



Employment Court of New Zealand

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Singh v Compass Group New Zealand Limited [2016] NZEmpC 63 (26 May 2016)

Last Updated: 13 June 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 63](#)

EMPC 379/2015

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

BETWEEN PADMINI LATA SINGH Applicant

AND COMPASS GROUP NEW ZEALAND
 LIMITED
 Respondent

Hearing: 19 May 2016 and by further evidence filed by consent
 on 23
 May 2016
 (Heard at Auckland)

Appearances: D Tilson, advocate for applicant
 R Towner, counsel for respondent

Judgment: 26 May 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

Nature of application

[1] The question for decision now is whether Padmini Singh should have further time to file and serve a challenge to the determination of the Employment Relations Authority which concluded that she was neither disadvantaged in her employment nor dismissed unjustifiably.¹ The determination of the Authority was delivered on 30

September 2015. In a subsequent determination issued on 17 December 2015² the

Authority directed Ms Singh to pay Compass costs in the sum of \$1,000 within 28 days of the date of that determination. There has been a subsequent agreement

between the parties that Ms Singh will pay this costs' award, perhaps by periodic

¹ *Singh v Compass Group New Zealand Ltd* [2015] NZERA Auckland 305 (substantive).

² *Singh v Compass Group New Zealand Ltd* [2015] NZERA Auckland 399 (costs).

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payments extending beyond the 28 days, and no issue has been taken by Compass with this arrangement. Being willing to meet her responsibilities to pay costs and doing so, puts Ms Singh in a better light than many other applicants in her circumstances.

[2] Ms Singh's application to extend the time for filing a challenge (which expired on 28 October 2015) was filed with the Court on 14 December 2015. On 10

November 2015 Ms Singh had purported to file a challenge to the Authority's determination but (correctly) this was not accepted for filing because it was, by then, beyond the 28 days allowed by law to do so.

[3] Ms Singh's application to extend the time for filing her challenge is opposed by Compass Group New Zealand Limited (Compass) and, the Court having directed that this be determined as a preliminary question, Ms Singh elected to have a face-to-face hearing of her application in open court.

[4] Affidavits were filed in support of and in opposition to the application although no witness was called for cross-examination. The hearing thus proceeded on submissions based on the law and the facts elicited from that affidavit evidence.

Applicable statutory provisions

[5] The jurisdiction to extend the time for filing a challenge exists expressly under [s 219\(1\)](#) of the [Employment Relations Act 2000](#) (the Act) which provides materially:

If anything which is required ... to be done by this Act is not done within the time allowed, ... the court ... may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, ...

[6] In the exercise of this broad discretion the Court is guided by a number of factors. One case identifying these will suffice in setting them out. That is *An Employee v An Employer*.³ There the Court summarised what it described as the fundamental principles which must guide it in the exercise of its discretion under s

219 and to determine the justice of the case. It relied on the earlier judgments of this

³ *An Employee v An Employer* [\[2007\] ERNZ 295 \(EmpC\)](#).

Court in *Day v Whitcoulls Group Ltd*⁴ and *Stevenson v Hato Paora College*.⁵ Those six fundamental principles were summarised by Judge Couch in *An Employee* as being:⁶

- 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.

Relevant facts

[7] As I have already noted, the Authority's determination was delivered on 30

September 2015. Although Ms Singh was listed as having been represented at the Authority's investigation meeting by what I was told was a "family friend", the determination was sent by email to her personally from the Authority on 30

September 2015. From at least early October 2015, it appears that Ms Singh was no longer represented by her friend but was obtaining, from time to time, advice from her current lawyers. From very soon after the receipt of the determination, Ms Singh was in touch with Compass (both personally and through her lawyer) on a number of occasions, both in relation to costs and emphasising expressly that she would challenge the Authority's determination in this Court.

[8] Following the hearing, further evidence was admitted by consent to clarify some uncertainties about Ms Singh's legal representation. I now set out the main points of this.

[9] Ms Singh first approached the firm Kidd Legal on 3 November 2015 and, on the following day, conferred with Mr Proctor at its Manukau office. The statement of claim signed by her but prepared by Mr Proctor was filed in the Employment

Court on 10 November 2015. Mr Proctor's role as lawyer was then "undertaking a

⁴ *Day v Whitcoulls Group Ltd* [\[1997\] NZEmpC 152](#); [\[1997\] ERNZ 541 \(EmpC\)](#).

⁵ *Stevenson v Hato Paora College Trust Board* [\[2002\] NZEmpC 39](#); [\[2002\] 2 ERNZ 103 \(EmpC\)](#).

⁶ *An Employee v An Employer*, above n 3, at [9].

pro bono exercise on the costs issue" for Ms Singh. A decision was then made by Kidd Legal on 11 November 2015 that if the firm was to represent Ms Singh on the application for leave to this Court, the lawyers needed a proper retainer, including payment in of funds to its trust account or the completion of a legal aid application. Neither of these steps had been taken by 19 November 2015, in which circumstances Kidd Legal assumed that Ms Singh would either be unrepresented or would have other representation. Mr Proctor resigned from Kidd Legal on 23 November 2015 due to illness and nothing more was heard by it from Ms Singh after the firm advised her of Mr Proctor's resignation.

[10] By her undisputed account, Ms Singh had sought legal assistance from several other sources but these were all to no avail. She

purported to file her first statement of claim (prepared by and containing her lawyer's address for service) with the Court on 10 November 2015. By that time, Ms Singh was already 13 days out of time to challenge as of right under [s 179](#). Although she was then told by the Court Registry that she would have to make an application for leave to extend the time for filing her challenge, a further 34 days elapsed until that application was filed with the Court on 14 December 2015. By that time, 47 days had elapsed since the expiry of the 28-day time limit under [s 179](#).

[11] That application, supported by the briefest of affidavits sworn by Ms Singh, was referred to me for directions. This affidavit in effect affirmed the reasons which she had set out in her application which she filed on 14 December 2015. By a Minute issued on 22 December 2015, I directed that Ms Singh, apparently as a litigant in person, would have to file and serve more detailed evidence in support of her application.

[12] On 21 January 2016 the applicant filed a slightly more comprehensive affidavit. On the same date, Ms Singh's current lawyers filed notice of change of address for service to their office, and Ms Singh's second affidavit in support of her application was filed by those lawyers.

[13] The Authority's advice to Ms Singh (which I assume was a standard form of advice to all parties receiving determinations) was clear that she had 28 days from

the date of the Authority's determination in which to file a challenge. I do not accept that there could have been any reasonable confusion which could lead to the belief that these days were 28 working days. Although Ms Singh asserts that the Authority made a number of directions in the course of its investigation that things be done within a period of "working days", the evidence does not support this: its time limits were referable to precisely specified dates, but not to working days.

[14] The applicant's third and final affidavit was filed on 14 April 2016. This addresses solely the merits of her claims principally by alleging errors on the part of the Authority but also setting out the case that she wishes to present if leave is granted, which will include causes of action not relied on, at least as strongly, in the Authority.

[15] There was no apparent indecision by the applicant about whether to challenge; she so advised the respondent from almost immediately after her receipt of the determination. Her problem was that she, whether herself or by her lawyers, did not file the necessary documents within time.

Duration of delay alone

[16] The respondent relies significantly upon this ground of opposition. Although the duration of any of several delays in a case such as this is a relevant factor, submissions in some cases, and the judgments in others, sometimes tend to focus on this issue in isolation as being a decisive factor or one of the decisive factors in allowing or refusing to extend time. In that regard, analyses of the durations of delays and their adjectival descriptions as "minimal", "significant", "excessive", "very substantial" or even "egregious", (and in this case, and others, "inordinate") are not determinative of the application for leave to extend time. Nor is it particularly helpful to make direct comparisons between cases of such periods alone.

[17] So, for example, a period of delay may often be associated with another important element of the decision, including whether there has been prejudice to the other party or to any other person as a result of the delay. Because, logically, the greater the delay, the greater the opportunity for prejudice may be, it is, nevertheless, important to consider the length of delay in association with those other factors. Such delay(s) should not, however, be the sole or predominant factor.

[18] So, too, is the explanation for a delay or for delays particularly important, not merely their duration(s). There may, for example, be what is described as a 'lengthy' delay in taking a step but which is explicable evidentially, so that the length of the delay is not alone a significant factor in determining the application for leave to extend time.

[19] Nor is it possible to say that the existence or strength of a ground which may be significant in one case will, thereby, be determinative in another. In this case, for example, Mr Towner, in his written submissions, contended that "Mistakenly counting working days instead of clear days [is] not an acceptable reason for delay in attempting to file [a] challenge." This was said to be in reliance on the judgment of

this Court in *Monteith v Eagle*.⁷ *Monteith* was a case in which an applicant for leave asserted, as does Ms Singh in this case, that she had misunderstood the reference to "28 days" in [s 179](#) to mean 28 working days rather than 28 calendar days.

[20] When the other relevant facts in each case are compared, however, they are clearly distinguishable. *Monteith* cannot be authority for the proposition that in all cases, miscounting the 28 days cannot be an acceptable reason for delay. In discussion with the Bench, Mr Towner conceded this to be so.

[21] In *Monteith* the applicant was an experienced businesswoman who asserted that all of her previous business dealings had been governed by "business days". His Honour Judge Couch, in that case, did not accept this as a good ground for the applicant's mistake. One of the Judge's reasons for doing so was that the applicant in *Monteith* had recently gone through an identical exercise in respect of seeking to challenge out of time an earlier determination of the Authority. Mrs Monteith had, on that recent occasion, been told by the Court Registry that 28 days meant 28 days and not 28 business days or, in this case, 28 working days. She had then sought an extension of time in that earlier case. Judge Couch concluded that "In the course of

that process, the appropriate procedure and statutory provisions were drawn to her attention on several occasions.” The Judge continued:8

If Mrs Monteith did not understand the correct procedure and the statutory time limits for filing a challenge before May 2007, she can have been in no doubt by the time she filed her second amended application for leave on 25

July 2007. She must also have understood the importance of compliance and the consequences of non-compliance. All this occurred prior to Mrs

Monteith receiving the Authority's determination in this proceeding.

[22] This illustrates a quite different factual situation to the present and, thereby, the importance of not relying on apparently similar circumstances in other cases or seeking to interpret judgments in individual cases as setting down hard and fast rules. The comparison of the cases also illustrates why a finding in one means that the same general ground in a later case, cannot simply thereby succeed.

Ascertaining merits of challenges by hearing de novo

[23] The statutory scheme for challenges under [s 179](#) of the [Employment Relations Act 2000](#) is a unique feature of cases such as this, but absent in other civil litigation. So, whilst Mr Towner argued for the respondent that most of Ms Singh's proposed grounds of appeal had already been dealt with by the Authority, I conclude that others were, if not new matters, then alternative ways of categorising her unjustified dismissal. An election to challenge by hearing de novo enables a party to refine, by addition or subtraction or other variation, the case run before the Authority although it must address the same “matter” that was before the Authority. In this case, that matter was Ms Singh's allegedly unjustified dismissal. So, if Ms Singh is granted an extension to file her challenge and, as she has indicated in her draft statement of claim, a de novo hearing is elected, she is entitled to present a different case about the “matter” as just defined. In this case, her ‘matters’ before the Authority were the justification in law for her suspension and for her dismissal. In these circumstances, it is difficult to ascertain the prospects of success on the challenge if the grounds for it have, in part at least, not yet been examined and determined.

[24] At the crucial times between 30 September and 14 December 2015, Ms Singh was, in part, unrepresented by a lawyer but also, in part, taking advice from her lawyer. By the time the Authority's determination was issued, she had ceased to be represented by her friend but, by the time the Authority came to deal with costs in October, she was clearly represented by Mr Proctor of Kidd Legal.

[25] On or about 23 November 2015 Mr Proctor departed from his role at Kidd Legal and apparently made no arrangements to hand on Ms Singh's file to another lawyer. In the meantime, however, it appears that Mr Proctor had drawn a statement of claim which was signed by the applicant on 10 November 2015 before she attempted to file it herself with the Employment Court Registry on the following day,

10 November 2015. When the statement of claim was returned to her as being out of time, it appears that she prepared her own application for leave to extend the time by adapting and using an online form in which there was no reference to Kidd Legal including, in particular, that firm being her address for service. However, by the time she filed the application for leave on 14 December 2015, her lawyers, Kidd Legal, were again representing her.

[26] Despite the applicant receiving some legal advice and, for periods, being represented by her current lawyers, the Court should not under-estimate the degree of reliance by lay litigants on their legal advisers. It is unrealistic in these circumstances to expect such persons to know and apply the law: why else, one might ask rhetorically, would one go to a lawyer for legal advice and representation? Indeed, Mr Tilson conceded frankly in submissions that errors had been made, were not Ms Singh's responsibility, and should not be held against her.

[27] Although, in her affidavits, Ms Singh has acknowledged such errors as being her own, I have some significant doubts that they can be so classified. Mr Tilson so conceded in submissions and it may well be that Ms Singh should have been separately represented on this application with affidavit having been provided by her lawyers.

Application of guidelines

[28] Dealing with each of the guidelines set out in the *An Employer* case, I conclude as follows.

[29] The reason for the omission to bring the challenge within time was a combination of the applicant's erroneous belief that the time limit was calculated by reference to working days rather than calendar years, and the temporary absence of legal representation during that crucial period. I note here that on a number of occasions during that 28-day period, the applicant advised the respondent in quite clear terms that she intended to challenge the Authority's determination.

[30] The length of the delay in filing the challenge was 13 days. This is calculated by reference to the date when Ms Singh first purported to do so on 10 November

2015. There was further delay while an application for leave to extend time was made.

[31] No prejudice or hardship to any other person resulting from the delay has been identified and more particularly by the respondent. That is despite comprehensive submissions in opposition to the application for extension of time. It is important to emphasise, as other judgments have, that such prejudice must arise from the delay and not merely from the bringing of a challenge with its inherent resultant delay and uncertainty. As Mr Towner conceded in exchanges with the Bench, the prejudices that he

submitted would affect the respondent and its witnesses would have all have been incurred if Ms Singh had challenged within time. In any event, such prejudices as contended for are more in the nature of inconveniences that may be compensable by costs if that is warranted.

[32] There is no evidence of effect, or particularly adverse effect, on the rights and liabilities of the parties as a result of the delays in bringing this challenge.

[33] The only subsequent event which the respondent has raised is the moving on to other employment of two of its principal witnesses in the proceedings. Despite the inference that these witnesses may be uncontactable, unbriefable or unavailable

to give evidence, one of them has provided a comprehensive affidavit in support of the respondent's opposition to this application after he left its employment. The applicant has identified where they now work in Auckland.

[34] Any problems in obtaining evidence that the respondent may claim by inference could not have resulted from Ms Singh's delay because its principal witnesses, Raymond Hall and Ethelred Chey, both left Compass's employment during the time when she was entitled to challenge as of right. Had Ms Singh filed within time, the respondent would have been in the same difficulties (if such they were) but without being able to do anything about that it cannot do now.

[35] Finally, the merits of the challenge are difficult to determine, not least because this is not a conventional appeal but rather, if leave is granted, an election to have a hearing de novo. Ms Singh was dismissed for serious misconduct for her management of a hospital kitchen, although there appears to be arguable merit in her assertion that this was a work performance issue that arose at a very difficult and stressful time in her private life, during which she should have been assisted, and not one of serious misconduct. Additionally, Compass obviously thought enough of her performance to urge her to transfer to the kitchen of another hospital so she could work under more supervision but, when she refused to agree to do so, it concluded that what it then said was her serious misconduct warranted dismissal from its employment altogether. On a challenge by hearing de novo the Court would start again with a clean slate and the parties would be required to present and establish their cases afresh.

Overall interests of justice

[36] Despite the unexplained delay in filing this application, which occurred between 10 November and 14 December 2015, which weighs against granting leave, other relevant factors cumulatively favour doing so, although that should be on terms. These factors include the absence of any proven real prejudice to the respondent or any other person; the fact that Compass was clearly on notice from very soon after the Authority's determination was delivered that Ms Singh was intent upon challenging the determination; and that there are relevant elements of her

dismissal by which she wishes to challenge justification for it which she is entitled to put before the Court on a challenge by hearing de novo if leave is granted.

Result

[37] The time for challenging the Authority's determination is, accordingly, extended to 14 December 2015, the date upon which the application was made and a draft statement of claim filed. That statement of claim will now be considered the primary pleading in the case and the appropriate filing fee will have to be paid. There are a number of conditions to this order which must also be satisfied by the applicant.

- (a) Irrespective of any conclusions about costs in the substantive proceeding, Ms Singh must compensate the respondent for its reasonable costs of opposing this application. It should not have been put to those costs. That order for costs is in the sum of \$2,000.
- (b) The applicant must prosecute her challenge expeditiously. In this regard, Ms Singh may have the period of 14 days from the date of this judgment to file and serve any amended statement of claim upon which she intends to rely and which should contain further particulars than are set out in her current statement of claim.
- (c) The respondent may have the period of 30 days within which to file and serve its statement of defence.
- (d) The case will then be the subject of a telephone directions conference with a Judge to deal with any interlocutory questions and to set the challenge down for hearing.
- (e) Leave is reserved for either party to apply for any further orders or directions on reasonable notice.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Thursday 26 May 2016