



# Employment Court of New Zealand

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## Ututaonga v North Western Farms Limited [2021] NZEmpC 150 (14 September 2021)

Last Updated: 17 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 150](#)  
EMPC 132/2021

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

BETWEEN               RAYMOND AARON MARSHALL  
                              UTUTAONGA  
                              Applicant

AND                     NORTH WESTERN FARMS LIMITED  
                              Respondent

Hearing:             On the papers

Appearances:       S Henare, agent for applicant  
                          E L Smith, counsel for  
                          respondent

Judgment:           14 September 2021

### JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Ututaonga seeks an extension of time to file a challenge to a preliminary determination of the Employment Relations Authority (the Authority).<sup>1</sup>

[2] The Authority found that Mr Ututaonga could not pursue his personal grievances against North Western Farms Ltd (North Western Farms) in relation to an alleged unjustifiable dismissal and for breach of good faith.

[3] Mr Ututaonga left his employment with North Western Farms on 26 April 2019 and was paid his final wage payment on 3 May 2019. The Authority found the

<sup>1</sup> *Ututaonga v North Western Farms Ltd* [2020] NZERA 370 (Member E Robinson).

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unjustifiable dismissal grievance was raised in submissions filed in July 2020 and that the breach of good faith grievance was raised by the filing of Mr Ututaonga's statement of problem on 31 December 2019. On that basis, they both were raised well outside the 90-day period specified in [s 114\(1\)](#) of the [Employment Relations Act 2000](#). The Authority found no exceptional circumstances applied and, even if there were, it would not be just to allow Mr Ututaonga to pursue the grievances out of time.<sup>2</sup>

[4] The Authority's determination is dated 14 September 2020; the application for leave to extend time was received by the Employment Court on 13 April 2021. This means that Mr Ututaonga's application for leave to extend time was filed approximately six months after the final date on which it could be filed as of right.<sup>3</sup>

[5] North Western Farms opposes the application. It says the delay of six months is significant and that the overarching interests of justice do not favour the application being granted. It says where an applicant is seeking the indulgence of the Court in what is a very significant extension of time, a close examination of the merits is justified and that here the applicant's case is very weak. It says that granting an extension of time to file the challenge would be unfairly prejudicial to North Western Farms when the claim lacks merit.

[6] Mr Ututaonga is represented by his wife, Mrs Henare. Mr Ututaonga filed an affidavit in support of his application, and Mrs Henare also provided her own affidavit. Mr Ututaonga's affidavit largely consists of exhibits that appear to have been prepared by Mrs Henare. A great deal of the material supplied was directed to the substantive complaints Mr Ututaonga has in respect of his employment with North Western Farms. The challenge Mr Ututaonga wishes to bring out of time is to the determination of the Authority that found he was unable to pursue his grievances in the Authority. Although I have read the material Mr Ututaonga included on his substantive complaints, at this stage of the proceedings, it is of very little relevance and therefore is not addressed in this judgment.

2 [Employment Relations Act 2000, s 114\(4\)](#).

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

[7] However, Mr Ututaonga does include a statement setting out his reasons for the delay in filing the challenge. These largely revolve around correspondence being undertaken with the Authority between September and November 2020; his efforts to obtain legal advice (from September 2020); delays caused by a broken phone (in December 2020); an injury suffered by Mrs Henare which caused her some incapacity from December 2020 to February 2021; and, finally, delays resulting from Mr Ututaonga wanting to take breaks from writing documents, as he says he could not bear to relive what he says he endured while working with North Western Farms.

[8] Mrs Henare's affidavit is more in the nature of a submission than evidence. It also attaches several attachments, most of which are again directed to Mr Ututaonga's substantive complaints rather than the Authority's preliminary determination or the present application. In essence, Mrs Henare says it would be fair to allow Mr Ututaonga to be granted leave to pursue his challenge because his rights as an employee were "trampled on" by North Western Farms, and it has taken months to gather evidence against North Western Farms.

[9] The remaining matters in the Authority have not been progressed, and Mr Ututaonga is in breach of timetabling orders for filing evidence, which required him to file his evidence by 26 November 2020. Those matters are now on hold until Mr Ututaonga files his evidence.

[10] North Western Farms is a small company. At the time of Mr Ututaonga's employment, Mr Smith was its sole director. Mrs Smith is his wife and is the office manager. She also is now a director. Mrs Smith has filed an affidavit in opposition to Mr Ututaonga's application.

[11] I have read Mrs Smith's affidavit in full, and much of it is in response to Mr Ututaonga and Mrs Henare's substantive assertions. North Western Farms strongly disputes Mr Ututaonga and Mrs Henare's characterisation of the substantive issues and says Mr Ututaonga and Mrs Henare are seeking to redefine and extend Mr Ututaonga's original claim. Given I am not dealing with the substantive issues, nothing further needs to be said on Mrs Smith's response on those in this judgment.

[12] In respect of the present application, Mrs Smith points to the advice of Mr Ututaonga received from the Authority that a challenge had to be filed within 28 days of the determination and to other publicly available information on pursuing challenges. Mrs Smith says that North Western Farms would be prejudiced by the granting of leave, given that it is now over two years since the ending of Mr Ututaonga's employment. She says that, in addition to the time taken from North Western Farms' business and the costs incurred, the proceedings are causing North Western Farms further stress and hurt. I infer Mrs Smith is primarily referring to the stress and hurt caused to herself and to Mr Smith. She points out that, in every stage of this process, North Western Farms has incurred legal costs and the costs involved in liaising with witnesses who are prepared to provide evidence in support of North Western Farms' position.

[13] The submissions and affidavit filed by Mrs Henare on behalf of Mr Ututaonga describe in detail Mr Ututaonga's substantive claim. They include serious allegations about North Western Farms, Mr Smith and counsel. Mrs Henare's submissions conclude that Mrs Henare was unaware that she could request an extension of time for filing a challenge until advised by the Employment Court.

### **The Court considers various matters in such an application**

[14] Where a person applies for the exercise of the Court's discretion to extend time for filing a challenge, the Court will consider what the interests of justice require.

Factors that are likely to be considered include:<sup>4</sup>

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the conduct of the parties, particularly the applicant;
- (d) any prejudice or hardship to the respondent or to any other interested person; and

4 *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801 at [38].

- (e) the significance of the issues raised by the proceedings, both to the parties and more generally.

[15] Where a delay is very brief, leave generally will be granted by the Courts, without consideration of the merits.<sup>5</sup> Where the delay is significant, the merits may be considered, but a decision to refuse an extension of time based substantially on the lack of merit should only be made where the case is clearly hopeless.<sup>6</sup>

#### **Mr Ututaonga's application is unsuccessful**

[16] A delay of six months where the time limit is 28 days is very significant. Although there is some explanation for some of the delay, there is no satisfactory explanation for a delay of the length seen here.

[17] I note too that Mr Ututaonga has not progressed his claims for unlawful deductions and underpayment of wages and is now over nine months late in filing and serving his witness statements. That counts against leave being granted.

[18] While the prejudice suffered by North Western Farms does not appear to be such that it could not properly defend the proposed challenge, it is a small company, and it ought to have been entitled to consider the personal grievance claims to be closed once the challenge period had expired. I also am conscious that the Authority's determination that Mr Ututaonga wishes to challenge is preliminary only. If the extension were to be granted, Mr Ututaonga still would need to persuade the Court that the Authority was wrong not to allow him to pursue his personal grievances. If the substantive personal grievance claims were to proceed, they would not be heard for some time.

[19] While I recognise refusing an extension will mean the end of the road for Mr Ututaonga's personal grievance claims, there is no public interest in the issues involved and Mr Ututaonga retains his right to pursue his claims in respect of alleged unlawful deductions and underpayment of wages.

5 At [37].

6 At [39](c).

[20] Any review of the merits of the case can only be superficial at this early stage, but it is fair to say that the findings of the Authority that the personal grievance claims were not raised within the prescribed statutory period, and that there was no basis to grant leave for Mr Ututaonga to raise them after the expiration of that period, appear to be well founded. At this stage, the case for Mr Ututaonga cannot be described as "clearly hopeless," but it certainly is not strong. While I would not have refused the extension simply (or substantially) based on a lack of merit, the difficulties faced by Mr Ututaonga are relevant alongside the other factors.

[21] Standing back then, and considering the interests of justice generally, I am not satisfied that an extension of time ought to be granted for Mr Ututaonga to challenge the Authority's preliminary determination. The application is unsuccessful.

#### **Mr Ututaonga ought now progress his other claims before the Authority;**

#### **North Western Farms may seek costs**

[22] If Mr Ututaonga wishes to continue the claims he has in the Authority in respect of alleged unlawful deductions and underpayment of wages, he ought to take immediate steps to progress them by filing and serving his evidence.

[23] North Western Farms has signalled an intention to seek costs on an indemnity basis. It should endeavour to agree costs with Mr Ututaonga. If agreement is not achieved, it may file and serve a memorandum applying for costs within 20 working days of the date of this judgment. Mr Ututaonga then may file and serve his response to the application within a further 15 working days, and North Western Farms will have a final five working days in which to file and serve any reply submissions. Any such application then will be determined on the papers.

J C Holden Judge

Judgment signed at 9.30 am on 14 September 2021

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