

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2020] NZERA 109
3091535

BETWEEN

PAULA CARSTENSEN
Applicant

AND

LAKES DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Robin Arthur

Representatives: Allan Halse, advocate for the Applicant
Mark Beech, counsel for the Respondent

Investigation: On the papers

Determination: 5 March 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 25 February 2020 Paula Carstensen applied to the Authority for an extension of time to lodge a statement of problem about a personal grievance she raised against Lakes District Health Board (LDHB) on 1 December 2016.

[2] LDHB opposed the application. It said Ms Carstensen's application relied on a section of the Employment Relations Act 2000 (the Act) that did not apply to her circumstances. Instead, another section of the Act applied so that Ms Carstensen was barred from commencing proceedings in the Authority more than three years after she had raised her grievance. It said the Authority had no jurisdiction to extend the time for lodging a statement of problem about a grievance outside that three year period.

The Authority's investigation

[3] By consent this jurisdictional issue has been decided on the papers. Those papers comprised a statement of problem (and attached background documents), the application for leave to extend the time to submit the statement of problem and LDHB's notice of opposition to the application. Neither party's representative wished to use an opportunity offered to make any further written or oral submissions on the matter for resolution. Both representatives made some brief comments in support of their respective arguments in the emails they each sent to the Authority agreeing to have the matter determined on the papers. Those comments have also been considered in preparing this determination.

How the delay occurred

[4] LDHB dismissed Ms Carstensen on 9 November 2016. A previous advocate raised a personal grievance on her behalf by letter on 1 December 2016. LDHB responded by letter dated 14 December 2016. It declined to accept Ms Carstensen had any basis to pursue a grievance about its actions in dismissing her.

[5] The application for leave to extend time submitted by Allan Halse explained that Ms Carstensen had contacted his advocacy business, CultureSafe, on 10 August 2018. She was assured CultureSafe would represent her in the Authority and would prepare a statement of problem. In August 2019 she was assured CultureSafe had prepared her statement of problem. She believed CultureSafe had lodged the statement by December 2019, that is within the three year period after she had raised her personal grievance. However CultureSafe failed to lodge her statement until February 2020.

[6] Mr Halse, by email sent to the Authority on 1 March 2020, said the statement of problem was ready and agreed by Ms Carstensen within the three year period but not sent to the Authority due to "an administrative error".

[7] As this error was no fault of Ms Carstensen she sought an extension of time to lodge her statement of problem so her grievance could be addressed. Her application referred to an extension under s 114(3) of the Act.

The relevant provisions of the Act

[8] The following provisions of the Act were relevant in considering Ms Carstensen's application:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
 - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.
- (5) ...
- (6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

142 Limitation period for actions other than personal grievances

No action may be commenced in the Authority or the 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.

219 Validation of informal proceedings, etc

- (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

- (2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

221 Joinder, waiver, and extension of time

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

- (a) direct parties to be joined or struck out; and
- (b) amend or waive any error or defect in the proceedings; and
- (c) subject to section 114(4), extend the time within which anything is to or may be done; and
- (d) generally give such directions as are necessary or expedient in the circumstances.

Could the Authority grant an extension of time under s 114(3) of the Act?

[9] Section 114(3) applies to circumstances where an employee has not raised a personal grievance within 90 days of the action alleged to amount to a personal grievance occurring or coming to the employee's notice. It allows leave to be granted to raise a grievance after the end of the 90-day period, if certain criteria set in s 114(4) and (5) are met.

[10] However s 114(3), and the subsequent criteria in s 114(4) and (5), do not apply to Ms Carstensen's situation. Those provisions concern only the situation where an employee has not raised a grievance within 90 days. There is no dispute in Ms Carstensen's case that she did raise her grievance well within 90 days. The grievance raised by her previous advocate, on 1 December 2016, was sent 22 days after her employment with LDHB had ended by dismissal on 9 November 2016.

[11] The letter her previous advocate had sent clearly met the description in s 114(2) that "a grievance is raised with an employer as soon as the employee has made ... the employer ... aware that the employee alleges a personal grievance that the employee wants the employer to address".

[12] Accordingly, Ms Carstensen's situation was plainly outside the scope of s 114(3) of the Act. The Authority has no power or discretion under the provisions of that subsection to extend time for her to lodge her statement of problem about her grievance.

The statutory bar in s 114(6)

[13] The question therefore turned to whether the Authority was permitted to allow an extension of time to the three years period referred to in s 114(6).

[14] A full Court of the Employment Court considered the operation of s 114(6) in its decision in *Blue Water Hotel Limited v VBS*.¹ The Court has most recently applied the outcome reached in that case in its decision in *Holland v OCS*, issued on 21 February 2020.²

[15] What the *Blue Water* decision makes clear is that, once a grievance has been raised, the three-year period referred to in s 114(6) begins to run. The Authority has no power “on any ground” under s 114(6) to extend that limitation period beyond three years.³

[16] The Court summarised its reasons for this conclusion in this way:⁴

These provisions confirm that Parliament acted deliberately. Exceptional circumstances may warrant the late raising of a personal grievance; indeed, where there are such circumstances, there is no time limit for doing so. ... [I]n contrast to the scheme outlined in ss 114(4) and 115, Parliament did not allow for an extension of time **on any ground** in s 114(6). ...

Drawing these threads together, we are satisfied that s 114 is intended to provide a complementary set of provisions as to how a personal grievance is raised; and within that context s 114(6) is intended to describe the period within which commencement of any action can occur. This is to provide an end point for commencement of proceedings, and thus certainty for a potentially liable employer; it means that personal grievances have to be the subject of an action in the Authority within the defined period of three years.

[17] For Ms Carstensen’s case the reference to not being allowed an extension “on any ground” includes her advocate’s explanation of “administrative error”.

Extension of time available under s 219 or s 221?

[18] The Court in *Blue Water* also considered whether the broad powers in s 219 and s 221 might, despite its conclusion about the effect of s 114(6), still be used to allow a person to commence proceedings in the Authority later than three years from when the grievance was raised.

¹ [2018] NZEmpC 128.

² [2020] NZEmpC 10.

³ *Blue Water*, above n 1, at [55].

⁴ *Blue Water*, above n 1, at [55] and [56].

[19] Its answer to that question was unequivocal. The Court said “the powers in s 219(1) or s 221 cannot be used to extend the time limitation provisions of s 114(6).”⁵ It explained that the possibility of extension of time under s 219(1) or s 221 would defeat Parliament’s intention in imposing the precise time limits introduced in 2000 for personal grievances (three years) and all other actions (six years). If general powers of extension were available, there would be no time limits at all.⁶

[20] In *Holland v OCS* the Court reviewed a decision of the Authority that said Ms Holland’s proceeding was outside the three-year time limit created by s 114(6). Ms Holland had raised a grievance in 2013 but did not lodge her proceeding in the Authority until 2018. The judge acknowledged Ms Holland still felt let down by her employer and the professionals she had turned to for help but said the depth of her feelings could not overcome the bar to litigation created by s 114(6). He concluded that “the Authority had no alternative other than to dismiss [her] claim because it was out of time”.⁷

[21] Ms Carstensen is in the same situation. And, in the same way, the Authority is bound by the law, as made by Parliament and explained by the Court, to dismiss her application to commence proceedings against LDHB more than three years after she had raised her personal grievance. Accordingly, the leave sought is declined and Ms Carstensen’s application is dismissed.

Robin Arthur
Member of the Employment Relations Authority

⁵ *Blue Water*, above n 1, at [99].

⁶ *Blue Water*, above n 1, at [96].

⁷ *Holland*, above n 2, at [11].