



# Employment Court of New Zealand

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## Armstrong v Surplus Brokers Limited [2019] NZEmpC 90 (31 July 2019)

Last Updated: 5 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 90](#)

EMPC 184/2019

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

BETWEEN                JOHN NEIL ARMSTRONG  
                              Applicant

AND                      SURPLUS BROKERS LIMITED  
                              Respondent

Hearing:                On the papers

Appearances:         L Anderson, advocate for  
                              applicant S-J Neville, counsel for  
                              respondent

Judgment:             31 July 2019

### JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] Mr Armstrong took a claim against his previous employer, Surplus Brokers Ltd. He succeeded in the Employment Relations Authority.<sup>1</sup> Parties have 28 days to file a challenge to a determination of the Authority.<sup>2</sup> The company filed a non-de novo challenge to the Authority's determination on 15 May 2019, the 27th day. Mr Armstrong did not file a challenge within the statutory time frame for doing so. He has now applied for leave to extend that time. The application is opposed by the company.

1 *Armstrong v Surplus Brokers Ltd* [\[2019\] NZERA 235](#).

2 [Employment Relations Act 2000, s 179\(2\)](#).

JOHN NEIL ARMSTRONG v SURPLUS BROKERS LIMITED [\[2019\] NZEmpC 90](#) [31 July 2019]

[2] The application appears to be based primarily on the ground that Mr Armstrong believed, erroneously, that the matter would settle. In this regard, Mr Anderson (Mr Armstrong's advocate) says that service of the company's statement of claim came as a surprise and there was no time to prepare a challenge to the remedies component of the Authority's determination. It is said that the company will not be prejudiced if leave is granted. An affidavit from Mr Armstrong, filed in support of the application, does not explain the reasons for the delay in filing a challenge. Rather, Mr Armstrong expresses a strong desire to have the quantum of compensation awarded to him revisited under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#). It is said that determination of the company's challenge will inevitably require evidence in relation to the impact of its actions on him, particularly as the grounds of the non-de novo challenge are very broad.

[3] The Court has jurisdiction to extend the time within which a challenge may be filed if doing so is in the interests of justice.<sup>3</sup> While the discretion is broad, it must be exercised in accordance with principle. The usual factors considered relevant include the reason for the omission to bring the case within time, the length of the delay, any prejudice or hardship, the effect on the rights and liabilities of the parties, subsequent events and the merits.<sup>4</sup>

[4] The reason for the omission to file within time has not been satisfactorily explained. The application refers to it being

“the first time that the [applicant’s] advocate has dealt with the Employment Court in his professional career.” While it remains unclear what the Court is being invited to take from this statement, information relating to the time frames for challenging determinations of the Authority is publicly available, including on the Court’s website, and is advised to parties by the Authority at the time a determination is issued. There is nothing to suggest that this practice was not followed in the present case – indeed counsel for the company confirms that such advice was notified to the parties by the Authority.

### 3 [Section 219](#).

4. As set out in *An Employee v An Employer* [\[2007\] ERNZ 295 \(EmpC\)](#) at [9]. In relation to considering the merits see the limitations in *Almond v Read* [\[2017\] NZSC 80](#), [\[2017\] 1 NZLR 801](#).

[5] The reference to anticipated settlement as explaining why a challenge was not filed within time does not explain why, when it was obvious settlement had not occurred and the company had filed a challenge, it then took a further 28 days to file an application for leave. Further, the explanation as to why a challenge was not filed on behalf of Mr Armstrong within the 28-day time frame, suggesting that he was effectively caught off guard, sits uncomfortably with the assertion that the delay arose from the advocate’s lack of knowledge about such matters.

[6] The delay is lengthy, namely just under four weeks.

[7] Mr Armstrong is seeking to challenge the quantum of compensation ordered by the Authority, which the Authority Member described as “modest.” Mr Anderson says that the quantum (\$10,000) is artificially low. It is not immediately apparent why this is said to be so, given the Authority Member’s analysis and assessment of the humiliation, loss of dignity and injury to feelings found to have been suffered on the facts which appear to have emerged during the course of the Authority’s investigation. Having said that, it is difficult to assess the merits in anything other than a superficial way.

[8] Contrary to the submissions advanced on behalf of Mr Armstrong, evidence as to the impact of the company’s actions will not be necessary in order to determine the company’s challenge, which it has elected to pursue on a non-de novo basis. That means that the challenge will be limited to particular findings of the Authority. The finding in respect of quantum is not part of the company’s challenge and accordingly will not need to be revisited. Rather, the company is seeking to have the compensatory award set aside on the basis that the company’s actions were substantively justified.

[9] I do not accept that the company is likely to suffer significant prejudice if leave is granted, as is claimed by the respondent. The reality is that the challenge it is pursuing centres on the justification or otherwise of the dismissal; Mr Armstrong’s challenge (if allowed) would focus on the impact of any unjustified actions of the company on him. That would be unlikely to require significant additional hearing time and any evidence would be adduced by him. Further, the fact that there has been a

delay between the events complained of (around 15 months) is not ideal but it is not out of the ordinary in cases such as this.

[10] Ultimately I must be guided by the overall interests of justice. These include the broader importance of respecting (absent good reason) the statutory time frames provided for in the Act, together with the particular interests of the parties. I am not satisfied that an adequate basis has been made out for the application. I note in passing that while I accept that this result might impact on Mr Armstrong, he may have other remedial avenues available to him given the reasons why the challenge was not filed within time.

[11] The application for leave for an extension of time to file a challenge is declined. The Registrar is directed to schedule a telephone directions conference with the parties’ representatives to progress the company’s challenge to a hearing.

[12] The respondent is entitled to costs, the quantum of which are reserved.

Christina Inglis Chief Judge

Judgment signed at 2.30 pm on 31 July 2019