

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2015] NZEmpC 103
EMPC 326/2014**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN WHANAU TAHI LIMITED
Plaintiff

AND KIRAN DASARI
Defendant

EMPC 116/2015

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

AND IN THE MATTER of an application for leave to extend time
for filing pleadings

AND BETWEEN WHANAU TAHI LIMITED
Applicant

AND KIRAN DASARI
Respondent

Hearing: On papers filed on 7 and 29 May 2015

Appearances: M Ryan, counsel for Whanau Tahī Limited
A Swan, counsel for Kiran Dasari

Judgment: 1 July 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The inattentions of counsel for both parties are responsible for each applying for leave to file proceedings, and opposition to them, outside time limits. They both seek to be excused for these failures and to advance their clients' cases although opposing the other's wish to do so.

[2] As always, context is relevant and is as follows.

[3] Kiran Dasari brought a claim to the Employment Relations Authority that he was dismissed unjustifiably by Whanau Tahī Limited (Whanau Tahī). The Authority investigated this claim on 17 November 2014 and delivered to the parties in their presence an oral determination on the same day, 17 November 2014.¹ The Authority's oral determination was typed and, with an addendum at [46]-[48] (inclusive) dealing with wage arrears, was issued to the parties three days later on 20 November 2014.²

[4] On 17 December 2014 Whanau Tahī purported to file in this Court a challenge by hearing *de novo* to the Authority's determination (under file EMPC 326/2014). On 19 December 2014, it applied for an order staying execution of the Authority's determination which required it to pay sums of money to Mr Dasari. On the same day also, 19 December 2014, counsel for Whanau Tahī filed a "Joint Memorandum of Counsel in relation to Application of Stay of Proceedings dated the 19th day of December 2014". That document, signed by Mr Swan as "Counsel for the respondent", consented to the Court making an order for stay of execution of the Authority's determination on grounds that Whanau Tahī would pay into court the sum of \$13,018.38 on 19 December 2014. Mr Swan signed a document on Employment Court entitling on behalf of Mr Dasari. The only proceeding before the Court then was what purported to be a challenge to the Authority's determination.

[5] That, in turn, caused the Court to issue a Minute on the same day, 19 December 2014, recording the agreed terms of the order and also requiring that Whanau Tahī was to prosecute its challenge promptly. Leave was reserved for either party to apply for any further orders or directions.

[6] On 13 April 2015 Mr Dasari, by counsel Mr Swan, filed a document entitled "Objection to the Court's Jurisdiction" in which counsel contended that the

¹ *Dasari v Whanau Tahī Ltd* [2014] NZERA Auckland 476.

² Before 6 March 2015 s 179(1) of the Employment Relations Act 2000 read, relevantly, "... who is dissatisfied with the determination". It is this provision that applied to the filing of the challenge in this case. Since 6 March 2015, however, s 70(1) of the Employment Relations Amendment Act 2014 altered s 179(1) to read: "... who is dissatisfied with a written determination".

Authority's determination having been delivered on 17 November 2014, the statement of claim filed by Whanau Tahi on 17 December 2014 was not filed within the 28 days allowed for Whanau Tahi to do so under s 179(2) of the Employment Relations Act 2000 (the Act).

[7] That memorandum objecting to the Court's jurisdiction was addressed by a further Minute issued by the Court two days later on 15 April 2015. Mr Ryan for Whanau Tahi was given a choice of either arguing whether the challenge had been filed within time in December 2014 or of seeking leave to file a statement of claim out of time.

[8] Whanau Tahi elected to seek to file its statement of claim out of time and did so by an application for leave (on notice) filed on 7 May 2015. Mr Dasari had the period of 14 days within which to oppose that application for leave but failed to do so within that period. He now seeks leave to file his opposition out of time.

[9] Poetic justice would have both parties succeed or both parties fail but poetic justice cannot determine the matter, especially where counsel for both have accepted responsibility for compromising their clients' positions.

[10] The reason for the filing of Whanau Tahi's challenge going out of time was Mr Ryan's advice to his client that it had 28 days, which ran from the issuing of the written version of the Authority's oral determination, within which to file a challenge. The determination was, however, delivered to the parties in their presence on 17 November 2014 and the 28-day period began to run from then. Notification to the Court of the challenge was, therefore, two days late.

[11] So, too, was responsibility for failing to oppose Whanau Tahi's application, that of its counsel, Mr Swan, whose inadvertence let that time limit slip by. That, too, has been a relatively minor error in terms of days elapsed.

[12] Mr Swan seeks not only to oppose Whanau Tahi's application for leave to extend the time for filing a challenge, but says that this should not be allowed because Mr Ryan omitted to serve Mr Dasari with the challenge proceedings for

about three months. It is, however, difficult to accept that submission when, on 19 December 2014, two days after the challenge was purportedly filed by Mr Ryan on 17 December 2014, Mr Swan signed a document entitled in this Court on behalf of Mr Dasari, which consented to an interlocutory application in that proceeding. It is not explained how Mr Swan could have signed a document in the proceeding, not being aware of the fact that a challenge had been brought, at least purportedly brought.

[13] The case must be decided in the interests of justice and in the particular (and probably unique) circumstances which are placed before the Court. In this case, the interests of justice follow one of the poetic justice solutions, that is that leave should be granted to both parties. I am satisfied that there is no prejudice to either. Although Mr Dasari raises his immigration status as a reason for finality, if he needs to account for his position to Immigration New Zealand, he can of course say that he is actively defending proceedings brought against him by way of a challenge to the Authority's finding in his favour.

[14] Whanau Tahi's draft statement of claim will now be treated as the operative statement of claim in the proceeding. Mr Dasari, may have the period of 30 days within which to file and serve a statement of defence. The Registrar will then arrange the usual telephone directions conference with a Judge.

[15] In all the circumstances, I will not make any order as to costs between the parties. Poetic justice might also incline them to look to their lawyers to reduce what might otherwise be their costs in the proceedings to date.

GL Colgan
Chief Judge

Judgment signed at 2.45 pm on Wednesday 1 July 2015