

- (d) Mr Davey breached s 63A of the Act and s 81 of the Holidays Act 2003;
and
- (e) Mr Davey was to pay penalties totalling \$500 (\$250 for each breach) to Ms Hollinshead within 28 days of the date of the determination.

[2] After Mr Davey and CNR Investments Limited (CNR Investments) filed a de novo challenge to the determination, and outside the time within which Ms Hollinshead could file a challenge as of right, Ms Hollinshead decided that she wished to file her own challenge. She wants a further \$3,303 in respect of holiday pay, and payment of notice for two weeks and one day plus eight per cent holiday pay on that figure (a total of \$1,471.22). She also seeks a hurt and humiliation payment in relation to what she says was misleading advice regarding future employment and, if CNR Investments is found to be the employer, she seeks a penalty against Mr Davey for aiding and abetting its breaches.

[3] There are two principle issues:

- (a) To what extent were the matters that Ms Hollinshead wishes to bring to the Court before the Authority?
- (b) Should leave to extend time be granted to Ms Hollinshead in the circumstances?²

There have already been some delays in bringing the related challenge to the Court

[4] The reason Ms Hollinshead gives for now wishing to challenge the determination is that because Mr Davey and CNR Investments have lodged a challenge, she will be incurring most of the costs anyway.

[5] The Authority's determination was issued on 14 May 2018. Accordingly, any challenge ought to have been filed by 11 June 2018. Neither party had filed a challenge by close of business on that day, but Mr Davey and CNR Investments had instructed

² Pursuant to the Employment Relations Act 2000, s 219(1).

their solicitors to lodge a challenge and the missed deadline was a slip-up by the solicitors. Ms Hollinshead's representative was advised the next morning, 12 June 2018, that an application for an extension of time would be made.

[6] Mr Davey and CNR Investments' application for leave to extend the time to file their challenge was filed on 13 June 2018 and, by memorandum dated 29 June 2018, the parties advised the Court that Ms Hollinshead agreed to the extension of time.

[7] The extension of time was granted and Mr Davey and CNR Investments' statement of claim was filed by email on 10 July 2018.

[8] Ms Hollinshead attempted to file a statement of defence on 16 July 2018, which included her counter-claim. She was advised that she would have to file a separate challenge; she could not include it within the statement of defence.

[9] Her application for leave to extend time within which to file that challenge was filed with the Court on 23 July 2018.

Mr Davey and CNR Investments oppose the application

[10] Mr Davey and CNR Investments say that the issue of Ms Hollinshead's claim for a shortfall in holiday pay was not a matter that was before the Authority; it had been resolved prior to the Authority investigation.

[11] They further oppose the application on the basis that:

- (a) there is no good reason for the omission to bring the case within time;
- (b) the length of delay is substantial;
- (c) there is a lack of merit to Ms Hollinshead's claim; and
- (d) there is undue prejudice and a detrimental effect on the rights and liabilities of Mr Davey and CNR Investments that would arise from granting Ms Hollinshead's application.

[12] The focus of their submissions is on Ms Hollinshead's claim for holiday pay.

Claimed breach of the Holidays Act was failure to provide records

[13] In her original statement of problem filed in the Authority, Ms Hollinshead identified the problem or matter that she wished the Authority to resolve as:

- (a) constructive dismissal or unfair disadvantage;
- (b) breach of the Holidays Act; and
- (c) breach of the requirement to have an individual employment agreement.³

[14] She noted that Mr Davey had "refused to supply wages and holiday records so the Applicant can calculate average hours employed and lost entitlements" and, amongst other things, sought unpaid holiday pay.

[15] There then followed some communication between the parties that led to Ms Hollinshead being paid a sum for unpaid wages and holiday pay.

[16] On 25 October 2017 Mr Hayes, Ms Hollinshead's representative, emailed the Ministry of Business, Innovation and Employment (MBIE) and counsel for Mr Davey and CNR Investments and said, "We appear to have resolved one issue regarding holiday pay with agreement to pay a small sum". An amended statement of problem was then filed. Although one issue Ms Hollinshead wished the Authority to resolve was her claim that there was a breach of the Holidays Act, she no longer sought unpaid holiday pay as a separate item. She continued to seek a penalty for the employer failing to supply wage and holiday records; "apportioned to [her] to cover excess costs incurred as a result of having to re-calculate wages".

³ Employment Relations Act 2000, s 65.

[17] Prior to the investigation, there was a case management conference with the Authority, at which the Authority identified the issues for investigation and determination as:

- (i) Constructive dismissal;
- (ii) Unjustified disadvantage;
- (iii) Breach of s 65 of the Employment Relations Authority 2000;
- (iv) Breaches of the Holidays Act;
- (v) Breach of the Fair Trading Act; and
- (vi) Application for strike out.

[18] In its determination dated 14 May 2018, the Authority identified the questions that needed to be determined:

- (a) Who was Ms Hollinshead's employer?
- (b) Was Ms Hollinshead unjustifiably dismissed and if so, what, if any, remedies should be awarded?
- (c) Did Ms Hollinshead's employer breach its statutory duty of good faith and if so, what, if any, penalty should be imposed?
- (d) Did Ms Hollinshead's employer breach the Act and, if so, what, if any, penalty should be imposed?
- (e) Did Ms Hollinshead's employer breach the Holidays Act and, if so, what, if any, penalty should be imposed?

[19] In dealing with the alleged breach of the Holidays Act, the Authority identified the claim as being that the employer had failed to provide Ms Hollinshead with copies of her holiday and leave records as required by s 81 of the Holidays Act.⁴

[20] The Authority found that the records held by the employer did not meet the statutory requirements and that this "resulted in the parties spending considerable time

⁴ *Hollinshead v Davey*, above n 1, at [62].

and energy resolving a dispute over Ms Hollinshead's leave entitlements and whether correct wages had been paid to her".⁵ This led to the \$250 penalty.

[21] Thus, the Authority did not consider a claim for a shortfall in holiday pay. This is consistent with the email sent to MBIE, in which Mr Hayes said that the issue regarding holiday pay had been resolved, and also consistent with the amended statement of problem.

[22] There was no claim for a shortfall in holiday pay before the Authority and Ms Hollinshead's attempt to raise that before the Court cannot proceed.

[23] I now turn to the remaining matters Ms Hollinshead wishes to challenge.

Court is guided by justice of the case

[24] In considering whether the Court should exercise its discretion pursuant to s 219 of the Act to allow an extension of time within which to file a challenge, the fundamental principle that must guide the Court is whether the justice of the case requires the extension of time to be granted.⁶

[25] If there is a short delay, caused by a minor slip-up, then an extension of time should generally be granted, desirably without opposition from the other party.⁷ This was the situation with respect to the challenge brought by Mr Davey and CNR Investments.

[26] However, where, as here, the delay in filing a challenge is more significant, the Court will, where relevant, consider:⁸

- (a) the reason for the omission to bring the case within time;
- (b) the length of the delay;

⁵ At [64].

⁶ See, for example, *Avery v No 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA) at 91; *An Employee v An Employer* [2007] ERNZ 295 (EmpC) at [9].

⁷ *Almond v Read* [2017] NZSC 80 at [37].

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

- (c) any prejudice or hardship to any other person;
- (d) the effect on the rights and liabilities of the parties;
- (e) subsequent events; and
- (f) the merits.

The delay is lengthy and reasons for it are not compelling

[27] The delay in applying for leave to extend the time for filing a challenge was significant. Even the delay in Ms Hollinshead attempting to raise her challenge (albeit within the statement of defence) was 35 days.

[28] All parties to a determination are expected to turn their minds to whether they wish to challenge all or part of it, and to file any challenge within the 28-day timeframe. It is not a valid excuse that a party was waiting to see if the other party filed a challenge.⁹

[29] In any event, even after Ms Hollinshead was aware that Mr Davey and CNR Investments were applying for leave to extend the time within which they could file a challenge, she still made no attempt to raise her own challenge until more than 28 days later.

The challenge lodged by Mr Davey and CNR Investments is de novo

[30] A significant feature in this matter is that the challenge already before the Court is a de novo challenge; accordingly, all matters that were before the Authority are now before the Court and the Court must make its own decision on those and on any relevant issues. Once the Court has made a decision, the determination of the Authority on the matter is set aside and the decision of the Court stands in its place.¹⁰

[31] Therefore, Ms Hollinshead will have the opportunity to advance her position in the Court on the matters that were before the Authority.

⁹ *Sunair Ltd v Walters* [2017] NZEmpC 124 at [20]-[21].

¹⁰ Employment Relations Act 2000, s 183.

[32] In particular, if Mr Davey and CNR Investments' challenge fails, it will be for the Court to determine remedies and penalties.

No extension of time

[33] Ms Hollinshead's delay, coupled with her ability to address issues in the challenge already before the Court, means it is not in the interests of justice to allow an extension of time for her to file a separate challenge.

[34] The Court will now proceed to deal with the challenge filed by Mr Davey and CNR Investments.

[35] Costs are reserved pending the completion of that challenge.

J C Holden
Judge

Judgment signed at 9 am on 2 October 2018