

dated 22 December 2014 and ordered the respondent to pay the applicant the sum of \$16,327.22.¹

[3] The company was dissatisfied with the Authority's determination and filed a challenge on 19 January 2015. A non de novo hearing was sought, essentially focused on the Authority's finding that a bonus was payable to the applicant. A statement of defence to the respondent's statement of claim was filed within the timeframe for doing so. It expressly referred to an intention to file an application for leave to challenge the Authority's determination.

[4] An application for leave, together with a draft statement of claim and an affidavit in support, was filed on 17 March 2015. The respondent's notice of opposition followed, albeit out of time.²

Analysis

[5] The Court may extend the time for filing a challenge in its discretion. A number of factors are relevant to the exercise of the Court's discretion, including the length of the delay; the reason for the omission to act within time; any prejudice to the other party; the potential effect on the rights and liabilities of the parties; and the merits. The overriding consideration is the interests of justice.³

Length of delay

[6] The length of the delay was significant. Mr Organ referred me to the observation in *An Employee v An Employer* that a delay of more than two months must be regarded as "very substantial or even gross".⁴ I accept that the extent of the delay in this case is a factor that supports the respondent's opposition to the application, although it must be viewed in the context of the reasons for the delay and weighed with other relevant factors in the exercise of the Court's discretion.

¹ *Georgetti v Compass Communications Ltd* [2014] NZERA Auckland 530.

² A point that the applicant took no issue with.

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

⁴ *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [15].

Reason for the delay

[7] The applicant represented himself at the Authority's investigation meeting. His claim was dealt with on the papers. The Authority's determination, which was in his favour, was issued on 22 December 2014. The applicant was concerned with the calculations underlying the Authority's orders. Unbeknownst to him, the respondent filed a challenge to the Authority's determination on 19 January 2015. The applicant was unaware that this step had been taken because he was not served with the statement of claim until 3 February 2015. In the intervening period he had contacted the Authority raising concerns in relation to the calculations underpinning the award in his favour and had received advice from the Authority as to his options, including that he could seek a reopening of the investigation. He was also advised that he could challenge the determination, and had 28 days within which to do so. In the event he applied for a reopening of the Authority's investigation.

[8] By the time the applicant was served with the statement of claim the timeframe for filing a challenge had passed. On 20 February 2015 he was advised that his application for the Authority's investigation to be reopened had been dismissed. Shortly after that the applicant sought legal representation, a statement of defence was filed within time and an application for an extension of time was filed on 17 March 2015.

[9] While it is apparent that the Authority drew the parties' attention to the right of challenge, and the timeframe for taking such a step, I accept Mr Georgetti's sworn evidence that his failure to file a challenge within time arose out of a misapprehension as to the best method for pursuing his legal remedies. He believed (erroneously) that he was required to wait for the outcome of the application to the Authority before filing a challenge. He then took prompt steps to seek legal representation; the intention to seek an extension of time was identified in the statement of defence and an application followed after that.

Prejudice

[10] The respondent was put on early notice about the applicant's intention to take issue with the Authority's calculations, having first done so on 7 January 2015, and having later been served with the application to reopen. The applicant's statement of defence made reference to an intended application for leave to cross-challenge the Authority's determination on a de novo basis. The respondent was not taken by surprise by the application in these circumstances and any prejudice it might have otherwise been exposed to was substantially reduced. In any event it had already filed a challenge and accordingly a further hearing, and the costs associated with it, was inevitable. While the respondent had elected to pursue its challenge on a non-de novo basis, its challenge raises issues involving disputed facts. It is doubtful that much additional time and expense will flow from allowing the applicant to pursue his proposed (de novo) challenge, having regard to the scope of the respondent's challenge already before the Court.

Rights and liabilities

[11] If the application is not granted, the applicant's ability to challenge the Authority's conclusion as to quantum, and to pursue a claim to holiday pay and interest in the context of these proceedings, will be compromised.

Merits

[12] It is difficult to assess the likely merits of the applicant's claim at this stage. The respondent says that the applicant's challenge has no prospect of success because there was no profit on which a bonus could be based. However, this argument did not find favour with the Authority. This tends to support the applicant's submission that he has an arguable case. Further, there appears to be support for the position he wishes to advance in the documentation before the Court. The applicant's case, if it is allowed to proceed, will draw in (disputed) evidence as to how the bonus payments worked in practice and the formula that was applied to the calculations. I accept, based on the material before the Court, that the applicant appears to have a seriously arguable case.

Conclusion

[13] Having considered the matters raised by the parties in support of their respective positions, I concluded that it was in the overall interests of justice that an extension of time be granted to the applicant to file a challenge. The time for filing a statement of claim in this matter was accordingly extended to validate the filing of the draft statement of claim. The applicant was ordered to pay the applicable filing fee within 10 working days of yesterday's date. The respondent is to file and serve a statement of defence by 20 July 2015.

Costs

[14] No issue of costs arises.

Judicial Settlement Conference

[15] The parties have indicated that attendance at a Judicial Settlement Conference might assist them in resolving matters. Such a conference is to be arranged by the Registrar on the first available date, in consultation with the parties' representatives.

Christina Inglis
Judge

Judgment signed at 3.15pm on 30 June 2015