



arrears, unpaid Holidays Act 2003 (HA03) entitlements, unlawful deductions from wages, interest, penalties, and a compliance order to produce wage and time records.

[3] Kiwi Pallets subsequently filed claims<sup>3</sup> against Mr Brennan for recovery of overpaid money<sup>4</sup> and penalties for breaches of good faith and of the employment agreement.<sup>5</sup>

[4] Mr Brennan seeks that the Authority dismisses Kiwi Pallets' "*matters and defences*" as they relate to "*the holiday pay arrangement allegations*", "*the commission payment allegations*", and "*the penalty allegations*" under clause 12A Schedule 2 Employment Relations Act 2000 (the Act) on the grounds they are frivolous and/or vexatious. Kiwi Pallets opposes this application and submits it is in the interests of justice for its claims to be investigated.

[5] The parties have agreed that the Authority shall determine this application to dismiss Kiwi Pallets matters and defences on the papers on the basis that the facts pleaded in Kiwi Pallets' Amended Statement of Problem<sup>6</sup> are true, although I note that they are not accepted by Mr Brennan.

[6] The Authority's jurisdiction under clause 12A Second Schedule of the Act allows the Authority to dismiss cases with little or no merit without them needing to first be fully investigated by the Authority. Counsel agree that it is analogous to the strike out jurisdiction in other courts.

[7] Mr Oldfield says that the application to dismiss is advanced on issues of law, not fact and on the basis that there are fundamental errors of law in Kiwi Pallets' Amended Statement of Problem which mean that certain matters or defences cannot proceed regardless of whether the Authority accepts the factual assumptions underpinning Kiwi Pallets' claims.

[8] Mr Brennan submits that the claims are so untenable on their face that they should not be permitted to proceed. He points to the unnecessary time and cost to the parties and use of Authority resources that will be incurred should all matters which Kiwi Pallets has identified in its Amended Statement of Problem proceed to a substantive investigation.

---

<sup>3</sup> Supra.

<sup>4</sup> Commission and holiday pay.

<sup>5</sup> Breach of implied duty in IEA of trust and confidence.

<sup>6</sup> Filed on 1 May 2015.

[9] Mr Oldfield submits that a matter or defence is frivolous if it is “*futile*”.<sup>7</sup> In *STAMS v MM Metals Ltd*<sup>8</sup> the Employment Court dismissed proceeding as frivolous “*because by reason of a patent error of law it is entirely misconceived.*” Mr Oldfield submits that there are patent errors of law in respect of Kiwi Pallets’ claims.

[10] I have regard to the principles established in the Supreme Court’s decision in *Couch v. A-G*<sup>9</sup> (which endorsed the established principles set out in the Supreme Court’s decision in *A-G v Prince*<sup>10</sup>) when determining this application under clause 12A Second Schedule of the Act.

[11] I also note that the dismissal of a matter or defence under clause 12A is discretionary. This discretion is to be exercised judicially. It goes without saying that there must be sufficient evidence upon which to base the exercise of the Authority’s discretion.

[12] Ms Templeton relies on the Labour Court’s decision in *Creser v. Tourist Hotel Corporation of NZ*<sup>11</sup> which identified that the question to be assessed is whether or not the case pleaded is so clearly untenable that it cannot possibly succeed. The Labour Court recognised that the jurisdiction is to be exercised sparingly and not if disputed facts need to be established.

[13] The Labour Court also commented that the special jurisdiction of employment institutions suggests that even greater caution needed to be exercised than by other courts thus recognising there may be an even greater reluctance to bar an applicant party from having their matter investigated.

### **Issues to be determined**

[14] The following issues are to be determined;

- (a) Is the holiday pay arrangement pleaded by Kiwi Pallets frivolous or vexatious?
- (b) If so, should the Authority exercise its discretion to dismiss it?

---

<sup>7</sup> *STAMS v. MM Metals Ltd* [1993] 1 ERNZ 115. See also *KVB Kunlun Ltd v. de Wet* [2014] NZERA, Auckland, 513

<sup>8</sup> *Supra.*

<sup>9</sup> [2008] NZSC 45

<sup>10</sup> [1998] 1 NZLR 262.

<sup>11</sup> [1990] 1 NZILR 1055 (LC).

- (c) Is the commission overpayment claim frivolous or vexatious?
- (d) If so, should the Authority exercise its discretion to dismiss it?
- (e) Are the recovery of holiday pay claims frivolous and vexatious?
- (f) If so, should the Authority exercise its discretion to dismiss the holiday pay overpayment claims?
- (g) Are the penalty claims frivolous and vexatious?
- (h) If so, should the Authority exercise its discretion to dismiss the penalty claims?

**Is the holiday pay arrangement pleaded by Kiwi Pallets frivolous or vexatious?**

[15] Kiwi Pallets claims it had a verbal agreement with Mr Brennan which resulted in him being paid enhanced or additional holiday pay entitlements over the minimum holiday pay rate prescribed by the Holidays Act 2003 (HA03). This is strongly disputed by Mr Brennan who claims Kiwi Pallets made unlawful deductions from his holiday pay payments resulting in him being owed holiday pay arrears.

[16] I find that this holiday pay arrangement as pleaded by Kiwi Pallets does not meet the standard required to qualify as frivolous or vexatious. The evidence in respect of this matter needs to be tested in order to determine whether Mr Brennan has been under or over or correctly paid all of his HA03 entitlements.

[17] I decline to dismiss this claim.

**Is the commission overpayment claim frivolous or vexatious?**

[18] Kiwi Pallets is seeking recovery of money for allegedly overpaid commission from Mr Brennan.

[19] Mr Oldfield submits that this commission overpayment claim is frivolous and vexatious because it is time barred by s142 of the Act as it relates to actions allegedly occurring from July 2007 to September 2008. The claim relating to the recovery of alleged overpayments of commission was filed on 16 February 2015.

[20] Section 142 of the Act states:

*“No action may be commenced in the Authority or Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose”.*

[21] Time runs from the date of the employment relationship problem rather than from the date the claimant becomes aware of the cause of action.<sup>12</sup> An action is commenced with the filing of the claim.

[22] Mr Brennan’s employment ended on 16 August 2013. Kiwi Pallets filed its recovery of commission overpayments claim on 1 May 2015. The six year time limitation under s.142 of the Act therefore applies to employment relationship problems that predate 1 May 2009.

[23] Accordingly I find that Kiwi Pallet’s recovery of commission claim is frivolous and vexatious unless the time limitation in s.142 of the Act is extended because without time being extended it has no prospect of success.

**Should the Authority exercise its discretion to dismiss the recovery of overpaid commission claim?**

[24] Ms Templeton submits that the commission overpayment claim should not be dismissed because the Authority has discretion under ss.219 and 221(c) of the Act to extend the s.142 time limitation in the Act. Although a formal application to do so has not been received the implication from Ms Templeton’s submissions is that the Authority should exercise its discretion to extend the s.142 time limitation.

[25] The issue of whether the Authority does have discretion to extend the time limitation under s.142 of the Act has not been authoritatively determined. The parties provided minimal submissions to assist with this point and the Authority has not had the benefit of hearing legal argument on it.

[26] Leaving to one side the issue of whether or not an application for leave to extend the limitation period for commencing the recovery of commission action has actually been made, I find that s221(c) of the Act does not apply to this matter.

[27] The recovery of commission overpayment claim is not already “before” the Authority.<sup>13</sup> It is an entirely new cause of action that Kiwi Pallets seeks to raise for the

---

<sup>12</sup> *Haig v Edgewater Developers Ltd (No 5)* [2012] NZEmpC 189 and *Murray v Morel & Co Ltd* [2007] NZSC 27.

<sup>13</sup> See *Roberts v Commission of Police* EmpC Auckland AC33/06, 27 June 2006.

first time. Section 221(c) of the Act does not enable the Authority to extend time to bring a matter before it that is otherwise out of time.<sup>14</sup>

[28] That leaves s.219 of the Act. Section 219 gives the Authority a discretionary power to extend time limitations. Mr Oldfield submits that the s.219 jurisdiction does not allow the s.142 time limitation to be extended because an application for leave to extend time under s.219 of the Act is still “*an action*” within the meaning of s.142 of the Act so such an application must also be time barred. I consider that argument has considerable merit.

[29] However assuming for argument’s sake that there is such a discretion, I will address the exercise of it in order to dispose of this application. Again leaving to one side the issue of whether or not Kiwi Pallets has actually sought leave to extend the six year time limitation in s.142 of the Act,<sup>15</sup> I do not consider this is an appropriate matter on which to exercise the Authority’s discretion, should s219 of the Act apply.

[30] Insufficient reasons have been advanced to warrant the exercise of the Authority’s discretion to extend time. The Authority has not been provided with any affidavit evidence to support an application to exercise its discretion to allow Kiwi Pallets to pursue its recovery of commission action outside the s.142 six year time limitation.

[31] The exercise of such a discretion involves the application of tests to assist the Authority to determine whether in all the circumstances the interests of justice require an extension of time. Counsel did not address these tests in submissions so the Authority has not had the benefit of legal argument on them.

[32] However because the s.219 discretion is exercised with a view to avoiding injustice there must be sufficient material on which any exercise of the discretion can be properly based. The factors that would normally be assessed and balanced include (but are not limited to);

- (a) Reason(s) for the omission to act within time;
- (b) Length of delay;

---

<sup>14</sup> Supra.

<sup>15</sup> No formal application has been filed but the implication from Mr Templeton’s submissions is that the Authority should act to exercise such a discretion in Kiwi Pallet’s favour.

- (c) Prejudice to others;
- (d) Effect on the rights and liabilities of the parties;
- (e) Subsequent events;
- (f) Merits (the assessment of which is made at a reasonably basic threshold).

[33] No affidavit evidence has been provided. The reasons for the delay have not been adequately explained. The delay is also lengthy. The commission overpayment recovery claim relates to events that occurred almost 8 years ago.<sup>16</sup> The six year limitation timed out in July 2013 for the cause of action that Kiwi Pallets claims arose in July 2007. This matter therefore involves an unexplained delay of up to 22 months.

[34] I consider there is a risk of unreasonable prejudice to Mr Brennan's ability to present evidence relating to events that occurred so long ago. I also consider there is possible prejudice to the ex-employee who Kiwi Pallets has identified as allegedly responsible for the "*unauthorised*" change to Mr Brennan's commission structure. That individual's employment ended in 2013.

[35] I also consider it is in the overall interests of justice for well understood time limitations (such as the six year limitation in s.142 of the Act) to be upheld. There is simply nothing extraordinary in the circumstances of the alleged commission overpayment claim that would warrant departing from the statutory time limitation in s.142 of the Act.

[36] I find it is in the interests of justice to exercise the clause 12A discretion to dismiss Kiwi Pallet's commission overpayment claim on the grounds it is frivolous and vexatious because it has no prospect of success being filed outside the time limitation specified in s.142 of the Act.

[37] I further find that there are insufficient grounds to exercise the s.219 discretion in the Act (assuming one exists) to extend the s.142 time limitation in the particular circumstances of this case.

---

<sup>16</sup> July 2007-September 2008.

### **Are the recovery of holiday pay overpayment claims frivolous and vexatious?**

[38] Kiwi Pallets claims it overpaid Mr Brennan \$10,500.20 holiday pay as a result of his commission being incorrectly calculated. Kiwi Pallets also claims it incorrectly paid Mr Brennan \$623.10 (which it claims was commission) in the weekly pay period ending February 2013.<sup>17</sup> However Kiwi Pallets says commission was not due to be paid to Mr Brennan in that pay period. Kiwi Pallets says this error was due to an administrative error.

[39] It is unclear what period the recovery of holiday pay (other than the alleged error identified above) relates to. Mr Brennan's employment ended in mid-August 2013 so assuming the alleged overpayment claim relates to holiday pay paid upon termination then it is in time. Each party has a different view about what holiday pay was payable and in fact paid so the evidence about this needs to be tested.

[40] The alleged \$623.10 commission error overpayment claim is filed within time so is not frivolous or vexatious.

[41] The recovery of holiday pay overpayments claim was filed on 1 May 2015 so the Authority can hear this claim if it relates to the period 1 May 2009 onwards. On that basis I find this claim in so far as it relates to alleged holiday pay overpayments from 1 May 2009 onwards is not frivolous or vexatious so will not be dismissed.

[42] However should the holiday pay overpayments claim relate to alleged overpayments predating 1 May 2009 then I find such claims are frivolous and vexatious unless the time limitation in s.142 of the Act is extended.

### **Should the Authority exercise its discretion to dismiss any holiday pay overpayment claims that predate 1 May 2009?**

[43] I do not consider a formal application has been made to extend time. However such an application may be implied from Ms Templeton's submissions. However the same issues arise as did with the alleged commission overpayment claim.

[44] I find that s.221(c) of the Act does not apply because the alleged holiday overpayment claim for the period prior to 1 May 2009 is not already before the Authority. Because it is a new claim s.221(c) of the Act does not apply.

---

<sup>17</sup> This payment was recorded in the payroll system as commission but Kiwi Pallets claims commission was not due.

[45] It is also questionable whether s.219 of the Act applies. But assuming it does I find this is not an appropriate case in which to exercise the discretion to extend time.

[46] There is a lack of evidence to support the exercise of such a discretion. There is also potential prejudice to Mr Brennan and to the former Kiwi Pallets' employee who was is alleged to have changed Mr Brennan's commission structure without authority.

[47] I consider the delay has not been adequately explained. I find there are no extraordinary circumstances which warrant extending the time limitation in s.142 of the Act. I consider that the interests of justice require the time limitation in s.142 of the Act to be upheld.

[48] Therefore any claims predating 1 May 2015 are frivolous and vexatious on the grounds they have no prospects of success. On that basis it is appropriate to exercise the Authority's discretion in clause 12A Second Schedule of the Act to dismiss the alleged holiday pay overpayment claims that relate to the period prior to 1 May 2009.

#### **Are the penalties claims frivolous and vexatious?**

[49] Mr Brennan's employment ended on 16 August 2013. Kiwi Pallets filed its penalty claims on 16 February 2015.

[50] Mr Oldfield submits that a penalty claim is out of time under s.135(5) of the Act. Section 135(5) requires an action for the recovery of a penalty to be commenced within 12 months of the action first becoming known to the person bringing the action or the date when the cause of action should reasonably have become known to the person bringing the action, whichever is the later.

[51] The penalty claim relates to an allegation that Mr Brennan unlawfully retained commission overpayments. Mr Brennan disputes that and further says he has been underpaid commission.

[52] Ms Templeton submits that the "*knowledge date*" of the event giving rise to the penalty claims was October 2013. This means the penalty claims needed to be filed by October 2014 to be within the s.135(5) time limitation. However the penalty claims were not filed until 16 February 2015.

[53] I consider the penalty claims are frivolous and vexatious unless the time limitation in s.135(5) of the Act is extended on the basis that unless that occurs then there is no jurisdiction to award the penalties sought.

**Should the Authority exercise its discretion to dismiss the penalty claims?**

[54] An application under s.219 of the Act to extend the time limitation for commencing a penalty action under s.135(5) of the Act has not been filed. However assuming it has been made informally by Ms Templeton in her submissions I find that this is not an appropriate case in which the exercise the Authority's jurisdiction to extend time.

[55] Kiwi Pallets says it has known about the circumstances which it claims should give rise to penalties since October 2013. There is no adequate explanation as to why the penalty claims were not filed until some 3-4 months outside the required time limit.

[56] I do not consider there is sufficient evidence before the Authority to establish extraordinary circumstances which justify departing from the time limitation set out in s.135(5) of the Act. Even if there was a discretion to extend the time limitation in s.135(5) of the Act, I find there are no grounds that would warrant that occurring. I consider that the interests of justice require the s.135(5) time limitation to be enforced.

[57] Accordingly the penalty claims have no prospect of success as they were not filed within time. I therefore exercise the Authority's discretion in clause 12A Second Schedule of the Act to dismiss Kiwi Pallet's penalty claims.

**Orders**

[58] Under clause 12A Second Schedule of the Act I dismiss Kiwi Pallets overpayment of commission claims, the overpayment of holiday pay claims which predate 1 May 2009 and the penalty claims.

**Costs**

[59] Costs are reserved.

**Rachel Larmer**  
**Member of the Employment Relations Authority**

