



Employment Court of New Zealand

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Briscoe v Oceania Dairy Limited [2017] NZEmpC 163 (19 December 2017)

Last Updated: 31 December 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2017\] NZEmpC 163](#)

EMPC 271/2017

IN THE MATTER OF an application to extend time to
 file
 challenge

BETWEEN MOIRA BRISCOE Applicant

AND OCEANIA DAIRY LIMITED
 Respondent

Hearing: On the papers dated 10 November, 24 November 2017
 and by
 telephone on 14 December 2017

Appearances: T Jackson, counsel for the applicant
 R Gibson, advocate for the respondent

Judgment: 19 December 2017

JUDGMENT OF JUDGE K G SMITH

[1] On 3 August 2017 the Employment Relations Authority issued a determination concluding that Moira Briscoe did not have a personal grievance against Oceania Dairy Ltd for unjustified disadvantage or for an unjustified dismissal.¹

[2] The consequence of the Authority's determination was that Ms Briscoe's proceeding failed in its entirety.

[3] On 26 September 2017 Ms Briscoe filed an application for leave to extend the time within which she could file a challenge to the determination. That

application is opposed by Oceania.

¹ *Briscoe v Oceania Dairy Limited* [2017] NZERA Christchurch 135.

The determination

[4] Ms Briscoe was employed as a Health and Safety Advisor by Oceania. She started work in March 2014 and on 1 February 2016 agreed to vary her individual employment agreement. The result was an alteration to her reporting lines within the company, so she reported to the Human Resources Manager who, at all relevant times, was Karen Treloar.

[5] Several allegations were made to support the claim that Ms Briscoe had been unjustifiably disadvantaged in her employment. Those allegations were, generally, that she was deprived of the benefit of a performance appraisal, was not treated with dignity and respect, and was not provided with adequate information about key performance indicators for her job. It is possible that other aspects of the management of Ms Briscoe's work formed either parts of these claims or separate allegations of unjustified disadvantage.

[6] The Authority dismissed all of these alleged grievances because they had been raised outside the 90 days allowed for doing so in the [Employment Relations Act 2000](#) (the Act).² Oceania had not consented to the alleged grievances being raised out of time.

[7] Having reached that conclusion, for completeness, the Authority commented briefly on the allegations. The Authority held that there was no deficiency in the way Oceania dealt with performance appraisals because they were moderated and applied to everyone. It followed Ms Briscoe had not been singled out for unfair treatment. It held that key performance indicators had never been implemented because they had not been agreed and could not, therefore, be the foundation for a personal grievance. As to the allegation that she had not been treated with dignity and respect, the Authority said it was difficult to respond because no particulars of the claim were provided. Instead the Authority chose to look at those allegations in the wider context of claims that she was constructively dismissed because she was bullied by

Ms Treloar.

2 [Employment Relations Act 2000, s 114\(1\)](#).

[8] The claim of constructive dismissal was dismissed because the Authority was not satisfied Ms Briscoe had been bullied at all. She had not been coerced into resigning by any behaviour for, or on behalf of, Oceania which breached her employment agreement with that company.

[9] All of Ms Briscoe's claims for personal grievances therefore failed. The

Authority reserved costs.

This application

[10] Ms Briscoe now wishes to challenge the determination. She is seeking to establish Oceania breached its duties to her resulting in personal grievances for unjustified disadvantage and constructive dismissal. If the challenge proceeds substantial financial remedies will be claimed.

[11] There are two grounds for this application. First, that the omission to file a challenge within the time allowed by [s 179\(2\)](#) of the Act was occasioned by personal circumstances arising from her husband's illness. Second, she wrongly thought that the time to challenge the substantive determination did not start to run until the Authority dealt with costs.

[12] The following subsidiary grounds are also relied on:

(a) the length of the delay in seeking to challenge the determination was relatively short;

(b) there was no, or minimal, prejudice or hardship to any person arising from the application;

(c) Ms Briscoe was genuinely concerned to have the matter heard in the Court because, she considers, the Authority's decision is wrong in material respects;

(d) Oceania will be entitled to respond and suffers no disadvantage other than the ability to regard the matter as having ended;

(e) subsequent events have had little bearing on the decision; and

(f) the application and her challenge are meritorious.

[13] Ms Briscoe filed an affidavit supporting the application and explaining it. She said she received the determination on or about 7 August 2017, four days after it was issued. Not surprisingly the outcome was disappointing to her. However, she said she was not really able to make an effective decision about a challenge at that time, even though she wanted to do so, because of her husband's ill health.

[14] Ms Briscoe said that at the time of the investigation meeting, which occurred on 24 and 25 May 2017, her husband was showing the symptoms of an illness. By early August 2017, she became aware of a likely diagnosis that he was suffering from early on-set dementia or myotonic dystrophy. Subsequently his illness was confirmed as myotonic dystrophy. Aside from explaining that this illness is progressive and degenerative with a terminal diagnosis she did not provide any more evidence to explain the stage this illness had reached or why it had prevented her from taking steps to challenge the determination. She confined herself to saying:

"We have been told that this is a progressive and degenerative disease with a terminal diagnosis. This has resulted in the need for me [to] give up some of my consultancy work as I care for my ailing husband."

[15] Ms Briscoe did say this illness is hereditary which information caused distress and concern to her husband, to her, and to their wider family.

[16] The second ground, of a mistaken belief about the time to challenge the determination, was only briefly mentioned in Ms Briscoe's affidavit. She believed the time to file a challenge did not start until costs were dealt with by the Authority, but did not say what gave her that belief.

[17] Ms Briscoe spoke to her representative the week before her affidavit was sworn (that is the week before 26 September 2017) which she said was the first opportunity she had to consider her position and to give instructions about costs submissions in the Authority. At that point she became aware she could no longer challenge the determination as of right and would need leave to proceed.

[18] The Court can extend time to file a challenge. [Section 219](#) of the Act provides:

219 Validation of informal proceedings, etc

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the

court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[19] Mr Jackson and Ms Gibson agreed that the following factors are relevant to considering the discretion under [s 219:3](#)

(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; and

(f) the merits.⁴

³ See generally *Roberts v Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006 at [19]

– [20].

⁴ Those principles were discussed in *Stevenson v Harto Paora College Trust Board* [2002] 2

ERNZ 103 (EmpC) and subsequently endorsed in *An Employee v An Employer* [2007] ERNZ

295 (EmpC) and *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91, (2012) 10 NZLR

84.

[20] In *An Employee v An Employer* the Court held that where an extension of time is sought the applicant has an onus to provide evidence necessary to explain the delay as fully as possible.⁵

[21] Explaining this omission to file on time rests exclusively on a statement by Ms Briscoe about her husband's illness and its seriousness. I accept that receiving a diagnosis of a family member's serious illness is likely to be distressing and dealing with its consequences distracting and time-consuming.

[22] However, Ms Briscoe said nothing more beyond receiving the news about his diagnosis to explain why its effects prevented her from taking steps to challenge the determination.

[23] Confining the evidence about this illness to a statement about Mr Briscoe's diagnosis falls short of adequate evidence explaining why, because of the diagnosis, there was no opportunity to consider the determination and to make a decision about challenging it. This part of Ms Briscoe's affidavit is a short paragraph that does not include any information about, for example, the nature and extent of any care her husband requires. That information could have gone some way towards explaining why the challenge was unable to be filed within time.

[24] Whatever stage this illness has reached, and despite the distress the diagnosis has caused, Ms Briscoe has not been prevented from working. The balance between her ability to work as a consultant and caring for her husband was not explained. That raises an unanswered question about why, if she is able to work, she could not file a challenge on time.⁶

[25] The second ground is also insufficiently explained. Her belief, that determining costs is the trigger for the time to challenge to begin, was reached of her

⁵ *An Employee v An Employer* [2007] ERNZ 295 (EmpC).

6. In a telephone conference on 14 December Mr Jackson confirmed that Ms Briscoe had nothing further to add by way of submissions or evidence to support her application.

own accord. That is compounded by the fact the Authority's determination was

accompanied by a notice stating the 28-day time limit in [s 179\(2\)](#) of the Act.

[26] Ms Briscoe has failed to explain the omission to file a challenge within time and her application fails at this stage.

[27] For completeness, some brief observations about the remaining criteria are made.

The length of the delay

[28] Relying on *Clear v Waikato District Health Board*,⁷ Mr Jackson submitted that the length of the delay was short, being 25 days.⁸

[29] In *Clear*, by oversight, the plaintiff and her counsel misunderstood the period of time for filing a challenge about the determination. That mistake occurred because the Authority determined liability but not quantum and, instead, sent the parties to mediation. They wrongly considered time ran from the latter not the former. Prompt steps were taken to seek to challenge when the error was discovered.

[30] The delay in *Clear* was 22 days. The entire time was explained by the oversight caused by confusion when the Authority referred

the parties to mediation. The Court determined that what was unusual was the referral to mediation after liability had been established but before remedies were addressed.⁹ The delay was not excessive and counsel moved to remedy the situation by filing the application immediately after the error was discovered.¹⁰

[31] I agree with Ms Gibson that *Clear* is distinguishable from this case. None of the features that led to the mistaken belief in *Clear* are present here, nor are there any

that could be said to be similar.

⁷ *Clear v Waikato District Health Board* [2007] ERNZ 338.

⁸ In fact it was 26 days.

⁹ *Clear v Waikato District Health Board*, above n 7, at [22].

¹⁰ At [22].

[32] Ms Gibson challenged the extent of the delay as unacceptable. The thrust of her submissions was that the Court has generally been unsympathetic to lengthy delays. As an example she referred to *Brightwater Engineers Ltd v Arrowsmith*¹¹ where there were criticisms of the delay of seven days and an analysis of other decisions where the longest extension of time was 20 days.¹²

[33] I am not persuaded that evaluating the length of a delay should be undertaken in isolation from the other factors referred to or that a yardstick should be applied that may be seen as imposing an arbitrary limit based on the number of days since the time to challenge elapsed.

[34] Had an adequate reason been given for the omission I would not have regarded this delay as so egregious as to tip the balance against granting the application.

Prejudice

[35] There is agreement between the parties that the only prejudice to Oceania is the lack of finality it thought had been achieved.

[36] I accept that a successful party is entitled to consider litigation has been resolved once the time to challenge passes. Once a decision has been issued the positions of the parties changes. Oceania would, ordinarily, be entitled to the benefit of the judgment and finality. However, by itself, this consideration would be insufficient to prevent an otherwise meritorious application from succeeding.

Rights and liabilities, subsequent events and merits

[37] These criteria can be addressed together. There is nothing in them which is sufficient to overcome the omission to file on time. The effect on the rights and liabilities of the parties has already been noted. There are no relevant subsequent events.

¹¹ *Brightwater Engineers Ltd v Arrowsmith* [2013] NZEmpC 29.

¹² That decision was *Peoples v Accident Compensation Corporation* EmpC Christchurch CC3/07,

¹³ February 2007.

[38] Traditionally the merits of an application have been taken into account, in a broad way, when deciding whether or not to grant an extension. A new approach might be needed given the Supreme Court decision in *Almond v Read*.¹³ In any event without a detailed examination of the evidence expressing a view on the merits of the proposed proceeding would be inappropriate.

Outcome

[39] The application for leave to extend the time to file a challenge to the Authority's determination is dismissed.

[40] The costs of this application are reserved. In the absence of agreement Oceania may file submissions within 15 working days and Ms Briscoe has the same amount of time to reply.

K G Smith

Judge

Judgment signed at 11:15 am on 19 December 2017.

¹³ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.