



# Employment Court of New Zealand

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## McBride v ANZCO Foods Limited [2020] NZEmpC 234 (18 December 2020)

Last Updated: 23 December 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 234](#)

EMPC 178/2020

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
BETWEEN	KELLY MCBRIDE Applicant
AND	ANZCO FOODS LIMITED Respondent

Hearing: On the papers

Appearances: G Bennett, advocate for applicant  
J Farrow and J Cowan, counsel for respondent

Judgment: 18 December 2020

### JUDGMENT OF JUDGE K G SMITH

[1] In February 2018 Kelly McBride raised a personal grievance with his former employer, ANZCO Foods Ltd, alleging he had been unjustifiably dismissed when he was not allowed to return to work following a prolonged absence.<sup>1</sup>

[2] ANZCO considered that the personal grievance was not raised within the 90- days allowed by the [Employment Relations Act 2000](#) (the Act) and did not consent to an extension of time.<sup>2</sup>

1 *McBride v ANZCO Foods Ltd* [\[2020\] NZERA 204 \(Member van Keulen\)](#) at [6].

2 At [7]; [Employment Relations Act 2000, s 114\(1\)](#).

KELLY MCBRIDE v ANZCO FOODS LIMITED [\[2020\] NZEmpC 234](#) [18 December 2020]

[3] In response Mr McBride lodged a statement of problem in the Employment Relations Authority claiming he had been unjustifiably dismissed. That chain of events led to an agreement between the parties to have the Authority resolve as a preliminary issue whether the grievance had been raised within time.

[4] The Authority held that Mr McBride resigned from ANZCO with effect from 10 March 2017 and that when he applied for a job with the company at the end of 2017 he was not a person intending to work. Those conclusions were sufficient for the Authority to find that his personal grievance had not been raised within time.<sup>3</sup>

[5] Mr McBride now wishes to challenge the determination, but he did not file a statement of claim within time.<sup>4</sup> He has sought an extension of time to file a challenge. His application is opposed by ANZCO.

### The determination

[6] A brief description of the Authority's investigation and conclusions is required to provide context for this decision. Mr

McBride worked for ANZCO at its Kokiri plant from 2001. In 2016 he was facing criminal charges and was remanded on bail pending trial.<sup>5</sup> His bail conditions, and a protection order, meant that he could not attend the Kokiri plant. That difficulty was dealt with by an agreement between Mr McBride and ANZCO that he would take three months unpaid leave while obtaining legal advice and deciding how he could deal with the charges that he faced.<sup>6</sup>

[7] The three months of unpaid leave was extended into February 2017. The additional leave was to see if he could return to work pending his trial. Meanwhile, Mr McBride had pleaded not guilty to the charges and a date for trial had been set.

[8] Mr McBride was unable to return to work and his employment came to an end in March 2017. The Authority recorded a discussion at that time between ANZCO's representatives and Mr McBride about the possibility of him returning after the trial

3 At [46].

4 [Employment Relations Act, s 179\(2\)](#); within 28 days after the date of the determination.

5 *McBride*, above n 1, at [1].

6 At [2].

concluded. That conversation led to Mr McBride's belief that he would be able to return to work if he was acquitted.<sup>7</sup>

[9] Mr McBride successfully defended the charges against him in November 2017.<sup>8</sup> Subsequently, he contacted ANZCO about returning to work but the company did not agree to him doing that.

[10] In February 2018, Mr McBride raised a personal grievance for an alleged unjustified dismissal because ANZCO did not re-employ him. ANZCO's response was that he had resigned in February 2017 and had not been dismissed. Part of the company's response was to dispute Mr McBride's entitlement to pursue a grievance because it was out of time.

[11] At the Authority's investigation, Mr McBride's case contained three elements:<sup>9</sup>

(a) He was not dismissed and did not resign in early 2017; the dismissal occurred when ANZCO did not allow him to return to work having been acquitted of the criminal charges.

(b) If the first submission was not successful, he argued that in early 2017 he did not know he was dismissed. This claim arose from his belief that he could return to his job if he was acquitted and he had not received written notice of dismissal from ANZCO. On this analysis he was only dismissed in late 2017 when ANZCO did not allow him to return to work.

(c) Alternatively, if he was dismissed in early 2017, and knew about that decision, because ANZCO agreed he could return to work if he was cleared of the criminal charges he was a person intending to work within the meaning of that expression in the Act.<sup>10</sup> On this analysis he was dismissed in late 2017 when he was not allowed to return to Kokiri.

7 At [4].

8 At [5].

9 At [13].

10 [Employment Relations Act, ss 5 and 6\(1\)\(b\)\(ii\)](#).

[12] The Authority recorded ANZCO's responses as:<sup>11</sup>

(a) Mr McBride resigned in 2017 because he could not return to work as a result of:

(i) the limitations imposed on him by the bail conditions; and

(ii) because he wanted to access a welfare payment, through a fund managed by both ANZCO and his union, which he was eligible to receive only if he resigned.

(b) There was no concluded agreement between ANZCO and Mr McBride about him returning to work after the trial. Instead, ANZCO had advised him that if he was cleared he could apply for a job. Whether or not a job was offered would depend on something suitable being available.

[13] After a detailed analysis the Authority concluded that Mr McBride resigned in February 2017.<sup>12</sup> It held that he knew his employment was going to end in March 2017. A significant factor in the decision was Mr McBride's desire to access the welfare fund that was only available to him if he resigned.

[14] The Authority rejected the contention that Mr McBride was a "person intending to work" as at late 2017. Section 5 of the Act defines a person intending to work as "a person who has been offered, and accepted, work as an employee". The significance of that extension to the definition of employee is that it provides access to the personal grievance procedures if, for some reason, the offer of employment is withdrawn.

[15] The Authority did not accept that Mr McBride had received an offer of work during a conversation between him and an ANZCO manager on 30 January 2017.<sup>13</sup> It preferred ANZCO's evidence to the effect that the conversation stopped short of an

<sup>11</sup> *McBride*, above n 1, at [14].

<sup>12</sup> At [32].

<sup>13</sup> At [45].

offer, but simply indicated that if the trial went favourably for Mr McBride he was welcome to apply for a job in the future.

[16] Those conclusions meant that:

- (a) because Mr McBride's employment ended on 10 March 2017 the personal grievance he raised in February 2018 was out of time; and
- (b) he was not a person intending to work and could not raise a personal grievance about not being re-employed.

[17] The Authority did not assess whether there were any circumstances relevant to an extension of time, and it appears no application of that sort was made. Even if one had been made so much time had elapsed that it is unlikely the threshold tests in s 114(4)(a)–(b) of the Act would have been satisfied.

[18] The Authority's determination was not challenged on time. Seven days after the time to challenge elapsed an application for leave to extend the time to file a challenge was made.

## **The application**

[19] The application for leave was filed by Mr McBride's advocate, Mr Bennett, on

24 June 2020. The only substantive ground relied on was that, because of a miscalculation by Mr Bennett, he had let down Mr McBride and failed to file the challenge within the time allowed.

[20] Initially the application was supported by a memorandum from Mr Bennett accepting personal responsibility for what happened. At the direction of the Court that memorandum was replaced by an affidavit. Mr Bennett deposed to the determination arriving during a recent lock-down period and that he had not correctly calculated the 28 days allowed to challenge as of right. Mr Bennett also relied on his heavy workload as a supplementary reason for missing the deadline and not carrying out Mr McBride's instructions.

[21] Before turning to the test to apply there is a further matter that needs to be addressed. The application was signed by Mr Bennett. Following enquiries from the Court about Mr Bennett's authority to act an affidavit by Mr McBride was filed. There are two relevant parts to that affidavit, which also contained information about some of the health-related reasons Mr Bennett gave for not being able to deal with this application in a prompt fashion. That information is not material.

[22] What is material is Mr McBride's evidence that he received a copy of the determination on the same day it was delivered; that is 20 May 2020. He deposed to having instructed Mr Bennett to file a challenge and, while he could not be precise about when that instruction was given, he thought that it was about a week later.

[23] The second aspect of Mr McBride's evidence is what he knew about the steps taken on his behalf. His evidence was that he was unaware that there had been a delay, presumably meaning that the challenge had not been filed within time, in these words:

As to the delay, I was unaware at the time that there had been a delay however I accept what [Mr Bennett] has done to seek an extension as is permitted by law, is what I would have instructed him to do.

[24] The issue presented by that statement by Mr McBride is discussed later.

## **Analysis**

[25] The Court has a discretion to extend time to file a challenge.<sup>14</sup> In exercising that discretion the Court must act in accordance with established principles. The overarching consideration is a decision in the interests of justice.

[26] Factors likely to be considered in such an application are:<sup>15</sup>

- (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.

14 [Employment Relations Act, s 221\(c\)](#).

15 *An Employee v An Employer* [\[2007\] ERNZ 295 \(EmpC\)](#) at [9]–[10].

- (d) The effect on the rights and liabilities of the parties.
- (e) Subsequent events.
- (f) The merits of the proposed challenge.

[27] Those criteria now need to be read in light of the Supreme Court’s judgment in *Almond v Read*.<sup>16</sup> That decision emphasised that the ultimate question to ask is what is in the interests of justice and rephrased the issue of prejudice as meaning prejudice or hardship to the respondent or others with a legitimate interest in the outcome.<sup>17</sup> The Supreme Court also considered that an assessment of the merits of the case would not generally be relevant where there had been an insignificant delay, for example as a result of a legal advisor’s error and where the proposed respondent had suffered no prejudice.<sup>18</sup>

#### *The reason for the omission to bring the case*

[28] Mr Bennett’s submissions rely almost exclusively on accepting responsibility for not filing Mr McBride’s challenge and inviting his error not to be visited on his client.

[29] In ANZCO’s submissions counsel accepted Mr Bennett had failed to take action. However, they also raised an issue about there being little in the way of information from Mr McBride to indicate what steps he had taken, after becoming aware of the determination, to make sure that a challenge was filed within time. In particular, they were critical of the absence of information about the timing of Mr McBride’s instructions to Mr Bennett, whether there was advice provided about the 28-day time limit, and what steps (if any) were taken before that time was reached to be ready to file.

[30] Those submissions were filed before Mr McBride’s affidavit in which he confirmed the instructions he gave. However, after that affidavit was received,

16 *Almond v Read* [\[2017\] NZSC 80](#), [\[2017\] 1 NZLR 801](#).

17 At [38](d).

18 At [22].

ANZCO’s counsel filed a memorandum addressing certain comments by Mr McBride, inviting the Court not to place any weight on those matters touching on the substantive dispute. While having the opportunity to do so, they did not comment on Mr McBride’s evidence that he instructed Mr Bennett about a week after the determination was received.

[31] I am satisfied that the omission has been explained. Mr McBride clearly intended to challenge the determination and gave an instruction to do that. There is no suggestion that he delayed or otherwise behaved in an unreasonable way contributing to Mr Bennett’s mistake. The standard of conduct that would be required, if ANZCO’s submissions were accepted, is too high; Mr McBride was entitled to rely on the agent he retained who is experienced in employment-related matters and to expect that his instructions were carried out.

[32] That assessment leads to the issue touched on earlier, about how Mr McBride became aware of the fact that the challenge was not filed. The passage from his affidavit appears to give retrospective approval to the application for leave being filed by ratifying what was done. There were no submissions from either party about the ability to do that given what is required by [s 236](#) of the Act.<sup>19</sup>

[33] Retrospective approval creates a potential conceptual difficulty. That said, I am prepared to infer Mr McBride’s instruction to Mr Bennett was sufficiently broad to authorise him to take all necessary steps to ensure the Authority’s determination was revisited. That included Mr Bennett taking steps to rectify his mistake.

#### *The length of the delay*

[34] This issue can be dealt with briefly. ANZCO accepted that the length of the delay was not determinative in these circumstances. I agree. The delay was moderate and not sufficient to support declining the application.

*Any prejudice or hardship to any other person*

[35] Not surprisingly, ANZCO is concerned that it would suffer prejudice or hardship because it would lose the certainty of the Authority's determination.

[36] While that is true it is not dispositive.

*Effects on the rights and liabilities of the parties?*

[37] ANZCO referred to further cost it is likely to be put to as a result of defending any challenge that is allowed to be pursued. While that observation is correct, it can be addressed, if necessary, by an order of costs should ANZCO succeed.

*Subsequent events*

[38] In this part of the assessment ANZCO was concerned about substantial delays in the Authority investigation it attributed to Mr Bennett. There were problems over not complying with timetables and directions. Observations were also made about how the timetabling of submissions in this application was dogged by difficulties with several extensions being required to accommodate Mr Bennett's unavailability.

[39] I am not persuaded that these issues are enough to tell heavily against the application. While there is likely to be some dispute about whether what was attributed to Mr Bennett was justified criticism, the reality is that any delays in this proceeding can be dealt with by costs orders.

*Merits*

[40] Finally, while there was an invitation to consider the merits I prefer not to do so at this stage. *Almond v Read* discourages an attempt to assess the merits when what has happened is a slip on the part of a representative that has been promptly rectified.<sup>20</sup>

<sup>20</sup> *Almond v Read*, above n 16, at [37].

**Outcome**

[41] The application is granted. A statement of claim in the form of the draft submitted with the application is to be filed and served no later than **4 pm on 15 January 2021**.

[42] Costs are reserved.

K G Smith Judge

Judgment signed at 12.15 pm on 18 December 2020