

time under s 219(1) of the Act if something is not done within the time allowed, or is done informally.

[3] The discretion conferred by s 219(1) is not subject to any statutory criteria but must be exercised judicially and in accordance with established principles.

[4] Counsel were agreed that the authorities clearly state that the fundamental principle which must guide the Court is the justice of the case. Useful and convenient headings before reaching a conclusion on whether the justice of the case requires an extension of time that have been isolated by the authorities are the following²:

- (a) The reason for the omission to bring the case within time;
- (b) The length of the delay;
- (c) Any prejudice or hardship to any other person;
- (d) The effect on the rights and liabilities of the parties;
- (e) Subsequent events;
- (f) The merits of the proposed challenge.

[5] The list is not exhaustive and, in the balancing exercise, one factor alone may not be decisive: see *Costley v Waimea Nurseries Ltd.*³ I also take into account the other well established principles referred to in *An Employee v An Employer*,⁴ applicable to applications for extensions of time generally, that the rules of Court must prima facie be obeyed. If the law were otherwise a party in breach would have an unqualified right to an extension of time.⁵ Once an applicant is outside the time for appealing, the applicant's position suffers a radical change and now becomes an applicant for a grant of an indulgence by the Court instead of a person with a right to challenge.⁶

² See for example *Masta Maintenance Services NZ Ltd v Page* [2006] ERNZ 260 at p262 at [2].

³ [2011] NZEmpC 59.

⁴ [2007] ERNZ 295.

⁵ *Ratnam v Cumarasamy* [1965] 1 WLR 8; [1964] 3 All ER 933 (PC).

⁶ See *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA) at 91.

Extent of delay

[6] The Employment Relations Authority's determination was dated 12 January 2011 and 9 February 2011 was the last day for filing a challenge. On that day the applicant's then solicitor, who I shall refer to as Ms S, filed a copy of a statement of claim by email but did not pay the filing fee either online or over the counter of a Westpac bank branch. The original of the statement of claim was sent to the Employment Court together with a cheque for the filing fee but, as it was received on 10 February, it was rejected.

[7] As the attempt to file the challenge with the appropriate fee was made when that document was received by the Court on 10 February, the challenge was therefore one day out of time. I have not been informed when the respondent first became aware of the attempt to file the challenge out of time.

The reason it was out of time

[8] On 21 February the application for leave to file the challenge out of time was received by the Court. It was supported by an affidavit by Ms S who explained that the failure to pay the filing fee on time was an oversight by herself. She deposed that the granting of leave would not prejudicially affect or disadvantage the respondent and that the applicant was dissatisfied with the determination of the Authority and wished to have the matter heard de novo in the Employment Court.

[9] Although as Mr Hood, counsel for the respondent, pointed out, the reasons for Ms S's oversight and the late filing of the statement of claim have not been set out, I find that, contrary to Mr Hood's submissions, the delay has been, just, adequately explained.

Subsequent events

[10] The application for leave was opposed by the respondent which filed a notice of opposition on 3 March setting out extensive grounds and an affidavit of the respondent's Human Resource Manager, Anne Purnell, in support. The affidavit set out in considerable detail the events that had led up to the Authority's investigation and annexed a number of documents going to the merits of the applicant's claims.

[11] On the same day as that notice of opposition was filed, the matter was referred to Chief Judge Colgan by the registry for directions. He issued a minute on 3 March which stated, in part:

Because there are issues raised by the opposition that the plaintiff has not had an opportunity to address, the plaintiff may have the period of 14 days from the date of this minute to file and serve any further affidavit evidence strictly in reply to that of the respondent.

[12] The minute then went on to deal with issues as to the way in which the application for leave would be dealt with, either on the papers or by a hearing, the venue for the hearing, and gave a suggested date of hearing in Hamilton on Wednesday, 6 April 2011.

[13] Counsel filed a joint memorandum on 7 March in which the then counsel for the applicant submitted that the matter could be heard on the papers and, if necessary, after the applicant had filed an affidavit in reply. Mr Hood submitted that a hearing was necessary and noted there might be a need for cross-examination. The matter was then referred to the Chief Judge for directions, which were the subject of a minute he issued on 8 March. He directed that, as there had been no agreement that the application could be heard on the papers, there had to be a hearing and then stated:

Neither party has advised the Registrar of unavailability on 6 April 2011 and accordingly that should be the date of hearing of the opposed application for leave. Following paragraph 2 of the Court's minute of 3 March 2011, the period of the plaintiff to file and serve any further evidence strictly in reply will expire on 17 March 2011.

[14] On 18 March Ms S sent an email to the Court and to Mr Hood as follows:

I confirm that no further affidavit evidence in reply will be submitted for the above matter.

[15] On that same day Mr Hood wrote to Ms S's firm requiring her to be available for cross-examination on 6 April, noting that her affidavit contained evidence of a contentious nature, referring to rules 13.5.1 and 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and stating those Rules prevented Ms S's firm from acting further in the proceedings. It concluded:

Unless you notify us that you have ceased acting for the applicant by 5pm, Monday 21 March 2011, we will have no choice but to file the **enclosed** memorandum of counsel with the Court.

[16] That memorandum was then filed on 21 March setting out the relevant Rules and submitting that the applicant's solicitors must cease to act for him in the proceedings.

[17] I required a telephone conference call to deal with the issue of whether the Court should direct the applicant's lawyer to continue to act. That took place on Thursday 24 March and, after hearing submissions from the applicant's then solicitors and from Mr Hood, I issued a minute on 25 March referring to the following Rules:

Independence in litigation

- 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.
 - 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
 - 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.
 - 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
 - 13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in

terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[18] I referred to Rule 13.5 and the comments of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,⁷ having caused some difficulties for barristers and solicitors practising employment law because it is not infrequent that such practitioners may have a very close involvement in the circumstances that can give rise to disputes and personal grievances. I also noted that that matter was further complicated by the presence of s 236 of the Act which permits anyone to be represented by any person. I also noted that the Employment Court does not have any supervisory jurisdiction over barristers and solicitors. I took the view that Ms S's affidavit evidence was contentious especially on the matter of prejudice, although it did not address the merits of the case. I then found there might also be a conflict of interest between the applicant's then solicitors and the applicant, arising from the consequences of the failure to lodge the challenge in time. In these circumstances I considered that I could not direct the applicant's solicitors to continue to act for the applicant in terms of Rule 13.5.2, because it appeared that the firm should cease to act in order to comply with the Rules. I stated that was a matter for the applicant's solicitors to consider.

[19] On 4 April then counsel for the applicant applied for an adjournment on the basis that her firm could no longer act for the applicant, that a new representative for the applicant had agreed to represent him but he would be overseas until 7 April. This left the applicant in the position where he was currently unrepresented, with a hearing to attend on 6 April 2011. Over the objection of Mr Hood, I granted the adjournment because of the matters very properly raised by him which had left the applicant in the situation where he was currently unrepresented.

[20] On 13 April a change of solicitor was filed. On 14 April Ms Alchin advised the Court that she was now counsel for the applicant. Both counsel then agreed on a hearing for Monday 18 July 2011.

⁷ [2010] NZSC 5, [2010] 2 NZLR 444.

[21] On 19 May the applicant's current solicitor filed an affidavit of the applicant, sworn on 3 May 2011, in reply. This dealt, for the first time, with the merits of the applicant's challenge. The affidavit was not accompanied by any application for leave to file it in view of the previous advice that had been given to the Court and the deadline imposed by the Chief Judge. On 16 May Mr Hood had advised the Court that the affidavit had just been received and that the respondent objected to its filing. It was agreed that this would be a preliminary issue to be determined at the hearing of the application for leave.

[22] At the hearing of the application on 18 July I invited counsel to proceed as though leave would be given for the applicant's affidavit to be read. This was to enable a proper analysis of the merits of the applicant's challenge to be made as I considered this would be an important and probably the determinative factor in finding where the interests of justice lay. In the event, although Ms Alchin cross-examined Ms Purnell at some length, Mr Hood did not seek to cross-examine either Mr Hurst or Ms S.

The merits

[23] The applicant had two claims before the Authority which he seeks now to challenge. The first was a claim arising from the termination of his employment for unpaid commission on a number of equipment sales that he says he instigated and hence was entitled to be paid for. The second was an unjustifiable dismissal claim when his employment was terminated on 4 September 2009 on the grounds of redundancy.

The commission claims

[24] According to the Authority's determination⁸, the commission claims advanced by the applicant in his statement of problem lacked sufficient detail and required further interaction between the parties. It recorded Ms Purnell's claim that she had conservatively spent "in excess" of 400 hours investigating the applicant's

⁸ [2011] NZERA Auckland 9.

claims because of the amount of time that had elapsed since the business transactions occurred and the lack of information provided by the applicant, which the Authority records that Ms Purnell described as very limited and hard to follow. The Authority stated that it concurred with the sentiments of Ms Purnell and accepted there was merit to her view that it was possible that the applicant's claims could have been resolved earlier, one way or the other, if he had presented them with written details as instructed to do so by his manager Mr Heapy, in Mr Heapy's letter of 28 February 2005.

[25] Having heard Ms Purnell's evidence and read the applicant's affidavit and his intended statement of claim I too agree with the Authority's comments. The proposed statement of claim simply states that the applicant's role was as Bay of Plenty Territory Manager and involved developing relationships and securing sales with customers wanting to purchase construction equipment. His territory was the Bay of Plenty and the head office was in Hamilton. He alleges in this proposed statement of claim:

6. My understanding was that commission was payable on all items that were purchased by customers in my territory. I sought clarification on this point from my manager at the time who confirmed this in writing.

7. By the time I was dismissed from the Defendant company there was a substantial amount of commission that was owed to me.

[26] He then alleged, in paragraph 11, that he was not paid his correct commission entitlements and, in paragraph 12, that the Authority found that his dismissal was justified and that he was only entitled to a portion of the commission. No further details are provided.

[27] The Authority referred to a copy of an employment agreement which the applicant accepted he probably did sign although there were still ongoing discussions relating to that document. It describes that the employer would pay commission in respect of completed sales and it was in the context of an exchange relating to this agreement that the letter of 28 February 2005 was written by Mr Heapy. This letter stated, inter alia:

8 ... You will receive commission for sales instigated by you within this designated area. There is always the potential for dispute but it

is impossible to document all potential circumstances which may lead to a dispute but all Territory Managers should refer the matter to the Branch Manager if they consider there is a potential for a dispute.

In the event of the[re] being a dispute as to payment of commission then I shall arbitrate on this given the circumstances involved in the specific case. This will involve discussions with all parties including the customer[.]

...

10 ... If you instigate and complete the sale then you will be deemed to have made the sale and paid commission accordingly regardless where the purchaser's Head Office is located. Other circumstances will be dealt with on a case by case basis and it would be advisable to clarify the issue of commission and you[r] involvement in the sale at the time. You cannot expect to be paid a commission if you had nothing to do with the sale and hadn't called on the client to instigate the sale.

...

I would remind you that you have unclaimed commissions. I have previously written to you stating that you must put a claim in for these commissions by Monday 28th February. I have also given you a verbal reminder of this requirement. At time of writing this letter I do not appear to have received a claim from you in respect to outstanding commissions. I will now proceed to ascertain what commissions are due to you and make payment accordingly. You can assist this process by making a formal claim before this process is complete.

[28] In his affidavit Mr Hurst deposes that the commission owed to him was on the basis set out in that letter from Mr Heapy and that the arrangements were quite successful and there were many occasions when he had instigated the sale for customers in his area that were signed off by another territory manager and he received the commission.

[29] He claims in his affidavit that the transactions for which he is claiming commission were raised at the time and the respondent should have records of all of the transactions. He deposes that although he was aware that the onus was on him to provide all the information necessary to support his claim, in the Employment Court challenge he would be able to obtain a formal order for discovery for all the invoices and documentation in relation to transactions and that "[u]nfortunately that is not an

option to me in the Authority". He further deposes he would then be in a much better situation to clarify his claims.

[30] The Authority records that it had to adopt a rather painstaking approach to the investigation of the applicant's commission claims by extracting information from him and conducted a detailed examination of the details of each of the 21 claims being pursued for which the applicant claimed a total of \$72,990. The Authority noted two of the claims were said to arise from the sales in 2004, in respect of which the Authority stated that it was difficult to understand why it had taken the applicant so long to dispute these, particularly when he had a barrister involved in July 2005. The other claims arose between 2005 and 2009. The applicant was successful in three claims totalling \$2,249.50 with an entitlement to a further 1 percent of the agreed sales value, excluding GST, of a particular high end loader sold in 2005.

[31] The evidence for the respondent, which I accept, was that it had offered to pay the applicant commission of \$1,603.50 in August 2010 and that it was content to pay the small amount of additional commission that the Authority found was owing.

[32] In rejecting the respondent's counter-claim for penalties and contractual damages for the costs of investigating the applicant's commission claims, the Authority made the following findings:

37. There is no doubt that Mr Hurst was inexcusably lax in regard to presenting some of his purported commission entitlement claims when instructed to do so by Mr Heapy back in February 2005, and then again when he had a barrister involved in May 2005. I also accept that the manner in which Mr Hurst presented his claims to EEL (and the Authority) is most unsatisfactory and it is commendable that Ms Purcell went to the trouble that she did to ascertain if there was any validity to any of Mr Hurst's claims, particularly given the lack of any helpful or constructive application on his part.

[33] There are other comments to similar effect throughout the determination.

[34] Ms Alchin relied on the following passage in the Authority's determination under the heading "Summary of the determination of the commission claims":⁹

⁹ At [20].

For the reasons set out above, largely due to insufficient proof, the claims of Mr Hurst have mostly failed. Unfortunately, Mr Hurst's recollection was, in substance, vague. And where, in some instances, his oral evidence appeared reasonably credible, he was unable to produce tangible evidence such as quotes, sales invoices, signed sales agreements, or collaborative evidence from other parties.

[35] Ms Alchin submitted that, unfortunately, due to the nature of the Authority's functions, the applicant was unable to request formal discovery of documents from the respondent.

[36] Whilst the Authority does not have any stated procedure for dealing with disclosure of documents between the parties it has very wide powers under s 160(1)(a) of the Act in investigating any matter to "call for evidence and information from the parties or from any other person" and under s 160(2) to "take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not".

[37] In *Andrew v Commission of New Zealand Police*¹⁰ Judge Colgan (as he then was) expressed reservations as to whether the Authority was empowered to order one party to make discovery of documents to another. Those powers exist expressly in the Courts and are the subject of detailed statutory schemes and protection. He had no doubt that the Authority can, in appropriate cases, direct parties to make documents available to it for the purpose of its investigation of an employment relationship problem and that, thereby, such documents might subsequently come to the knowledge of other parties.

[38] I note that in this case there was no application on behalf of the applicant requiring the respondent to produce any documentation. I also accept Ms Purnell's evidence that she produced all the documents that her extensive searches were able to find, to the Authority where they were viewable by the applicant.

[39] I therefore reject the ground advanced by Ms Alchin that the availability of formal discovery in the Court would, of itself, provide grounds for granting leave.

¹⁰ [2003] 2 ERNZ 514 at [9].

[40] For all of these reasons I conclude that the applicant's claim for commission in his challenge was so weak "that it is just to extinguish it without further consideration", to use the Chief Judge's expression in *Pani v Transportation Auckland Ltd.*¹¹ In the alternative, although it is nearly synonymous, that there is an "absence of any realistic prospect of success" to use Judge Shaw's expression in *Stevenson v Hato Paora College Trust Board.*¹² I note in this regard that I agree and support the approach of the Chief Judge in *Liu v South Pacific Timber (1990) Ltd*¹³ where he disagreed with the view of Judge Ford in *Costly v Waimea Nurseries Ltd*¹⁴ which suggested that the test for determining whether the merits are sufficient to allow leave for a challenge out of time to proceed was that there was no recognised cause of action. I agree that that would be setting the test far too high and would make it virtually impossible for a respondent to succeed on a merits argument.

The unjustifiable dismissal claim

[41] At the outset I accept Mr Hood's submission that the proposed statement of claim is inadequate in that it does not specify whether the personal grievance claim relates to the genuineness of the redundancy and, if so, how the redundancy is said not to have been genuine, and how the selection process is said to have been unfair. This, however, is a matter that can be addressed by a request for further and better particulars and I find that the draft statement of claim is not so fundamentally deficient that it fails in all respects to comply with reg 11 of the Employment Court Regulations 2000.

[42] The Authority's determination discloses that the applicant claimed his dismissal on the grounds of redundancy was unjustified and that the manner in which it was implemented was a breach of good faith, pursuant to s 4 of the Act. The Authority found that at a meeting of 17 August 2009 the applicant was given a letter relating to the proposed restructuring of his sales area as a result of a downturn in the economy and that at a subsequent meeting, on 19 August, at which the applicant was offered the opportunity to be represented but declined, he presented several

¹¹ AC 45/09, 3 December 2009 at [26].

¹² [2002] 2 ERNZ 103 at 109.

¹³ [2011] NZEmpC 100.

¹⁴ [2011] NZEmpC 59 at [15].

proposals as an alternative to the disestablishment of his position. He was advised at a meeting on 21 August that none of his alternatives were acceptable and that his position would be made redundant as of 4 September 2009. There was a conflict about whether he was given written confirmation of the redundancy, which the Authority resolved in favour of the respondent. That confirmation was contained in a letter of 21 August 2009 which the respondent's witness said was read to him at the meeting.

[43] The applicant had argued before the Authority that the redundancy was not genuine because his work was still available and, as there were three territory managers in total, a process should have been adopted by which all three were required to apply for the two remaining positions. He also argued that there was not a fair and reasonable selection process. The Authority determined that the redundancy was genuine, that there had been a substantial loss of revenue in the applicant's sales territory, but that this was not an overall restructuring and there was nothing that required the review of the positions of the other territory managers.

[44] The applicant also claimed that the redundancy was predetermined and that one of the other territory managers had confirmed to the applicant that he knew the applicant would be made redundant and that he would be obtaining the applicant's territory. It does not appear that the other territory manager was called as a witness and the Authority rejected the applicant's evidence.

[45] The applicant, in his affidavit, deposes that he believes the Court may come to a different decision, in particular if the other territory manager gives evidence to corroborate the applicant's claim that the redundancy was predetermined. He continues to maintain his claim that all three territory managers should have been interviewed for the two remaining positions and that instead the respondent unilaterally chose to disestablish his position without considering the others.

[46] Ms Purnell's affidavit put these matters in issue, as did her responses to the cross-examination. She did, however, accept that at the time the respondent was going through consultation for the redundancy, the applicant was also the subject of disciplinary proceedings but claimed that had no bearing on the outcome of the

restructure. I note that this is not an issue that is pleaded in the proposed statement of claim and does not appear to have been a matter put before the Authority.

[47] Although, as I have stated, the proposed pleadings are unsatisfactory, there is sufficient evidence, even taking the cross-examination of Ms Purnell alone without reading the applicant's affidavit in reply, and from the findings of the Authority, that the applicant has a complaint that he has been unjustifiably dismissed. The onus of proving justification under s 103A of the Act rests upon the defendant. From the material before the Court, I am unable to conclude that the applicant's challenge would have such a low prospect of success at a hearing, de novo, and that his claim that he was unjustifiably dismissed should not be allowed to go to a hearing.

Any prejudice or hardship to any other person

[48] If the applicant was permitted to pursue his commission claims, then the evidence satisfies me that this would put the respondent to unnecessary duplication of effort to respond to the applicant's unsupported allegations. I note that it may also affect third parties, namely the customers who may be required to give evidence in support or in opposition, as contemplated in Mr Heapy's letter. This is another factor for concluding that leave should not be granted in relation to the commission claims.

[49] The same considerations do not, I find, apply in relation to the unjustifiable dismissal allegations which, although they may require further particularisation, might be supported by the evidence of the other territory manager. I also take into account that there was only a one day delay and that there has been an explanation for that delay based on his previous solicitor's oversight.

Conduct in the Authority

[50] Mr Hood submitted that the applicant's conduct in the Authority disqualified him from receiving any equitable relief by way of the exercise of the Court's discretion. The respondent relied on a number of examples, the first of which was that the grievance was raised out of time, although the respondent did not take that point at the time. In fact the grievance was raised within time and this ground was

no longer relied on. The other examples were failures to provide the evidence in support of the commission claims and these do support my conclusion that leave to pursue these claims by way of challenges should not be granted. There are no examples directly relating to the personal grievance claim that would amount to any form of disqualifying conduct on the part of the applicant in the Authority.

Late filing of affidavit in reply

[51] Finally I turn to the issue of whether the affidavit in reply should be disregarded because it was not filed in accordance with the Chief Judge's direction. Leave to file that affidavit out of time should have been applied for, but was not.

[52] Ms Alchin submitted that at the time the affidavit was due, the issue of the applicant's previous solicitors continuing to act was a very live issue but accepted that until this issue was determined, an extension for filing the affidavit should have been requested. That, she submitted was a failure by counsel and was not due to the applicant's apparent disregard for timelines.

[53] There is some difficulty with that submission in that the applicant's former solicitor advised the Court on 18 March that an affidavit would not be filed and this was the same day that Mr Hood wrote his letter raising, apparently for the first time, the issue of the solicitors continuing to act for the applicant.

[54] Not without some hesitation I accept Ms Alchin's submission that as the affidavit of the applicant in reply was an essential part of the applicant's claim and contained relevant information, to refuse to read it would have prevented the applicant, through no personal fault of his own, from presenting necessary material in support of his application. I agree with Ms Alchin that the justice of the case required that affidavit to be read.

Conclusion

[55] For the reasons I have given I consider the justice of this case requires an extension of time for filing a challenge against the Authority's determination of the personal grievance claim, but not for the claims for commission.

[56] As conditions of the exercise of my discretion, I direct the applicant to file and serve, within 21 days from the date of this judgment, a statement of claim addressing only the challenge against the Authority's determination of his grievance claim and which provides particulars of the allegation that the respondent did not follow a fair selection process and, if it is claimed that this was not a genuine redundancy, the grounds for so asserting.

[57] Within 21 days from the date of this decision, the applicant is to pay the filing fee on what I have determined is to be a limited challenge, albeit de novo.

[58] If the statement of claim and the filing fee are not paid within 21 days then, unless there has been a successful application for an extension of time before the expiry of the 21 days, the challenge will be dismissed.

[59] The respondent is to have 30 days after service upon it of the statement of claim to file a statement of defence.

[60] Costs in relation to this application are reserved and, if they cannot be agreed, can be the subject of an exchange of memoranda, the first of which is to be filed 30 days after the date of this judgment.



B S Travis
Judge

Judgment signed at 3.45pm on 26 August 2011