



Employment Court of New Zealand

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Ling v Super Cuisine Group Limited [2021] NZEmpC 204 (23 November 2021)

Last Updated: 2 December 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 204](#)

EMPC 203/2021

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

BETWEEN LONGSHENG LING
 Applicant

AND SUPER CUISINE GROUP LIMITED
 Respondent

Hearing: On the papers

Appearances: P Young, advocate for
 applicant

Judgment: 23 November 2021

JUDGMENT OF JUDGE KATHRYN BECK

[1] The applicant, Mr Ling, seeks leave to extend time to file a challenge to a determination of the Employment Relations Authority (the Authority).¹ In the Authority, Mr Ling was unsuccessful in his claim that he was constructively dismissed from his employment with the respondent, Super Cuisine Group Ltd (Super Cuisine). He was, however, successful in establishing that he was owed wage and holiday pay arrears of \$3,801.60. The Authority declined to award penalties sought in relation to those arrears.

[2] A costs determination was issued on 19 May 2021.² It was considered appropriate, given that both parties had been partially successful, that costs lie where

¹ *Ling v SuperCuisine Group Ltd* [\[2021\] NZERA 145 \(Member Campbell\)](#).

² *Ling v Super Cuisine Group Ltd* [\[2021\] NZERA 209 \(Member Campbell\)](#).

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they fall. While it is not entirely clear on the pleadings, the costs determination appears to be part of the challenge. Such challenge is in time and no leave is required.

[3] The Authority's substantive determination was issued on 14 April 2021. This meant that the 28-day time period for filing a challenge to that determination ended on 12 May 2021.³ No such challenge was filed. Mr Ling's application for leave to extend time was received on 15 June 2021 – a delay of approximately five weeks.

[4] The draft statement of claim accompanying the application seeks to challenge, on a non-de novo basis, the Authority's finding that Mr Ling was not constructively dismissed. Compensation of \$50,000 pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) is sought.

[5] In such a case where the statutory timeframe has elapsed, the Court has the discretion to extend the time for filing.⁴ That

discretion is exercised in accordance with established principles. The overarching consideration is the interests of justice.⁵

[6] The usual factors that will be considered are:⁶

- (a) the reasons 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 of the proposed challenge.

³ [Employment Relations Act 2000, s 179\(2\)](#).

⁴ [Section 219](#).

⁵ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

⁶ *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]–[10]; *Almond v Read*, above n 5, at [38]–[39].

[7] Mr Young, advocate for Mr Ling, has confirmed that the application was served on Super Cuisine. The company has not taken any steps to address or oppose the application. This does not change the fact that the Court must be satisfied that this is an appropriate case in which to exercise its discretion.

Reasons for the delay

[8] Mr Young appears to accept responsibility for the delay. He says that after the Authority issued its substantive determination, it was decided that the applicant would wait until the costs determination had been issued before deciding whether to pursue a challenge. If Mr Ling was awarded costs, he did not plan on issuing a challenge.

[9] There was confusion as to whether the 28-day period for challenging the constructive dismissal finding started counting from the date of the substantive determination or from the date of the costs determination. An incorrect assumption was made that it was the latter.

[10] That error is regrettable. Information on timeframes for filing is readily available online, and Mr Young could also have sought clarification from the Registry. Knowledge of such matters should be within the basic competence of any representative in this jurisdiction.

[11] However, in such circumstances, the Court is reticent to sheet home the consequences of a representative's error to their client.⁷

The length of the delay

[12] The longer the delay, the more an applicant would be seeking an indulgence from the Court and the stronger the case for an extension for leave would need to be.⁸

[13] The challenge was out of time by approximately five weeks. Previous decisions of this Court have classified such a delay as not being minor but, equally,

⁷ See for example *Tamarua v Toll Tranzlink Ltd* [2006] NZEmpC 64; [2006] ERNZ 599 (EmpC).

⁸ *Almond v Read*, above n 5, at [38(a)]

not lengthy.⁹ Mr Ling was still within time to bring a challenge to the costs determination. In the circumstances, I do not consider the delay to weigh heavily against an extension of time.

Prejudice

[14] Super Cuisine has not responded to Mr Ling's application. As such, there is no evidence that the delay in filing the challenge will cause any additional difficulties for the company beyond the inconvenience which will always form a part of such a challenge.

Impact on party rights and liabilities

[15] Mr Ling obviously holds strong feelings about the circumstances in which his employment with Super Cuisine ended. If

leave was not granted, he would be unable to pursue a challenge to the Authority's substantive determination, in particular the constructive dismissal claim.

Subsequent events or conduct

[16] As discussed, Mr Ling was apparently informed by his representative that the filing period began from the date of the costs determination. While that assumption was incorrect, the challenge was filed in a manner consistent with that understanding.

[17] Mr Young's explanation that the applicant had chosen to wait until it had seen what was awarded in the costs determination is less than satisfactory. However, it must be seen in the broader context of the applicant's misapprehension that the 28-day period commenced from the date of the costs determination.

Merits

[18] There is difficulty in assessing the merits of an application at an early stage and the exercise should be approached with caution. The Supreme Court noted in

9 *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 158 at [5].

Almond v Read that the merits will not generally be relevant where there has been an insignificant delay as a result of a legal adviser's error and the proposed respondents have suffered no prejudice (beyond the fact of an appeal).¹⁰ The qualifier "generally" was used as it was accepted there were circumstances where the lack of merit is so obvious that the Court is justified in refusing to extend time.¹¹

[19] While the delay here is not insignificant, it has been occasioned by a representative's error and there is no prejudice to Super Cuisine. There is no obvious lack of merit.

Summary

[20] Taking into account the above factors, and the overarching consideration of the interests of justice, I am satisfied that leave should be granted. The relatively short delay, the representative's error that led to it, and the lack of prejudice to Super Cuisine support this conclusion.

[21] Leave is accordingly granted for Mr Ling to file a statement of claim challenging the determination of the Authority within 15 working days of the date of this judgment. That challenge is to be a non-de novo challenge to the constructive dismissal aspect of the determination, as has been considered here, and the costs determination for which leave was not required.

[22] Super Cuisine is to file and serve a statement of defence in the usual way and thereafter a directions conference will be convened to progress this matter. The company should be aware that if it chooses not to engage in the Court proceeding, the matter will likely proceed by way of formal proof.

¹⁰ *Almond v Read*, above n 5, at [39(b)]

¹¹ At fn 91.

[23] As Super Cuisine did not take a position on the application, I do not understand there to be any issue as to costs.

Kathryn Beck Judge

Judgment signed at 12 pm on 23 November 2021