IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA632/2017
[2019] NZCA 566

BETWEEN	TYRONE WAYNE UNDERHILL First Applicant	
	KANE JOSEPH UNDERHILL Second Applicant	
AND	COCA-COLA AMATIL (NZ) LTD Respondent	

Court: Cooper and Goddard JJ

Counsel: Applicants in person
B A Smith and T P Oldfield for Respondent

Judgment: (On the papers) 19 November 2019 at 11.30 am

JUDGMENT OF THE COURT

A We grant the application to extend the time for filing the appeal subject to the following conditions which must be strictly observed:

(a) The applicants must bring their appeal by filing and serving a notice of appeal on or before Wednesday 18 December 2019.

(b) The applicants must apply for the allocation of a hearing date and file and serve the case on appeal on or before Friday 28 February 2020.

(c) By the same date, the applicants must file in writing the submissions they intend to make on the questions approved for

consideration by this Court in the judgment of 22 November 2018 ([2018] NZCA 521).

(d) All documents filed pursuant to the above directions must be immediately served on the respondent.

(e) The respondent's submissions in reply must be filed and served three weeks prior to the hearing of the appeal.

B Costs are reserved.

REASONS OF THE COURT

(Given by Cooper J)

[2] The applicants have applied for an extension of time in which to appeal under r 29A of the Court of Appeal (Civil) Rules 2005 (the Rules). Their appeal would be under s 214(1) of the Employment Relations Act 2000, this Court having previously granted leave as provided for in that section.[1] Pursuant to r 29(1)(b)(ii), the appeal should have been filed on or before 20 December 2018.

[3] The applicants are lay people, evidently acting without the benefit of legal advice, and their papers reflect that. However, as this Court's judgment granting leave indicates, there are questions of law involved in the appeal of sufficient importance to be submitted to this Court for decision.

[4] The difficulty is that having achieved the grant of leave, the applicants have not proceeded with due diligence. The respondent now opposes a grant of leave to extend the time for appealing claiming that they are prejudiced by delays which have accumulated over the period since the Employment Court's judgment was delivered on 29 September 2017.[2] They refer in particular to the fact that the reinstatement of the applicants to positions that they previously occupied as employees of

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1 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2018] NZCA 521.
2 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117.

the respondent would be problematic given that the positions have been taken up by new employees.

[5] In considering the present application, we apply the principles summarised by the Supreme Court in *Almond v Read*.[3] This requires us to consider the length of the delay that has occurred, the reasons for it, the conduct of the parties (particularly of the applicants), prejudice to the respondent and the significance of the issues raised by the proposed appeal both to the parties and more generally. We must also give some consideration to the merits of the appeal.

Delay and the conduct of the applicants

[6] In this case, it is convenient to deal with the first three issues together, for reasons which will become apparent. Following delivery of the judgment of the Employment Court on 29 September 2017 there was an exchange of emails between the parties from which it appeared that an appeal to this Court was intended. On Friday 8 December 2017 a Court of Appeal registry officer wrote to counsel for the respondent attaching a copy of a notice of application for an extension of time to file an application for leave to appeal and seeking a response by 11 December. An affidavit sworn in opposition to the present application by Mr Lane, general counsel for the respondents, says that the application was not served on the respondent, and the same applies to other documents subsequently filed with this Court. Mr Lane says that nothing further was heard from the applicants until 19 September 2019 when the Registry sent a further email attaching the present application, but without the attachments referred to in it.

[7] Counsel for the respondent, Mr Oldfield, claims in the circumstances that the application for an extension of time to appeal was made almost nine months after the time for bringing an appeal had expired. In what they describe as an "affidavit in reply" (which does not appear to have been sworn but has been witnessed before a Justice of the Peace) the applicants say that after the "preliminary hearing at the Court of Appeal"[4] they "filed the second round of applications in the Court of

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3 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [36]–[40].

4 Apparently a reference to the hearing giving rise to the judgment of 22 November 2018.

Appeal in Wellington with [the registry officer] on time by another Courier Post paid envelope. Our application was either lost or misfiled." They continue:

> I, *Waynne Underhill*, went to Wellington on 9 September for other matters, and I went into the Court of Appeal and spoke with [the Registrar]. I asked him how or what is the status of our appeal, or what's happened to our appeal and he said that [the registry officer] does not work for the Court of Appeal anymore, for the past several months.
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> So, this is on [the registry officer] and something went wrong. [The Registrar] couldn't find our application and so that makes it again the fault of the Registry Office, and not us and applications can and do occasionally get misfiled or lost or whatever.
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> The reason we have waited so long was because the Court of Appeal have their own timetable and appeals can take as long as they take and it's not uncommon to wait many months for the appeal fixture date. We assumed that this may be one of those cases.

[8] Mr Oldfield submits that this is not an adequate explanation for the delay. He points out that no affidavit has been sworn in support of the present application and that even if an appeal had been filed with this Court it had not been served on the respondent. Under r 31(1)(b) of the Rules, an appeal is not brought until that step is taken. Mr Oldfield further notes that the applicants have not produced a copy of the notice of appeal which they say was sent to this Court by courier post, they have not given the date on which it is alleged the notice of appeal was posted and there is no evidence from the courier company showing that the notice of appeal was delivered to this Court. In this respect, the applicants' claim is that the notice of appeal was sent by "Courier Post paid envelope". Mr Oldfield contends that it is not credible that the applicants would not have retained a copy of this and they should have been able to exhibit it in support of the present application. Nor is there any explanation why the notice appeal was not served on the respondent.

[9] In summary, the applicants assert that on an unspecified date following the hearing that gave rise to this Court's judgment of 22 November 2018 an appeal was couriered to the Court for delivery to a named officer of the Registry who is no longer employed. The applicants then assert that the "application" was either "lost or misfiled". The responsibility should rest with the Registry and not with the applicants.

[10] The difficulty with these allegations, made in an unsworn statement, is that it is not possible in an application such as the present for this Court to verify the truth of the assertions that are made. We are not inclined to accept the assertions in the absence of the kind of verification and detail which ought to have been available if the documents had been dispatched by courier as alleged. There is no detail as to the date when that allegedly occurred, or reference to any document which might normally be expected in the case of a courier post delivery. On the other hand, there is no dispute that whatever document was allegedly sent to the Court was not served on the respondent. It is consequently clear that the appeal was not brought within the meaning of r 31(1), which requires both filing of the notice of appeal and service of it on the respondent. Regrettably, this seems to be par for the course in the way the applicants have gone about the appeal, as instanced by their previous failure to serve a copy of the notice of application for an extension of time to apply for leave to appeal, filed in November 2017 and, in addition, the present application for a further extension of time. Even making due allowance for the fact that the applicants are lay people, their involvement in the Employment Court process and in the previous applications to this Court ought to have alerted them to the need to serve copies of anything filed in the Registry on the respondent.

[11] In the circumstances, we conclude that the delay has been lengthy, it has not been satisfactorily explained and the relevant conduct of the applicants has been unsatisfactory.

Prejudice to the respondent

[12] We turn next to the issue of prejudice or hardship. Here, the respondent relies on the fact that the applicants' objective is to secure reinstatement to positions from which they were dismissed. The respondent has filed an affidavit by Mr Robert Irvine, the respondent's national sales and operations manager, who notes that if the applicants were reinstated, the respondent would be overstaffed. The implication of the affidavit is that the vacancies created by the applicants' dismissal no longer exist. Mr Irvine referred to the uncertainty created by the delay in dealing with the matter because of the lack of certainty as to whether the applicants might be reinstated.

[13] Mr Oldfield submits that parties seeking reinstatement should proceed promptly, because the passage of time itself may impact on the reasonableness and practicability of reinstatement; any delay creates ongoing uncertainty for the employer. This is inherently prejudicial. Another element of prejudice arises from the applicants' failure to serve documents filed in this Court.

[14] We accept that there is prejudice in terms of ongoing cost and delay. However, the main substantive issue raised as prejudicial relates to possible reinstatement. We do not think significant weight can be attributed to that in the present context, for two reasons. First, Mr Irvine's affidavit would not justify a finding that the respondent's position is attributable to the delay that has occurred. He does not say when the vacancies were filled and for all we know that may have occurred soon after the dismissal. Secondly, the prejudice complained of would only be a consequence of reinstatement, if that occurred following the substantive judgment on the appeal. As presently advised we think it unlikely that this Court's decision resolving the questions which have been approved would have the direct result of reinstatement of the applicants. Much more likely is that the appeal would be referred back to the Employment Court if this Court concluded it had erred. Practical issues concerning reinstatement would no doubt be considered by that Court if and when the matter came back before it.

[15] We conclude that prejudice to the respondent would not justify refusing the present application.

Significance of the issues raised

[16] Although Mr Oldfield submits that there are no issues of public importance involved in the appeal, the present application has to be considered in the context that this Court has already determined the application for leave to appeal. This Court has decided that the questions approved for consideration in each case involve a question of law which by reason of its general importance ought to be submitted to this Court for decision.[5] This means the issues raised must necessarily be regarded as sufficiently important to favour the grant of an extension.

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5 *Underhill v Coca-Cola Amatil (NZ) Ltd*, above n 1, at [2].

Merits of appeal

[17] That leaves for consideration the question of the merits of the proposed appeal. In *Almond v Read*, the Supreme Court accepted that the merits of a proposed appeal might in principle be relevant to the exercise of the discretion to extend time.[6] The Court also noted that any consideration of the merits in the context of an application such as the present will necessarily be "relatively superficial".[7]

[18] The discussion in this part of the Supreme Court's judgment suggests that only in limited circumstances should a perceived lack of merit be a basis for refusing an application to extend time. The Court observed that:[8]

> … a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the appeal is clearly hopeless. An appeal would be hopeless, for example, where, on facts to which there is no challenge, it could not possibly succeed, where the court lacks jurisdiction, where there is an abuse of process (such as a collateral attack on issues finally determined in other proceedings) or where the appeal is frivolous or vexatious. The lack of merit must be readily apparent. The power to grant or refuse an extension of time should not be used as a mechanism to dismiss apparently weak appeals summarily.

[19] We do not consider the present appeal can properly be characterised as clearly hopeless. The grant of leave stands in the way of any such conclusion on an application for extension of time.

Outcome

[20] To summarise, there has been a lengthy and unjustified delay. However, the prejudice to the respondent is not significant and there is no other consideration which would justify refusal of the application.

[21] In the circumstances, we grant the application to extend the time for filing the appeal, but we do so subject to the following conditions which must be strictly observed:

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6 *Almond v Read*, above n 3, at [39].
7 At [39(c)].
8 At [39(c)].

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[22] We make two further observations, principally for the benefit of the applicants. First, it should be obvious that anything filed with the Court must be copied to the other party. It is a basic requirement of fair procedure. Second, the Court expects that parties will deal with each other on a cooperative and courteous basis both prior to and at the hearing of appeals. This should be reflected in the correspondence passing between the parties. We have found the tone and language used in some emails sent by the applicants to the respondent's lawyers inappropriate and we urge them not to continue with that approach.

[23] We reserve questions of costs.

Solicitors:
SBM Legal, Auckland for Respondent