

[3] On 19 November 2014, Mr O'Regan filed a formal application for leave and, although it failed to specify the leave sought, it has been treated as an application for an extension of time in which to commence the challenge.

[4] It is well established that this Court has jurisdiction under s 219 of the Act to make an order extending the 28-day limitation period. As with all such discretions, it must be exercised judicially and in accordance with established principles. The overriding consideration in any given case is the interests of justice.

[5] In exercising its discretion, the Court traditionally takes into account a number of factors such as the length of the delay, the reasons for the delay, any prejudice resulting from the delay and the apparent merits of the proposed challenge.

Background

[6] Before the Authority, Ms Rebecca Hodges and Ms Tui Allen (the applicants before the Authority) claimed that they had each been unjustifiably dismissed from their employment with Dynamic Meats at Hastings. The Authority consolidated both claims for one investigation meeting. However, Dynamic Meats did not communicate with the Authority or participate in any way in the Authority's investigation meeting which was held in Napier on 30 September 2014.

[7] The Authority found that Ms Hodges had started work telemarketing for Dynamic Meats on 1 May 2014 for a wage of \$17 per hour. She was dismissed on 16 May 2014. It found that Ms Allen had started work as an administration manager on 16 April 2014 on a salary of \$45,000 per annum and she had been dismissed the following day. Both applicants had given up other jobs to work for Dynamic Meats. There were no written employment agreements and no wage and time and holiday records were ever produced to the Authority by Dynamic Meats despite being requested. Neither applicant was paid although Ms Allen subsequently received a sum that she agreed to.

[8] The Authority did not make any detailed findings about the circumstances giving rise to the dismissals but in sworn affidavits filed in opposition to the application for an extension of time, both applicants deposed that they had been

dismissed by Mr O'Regan, who the Authority found was in charge of the business premises at Hastings (the Authority incorrectly referred to him in its determination as "Mr Kevin O'Regan"). The sole director of Dynamic Meats was Mr Gary Ashley who resided in Mangonui.

[9] Ms Hodges deposed that Mr Ashley employed her as a telemarketer for the company and she started work on Thursday, 1 May 2014. Over the succeeding days she met her targets and received positive feedback from Mr Ashley and Mr O'Regan. On Thursday, 15 May 2014, Ms Hodges met with Mr Ashley and she raised with him a problem she was experiencing with the phones and her computer. At the same time, she asked if she could have the Friday off to attend a family function. As Mr Ashley was "hesitant", she told him that if it was too much of a hassle she would be happy to work. She said that Mr Ashley replied: "Okay, but don't make a habit of it, as you are still in your trial period". Ms Hodges said that was the first time any reference had been made to a trial period.

[10] At about 6.30 pm that same evening, she received a call from Mr O'Regan who accused her of "attacking the boss" and having negativity towards the business. He told her not to return to work on the Friday or any other day as she had been dismissed.

[11] Ms Allen deposed in her affidavit that she commenced working for Dynamic Meats on Wednesday, 16 April 2014. She spent a couple of hours with Mr Ashley discussing her role and she said that she was instructed "basically to run the company without stepping on Mark's (Mr O'Regan) toes". Mr Ashley then left the premises and travelled back up North.

[12] Ms Allen said that on the following morning when she turned up for work, Mr O'Regan was angry with her because she had talked with staff and had distributed pay slips for the wages. She was told that it was not her job to distribute payslips and to stop talking to the staff as they were not her department. He also asked her to vacate the office that she was in and move out to the front desk. When she advised Mr O'Regan that Mr Ashley had told her to be in that office he replied that he ran the business and she was to do what he said, not Gary Ashley.

[13] Later that same morning, Ms Allen told Mr O'Regan that she was going out for a farewell lunch with friends from her previous employment. She said that Mr O'Regan immediately took exception and became intimidating to the point where she telephoned Mr Ashley but she said that "Gary didn't really seem to care much". Just before midday, Mr O'Regan told her to pack her things and get out of the building as she had no respect for him and it wasn't working out.

[14] In the statement of claim, which appears to have been drafted by Mr O'Regan and reads more like a brief of evidence than a proper pleading, it is alleged that he (Mr O'Regan) overheard Ms Allen on the phone trying to borrow \$20 so she could go to her farewell lunch which he did not think was fair on Dynamic Meats because, as he put it, "she was getting paid to do a job not try and borrow money for a lunch date". Mr O'Regan also accused her of returning from the farewell lunch at 1.17 pm "intoxicated" and he said that she then took approximately \$400 from Dynamic Meats without his permission and purchased "non food safety designated cleaning products". Mr O'Regan said that he and Mr Ashley agreed that Ms Allen's actions amounted to serious misconduct and he was left with no choice but to ask her to leave the premises.

[15] In relation to Ms Hodges, Mr O'Regan stated in the statement of claim that she had made it clear that she was not happy with the situation surrounding "Ms Allen's demise" and he had overheard her talking about Ms Allen's situation with other staff. He said that when he asked her to return to her workstation Ms Hodges gave him "a very inappropriate look and stormed off". Mr O'Regan said that he did not believe that Ms Hodges was being a supportive team member and given her indiscretions in talking about Ms Allen with other staff, "her employment was no longer tenable".

[16] The Authority had no difficulty in concluding that there had been a serious failure of procedure on the part of Dynamic Meats in that it had not complied with its obligation under the Act to put to the two employees any concerns that it had about their employment so as to allow them the opportunity to comment and respond before their dismissal.

[17] In reaching its conclusions, the Authority was relying upon the evidence it had heard from the two applicants. It noted that by deciding not to reply to their claims, Dynamic Meats had not challenged the applicants' claims and the Authority inferred that the company, therefore, accepted the claims and had decided not to provide any mitigating defence.

[18] The Authority ordered Dynamic Meats to pay:

[19] ...

a. Rebecca Hodges

- 1) \$1,330.25 wage arrears; and
- 2) \$8,763.29 lost wages; and
- 3) \$6,000 compensation for hurt and humiliation.

b. Tui Allen

- 1) \$6,000 compensation for hurt and humiliation.

[19] In addition, Dynamic Meats was required to reimburse the applicants the total sum of \$3000 for costs and \$71.56 each for filing fees.

Good faith report

[20] As it appeared from the Authority's determination that Dynamic Meats had not participated in the investigation in a manner designed to resolve the issues involved, the Court requested a good faith report pursuant to s 181 of the Act.

[21] In its request the Court specifically invited the Authority to address the first ground relied upon by Dynamic Meats in its application for the extension of time, namely, that:

The defendant Dynamic Meats was not served notice at its correct addresses, the manager Mark O'Regan (who is incorrectly named) in (sic) determination was not served and as witness to the events that transpired was not given fair legal opportunity to state his version of events.

[22] The Authority's good faith report dated 30 January 2015, explained in detail the steps taken to serve Dynamic Meats and Mr Ashley (both had been cited as respondents). The Authority Member confirmed, and I accept, that the proceedings

filed in the Authority were duly served on Dynamic Meats and Mr Ashley in accordance with the service provisions provided for in reg 16 of the Employment Relations Authority Regulations 2000 (the Regulations).

[23] Regulation 16(2) requires the Authority to serve any document lodged with the Authority on the other party to the proceedings "as soon as practicable after the lodging of that document". The statements of problem were received by the Authority on 15 July 2014. The Authority does not specify in its good faith report the precise date of service but the respondents would have had 14 days after service in which to lodge with the Authority their statements in reply.

[24] The good faith report confirmed that as no statements in reply were filed by the respondents in the required time the Authority's office had attempted to contact Mr Ashley, but were unsuccessful.

[25] Next, the Authority proceeded to organise a telephone conference and notice of the conference call was provided in a letter (which also contained a second copy of the statements of problem) and sent to the address of the business premises, the address of the company's registered office and the address of the Director, Mr Ashley. Again, the report does not give a date for the mailing of this correspondence.

[26] The letter that had been sent to the business premises was returned marked by the courier "return to sender" and there was a refusal at the address to sign for the item. The letter sent to the company's registered office was returned by the courier and marked "return to sender - no such business". The Courier Post records confirmed delivery of the letter to Mr Ashley on 4 September 2014, but it was signed for by the courier on the basis of the recipient's authority to leave deliveries when no one was available.

[27] The good faith report confirms that the telephone conference call took place on 16 September 2014 with the applicants' representative but without the respondents' involvement. A message had been left for Mr Ashley to contact the Authority but he did not return the call. In the telephone message from the

Authority, Mr Ashley was advised that it was still open for the respondents to seek leave to defend the claims, and that leave would not be unreasonably withheld, so long as the reasons for lateness were provided in writing.

[28] A separate notice was issued by the Authority on 15 September 2014 confirming that the investigation meeting would be held on 30 September 2014. The good faith report explained the position regarding service of the investigation meeting notice:

[4] ... A separate notice dated 15 September 2014 of investigation meeting was issued. There was no service of the notice by the Authority as it was left to the applicant to make alternative arrangements to serve the notice with the Authority's approval. This was because prior deliveries had been returned to the Authority marked "no such business" and there was a refusal to sign/accept delivery at the business premises (the shop) and no absolute certainty of delivery being made to Mr Ashley earlier because the courier had signed an earlier delivery. The service of the notice and the minute was left to the applicants' representative who arranged for Catherine Anne Murray of Greenlane Auckland to deliver and serve the notice of investigation meeting and the minute to the address for service of the company in Auckland (including Mr Ashley) and she taped the envelope containing the papers to the door of the company's registered address. She confirmed this in writing and provided proof with photos of what she did. The Authority was satisfied that this was done to achieve alternative service to that of the business premises referred to in the statement of problem and any action remained the responsibility of the director or any other authorised person at the address of service to manage the company's affairs and make any arrangements accordingly.

[29] The investigation meeting proceeded on 30 September 2014 but without the respondents' involvement. Mr Ashley had been sent an email on 26 September 2014 confirming the date of the investigation meeting. The good faith report records that the email "was read" on Friday, 26 September 2014 but no response from the respondent was received by the Authority.

The grounds of the application

[30] The first ground advanced by Dynamic Meats in support of its application for an extension of time relates to service of the Authority's proceedings. I have just dealt with that issue in the context of the good faith report and I will need to return to it.

[31] The second "ground" advanced by Mr O'Regan in his application for leave is expressed in these terms:

Furthermore the circumstances involving both Tui Allen & Rebecca Hodges dismissal involved section 4A of the Employment Act being breaches of duty of good faith.

[32] On 6 March 2015, the Court convened a telephone directions conference with the parties. Dynamic Meats was represented by Mr O'Regan. At that telephone conference it was agreed that the application for leave to challenge out of time could be dealt with by the Court on the papers without the need for a formal hearing. A timetable was fixed for the filing of submissions.

[33] In his written submissions filed on 20 March 2014, counsel for Dynamic Meats, Mr Aulakh, advanced several other grounds in support of the application. First, and most significantly, he stated that Mr Ashley had for some time been diagnosed with a serious medical condition that could be life threatening. The details of the illness were disclosed and some medical reports were produced. I accept Mr Aulakh's description of the medical condition.

[34] Mr Aulakh then raised several other matters. Those relevant to the application appeared to be:

- (i) The submission that the company office was in "shared premises" with other businesses (this being relevant to service by the Authority).
- (ii) The Authority referred to Mr O'Regan in its determination but it made no effort to call him as a witness or ask him to attend mediation on behalf of the company.
- (iii) Ms Allen's claim before the Authority was time barred as no grievance had been raised within the 90-day limitation period for raising a personal grievance.

- (iv) It had been agreed orally that Ms Hodges's employment was for a 90-day trial period and, therefore, she was not entitled to bring a personal grievance in respect of her dismissal.

Discussion

[35] I reject any suggestion that Dynamic Meats and Mr Ashley were not properly served with the proceedings by the Authority. No affidavit was filed by Mr Ashley claiming that he or the company had not been served and Mr Aulakh did not make any submission to that effect. Mr Aulakh expressed his position in these two submissions:

19. ...

- (i) The company office is in shared premises with other businesses, hence the issue of effective service *is at large*.
- (ii) Due to the medical condition of Mr Ashley, as detailed in the foregoing paragraph and annexures, the issue of service of the documents *is at large*.

(emphasis added)

[36] I suspect that the words "is at large" have been carefully chosen. They do not persuade me that service had not been effected by the Authority.

[37] While I accept that Mr Ashley, most unfortunately, suffers from a serious medical condition, I do not accept on the evidence before me that his medical condition would have prevented him from taking appropriate action to defend the proceedings when he and the company were first served by the Authority either in July or early August 2014. I say that because the medical reports produced were dated 10 February 2014, 11 February 2014, 15 September 2014 and 9 February 2015.

[38] The reports show that Mr Ashley's condition was diagnosed in February 2014. There was clear evidence, however, that Mr Ashley was working on company matters in Hastings in April 2014 during the time of the respondents' employment and there is nothing in the medical reports or in counsel's submissions to suggest that he was not able to deal with the proceedings at the time they were

served on the applicants in either July or early August 2014. I, therefore, reject any suggestion that the applicants were unaware of the proceedings. Admittedly, Mr Ashley had an outpatients' medical appointment on 15 September 2014 but, significantly, he has not filed an affidavit stating that he was unaware of the date of the Authority's investigation meeting. I am satisfied therefore, that service had been effected in accordance with the Regulations.

[39] With respect, I do not understand the second ground advanced by Mr O'Regan which is referred to in [31] above. In any event, I cannot see it as being relevant to the present application for leave.

[40] Referring to the additional matters raised by Mr Aulakh (see [34] above), I have dealt above with the first point which relates to the position regarding service of the proceedings. In terms of the second matter raised by counsel, there was no obligation on the Authority to call Mr O'Regan as a witness when the company and Mr Ashley had failed to respond in any way to the proceedings that had been served on them. In reference to the two remaining matters, Ms Allen's claim was not statute barred because the personal grievance had been raised within the 90-day limitation period, albeit just; and under 67A(2) of the Act, an agreement for a 90-day trial period must be in writing.

Conclusions

[41] For the reasons canvassed above, I have concluded that the grounds relied upon in support of the application are without merit or substance.

[42] The 15-day delay in making application for an extension of time in which to challenge the Authority's determination is not insignificant and it has not been explained in any way.

[43] This is one of those relatively unusual cases where it is possible for the Court to make an informed judgment about the merits of the substantive challenge. On the evidence before it, the Authority correctly concluded that there had been "a serious failure of procedure by the employer". Under s 103A(3) of the Act, allegations against an employee that may result in dismissal must be raised with the employee in

a timely way so as to give the employee a reasonable opportunity to respond. The employer must then genuinely consider the employee's explanation (if any) before a dismissal can take place. There was clear evidence before the Authority of flagrant breaches of these good faith obligations on the part of the respondents and nothing advanced subsequently, either by way of pleading or submission, has changed that position.

[44] In my view, the proposed challenge has no realistic prospect of success and it would not be in the interests of justice to allow the case to proceed. The application for leave to challenge out of time is, therefore, dismissed. Costs have not been sought.

A D Ford
Judge

Judgment signed at 9.30 am on 14 May 2015