IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 88
WRC 6/14

IN THE MATTER OF	an application for leave to file a challenge out of time
BETWEEN	MEGA WRECKERS LIMITED Applicant
AND	KEITH TAAFULI Respondent

Hearing:	(on the papers by affidavit dated 14 February 2014 and submissions dated 17 March 2014)
Representation:	G Bennett, advocate for the applicant G Ogilvie, representative for the respondent
Judgment:	10 June 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In a determination dated 6 January 2014 the Employment Relations Authority (the Authority) found that the respondent, Mr Keith Taafuli, had been unjustifiably dismissed from his employment with the applicant.[1] The applicant was ordered to pay wages and holiday pay to the respondent totalling $2,407.45 along with compensation in the sum of $6,000 together with costs and disbursements of $2,500 and $71.56 respectively.[2] In addition, the applicant was ordered to pay a penalty of $750 to the Crown account.[3] The applicant sought to challenge the Authority's determination in this Court but its challenge was filed two days out of time. It now seeks an order pursuant to s 219 of the Employment Relations Act 2000 (the Act)

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[1] *Taafuli v Mega Wreckers Ltd* [2014] NZERA Wellington 2 [Authority determination].
[2] At [51].
[3] At [52].

extending the time in which to file its challenge. The application is strongly opposed. By agreement, the matter has been dealt with on the papers.

Background

[2] The applicant, Mega Wreckers Limited (Mega Wreckers), is a vehicle wrecking company. It employed the respondent as a tow truck driver, although there was no employment agreement between the parties. Mr Taafuli commenced employment on 26 February 2013. He was dismissed on 15 March 2013 on the grounds of alleged dishonesty and theft. There had been an incident the previous day which it is not necessary for me to go into but on the morning of Friday, 15 March 2013, the Manager of the Wellington branch of Mega Wreckers, Mr Mohamad Hossaini, requested Mr Taafuli to go to Kelburn on his way into work to purchase a vehicle from a customer.

[3] Mr Taafuli went to the Kelburn address and negotiated a price of $300 for the vehicle. Mr Taafuli claimed that he gave the customer $300 cash. A receipt for $300 was signed by the customer. Later that day, however, the customer contacted Mega Wreckers and stated that she had received only $200, not $300. Mr Hossaini questioned Mr Taafuli about the matter and Mr Taafuli reiterated that he had paid the customer $300 and he referred to the receipt that had been signed by her for that amount.

[4] In the early evening of 15 March, Mr Hossaini set up a three-way telephone conversation with the customer and Mr Taafuli. The customer still insisted that she had been paid only $200 despite having agreed to a figure of $300. A threat was allegedly made by the customer to go to the Police and/or a consumer group if she did not receive the additional $100. The Authority concluded that Mr Hossaini had made an assumption that the customer would not have made a threat of that nature unless her assertion to have received only $200 was correct and he felt he had no choice but to dismiss Mr Taafuli.[4] The Authority held that Mr Hossaini had insufficient evidence of dishonesty on the part of Mr Taafuli and that the dismissal

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[4] At [29].

appeared to be a "panicked reaction to the prospect of Mega Wreckers being investigated by an external agency."[5]

The application

[5] The Authority's determination was issued on 6 January 2014. Section 179(2) of the Employment Relations Act 2000 (the Act) provides that a party who is dissatisfied with a determination of the Authority has 28 days from the date of the determination in which to file a challenge. The 28-day limitation period in this case expired on Monday, 3 February 2014 but the applicant did not file his challenge until Wednesday, 5 February 2014.

[6] At the investigation meeting before the Authority the applicant was represented by Mr Hossaini. On 31 January 2014, Mr Hossaini apparently instructed Mr Bennett in the matter. The explanation for the delay in filing the challenge is outlined by Mr Bennett in a supporting affidavit in these terms:

> 1. The plaintiff's director in this matter Mohamad Hossaini telephoned Abbey Employment Law Specialists on Friday 31 January 2014 to inquire about an employment matter and a de novo appeal to this Court.
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> 2. I was in the offices just checking up on what was happening in my absence having just had hand surgery on Wednesday 29 January 2014 and was on pain relief medication. The pain relief medication was a mixture of Tramal 100mg, Amitriptyline Hydrochloride 10mg, Ibuprofen 200mg and Panadol. Tramal and Amitripyline Hydrochloride were prescribed for pain relief while Ibuprofen was for swelling control.
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> 3. The surgery was due to my breaking my small finger and the break healed with a bone spur that was cutting the nerve and tendon of the finger.
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> 4. At the time of Mr Hossaini's call I was not meant to be in the offices but was given the call given his situation which was relatively serious.
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> 5. I advised Mr Hossaini incorrectly that the last date for filing the Statement of Claim would be the following Wednesday, and because of this, the Statement of Claim has been filed later than it should have been.
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> 6. The Statement of Claim should have been filed on Monday 3 February 2014, however due to my calculation in the dates I had indicated

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[5] At [31].

> Wednesday the 5 February 2014, which when looking at the dates comes to 30 days rather than what is allowed, which is that of 28 days.
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> 7. The error is completely mine and the plaintiff's director relied upon my advice.
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> …

[7] Although Mr Bennett did not mention the matter in his affidavit, the application for leave to file out of time records that when he spoke to Mr Hossaini on 29 January 2014 he apparently expressed concern to Mr Hossaini that "if he wanted to appeal he was leaving it to the last minute to seek advice and someone to do it." It also appears from the application that Mr Hossaini telephoned Mr Bennett on 5 February 2014 and asked him to proceed and it was then that Mr Bennett realised that the proceedings should have been filed on 3 February 2014.

[8] The statutory provision under which the Court can make an order extending the 28-day limitation period for making a challenge to a determination of the Authority is s 219(1) of the Act which provides:

> **219 Validation of informal proceedings, etc**
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> (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.

[9] Under this provision the Court has a broad discretion to extend time but, as with all discretions, it must be exercised judicially and in accordance with established principles. The overriding consideration in any given case will always be the interests of justice. In exercising its discretion, the Court will take into account a number of factors including the length of the delay, the reason for the delay, any prejudice resulting from the delay and the apparent merits of the proposed challenge.[6]

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[6] *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8].

Discussion

[10] In opposition to the application for leave, the representative for the respondent, Mr Ogilvie, raised a number of issues. First he submitted that while Mr Bennett was attempting to take responsibility for the delay, the primary cause for the lateness in filing the challenge was "the inaction" of the applicant in failing to give instructions to proceed with the challenge until 5 February 2014, which was already past the deadline. There is no doubt that Mr Hossaini can be rightfully criticised for leaving it until virtually the last moment before seeking advice and giving instructions in relation to the filing of the challenge, particularly when Mr Bennett had not previously been involved in the case. On the other hand, it was Mr Bennett who wrongly calculated the 28-day period.

[11] Mr Ogilvie was also critical of the applicant for failing in a number of respects to participate in the Authority's investigation in an "appropriate manner" and he produced correspondence passing between the Authority and the applicant where the applicant was criticised for failing to comply with the Authority's instructions. While there would seem to be merit in this criticism, it is a matter which can more appropriately be considered in the context of a good faith report pursuant to s 181 of the Act. Significantly in this regard, in terms of s 181(2) of the Act, the issues raised by Mr Ogilvie were also touched upon by the Authority in its determination.[7]

[12] Mr Ogilvie claimed that the respondent was "disadvantaged by the delay" both "financially and emotionally" given his expectations that on 3 February "he would be free from any challenge". Mr Ogilvie also made the point that the application for an extension of time was not accompanied by an affidavit and he submitted that, "the delay is far more than two days because the correct date of filing should be based on the date of filing the affidavit." I have taken these considerations into account but in my view, in the circumstances of this case, it is appropriate to treat the delay as the period up until 5 February when the application for an extension of time was filed. On that basis the delay is minimal and no real prejudice has been established.

[7] Authority determination, above n 1, at [45]-[46].

[13] Finally, Mr Ogilvie contends that, based on the findings of the Authority, the applicant "does not have an arguable case". In *McLeod v National Hearing Care (NZ) Ltd*, I expressed some caution about overstating the significance of the merits of the case as a factor in an application like the present.[8] In this regard, I respectfully agreed with the views of Judge Perkins in *Clear v Waikato District Health Board* that any evaluation of the merits or chances of success can only be considered at a relatively basic threshold at this early stage of the proceedings.[9] In my view, the present application satisfies that threshold test.

[14] Having regard to all these matters, I am satisfied that the overall justice of the case requires that the applicant be permitted to proceed with its challenge to the Authority's determination. The statement of claim filed as a draft on 5 February 2014 will be regarded as having been validly filed today.

[15] For the reasons touched upon in [11] above, I will be issuing a separate order requesting a good faith report from the Authority pursuant to s 181(1) of the Act. The respondent need not file a statement of defence until directed to do so by the Court.

[16] Costs are reserved.

A D Ford
Judge

Judgment signed at 11.30 am on 10 June 2014

[8] *McLeod v National Hearing Centre (NZ) Ltd* [2012] NZEmpC 120, [2012] ERNZ 466 at [33] citing *Costley v Waimea Nurseries Ltd* [2011] NZEmpC 59 at [14]-[15].
[9] *Clear v Waikato District Health Board* [2007] ERNZ 338 (EmpC) at [19]-[21].