

**IN THE EMPLOYMENT COURT  
WELLINGTON**

**[2014] NZEmpC 91  
WRC 7/14**

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	PHILLIP VINCENT PETERS Plaintiff
AND	HOUSING NEW ZEALAND CORPORATION Defendant

Hearing:	On the papers (submissions dated 26 February, 7 March and 1 May 2014)
Appearances:	B Paradza, counsel for the plaintiff B Scotland, counsel for the defendant
Judgment:	12 June 2014

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**JUDGMENT OF JUDGE A D FORD**

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**Introduction**

[1] Between November 2009 and May 2013, the plaintiff, Mr Phillip Peters, worked as a Housing Advisor for the defendant at its Porirua Call Centre. On 31 May 2013, he was summarily dismissed. He issued proceedings in the Employment Relations Authority (the Authority) claiming that his dismissal was unjustified. His claim was unsuccessful. He then filed a statement of claim in this Court challenging the Authority's determination.<sup>1</sup> In response, the defendant filed an application seeking a declaration that the challenge had been filed out of time. That is the issue before the Court. The plaintiff claims that his challenge was filed within time but, in the alternative, he seeks leave to challenge out of time. No statement of defence has yet been filed.

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<sup>1</sup> *Peters v Housing New Zealand Corporation* [2013] NZERA Wellington 154.

## Background

[2] Mr Peters worked on permanent nightshift. His role involved the provision of tenancy related advice to the defendant's tenants over the telephone. In his statement of claim, Mr Peters explained that there was one particular tenant who "was an extremely difficult client for many housing advisers to handle." The defendant had put in place measures and instructions as to how to handle calls from this person. Mr Peters said that the tenant, who was not in good health, "demanded attention and would not let go until he got what he wanted."

[3] It appears from the pleadings that over a period of time Mr Peters developed a sympathetic rapport with the difficult client. He came to the belief that the defendant was not addressing the tenant's income-related rent problem satisfactorily and so he apparently began to advocate on the tenant's behalf – to the extent of offering to support the tenant in a matter against the defendant in the Tenancy Tribunal. Mr Peters claims that the defendant would have evicted the tenant from his place of residence had he not intervened and assisted the tenant in the way that he did.

[4] Mr Peters alleges that he was dismissed because the defendant considered that he had acted in an inappropriate manner in handling calls from the tenant in question and because of certain "unfortunate comments" he had made which the defendant alleged constituted serious misconduct. Mr Peters issued personal grievance proceedings in the Employment Relations Authority claiming that he had been unjustifiably dismissed. In its determination dated 28 November 2013, the Authority rejected Mr Peters' claim, although it accepted that he had been "clearly acting in what he thought was the best interests of the client."<sup>2</sup> The Authority nevertheless determined that the defendant's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.<sup>3</sup>

[5] Mr Peters then sought to challenge the Authority's determination in this Court. His statement of claim was filed in the Court registry office on 6 January 2014. On 17 January 2014, the defendant filed an application for a

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<sup>2</sup> At [71].

<sup>3</sup> At [73].

declaration that the challenge had been filed out of time. On 5 February 2014, Mr Peters filed his notice of opposition claiming that the challenge had been filed within time and, as a fallback position, he filed an application for leave to extend the time in which to challenge the Authority's determination.

### **The issues**

[6] The particular issues involved in this interlocutory matter are essentially the same as those considered in another proceeding, namely, *New Zealand Airline Pilots Association v Airways Corporation of New Zealand Ltd*, in which I have issued a contemporaneous judgment.<sup>4</sup> Under s 179(2) of the Employment Relations Act 2000 (the Act), Mr Peters had 28 days from the date of the Authority's determination in which to commence his challenge. The determination was issued on 28 November 2013 meaning that the 28-day period expired on 26 December 2013. Regulation 74B(2) of the Employment Court Regulations 2000, however, provides that in calculating a period of time within which an act must be done, the 12 days between 25 December and the close of 5 January are not counted. Mr Peters filed his challenge on 6 January 2014. His statement of claim was accepted for filing by the registry office on that day and a copy was duly served on the defendant.

[7] As noted above, the next development came on 17 January 2014 when the defendant applied for a declaration that the challenge had been filed out of time. The grounds of the application were said to be that this Court had held in *Vice-Chancellor of Lincoln University v Stewart* that reg 74B(2), which allowed until 6 January for the filing of the challenge, was "effectively overridden" by the specific requirement of s 179(2) of the Act that a challenge had to be filed within 28 days after the date of the determination.<sup>5</sup> A notice of opposition to the application for a declaration was duly filed along with comprehensive submissions on behalf of both parties. It was agreed that the matter could be dealt with on the papers.

[8] An affidavit was filed on behalf of Mr Peters by his employment advocate, Mr Benjamin Paradza. Mr Paradza deposed that he is "an enrolled barrister and

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<sup>4</sup> *New Zealand Airline Pilots Assoc v Airways Corporation of New Zealand Ltd* [2014] NZEmpC 90.

<sup>5</sup> *Vice-Chancellor of Lincoln University v Stewart* [2008] ERNZ 132 (EmpC) at [4]-[19].

solicitor of the High Court”. In reference to the alleged late filing of the statement of claim, Mr Paradza said:

3. The reason why the Statement of Claim was not filed within time is that the deadline within which to file fell on 26 December 2013. The day was a holiday and therefore the Court was closed. I then discovered that the Court itself was closed not only for that day but up until the 6 January 2014. Applicant had been pushing me to file the papers and when I checked in the regulations and found that regulation 74B specifically provided that the period 24 December to 5 January was not to be counted in calculating the 28 day limit within which to file the challenge, I assured him that all was okay. I was committed with other activities and I was comfortable the law was clearly on the applicant’s side. I felt it was proper to file for the challenge on 6 January 2014 which was a Monday.

## **Discussion**

[9] In the *Airline Pilots Association* case I reviewed the relevant legal principles and respectfully came to a different conclusion from the Court in *Lincoln University* and its subsequent decision in *Trans Otway Limited v Hall Lincoln University*,<sup>6</sup> as to the status of reg 74B. In those cases it was held that reg 74B was inconsistent with s 179(2) of the Act and, therefore, effectively ultra vires. For the reasons explained in *Airline Pilots Association*, I was not prepared to hold that the regulation in question was unlawful. On the contrary, I concluded that an interpretation which preserved the validity of the regulation was open to the Court and was plainly to be preferred to a finding of invalidity.<sup>7</sup> I do not propose to repeat my analysis of the legal issues apart from making reference to one practical observation which has particular relevance to the facts of the present case.

[10] In *Airline Pilots Association*, I made reference to the information contained on the Employment Court registry’s official website regarding the Christmas vacation.<sup>8</sup> Relevantly, the website information stated:

### **Christmas hours and emergency contacts:**

The Employment Court registries are closed from 25 December 2013 to 6 January 2014.

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<sup>6</sup> *Trans Otway Ltd v Hall* [2010] NZEmpC 76, (2010) 7 NZELR 560.

<sup>7</sup> *New Zealand Airline Pilots Assoc*, above n 4, at [25]-[31].

<sup>8</sup> At [24].

**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.

[11] The plaintiff followed the directions contained in the official website instructions. He could not have filed his challenge on 26 December or on any other day between 25 December and 5 January (inclusive) because the registry office was closed during that period. In this regard, as noted in *Airline Pilots Association*, reg 74B does no more than give practical effect to the realities in relation to the operation of the Court's registry offices. That, in my view, is a compelling reason for upholding the integrity of the regulation rather than declaring it unlawful.

[12] My conclusion, therefore, is that Mr Peters' challenge in the present case was made within time and it is not, therefore, necessary to consider his application, made in the alternative, for an order granting an extension of time in which to commence a challenge. Had it been necessary, however, for the same reasons that I expressed in *Airlines Pilots Association*, I would have granted an appropriate extension.<sup>9</sup> It is difficult to imagine a more deserving case.

[13] For the foregoing reasons, the defendant's application dated 17 January 2014 for a declaration that the challenge was filed out of time is declined. The statement of claim filed on 6 January 2014 is accepted as the statement of claim in this proceeding. The defendant is to file its statement of defence within 30 days of the date of this judgment.

[14] Costs are reserved.

A D Ford  
Judge

Judgment signed at 3.00 pm on 12 June 2014

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<sup>9</sup> At [32].