

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2014] NZEmpC 81
WRC 27/13**

IN THE MATTER OF an application for leave to file challenge
out of time

AND IN THE MATTER of an application to file notice of
opposition out of time

BETWEEN BRENDAN KELLERMAN
Applicant

AND STONEWARE 91 LIMITED t/a
SWITCHED ON GARDENER
Respondent

Hearing: (on the papers - by consideration of documents dated 16 August
2013 and 16 April 2014)

Judgment: 22 May 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment determines an application for leave to bring a challenge in respect of a costs determination of the Employment Relations Authority (the Authority) dated 29 October 2013.¹ The Authority costs determination followed a substantive determination where the Authority found that the applicant did not have a personal grievance and that his dismissal from employment with the respondent was justified. That determination has not been challenged.

[2] In the costs determination the respondent sought indemnity costs in excess of \$11,000. The Authority determined that taking into account the costs reasonably

¹ *Kellerman v Stoneware 91 Ltd t/a Switched on Gardener* [2013] NZERA Wellington 136.

incurred by the respondent, a rejected *Calderbank* offer, the nature of the applicant's claims and the principle that an unsuccessful party should contribute to the costs of the successful party, an increase above the notional daily tariff was appropriate. Accordingly, the Authority Member determined that the applicant should pay the respondent \$6,000 as a contribution towards the respondent's costs.²

[3] On 21 November 2013, the applicant prepared and dated a challenge. According to the date stamp on the envelope subsequently received by the Court, the document was posted on 25 November 2013. It was delivered to the Court on 28 November 2013. Time for the filing of a challenge expired on 26 November 2013. It was accordingly two days out of time. Court staff then advised the applicant that an application for leave to file a challenge out of time would have to be filed.

[4] On 10 December 2013, the applicant signed an application for leave. It was received by the Court on 16 December 2013. On 16 January 2014, the applicant sent copies of the documents he had filed and a covering letter to the respondent.

[5] Eventually the advocate for the respondent filed its own application for leave to file an objection to the applicant's application. This was supported by an affidavit of Mr A Mai dated 16 April 2014, in which it was asserted that the respondent only became aware of the application for leave to challenge the costs determination on 24 March 2014. This is disputed by the applicant.

Relevant principles

[6] The provisions of s 219 and 221 of the Employment Relations Act 2000 (the Act) permit the Court to extend time in a situation such as the present. The criteria were set out as follows in *Stephenson v Hato Paora College*:³

There are well-established principles for the exercise of the Court's discretion to make orders extending time. The jurisdiction is derived from s 219 of the Employment Relations Act 2000 which, apart from a style change, is identical to s 138 of the Employment Contracts Act 1991. ... The overriding consideration is the justice of the case. The following matters, where relevant, are material to the exercise of the discretion:

1. The reason of the omission to bring the case within time.

² At [23]-[24].

³ *Stephenson v Hato Paora College* [2002] 2 ERNZ 103 (EmpC) at [8].

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.

Discussion

[7] The applicant, who is unrepresented, states that the late filing was due to a miscalculation. It was posted to the Court prior to the expiry date but received after it. The applicant also said that he had been unemployed since his dismissal from the respondent on 22 May 2012 and had been under financial stress, implying that these factors contributed to the inadvertent error.

[8] The length of the delay is modest; and the applicant did attempt to file his challenge within the statutory period of 28 days.

[9] The respondent seeks leave to file its objection to the applicant's application out of time, apparently because there was delay in the application for leave being brought to the respondent's attention. It is not clear how this delay occurred but in the circumstances where both parties have timing issues, leave is granted.

[10] The respondent's reasons for objecting turn on its view of the merits. It asserts that the applicant has a history of litigation where he has previously made unsubstantiated claims against his employers. It is further asserted that whilst indemnity costs in the sum of \$11,100 were sought, \$6,000 was awarded which is only 54 per cent of the amount claimed.

[11] Essentially the respondent is asserting that the challenge to the costs determination is without merit.

[12] Having considered the Authority's determination as to costs, and having regard to the quantum of the amount at issue, it is in the Court's assessment that the interests of justice require the Court to consider the issues raised.

[13] Accordingly leave is granted to file the statement of claim out of time.

Conclusion

[14] The following directions are made:

- (a) The applicant is to file and serve his statement of claim within 14 days of the date of this decision.
- (b) The statement of defence is to be filed and served within 14 days after service of the statement of claim.
- (c) Within 14 days of the date of filing and service of the statement of defence, the applicant is to file evidence by affidavit (if any) and submissions in support of his challenge.
- (d) Within 14 days thereafter the respondent is to file and serve its evidence (if any) and submissions in support of its position.
- (e) Within 14 days thereafter, the applicant is to file any final evidence (if any) and submissions in reply.

[15] Unless one or both parties advance reasons as to why such a course should not be adopted, the Court will resolve the challenge on the papers.

B A Corkill
Judge

Judgment signed at 3.00 pm on 22 May 2014