IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 60/2020
[2020] NZSC 103

BETWEEN	TYRONE WAYNE UNDERHILL First Applicant	
	KANE JOSEPH UNDERHILL Second Applicant	
AND	COCA-COLA AMATIL (NZ) LIMITED Respondent	

Court: Glazebrook, Ellen France and Williams JJ

Counsel: Applicants in Person
B A Smith and T P Oldfield for Respondent

Judgment: 30 September 2020

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

C There is no order as to costs.

REASONS

Extension of time

[1] This application for leave to appeal was received on 14 July 2020 but, for administrative reasons, was unable to be accepted for filing until 3 August 2020. The application was therefore four days out of time. The respondent has not opposed an

extension and the delay is minimal. In the circumstances, we grant an extension of time to apply for leave to appeal.

Background

[2] The applicants are self-represented. They are engaged in a protracted employment dispute with the respondent. Having failed in the Employment Relations Authority because their claim was out of time, they appealed to the Employment Court. The respondent had initially argued that the applicants were independent contractors, but conceded in the Employment Court that they were in fact employees. That Court found that the claim was not out of time. The applicants obtained a modest award.[1]

[3] Unsatisfied with the extent of their win, they sought leave to bring an appeal to the Court of Appeal. Their application was 10 days out of time. On 22 November 2018, the Court of Appeal granted the applicants leave to appeal out of time.[2] Having obtained leave, the applicants were required to file their appeal by 20 December 2018.[3] They did not do so.

[4] Almost nine months later, the applicants applied for an extension of time to appeal.[4] The Court of Appeal considered that the delay was lengthy and not satisfactorily explained, but countervailing prejudice to the respondent was not significant.[5] The Court granted the extension of time subject to timetabling directions which were to be "strictly observed".[6] The applicants did not comply with those directions. Though required to apply for a hearing date, file and serve the case on appeal, and file written submissions by 28 February 2020, they failed to do so.

[5] Two months later, on 29 April 2020, the Court of Appeal notified the applicants of its intention to consider striking out the appeal.[7] The applicants responded by asserting that they had "previously filed [the required] information" and did not

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1 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117.
2 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2018] NZCA 521 (Cooper, Winkelmann and Gilbert JJ).
3 Court of Appeal (Civil) Rules 2005, r 29(1)(b)(ii).
4 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2019] NZCA 566 (Cooper and Goddard JJ).
5 At [11] and [14].
6 At [21].
7 Court of Appeal (Civil) Rules, r 44A(1)(a) and (b).

understand they had to file anything further. The Court was not satisfied with this explanation. It considered that there would be no guarantee the matter would ever be ready for hearing given the applicants' history of defaults.[8] The Court accordingly struck out the appeal.[9]

This application

[6] The applicants now apply for leave to appeal against that decision. They have also filed submissions challenging the substance of the Employment Court decision they sought to appeal in the Court of Appeal.

[7] In respect of the Court of Appeal's decision to strike out the appeal, the applicants submit that they were unable to apply for a hearing date and file the relevant documents as directed by the Court because they were not told how to do so. They explained their position in these terms:

> We genuinely **did not** understand these orders, that we were required to file two further application forms to the Court and the Respondents. Nobody tells you anything, period.
>
> We asked a question of the Court, "that we do not know what the application format is or what the documents look like". We asked the court if these application forms are official Court of Appeal documents and if they are, could we get copies of these applications. We didn't get an answer from the Registry Office or the Court, so we still don't know what the application forms are. How can we file, if we don't know what to file.

[8] In respect of the Employment Court decision, the applicants' submissions are, understandably, neither directed at the legal test for leave in this Court nor, in large part, to matters that might suggest that test is satisfied in their case. They argue variously that the Employment Court Judge did not understand the nature and difficulty of their work, that the respondent's witnesses overstated its case or gave false evidence about the applicants' performance at work, and that they had carried out their duties to the required standard. These submissions are supported with extensive tracts of unsworn evidence rebutting the Employment Court's factual findings.

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8 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2020] NZCA 267 (Cooper and Goddard JJ) [Strike-out judgment] at [10]–[11].

9 At [12].

[9] The applicants also dispute the quantum of damages awarded to them in that Court. They challenge the accuracy of the Court's calculation of quantum as well as the sufficiency of the basis upon which the Court arrived at the modest sum it did. No alternative award is suggested.

Our assessment

[10] The Court of Appeal decision under challenge is a decision to strike out. The submissions challenging the Employment Court decision can therefore be treated in two ways: either as submissions in support of the application to appeal the strike-out, or as a separate application to appeal the Employment Court's decision directly to this Court.[10] The standard for leave would be higher in the latter case: there must be exceptional circumstances justifying a direct appeal.[11] In the circumstances, we give the applicants the benefit of the doubt and proceed on the basis that their submissions relating to the merits of their appeal to the Court of Appeal are made to provide supportive context to the application for leave to appeal the strike-out decision.

[11] Even on this basis, the criteria for leave are not met. The proposed strike-out appeal does not raise a matter of general or public importance.[12] The Court of Appeal applied settled principles to the facts in this case. Nor is it apparent that the Court erred in deciding to strike out the appeal. While courts should not be quick to deny self-represented laypersons access to justice, the Court of Appeal was very much alive to the applicants' position. It allowed the applicants to apply for leave to appeal out of time and further granted them a lengthy extension of time in which to file their appeal and other necessary documentation. There is no evidence that the applicants have themselves endeavoured to seek legal advice, as they were advised to do by the Court of Appeal Registrar,[13] whether by applying for legal aid or seeking advice from publicly-funded services such as a community law centre. In any event, we are not satisfied on the merits of the case that it would be repugnant to justice for the applicants to be denied a further extension.[14]

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10 Employment Relations Act 2000, s 214A(1).
11 Senior Courts Act 2016, s 75(b). See also Employment Relations Act, s 214A(4).
12 Senior Courts Act, s 74(2)(a).
13 Strike-out judgment, above n 8, at [9].
14 See Senior Courts Act, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

Result

[12] The application for an extension of time to apply for leave to appeal is granted.

[13] The application for leave to appeal is dismissed.

[14] There is no order as to costs.

Solicitors:
SBM Legal, Auckland for Respondent.