IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 49
EMPC 337/2017

IN THE MATTER OF	of a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to extend time
BETWEEN	TALBOT AGRICULTURE LIMITED Plaintiff
AND	FRANKLYN WATE Defendant

Hearing:	On the papers filed on 7, 8 and 14 May 2018
Appearances:	D Caldwell, counsel for plaintiff J Horan, advocate for defendant
Judgment:	18 May 2018

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE K G SMITH

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[1] Franklyn Wate has applied for an extension of time to file and serve evidence. The evidence was to be filed no later than 3 May 2018 but was not. If the application is not granted, Mr Wate's defence to Talbot Agriculture Ltd's claim will be severely compromised if not crippled.

[2] A brief comment about the litigation is required to place into context the application that has been made. Talbot Agriculture Ltd has challenged a determination of the Employment Relations Authority that concluded it had unjustifiably dismissed Mr Wate and awarded him substantial remedies.[1] Talbot Agriculture was ordered to pay Mr Wate wages and holiday pay, three months' gross pay as reimbursement for

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1 *Wate v Talbot Agriculture Ltd* [2017] NZERA Christchurch 181.

lost wages and $10,000 as compensation for humiliation, loss of dignity and injury to feelings.[2]

[3] Talbot Agriculture has challenged the whole of that determination and the proceeding has been set down for hearing on 9 and 10 July 2018. Before those hearing dates were allocated orders were made directing both parties to file and serve briefs of evidence. Talbot Agriculture has complied but Mr Wate has not done so, as a result of an oversight or omission on the part of Mr Horan.

The application

[4] On 7 May 2018, Mr Horan filed an affidavit, described as a formal request for an extension of time, deposing to the circumstances which led to this oversight. That application has been opposed by Talbot Agriculture.

[5] At the heart of the application is a statement by Mr Horan that he believed the evidence was due on 30 May 2018, because of a minute issued by the Court. An extension of time to 29 May 2018 was sought.

The Court's orders

[6] The Court has issued four minutes timetabling the exchange briefs of evidence and related matters. The first minute, dated 15 February 2018, directed evidence to be filed and served on 16 March 2018 and 19 April 2018 with evidence in reply no later than 26 April 2018. Those dates were agreed to by the parties' representatives.

[7] Subsequently Talbot Agriculture instructed Mr Caldwell as counsel and, as a result, a request was made to amend the timetable. That request was granted and a minute dated 16 March 2018 was issued with a revised timetable requiring the plaintiff's briefs of evidence to be filed and served no later than 29 March 2018. This minute stated the defendant's briefs of evidence were to be filed and served no later than 30 May 2018. The intended date was 3 May 2018. The third order in the minute,

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2 Employment Relations Act 2000, s 123(1)(c)(i).

for evidence in reply, required the plaintiff to do so no later than 10 May 2018. It is this minute Mr Horan says he relied on.

[8] The typographical error in the minute, referring to 30 May 2018, was identified and corrected by an amended minute emailed to Mr Caldwell and Mr Horan on 20 March 2018. The date for the defendant to file was corrected to 3 May 2018. No other changes were made. When this minute was distributed it was labelled as an amended minute and the Court Registry Officer drew attention to the amended order in a covering email.

[9] On 27 March 2018, Mr Horan applied to further amend the timetable; that is seven days after being sent the amended minute. He sought to change the date by which the bundle of documents was to be filed. The application was granted and in the resulting minute dated 27 March 2018, attention was further drawn to the date on which the defendant's briefs of evidence were to be filed. Para [7] of that minute reads:

> There is no change to the directions for the defendant's briefs to be filed which remains no later than 3 May 2018. Likewise, any briefs in reply are still required to be filed and served no later than 10 May 2018.

[10] Mr Horan now says that he interpreted the minute of 16 March 2018 as meaning Mr Wate's evidence was not due until 30 May 2018. On the strength of his appreciation of the due date for evidence he says he had accepted personal and professional commitments in Auckland and made travel plans. He did not say when he accepted them.

The opposition

[11] Talbot Agriculture has opposed the application and has submitted that what is being asked for is an extension under s 221 of the Employment Relations Act 2000 (the Act). It says there is no merit in the application. That is because, it says, the date on which the evidence was due was clear.

[12] It also submitted that it may suffer prejudice if the application is granted because of the commitments which Mr Caldwell, as counsel, has and which were accepted by him on the basis that Mr Wate's evidence would be filed on time.

Analysis

[13] Section 221 of the Act reads:

> **221 Joinder, waiver, and extension of time**
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> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
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> (a) direct parties to be joined or struck out; and
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> (b) amend or waive any error or defect in the proceedings; and
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> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
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> (d) generally give such directions as are necessary or expedient in the circumstances.

[14] In considering the factors taken into account in an application for an extension of time the Court considers the overall interests of justice.[3] In this case, there has not been an adequate explanation for the omission to take steps to file the briefs of evidence on time. While the original minute contained an error, it was promptly amended. Two subsequent minutes, one of which responded to an application by Mr Horan on Mr Wate's behalf, also stated the date by which evidence was to be filed and served. The application is silent about those minutes. On any reasonable reading of the minutes the date for Mr Wate to comply was unambiguous.

[15] However, I do not accept that Talbot Agriculture will be prejudiced if the application is granted. The application is to file and serve Mr Wate's evidence no later than 29 May 2018. That leaves approximately five weeks before the hearing, which is sufficient time for Talbot Agriculture to prepare.

[16] The only potential prejudice is that Mr Caldwell's preparation time will be compressed by his commitments and the unavailability of one of the Talbot Agriculture's directors between 8 June 2018 and 3 July 2018. While there will be some inconvenience to Talbot Agriculture that does not amount to the sort of prejudice

3 See, for example, *Liu v South Pacific Timber (1990) Ltd* [2011] NZEmpC 100.

required to justify denying Mr Wate the opportunity to file evidence and to fully participate in the hearing.

[17] The overall interests of justice favour the application being granted.

[18] The timetable orders previously made are revised. Mr Wate is to file and serve his evidence no later than 4.00 pm on 29 May 2018. If Talbot Agriculture intends to file briefs of evidence in reply it may do so no later than 4.00 pm on 8 June 2018.

[19] While the application was successful the circumstances in which it was necessary mean costs should lie where they fall.

K G Smith
Judge

Judgment signed at 9 am on 18 May 2018