



Employment Court of New Zealand

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Talent Propeller Limited v UXK [2021] NZEmpC 2 (26 January 2021)

Last Updated: 29 January 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 2](#)
EMPC 224/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file a cross- challenge out of time
BETWEEN	TALENT PROPELLER LIMITED Plaintiff
AND	UXK Defendant

Hearing: On the papers
Appearances: R Upton, counsel for plaintiff
C Patterson, counsel for defendant
Judgment: 26 January 2021

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application for leave to extend time to file cross-challenge)

[1] The defendant applies to the Court for leave to file a cross-challenge out of time to a determination of the Employment Relations Authority in which a permanent non-publication order was made in respect of the defendant's identity.¹ I treat the application as one to extend the timeframe for filing, under [s 221\(c\)](#) of the [Employment Relations Act 2000](#) (the Act). The application for leave is opposed by the plaintiff.

¹ *Talent Propeller Ltd v YJL* [\[2020\] NZERA 284 \(Member Urlich\)](#).

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[2] The approach to applications of this sort is well settled.² Relevant factors include:

- Why the challenge was not filed within the required time
- The length of the delay in filing
- Any prejudice or hardship to any person
- The effect on rights and liabilities
- The interests of justice

[3] The Authority's determination is dated 22 July 2020. That is the date from which the 28-day timeframe for filing a challenge ran. The Authority determination dealt with a number of issues, including whether a non-publication order should be made. Two other issues are yet to be investigated and determined. The plaintiff filed a challenge in relation to

the Authority's determination on 29 July 2020. The challenge, which the plaintiff has elected to pursue on a non-de novo basis, alleges that the Authority erred in law in making a permanent non-publication order in respect of the defendant's name and identifying details. The plaintiff's statement of claim was followed by the filing of a statement of defence on 27 August 2020. A telephone directions conference was convened on 14 September 2020 and issues relating to the nature and scope of the challenge were raised by counsel for the defendant, including the extent to which the defendant could seek to support the Authority's determination on other grounds in light of the non-de novo nature of the plaintiff's challenge. It was agreed that counsel would confer, but no agreement as to the way forward proved possible. A draft cross-challenge, along with an application for leave, was filed on 23 September 2020.

[4] The application for leave is supported by an affidavit sworn by the defendant. The defendant confirms that there were some delays in processing their application for legal aid and says that while they were able to file a statement of defence within time, they were unable to file a cross-challenge within time. The defendant goes on to

2 See, for example, *Barry v Anoop Investments Ltd* [2008] ERNZ 204 (EmpC) at [20]. See also

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

explain that they discussed matters with their approved legal aid provider (counsel now acting), identified further grounds on which the non-publication order could have been made by the Authority and the potential difficulties in pursuing those grounds given the limited nature of the plaintiff's challenge and absent a cross-challenge. It was agreed that the issue would be raised with the Court, which was then done during the course of the 14 September 2020 telephone conference. When it became apparent that a cross-challenge would be required, the defendant promptly instructed their lawyer to prepare the necessary documentation. The delay, as the defendant explains, is a little over a month.

[5] As I have said, the plaintiff is opposed to the defendant's application for leave. It is said that no valid explanation has been provided for the delay; the delay, while not at the higher end of the scale, is not short; the plaintiff was entitled to believe that there would be no cross-challenge when the timeframe for filing elapsed and, if leave is granted, it will be prejudiced. In this regard it is said that a deliberate decision was made to file a non-de novo challenge and granting the application would increase the plaintiff's costs and compromise the narrow scope of the challenge.

[6] I am satisfied that the application ought to be granted. The defendant wishes to support the Authority's determination that their name and identifying details be permanently prevented from publication. That is an important issue from the defendant's perspective. While the argument can be pursued by way of defence to the plaintiff's challenge the wrinkle is that the defendant wishes to support the Authority's determination on other grounds.

[7] The reasons why the cross-challenge was not filed within time are touched on in the affidavit filed in support of the application. It appears that a decision was made that issues relating to the way in which the challenge might be heard would best be raised with the Court and counsel at the initial directions conference. This step took things beyond the timeframe for filing the cross-challenge. The parties were directed to discuss matters and given two days to do so; counsel for the plaintiff then filed an updating memorandum for the Court; and counsel for the defendant filed an application for leave. The delay was not short but must be viewed in context.

[8] I accept that there is a value in finality, as Mr Upton (counsel for the plaintiff) points out. But I do not accept that the plaintiff would suffer any real prejudice if leave is granted. The plaintiff says that it decided to pursue a non-de novo challenge to keep the issues for the Court narrow (and, I infer, less costly). It is true that opening the grounds of challenge up would undermine that strategy, but that was always a risk, depending on the way in which the defendant responded to the challenge as pleaded. The plaintiff may have felt a sense of relief once the 28-day time frame had passed and no cross-challenge was filed, but that was short-lived given that counsel for the defendant raised the issue at the first directions conference and discussions then took place. No steps have otherwise been taken, and no other prejudice (other than disappointed strategy expectations) has been identified. Any prejudice that might otherwise have been faced by the plaintiff can be dealt with by way of costs. If the application is not granted the defendant will lose an opportunity to seek to uphold the Authority's determination in their favour on other grounds.

[9] I turn to the overall interests of justice. They weigh in favour of the grant of leave. It is not unknown for the non-de novo challenge rights contained within s 179 of the Act to trip litigants and their advisors up, particularly as to the potential consequences of electing one sort of hearing or another and the mode of response. The core (narrow) issue is whether the Authority erred in deciding to order permanent non-publication of the defendant's identifying details. It is desirable that the defendant have an opportunity to support the Authority's determination on other grounds, and that the Court is able to actively grapple with the real controversy between the parties.

[10] The grounds for the application have been made out. The application is granted; the defendant must file and serve their cross-challenge within three working days of the date of this judgment; the plaintiff will then have the usual timeframe to file and serve any statement of defence. A directions conference is then to be convened at the earliest available date to progress the proceedings. Counsel should confer in advance of the conference and file (if possible) a joint memorandum setting out proposed timetabling directions for hearing.

[11] Costs on this application are reserved.

Christina Inglis Chief Judge

Judgment signed at 1.10 pm on 26 January 2021

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