

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

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

**[2025] NZEmpC 94  
EMPC 347/2023**

IN THE MATTER OF            an application for leave to extend time to file  
   a challenge

BETWEEN                      A LABOUR INSPECTOR OF THE  
   MINISTRY OF BUSINESS, INNOVATION  
   AND EMPLOYMENT  
   Applicant

AND                              ELEMENTS THERAPEUTIC MASSAGE  
   LIMITED  
   First Respondent

AND                              XUAN ZHANG  
   Second Respondent

AND                              PING DU  
   Third Respondent

Hearing:                      21 March 2025  
   (Heard at Auckland)

Appearances:                G La Hood and P Siania, counsel for applicant  
   No appearance for first and second respondent  
   A Douglass and S Gaskell, counsel for third respondent

Judgment:                    15 May 2025

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**JUDGMENT OF JUDGE M S KING**

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[1] This judgment resolves an application for an extension of time to file a challenge to a determination of the Employment Relations Authority dated 26 August 2022. In that determination, the Authority resolved a claim brought by a Labour

Inspector and found that Elements Therapeutic Massage Ltd (ETM) had employed three workers and breached those workers' minimum entitlements.<sup>1</sup>

[2] In addition to making findings against ETM, the Authority also considered whether to make the second and third respondents personally liable for ETM's breaches.<sup>2</sup> It found that the second respondent, Xuan Zhang, was a party to ETM's breaches of minimum standards and that he was personally liable for those breaches to the extent the arrears could not be recovered from ETM.<sup>3</sup>

[3] The Authority made a narrower finding against the third defendant, Ping Du:

[68] In regards the arrears of wages owed, I find Ping Du jointly liable for the breach of minimum standards but I exclusively find Xuan Zhang responsible for the unpaid holiday pay as it was his conscious decision to withhold such. In addition, I find Xuan Zhang was responsible for failing to keep adequate wage, time and leave records and did not provide one identified employee with an employment agreement.

[4] In the remedies section at the end of the determination, the Authority indicated that Mr Zhang was responsible to pay the arrears to the extent that ETM was not able to pay and that Mr Du was only liable to a penalty of \$4,000.<sup>4</sup>

[5] ETM had ceased trading by the time the Labour Inspector took enforcement steps, and Mr Zhang had left New Zealand. Therefore, it was not possible to recover arrears from either ETM or Mr Zhang. The Labour Inspector gave evidence that they found the paragraph set out above confusing and that they assumed that if Mr Du was a person involved in minimum standards legislation, they were liable for all arrears. Clarification was formally sought from the Authority on 13 December 2022.

[6] After a period of delay, the Authority issued a brief second determination on 21 August 2023.<sup>5</sup> The Authority held:

[9] Setting aside the contention that there is no discretion for the Authority to exercise once breaches are established, the original determination was in my view clear at para [68] that Ping Du, while being held jointly liable

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<sup>1</sup> *A Labour Inspector v Elements Therapeutic Massage Ltd* [2022] NZERA 415 at [40]–[57].

<sup>2</sup> At [57].

<sup>3</sup> At [65].

<sup>4</sup> At [100]–[101].

<sup>5</sup> *A Labour Inspector v Elements Therapeutic Massage Ltd* [2023] NZERA 461.

for the breach of minimum standards, was not held responsible for arrears of holiday pay owed. I omitted at this point in the determination to make it clear that Xuan Zhang was responsible for both holiday pay arrears owed and wage arrears but that fact was made explicit in the determination's section ... headed "Conclusion on penalties and arrears" at para [99] – [101]. I also at this point made it clear Ping Du was only liable for a penalty and how it was to be apportioned between two workers involved. To this extent the determination does not need 'clarifying'.

[10] I also accept that I cannot determine the legal question raised by the Labour Inspector on the scope of the Authority's discretion and whether the Labour Inspector merely must establish that all the elements set out in s 142Y(1) have been met to recover wage or holidays arrears from Ping Du. That could only be pursued as a challenge to the determination in the Employment Court or an application for a reopening of the investigation.

[11] In conclusion. I am not persuaded that I should order that Ping Du's liability for additional remedies beyond that set out in the original determination is necessary.

[7] Having received that determination, the Labour Inspector sought to file a challenge to both determinations and subsequently filed an application for an extension of time to file a challenge to the original determination of 26 August 2022. This judgment resolves the application for an extension of time.

### **The application for an extension of time is opposed**

[8] In its draft challenge which was filed with its application for an extension of time, the Labour Inspector indicated that it wished the Court to review the issue of whether the Authority erred in law by finding that Mr Du, while being held jointly liable as a person involved for the breaches of minimum employment standards, was not liable for arrears owed as a result of those breaches.

[9] The grounds of the application are that the Labour Inspector sought clarification from the Authority and that clarification was not received until the second determination was issued in August 2023. The Labour Inspector said that the findings of the first determination are inextricably linked to the findings in the second determination so that the challenges should be heard together. Further, it said that it was necessary to wait for the second determination for it to be able to make a considered decision about whether to file a challenge to the first determination. It also said that the question of law is one of public interest.

[10] In response, Mr Du said that the alleged error of law arose for the purposes of filing a challenge when the first determination was issued on 26 August 2022 and that there is no justification for the delay. He said that the first determination was clear that he was only liable for a penalty and not liable for the arrears. He also said that the proposed challenge is pre-emptive as the Labour Inspector has not established that ETM and Mr Zhang are unable to pay the arrears as required.

### **Legal principles**

[11] Section 179(2) of the Employment Relations Act 2000 (the Act) states that a challenge must be filed within 28 days of 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:<sup>6</sup>

- (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) the conduct of the parties;
- (f) the significance of the issues raised by the proposed challenge;
- (g) subsequent events; and
- (h) the merits.

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<sup>6</sup> *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].

## Analysis

### *The length of the delay*

[12] The Authority released its determination on 26 August 2022. The last day for filing a challenge was 23 September 2022. An application for an extension of time to file a challenge was not filed until 28 September 2023. Ultimately, there was over a year of delay. That is a lengthy period of delay.

[13] Ms Douglass, counsel for Mr Du, reviewed a number of previous decisions of the Court and submitted that the Court appears to have never granted an extension of time for such a lengthy delay.

[14] However, that is not the case. In *Freeborn v Sfizio Ltd*, the Court allowed an application where there was a delay of 10 months and two weeks.<sup>7</sup> The Court noted that it was necessary to consider the reasons for the delay. In that case, the delay arose as a result of the employer having filed and then withdrawn a challenge. Ms Freeborn acted promptly to file her application once the employer filed their notice of discontinuance.<sup>8</sup>

[15] Accordingly, while I accept that the delay was lengthy, I do not consider that it is necessarily determinative.

### *The reasons for the delay*

[16] In an affidavit filed in these proceedings, the Labour Inspector stated a challenge was not filed to the first determination in time because she was not sure what the Authority had awarded and had considerable doubts as to how ss 142Y and 142W had been applied. She said that she did not consider that she was able to pursue any enforcement action or challenge until such time as the Authority provided clarification of the issues; that clarification was provided in the second determination on 21 August 2023, which was challenged on 15 September 2023. She acknowledged that there was

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<sup>7</sup> *Freeborn v Sfizio Ltd* [2020] NZEmpC 87 at [1] and [48].

<sup>8</sup> At [25]–[32].

a delay in filing a challenge for the period between the two determinations but said that those delays were outside of the parties' control.

[17] Ms Douglass submitted that the reasons given by the Labour Inspector in her affidavit were not sufficient because the Labour Inspector can be reasonably expected to know the timeframes in the Act. She submitted that the Labour Inspector's belief was not reasonable in the circumstances given the clear language of the first determination along with the subsequent communications from the Authority. She submitted that if there was ambiguity, the prudent course of action would have been for the Labour Inspector to have filed a challenge to preserve their position.

[18] I accept the Labour Inspector's evidence that there was some ambiguity within the first determination. However, I also consider that the Labour Inspector was slow to preserve its position.

[19] The Authority issued certificates of determination on 12 September 2022 which reflected the language of the first determination in that the certificate for Mr Du indicated that he was only required to pay a \$4,000 penalty. The Labour Inspector claimed that she found the certificate of determination for Mr Du confusing; however, she did not take steps to clarify the certificate until 16 November 2022. The delay between 12 September 2022 and 16 November 2022 was partially a result of efforts made by the Labour Inspector to seek payment from ETM and Mr Zhang, but given that the Labour Inspector claims to have been confused by the certificate, steps ought to have been taken more quickly to seek clarification from the Authority.

[20] After clarification was sought from the Authority on 16 November 2022, the Labour Inspector filed a formal memorandum with the Authority on 13 December 2022 seeking clarification concerning the first determination. Given that steps were being taken to obtain clarity from 16 November 2022, I consider that the delay between 16 November 2022 and 13 December 2022 has been sufficiently explained and was justified.

[21] From 13 December 2022 until 21 August 2023, the Authority undertook a process to clarify its first determination. That period is lengthy. However, even if a

challenge had been filed to preserve the Labour Inspector's position, it would likely have been stayed pending the Authority's clarification of its first determination. As a result, I consider that the period of delay between 13 December 2022 and 21 August 2023 has been sufficiently explained and was justified.

[22] For completeness, I do not accept Ms Douglass' submission that the actions taken by the Labour Inspector from 16 November 2022 to clarify whether Mr Du was liable for the arrears were an abuse of process. It may have been faster and cheaper to have challenged the determination, but in light of the ambiguous drafting of the determination, it was also open to the Labour Inspector to seek clarification from the Authority.

[23] Finally, once the Authority released its determination on 21 August 2023, the Labour Inspector purported to challenge both determinations on 15 September 2023. After being informed that the challenge to the first determination was out of time, an application for an extension of time to challenge the first determination was filed on 28 September 2023. Given that steps were taken to challenge both determinations on 15 September 2023, I consider the period of delay between 21 August 2023 and 15 September 2023 to be justifiable; however, it is not clear why it took until 28 September 2023 for an application for an extension of time to be filed.

[24] Overall, although the Labour Inspector has provided a credible explanation for much of the delay, I do not consider that the periods of delay between 12 September 2022 and 16 November 2022 and between 15 September 2023 and 28 September 2023 were fully justifiable. The Labour Inspector ought to have acted more promptly during those two periods.

*Any prejudice or hardship to any other person*

[25] In the present case, the Labour Inspector is representing the interests of three employees. The Labour Inspector has not been able to recover money from ETM or Mr Zhang, and if recovery is not available from Mr Du, the three employees may be left without a remedy. The employees' interests are particularly relevant given that they do not have any control over steps taken by the Labour Inspector to pursue these

proceedings, and if the Labour Inspector has been negligent in pursuing a challenge, it would be unfair for the employees to carry the responsibility for that.

*The effect on the rights and liabilities of the parties*

[26] Ms Douglass submitted that there would be significant prejudice to Mr Du if the challenge was permitted to proceed. She submitted that it has been more than a year since the Authority's original determination and that he is entitled to finality. She noted that if the Labour Inspector is successful in its challenge, Mr Du would become liable for \$12,978.50 in arrears plus interest of over \$1,769.90. She submitted that given Mr Du's limited financial means, which were described in an affidavit, he could suffer significant hardship as a result of the proposed challenge. Further, she noted that Mr Du is himself owed \$39,617.14 plus interest, \$2,000 in compensation, and \$4,500 in costs from ETM and has similarly suffered from Mr Zhang absconding to China.<sup>9</sup>

[27] I accept that Mr Du will suffer prejudice if the challenge is allowed to proceed. He will be required to defend the challenge and may become liable for ETM's financial liabilities in a situation where he himself is owed substantial sums by ETM. On the other hand, I observe that Mr Du was a party to the clarification issue in the Authority, so he was on notice that these proceedings were not yet fully concluded. I also consider that some prejudice to Mr Du could be mitigated by allowing him to cross-challenge the Authority's finding that he was a person involved in the breach.

*The significance of the issues raised by the proposed challenge*

[28] Mr La Hood noted that these proceedings involve questions about the rights of employees to recover arrears of wages from persons involved in breaches of minimum entitlements. He submitted that there is an important question of law raised by these proceedings and that it is of public interest with implications which extend beyond the parties themselves.

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<sup>9</sup> *Du v Elements Therapeutic Massage Ltd* [2022] NZERA 497 at [56].

[29] Ms Douglass submitted in response that the Court should be cautious in finding that the proposed issues give rise to significant public interest. She submitted that the Labour Inspector has not provided any previous cases which indicate that the Authority adopted a novel interpretation of the Act in its determinations.

[30] I accept that there is public interest in these proceedings. Part 9A of the Act was introduced in 2016 to provide additional enforcement measures to promote the more effective enforcement of employment standards, especially minimum entitlement provisions.<sup>10</sup> There is public interest in minimum entitlement provisions being enforced, and determinations about the interpretation of the enforcement provisions necessarily give rise to public interest.

#### *Other issues*

[31] I do not consider that subsequent events or the parties' conduct is relevant to this application. I also do not consider that the merits are relevant, particularly if leave is granted to Mr Du to challenge the Authority's finding that he was involved in ETM's breaches.

[32] Ms Douglass and her co-counsel, Ms Gaskell, submitted that there is no evidence that ETM and Mr Zhang are unable rather than simply unwilling to pay the sums which they owe and that, as a result, there is no evidence that recovery would be possible against Mr Du.<sup>11</sup> However, that is a matter that can be considered as part of any challenge. Even if ETM was possibly able to make payment, that does not necessarily prevent conditional orders being made ordering Mr Zhang and Mr Du to cover any arrears that the employer is unable to meet.<sup>12</sup> As ETM is no longer trading, it appears reasonably arguable that such conditional orders were appropriate. Further, in terms of Mr Zhang being possibly able to pay, s 142Y applies where the employer is unable to pay rather than where any other involved party, such as Mr Zhang, is unable to pay.

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<sup>10</sup> Employment Relations Act 2000, s 142A.

<sup>11</sup> See *Lawton v Steel Pencil Holdings Ltd* [2021] NZEmpC 199, [2021] ERNZ 1164 at [35].

<sup>12</sup> Orders of that nature were made in *Shah Enterprise NZ Ltd v Labour Inspector* [2022] NZEmpC 177, [2022] ERNZ 873 at [45]; see also *Kongbang v Lotus Touch Ltd* [2024] NZEmpC 224 at fn 11.

[33] Finally, I note that Mr La Hood submitted that the proposed challenge to the first determination is inextricably linked to the challenge to the second determination. However, the second determination merely clarified the first determination; a challenge to that determination could only lead to a finding that the second determination misinterpreted the first determination. It could not lead to a finding that the first determination was incorrectly decided. Therefore, although the two challenges are necessarily linked, I accept Ms Douglass' submission that the challenge to the first determination is the material challenge – otherwise this application would not be necessary.

### *Conclusion*

[34] Although there was extensive delay in bringing this application, most of the delay, apart from two periods, was sufficiently explained by the Labour Inspector. In the absence of other relevant factors, the unexplained periods of delay and the prejudice to Mr Du would normally have indicated that the application should not be successful. However, I consider that the balance is tipped by the interests of three employees concerned along with the public interest in the legal issues arising in this case. Therefore, I find that an extension of time ought to be granted.

### **Outcome**

[35] The application for an extension of time to file a challenge to the determination of the Authority dated 26 August 2022 is successful.

[36] The draft statement of claim filed by the Labour Inspector on 28 September 2023 is accepted for filing.

[37] If Mr Du wishes to file a cross challenge, he has leave to do so. If he intends to file such a challenge, he must file and serve it within 21 days of the date of this judgment. If additional time is required for legal aid purposes, he is to advise the Court as soon as possible.

[38] The Labour Inspector may wish to consider whether its challenge to the second determination should be discontinued. The second determination merely confirms that

the first determination means what it says. The Court is unlikely to make a finding that the Authority misinterpreted its own determination. The real issue is whether the Authority's first determination was correctly decided. If the challenge is withdrawn, Mr Du will likely be entitled to any costs incurred in relation to that challenge.<sup>13</sup>

### **Costs**

[39] Although the Labour Inspector was successful in these proceedings, that success was an indulgence. In light of Mr Du's financial circumstances and given that the result of this case largely rests on the interests of third parties and the public interest, I consider that the Labour Inspector ought to pay scale costs to Mr Du.<sup>14</sup> If Mr Du's legal aid costs are less than scale costs, then he will likely be entitled to costs on an indemnity basis. If the parties are unable to agree on costs, memoranda may be filed.

M S King  
Judge

Judgment signed at 11.55 am on 15 May 2025

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<sup>13</sup> High Court Rules 2016, r 15.23.

<sup>14</sup> See *Cunningham v Butterfield* [2014] NZCA 213, (2014) 22 PRNZ 521 at [52]–[60].