Employment Court of New Zealand

Director-General of Health v Rayner [2019] NZEmpC 13 (11 February 2019)

Last Updated: 16 February 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2019] NZEmpC 13
EMPC 439/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AMANDA RAYNER Plaintiff
AND	DIRECTOR-GENERAL OF HEALTH Defendant

EMPC 14/2019

AND IN THE MATTER	of an application for leave to file a challenge out of time
BETWEEN	DIRECTOR-GENERAL OF HEALTH Applicant
AND	AMANDA RAYNER Respondent

Hearing:	Submissions-only on 5 February 2019
Appearances:	A Oberndorfer, advocate for Amanda Rayner D Traylor, counsel for Director-General of Health
Judgment:	11 February 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL:

(Application for leave to file a challenge out of time)

AMANDA RAYNER v DIRECTOR-GENERAL OF HEALTH [2019] NZEmpC 13 [11 February 2019]

Introduction

[1] This judgment deals with an application for leave to bring a challenge out of time; that application was made immediately after a statement of claim relating to an earlier challenge which had been filed by Ms Amanda Rayner was served on the Director-General of Health (the Director-General heads the Ministry of Health; it is appropriate in this judgment to refer to the defendant as the Ministry).

Background

[2] The relevant determination of the Employment Relations Authority (the Authority) was issued on 28 November 2018.1 In that determination, the Authority found that there had been an unjustified suspension and dismissal of Ms Rayner by the Ministry.

[3] Briefly, an issue arose when an anonymous complaint was made about Ms Rayner, alleging that representations she made as to her United Kingdom qualifications and experience were false. The Ministry undertook an investigation. The relevant manager found it was difficult to progress that investigation, because Ms Rayner refused to give her consent to contact persons she knew in the United Kingdom who might verify her qualifications. She was suspended while the investigation proceeded. The Ministry threatened dismissal unless consent was provided. That Ms Rayner was not prepared to provide consent gave rise to distrust. Eventually, the Ministry determined that the complaint regarding her qualifications and experience was not substantiated. However, the Ministry considered her conduct in the investigation had destroyed the relationship of trust and confidence between employer and employee, and dismissed her.

[4] The Authority found the suspension and dismissal were unjustified. Dealing with remedies:

1. *XCT v UHG* [2018] NZERA Christchurch 174. Each representative confirmed that no application would be made to the Court for a non-publication order.

a. the Authority was not persuaded there should be an order of reinstatement, essentially because of issues relating to trust and confidence referred to above;
   b. three months' wages were ordered;
   c. $20,000 was ordered for humiliation, loss of dignity and injury to feelings; and
   d. remedies were reduced by 15 per cent because of contributory conduct; the Authority accepted Ms Rayner's behaviour during the investigation was mostly "a robust defence of her position", but at times crossed the line to obstruction thus warranting the reduction.

[5] On 21 December 2018, Ms Rayner filed with the Registrar of the Court an electronic copy of a statement of claim raising a non-de novo challenge as to remedies only.

[6] On 7 January 2019, the 28-day period within which a challenge had to be filed, expired.

[7] On 14 January 2019, the Ministry learned of the challenge which had been brought by Ms Rayner.

[8] On 15 January 2019, Mr Traylor, counsel for the Ministry, received a copy of the statement of claim raising the challenge, from which a page was missing.

[9] On 17 January 2019, a (complete) service copy of the statement of claim was provided to Mr Traylor.

[10] On the same day, I held an early telephone directions conference; this had been directed because reinstatement was being sought. In the course of that conference, Mr Traylor advised that although it had initially been the Ministry's intention not to initiate a challenge so as to bring an end to the proceeding, the position had changed by the filing of a non-de novo challenge by Ms Raynor as to remedies. He said that an

evaluation of remedies would involve an analysis of all the circumstances giving rise to the dismissal, particularly the remedy of reinstatement and as to contribution. He said that in those circumstances the Ministry would apply for leave to bring a challenge out of time, on a de novo basis; if granted, issues giving rise to the dismissal would fall for consideration.

[11] Such an application was filed and served on 22 January 2019, and heard on 5 February 2019.

Submissions

[12] Mr Traylor submitted in summary that the reason for not bringing the challenge in time was explained by the unusual circumstances. He said the benefits of the matter ending at the Authority stage were no longer available to the Ministry because of Ms Rayner's challenge; that the Ministry reacted very promptly as soon as it became aware of the changed circumstances; that there would be no undue prejudice or hardship to Ms Rayner given the existence of her challenge; and that there was sufficient merit in the Ministry's intended case as to warrant the making of an order.

[13] Ms Oberndorfer, advocate for Ms Rayner strongly opposed the application. She submitted that the Ministry had made a deliberate decision not to proceed, and then changed its mind. In those circumstances, leave should not be granted. She argued that in fact the extent of the hearing would be enlarged if leave were to be granted, because a broader range of issues would require consideration. She said that it was clear from the Authority's determination that the Ministry's case would be weak. Finally, overall justice meant leave should not be granted. The Ministry did not have a reasonable prospect of success; if it had believed it did, then it had the opportunity to challenge within the required 28-day time period. She submitted the delay was more than minimal.

Legal principles

[14] The Court has jurisdiction under s 219 of the Employment Relations Act 2000 (the Act) to extend time. The relevant criteria are contained in the following paragraphs from *An Employee v An Employer*:2

> [9] The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case. Does the justice of the case require that the extension of time sought be granted? In their detailed submissions about what the interests of justice are in this case, both Mr Beck and Ms French adopted the headings used by Chief Judge Goddard in *Day v Whitcoulls Group Ltd* [1997] NZEmpC 152; [1997] ERNZ 541 and by Judge Shaw in *Stevenson v Hato Paora College* [2002] NZEmpC 39; [2002] 2 ERNZ 103:
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> (1) The reason for the omission to bring the case within time.
> (2) The length of the delay.
> (3) Any prejudice or hardship to any other person.
> (4) The effect on the rights and liabilities of the parties.
> (5) Subsequent events.
> (6) The merits of the proposed challenge.

[10] I agree that these are convenient and appropriate headings under which to consider the matters relevant to the exercise of my discretion in this case, albeit that I do so in a different order.

[15] As Judge Perkins noted in *P v A*,3 the statements in *An Employee v An Employer* must now be read in light of the Supreme Court's judgment in *Almond v Read*.4 In that judgment, the Supreme Court emphasised that the ultimate question in such a case is what the interests of justice require. It modified the approach which needs to be taken as to the merits of the claims of the party seeking exercise of the discretion to extend time, in these paragraphs:

> [36] The first point we make is that in most civil cases in New Zealand there is a right to a first appeal. The Court of Appeal (Civil) Rules do not confer an explicit power on the Court of Appeal to strike out timely appeals summarily on their merits (although they do contemplate appeals being struck for non-payment of security for costs or non-compliance with directions). Even if the Court has such a power, it has not been the Court's practice to exercise it, so that those who bring timely appeals will almost always be able

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

3 *P v A* [2017] NZEmpC 92 at [21].

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

to have them heard on the merits. We think that this is an important part of the background against which extension applications must be determined.

> [37] Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

(footnotes omitted)

[16] The Supreme Court also examined the extent to which the issue of merits may be relevant when leave is sought. It referred to three particular problems. First, issues as to the merits may be overwhelmed by other factors, such as the length of the delay or the extent of prejudice to a respondent. Second, the merits would not generally be relevant in a case where there had been insignificant delay as a result of a legal advisor's error and the proposed respondent had suffered no prejudice; in such a case, a respondent who does not consent would run the risk of an adverse costs award. Third, consideration of the merits on an interlocutory application is necessarily superficial. That meant there would be cases where the court should discourage argument on the merits, and reach a view about them only where they are obviously very strong or very weak. Thus, the issue of merits could be determinative where the proceeding is clearly hopeless.

[17] Although these observations were made with regard to applications for leave to appeal to the Court of Appeal, in my view there are cases under s 219 of the Act where such factors are potentially relevant, particularly if delay is minor.

[18] I proceed in light of these principles.

Discussion

[19] There are three points which persuade me that leave should be granted.

[20] The Ministry decided initially not to initiate a challenge; but that view changed when it learned that Ms Rayner had challenged the determination. A circumstance of this kind is not unusual. The Court often considers applications for leave to appeal out of time where a party learns late in the period within which challenges must be instituted that an opponent has lodged a challenge. This is the not uncommon case of "if you do I will". A Practice Direction formerly governed such a case allowing a party who would not have initiated a challenge a further period within which to do so. The Practice Direction was revoked in 2014. That means that such a party – a party who had initially decided not to proceed, such as the Ministry – must apply for leave if it subsequently elects to do so. In this case, there is no reason to doubt that the Ministry is acting on a bona fide basis. I accept that its reasoning was genuine.

[21] Next, I consider the issue of timing. The obligations as to service of a statement of claim are relevant. Regulation 12 of the Employment Court Regulations 2000 (the Regulations), states that the plaintiff must, as soon as practicable after filing a statement of claim, serve a copy of that document and any attachments to it. That did not happen in the present case. The challenge was electronically forwarded to the Court on 21 December 2018, and as the chronology confirms, the Ministry's lawyer did not receive a complete service copy of the document until 17 January 2019. I do not accept the submission that this fact is not relevant to the question of delay. If the Ministry took the position that it would not issue a challenge, but then decided it would when it learned the employee was challenging, then the timing of proper advice to it of the employee's challenge must be relevant to the exercise of the Court's discretion. When assessed in that light, the delay was minimal. The service copy was received on 17 January 2019; that was the day when advice was given that an application for leave would be given; the application itself was filed four days later under a timetable which was established at the telephone directions conference.

[22] Finally, I refer to the merits. These are to be assessed in light of the dicta in *Almond v Read*. The Supreme Court made it clear that it is difficult for the Court on an interlocutory application such as the present kind, to make a realistic assessment of the merits. In a case of minor delay, that factor will only play a part where the

proceeding is clearly hopeless, or very weak, as it was put by the Supreme Court.5 In this case, all the Court has is a determination. It does not have any evidence as to what witnesses said; it has only the summarised chronology set out in the determination. On the basis of this limited information, it is not appropriate to conclude that the points which the Ministry proposes to raise are very weak or clearly hopeless. I am not assisted in the circumstances of this case by a consideration of the merits.

[23] On the basis of these factors, I granted the application at the hearing. I also indicated to counsel that if it transpired the Ministry's case was significantly unsound in some material respect, that factor could be relevant at the costs stage.

[24] The Ministry was directed to file and serve its statement of claim, and any necessary fee, by 7 February 2019. Ms Rayner was directed to file and serve her statement of defence by 14 February 2019.

B A Corkill Judge

Judgment signed at 4.15 pm on 11 February 2019

5 At [39].
