

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 25
5561467

BETWEEN PHILIP CLARK
 Applicant

A N D COMMISSIONER OF POLICE
 Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Cathryn Curran-Tietjens, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 18 February 2016 for Applicant
 15 January 2016 for Respondent

Date of Determination: 9 March 2016

**DETERMINATION BY EMPLOYMENT RELATIONS AUTHORITY OF
A PRELIMINARY ISSUE**

- A Philip Clark is prevented by the limitation period in s 142 of the Employment Relations Act 2000 from bringing a claim against the Commissioner of Police before 23 October 2009 for wage arrears for a standby allowance.**
- B Any issue as to costs is reserved.**

Employment relationship problem

[1] Philip Clark lodged an application with the Authority on 22 October 2015 seeking arrears payments of a standby allowance for a period he was a member of the Dunedin Dog Section from 1 January 2007 to 1 April 2010. He says that he was entitled to payments of a standby allowance under the collective agreement that covered his employment at the material time as a Constable.

[2] The Commissioner of Police (Police) says that Mr Clark is outside of the statutory time limit for pursuing the wages arrears claim in the Authority. Police say that Mr Clark was not entitled to receive the standby allowance as he was not on standby over the period for which he seeks the allowance.

[3] The Authority held a telephone conference with Mr Clark and Ms Curran-Tietjens on 7 December 2015 and it was agreed that the Authority would determine a preliminary issue on the papers whether the causes of action arose more than six years before the date the application by Mr Clark was lodged.

[4] Section 142 of the Employment Relations Act 2000 (the Act) provides for a limitation period for actions other than personal grievances as follows:

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.

[5] By agreement Police lodged and served its submissions in respect to the preliminary issue and then Mr Clark lodged his submissions in response.

[6] The Authority is now in a position to determine the preliminary issue.

The issues

[7] The Authority needs to determine the following:

- (a) What is the cause of action in this case;
- (b) Does the failure to pay the standby allowance each pay period Mr Clark says it is payable amount to a new cause of action and if so is

any part of the claim lodged more than six years after the cause of action arose,

- (c) Could Mr Clark's employment relationship problem and submissions be taken to be an application to extend the time limit under s 142?
- (d) If it could, and Ms Curran-Tietjens has addressed this possibility in her submissions, does the Authority have jurisdiction to extend the time limit?
- (e) If the Authority does have jurisdiction to extend the time limit in s 142 should it do so in the facts of this case?

What is Mr Clark's cause of action?

[8] The statement of problem records that Mr Clark wants the Authority to resolve *wages in arrears for a standby allowance that was not paid..... from the 1st January 2007 until 21 April 2010.*

[9] I find that the claim is properly considered as an application under s 131 (1) of the Act for the recovery of wages or other money. Allowances not paid or paid at a lower rate than prescribed in the employment agreement have been treated in cases in the employment jurisdiction as recovery actions for *other money*.¹

[10] Chief Judge Colgan in *Law v Board of Trustees of Woodford House*² considered s 142 in respect to a claim for recovery of minimum wage rates for sleepovers and stated amongst other matters that s 131 of the Act deals with remuneration arrears proceedings generally and is subject to s 142 of the Act.³ It was further stated that by applying s 142 of the Act the plaintiffs' claims cannot relate to breaches of the Minimum Wage Act 1983 where the causes of action accrued six years before the claims were brought to the Authority.⁴

Does the failure to pay the standby allowance each pay period Mr Clark says it is payable amount to a new cause of action?

¹ Travel allowance *NZ Engine Drivers etc IUW v Waitaki International Ltd* [1990] 2 NZILR 1057 for example

² [2014] NZEmpC 25, (2014) 11 NZELE 355

³ At [79]

⁴ At [80]

[11] Ms Curran-Tietjens submits that the Authority should not regard each failure to pay a standby allowance as giving rise to a new cause of action but rather should follow the Authority's approach in *Pretorius v. Marra Construction (2004) Ltd.*⁵

[12] Ms Curran-Tietjens submits that if Mr Clark believed he had a claim he should have brought it within six years of January 2007 when all the elements necessary to pursue such a claim existed:

- the employment agreement made provision for payment of a standby allowance from 1 January 2007;
- in January 2007 Mr Clark was of the view that the criteria in the employment agreement for payment of the standby allowance applied to his situation;
- Mr Clark claimed the standby allowance in his January 2007 timesheet;
- Police declined to pay the standby allowance to Mr Clark.

[13] In *Pretorius* it was held that an oral understanding for increased salary or alternatively payment on a quantum meruit basis for all hours worked in excess of a 40 hour week could not be pursued. It was found that Mr Pretorius would have been in possession of all the elements necessary for prosecuting his cause of action as he failed to receive a salary increase in his first payslip from the end of December 2007. Subsequent non-payment of the enhancement was found not to give rise to new causes of action and it was determined that he was outside the six year time limitation period.

[14] The reasoning of the Employment Court judgment in *Haig v Edgewater Developers Limited*⁶ was adopted in *Pretorius* in reaching the finding above. *Haig* is distinguishable from Mr Clark's claim for arrears for an allowance. It concerned claims for damages for non-provision of shares and counterclaims for breach of contract, fraudulent concealment and breach of implied obligations. It appears that the claim in *Pretorius* was viewed differently to a claim under s 131 (1) of the Act.

[15] There have been other determinations of the Authority and judgments of the Employment Court where claims under s 131(1) were simply limited to arrears of

⁵ [2015] NZERA Auckland 314 at [44]

⁶ [2013] ERNZ 543

wages for the six years before the date of lodging or filing – *Lau v Canaan Productions Ltd (in Liq)*⁷ and *Poulter v Antipodean Growers Limited*.⁸ I find that is the correct approach to take in this matter because each pay period in which Mr Clark said he should have received a standby allowance gives rise to a new cause of action.

[16] Mr Clark submits that his situation is the same as that referred to in *Abbot v Alles Verlore Limited*⁹ and he is entitled to bring his claim outside of the six year limitation in s 142. The claim in *Abbot* was a wage arrears claim for accrued annual leave entitlements between August 2004 and February 2012. I accept Ms Curren-Tietjens submission that annual holiday entitlements accrue over time and the obligation to pay crystallises at the end of the employment relationship. It is different therefore and distinguishable from the claim for arrears for an allowance that Mr Clark has lodged. The only issue for determination in *Abbot* was what accrued annual leave entitlements were owed to Mr Abbot.

[17] The pay periods that fall within the six years of the lodging by Mr Clark of his claim are from 23 October 2009 until 1 April 2010 (inclusive) after which time the Dunedin dog handlers including Mr Clark were paid a standby allowance.

Could Mr Clark’s employment relationship problem and submissions be taken to be an application to extend the time limit under s 142?

[18] Mr Clark is dealing with this matter on his own although he was assisted by an Industrial Officer at the New Zealand Police Association more recently in 2013 and again in 2015. The parties have been to mediation. Whilst Mr Clark does not formally make a claim to extend time, his submissions suggest that the delays, or at least part thereof, were the responsibility of the Police.

[19] I agree with the Police submission that there is no express power for the Authority to extend the time limit in s 142 and that whether s 219 of the Act which deals with validation of informal proceedings could apply in the circumstances has not, it would appear, been authoritatively determined.

⁷ [2011] NZERA Auckland 29

⁸ [2010] NZEmpC 77, (2010) 7 NZELR

⁹ [2014] NZERA Auckland 421

[20] If there was discretion to extend the time limit in s 142, the history of the matter would not support, I find, an extension of time. The delay in lodging the proceedings was quite significant and the reason for delay unclear.

[21] There was communication and correspondence about the allowance from 2007 to 2010. Mr Clark ended his employment with police in September 2013 and then there was an extended period between a letter to the Police dated 10 September 2013 about the issue and a follow up from the Police Association in February 2015. Some weight does need to be placed on an email from Police that put Mr Clark on notice that his claim was at risk of being out of time dated 6 March 2015. There was then delay until October 2015.

[22] The claim is clearly very important to Mr Clark and he has provided rosters up to 22 November 2009 and a lot of other relevant information but I cannot rule out some prejudice to the police in defending its position given the passage of time.

Determination

[23] Mr Clark is limited in his claim under s 131 (1) of the Act to the period from 23 October 2009 to 1 April 2010 after which the standby allowance was paid.

[24] In light of this determination Mr Clark may like to communicate further with Ms Curren-Tietjens as to whether the matter can be resolved or he can ask an Authority Officer to arrange a further telephone conference with the Authority to discuss the next step.

Costs

[25] I reserve any issue of costs.

Helen Doyle
Member of the Employment Relations Authority