

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 194  
EMPC 307/2023**

IN THE MATTER OF      an application for leave to extend time to file  
   a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      NICOLA MAREE WATKINS  
   Applicant

AND                              HIGHMARK HOMES LIMITED  
   Respondent

Hearing:                      On the papers

Appearances:                A Halse, advocate for applicant  
   R Upton, counsel for respondent

Judgment:                    9 November 2023

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**JUDGMENT OF JUDGE KATHRYN BECK**

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[1]      The applicant, Ms Watkins, seeks leave to extend time to file a challenge to a determination of the Employment Relations Authority.<sup>1</sup> That determination resolved an application from Ms Watkins who sought to reopen two determinations issued on 30 November 2022<sup>2</sup> and 1 December 2022<sup>3</sup> respectively. The Authority declined the application.

[2]      Ms Watkins now wishes to challenge that determination on a de novo basis, but she requires a grant of leave from the Court as the challenge was not filed within the statutory timeframe. The respondent neither supports nor opposes the application, adopting a neutral position on the issue.

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<sup>1</sup>      *Watkins v Highmark Homes Ltd* [2023] NZERA 418 (Member Urlich).

<sup>2</sup>      *Watkins v Highmark Homes Ltd* [2022] NZERA 632 (Member Urlich).

<sup>3</sup>      *Watkins v Highmark Homes Ltd* [2022] NZERA 638 (Member Urlich).

[3] For the reasons that follow, leave to extend time is granted.

*Leave to extend time*

[4] The Authority's determination was issued on 4 August 2023. This meant that the 28-day time period within which a challenge could have been filed ended on 1 September 2023.<sup>4</sup> No challenge was filed within that timeframe. Mr Halse, advocate for Ms Watkins, claimed that this was the result of a miscalculation on his part, together with a heavy workload. Ms Watkins's leave application was eventually filed on 4 September 2023.

[5] In a case where the statutory timeframe has elapsed, the Court has the discretion to extend the time for filing.<sup>5</sup> That discretion is exercised in accordance with established principles. The overarching consideration is the interests of justice.<sup>6</sup>

[6] The usual factors that will be considered include:<sup>7</sup>

- (a) the reasons for the omission to bring the case within time;
- (b) the length of the delay;
- (c) any prejudice or hardship to any other person;
- (d) the effect on the rights and abilities of the parties;
- (e) subsequent events; and
- (f) the merits of the proposed challenge.

[7] As already noted above, the application is not opposed by the respondent. It has advised it is adopting a neutral position on the issue.

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<sup>4</sup> Employment Relations Act 2000, s 179(2).

<sup>5</sup> Section 219.

<sup>6</sup> *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [38].

<sup>7</sup> *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9]–[10]; and *Almond v Read*, above n 6, at [38]–[39].

### *Reasons for the delay*

[8] Mr Halse accepts full responsibility for the delay. In an affidavit, Debra Joy Weatherley-Hull, an employee of CultureSafe Hamilton as its office manager, says that due to workload, travel commitments and other urgent matters, an error was made as to when the statement of claim in relation to the challenge needed to be filed. She says this error resulted in them getting it wrong by one day and filing it via email on Saturday, 2 September 2023 rather than Friday, 1 September 2023. She also says that her not working on that Friday may have contributed to the error. However, Mr Halse accepts full responsibility.

[9] As noted in previous judgments of this Court, the Court is very reticent to sheet home the consequences of a representative's error to their client.<sup>8</sup>

[10] Accordingly, the reasons for the delay do not factor against a grant of leave. On the contrary, they are supportive of such leave being granted.

### *The length of the delay, prejudice, effect on other parties and subsequent events*

[11] Ms Watkins was one day (or at the most, three days) out of time. The delay is a modest one in the circumstances and falls into the category of extensions that the Supreme Court has indicated should generally be granted, desirably without opposition, as in this case.<sup>9</sup>

[12] No prejudice has been raised by the respondent in relation to the application. Nor is there any impact on party rights and liabilities.

[13] There is no evidence of any other subsequent issues or conduct before the Court that would factor against a grant of leave.

### *Merits*

[14] There is difficulty in assessing the merits of an application at an early stage, and the exercise should be approached with caution. The Supreme Court noted in

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<sup>8</sup> *Tamarua v Toll Tranzlink Ltd* [2006] ERNZ 599 (EmpC); and *Almond v Read*, above n 6, at [37].

<sup>9</sup> *Almond v Read*, above n 7, at [37].

*Almond v Read* that the merits will not generally be relevant where there has been an insignificant delay as a result of a legal adviser's error, and the proposed respondent has suffered no prejudice (beyond the fact of an appeal).<sup>10</sup>

[15] There is no evidence before me that would enable me to make any findings in relation to lack of merit.

### *Conclusion*

[16] Taking into account the above factors and the overarching consideration of the interests of justice, I am satisfied that leave should be granted. The relatively short delay, the representative's error that led to it, and the lack of any prejudice to the respondent support this conclusion.

### *Substance of the proposed challenge*

[17] However, that is not the end of the matter. There is an issue in relation to the content or substance of the proposed challenge.

[18] A draft statement of claim accompanying the application would seek to challenge the Authority's determination on a de novo basis; that is, Ms Watkins desires a full hearing of the entire matter. Ms Watkins claims she was unjustifiably disadvantaged by the respondent's actions. She says the Authority Member failed to act in accordance with the intent of Parliament and allowed the respondent to use delays, technicalities and a disparity of resource/power to further disadvantage her as a self-litigant.

[19] In her statement of claim, she seeks various remedies, including reimbursement of fees, loss arising from the building of a spec home, unpaid wages and outstanding holiday pay, and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000. This is problematic as the determination that Ms Watkins seeks to challenge relates to her application to reopen the determinations of the Authority issued on

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<sup>10</sup> At [39](b).

30 November 2022 and 1 December 2022 respectively, not the determinations themselves.

[20] The 30 November 2022 determination found that Ms Watkins' claims of personal grievance for unjustified disadvantage and wage arrears were unsuccessful and ordered her to pay Highmark Homes Ltd \$3,500.25 in damages with interest.<sup>11</sup> In the determination dated 1 December 2022, the Authority declined Ms Watkins' application to reopen a determination issued on 13 November 2020.<sup>12</sup>

[21] As already noted, those determinations were not challenged in the Court. Instead, Ms Watkins sought to have them reopened. Her application was declined, and it is that determination that is before the Court and the subject of the challenge now.

[22] As no leave has been sought to challenge the earlier determinations of the Authority, leave is only granted in respect of the challenge to the determination dated 4 August 2023.<sup>13</sup> It cannot extend beyond that.

## **Outcome**

[23] Leave is accordingly granted for Ms Watkins to file a statement of claim challenging the determination of the Authority dated 4 August 2023 within 10 working days of the date of this judgment. That challenge is to be a *de novo* challenge.

[24] The respondent is to file and serve a statement of defence in the usual way, and thereafter there will be a directions conference to progress this matter.

[25] This matter was not opposed. There is no issue as to costs.

Kathryn Beck  
Judge

Judgment signed at 9.50 am on 9 November 2023

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<sup>11</sup> *Watkins v Highmark Homes Ltd*, above n 2.

<sup>12</sup> *Watkins v Highmark Homes Ltd*, above n 3; and *Watkins v Highmark Homes Ltd* [2020] NZERA 467 (Member Urlich).

<sup>13</sup> *Watkins v Highmark Homes Ltd*, above n 1.