



Employment Court of New Zealand

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Ward v Concrete Structures (NZ) Limited [2019] NZEmpC 158 (11 November 2019)

Last Updated: 14 November 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 158](#)

EMPC 3/2019

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

BETWEEN SAM WARD
 Applicant

AND CONCRETE STRUCTURES (NZ) LIMITED
 Respondent

Hearing: On the papers

Appearances: R Bryant, counsel for applicant
 KA Badcock, counsel for
 respondent

Judgment: 11 November 2019

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] Mr Ward has applied for leave to extend time to file a non-de novo challenge against that part of a determination of the Employment Relations Authority (finding that he had been unjustifiably dismissed from his employment with the respondent) dealing with the remedies awarded to him.¹ The application is opposed.

[2] The application is based on the reasons for the omission to bring the challenge within time; the length of the delay in filing (which is said to be short); the perceived merits of the proposed challenge; and the broader interests of justice. The opposition is primarily focused on prejudice.

1 *Ward v Concrete Structures (NZ) Ltd* [2018] NZERA Auckland 350.

SAM WARD v CONCRETE STRUCTURES (NZ) LIMITED [\[2019\] NZEmpC 158](#) [11 November 2019]

[3] The Court has jurisdiction to extend the time within which a challenge may be filed if doing so is in the interests of justice.² While the discretion is broad, it must be exercised in accordance with principle. The usual factors considered relevant include the reason for the omission to bring the case within time, the length of the delay, any prejudice or hardship, the effect on the rights and liabilities of the parties, subsequent events, and the merits insofar as they can be assessed at such an early stage.³

[4] The reason for the omission to file within time appears, on the basis of the documentation before the Court (namely a sworn affidavit), to lie squarely at the feet of the applicant's previous representative. The delay does not appear to have been occasioned by the applicant himself. Rather, he instructed his then advocate to file a challenge and the advocate did not do so.

[5] The date of the Authority's determination was 14 November 2018. That means that the last day for filing a challenge was 12 December 2018. The application for leave was filed on 4 January 2019. I would not describe the delay as minor; nor would I describe it as lengthy. What is clear is that an application for leave was filed promptly once the failure was discovered. There were subsequent delays in progressing the application.

[6] The proposed challenge effectively seeks to revisit the factual findings of the Authority. There are difficulties in assessing the likely merits in this context.

[7] I do not accept that there will be significant prejudice if leave is granted. In this regard, it is notable that Concrete Structures (NZ) Ltd has itself challenged the Authority's determination, and that challenge is currently before the Court. And while the respondent has raised concerns about the bona fides of the proposed challenge, I cannot be satisfied, on the material before the Court, that there is an adequate basis for these concerns. I accordingly put them to one side.

[8] Ultimately, I must be guided by the overall interests of justice. These include the broader importance of respecting (absent good reason) the statutory timeframes

2 [Employment Relations Act 2000, s 219.](#)

3. As set out in *An Employee v An Employer* [\[2007\] ERNZ 295 \(EmpC\)](#) at [9]. In relation to considering the merits see the limitations in *Almond v Read* [\[2017\] NZSC 80](#), [\[2017\] 1 NZLR 801](#).

provided for in the [Employment Relations Act 2000](#), together with the particular interests of the parties. In this case, it was the applicant's representative who appears to have been at fault in circumstances where the applicant had given timely instructions to file a challenge; there is an interest in the applicant being able to pursue his challenge rights; there is limited prejudice to the respondent in allowing the challenge to proceed; and I am satisfied that the broader interests of justice weigh in favour of the grant of leave.

[9] The application for leave for an extension of time to file a challenge is granted. The draft statement of claim is to be treated as if filed on the date of this judgment. The filing fee is to be paid promptly. The respondent will have the usual time for filing and serving any statement of defence. The proceeding should then be referred to a Judge in the usual way.

[10] Finally, the respondent submits that it would be appropriate to make an order for security for costs in the event that leave is granted. The applicant has raised an objection to the way in which this issue has been raised. It is not appropriate to make an order for security for costs against the applicant at this stage, and absent an adequate opportunity for substantive response. It may be that the respondent will wish to pursue such an application. Discussions between the parties may well be a useful first step. As the parties will no doubt be aware, absent an order from the Court staying execution of the Authority's orders against the respondent, such orders remain enforceable by the applicant in the usual way.

[11] In the circumstances, costs on the application to extend time are reserved.

Christina Inglis Chief Judge

Judgment signed at 11.55 am on 11 November 2019