IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 234
EMPC 2/2015

IN THE MATTER OF	of an application for leave to file challenge out of time
BETWEEN	AFT Applicant
AND	BCM Respondent

Hearing:	By memoranda of submissions and affidavits filed on 21 April, 25 May, 25 June, 14 and 20 July, 18 and 31 August, 14 September, 12 October and 3 November 2015
Appearances:	Applicant in person No publication of counsel for respondent
Judgment:	23 December 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

INDEX

Introduction

[1] This judgment decides the applicant's application for leave to extend the time within which to file and serve his challenge to a determination of the Employment Relations Authority. The judgment's entituling reflects the filing of multiple memoranda, affidavits and other pleadings over an extended period of time. There are two reasons for these unusual circumstances. The first is that the applicant is unrepresented and an unusual degree of leniency has been allowed to him to lodge proceedings that are not in the required formats. The second is that the applicant now lives and works outside New Zealand and in circumstances in which it is difficult and time-consuming both to put together those pleadings and to have affidavits sworn any more than very infrequently.

Order prohibiting publication

[2] On 26 May 2015 the Court made an interim order, pursuant to cl 12 to sch 3 to the Employment Relations Act 2000 (the Act), prohibiting, on an interim basis, publication of the applicant's name. The terms of this order were:

> 1. … no person is to publish the plaintiff's name, whereabouts or any other particular which may lead to the plaintiff being identified. Exempt from this order are the parties themselves and their legal representatives in the proceedings.
>
> 2. This order is to remain in effect until reviewed by the Court after hearing from the defendant about whether it should be extended or made permanent.

[3] That order was to continue as an interim order. It was made, and will now continue, until further order of the Court, to protect the applicant's personal safety and security, including his work security, in the country in which he is currently residing and the particular employment in which he is engaged. It would compromise the integrity of those orders to provide publicly any further information about the grounds for them. Those grounds are, however, contained in undisputed affidavit evidence. The evidence and other indicia of the applicant's identity, whereabouts and other circumstances are contained in documents on the court file, but this may not be inspected by any person without leave of a Judge.

[4] Although not addressed by the parties, to be effective in the circumstances of this case, the non-publication order relating to the applicant's identity must extend necessarily to that of his former employer, the respondent. If an order prohibiting publication now relates only to the applicant, it would not be difficult to identify him by reference to the name of his former employer. In those circumstances, the respondent's identity is likewise the subject of a non-publication order in the same terms as the applicant's.

[5] Also not addressed by the parties, the identification of counsel acting for the respondent in this judgment would enable discovery of the applicant's identity. So, in these circumstances, also, it is appropriate to depart from the Court's usual procedure of identifying parties' representation in the entituling to the judgment. The potential consequence to the applicant of these identifying features of the case warrants the Court taking this unusually secretive approach to information contained in the judgment and on the Court's file.

The Employment Relations Authority's determination

[6] I now move to the substance of the plaintiff's application. By a determination after receiving written submissions, the Authority dismissed AFT's claim for compensation for unjustified constructive dismissal and for what AFT described as the respondent's "deceptive and abusive/bullying conduct around mediation".

[7] Although the applicant's proceeding was a personal grievance alleging that he had been dismissed constructively and unjustifiably, the Authority dealt first with the significance to AFT's proceeding of a document submitted by him to the Authority described as a "Record of Settlement" (what I will call the settlement agreement) dated 27 September 2011. This had been entered into between the parties and executed by a mediator appointed by the Chief Executive of the (then) Department of Labour under s 149 of the Act. AFT's necessarily initial claim to have the settlement agreement set aside by the Authority included allegations of bias and incompetence against the mediator and that he, the applicant, had been "incapacitated" at the time of the mediation. AFT provided evidence to the

Authority which he said confirmed that at the time of the settlement he had been suffering from a medical condition which affected his concentration and his ability to interact when in the company of others including, in this case, the mediation meeting as a result of which the settlement agreement was recorded and signed.

[8] The Authority Member said in this regard:

> [10] If it could resolve claims about the performance and behaviour of [the employer] and the mediator in mediation, to do so effectively the Authority would most likely need evidence from [the employer's] Chief Executive or representative and also from the mediator. That evidence is unlikely to be obtainable as provisions of the Act tightly restrict the circumstances in which information can be given about mediation by participants in it or by a mediator.

[9] The Authority Member found that AFT's was not a claim brought for the purposes of enforcement of the mediated settlement, which it said was the sole exception to the inability of the Authority to inquire into what happened at mediation.[1] The Authority concluded that AFT sought to achieve a different outcome in the Authority from that which had been settled in mediation and recorded pursuant to s 149. The Authority concluded:

> While the Authority can determine that a purported settlement is unenforceable if the making of it did not comply with s 149, that is not the same as voiding an otherwise enforceable settlement or declaring it to have been void from the beginning. In any event the settlement has now apparently been fully performed by the parties.

[10] The Authority also concluded that it was not empowered in law to investigate and declare whether the mediator had acted unlawfully or contrary to the mediator's obligations under the Act. It also recorded its conclusion that remedies would not be available to AFT because the mediator and the (then) Department of Labour were not parties to any employment relationship either with AFT or BCM.

[11] The Authority then considered its power to dismiss AFT's proceedings under cl 12A of sch 2 to the Act. That is based on a test of frivolity or vexatiousness. The Authority accepted that AFT had been "earnest and sincere" in bringing his application to it but said:

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[1] Employment Relations Act 2000, s 149(3)(b).

> … the law recognises that in some cases there is simply no legal foundation for proceedings and it is plain they cannot succeed. In the wider interests of justice those cases ought to be ended once that is able to be clearly seen.

[12] The Authority confirmed that AFT's medical condition at the relevant time was not a trivial issue. It said:

> No doubt his ability to apply himself to the mediation was affected by his condition, although strain on health in various ways is not unusual for parties experiencing a serious breakdown in an employment relationship. The ability to concentrate and interact may be diminished and put wider pressure by an acrimonious split and by employer and employee becoming antagonists who must try to relate to each other during mediation.

[13] The Authority Member rejected what he perceived to be AFT's attempt to deflect responsibility for the terms of the settlement reached with the former employer by accusing the mediator and the Department of Labour of being partly to blame for the outcome of the process. The Authority Member concluded:

> It is most unlikely that the mediator criticised by [the employee] in this case fell below the high standards set by the Mediation Service and affirmed by the Courts and also by this Authority.

[14] The references to curial affirmation are to the judgments in *Te Ao v Chief Executive of the Department of Labour*[2] and *Just Hotel Ltd v Jesudhass*.[3]

[15] The Authority concluded that it was obliged to dismiss AFT's application because, from its contents and as a result of the settlement agreement, "it cannot succeed". The Authority opined, also, that AFT had breached the Act by seeking to put the settlement before the Authority other than for enforcement purposes. AFT's proceeding was dismissed under cl 12A of sch 2 to the Act.

[16] It appears that the Authority considered whether it should make a compliance order against AFT requiring him to comply with the terms of the settlement agreement including, in particular, its requirement of confidentiality. The Authority decided that this did not "seem necessary" and made no order.

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[2] *Te Ao v Chief Executive of Department of Labour* [2008] ERNZ 311 (EmpC).
[3] *Just Hotel Ltd v Jesudhass* [2007] ERNZ 817 (CA).

Relevant factual background

[16] It is now necessary to refer briefly to previous events which underlie the applicant's claim. During the parties' ongoing employment relationship, in late September 2011 they attempted to resolve by mediation an employment relationship problem that had arisen between them. This took place on 27 September 2011 and as a result of their discussions, assisted by a statutory mediator, the parties entered into the settlement agreement referred to above.[4] This document is before the Court as it was before the Authority.

[17] The applicant claims to have raised a personal grievance with his employer on 31 August 2011 and although there is no information before the Court about this, it can only have been a personal grievance alleging that the applicant had been disadvantaged in his employment by an unjustified act or omission by the respondent. It appears that the unjustified disadvantage alleged by the applicant was the employer's decision to subject him and his employment to a performance inquiry process. He says that it was designed and used for educational institutions but not for individual staff members of them, and not a process that was provided for in his contract.

[18] The applicant says that this quality assurance programme would have subjected him to inquiry by eight different persons and would have been both oppressive and overwhelming. The applicant says that, coupled with the respondent's initial claimed inability to respond to his personal grievance within time, there followed an hiatus during which he took leave and received medical treatment for a serious condition which had a slow recovery time. The applicant says that on the day of his return to work (19 September 2011) he was advised that the respondent had arranged an urgent mediation about the matter of his 31 August 2011 complaint, which mediation was due to take place on 27 September 2011. The applicant claims that despite notice of this urgent mediation being given to him very late, he believed that it might provide a path to settling the problems which were the subject of his complaint of unjustified disadvantage and so did not object to participating in the mediation of his personal grievance on that date.

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[4] At [7].

[19] In addition to detail which is unnecessary and would be inappropriate to disclose in this judgment, the settlement agreement executed at the end of the mediation included reference to AFT's agreement to resign from his employment with the former employer, on notice to take effect on 23 December 2011, about three months after the mediation. AFT agreed to provide the former employer with written confirmation of his resignation, which document would be put on his personnel file. The parties agreed that, in the meantime, the employment relationship would continue with an assurance by AFT about the manner in which he would perform that.

[20] Further to its provision whereby AFT would work out his notice of resignation, the settlement agreement provided for a further relatively modest payment to him of one month's salary. The applicant's former supervisor was to provide "a positive written reference" regarding his strengths and confirming his resignation, and to confirm those details verbally if required.

[21] The settlement agreement made particular provision for the content of statements made by either party about the reasons for AFT's departure from the former employer. Clause 12 of the settlement agreement provided:

> The terms of this Agreement (including the circumstances leading to it) will be kept strictly confidential by the parties and their advisors, except as required by law or with the prior written consent of the other party.

[17] There was also what is known as a 'non-disparagement' clause.

[18] Clause 14 of the settlement agreement provided:

> The terms of this Agreement are in full and final settlement of any claims, allegations, employment relationship problems or grievances whatsoever that either party has (or in the future may have) arising from or related to the Employee's employment with [the employer], including the termination of his employment, and all contractual or statutory entitlements owing to the Employee.

[19] After the parties' signatures the following appears:

> We confirm that we fully understand that once the Mediator signs the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and

2. except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, and application for review, or otherwise; and

3. the terms of the settlement cannot be cancelled under section 7 of the Contractual Remedies Act 1979; and

4. that section 149(4) provides that a person who breaches an agreed term of settlement to which subsection(3) applies is liable to a penalty imposed by the Authority.

[20] At its conclusion, a mediator employed by the Chief Executive of the (then) Department of Labour to provide mediation services and holding a current general authority from the Chief Executive to sign agreed terms of settlement for the purposes of s 149 of the Act, recorded:

c) I have been requested by the parties to sign the attached agreed terms of settlement; and

d) Before I signed the agreed terms of settlement I explained to them the effect of sections 148A, 149(1) & (3); and

e) I confirm that the parties have advised me that no minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined by the Employment Relations Act 2000) have been foregone in the reaching of this settlement; and

f) I am satisfied that the parties understood the effect of sections 148A, 149(1) & (3), and have affirmed their request that I should sign the agreed terms of settlement.

I sign the agreed terms of settlement pursuant to section 149(1) & (3).

[21] The mediator's signature was affixed and dated "27th day of September 2011", the same day as the mediation meeting was held.

[22] That settlement agreement having been executed and certified in late September 2011, and the applicant having worked out his three months' notice, AFT applied first to the Authority on 16 February 2012. He asked it to investigate what he described as his constructive dismissal by the employer and made allegations as to its conduct around mediation as being "deceptive and abusive/bullying". As already noted, the Authority dismissed the applicant's proceeding under cl 12A of

sch 2 to the Act. It was, however, almost three years later that the applicant sought to challenge the Authority's dismissal of his case in 2012.

Applicant's grounds for leave

[23] Because of the applicant's unfamiliarity with court proceedings, his grounds in support of leave are contained in several documents, many parts of which overlap. These include a memorandum filed with the Court on 20 July 2015; another memorandum filed on 18 August 2015 and, finally and most significantly, an affidavit sworn on 9 September 2015 and filed by email three days later, and in hard copy on 21 September 2015. There is also an affidavit filed by the applicant's specialist medical practitioner whose evidence is only challenged as to its sufficiency and is not contradicted factually. There are also extensive submissions "in reply" filed by the applicant on 3 November 2015. Together, these documents run to more than 100 pages.

[24] The applicant's reasons for the lateness of his application for leave to challenge the Authority's determination are summarised by him as being three. The first relates to his health. He says that the demands of filing and serving a challenge to the Authority's determination would have been beyond him in early 2012 because of the physical and mental limitations consequent upon his medical treatment for hyperthyroidism. He says that his health was significantly compromised at that time by his reaction to this treatment for thyrotoxic (Graves') disease which involved treatment of him with radioactive iodine-131.

[25] While the Court is not unsympathetic to AFT's medical circumstances, there is no explanation for the apparent paradox that at the same time as he says he was unable to file a challenge to the Authority's determination within time, he filed with the Authority submissions or other pleadings relating to his case in that forum. Nor does the evidence deal with what is the extraordinarily long delay of about three years before the applicant came to file his papers in this Court seeking leave, despite apparently being able to apply for and take up demanding professional teaching work in a very challenging foreign environment.

[26] The applicant's second broad reason for the lateness of his application relates to his claimed inability to obtain professional legal advice and representation for a challenge to the Authority's determination.

[27] Third, and finally, are his difficulties in preparing, having sworn, and filing his proceedings from the country in which he now lives.

Respondent's grounds of opposition

[28] In opposing the leave AFT seeks, the former employer relies first and principally on the fact that almost three years has passed between the time the Authority's determination was issued and AFT applied to the Court. The time limit for doing so under s 179 of the Act is 28 days. The ex-employer says that AFT has not put forward sufficiently persuasive reasons to justify that delay. He (the Chief Executive) says that his medical evidence does not explain adequately his failure to challenge the Authority's determination either within time, or at least sooner than after the period of almost three years that elapsed.

[29] It says that AFT's unsuccessful search for legal representation during that period is also an insufficient explanation. The respondent says that, even if leave were to be granted in these unusual circumstances, AFT's claim to set aside the settlement agreement remains frivolous or vexatious so that his case is misconceived and meritless.

[30] As to delay generally, the respondent points to AFT's application to the Authority on 16 February 2012, made with urgency, for an order for interim reinstatement. He also provided submissions to the Authority on 28 February 2012 in support of his application. The respondent says that this undermines AFT's argument that he was unable to meet the statutory 3 April 2012 deadline for challenging the Authority's determination when his condition was no worse, or even better, than previously.

[31] The respondent relies on the following statement of the Court in *Bilderbeck v Brighouse Ltd* concerning the desirability of finality to litigation:[5]

> Any disruption to that finality is in itself a serious detriment capable of being regarded as prejudicial. However, if application had been made promptly, even within a day of receipt of the decision by the appellant, the respondents would still have suffered the prejudice of defeat of their expectations of certainty if the application had been granted −as it almost certainly would have been at that stage. That circumstance also goes into the balance. So does the consideration that with every day that goes past without an appeal being signalled, confidence in the certainty and finality of the decision grows stronger. At the end of the day the presence or absence of prejudice, while a matter to be taken into account, is not conclusive either way.

[32] The respondent says that the applicant's challenge to the Authority's determination is so weak, in both fact and law, that it cannot succeed and the Authority was correct to have dismissed it. He points to s 149 of the Act and says that the parties' record of settlement and the circumstances in which it was reached cannot be examined by the Authority or the Court. He submits that s 148(3) prohibits the applicant from bringing evidence of events that occurred at the mediation and, in any event, the applicant will have to show that the Authority was wrong to find that the substantive claim was frivolous or vexatious. The respondent invites the Court to reiterate the Authority's finding that the claim was and is frivolous and vexatious.

Tests for leave

[33] The statutory tests applicable to an application for extension of time, as in this case, are said by the respondent to be contained in ss 219 and 221 of the Act which provide as follows:

> **219 Validation of informal proceedings, etc**
>
> (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.
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> (2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[5] *Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74 (EmpC) at 86-87.

…

221 Joinder, waiver, and extension of time

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,—

…

(c) subject to section 114(4), extend the time within which anything is to or may be done; and

(d) generally give such directions as are necessary or expedient in the circumstances.

[34] I propose to deal with this application under s 219. Section 221 applies to matters that are before the Court. This is an application to bring a matter before the Court.

[35] As will be seen from s 219, the Court has a broad discretion to extend time limits, including for bringing a challenge to an Authority determination. The interests of justice on balance between the parties is the lodestar. The courts, including the Employment Court, have developed a number of relevant considerations to be taken into account, as the following cases illustrate.

[36] Following the judgment of this Court in *An Employee v An Employer*, the respondent accepts that: "The fundamental principle which must guide the Court in the exercise of its discretion is the justice of the case."[6] The respondent also accepts that guidelines emerging from such cases as *Day v Whitcoulls Group Ltd*[7] and *Stevenson v Hato Paora College Trust Board*[8] are applicable in determining the overall justice of the case. These are said to be:

- the reason for the omission to bring the case within time;
- the length of the delay;
- any prejudice or hardship to any other person;
- the effects on the rights and liabilities of the parties;

[6] *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].
[7] *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 (EmpC) at 548.
[8] *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8].

- subsequent events; and

- the merits of the proposed substantive proceeding.

Discussion

Reasons for delay

Medical reasons

[37] Although the applicant's affidavit evidence explains why he may not have been able to file a challenge to the Authority's determination before the end of the 28-day period on 3 April 2012, there is no or insufficient explanation for the subsequent delay of almost three years including, within this period, the apparently contradictory fact that the applicant obtained and commenced work in difficult and unusual surroundings overseas. As the case law confirms, it is not sufficient for an applicant for leave in these circumstances to explain only why a challenge was not brought within the 28-day period. The delay after that period must be explained and it has not been, at least for medical reasons, in the applicant's case. The applicant's explanation for the totality of the delay is insufficient.

[38] It is significant, in my assessment, to note that the delay has not been in bringing the applicant's personal grievance to the Authority (it was raised within the 90-day limit for doing so and filed promptly after that) but, rather, in challenging an Authority determination that had gone against him. That is arguably a less complex and taxing process than raising a grievance with an employer and commencing proceedings in the Authority. It is telling, also, that the applicant apparently gave no intimation to the respondent, even informally, that he was so dissatisfied with the Authority's determination that he would challenge it. Those exercises were undertaken by the applicant when he was in poorer health than subsequently when he says he was unable to do less arduous tasks relating to his case.

[39] It is noticeable, also, that in February 2012 when the medical evidence points to the applicant being at his most disabled, he was nevertheless able to bring an application for interim reinstatement in employment to the Authority. Although none

of his documents in this regard is in evidence, it must necessarily have included a form of application, affidavit evidence and an undertaking as to damages for the Authority to have embarked upon an investigation of it.

Inability to obtain legal representation

[40] The applicant says that he was unable to obtain professional legal advice and assistance to challenge the Authority's determination despite having approached lawyers on several occasions. He says that he was, in his words, "discouraged at every turn" by the perception that his application carried significant risks. The applicant says that "one reputable employment lawyer" was willing to represent him but delayed getting documents to him and, even then, these were incomplete. He says: "I felt unable to give him the trust his role would require and did not engage him." There is no indication of when these attempts to engage legal representation took place. That, too, is important information in support of the applicant's claim but which lacks vital detail.

[41] Eventually, on 23 December 2014, the applicant filed his own papers (a draft statement of claim, this application for extension of the time within which to file it and affidavit in support) apparently without professional legal assistance, as such proceedings can indeed be formulated and lodged by litigants themselves. The applicant's grasp of legal principles, as illustrated by his comprehensive submissions in support of this application, together with the nature of his current and previous employment in New Zealand, suggests that it would have been well within his capabilities to have done earlier what he did belatedly, by filing a draft statement of claim, application for leave and affidavit in support.

Effects on others

[42] The respondent submits that he will be prejudiced if the application is allowed. He points to the natural diminution of witnesses' recollections of events which, by the time of a substantive hearing, would have occurred more than four years previously.

[43] The respondent says that he will be prejudiced by having to commit additional and limited financial resources to a case of that antiquity as well as finding it difficult to gather evidence from witnesses, including other staff members and former students. In particular, most former students will inevitably have left the institution and some of those may not now be in New Zealand.

Merits of proposed challenge

Clause 12A tests

[44] This is not a case in which the assessment of the merits of the grievance can be undertaken in the same way because such an assessment was not undertaken at all in the Authority. The ability to analyse the Authority's factual findings clearly affected the decision of the Court in *Cottrell v the Nelson Society for the Prevention of Cruelty to Animals Inc* in which the Court considered that, on a challenge, no additional evidence would be available to it than was considered by the Authority.[9] The Court there categorised the case as one of an applicant hoping to persuade it to reach a different conclusion on essentially the same evidence.

[45] There is a distinction between these cases that is significant. In the present case, the Authority dismissed the applicant's claims as frivolous or vexatious without considering their merits. So the first 'merits' issue is whether the Authority dismissed the proceedings wrongly on these particular grounds.

[46] The Authority's dismissal of the applicant's claims under cl 12A of sch 2 to the Act (frivolous or vexatious) leaves me with a number of significant concerns about whether this was the proper way to deal with these and, if so, whether the Authority exercised its discretion on correct legal principles.

[47] I begin consideration of the 'merits' argument by recording that the Authority was empowered to strike out the applicant's substantive claim to unjustified dismissal if it met the stringent test for strike-out other than on its merits, which is essentially the same test for all courts and the Authority. It can be summarised as

[9] *Cottrell v The Nelson Society for the Prevention of Cruelty to Animals Inc* [2014] NZEmpC 2 at [11].

follows. If, as pleaded (in this case in the statement of problem), the applicant's case had no prospect of success, then it was open to the Authority, after having heard from the applicant, to so dismiss it.

[48] That power is not the same as the Authority's relatively new power under cl 12A of sch 2 to the Act to dismiss proceedings which are frivolous or vexatious. Such proceedings may survive or indeed be successful, but if they have the necessary characteristics of frivolity or vexatiousness, then the Authority is empowered to dismiss them on these grounds. Vexatiousness is not to be interpreted simply as vexing the other party because all litigation can be said, to a greater or lesser extent, to vex the other party to it.

[49] There are a number of well-known and established tests for both frivolity and vexatiousness in litigation which I consider Parliament intended the Authority to apply to applications under cl 12A of sch 2 to the Act, but which were very arguably not made out in this case. I will come back to these.

[50] This was not litigation brought repeatedly by the applicant against the respondent or others associated with it, whether plainly or dressed up in alternative forms or forums. It was a serious claim that was brought by the applicant, that he had been dismissed constructively and unjustifiably by his employer from professional employment. The applicant's claims were that the employer respondent had arranged unilaterally for urgent mediation about the applicant's concerns during his absence from work suffering from a serious medical condition, and that there was only very limited time after his return to work and being advised of the urgent mediation, for him to prepare for, or otherwise respond to, that significant meeting. That said, however, the applicant's case is that he agreed to go ahead to try to settle his disadvantage grievance at the arranged mediation.

[51] The applicant was unrepresented. Again, if it is correct, as the applicant has said, it is of concern to the Court that, after having presented to the respondent and to the mediator a letter from the applicant's surgeon setting out the inadvisability of such an exercise taking place at that time, the applicant was nevertheless persuaded to resign from valuable employment of high standing with very minimal monetary

compensation, and that this 'settlement' was ratified by the mediator on the same day. That said again, the applicant admits frankly to having participated in the mediation with hopes for a mutually successful outcome, although the imminent end of his employment would not have been within his contemplation.

[52] I emphasise that these are the applicant's allegations at this stage and neither the respondent nor the Mediation Service has had an opportunity to respond to them. That said, however, those were also the issues put forward by the applicant in the Authority which were dismissed by it peremptorily.

[53] I am concerned, also, that the Authority Member reached conclusions about the veracity of the applicant's allegations without hearing evidence about them but, rather, based on the Authority Member's belief about their inherent implausibility. The Authority Member wrote:

> [20] [The applicant] has not understood the role of the Mediation Service and the mediator in seeking to deflect responsibility for his settlement by accusing them of being partly to blame for the outcome of the process. The skill and experience of Department of Labour mediators generally has been acknowledged by both the Employment Court and the Court of Appeal in *Te Ao v. Chief Executive of the Department of Labour* [2008] ERNZ 311 and *Just Hotel Ltd v. Jesudhass* [2007] ERNZ 817. It is most unlikely that the mediator criticised by [the applicant] in this case fell below the high standards set by the Mediation Service and affirmed by the Courts and also by this Authority.

[54] As author of the *Te Ao* judgment (referred to above by the Authority), I venture to say that no doubt many people would have made the same comment in response to allegations (subsequently proven) of very unprofessional misconduct by a mediator in the mediation. The same sentiments expressed by the Authority Member in this case would no doubt have been in the minds of many in response to any suggestion that a Mediation Service support officer would have acted in an unprofessional manner as was disclosed in another case dealt with the Court recently, *Fox v Hereford School Trust Board*.[10] These cases illustrate that it can be dangerous to act on assumptions generated by a good general institutional reputation. It is not necessarily inconceivable, as the Authority readily concluded it was, that a mediator

[10] *Fox v Hereford School Trust Board* Interlocutory (No 6) [2014] NZEmpC 154, (2014) 12 NZELR 251.

may have embarked on the mediation and certified its settlement, in spite of a medical practitioner's letter in effect advising against this, or at least alerting readers to the need for special care in resolving the parties' dispute in these circumstances.

[55] That is not to say that the events (or allegations of them) within the Mediation Service, illustrated by these cases, are common ones – clearly they are not. But it is wrong in principle for the Authority to base its determination to dismiss proceedings as frivolous or vexatious, in part on an expression of such sound confidence in an allied institution that amounts to saying that such allegations are so unlikely to be correct that they can safely be dismissed. On the contrary, not only is a careful examination of them on their merits the just way for such allegations to be determined, but their outcomes provide a sounder basis for the Mediation Service's good general reputation if an independent investigation finds that it acted appropriately.

[56] It is not clear that the Authority interpreted and applied cl 12A of sch 2 correctly. In its determination the Authority Member wrote:

> [18] Under Clause 12A of Schedule 2 of the Employment Relations Act 2000 the Authority may at any time dismiss any proceedings before it considered to be frivolous or vexatious. For the Authority to apply that provision in this case is not to doubt that [the applicant] has been earnest and sincere in bringing his application, but the law recognises that in some cases there is simply no legal foundation for proceedings and it is plain they cannot succeed. In the wider interests of justice those cases ought to be ended once that is able to be clearly seen.

[57] That reasoning does not address the frivolous or vexatious test but, rather, re-states the general power of strike-out with its very high success threshold. Parties should not have proceedings against them struck out, and the Authority should not use its powers under cl 12A of sch 2, where the position is not one of frivolity or vexatiousness as these terms are known to the law. Rather, that is the different question whether the Authority assesses, in law, the proceeding can succeed at all.

[58] Nor, too, did the Authority appear to address the possible exceptions to the apparently strict confidentiality and inadmissibility restrictions attaching to mediated settlements. The judgment of the Court of Appeal in *Jesudhass* is authority for the proposition that there may be valid public policy reasons why, in a particular case, ss

148 and 149 cannot protect from subsequent disclosure and examination by the Authority or the Court, what happened in mediation.[11] Subsequent judgments of this Court have reiterated that. Such cases will be rare numerically but on the limited evidence presented in this case, it cannot be said confidently that this might not have been one of them. If the applicant's allegations are correct that, in circumstances in which his ability to comprehend significant events and free will may have been affected adversely for medical reasons, and in which he is also vulnerable as being without professional advice or representation, it may have qualified as one of those exceptional cases.

[59] The law on inviolability of mediation is not as the respondent submits; that is that no settlement between parties in mediation and counter-signed by a mediator under s 149 can ever be examined as to the way in which it was entered into or as to its contents. If, as the applicant alleges, his psychological health, as a result of illness and treatment for that, was such that his entering into the settlement was not an informed exercise of his free will, then it may well be that this is the sort of circumstance for which this Court and the Court of Appeal have reserved exceptions for public policy reasons. It is not, as the respondent alleges, a matter simply of entering into that agreement under duress, because the applicant's case is broader than that, although duress may feature in it.

[60] If, however, the settlement agreement was entered into fairly and the mediator's certification confirming its inviolability was properly applied, the Authority or the Court could not examine what would be the merits of the respondent's defence to an unjustified dismissal claim. It is simply not possible to do more than identify the arguability of this issue, but it should not have been dismissed out of hand as the Authority did.

[61] Turning to the merits of the applicant's claims to unjustified disadvantage in, and unjustified dismissal from, employment (that is, ignoring for the moment the respondent's defence to these of full and final settlement), there is some limited evidence supporting these. The respondent has not dealt with the merits of the applicant's personal grievance if the settlement agreement is set aside and he is

[11] *Jesudhass*, above n 3, at [9], [31].

entitled to have the merits of his claim heard. On the very limited evidence before the Authority and now the Court, I do not think it could be said with unassailable confidence that the respondent did not dismiss the applicant constructively and unjustifiably.

[62] I wish to comment, albeit briefly, on the appropriate appellate vehicle for challenges to cl 12A strike-outs. The respondent says that rather than seeking leave to extend the time under s 179 of the Act, AFT's application should have been made under s 178A which provides materially:

> **178A Challenge in respect of dismissal of frivolous or vexatious proceedings**
>
> (1) A party to a matter before the Authority that was dismissed because the Authority determined it was frivolous or vexatious under clause 12A of Schedule 2 may challenge that determination in the court.
>
> (2) A challenge under this section must be made in the prescribed manner within 28 days after the date that the matter is dismissed by the Authority.
>
> (3) The court must determine whether it considers the matter to be frivolous or vexatious.
>
> (4) If the court does not determine that the matter is frivolous or vexatious, it must order the Authority to investigate and determine the matter.

[63] Section 179(1) sets out the statutory entitlement to elect to have the Court hear a matter on the application of a party who is dissatisfied with a determination of the Authority other than one made under cl 12A of sch 2 to the Act.

[64] The respondent concedes, however, that there is no material difference in the outcome, whether the application for extension of time is dealt with as one relating to s 178A or is a challenge under s 179. The respondent's submissions in opposition cover the position under both sections.

[65] I consider, however, that while the defendant's concession about the time limit may be correct, there are some significant differences between ss 179 and 178A. The former applies to any dissatisfaction with a determination of the Authority and provides a dissatisfied party with an election, including to seek to challenge that determination by hearing de novo. Section 178A, however, is limited to a challenge to an Authority determination dismissing a proceeding as frivolous or vexatious. Subsection (3) limits the Court's role on the challenge under s 178A to

"determine whether it considers the matter to be frivolous or vexatious". Subsection (4) provides: "If the court does not determine that the matter is frivolous or vexatious, it must order the Authority to investigate and determine the matter."

[66] Dismissal of a proceeding as being "frivolous or vexatious" is not the same thing at all as dismissal by a determination of the substance of a case by the Authority as being wrong in fact and/or law.

[67] Dismissing a case as frivolous or vexatious under cl 12A of sch 2 to the Act without, necessarily, consideration of the merits of the claim, is a recent statutory addition to the Authority's powers. Although it is distinctly arguable that the Authority previously had the power, as part of its jurisdiction to control its own procedure, to dismiss proceedings in some instances without investigating them on their merits, that is not the same power as under the cl 12A test.

[68] If this is, in reality, an intended challenge brought under s 178A, as I consider it is, the merits test in determining whether to grant leave to challenge will necessarily only address whether the Court may consider the applicant's proceeding to have been "frivolous or vexatious". That is the statutory test under s 178A(3). Unless, under subs (4), the Court determines that the applicant's proceeding in the Authority was frivolous or vexatious, it must remit the proceeding to the Authority to investigate and determine, if leave is granted.

What are frivolous and/or vexatious proceedings?

[69] Dismissing proceedings for frivolity or vexatiousness has been examined by this Court, most recently in a judgment released while this decision was being prepared, *Lumsden v Skycity Management Ltd.*[12] I respectfully agree with the analysis of the Authority's powers under cl 12A of sch 2 set out in that judgment by Judge Inglis. Her Honour relied in *Lumsden*, as I do in this case, in part on the 2014 judgment in *Gapuzan v Pratt & Whitney Air New Zealand Services trading as*

[12] *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225.

Christchurch Engine Centre.[13] The issue in *Gapuzan* was determined under cl 15(1) of sch 3 to the Act setting out the Employment Court's powers including:

> **15 Power to dismiss frivolous or vexatious proceedings**
> (1) The court may, at any time in any proceedings before it, dismiss a matter or defence that the court considers to be frivolous or vexatious.

[70] In *Gapuzan* there was a background of what was described as "an extraordinary range of proceedings" having been initiated by the plaintiff against the defendant which it had to defend, including by the expenditure of significant resources. The plaintiff's claims had all been dismissed. The plaintiff had made significant negative comments about the defendant in social media, contrary to the terms of the settlement agreement. The plaintiff had also pursued other indirectly related parties. The plaintiff's proceedings included scandalous and exaggerated claims made without substance.

[71] Turning, first, to whether Mr Gapuzan's claims were frivolous, the Court concluded that there must be extraordinary circumstances to meet this test.[14] It cited *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW*,[15] where the then Chief Judge stated:

> … Frivolous cases are more than just cases which disclose no cause of action. A frivolous case is one, to use the words of Lush J in *Norman v Matthews*:
>
> "which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court."
>
> It is one which it is impossible to take seriously. .... (citations omitted).

[72] Next, in *Creser v Tourist Hotel Corp of New Zealand*, the then Chief Judge stated:[16]

> ... to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the

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[13] *Gapuzan v Pratt & Whitney Air New Zealand Services trading as Christchurch Engine Centre* [2014] NZEmpC 206.
[14] At [52].
[15] *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW* [1989] 3 NZILR 284 (LC) at 289
[16] *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 (LC) at 1069.

> Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.

[73] In *Smith v Attorney-General* the Court considered the word "futile" to be an adequate synonym for "frivolous".[17]

[74] In *Deliu v Hong* the High Court adopted the following definition of "frivolous" from the *New Shorter Oxford English Dictionary*:[18]

> 1. Of little or no value or importance, paltry; (of a claim, charge, etc), and for a claim or charge having no reasonable grounds.
>
> 2. Lacking seriousness or sense; silly.

[75] Similarly, Judge Corkill in *Gapuzan* cited *Black's Law Dictionary's* definition of "frivolous" as: "[l]acking a legal basis or legal merit; not serious; not reasonably purposeful".[19]

[76] Summarising the position in *Gapuzan*, Judge Corkill held: "The underlying theme of these statements is that there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously."[20]

[77] Turning to whether the claim in *Gapuzan* was also vexatious, Judge Corkill adopted the *Black's Law Dictionary* definition of the word as conduct "without reasonable or probable cause or excuse; harassing; annoying".[21]

[78] The Judge also relied on the Court of Appeal's application, in *Heenan v Attorney-General*, of s 88B of the Judicature Act 1908, where a person has persistently or without any reasonable ground, instituted vexatious proceedings:[22]

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[17] *Smith v Attorney-General (on behalf of State Services Commission)* [1991] 3 ERNZ 556 (EmpC) at 589.
[18] *Deliu v Hong* [2011] NZAR 681 (HC) at [21], citing Lesley Brown (ed) *New Shorter Oxford English Dictionary* (4th ed, Oxford University Press, 1993).
[19] *Gapuzan*, above n 13, at [57], citing Bryan A. Garner (ed) *Black's Law Dictionary* (9th ed, Thomson Reuters, St Paul (MN), 2009).
[20] At [58].
[21] At [66].
[22] *Heenan v Attorney-General* [2011] NZCA 9 at [22]-[25], cited in *Gapuzan*, at [67].

(a) Recognition of the fundamental constitutional importance of the right of access to the courts must be balanced against the desirability of freeing defendants from the burden of groundless litigation.

(b) Relevant is the character of the proceeding. Did the proceeding have a reasonable basis and how has it been conducted; have such proceedings been issued persistently?

(c) Whether attempts have been made to re-litigate issues already determined, containing scandalous and unjustified allegations.

(d) A factor may well be whether the litigant is found to have had an improper purpose in commencing proceedings.

[79] I have examined in more than usual detail the 'merits' component of the 'interests of justice' test in this case. That is because, together with the judgment in *Lumsden*, this is the first occasion on which the Court has been able to examine cl 12A of sch 2 to the Act and to give the Authority guidance about its interpretation and application. As will be apparent from both judgments, cl 12A of sch 2 contains quite specific powers to be exercised in unusual circumstances and, in particular, should not be used by the Authority to dismiss, without consideration of their merits, proceedings which impress the Authority as having low or no expectations of success.

Decision

[80] AFT's application faces formidable hurdles. First, the applicant apparently entered into a full and final settlement, with the assistance of a mediator, of his employment relationship problems with the respondent, the terms of which settlement included his resignation after a period of notice, and some (albeit very modest) compensation. The plaintiff was willing to mediate his dispute with the respondent. Such settlements under s 149 of the Act are very difficult, but not necessarily impossible, to set aside. AFT may, however, have an arguable case of medical incapacity which might lead to the settlement being set aside.

[81] Next, even if the settlement could be set aside by the applicant establishing that he was so unwell at the relevant time that his agreement was not the result of an informed exercise of his free will, the insufficiently explained and very significant delay before challenging the Authority's dismissal of his personal grievance requires

a high standard of proof of reasonable explanation. Despite the volume of material that the applicant has filed, he has not met that standard by addressing sufficiently the circumstances which brought about the totality of that delay. Parliament has required such challenges to be brought within 28 days and the applicant's delay is almost 36 times that period.

[82] Such is the length of that delay that I accept that there will be prejudice to the respondent in now assembling evidence, witnesses and other material to defend the applicant's claims in the same way that it would have been able to if these had been made in a timely fashion. That is especially so because, if leave were granted, the respondent would bear the onus of establishing the justification for what it did in relation to the applicant under s 103A of the Act.

[83] The same prejudice would accrue to the Mediation Service, if it participated, as it would be entitled to in the challenge to the propriety of the settlement. The applicant refers to the particular mediator involved having now left the employment of the Mediation Service. It is unknown what records may be kept of mediations that might assist in determining what happened, and for how long such records are kept.

[84] The applicant's case does not explain how, in view of his condition, he was able to institute personal grievance proceedings in the Authority within time and to apply for an order for interim reinstatement. Nor does the evidence explain the apparent contradiction between the applicant's ability to engage with the Authority and the respondent during the period before the Authority's determination was issued, and, especially in view of his gradually improving condition, the period after that time and within the 28 days for filing a challenge. Nor does the evidence explain how, since then, the applicant has been able to apply successfully for, and take up, a teaching position in another country and under what are, by his account, difficult cultural and environmental circumstances.

[85] Nor do the applicant's accounts of seeking but failing to obtain professional legal advice and representation explain sufficiently that delay. That is especially so in view of the fact that the steps that he took to bring his proceedings in the

Authority, and the steps that he has now taken seeking leave to challenge out of time, have been completed by him without professional legal assistance, as they are capable of being undertaken by informed lay people. The length and complexity of the applicant's submissions to the Court and his obvious awareness of legal principles and case law attest also to the weakness of his account of the consequences of being unable to obtain legal representation.

[86] The applicant's third ground for seeking leave relating to the difficulties of filing proceedings from a foreign location, do not avail his case. The applicant has private access to the internet via a computer. Although there may be delays in having documents sworn or notarised because of the physical distance from a New Zealand Ambassadorial Representative coupled with the applicant's limited opportunities to make such journeys, the applicant's track record in undertaking these tasks in the last few months is irreconcilable with his contentions that he could not have done so over the previous period of about three years.

[87] Unlike many other cases of significantly shorter delay, I am satisfied that the respondent would suffer prejudice if he now had to locate relevant witnesses (especially including former students) to mount a defence to the substance of the applicant's claim of unjustified constructive dismissal. Even by the applicant's own account of the events which preceded his raising of his first personal grievance, the evidence of former students and staff (some of whom are likely to now be former staff) will be important to the prosecution and defence of that claim.

[88] As the applicant accepts, the test is ultimately whether it is more just to allow the substantive proceeding to be brought out of time than it is to refuse to do so. On balance I consider that the long delay is such that, in combination with the inadequacy of its explanation, and the prejudice to the respondent of having to defend proceedings concerning events so long ago, leave should be and is refused.

[89] In the unusual circumstances of this case there will be no order for costs.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Wednesday 23 December 2015