IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2025] NZEmpC 49
EMPC 398/2024
EMPC 399/2024

IN THE MATTER OF	applications for leave to extend time to file challenges to determinations of the Employment Relations Authority
BETWEEN	MICHELLE MATHESON Applicant
AND	RAINBOW CONFECTIONERY LIMITED Respondent

Hearing: On the papers

Appearances: M Matheson, applicant in person
J Copeland, counsel for respondent

Judgment: 18 March 2025

JUDGMENT OF JUDGE K G SMITH

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[1] In a determination dated 13 November 2023, the Authority dismissed Ms Matheson's claims for unjustified dismissal and an unjustified disadvantage by Rainbow Confectionery Ltd.[1] In doing so it held she was employed as a "Seasonal Casual".

[2] The Authority described what happened in the lead up to Rainbow Confectionery deciding not to extend Ms Matheson's employment beyond 19 January 2023. It held that a few days before, on 12 January 2023, an altercation occurred

1 *Matheson v Rainbow Confectionery Ltd* [2023] NZERA 672 (Member van Keulen).

between her and another Rainbow Confectionery employee in the course of making arrangements to swap a shift.

[3] The determination turned heavily on the conclusion that Ms Matheson was a casual employee so that, rather than being dismissed, the company did not offer any further work to her beyond the contracted period.[2] The Authority was satisfied that the company made that decision by following a fair process and not offering further work was justified.[3]

[4] Ms Matheson did not challenge the determination. Instead, she applied to the Authority to reopen the investigation. On 2 July 2024, the Authority determined that the investigation would not be reopened.[4] The determination recorded a submission from Ms Matheson's then advocate, Ronald Jones, that there was no new evidence to consider but that she wanted the matter reopened so that the employer's actions could be fully canvassed. The Authority was satisfied that Ms Matheson's disagreement with the findings in the first determination did not establish grounds sufficient to reopen the investigation.[5]

[5] Ms Matheson did not challenge the July determination within time. She has now applied for extensions of time enabling her to challenge both determinations.

The applications

[6] Two applications were filed on the same day, 8 October 2024. One was for the 13 November 2023 determination and the other for the 2 July 2024 determination.

[7] The grounds of the application about the November determination are as follows:

(a) There was a miscarriage of justice.

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2 At [31]–[32].
3 At [37].
4 *Matheson v Rainbow Confectionery Ltd* [2024] NZERA 389 (Member van Keulen).
5 At [12].

(b) The lateness of the application was because Ms Matheson applied to reopen the case in the Authority which was declined.

(c) Her advocate did not file the required documents in Court.

[8] Subsequently, Ms Matheson clarified that the first ground is a criticism of Rainbow Confectionery's conduct and is not about how the Authority investigated.

[9] The second application, for the July determination, takes a similar approach. This application included a statement that Ms Matheson's advocate had not filed a challenge, or applied on her behalf for legal aid, despite informing her that he had done both.

[10] Both applications were supported by draft statements of claim and a common affidavit. Ms Matheson said Mr Jones was instructed to file a challenge to the Authority's July 2024 determination. She referred to keeping in touch with him and discovering on the day time expired that he had not taken steps. The reason given to her for not filing a challenge on time was because he discovered he had done the "wrong paperwork". She said his advice was that he would apply for an extension of time.

[11] Ms Matheson said Mr Jones sent paperwork to her to apply for an extension of time, which she filled out along with an application for legal aid. She said it has come to her attention, by contacting the Court and Legal Services, that no forms were completed and filed on her behalf.

[12] Ms Matheson filed a further affidavit to clear up some potential ambiguities in her first affidavit. She provided copies of emails and text messages between her and Mr Jones, handwritten notes she considered would support her claim against Rainbow Confectionery, and some correspondence with the Court's Registry.

[13] Mr Jones filed a supporting affidavit. It is succinct. He acknowledged acting for Ms Matheson and unequivocally accepted responsibility for the delay in

challenging the July determination, which he explained arose because of his unfamiliarity with filing a challenge.

The opposition

[14] Both applications are opposed. Rainbow Confectionery's case is that it would not be just to grant either extension of time, there was no miscarriage of justice and, in any event, no extension could be granted to challenge the Authority's July determination because it was procedural and the Employment Relations Act 2000 (the Act) prohibited challenges to such decisions.[6] Worked into Rainbow Confectionery's notice of opposition were comments on the factors normally considered in assessing applications such as these.

Power to grant an extension

[15] Section 219 of the Act confers on the Court the power to grant an extension of time. That power is discretionary. The discretion is a broad one, but it must be exercised in a principled way and in the interests of justice.

[16] When exercising the discretion the Court is usually guided by factors such as the reason for the omission to file the challenge within time, the length of the delay, any prejudice or hardship to any other person, and the effect on the rights and liabilities of the parties.[7] Until the Supreme Court's judgment in *Almond v Read* the merits of the proposed challenge were sometimes considered.[8] Now the merits are to be looked at only with caution and are not usually relevant where there has been an insignificant delay and there is no prejudice to the other party.[9] Given what could only ever be a superficial examination of the merits on an interlocutory application, the Supreme Court held that they should only be taken into account when obviously very strong or very weak.

[17] The applications will be assessed using the factors just described.

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6 Section 179(5)(a).
7 *An Employee v An Employer* [2007] ERNZ 295 at [9] and [10].
8 See *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [14]-[39].
9 At [39].

The reason for the omission to file the challenge within time

[18] The applications place considerable weight on Mr Jones failing to protect Ms Matheson's interests. At first blush, Mr Jones' acceptance of responsibility might be considered to provide significant support in explaining why challenges were not filed. Ms Matheson's submissions referred to instructing him to take steps on her behalf. She described being unhappy with the determinations and wanting to exercise her right to have "the whole case" heard by the Court. She considered that the Authority's decision-making stopped at the point where a finding was made that she was a casual employee and that there was no investigation into what she called a miscarriage of justice by Rainbow Confectionery.

[19] The position is not, however, quite so straight forward when the texts and emails exchanged between Ms Matheson and Mr Jones are examined. Ms Matheson knew that she had 28 days to file a challenge as of right.[10] The time to challenge the November 2023 decision elapsed because, instead of challenging it, she decided to apply to the Authority to reopen the investigation. That step was taken to save the inconvenience and cost of attempting to challenge the determination.

[20] The exchanges of messages between Ms Matheson and Mr Jones show that some of the early communication between them was possibly about a challenge. However, by late November 2023, and still within time to pursue a challenge, her attention had shifted towards asking the Authority to reopen its determination.

[21] Ms Matheson's situation is not saved by Mr Jones' acceptance of responsibility. He was referring to failing to challenge the July determination on time. His evidence did not extend to discussing the decision-making that went into applying to the Authority to reopen the investigation resulting in the November determination.

[22] The reality is that there was no delay in taking steps to challenge the November determination. A conscious decision was made to pursue an alternative course of action and Ms Matheson got what she anticipated. This factor points away from granting the application relating to the November 2023 determination.

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[10] Employment Relations Act 2000, s 179(1).

[23] The situation about the July determination is different. The text messages Ms Matheson provided showed she communicated with Mr Jones on 10 July 2024 asking about legal aid and he responded the same day. On 12 July 2024, he advised her that he would "start the ball rolling", which I infer means taking steps to complete the legal aid application and the challenge.

[24] On 26 July 2024, Ms Matheson sent a text to Mr Jones saying that she was confused. From the context in which the text was written, it would appear the confusion was about whether she would have to wait for the outcome of the legal aid application before challenging the determination. In these messages, she told him that she did not know how things worked. His answer the same day was that he had started work because he did not want to leave it "too late".

[25] On 26 July 2024, Ms Matheson wrote a further text to Mr Jones asking how he was getting on, because she was concerned that it must be close to the expiry of the 28 days allowed to file a challenge.[11] On 30 July 2024, she sent another text message to him asking what was happening and expressing the hope that he had not "missed the deadline again". Mr Jones' reply was that he had calculated there were a further two days to file a challenge. Not surprisingly, Ms Matheson replied correcting him, pointing out that time expired that day. The messages supplied by Ms Matheson did not include any response from him that day.

[26] The next day, 31 July 2024, Mr Jones wrote to Ms Matheson reporting the outcome of his discussion with a member of the Employment Court's registry staff. The nature of that conversation was not disclosed in the message, or Mr Jones' affidavit, but it is reasonable to assume it was about applying for an extension of time.

[27] On 5 August 2024, Mr Jones attempted to file in Court an application for leave to extend time to challenge the determination. It was deficient and not accepted for filing.

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[11] Employment Relations Act 2000, s 179(1).

[28] Ms Matheson's next step was to ask Mr Jones, by text on 15 August 2024, how he was getting on with seeking an extension and about progress with her legal aid application. His response was that an affidavit from her would be required.

[29] On 10 September 2024, Mr Jones sent a text message to Ms Matheson reporting the outcome of his inquiries of the Court's registry staff and informing her that some more information was required. He mentioned making progress slowly. The same day Ms Matheson asked him what else was needed and requested copies of documents for her records. They exchanged other correspondence over the legal aid application which is not relevant to this decision.

[30] Eventually, Ms Matheson took matters into her own hands. On 26 September 2024, she attempted to file an application for leave to extend time, which was rejected by the Court, before succeeding in filing the applications on 8 October 2024.

[31] From the exchanges between Ms Matheson and Mr Jones it is clear that, almost immediately after the July 2024 determination was issued, she wanted to challenge it and Mr Jones was instructed to do that. The rest of their correspondence shows that she wanted a challenge progressed. On the day time expired she reminded Mr Jones that time was running out and was still making enquiries about him taking steps on her behalf.

[32] After 30 July 2024 the correspondence shows no urgency by Mr Jones to attempt to correct what had happened. While there are passages of time where it might be thought that Ms Matheson sat back to let Mr Jones continue on in this unsatisfactory way, she continued to place trust in him to file an application for an extension of time; effectively to do something to advance her case against Rainbow Confectionery.

[33] Ms Matheson was let down by Mr Jones about challenging the July 2024 determination and that provides an adequate explanation for not filing within time. This factor points towards granting the application as it relates to the July 2024 determination.

The length of the delay

[34] As has already been mentioned, a party dissatisfied with a determination has 28 days within which to challenge it. The first determination was issued on 13 November 2023 so the time to challenge it as of right expired on 11 December 2023. The second determination was issued on 2 July 2024 meaning time expired on 30 July 2024. Measuring the time from those dates until the applications for extensions of time were filed show lengthy delays. The delay in so far as the November 2023 determination is concerned was 302 days. The delay relating to the July 2024 determination was 70 days.

[35] There was probably some uncertainty over what to do about the November determination given Mr Jones' inexperience. However, the elapsed time to now seek to challenge that determination is not adequately explained by the decision to opt to seek to reopen the investigation or in Mr Jones' subsequent inadequate efforts. The delay is very significant and points firmly away from granting leave to challenge the November determination.

[36] The delay in challenging the July 2024 determination is significant at 70 days. The same reasons were put forward; Mr Jones' uncertainty about what to do and Ms Matheson's expectation that he would protect her interests. The delays that occurred, and Mr Jones' responses, suggest a casual approach by him without appreciating the effect of allowing time to expire or the difficult position Ms Matheson was in after it expired, and how she would be further compromised if he did not move promptly. After Ms Matheson became dissatisfied with him, and engaged with the Court herself, she took steps reasonably promptly.

[37] What makes this assessment difficult is that considerable weight needs to be attached to Mr Jones' acceptance of responsibility. He was engaged as a professional advocate. Ms Matheson was entitled to rely on him and she was keeping up an active interest in what was (or was not) happening.

[38] Ranged against that assessment, however, is the length of time that elapsed before Ms Matheson lost confidence in Mr Jones and made her own applications to the Court which also involved a delay. While the overall delay is significant, her

diligence in attempting to have Mr Jones take steps goes some way towards offsetting the time that elapsed. On balance, this factor points towards granting the application relating to the July determination.

Any prejudice or hardship to any other person

[39] The parties did not point to any prejudice or hardship to any other person in granting or refusing the application.

The effect on the rights and liabilities of the parties

[40] Ms Matheson did not address this topic specifically, although her submissions emphasised a concern about an alleged miscarriage of justice in Rainbow Confectionery's actions which she considered needs to be addressed. Ms Copeland's submission was that the company is entitled to the benefit of success in the November 2023 and July 2024 decisions and to move on. I accept this factor is relevant and it points against granting both applications.

The merits

[41] The only remaining factor to consider is the merits of the claim. This is a rare case of the sort discussed in *Almond v Read* where it is appropriate to attempt to weigh the merits of the potential claims.[12] Obviously, such an assessment needs to be undertaken carefully and bearing in mind that at this stage it can only ever be an impression of the merits of the case.

[42] There is a significant impediment to Ms Matheson's case which indicates that her prospects of overturning the Authority's November determination are very weak. The Authority held she was employed as a casual which was the foundation for its conclusions. In her submissions Ms Matheson accepted that she was employed as a casual. That concession is not completely fatal but is an indication that the anticipated litigation would be an uphill struggle. That points away from granting an extension of time for the November determination.

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[12] See *Almond v Read,* above n 8, at [39].

[43] The July determination is in a different position. All that could be achieved in challenging it is a reconsideration of the Authority's decision to decline to reopen the investigation. It is only being pursued because the outcome resulted in a confirmation of the November determination which dismissed the claims alleging an unjustified dismissal and unjustified disadvantage. In a sense, success in challenging the July determination would amount to an impermissible collateral attack on the November 2023 determination that has not been set aside. For that reason, the prospect of success in a challenge to the July determination is very weak.

Conclusion

[44] Stepping back and looking at these assessment factors overall, I am not satisfied that Ms Matheson has established it is appropriate to grant either application. Given that conclusion it is not necessary to analyse Ms Copeland's submission that the July determination was procedural and not open to challenge.

[45] The applications are unsuccessful and are dismissed.

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

K G Smith
Judge

Judgment signed at 3.30 pm on 18 March 2025