IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 101
ARC 33/11

IN THE MATTER OF	an application to extend time for filing a challenge
BETWEEN	PRASERT ARKOMPAT Applicant
AND	THAI CHILLI CO LTD TRADING AS THAI CHILLI Respondent

Hearing: 22 July 2011
(Heard at Auckland)

Counsel: Hon Matt Robson, counsel for applicant
Paul Gallagher, counsel for respondent

Judgment: 10 August 2011

JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] The question for decision in this judgment is whether Prasert Arkompat should be allowed to challenge the determination of the Employment Relations Authority after the time for doing so as of right (28 days from the Authority's determination) has expired. The Authority's determination[1] was issued on 24 February 2011. The 28-day period expired after Thursday 24 March 2011. This application, together with supporting evidence and a draft statement of claim, were filed on 6 May 2011 and served on the respondent soon thereafter. The delay in applying was almost six weeks.

[2] The applicant's reasons for lateness include that he was unable, within the 28-day period, to pay further legal costs enabling him to challenge the Authority's

[1] [2011] NZERA Auckland 72.

determination. The applicant also says he was advised wrongly by his counsel that the 28-day period expired on 31 March 2011, about a week after it did in fact.

[3] Even accepting that the applicant's lawyer may have erroneously advised him that he had one further week within which to challenge the Authority's determination, that does not explain adequately, or really at all, why it took a further five weeks after that to lodge a challenge. Indeed, it does indicate that both the applicant and his lawyer were then aware of the expiry of an appeal period and could be expected to have done something about it.

[4] The applicant's case then falls back on his other ground, that of temporary impecuniosity. He says he had other debts which, presumably, he felt obliged to either discharge or at least address before filing a challenge. The applicant, as someone in New Zealand on a temporary immigration permit, is not entitled to legal aid. There is, however, little if any detailed explanation of the sort that would be expected in an application such as this about the efforts made to obtain the court filing fee ($204.44) or why a waiver of this, even in a temporary way, could not have been sought by his counsel. Although rarely if ever sought, the legislation does not necessarily prohibit an application to the Court to waive or delay payment of a filing fee, or to file a proceeding and apply contemporaneously or subsequently to formalise its filing under s 219 of the Employment Relations Act 2000. Meritorious challenges should not fail simply for want temporarily of a filing fee. It would be a shameful day when the door of the Court were to remain closed to a litigant because of temporary impecuniosity and although Parliament and the Executive (by regulations) have not (yet) provided expressly for a fee waiver/postponement regime, it should not be beyond the wit of the Judges to so dispense justice in what will be rare but deserving cases.

[5] Mr Arkompat's claims in the Employment Relations Authority against Thai Chilli were for a personal grievance (unjustified dismissal) and for arrears of wages and holiday pay. He first filed his statement of problem in the Authority (without having raised his grievance with his employer) at the beginning of August 2009, more than 18 months after his employment had ended. Although he was within time to claim wage arrears and was not required to notify his former employer of this

before doing so, his personal grievance should have been raised with the company within 90 days of his dismissal or of his becoming aware of this event. So he was then about 15 months out of time in raising his grievance.

The Authority's determination

[6] This dismissed comprehensively not only the claims brought before it by Mr Arkompat but also others that were not permitted by the Authority to be put before it.

[7] First, the Authority had to determine whether Mr Arkompat had raised his personal grievance of unjustified dismissal with his employer within 90 days after its occurrence or his discovery of that if it was a longer period. Although Mr Arkompat asserted that he had raised his grievance when, as he claimed, his employer sought a payment of $30,000 from him to both support his application for renewal of his work visa and for permanent residence, the Authority concluded that this could not have been the raising of a grievance as required by the legislation. That appears to have been a sound finding by the Authority and indeed Mr Arkompat has not challenged it.

[8] There are, however, some aspects of the Authority's determination upon which I feel compelled to comment for the assistance of Authority Members generally. These are not matters which fall within the prohibitions set out in s 188(4) of the Act. Rather, they are considerations of natural justice in respect of which this Court has an entitlement, indeed perhaps an obligation, to raise for the fair and just disposal of proceedings under the Act.

[9] As noted already, nothing was done to raise Mr Arkompat's grievance until more than 18 months after dismissal when he initiated proceedings in the Authority. It appears that Mr Arkompat, who was represented by counsel in the Authority, did not apply for leave under s 114 of the Act to raise his grievance until very belatedly. That application was only made to the Authority orally and during Mr Robson's closing submissions.

[10] The Authority determined:

> [36] … That is far too late, especially given that the 90 day issue was first raised by Thai Chilli Co in its statement in reply lodged in August 2009. The employer is not able to have a reasonable opportunity to be heard on the application. It would be unjust and unreasonable to expect the employer to reply to the application made so late.
>
> [37] Given the time that was made available for preparation for the investigation meeting it would not be reasonable to resume the meeting so that the application can be replied to and considered.
>
> [38] A further major reason against considering the application is that it has been made well over two years after the employment ended around the end of October 2007. There is no apparent reason for that length of delay.
> …

[11] The Authority should be slow to reject applications made to it, even belatedly, orally, and towards the end of its investigation meetings. That is especially so where the existence or absence of such an application can dictate whether the proceeding survives or not otherwise than on its merits, as was the position here. If an application can be heard justly by adjourning an investigation meeting and/or using the Authority's broad discretion on costs, serious consideration should always be given to such a course, even when that might be inconvenient for the other party or the Authority itself. Such a course is often taken by this and other courts and it would be ironic if the more informal, flexible and problem solving jurisdiction of the Employment Relations Authority did not employ the same approach.

[12] Even if the Authority had determined justly not to entertain this belated application for leave after having considered those factors, it is problematic that it then proceeded to express what would have been its determination if it had allowed the application for leave. That is problematic because the Authority had refused to hear Mr Arkompat's case for leave. The non sequitur of expressing how such an application would have been decided if it had been allowed, without knowing the facts and submissions that would have been made, should have caused the Authority to have not attempted to reinforce its determination in this way. It is not surprising that Mr Arkompat did not adduce evidence (the absence of which caused the Authority to conclude that his application for leave would not have succeeded) because it did not occur to him or his counsel to so apply until towards the end of the investigation meeting.

[13] Although it is sometimes appropriate for a judicial body to express a fall-back conclusion that may not be strictly required, this should be done after having heard evidence and submissions on that fall-back conclusion issue.

[14] The Authority did likewise in respect of any question of justification for dismissal. That is, although Mr Arkompat's grievance was not properly before the Authority because it had not been raised with the employer in time, and an application for leave to do so out of time had been refused, it found he would have been unlikely to have succeeded in his claim to unjustified dismissal on its merits. This was said to be because if Mr Arkompat had not resigned, his employment would have come to an end "by operation of an implied term in the agreement that it would continue only for so long as Mr Arkompat was lawfully entitled to work in New Zealand."

[15] That is, so far as I am aware, if not a novel proposition of law which may or may not be correct, then certainly not well and authoritatively established. If it amounts to an argument of frustration, the law in this field in New Zealand is not well settled and this Court would be loath to make such an unequivocal assertion of a legal principle without the benefit of thorough legal argument and careful consideration. That is especially so because it was Mr Arkompat's case that he had been asked to pay a substantial amount of money to his employer for its support of his application for a renewal of his work permit to enable him to continue in that job. This would engage questions of good faith, justification on the fair and reasonable treatment tests in s 103A, and other considerations that cannot be said to necessarily support the Authority's proposition. Nor is it simply, as I read the Authority's determination, a matter whether the employer made false or malicious representations to the immigration service about Mr Arkompat's employment or obstructed his application for extension of his work permit.

[16] Nor, too, should this judgment be seen as necessarily agreeing with the Authority's conclusion that it could have no regard to the payment of a substantial sum of money by Mr Arkompat in Thailand connected with both his employment at Thai Chilli and his immigration status in New Zealand. The Authority concluded that Mr Arkompat could not claim relief in respect of breach of an agreement made

extraterritorially including the payment of the equivalent of $40,000 in New Zealand currency to obtain a job in New Zealand and accompanying work permit. But as I understood his case, Mr Arkompat did not seek to do so. Rather, his reference to these contended arrangements was part of the evidence supporting his claim that he had been dismissed unjustifiably when his employer refused to support his application for an extension or renewal of his work permit which, he claimed, was fatal to that application. The judgment referred to by the Authority in that regard, *Mehta v Elliott (Labour Inspector),*[2] does not determine the issue raised by Mr Arkompat's claim.

[17] Although the Court will not grant Mr Arkompat leave to challenge the Authority's determination, this should not be taken to necessarily be an endorsement by the Court of the Authority's reasoning and conclusion on these issues.

Decision

[18] The parties were agreed that the Court should follow a number of well established guidelines in determining the application for leave but ultimately these are only considerations going to whether it is just in all the circumstances of the case to grant leave.

[19] The first of these is the reason or reasons for the omission to bring the case within time. Accepting, as I do, that Mr Arkompat's lawyer may have miscalculated the period in which he had to file a challenge by one week, this does not account for the further period of five weeks before that was done. As already noted, also, this concession tends to confirm that Mr Arkompat and his lawyers were aware of the expiry of the appeal period and in those circumstances it is significant that there is no explanation why the relatively simple and inexpensive task of drafting at least a pro forma statement of claim and filing and serving this (together with an application for leave in reliance on the lawyer's error) could not have been done. Mr Arkompat's evidence about his straitened financial circumstances does not account adequately for that delay and was certainly not assisted by Mr Robson's submission that Mr Arkompat could not, in any event, make up his mind whether or not to challenge

[2] [2003] 1 ERNZ 451.

during that period. When compared to the 28-day period within which to challenge by right, a further delay of six weeks is not insignificant and should have been both better and more plausibly explained.

[20] The next consideration is the length of the delay. I have already dealt with this in part, concluding that it was six weeks, albeit this included the Easter holiday period of four days. Although not determinative of the issue by any means, I simply note that the time limits in the legislation do not take account of such public holiday periods as Easter. This was not a modest delay although not amongst the longest seen by this Court.

[21] The next consideration is whether any other person has suffered prejudice or hardship as a result of the delay. In this case the focus is on the respondent company and its owners and directors, Kraiya Archvarin and Yakin Archvarin. With some justification, they say that the cost and pressure of these proceedings, despite having been successful in them at all stages, is an unwarranted inconvenience and they may have suffered prejudice in a continuation of that by reason of Mr Arkompat's failure to take steps to challenge the Authority's determination in time. They say that this is particularly significant because the Authority's determination was also about Mr Arkompat's equal or greater failure to take timely steps about his employment relationship problem.

[22] The next consideration is the effect on the rights and liabilities of the parties. This has already been dealt with in relation to the prejudice to the respondent.

[23] Next is what is known as 'subsequent events'. No relevant subsequent event has been raised by the parties.

[24] Finally, the Court is required to give such consideration as it can to the merits of the applicant's claim which was dismissed by the Authority and which Mr Arkompat wishes to challenge. Mr Robson's submissions did not, however, focus on those merits. Rather, counsel identified what he said were important questions of principle involving the employment of migrant employees in New Zealand and, in particular, those on temporary work visas tied to particular employments. Counsel

submitted that there is a public interest in whether employers employing migrant workers can dismiss them with impunity and therefore justifiably, simply by withdrawing support for an employee's extension to a work visa. Counsel submitted that the case is an appropriate one for the Court to determine that migrant employees must receive the same benefits under New Zealand employment legislation as do citizens and permanent residents and that Parliament has made this clear in subsequent immigration legislation. There is no doubt that this is so in principle: whether it applies to this particular case is the real issue but one which the Court has little to go on.

[25] Unfortunately for Mr Arkompat, I have concluded that a combination of the significant lateness of his notified intention to challenge, the absence of sufficiently good reasons for that, and an absence of identification of the merits of his case, together with ongoing prejudice to the respondent from Mr Arkompat's repeated failures to adhere to time limits even when assisted by lawyers, means that it would not be just to extend the time for him to challenge the Employment Relations Authority's determination and his application must fail. I reserve questions of costs.

GL Colgan
Chief Judge

Judgment signed at 10.10 am on Wednesday 10 August 2011