IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 90
WRC 2/14

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	NEW ZEALAND AIR LINE PILOTS' ASSOCIATION Plaintiff
AND	AIRWAYS CORPORATION OF NEW ZEALAND LIMITED Defendant

Hearing:	On the papers (submissions dated 21 February and 6 March 2014)
Counsel:	R McCabe, counsel for the plaintiff S Hornsby-Geluk and M Harrop, counsel for the defendant
Judgment:	12 June 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] A litigant wishing to challenge a determination of the Employment Relations Authority (the Authority) must do so within 28 days after the date of the determination.[1] In appropriate cases, however, the Court may, in the exercise of its discretion, make an order extending that time period.[2] In this case the plaintiff claims that its challenge was made within the 28-day limitation period but in the alternative it makes an application, if necessary, for an extension of time within which the challenge may be made. For its part, the defendant contends that the challenge was made outside of the 28-day period and opposes the plaintiff's

[1] Employment Relations Act 2000, s 179(2).
[2] Section 219.

application for an extension of time. Strictly speaking the parties should be described as the "intending plaintiff" and the "intended defendant," or applicant and respondent, respectively, but they have been named in the draft pleadings and throughout counsel's submissions as plaintiff and defendant, and so for ease of reference I will continue to use that terminology.

[2] The issue of whether the challenge was made within 28 days involves a consideration of the relevance (if any) of what is commonly referred to as the "Christmas vacation" in the calculation of the 28-day time period. This, in turn, involves an analysis of the relevant provisions in the Employment Relations Act 2000 (the Act) and the Employment Court Regulations 2000 (the Regulations). It is not the first time that the issue has been before the Court and nor should this case be seen in isolation. The issue also arises in another proceeding currently before the Court, in which I will endeavour to issue a contemporaneous interlocutory judgment.

The background

[3] The plaintiff is a union representing pilots and air traffic controllers. It is a party to a collective agreement with the defendant Corporation, described in the draft pleadings as a state-owned enterprise which, inter alia, provides air traffic control services in New Zealand. The dispute before the Authority related to a clause in the collective agreement which provided how rest periods for air traffic controllers on rostered shifts should be managed in a specific set of circumstances. The plaintiff alleged that the defendant refused to provide relief staff to cover air-traffic controllers' rest periods in accordance with the clause in question. In its determination dated 10 December 2013, the Authority rejected the plaintiff's claim, concluding that the defendant was not in breach of its obligations under the collective agreement.[3] Taking the 28-day limitation period at its face value, the plaintiff then had until 7 January 2014 in which to lodge its challenge.

[4] On 23 December 2013, counsel for the plaintiff, Mr McCabe, emailed counsel for the defendant, Ms Hornsby-Geluk, stating:

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[3] *New Zealand Airline Pilots Association v Airways Corporation of New Zealand Ltd* [2013] NZERA Wellington 158.

Hi Susan

I have been instructed to file a challenge to the above decision.

Are you able to accept service?

Regards

Richard McCabe

[5] Ms Hornsby-Geluk responded by email dated Monday, 13 January 2014 in these terms:

Happy New Year Richard

I apologise for the delay in replying – this is my first day back in the office.

I confirm that I am authorised to accept on behalf of Airways.

[6] On 14 January 2014, Ms Clare Abaffy, a solicitor employed by the plaintiff at its Auckland office, sent an email to Ms Hornsby-Geluk attaching a copy of a statement of claim which she had forwarded to the Wellington registry of the Court. In the second paragraph of her email, Ms Abaffy stated:

> I understand the statement of claim has been filed out of time, and we are in the process of making an application for leave to file out of time.

[7] The application for leave to file the challenge out of time was filed on 16 January 2014. In a supporting affidavit dated 14 January 2014, Ms Abaffy deposed, relevantly:

> 3. I was instructed to file a challenge to the Employment Relations Authority's determination dated 10 December 2013, while Mr McCabe (Legal Counsel for NZALPA) was on leave. I inadvertently overlooked the decision of *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 132. Therefore, I calculated the time for filing excluding the days referred to in regulation 74B of the Employment Court Regulations 2000.
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> ...
>
> 6. I am disappointed that I inadvertently overlooked *Vice-Chancellor of Lincoln University v Stewart*. I am solely responsible for the matter not being filed on 10 January [2014]. I sincerely request that the Court grant the application made for late filing because, in my view, it would be grossly unfair that members' of NZALPA who work at Airways be denied the ability to have the matter heard and considered on the merits by the Employment Court because of my error.

The law

[8] Regulation 74B, which Ms Abaffy referred to in her affidavit and reg 74A were inserted in the Regulations as from 10 December 2004. Because of their significance, I set them out in full:

> **74A What happens to timing when Court is closed**
>
> (1) This regulation applies when—
> (a) the time for doing an act at an office of the Court ends on a day on which the office is closed; and
> (b) the act cannot be done because the office is closed.
> (2) The act is treated as being in time if it is done on the next day on which the office is open.
>
> **74B What happens to timing in Christmas period**
>
> (1) This regulation applies when the period of time within which an act must be done is calculated.
> (2) The 12 days starting with 25 December in one year and ending with the close of 5 January in the next year are not counted.
> (3) Subclause (2) is subject to—
> (a) an express provision in any Act; or
> (b) an express provision in these regulations; or
> (c) a direction of the Court.

[9] The statutory provision which requires a challenge to a determination of the Authority to be made within 28 days is prescribed in s 179 of the Act. Relevantly, s 179 states:

> **179 Challenges to determination of Authority**
>
> (1) A party to a matter before the Authority who is dissatisfied with the determination of the Authority or any part of that determination may elect to have the matter heard by the Court.
>
> (2) Every election under this section must be made in the prescribed manner within 28 days after the date of the determination of the Authority.
>
> ...

[10] In her affidavit, Ms Abaffy referred to the decision of this Court in *Vice-Chancellor of Lincoln University v Stewart*.[4] In that case Judge Couch, in relation to the juxtaposition between the Regulations and the Act, stated:

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[4] *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 132 (EmpC) [*Lincoln University*].

> [10] … Section 179(2) is clear, explicit and unqualified. For the purposes of regulation 74B(3) it is an "express" provision of the Act. It follows that, in any case where the application of regulation 74B(2) would have the effect of extending the 28-day time period in s 179(2), the regulation does not apply.
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> [11] The position would have been the same even if subclause (3) of reg 74B had not been included. The Employment Court Regulations 2000 are a form of delegated legislation made pursuant to the power conferred by s 237 of the Employment Relations Act 2000. Unless the empowering statute so provides, delegated legislation cannot override or otherwise be inconsistent with a statute, particularly the statute under which it was made.

[11] Judge Couch concluded that reg 74B(2), which excludes the 12-day period between 25 December and 5 January in the calculation of a time period, was "inevitably inconsistent" with what he referred to as the 28-day "express provision" in s 179(2) of the Act.[5] In other words, the Court in *Lincoln University* effectively concluded that reg 74B was inconsistent with the Act and, therefore, ineffective or ultra vires the power under which it was purportedly made.

[12] Although Judge Couch stated that the 28-day period prescribed in s 179(2) of the Act could not be modified by the Regulations, he did accept that the Act, in particular s 179(2), was subject to the provisions of the Interpretation Act 1999. His Honour stated:

> [15] Although the 28-day period provided for in s 179(2) may not be modified by regulations made under the Act, the Employment Relations Act 2000 is subject to the provisions of the Interpretation Act 1999. …

[13] The two relevant provisions in the Interpretation Act 1999 which Judge Couch identified were s 35(6), which deals with time, and s 29, which contains the definition of "working day".[6] Respectively, the relevant provisions in each section of the Act state:

> **35 Time**
>
> …
>
> (6) A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or the last day of that period is not a working day, be done on the next working day.

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[5] At [14].
[6] At [15]-[16].

29 Definitions

...

working day means a day of the week other than—
(a) a Saturday, a Sunday, Waitangi Day, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, and Labour Day; and
(b) a day in the period commencing with 25 December in a year and ending with 2 January in the following year; and
(c) if 1 January falls on a Friday, the following Monday; and
(d) if 1 January falls on a Saturday or a Sunday, the following Monday and Tuesday.

...

[14] Commenting on these provisions, Judge Couch said:

> [17] These provisions do have the effect in some cases of extending the period specified in s 179(2) of the Employment Relations Act 2000 but only where the 28-day period expires on a day which is not a working day as the term is defined in the Interpretation Act. They do not operate to exclude from the calculation of the 28-day period any days which are not working days.

[15] Judge Couch then turned his mind to reg 74A which deals with what happens to timing when the Court registry office is closed. His Honour held that similar considerations would affect the application of reg 74A. His Honour stated:

> [19] For the reasons set out above, reg 74A cannot be effective to extend the 28-day period specified in s 179(2). To the extent that reg 74A is based on the provisions of s 35(6) of the Interpretation Act 1999, however, its effect is achieved to that extent by s 35(6).

[16] In *Trans Otway Ltd v Hall*, Judge Couch had occasion to revisit his decision in the *Lincoln University* case.[7] His Honour confirmed that in the earlier decision he had found that reg 74B(2) did not apply to the 28-day time period prescribed by s 179(2) of the Act for two principal reasons. First, sub-reg (3) of the regulation made sub-reg (2) subject to "an express provision in any Act" and s 179(2) was an express provision of an Act. Secondly, the Regulations were made pursuant to a power granted by s 237 of the Act and that section did not authorise the making of regulations which modified or overrode provisions of the Act.[8] Judge Couch considered and rejected several submissions advanced by counsel for the applicant in

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[7] *Trans Otway Ltd v Hall* (2010) NZELR 560 (EmpC).
[8] At [9].

support of counsel's principal submission that the *Lincoln University* case was wrongly decided.[9]

[17] Of particular relevance in the *Trans Otway* case was a submission advanced by counsel that there was no conflict between the provisions of s 179 and reg 74B(3) as s 179 did not expressly state that no variation of the 28-day time limit was permitted - it simply stated what the time limit was. In response to that submission, Judge Couch said:

> [15] This submission also proceeds on a misunderstanding, in this case what is meant by the term "an express provision in any Act". What it contemplates is a provision of an enactment which is "express" in the sense of being positively stated as opposed to implicit. Section 179(2) requires that "every" election "must" be made within the 28 day period. That wording leaves no room for variation. It may be contrasted with expressions used in the regulations such as "as soon as practicable" and "without delay", which are less precise and whose application will depend on the circumstances.

[18] In *McLeod v National Hearing Care (NZ) Ltd*, I had occasion to consider the regulations in question and I referred to possible arguments which could be advanced so as to retain the integrity of reg 74B(2) as opposed to having it declared ultra vires.[10] As I did not hear argument on the issue in that case, however, I declined to depart from the reasoning in *Lincoln University* and *Trans Otway*.[11]

[19] In the case before me all the issues have been ably argued in submissions and so I briefly refer again to some of the points I raised in *McLeod*. In my judgment in *McLeod* I stated:

> [21] Regulation 74B would appear to have been designed to ameliorate any unfairness that might otherwise result if the Christmas/New Year period was to be included in the calculation of time limitations under the Act. It was introduced shortly after, and most likely in response to, the decision of this Court in *Shepherd v Glenview Electrical Services Ltd* where Chief Judge Colgan noted that: "However desirable it might be to have a 'grace period' during the Christmas break, I do not think it is possible for the Court to impose by itself a variation to the statutory limitation period contained in s 179(2) and reg 7(1)."
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> ...

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[9] At [10]-[16].
[10] *McLeod v National Hearing Centre* (NZ) [2012] ERNZ 466 (EmpC).
[11] At [29].

[25] The fundamental question is whether reg 74B can be read consistently with the primary legislation. As noted in *Bennion on Statutory Interpretation* there is a presumption of validity and "delegated legislation must be presumed to be valid unless and until declared invalid." The principle was recognised by the Court of Appeal in *Harness Racing New Zealand v Kotzikas* in these terms:

> [62] At the level of fundamental principle, what is termed the presumption of validity also needs to be kept firmly in view. In the area of delegated legislation, matters are presumed to have been done regularly and lawfully, and Courts will only interfere in a clear case: *Edwards v Onehunga High School Board.* That said, an improper purpose will override this presumption of validity.

[26] There is also a well established principle that a regulation must be interpreted so as to be reconciled with its empowering statute, or if it cannot be reconciled, the rule must give way to the plain terms of the Act, *Ex parte Davis, In re Davis*. In *Wielgus v Removal Review Authority*, Fisher J made the comment that an "interpretation which preserves the validity of the regulation is plainly to be preferred."

[20] *Bennion on Statutory Interpretation*, in reference to delegated legislation, refers to the rule of primary intention in these terms:[12]

> There are various types of delegated legislation, but all are subject to certain fundamental factors. Underlying the concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it...
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> The main reason why the legislature delegates is that it cannot itself go into sufficient detail. The answer is two-tier legislation. The top tier is the enabling Act, sometimes known as a skeleton Act or ... a streamlined Act. The second tier is laid down in delegated legislation, which can easily be adjusted in the light of experience of its working. The true extent of the power governs the legal meaning of the delegated legislation. The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention. '[Power delegated by an enactment] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.

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[12] FAR *Bennion Statutory Interpretation* (4th ed, Butterworths, London 2002) at 215-216 [*Bennion*]. See also Ross Carter and others *Subordinate Legislation in New Zealand* (LexisNexis, Wellington 2013) at [12.2].

> The court will assume that the delegate intended to conform to the rule of primary intention, and will construe ambiguous provisions in the instrument accordingly. 'In other words, the courts will not be astute to ascribe to the person by whom the [delegated] legislation was made an intention to make ultra vires provision'...

[21] It seems to me, with respect, that Judge Couch was correct in concluding in *Lincoln University* that the Act, in particular the 28-day period provided for in s 179(2), is subject to the provisions of the Interpretation Act 1999. The position is covered by what *Bennion* refers to as the informed interpretation rule which is described as the inference that the legislator, in settling the wording of the enactment, intended it to be given a fully informed, rather than a purely literal, interpretation.[13] *Bennion* goes on to state:[14]

> For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it ... the provisions of other Acts *in pari materia* ...

Discussion

[22] As noted in [3] above, a strict application of the 28-day requirement would mean that the challenge in the present case had to be filed by 7 January 2014. That date would not have been affected by the provisions in the Interpretation Act 1999 because Tuesday, 7 January 2014 was a working day. If, however, the 28-day period had expired on a day during the period 25 December – 2 January, then the Interpretation Act 1999 would have application in the sense that any particular day during that period is effectively defined as a non-working day and, subject to s 29(c) and (d) of that Act, the challenge would not need to be made until 3 January. In other words, the 28-day period prescribed in s 179(2) of the Act is not set in stone. If, for example, the Authority had issued its determination on 27 November 2013, a strict application of the 28-day requirement would mean that the challenge would have to be made on or before 25 December but the relevant provisions of the Interpretation Act 1999 effectively grant a 10-day extension meaning that the party seeking to make the challenge would have until 3 January 2014 (i.e. 37 days) in which to do so rather than the 28 days allowed under s 179(2).

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[13] At 449.
[14] At 501.

[23] On the other hand, to take another example, if the Authority had issued its determination on Friday, 6 December 2013 then the 28-day period would have expired on Thursday, 2 January 2014 and, because of the closure of the Court registry office during the Christmas vacation, a strict application of s 179(2) of the Employment Relations Act 2000 would mean that any challenge would have to be made on or before 24 December. In other words, in that situation a party seeking to make the challenge would have only 18 days in which to do so instead of the 28 days contemplated in the legislation. It is also probably fair to observe that the 18-day period between 6 and 24 December is often the busiest time of the year for lawyers practising in this jurisdiction. As noted, however, in that situation, putting the Regulations to one side, the Interpretation Act 1999 would operate so as to allow the challenge to be filed on 3 January 2014.

[24] There is a practical difficulty, however, with a requirement that something is to be filed in this Court on 3 January in any year. The Employment Court registries are closed between 25 December and 6 January. The official website information about the most recent Christmas vacation, for example, stated (relevantly):

> **Christmas hours and emergency contacts:**
>
> The Employment Court registries are closed from 25 December 2013 to 6 January 2014.
>
> **Advice for parties who wish to file a challenge to the Employment Relations Authority determinations:**
>
> Any challenge to a determination of the Employment Relations Authority must be filed within 28 days from the date of determination. Please note that you need to include in your calculation all weekends and public holidays. If the last date for filing a challenge falls in between 25 December 2013 and 6 January 2014 the challenge should be filed on 6 January 2014.

[25] It seems to me that regs 74A and 74B really do no more than give effect to practical realities in this jurisdiction. In recognition of the fact that the Court registries are closed between 25 December and 6 January, reg 74B operates so as to provide that the period beginning on 25 December and ending with the close of 5 January, the traditional "Twelfth Night", is not to be counted when calculating the period of time within which a particular act must be done. Under that approach, as I noted in *McLeod*, reg 74B and s 179 of the Act can be reconciled or read consistently in that the regulation is expressed to apply only to the calculation of time and not to

the number of days or the amount of time given.[15] In that way, the 28-day time limit is not extended but some days simply do not count in the calculation of the 28 days.

[26] Such an interpretation would be consistent with the well-established presumption of validity which, the Court of Appeal *in Harness Racing New Zealand v Kotzikas*, stated in these terms:[16]

> In the area of delegated legislation, matters are presumed to have been done regularly and lawfully, and courts will only interfere in a clear case.

[27] I also see such an interpretation as being consistent (or at least not necessarily inconsistent) with the contextual approach to interpretation described in the passage from *Bennion* referred to at [20] above. In other words, in appropriate cases, reg 74B will apply to the actual calculation of the 28-day period in s 179(2) of the Act in the same way that ss 29 and 35 of the Interpretation Act will apply. To that extent, a contextual approach to interpretation of the provisions in question indicates a consistency in the primary intention of the legislature.

[28] For these reasons, and with some diffidence, I respectfully disagree with the conclusion reached by this Court in *Lincoln University* where it was held that the Regulations were invalid. I do not see them, for example, as being in the category of delegated legislation described by *Bennion* as an attempt "to widen the purposes of the Act to add new and different means of carrying them out or to depart from or vary its ends."[17] Rather, I see the Regulations as being ancillary to the statutory requirements in so far as they deal with specific incidental matters relating to time and the calculation of time which give practical recognition and effect to the administrative realities in the operation of this Court's registry offices.

[29] I acknowledge that the drafting of reg 74B is not as precise as one would like to see. Regulation 74B(3)(a), for example, refers to "an express provision in any Act" whereas the word "Act" is defined in reg 3(1) as "the Employment Relations Act 2000". The use of words "any Act" as distinct from "the Act" would appear to indicate an intention to include a reference to express provisions in other enactments

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[15] *McLeod*, above n 10, at [27].
[16] *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [62].
[17] Bennion, above n 12. At 216.

apart from the Employment Relations Act 2000. In the present case, I do not see the need to take this matter any further apart from noting the contradiction in terminology.

[30] Application of reg 74B to the facts of the present case would mean that in computing the 28-day time period in which the plaintiff's challenge needed to be filed, the 12 days starting on 25 December 2013 and ending with the close of 5 January 2014 are not to be counted. On that basis, as the Authority's determination was issued on 10 December 2013, the 28-day limitation period would not have expired until Monday, 20 January 2014 meaning, as the plaintiff contends, that its challenge which had been received by the Court for filing on 16 January 2014, had been made within time.

[31] I would add this additional observation. In [7] above I record that Ms Abaffy had deposed in her affidavit that she had overlooked the decision in *Lincoln University* and had relied on reg 74B in calculating the expiry date of the 28-day period. Ms Abaffy is a qualified solicitor. In this jurisdiction s 236 of the Act allows parties to choose any other person to represent them in both the Authority and the Court. If Ms Abaffy was unaware of the decision in *Lincoln University* and content to rely upon the Regulations, how much more likely is it that lay representatives or litigants in person would find themselves in a similar situation? It seems to me that given this observation coupled with the special equity and good conscience jurisdiction of the Court under s 189 of the Act, there is special significance in the statement made by Fisher J in *Wielgus v Minister of Immigration* that "an interpretation which preserves the validity of the regulation is plainly to be preferred."[18]

[32] Given my conclusions regarding the validity of the Regulations, it is unnecessary to have to consider the plaintiff's alternative application for an order pursuant to s 219 of the Act extending the time in which to file its challenge. I record, however, that had it been necessary I would have had no hesitation in granting the application. The principles applicable to the exercise of the discretion conferred on the Court by s 219 are well established and were summarised by Judge

[18] *Wielgus v Minister of Immigration* [1994] 1 NZLR 73 (HC) at 81.

Couch in *Lincoln University*.[19] I do not intend to go through them in detail but the fundamental principle which must guide the Court in every case is the justice of the case based on factors such as the length of the delay, the reason for the delay, the merits of the challenge and any prejudice which might result. In the present case, no prejudice is claimed by the defendant and I am satisfied that on any consideration of the other recognised factors, the justice of the case favours the granting of the leave sought.

[33] For the reasons stated, I have concluded that the plaintiff's challenge was made within time. Had it been necessary, however, I would have granted leave under s 219 for an appropriate extension of time. The draft statement of claim dated 10 January 2014 is to be accepted for filing by the Registry.

[34] Costs are reserved.

A D Ford

Judge

Judgment signed at 12.45 pm on 12 June 2014

[19] *Lincoln University*, above n 4, at [21].