IN THE EMPLOYMENT COURT
AUCKLAND

AC 49/07
ARC 36/07

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	LANDMARX DEVELOPMENT (NZ) LTD Plaintiff
AND	SHRI RAMAN Defendant

Hearing: 16 August 2007
(Heard at Auckland)

Appearances: Radhe Nand and Kerry Davis, counsel for applicant
Aaron Kashyap, counsel for respondent

Judgment: 20 August 2007

JUDGMENT OF JUDGE B S TRAVIS

---

[1] The applicant company has applied for leave to challenge out of time a determination of the Employment Relations Authority, dated 5 March 2007. Section 179(1) of the Employment Relations Act 2000 requires a party who is dissatisfied with a determination of the Authority, and elects to have the matter heard by the Court, to make that election "*within 28 days after the date of the determination of the Authority*". Therefore, to be within the statutory time, the applicant should have filed its challenge by 2 April 2007 at the latest. Instead some 85 days after that date, namely on 27 June 2007, the applicant filed what was described as an application for leave to appeal out of time.

Principles

[2] The Court has jurisdiction to grant leave to extend time by s219 of the Employment Relations Act 2000 which provides:

> ***219 Validation of informal proceedings, etc***
>
> *(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*
>
> …

[3] The discretion conferred by s219 is not subject to any statutory criteria but must be exercised judicially, in accordance with established principles and the fundamental principle is the interests of justice see the judgment of Judge Couch, cited by Ms Davis, *An Employee v An Employer* unreported, 15 May 2007, CC 8/07.

[4] Both parties cited *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 which has been adopted in a number of decisions since that time. Chief Judge Goddard there stated:

> *I prefer to leave this discussion on the basis that the overriding consideration is the justice of the case and that an applicant for leave must have some onus of persuasion, but there should be no predisposition to refuse leave. As I indicated in* Lavery, *it is for the Court to do whatever the justice of the case requires.*
>
> *Under this heading it further seems to me that the following matters are material to the exercise of the discretion:*
>
> *(1) The reason for the omission to bring the appeal within time.*
>
> *(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.

This is not an exhaustive list but only a list of those elements which seem to have a bearing on the present case.

[5] Mr Kashyap, counsel for the respondent, cited from the decision of the Privy Council in *Ratnam v Cumarasamy* [1964] 3 All ER 933 at 935:

> *The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.*

[6] Mr Kashyap also cited *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 at 91:

> *When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.*

[7] Both *Ratnam* and *Avery* are relied on by Judge Couch in *An Employee*. I too am satisfied that the fundamental principle which must guide me in the exercise of my discretion is the interests of justice. The matters referred to by Chief Judge Goddard in *Day* provide helpful headings but only insofar as they are relevant to the circumstances of the particular case. The parties addressed their submissions using those headings and I shall do the same in this judgment.

The reason for the omission and the length of the delay

[8] As Ms Davis submitted the applicant had until 2 April 2007 to appeal as of right and the delay since that time must be adequately explained.

[9] In support of the application the applicant filed two affidavits. They are so brief that it is appropriate to set them out in full. The first is from Shailendra Kewal who was the applicant's advocate when it was the respondent in the Authority. He deposes:

> *I, SHAILENDRA KEWAL, Executive Assistant to Managing Director of Auckland swear;*
>
> *1. I was absent from my employment at Landmarx Development (NZ) Limited when the determination from the Employment Authority was received on or around 12 March 2007. Then our Human Resources Officer went on leave from 19 to 23 March 2007.*
>
> *2. I was also involved in staff inductions and quarterly review meetings at this time.*
>
> *3. I was then away on leave from 2 to 10 April 2007. All of which led to there being a delay in referring the determination to our solicitors.*
>
> *4. Our solicitors asked to speak to Mr Anirudh Munsami before they could advise us. Mr Munsami was heavily tied up with projects involving in excess of 70 houses in Auckland and Tauranga and was not able to meet with our solicitors for several weeks.*
>
> *5. The Easter public holiday period put a lot of pressure on me at work. There was a lot to do leading up to the Easter break and a lot of work to catch up on after the break.*
>
> *6. I was not able to meet with our solicitors to talk about the Employment Court's decision and whether we had grounds to file an appeal until a couple weeks after Easter.*

7. Our solicitors requested a transcript of the evidence given at the Employment Authority from the Employment Authority and were told that no transcripts were taken.

8. For all of these reasons we were not able to apply for leave to appeal the determination within the time required.

[10] Ms Davis sought to tell me, from the bar, that the applicant company received the determination on or about 5 March but that Mr Kewal did not become aware of it until 11 April 2007. The affidavit evidence, however, does not appear to support that submission. As will be seen from paragraph 1, Mr Kewal says that he was away when the determination was received on or about 12 March but he does not say how he knew when it was received if he was not present at the time, or how long he was away or when he first became aware of the determination. His affidavit also does not address the role of the human resources officer and the relevance of that person being on leave.

[11] Again, from the bar, Ms Davis submitted legal advice was not sought until 11 April 2007. That does not appear from Mr Kewal's affidavit which merely says that there was a delay in referring the determination to the applicant's solicitors.

[12] Ms Davis made a submission that because the applicant had not been legally represented at the hearing it did not readily appreciate the time constraints. Mr Kewal's affidavit does not deal with these matters and does not plead ignorance of the time limit. However, the solicitors would clearly have been aware of them and once they received instructions it was incumbent on them to proceed promptly.

[13] Although Mr Kewal's affidavit does not make it clear when counsel were instructed, he gives considerable hearsay evidence of the steps the solicitors allegedly took to contact Mr Munsami and to obtain a transcript of his evidence from the Authority. No affidavit from the solicitors was filed.

[14] Mr Munsami's affidavit was even shorter and deposed as follows:

I, ANIRUDH MUNSAMI, Operations Manager of Auckland swear;

> *1. I was a witness for the Landmarx Development (NZ) Limited ('LD') in the hearing between LD and Shri Raman before the Employment Authority.*
>
> *2. I was out of Auckland on various days at the time that the determination of the Employment Authority was received by LD.*
>
> *3. I was heavily tied up with projects that LD was undertaking in Tauranga and around greater Auckland. I was involved in more than 78 sub division projects in these various locations.*
>
> *4. For this reason I was not able to discuss the evidence given by me at the Employment Authority with my employer's solicitors until the end of May 2007.*

[15] As will be seen from paragraph 4, by the end of May 2007 Mr Munsami was in a position to discuss his evidence with the applicant's solicitors. The delay between the end of May and the filing of the application for leave on 27 June is nowhere addressed.

[16] I accept Mr Kashyap's submission that the failure to apply in time and the subsequent delay has not been adequately explained. Further, the affidavit evidence does not contain sufficient detail to support the submissions made by Ms Davis on behalf of the applicant company.

[17] As to the length of the delay, in *An Employee* Judge Couch helpfully summarised the decisions over many years in comparable cases, both under the Employment Contracts Act 1991 and the current Act. He observed that, with one exception, the longest extension of time granted appears to have been 14 days. The exception was in *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74 where the time was extended by 20 days. I shall refer to this case again under the heading "*Prejudice*".

[18] In *Otago Taxis Ltd v Strong* unreported, 2 March 2007, CC6/07, Judge Couch noted that the length of delay in filing a defence in that case was 87 days and that: "*Such a delay in making application for an extension of time to file a challenge*

would be regarded as very substantial and, in most cases, fatal to the application". He observed that the position is somewhat different when the application is for an extension of time to file a statement of defence as the matter is already before the Court by virtue of the challenge and the granting of the extension to file a defence simply allows the party to participate in the resolution of the dispute which has already been determined by the Authority in that person's favour.

[19] In *An Employee* Judge Couch states, at paragraph [15], that a 75 day delay was "*very substantial or even gross*". That 75 days included the Christmas and New Year period when the Court was closed and legal advisors were less available. Leave was declined.

[20] I also agree that the delay of some 85 days in the present case is gross, insufficiently explained and the period was only affected by the Easter break not the Christmas holidays. The failure to adequately explain this gross delay is fatal to the application for leave.

Prejudice

[21] Ms Davis submitted there would be no prejudice or hardship caused to the respondent even though in his notice of opposition the respondent states he is 69 years of age and would like the matter drawn to a close. Ms Davis submitted that the application could not have been reasonably made sooner, given the circumstances, and that the justice of the case warranted a hearing.

[22] Mr Kashyap referred to the respondent's age and his circumstances and submitted that he was entitled to have certainty of a matter outstanding since early 2005.

[23] In *Bilderbeck*, as I have noted, an extension of time by 20 days was granted on what was apparently seen as exceptional circumstances. Chief Judge Goddard in dealing with prejudice stated at p88:

> *Plainly, where the delay is slight and the merits great they will outweigh the delay. Where, however, the delay is substantial the consideration that an appellant may succeed if allowed to proceed may carry less weight.*

> *The Court should not encourage stale appeals or come to the aid of appellants who are less than vigilant in the safekeeping of their own rights and interests.*

[24] Judge Couch relied on that statement in *Peoples v Accident Compensation Corporation* unreported, 13 February 2007, CC 3/07 and went on to observe that prejudice to the respondent can be greatly reduced by informing the intended respondent promptly of the intention to appeal or challenge. Judge Couch declined leave where the delay was 27 days.

[25] As in the *Peoples* case, there is no evidence before me that any communication was received by the respondent prior to service upon him of the application for leave to extend the time. Service, apparently, was some considerable time after the applicant had filed its application in Court. Although there is no direct evidence of the date on which the application was served, as Mr Kashyap submitted, the respondent's notice of opposition was filed on 8 August, which must have been within the 14 clear days he was required to file such a notice, there having been no objection to his notice being out of time. For all that period the respondent was entitled to have assumed that there was no challenge to the Authority's determination. I accept Mr Kashyap's submission that, based on the authorities, there has been considerable prejudice to the respondent.

Effects on the rights and liabilities of the parties

[26] Ms Davis submitted that, if leave was not granted, the applicant would be deprived of its right to challenge the finding that it unjustifiably dismissed the respondent, whereas the respondent only faced the prospect of findings favourable to him in the Authority being reversed. She submitted that on balance the applicant will suffer the greater deprivation on having the finding and an award of compensation made against it.

[27] Mr Kashyap observed that the respondent had not received payment from the applicant and required certainty. He relied also on the same circumstances he advanced in relation to prejudice.

[28] This matter is somewhat neutral in the present case but the grant of leave will continue to prejudice the respondent. The applicant's own failure to properly pursue the matter has caused its present difficulties.

Subsequent events

[29] This is not a relevant matter in the present case.

Merits

[30] The applicant submitted that it has a reasonable prospect of success in the challenge if the evidence of Mr Munsami is reheard and the evidence of Mr Gopal Krishna, the respondent's supervisor at the time he was dismissed, is also called.

[31] It seemed to be common ground between the parties that both Mr Munsami and Mr Krishna had been called before the Authority. The Authority made a finding that the respondent had sought and had been given approval by his immediate supervisor to take time off work to attend his lawyer's office at the time when he had been requested to attend a performance appraisal meeting. That was his reason for not attending the applicant's meeting. The respondent's failure to attend the applicant's meeting was the reason for his dismissal.

[32] None of the material addressed by Ms Davis in her submissions was placed before the Court. Mr Munsami's affidavit, as can be seen, does not address the merits at all. I am therefore unable to make any satisfactory determination of the likelihood of the applicant succeeding on the merits, if leave is granted. I do, however, accept Mr Kashyap's submission that the Authority's determination is logical and apparently based on factual findings. This is therefore not a factor which weighs in favour of the grant of the application.

Conclusion

[33] The applicant has not provided an adequate explanation for the very substantial and gross delay in filing its application for leave. The affidavit evidence presented to the Court was inadequate in detail and did not cover all the relevant

periods, especially that after the end of May 2007. I therefore reject the applicant's submission that the delay has been fully explained and was reasonable.

[34] The other matters canvassed do not assist the applicant. I find that the respondent has been prejudiced by the delay.

[35] In the absence of any compelling evidence on the merits or any adequate explanation of the extraordinary delay in this case, I find that it is not in the interests of justice to grant the application.

[36] The application is accordingly dismissed and the respondentis entitled to costs. The parties were agreed that this would be addressed by an exchange of memoranda if costs cannot be agreed. The first memoranda is to be filed within 30 days from the date of this judgment with a further 21 days for the other side to file a memorandum in response.

B S Travis
Judge

Judgment signed at 4.30pm on Monday 20 August 2007