



# Employment Court of New Zealand

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## Hutchison v Nelson City Council [2013] NZEmpC 10 (8 February 2013)

Last Updated: 18 February 2013

### IN THE EMPLOYMENT COURT CHRISTCHURCH

#### [\[2013\] NZEmpC 10](#)

CRC 3/13

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

BETWEEN ROBYN ANN HUTCHISON Applicant

AND NELSON CITY COUNCIL Respondent

Hearing: on the papers - affidavit of the applicant and memorandum of counsel for the respondent received 7 February 2013

Judgment: 8 February 2013

#### JUDGMENT OF JUDGE A A COUCH

[1] This decision concerns an application for an extension of time in which to commence proceedings in the Court.

[2] Ms Hutchison was employed by the Nelson City Council (the Council) from

30 May 2011 until her dismissal on 13 December 2011. She wishes to pursue a personal grievance that her dismissal was unjustifiable. To that end, she lodged a statement of problem with the Employment Relations Authority (the Authority).

[3] The Authority identified as a preliminary issue whether Ms Hutchison had raised her personal grievance with the Council within the 90 day period provided for in [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). That issue was investigated by the Authority which determined<sup>[1]</sup> that the personal grievance was not

raised in time.

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[4] Ms Hutchison then applied under [s 114\(3\)](#) of the Act for leave to raise her personal grievance after the expiry of the 90 day period. That application was determined by the Authority in a second determination<sup>[2]</sup> dated 19 December 2012. The Authority declined leave.

[5] Ms Hutchison wishes to challenge that second determination relating to leave. Her right to do so is conferred by [s 179\(1\)](#) of the Act but subsection (2) requires any such challenge to be made “within 28 days after the date of the determination of the Authority.” That means the last day on which Ms Hutchison could challenge the Authority’s second determination as of right was 16 January

2013.

[6] Ms Hutchison attempted to initiate a challenge by filing a statement of claim on 24 January 2013. She was then told by registry staff that she was out of time and would need to first seek and obtain an extension of time before she could proceed. She duly filed that application and an affidavit in support the following day, 25

January 2013. At the same time, she provided her proposed statement of claim.

[7] Those documents have been served on the Council. The position of the Council, confirmed in a memorandum of counsel,

is that it neither consents to nor opposes the application and will abide the decision of the Court.

[8] The fact that an application such as this is not opposed does not, of itself, mean that the application should be granted. The Court must still be satisfied that it is an appropriate exercise of the Court's discretion to grant the extension of time sought. The principles applicable to the exercise of that discretion are settled and well known.<sup>[3]</sup> I apply such of those principles as are applicable to the facts of this case.

[9] The extent of delay in this case was eight days.

[10] The reason for the omission to file proceedings in time was explained by Ms

Hutchison in her affidavit. The determination she wished to challenge was delivered

shortly before Christmas. Ms Hutchison telephoned the Wellington office of the Court to seek advice about the effect on timing of the Christmas and New Year holidays. Ms Hutchison says that she was informed that the 12 days beginning with 25 December and ending with 5 January were not to be counted and that this seemed consistent with regulation 74B of the Employment Court Regulations which she later consulted. On this basis, Ms Hutchison believed that she was within time on 24

January 2013.

[11] This advice and the conclusion Ms Hutchison reached as a result were wrong. Although reg 74B provides that 12 days over Christmas and New Year should not be counted when calculating time limits, that is subject to any express provision in a statute. It follows that reg 74B does not apply to the statutory time limit of 28 days in s 179(2) of the Act.

[12] It appears that the error may be attributable to the fact that the Court registry in Wellington shares premises with the registry of the Environment Court and that the staff member who spoke to Ms Hutchison thought the enquiry related to proceedings in the Environment Court rather than the Employment Court. In any event, it was reasonable for Ms Hutchison to rely on the advice she understood she had been given and this satisfactorily explains the whole of her delay in seeking to commence proceedings. Once Ms Hutchison became aware of the error, she acted very promptly to seek an extension of time.

[13] There is no suggestion that granting the extension of time sought by Ms

Hutchison would prejudice the Council or affect the interests of third parties.

[14] Another factor I must take into account is the merits of the proposed challenge. Ms Hutchison does not address this in her affidavit but I am able to discern from the Authority's determination the evidential and legal basis on which the Authority acted. Although I am in no position to reach any conclusion on the basis of this material, it seems to me that the outcome determined by the Authority was by no means obvious or inevitable. It is certainly arguable that there were "exceptional circumstances" as that term is used in s 114(4) and s 115 of the Act.

[15] The overall consideration for the exercise of the Court's discretion is the interests of justice. In deciding where that lies, I have regard to the factors discussed above. I also have regard to the fact that the Authority's determination has the effect of finally dismissing Ms Hutchison's grievance without there having been any consideration of the merits of it. I find that the interests of justice favour granting the extension of time sought.

[16] Commencing proceedings requires both the provision of a statement of claim and payment of the filing fee required by the regulations. Ms Hutchison provided a statement of claim on 25 January 2013 but the Registrar could not accept payment of a filing fee on that document because it was out of time. If the proceedings are now to be validly commenced, what is required is timely payment of the filing fee.

[17] Accordingly, I make the following orders:

(a) The time within which Ms Hutchison may commence a challenge to

the Authority's second determination is extended to 4.00 pm on 22

February 2013.

(b) When the filing fee payable on filing a statement of claim has been paid, the statement of claim provided to the Court by Ms Hutchison on 25 January 2013 shall be effective and may be signed by the Registrar.

(c) The regulations regarding service and the provision of a statement of defence shall then apply in the usual way.

[18] Costs relating to this application are reserved pending resolution of the substantive challenge.

Signed at 4.00 pm on 8 February 2013

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[\[1\]](#) [2012] NZERA Christchurch 208 dated 25 September 2012.

[\[2\]](#) [2012] NZERA Christchurch 280.

[\[3\]](#) See, for example, *An Employee v An Employer* [\[2007\] ERNZ 295](#).

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