



Employment Court of New Zealand

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Waste Management New Zealand Limited v Jones [2019] NZEmpC 19 (28 February 2019)

Last Updated: 5 March 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2019\] NZEmpC 19](#)
EMPC 436/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to extend time to file a statement of defence
BETWEEN	WASTE MANAGEMENT NEW ZEALAND LIMITED Plaintiff
AND	BRIDGET JONES Defendant

Hearing: On the papers
Appearances: D Erickson, counsel for plaintiff
M McDonald, advocate for defendant
Judgment: 28 February 2019

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application for leave to extend time)

[1] On 26 November 2018 the Employment Relations Authority determined that Bridget Jones was unjustifiably dismissed from her employment with Waste Management New Zealand Ltd.¹ The Authority ordered Waste Management to reimburse Ms Jones' lost wages of \$11,192.54 gross, under [s 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#) (the Act). In addition the company was ordered to pay her compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act of \$20,000.

¹ *Jones v Waste Management NZ Ltd* [2018] NZERA Christchurch 170.

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[2] On 20 December 2018 Waste Management challenged the determination, seeking to have it set aside together with declarations that Ms Jones was not unjustifiably dismissed or, as an alternative, to have the remedies awarded to her reduced. A full hearing of the entire matter before the Authority was sought.

[3] A statement of defence for Ms Jones was not filed within 30 days after the date on which the statement of claim was served, as required by reg 19(2) of the [Employment Court Regulations 2000](#). That omission means Ms Jones will not be able to defend the proceeding without the leave of the Court.²

[4] On 13 February 2019 Mr McDonald, Ms Jones' representative, filed an application seeking an extension of time to file a statement of defence. An extension of a further 14 days from the date when leave is granted was requested. Four grounds were relied on supported by Mr McDonald's memorandum. Underlying each of those grounds was that the omission to file

the statement of defence was not Ms Jones' fault. The grounds included that the length of the delay was said to be relatively short, there would be no prejudice to Waste Management if leave was granted, and the merits of Ms Jones' case are such that she has a realistic prospect of success. The interests of justice were said to favour granting leave. The application relied on the Employment Court's Practice Directions, s 219(1) of the Act and *P v A*.³

[5] Surprisingly, the application was not accompanied by a supporting affidavit for, or on behalf of, Ms Jones explaining why a statement of defence was not filed. An affidavit should have been filed and it is a matter of good fortune for the outcome of this application that Waste Management does not object to leave being granted. Its counsel, Mr Erickson, filed a memorandum providing further relevant information that has been relied on in this decision.

[6] The reason given to explain what happened was that counsel who represented Ms Jones in the Authority's investigation meeting has suffered an unspecified medical problem rendering him unable to accept further instructions.

2 [Employment Court Regulations 2000](#), reg 19(4).

3 *P v A* [2017] NZEmpC 92.

[7] No further information about the medical problem was supplied to explain why it has, in some way, prevented Ms Jones from providing instructions to her advocate. The state of affairs described in the application, and supporting memorandum, may well have fallen short of an adequate explanation for failing to comply with reg 19(4) but the situation was remedied by Mr Erickson's memorandum explaining the company's position in relation to the application.

[8] The statement of claim was served on 7 January 2019. That meant a statement of defence was required to be filed no later than 7 February 2019, taking into account the public holiday of Waitangi Day on 6 February. Mr Erickson acknowledged having received advice on 7 February 2019, from Mr McDonald, that Ms Jones intended to defend the proceeding but was having difficulty obtaining her file from her former counsel and, as a result, had been unable to progress drafting a statement of defence.

[9] Waste Management did not oppose the application and accepted that:⁴

- (a) the omission in filing was for a genuine reason outside of Ms Jones' control;
- (b) the proposed timeframe for filing the statement of defence was reasonable;
- (c) that it would not suffer any material disadvantage if the orders sought were granted;
- (d) the proposed timeframe would not materially impact on anyone's rights and liabilities; and
- (e) the company conceded Ms Jones had prospects of success because she had won in the Authority.

4 Relying on *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].

[10] From the memoranda it is apparent that the parties have reached agreement about a possible application for a stay of execution of the Authority's determination if matters get that far.

[11] As has already been indicated, the memoranda followed and sought to apply the criteria in *An Employee v An Employer*. With one minor modification I agree that course is appropriate. I accept that the omission was genuine, given the difficulties encountered in getting access to Ms Jones' file and, as a result, compromised her ability to give instructions to Mr McDonald. That was a genuine reason outside of her control. The other criteria are also satisfied; the timeframe proposed for filing is reasonable, and Waste Management is not prejudiced or disadvantaged if leave is granted.

[12] The minor modification arises from what has been perceived as a need to consider the merits in situations such as this. Judge Perkins noted in *P v A* that the criteria in *An Employee v An Employer* must now be read in light of the Supreme Court judgement in *Almond v Read*.⁵ The Supreme Court emphasised that the ultimate question is what the interests of justice require. Specifically, the Court noted that where a litigant misses a specified time by a day or so, as a result of an error or miscalculation, and applies for an extension of time promptly, the Court was not inclined to characterise the application as one seeking an indulgence. The Court said:⁶

Accordingly, where a litigant takes steps to exercise the right of appeal within the required timeframe (including advising the other party), but misses the specified time limit by a day or so as a result of an error or miscalculation (especially by a legal adviser) and applies for an extension of time promptly on learning of the error, we do not think it is appropriate to characterise the giving of an extension of time as the granting of an indulgence which necessarily entitles the court to look closely at the merits of the proposed appeal. In reality, there has simply been a minor slip-up in the exercise of a right. An application for an extension of time in such a case should generally be dealt with on that basis, with the result that an extension of time should generally be granted, desirably without opposition from the respondent.

[13] While the Supreme Court decision dealt with an appeal the same reasoning applies to applications such as the present.⁷

5 *P v A*, above n 3, at [21]; *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

6 *Almond v Read*, above n 5, at [37].

7 See, for example, *Rayner v Director General of Health* [2019] NZEmpC 13.

[14] In this case the reason given and accepted for the failure to file on time can be seen as akin to a minor slip-up. While not an omission or error in the sense referred to in *Almond v Read*, the same reasoning ought to apply. The unavailability of Ms Jones' file did not arise from any omission on her part and it would not be just to preclude her from defending the proceeding.

Outcome

[15] The application is granted. The time to file the statement of defence is extended and it must be filed and served no later than 15 March 2019.

[16] Costs are reserved.

K G Smith Judge

Judgment signed at 11.40 am on 28 February 2019

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