



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2019](#) >> [\[2019\] NZEmpC 183](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Duncan v Southern Milk Transport Limited [2019] NZEmpC 183 (12 December 2019)

Last Updated: 17 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2019\] NZEmpC 183](#)

EMPC 350/2019

IN THE MATTER OF an application to extend time to
 file a challenge to a determination
 of the Employment Relations
 Authority
BETWEEN KERRY DUNCAN
 Applicant
AND SOUTHERN MILK TRANSPORT
 LIMITED
 Respondent

Hearing: On the papers
Appearances: K Duncan, applicant in person
 J Copeland, counsel for
 respondent
Judgment: 12 December 2019

JUDGMENT OF JUDGE K G SMITH

[1] On 14 August 2019 the Employment Relations Authority released a determination dealing with an application by Kerry Duncan's former employer, Southern Milk Transport Ltd, for a compliance order and penalty.¹ The application was made because Mr Duncan was alleged to have breached a record of settlement between himself and Southern Milk made pursuant to [s 149](#) of the [Employment Relations Act 2000](#) (the Act) on 5 April 2019.

[2] Before considering that application the Authority had to deal with a preliminary matter arising from the fact that Mr Duncan had not filed a statement in

1 *Southern Milk Transport Ltd v Duncan* [\[2019\] NZERA 473](#).

KERRY DUNCAN v SOUTHERN MILK TRANSPORT LIMITED [\[2019\] NZEmpC 183](#) [12 December 2019]

reply. He also did not attend the Authority's investigation meeting, even though he was given notice of it. The Authority concluded that it was appropriate to proceed with the investigation.

[3] The Authority held that Mr Duncan had breached the record of settlement, by discussing its terms and by making disparaging remarks about Southern Milk. A compliance order was made pursuant to [s 137\(2\)](#) of the Act. The Authority also imposed a penalty on Mr Duncan of \$3,000 and directed that \$2,250 of that sum was to be paid to Southern Milk.

This application

[4] Parties to a proceeding in the Authority have 28 days to file a challenge to the determination.² Mr Duncan did not file a

challenge within that statutory timeframe. He has now applied for leave to extend the time within which he can challenge the determination. The grounds of the application are that he was not given proper or sufficient notice of the date of the investigation meeting and had not, in fact, breached the record of settlement.

[5] The application is opposed by Southern Milk.

[6] The Court has jurisdiction to extend the time within which a challenge may be filed if doing so is in the interests of justice. The discretion the Court has is broad but it has to be exercised in a principled way. The factors that are usually considered relevant in exercising this discretion include the reason for the omission to bring the challenge 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.³

Analysis

[7] Mr Duncan has not explained why a challenge was not filed within the statutory timeframe. His application was completely silent about any reason for not taking steps within time. Both his application and subsequent submissions dealt with

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

3. As described 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.

why he did not participate in the investigation meeting, denied breaching the agreement, and made comments about Southern Milk. Mr Duncan supplied a copy of a medical certificate with his submissions, but it did not contain any advice from which it could be concluded or inferred that a relevant medical reason existed to explain why the application should be granted.

[8] The time within which a challenge can be brought as of right is publicly available information. As well as being in the Act, it is advised to the parties by the Authority at the time the determination is issued. Information about it is also published on the Court's website.⁴ Nothing in the application, or Mr Duncan's supporting submissions, suggests that the Authority's practice was not followed in this case or, for some other reason, he was unable to take steps within the statutory timeframe. Failure to explain why the challenge was not filed within time is a critical omission and, by itself, is fatal to the application.

[9] The other factors to be considered do not assist Mr Duncan's application. The delay in filing the application was moderate, so this factor is neutral. There will be prejudice to Southern Milk if the application is granted, in the sense that it will be deprived of the benefit of the Authority's determination. It was entitled to consider that the dispute about compliance with the record of settlement was resolved. This factor points away from granting the application.

[10] Little can be said about the merits. While Mr Duncan's application maintains that he was not given adequate notice of the investigation, and did not breach the agreement, that is disputed by Southern Milk. Such a disagreement cannot be resolved on the papers. This factor is neutral.

[11] In considering the overall interests of justice, I agree with the observations of Chief Judge Inglis in *Armstrong v Surplus Brokers Ltd*, that what should be taken into account are the importance of respecting, in the absence of good reasons, the statutory timeframes provided for in the Act, together with the particular interests of the parties.

4 See for example, the discussion in *Armstrong v Surplus Brokers Ltd* [2019] NZEmpC 90.

[12] In this case, the absence of an explanation from Mr Duncan for failing to meet the statutory time to file a challenge is determinative. That omission cannot be overcome by considering the other factors to be assessed which do not, even on a generous assessment, remedy that deficiency.

Outcome

[13] Mr Duncan's application for an extension of time to challenge the Authority's determination is unsuccessful and is dismissed.

[14] Costs are reserved. If costs are to be sought Southern Milk may file a memorandum within 20 working days, Mr Duncan can reply within 15 working days and the company can have a further period of 5 working days to respond.

K G Smith Judge

Judgment signed at 11 am on 12 December 2019

