and is dated 25 June 2023. It stated that Mr Alexander would not be fit to work between 25 June 2023 and 3 July 2023. It further stated that Mr Alexander had advised the doctor that he had been unable to work since 27 May 2023. This certificate is problematic given that the medical certificate relies on self-reporting between 27 May 2023 and 25 June 2023, especially where the doctor in the second certificate stated that he would be fit to work from 27 May 2023.

[17] Further, there is reason to believe that Mr Alexander's self-reporting was inaccurate, given that he was able to appear at the District Court for separate proceedings on 20 June 2023, which was during the self-reported period. Mr Thorn gave evidence that Mr Alexander rode his "Sports Motorbike to the Christchurch Courts" and that this is "a clear indication that his physical abilities contradict his claims". Evidence before the Court included a screenshot of a photograph of a motorbike outside the Christchurch District Court and a screenshot of a text message from Mr Thorn to Mr Alexander referencing that he had seen him at the Court on 20 June 2023.

[18] Mr Alexander does not deny attending Court or that he rode the motorbike shown in the photograph. The evidence includes a copy of an email dated 21 June 2023 sent at 1.52 am in the morning, where Mr Alexander responds to Mr Thorn's text message referring to Mr Thorn's "weird stalker-ish ways" and going on to further acknowledge that he had observed Mr Thorn at the Court two other times. Mr Alexander states "[l]egal advice has been sought" and then states the "Employment [C]ourt proceedings will be filed in due course." This email was also sent during the period of the third medical certificate, when Mr Alexander self-reported that he was unfit for work.

[19] Mr Alexander further noted in his own evidence that he had tried filing documents for these proceedings on 20 June 2023 but that he was unable to do so because he was told by desk staff at the District Court to post the documents to the Employment Court. If he had the documents ready for filing on 20 June 2023, it is inexplicable that he took a further month to file the documents, when he could have simply posted the documents as directed. For these reasons and the reasons stated for the second certificate, I am not able to rely on the third certificate.

[20] In the circumstances, I consider that the delay was lengthy and that it remains unexplained. Mr Alexander was able to take some selective steps in these proceedings and in other proceedings but has failed to explain how his medical condition prevented him from taking the critical step of filing an application in these proceedings.

[21] I also note that even after these proceedings were filed, there have been further delays. Both parties failed to file a notice of opposition to the other party's application for leave to file a challenge out of time. Both parties then proceeded to oppose the other party's application for leave to file a notice of opposition.⁴ The fact that both parties failed to file a notice of opposition and then opposed each other's application to file those notices of opposition out of time indicates that the parties appear to be more interested in feuding than progressing these proceedings in a reasonable manner.

[22] This is also borne out by allegations made by the parties when the proceedings were at a case-management stage. Each party made several serious allegations about the conduct of the other and indicated that they feared for their safety and the safety of those around them. In a minute dated 12 September 2024, the Court noted: "The alleged conduct of the parties towards each other raises health and safety concerns not only for them, but also for Court staff."

[23] It seems clear, given the manner in which the parties have conducted themselves, that the parties are pursuing these proceedings as part of an overlapping and broader feud that has arisen between them. Therefore, I conclude that there is a real risk that these proceedings are not being pursued in good faith and that they are likely an abuse of the Court's processes.

[24] I consider that the impact on the parties of allowing or not allowing a challenge to be filed out of time would have an equal impact on both parties. Either Mr Alexander will be prevented from filing his claim or Mr Thorn will be required to defend his position where he understood himself to be successful, at least in part, in the Authority. Therefore, I consider this factor to be neutral.

[25] I also do not place any weight on the merits of the challenge. It seems that both parties have a reasonably arguable case on the s 6 issues of whether Mr Alexander was in an employment or contractor relationship with Mr Thorn, and in those circumstances, it is not possible or desirable for the Court to make any kind of assessment about the merits.⁵

⁴ See *Alexander v Thorn* [2024] NZEmpC 55.

⁵ See *Almond v Read*, above n 3, at [39].

Conclusion

[26] The length of delay arising in this case is lengthy and unexplained. That alone would be sufficient for the application to be denied. However, there also appears to be a real risk that Mr Alexander is not intending to pursue these proceedings in good faith. Therefore, I consider that it is not in the interests of justice for Mr Alexander's application to be granted.

[27] Mr Alexander's application for leave to file a challenge out of time is unsuccessful.

Mr Thorn's application for leave to file a challenge out of time

Submissions

[28] Mr Ballantyne acknowledged that there was a significant length of delay between the Authority's determination and Mr Thorn filing his application. He also acknowledged that Mr Thorn had legal advice at an early stage after the Authority's determination. However, he submitted that Mr Thorn had understood Mr Alexander to have challenged the determination on 16 May 2023. It was submitted that Mr Thorn took steps to obtain information about that challenge from the Authority to enable him to determine what his response should be.

[29] Mr Ballantyne acknowledged that that explanation did not relate to the period between 19 July 2023, when Mr Alexander filed his application with the Court, and 30 August 2023, when Mr Thorn first tried to file his application. However, he said that the delay during that period was explainable due to other issues that were going on between the parties, which Mr Thorn considered to be more important, such as protecting the identity of witnesses. He acknowledged a further delay between 30 August 2023 and 13 September 2023 but submitted that the period was reasonable given that Mr Thorn had to work out what he had to file.

[30] He submitted that there was no prejudice to Mr Alexander because Mr Alexander is seeking to pursue a challenge himself. He also submitted that if leave is not granted to Mr Thorn to file his challenge, he will not be in a position to challenge

the Authority's findings against him. Turning to the merits of the proposed challenge, he said that the question of whether Mr Alexander was an employee is an important issue. He also submitted that the Authority was incorrect to find Mr Thorn liable under s 142Y of the Act when it has not yet established whether any breaches have occurred – he submitted that the Authority put the cart before the horse.

[31] Mr Alexander submitted that Mr Thorn has, by his own admission, extensive legal experience in a range of Courts and that if Mr Thorn had wanted to clarify information from the Authority, he should have made more of an effort to obtain the information. He also submitted that there was no need for Mr Thorn to seek legal advice on protecting witnesses prior to filing his application because there were no witnesses at risk.

[32] I put Mr Alexander's evidence about Mr Thorn's alleged legal experience to one side as that evidence was presented from the bar and referred to evidence before the Authority. In any case, as submitted by Mr Ballantyne, even if Mr Thorn has legal experience in other jurisdictions, that does not mean that he has any extensive legal experience within the employment institutions.

Analysis

[33] The last day for filing a challenge was 16 May 2023. On that day, Mr Thorn received an email from Mr Alexander indicating that he was filing a challenge. As noted above, it is not clear what was written in the attachments to that email. Mr Thorn said that he tried to get further information so as to know how to respond; however, that indicates that he did not, at least at first, have any intention of challenging the Authority's determination. He was acting on a purely reactive basis in response to Mr Alexander's actions. Ultimately, if Mr Thorn intended to challenge the determination, he ought to have been more active in that regard – the fact that he sought information and did not receive it does not explain his delay in seeking to file a challenge.

[34] Further, once Mr Alexander filed his application for leave to file a challenge out of time, Mr Thorn still did nothing. He said that other more urgent proceedings

were occupying his attention. However, I do not accept that explanation as sufficient. Mr Thorn did nothing to preserve his position by indicating to the Court that he intended to seek leave to file a challenge or by indicating that he wished to oppose Mr Alexander's leave application. Finally, once Mr Thorn attempted to take steps by filing a memorandum with the Court on 30 August 2023, it took too long for Mr Thorn to finally file his application for leave on 13 September 2023.

[35] Ultimately, Mr Thorn delayed approximately four months in filing a challenge. I find that his explanations for that delay are unsatisfactory.

[36] As with Mr Alexander's challenge, I am not convinced that Mr Thorn is pursuing his challenge in good faith; the same considerations apply to him as those that apply to Mr Alexander. Similarly, as with Mr Alexander's challenge, I consider that the impact of allowing a challenge to proceed would have a broadly neutral impact on the parties.

[37] Turning to consider the merits of the challenge, as with Mr Alexander's challenge, the merits of the s 6 issues are insufficiently clear to have any bearing on this application.

[38] However, I accept that the merits of Mr Thorn's case are strong in relation to the s 142Y issue.⁶ Section 142Y states:

142Y When person involved in breach liable for default in payment of wages or other money due to employee

- (1) A Labour Inspector or an employee may recover from a person who is not the employee's employer any wages or other money payable to the employee if—
- (a) there has been a default in the payment of wages or other money payable to the employee; and
 - (b) the default is due to a breach of employment standards; and
 - (c) the person is a person involved in the breach within the meaning of section 142W.

...

⁶ On the other hand, I note that the s 142Y issue was only raised during submissions. Mr Thorn's draft statement of claim for his proposed non de novo challenge did not propose to challenge the finding made against him under s 142Y.

[39] The Authority has not yet concluded whether there has been a default in the payment of wages or other money payable to Mr Alexander, or whether such a default is due to a breach of employment standards. Therefore, it was not in a position to find that Mr Thorn was a person involved in a breach within the meaning of s 142W.

[40] On the other hand, although I accept that the merits of Mr Thorn's challenge are strong on that issue, I do not consider that to be determinative of the application. Once the Authority investigates the substantive allegations, the Authority may wish to reassess whether Mr Thorn was in fact involved under s 142W. It likely has freedom to do so in investigating according to the substantial merits of the case, without regard to technicalities.⁷

[41] More generally, the Authority determined that proceedings could be continued against Mr Thorn under s 142Y. There is nothing improper about that finding. In light of his relationship with the company, it is clearly reasonably arguable that Mr Thorn was a person involved in any breaches that may be established.

Conclusion

[42] Although Mr Thorn may have a strong case on one of the issues which he says he intends to challenge, I consider that the Authority is likely not bound by its determination on that point so that no challenge is required. Further, the length of delay arising in this case is lengthy and unexplained. Mr Thorn has taken a passive or, at best, a reactive approach in bringing these proceedings to the Court. Additionally, there is a real risk that Mr Thorn is not intending to pursue these proceedings in good faith. Therefore, I consider that it is not in the interests of justice for Mr Thorn's application to be granted.

[43] Mr Thorn's application for leave to file a challenge out of time is unsuccessful.

⁷ Employment Relations Act 2000, s 157(1).

Outcome

[44] The applications filed by the parties for leave to file challenges out of time are unsuccessful.

[45] The Court file on these matters may not be searched without leave of the Court.

[46] As both parties have been unsuccessful in their applications, I consider that costs ought to lie where they fall.

M S King
Judge

Judgment signed at 4.30 pm on 11 March 2025