

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA561/2022
[2023] NZCA 506**

BETWEEN	TONI COLIN REIHANA Applicant
AND	GREGORY FORAN First Respondent
AND	AIR NEW ZEALAND LIMITED Second Respondent

Court: Brown and Wylie JJ

Counsel: Applicant in person
J Q Wilson and T M J Shiels for the First and Second Respondents

Judgment: 20 October 2023 at 10 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for an extension of time is declined.**
- B Mr Reihana must pay to the respondents jointly costs for a standard interlocutory application on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The applicant, Toni Reihana, filed proceedings against Air New Zealand and its Chief Executive Officer, Greg Foran, in relation to the airline's Covid-19

vaccination policy. Those proceedings were struck out by Venning J in a judgment issued on 22 September 2022.¹ Mr Reihana filed a notice of appeal against that judgment on 14 October 2022. However, Mr Reihana has since failed to comply with r 43(1) of the Court of Appeal (Civil) Rules 2005 (the Rules). As a result, his appeal is treated as having been abandoned as of 12 May 2023.

[2] Mr Reihana now seeks an extension of time, pursuant to r 43(2) of the Rules, to apply for the allocation of a hearing date and to file his case on appeal.

[3] The application for an extension of time is opposed by the respondents.

Background

[4] In March 2022 Mr Reihana was a resident in Australia. He wanted to travel from Australia to New Zealand and, in early March 2022, he booked a ticket with Air New Zealand to do so. Air New Zealand had announced in October 2021 that from 1 February 2022, any person aged 18 or over wishing to fly on its international network was required to be vaccinated against Covid-19. Mr Reihana was unvaccinated and as a result he was unable to travel on the ticket he had booked. Mr Reihana's return to this country was delayed. He had intended to assist his sons with a building project on Te Kanawera Tītī Island, but was unable to do so because of his inability to return to New Zealand at the relevant time. Access to the island is controlled and the building project had to be delayed by a year.

[5] Mr Reihana sought judicial review of Air New Zealand's Covid-19 vaccination policy. He raised three causes of action. First, he alleged that in making their policy decision in October 2021, the respondents made a jurisdictional error by failing to take account of all relevant biomedical/immunological scientific considerations and that as a result, they failed to make a fully cognisant decision.² Secondly, Mr Reihana alleged that the respondents breached the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, because the policy discriminated against him.³ Thirdly, he alleged that the respondents breached a duty of care not to require Air New Zealand

¹ *Reihana v Foran* [2022] NZHC 2425 [strike out judgment].

² At [5].

³ At [6].

customers to undergo “potentially dangerous” vaccinations. He asserted that Mr Foran and Air New Zealand were negligent in failing to apply biomedical and immunological science in making the decision to ban unvaccinated persons from flying internationally.⁴

[6] Mr Reihana sought:

- (a) certiorari invalidating the October 2021 Covid-19 vaccination policy decision;
- (b) mandamus requiring the respondents to “diligently” apply applicable and relevant biomedical and relatable scientific considerations to a reconsideration of their October 2021 policy decision;
- (c) costs;
- (d) damages for breach of the New Zealand Bill Rights Act and the Human Rights Act;
- (e) damages in tort for pecuniary loss and loss of a chance; and
- (f) such other order, including punitive damages, as the Court considered appropriate.

[7] The respondents sought security for costs and an order that the proceeding be stayed until security was provided. Mr Reihana opposed this application. It came before Peters J on 29 June 2022. In a judgment issued on 16 September 2022, the Judge ordered Mr Reihana give security for costs.⁵ Inter alia, she recorded that she was satisfied that the prospects of success of Mr Reihana’s proceeding were poor as against Air New Zealand and that his claim had no prospect of success at all as against Mr Foran.⁶ Mr Reihana sought leave to appeal this judgment. Peters J declined

⁴ At [7].

⁵ *Reihana v Foran* [2022] NZHC 2382 at [25].

⁶ At [20].

leave.⁷ Mr Reihana then sought special leave from this Court. French and Collins JJ declined special leave.⁸ In the course of doing so, they recorded that Peters J had correctly assessed that the prospects of success were poor against Air New Zealand and non-existent against Mr Foran.⁹

[8] Before Venning J, the respondents sought that the proceedings should be struck out as disclosing no reasonable cause of action against them. As noted, Venning J struck out all three causes of action.¹⁰ In a careful and comprehensive judgment he considered that none of the causes of action was reasonably arguable.¹¹ He also commented that his reasoning in relation to the strike out application would also have supported the entry of summary judgment for the respondents, because there was no basis on which the pleaded claims could succeed.¹²

[9] As noted, Mr Reihana filed a notice of appeal against Venning J's judgment with this Court on 14 October 2022.

[10] On 9 November 2022 Mr Reihana made an application in this Court for security for costs to be dispensed with. In a decision dated 18 January 2023, the Deputy Registrar declined this application. Mr Reihana then applied for a review of the Deputy Registrar's decision. The application for review was declined by Collins J in a judgment issued on 14 March 2023.¹³ In declining the application, Collins J recorded his agreement with Venning J's conclusion that Mr Reihana's claims were untenable. Collins J also observed that Air New Zealand's policy was no longer operative and that no issue of public importance arose from the way in which Mr Reihana's proceeding had been framed. He further expressed the view that no solvent litigant would seriously pursue the appeal.¹⁴

[11] Allowing for this Court's vacation period, the time limits put in place by r 43(1) expired on 7 February 2023. The Deputy Registrar extended the deadline pursuant to

⁷ *Reihana v Foran* [2023] NZHC 324 at [9].

⁸ *Reihana v Foran* [2023] NZCA 310 at [9].

⁹ At [8].

¹⁰ Strike out judgment, above n 1, at [62].

¹¹ At [24]–[61].

¹² At [63].

¹³ *Reihana v Foran* [2023] NZCA 59 at [14].

¹⁴ At [11]–[13].

r 43(1B) on three occasions — until 7 March 2023, then to 11 April 2023 and finally, until 11 May 2023. Mr Reihana still did not file his case on appeal or apply for the allocation of a hearing date. As a result, his appeal was deemed abandoned pursuant to r 43(1) as from 12 May 2023. On 29 May 2023 Mr Reihana applied informally for a further extension. The Deputy Registrar declined to further extend the deadline and advised Mr Reihana that he would have to file a formal application. On 12 June 2023 Mr Reihana applied formally for an extension of time to comply with r 43(1).

Submissions

[12] Mr Reihana has filed submissions in support of his application. In summary, he contends as follows.

- (a) His delay in complying with r 43(1) can be explained by other demands on his time. He was supervising his sons' building project between March and May 2023 and he missed notification of the timetabling requirements because there is no internet or cell coverage on and no mail service to Te Kanawera Tītī Island. He did not receive notification of Collins J's decision prior to his departure for the island. He was on the island when emails were sent advising of the 11 May 2023 extension to the deadline and he was still on the island when a follow up reminder was sent by the Registry on 1 May 2023. He only returned to the mainland on 15 May 2023. He sought to make an informal application for a further extension of time on 29 May 2023, but was then advised that he would need to make a formal application. The decisions about security for costs and the extension of the deadline came "too thick and too fast" and all while he was already rushing to complete the building project.
- (b) There is no material prejudice to the respondents due to his delay.
- (c) The Court's discretion should be exercised taking into account the consequences of Air New Zealand's vaccination policy for him and his family. The Court should exercise its discretion to grant an extension, given the circumstances of his case and the aim of his litigation, namely

to “fight for true justice in this covid vaccine holocaust depopulation setting”.

[13] The respondents oppose the application for an extension of time on the following grounds.

- (a) Mr Reihana has not offered an adequate explanation for his delay.
- (b) Mr Reihana has not paid the requisite security for costs, and there is nothing suggesting that he taken steps to arrange the payment of security.
- (c) The merits of the proposed appeal are weak. It is not genuinely arguable.
- (d) That Mr Reihana is self-represented should not be determinative. Mr Reihana has experience in the procedural requirements of advancing appeals.

Analysis

[14] Rule 43(1) of the Rules provides that an appeal is to be treated as having been abandoned if an appellant does not apply for the allocation of a hearing date and file the case on appeal within three months after the appeal is brought. The philosophy behind the rule is that once a matter has been the subject of a determination by the High Court, any party wishing to challenge that determination must do so expeditiously.¹⁵

[15] The Registrar may, on informal application made before the end of the three-month period, extend the period by periods up to one month at a time in various defined circumstances.¹⁶ Further, the Court, on an interlocutory application, can grant an extension of that period, or grant one or more further extensions of any extended

¹⁵ See *Airwork NZ Limited v Vertical Flight Management Ltd* [1999] 1 NZLR 29 (CA) at 30 and *Nielsen v Body Corporate No 199348* [2010] NZCA 101 at [10].

¹⁶ Court of Appeal (Civil) Rules 2005, r 43(1B).

period.¹⁷ In *Almond v Read*,¹⁸ the Supreme Court summarised the principles that guide the exercise of such discretions. Relevant factors include the following:¹⁹

- (a) the length of the delay;
- (b) the reasons for it;
- (c) the conduct of the parties and in particular the applicant;
- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome;
- (e) the significance of the issues raised by the proposed appeal, both to the parties and more generally; and
- (f) the merits of the appeal (although a decision to refuse an extension of time based substantially on the merits should be made only where the appeal is clearly hopeless because there is no point in extending time for an appeal that has no prospect of success).²⁰

[16] While some latitude in respect to compliance with case management requirements can be permitted to litigants in person if the overall justice of any particular case requires this to be done,²¹ the court is likely to afford less latitude to a lay litigant who has extensive experience in the appellate jurisdiction.²²

[17] In the present case, the delay is significant. The notice of appeal was filed on 14 October 2022. The r 43(1) deadline was originally 7 February 2023. It was extended on three subsequent occasions. Despite this, Mr Reihana has not applied for the allocation of a hearing date. Nor has he filed the case on appeal. Further, security

¹⁷ Rule 43(2).

¹⁸ *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801. Although the Supreme Court was dealing with r 29A and not r 43, this Court has subsequently explained that the principles discussed by the Supreme Court in *Almond v Read* apply to any interlocutory application for an extension of time where there is a right of appeal: see *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4].

¹⁹ *Almond v Read*, above n 18, at [38]–[39].

²⁰ *White v Lynch* [2016] NZCA 513 at [31].

²¹ *Robson v Gallagher* [2011] NZCA 204 at [9].

²² *Erwood v Official Assignee* [2015] NZCA 620 at [9].

for costs on the appeal remains outstanding and there is nothing to suggest that any steps have been taken in this regard.

[18] No good reason has been advanced as to why Mr Reihana has not complied with his obligations. Although there is mention in the submissions of an affidavit prepared for filing in other unrelated proceedings, no affidavit has been filed. Rather in his submissions, Mr Reihana says that he was on Te Kanawera Tītī Island, and effectively uncontactable, from mid-March to mid-May 2023. Even accepting this, Mr Reihana was notified on 28 February 2023 that the deadline for compliance was then 11 April 2023. Insofar as we are aware, he did not take any steps to meet that deadline prior to his departure to the island. Mr Reihana says that he returned to the mainland on 15 May 2023, but he does not explain why he did not engage with the Registry seeking a further extension until 29 May 2023, or why he did not file a formal application seeking a further extension until 12 June 2023, despite being told that he needed to do so on 29 May 2023. Nor has any reason been offered as to why security for costs has not been paid notwithstanding that Collins J declined a review of the Deputy Registrar's refusal to waive the payment of security on 14 March 2023.

[19] Mr Reihana has had the benefit of a number of extensions granted by the Deputy Registrar, but, in so far as we can glean, he has shown no urgency in complying with his obligations. Rather it appears that he has wilfully chosen not to do so.

[20] There is a prejudice to the respondents. They are entitled to have the appeal brought on for hearing promptly. They are prejudiced by the fact that the appeal has been hanging over them for some time.

[21] Importantly in this case, the issues raised by Mr Reihana are no longer of any great moment. Air New Zealand has since withdrawn the challenged policy. There is nothing to suggest that it is considering any new policy. The courts have consistently held or observed that Mr Reihana's claims are untenable — first Peters J, then Venning J, then French and Collins JJ, and most recently Collins J. We have considered Mr Reihana's notice of appeal as well as the various judgments. We agree with Venning J's analysis. Mr Reihana's appeal is hopeless. It has no prospect of success at all.

[22] We accept that Mr Reihana is self-represented but, in the circumstances of this case, that fact is not determinative. Mr Reihana has experience with the procedural requirements for advancing appeals. He has previously pursued at least two appeals in this Court on a self-represented basis.²³

[23] For the reasons we have set out, we conclude that Mr Reihana's request for an extension of time is not justified in the circumstances of this case. Mr Reihana has shown neither willingness nor inclination to pursue his appeal in a timely fashion.

Result

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

[25] Mr Reihana must pay to the respondents jointly costs for a standard interlocutory application on a band A basis together with usual disbursements.

Solicitors:
Bell Gully, Auckland for the First and Second Respondents

²³ *Reihana v Hitchcock* CA278/97, 16 November 1998; and *Reihana v Rakiura Titi Committee* [2017] NZCA 325, [2018] NZAR 1652.