NOTE: ORDER OF EMPLOYMENT COURT IN [2018] NZEMPC 120 PROHIBITING PUBLICATION OF THE NAMES AND ANY INFORMATION LIKELY TO LEAD TO THE IDENTIFICATION OF H AND C REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA632/2021
[2022] NZCA 260

BETWEEN	H Applicant
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Respondent

Court: Clifford and Courtney JJ

Counsel: Applicant in person
M B Beech for Respondent

Judgment: (On the papers) 22 June 2022 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The applicant, H, seeks an extension of time to apply for leave to appeal a decision of the Employment Court.[1]

Background

[2] In 2015 Ms Shaw, an echocardiographer/cardiac technologist, was dismissed by her employer, the respondent Bay of Plenty District Health Board (the DHB). She filed a statement of problem in the Employment Relations Authority (the Authority), advancing disadvantage grievances on a number of grounds.

[3] In March 2017, H commenced his representation of Ms Shaw. In the course of that representation, H had (very much in summary) improperly contacted the DHB and publicly made a number of derogatory comments about it. In view of that conduct, the Authority made four sets of directions over the course of 2017 and 2018. The detail of that conduct is set out in the Employment Court decision and we need not repeat it here. The Authority made the following directions:

(a) First, H was not to make contact with the DHB directly whilst it was represented by counsel.[2]

(b) Second, H was to comply with the first direction and, in addition, was not to make public comment regarding the DHB and its staff on his personal Facebook page whilst the Authority's investigation was ongoing.[3]

(c) Third, the parties were not to make public comment about the matter, which was to remain sub judice pending the Authority's determination.

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1 *Bay of Plenty District Health Board v [C]* [2020] NZEmpC 149, (2020) 17 NZELR 545 [Employment Court decision].
2 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 May 2017.
3 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 23 March 2018.

(d) The fourth set of directions, issued in the form of interim orders pursuant to s 160(1)(f) of the Employment Relations Act 2000 (the Act), provided that:[4]

(i) H was to comply with the Authority's three previous directions, as was Ms Shaw; and

(ii) H was to take down from the website of his company, C, certain Facebook posts which had commented on the DHB's position in respect of the Authority's current investigation into Ms Shaw's claim. Ms Shaw was also directed to take down posts on her Facebook page concerning the Authority's investigation.

[4] The application leading to the making of the fourth of those sets of directions had originated on an ex parte basis for penalty, contempt and takedown orders. At that stage only Ms Shaw was a party, but the DHB sought the orders on the basis they would apply not only to Ms Shaw, but also to H and to C. The Authority recorded in a direction of 3 December 2018:[5]

> [9] The ex parte application made by the DHB has been made in respect of Ms Shaw, Ms Shaw's representative, [H] and [C]. Neither [H] or [C] are parties to the current matter before the Authority. The application has been made pursuant to ss. 133, 133A, 134A, 136(2) and 196 of the Employment Relations Act 2000 ("the Act").
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> …
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> [11] The Authority considers it necessary for an application by the DHB to be lodged under s. 158 of the Act,[6] against each of the parties against whom it seeks orders and penalties. The application is to be on notice.

[5] Notwithstanding that decision, the Authority made the interim orders referred to above as the fourth set of directions.

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4 *Shaw v Bay of Plenty District Health Board* NZERA Auckland 5593008, 3 December 2018 at [13]–[16].

5 *Shaw v Bay of Plenty District Health Board*, above n 4 (footnote added).

6 Section 158 provides "Proceedings before the Authority are to be commenced by the lodging of an application in the prescribed form".

[6] Shortly thereafter, on 7 December 2018, the Authority released its determination, finding that Ms Shaw had not been unjustifiably dismissed by the DHB.[7]

[7] Further, and in accordance with the Authority's decision on the ex parte application, on 10 December 2018 the DHB filed a statement of problem in the Authority seeking declarations, penalties and contempt orders. That statement of problem recorded C, H and Ms Shaw as the first, second and third respondents respectively.

[8] As it happens, that statement of problem would not be determined by the Authority; rather the proceeding was removed on the DHB's application to the Employment Court on 25 February 2019.[8]

[9] H and the other defendants opposed liability for any of the orders the DHB sought, principally on the basis the Authority lacked jurisdiction to make those orders. Whilst they had originally applied to strike out the DHB's application as disclosing no reasonably arguable cause of action, they subsequently discontinued that strike out application. The parties agreed the Employment Court should determine the jurisdiction issues as preliminary questions on the basis of an agreed summary of facts.[9]

[10] The background does not, however, end there. Shortly before the Employment Court released its decision on those jurisdiction issues, in August 2020 H filed in this Court an application for judicial review of 16 directions of the Authority and seven decisions of the Employment Court. Those decisions were made in the context of three separate employment disputes, including the present one. The respondents to that application, including the DHB, jointly applied to strike out the proceeding. It would be some time before that proceeding was resolved.

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7 *Shaw v Bay of Plenty District Health Board* [2018] NZERA Auckland 390.
8 *Bay of Plenty District Health Board v [C]* [2019] NZERA 101.
9 At [5].

Employment Court decision

[11] In a comprehensive decision of 22 September 2020, Judge Corkill determined the preliminary issues.[10] He held the Authority had jurisdiction to make the first three, but not the fourth, set of directions.[11] In doing so, the Judge referred to:[12]

(a) Section 160(1)(f) of the Act, which provides the Authority may, in investigating any matter, "follow whatever procedure the Authority considers appropriate".

(b) Section 173(1), which provides the Authority must, in exercising its powers and functions, comply with the principles of natural justice and act in a manner that is reasonable, having regard to its investigative role.

(c) Regulation 4 of the Employment Relations Authority Regulations 2000, which refers to the Authority's power to give "any directions that are necessary or expedient in the circumstances of the case".

(d) Finally, the Authority's "significant court-like powers of enforcement of its processes".[13]

[12] The Judge concluded the Authority had broad jurisdiction to issue directions for the purposes of ensuring the fair conduct of proceedings before it. Such directions could also be made against any person representing a party.[14] The Authority was permitted to balance any right to freedom of expression against natural justice considerations.[15] Against that background, the first three sets of directions were properly made.

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10 Employment Court decision, above n 1.
11 At [170].
12 At [47] and [49].
13 At [52], referring to s 134A (penalties for obstructing or delaying investigation), ss 137 and 138 (compliance orders) and s 196 (application of some provisions of the Contempt of Court Act 2019).
14 At [86].
15 At [105].

[13] As regards the fourth set of directions, however, the Authority had erred. The Judge referred to s 173(2) and (3) of the Act which provides that, whilst the Authority may exercise its powers in the absence of one or more "parties", it must provide an absent party with any relevant material it has received and an opportunity to comment on that material.[16] Whilst H and C were not parties, the Judge considered it would have been preferable for the Authority to have directed "very urgent service" of the DHB's ex parte application on all the affected persons and to have provided them with the opportunity of being heard.[17] The Judge went on:

> [152] I conclude that the fourth direction should not have been made, notwithstanding the difficult circumstances which the Authority was required to consider. It is regrettable that the DHB did not when seeking substantive orders issue fresh proceedings against each of Ms [Shaw], [H] and [C] in the first instance.

[14] H did not bring his application for leave to appeal Judge Corkill's decision under s 214 of the Act within the 28-day time limit.

Subsequent events

[15] A year or so after the Employment Court decision, this Court struck out H's judicial review proceeding in a decision of 4 October 2021.[18]

[16] In that same month, H:

(a) applied for leave to appeal this Court's decision to the Supreme Court, which was later declined;[19]

(b) filed an application in the Employment Court for judicial review of the directions;[20] and

(c) filed the present application for an extension of time, approximately a year out of time, to appeal Judge Corkill's September 2020 decision.

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16 At [145].
17 At [151].
18 *H v Employment Relations Authority* [2021] NZCA 507.
19 *H v Employment Relations Authority* [2021] NZSC 188.
20 The DHB has applied to strike out this application and is, as we understand matters, awaiting judgment.

This application

[17] Rule 16A of the Court of Appeal (Civil) Rules 2005 provides that an applicant may apply to this Court to extend the time to apply for leave to appeal under s 214 of the Act. Under s 214(3) of the Act leave may be granted if, in the opinion of this Court, the proposed question of law is one that by reason of its general or public importance or for any other reason ought to be submitted for determination.

[18] The well-known principles of *Almond v Read* apply to the exercise of the discretion to grant an extension.[21] The ultimate question is what the interests of justice require.[22] The factors relevant to that inquiry include the length of the delay and the reasons for it; the parties' conduct, particularly of the applicant; the extent of any prejudice to the respondent; and the significance of the issues raised by the parties and more generally.[23]

[19] The merits of the proposed appeal may also be relevant, but any consideration of the merits is necessarily relatively superficial.[24] The Supreme Court observed that a court should only reach a view about the merits where they are "obviously very strong or very weak".[25] We recognise, at least at a superficial level, the scope of the Authority's statutory powers to issue directions such as those made in the present case is an issue capable of argument. The Employment Court's extensive analysis may be seen as reflecting that. However, balanced against that consideration are the other arguments as to errors about which H complains which are clearly hopeless. In particular:

(a) The Authority plainly has the power to remove proceedings to the Employment Court. In striking out H's judicial review proceeding, this Court observed:[26]

> … [I]t is apparent from the statutory scheme that the Employment Court is the appropriate forum for challenges to

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21 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801; and *B v ALA* [2021] NZCA 229 at [8].
22 *Almond v Read* at [38].
23 At [38].
24 At [39(c)].
25 At [39(c)], referring to *R (Hysaj) v Secretary, State for the Home Department* [2014] EWCA Civ 1633, [2015] 1 WLR 2472.
26 *H v Employment Relations Authority*, above n 18, at [37].

> orders and determinations of the Authority, whether by appeal or review. The Employment Court was considering within its jurisdiction challenges to determinations of the Authority. …

(b) H identifies some 14 errors of law made by the Employment Court consisting of "exaggerations and misquotation[s]". In our view they are neither and are also not issues of public importance.

(c) Finally, H submits what he describes as the "layering of baseless procedure over the baseless origin" presents a serious reputational risk for the employment jurisdiction and for the DHB's governance. That may be H's view, but it is not a ground of appeal.

[20] Here, we are of the view that, notwithstanding any potential for argument to be raised as to the scope of the Authority's powers, other factors point strongly against the grant of an extension.

[21] The first is that H's application follows a significant, year-long, delay. H explains that delay in making this application by reference to the fact that the judicial review proceedings were already on foot. However, we note that in *Moodie v Employment Court*, the applicant's "deliberate decision to seek judicial review rather than to appeal" was part of the reason this Court declined an extension of time.[27] Whilst H is not legally trained like the applicant in *Moodie* and allowing for the fact he is self-represented, the delay here is also ten months longer than in *Moodie*.

[22] Secondly, H has filed multiple other applications concerning the same matter the proposed appeal would raise. H submits an extension is "appropriate because this matter has been heavily contested from the outset". However, we agree with the DHB that there is clear prejudice to it having to continue to defend proceedings in which H has been largely unsuccessful.

[23] We are therefore satisfied H's application does not satisfy the *Almond v Read* criteria for an extension being granted in these circumstances.

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[27] *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [49].

Result

[24] The application for an extension of time is declined.

[25] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Holland Beckett Law, Tauranga for Respondent