IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 125/08
5112032

	BETWEEN	WARREN DAVID COLLINS Applicant
	AND	IDEA SERVICES LIMITED First Respondent
	AND	IHC NEW ZEALAND INCORPORATED Second Respondent
Member of Authority:	G J Wood	
Investigation by way of Submissions:	Due by 9 September 2008	
Determination:	23 September 2008	

DETERMINATION OF THE AUTHORITY

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[1] The applicant, Mr Warren Collins, was employed by the second respondent, the IHC, as a community support worker, between May 2004 and early January 2005.

[2] After his employment ended Mr Collins' first representative raised a personal grievance against IHC of constructive dismissal. Mr Collins attended mediation over that grievance with IHC in early 2005. Matters then went into abeyance until 21 December 2007. At that point, Mr Collins personally filed a personal grievance with the Authority against *Idea Services (formerly IHC).* The Authority support staff, following the prompt contained within its computer system, served the papers on the first respondent, Idea Services Limited.

[3] Prior to the commencement of the investigation meeting on 6 May 2008, Idea Services Limited raised the jurisdictional point that it never had been Mr Collins' employer. Mr Collins wants to pursue his personal grievance against his former employer, the IHC. The IHC believes his claim is out of time (a grievance must be filed within 3 years of it being raised) and should be rejected accordingly.

[4] The issues for determination are:

- Whether the statement of problem identifies IHC as Mr Collins' employer and therefore proceedings can continue against it; or
- Whether the IHC be joined as a party under s.221; or
- Whether the Authority should extend the time within which Mr Collins may properly bring a personal grievance against the IHC under s.219.

Was IHC properly named in the statement of problem?

[5] It is accepted by all parties that the IHC was Mr Collins' employer, but there are reasonable grounds for Mr Collins, as a lay person, to have misunderstood the legal situation. This is because in March 2005, only months after Mr Collins had left IHC's employment, it ceased to become directly involved in the provision of support services to its clients. Instead, this was done by a new entity named Idea Services Limited, which is 100% owned by IHC. Staff elected to transfer their employment to Idea Services Limited. IHC retained all its liabilities prior to the transfer date, such as any liability under Mr Collins' grievance claim.

[6] Mr Collins' first representative raised the grievance with the IHC in January 2005. Subsequently, Mr Collins' second representative wrote to the IHC in September 2005, noting his employment with it and that a grievance had previously been raised. More than two years later Mr Collins filed his statement of problem against *Idea Services (formerly IHC).*

[7] The Department of Labour's computer system automatically matches names such as Idea Services with legal entities such as Idea Services Limited and generates the appropriate forms accordingly. The support staff member concerned therefore simply utilised the computer generated name to serve the statement of problem on Idea Services Limited. Clearly, this was an error. A more proper course of action would have been to clarify the identity of the respondent with Mr Collins, informing him that there was no such legal entity as *Idea Services (formerly IHC).* It would then have been up to Mr Collins to file against Idea Services Limited, or IHC, or whomsoever he chose.

[8] However, the fact is that all parties proceeded from that point on with the mutual understanding that Mr Collins' personal grievance was properly raised against Idea Services Limited. Unfortunately, it was not until the date of the investigation meeting, despite a

number of conference calls, and statements having been prepared, that Mr McBride (representing Idea Services Limited) first informed Mr Mitchell (now representing Mr Collins) and the Authority, that Idea Services Limited had never employed Mr Collins. He therefore requested that the application against Idea Services Limited be dismissed and that the matter not be permitted to be filed against IHC. In particular, Mr McBride noted that s.114(6) provides that no action may be commenced in the Authority in relation to a personal grievance more than three years after the date on which the personal grievance was raised.

[9] The identity of an employer in bringing a legal claim of a personal grievance is vital, as is made clear by cases such as *Service & Food Workers' Union v. Chan* [1991] 3 ERNZ 15. Mr Collins had misdescribed his employer. The statement of problem was filed against *Idea Services (formerly IHC)*. Idea Services is not a legal entity and even if it was it is not *formerly IHC*, even though IHC owns 100% of Idea Services Limited. As noted above, Mr Collins did not file against Idea Services Limited, nor did he file against IHC. The word *formerly* means just that. Mr Collins' employer was IHC and this has never changed. He should have brought his application against IHC, which is the legal identity of his employer, against whom he had raised a grievance and been to mediation, and who his two previous representatives had properly identified as his employer.

[10] No doubt Mr Collins genuinely believed that he was filing against his former employer in the way that he did, but he was simply incorrect. His previous representatives had correctly identified IHC and there was no reason for Mr Collins to change this.

[11] It is quite wrong in principle to interpret Mr Collins' application as an application against IHC. It was not so interpreted by the Authority, Mr Mitchell, Mr McBride, or any representative of Idea Services Limited. As a matter of law, it was simply not the case that IHC and Idea Services (Limited) are one and the same entity.

[12] Mr Mitchell has submitted that Idea Services Limited and Mr McBride have used the confusion over the identity of the employer as a *tactical delay* in order to deprive Mr Collins of his statutory right to bring a grievance. I must accept Mr McBride's word as an officer of the Court that it was not until the date of the Authority's investigation meeting that he first recognised the significance of the issue.

[13] I therefore determine that the IHC was not properly identified as Mr Collins' employer in his statement of problem.

Should the Authority direct that IHC be joined pursuant to s.221?

[14] Section 221 of the Act provides:

> *In order to enable the … Authority … to more effectually dispose of any matter before it according to the substantial merits and equities of this 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*
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> *(b) amend or waive any error or defect in the proceedings; and …*
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> *(d) generally give such directions as are necessary or expedient in the circumstances.*

[15] Mr Mitchell claimed that it is only just that IHC be joined as a party under any of the three subsections referred to. Mr Mitchell relied on the basic legal principle that parties should be entitled to their day in Court. In particular he noted that:

- Mr Collins had proceeded in good faith;
- IHC owns all the shares in Idea Services Limited;
- IHC would not be prejudiced as a result;
- Idea Services Limited had fully participated in setting up the investigation meeting; and
- the Authority was also complicit in the process.

[16] There is merit in each of Mr Mitchell's submissions except as to prejudice. It is quite appropriate to note that Mr Collins, the Authority and Idea Services Limited had proceeded in good faith to determine the matter, with them all overlooking the fact that Mr Collins was only ever employed by IHC. Furthermore, because of the three year time restriction between the raising of a grievance and commencing an action in the Authority, Mr Collins was unable to simply withdraw his application against Idea Services and recommence against the IHC, except as may be provided for below.

[17] The effect of the three year timeframe would mean that Mr Collins would be unable to have his day in Court. Section.221 does not, however, enable the Authority to extend time to bring a matter before it that is otherwise out of time, as was held in *Roberts v. Commissioner of Police* (unreported, AC33/06, 16 June 2006, Colgan CJ). I therefore determine that s.221 cannot assist Mr Collins.

Should the three year timeframe be extended?

[18] Following submissions from the parties, I directed that further submissions be made on the issue of whether s.219 could assist Mr Collins. Section 219 is entitled V*alidation of informal proceedings etc* and ss1 states:

> *(1) If anything which is required or authorised to be done by this Act is not done within the time allowed … the Authority … may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done…*

[19] In *Roberts* it was held that s.219(1):

> *… is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority determinations to this Court within the statutory period of 28 days following their issue. As a discretionary power, the Court applies a number of tests, all of which assist it to determine whether, in all the circumstances of the case, the interests of justice require an extension of time. Section 219 is not limited to any particular time limits: nor is that contained in s.114(6) excluded. Most, if not all, statutory limitation periods allow for their extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed …*

[20] Mr Mitchell subsequently submitted that s.219 should be called upon to allow Mr Collins to bring the grievance he had previously raised with IHC to the Authority. I treated this submission as a de facto application involving IHC (utilising s.221(b), as the submission was not a formal application involving a Statement of Problem against the IHC). IHC was therefore served with all the papers relating to this matter. It provided a response on why it considered no extension should be granted, along the lines previously highlighted by its subsidiary Idea Services Limited.

[21] In *Stevenson v. Hato Paora College Trust Board* [2002] 2 ERNZ 103, the Court held, in relation to the 28 day timeframe for a challenge to an Employment Relations Authority determination, that the major factors over extensions of time were:

(a) The reason for the omission to bring a case within time;

(b) The length of delay;

(c) Any prejudice or hardship to any other person;

(d) The effect on the rights and liabilities of the parties;

(e) Subsequent events;

(f) The merits.

[22] I accept that these factors are appropriate for consideration under s.219 in a case like this (*Roberts* applied). The overriding principle is to determine the issue in the overall interests of justice.

[23] The reason for the omission to bring the case within time has been highlighted above. Mr Collins, at that point acting on his own behalf, wrongly identified his former employer. That is not the responsibility of IHC. Under s.114, the time for pursuing IHC in the Authority ended on 19 January 2008. The application for an extension of time (which may only be brought by a *person interested* and therefore, by implication, not by the Authority on its own motion) was only made following the intervention of the Authority on 28 July 2008, over six months beyond the three year time limit provided for. This is a substantial delay. The delay must be seen in the statutory context of personal grievances. Clearly time limits are set so employers in positions such as the IHC do not have to consider grievances which are not raised within 90 days or pursued within three years thereafter. These time limits are normally to be adhered to - see for example *Wilkinson Field Ltd v. Fortune* [1998] 2 ERNZ 70 (CA). No explanation has been provided for Mr Collins' delay until the very end of the three year period before putting the matter before the Authority. He must take responsibility for the consequential risk (which did in fact eventuate) that there was a flaw in his application that, for whatever reason, was not remedied in time.

[24] The IHC would be no more prejudiced than Idea Services Limited in defending this matter. However, Idea Services Limited has throughout the course of these proceedings protested about the prejudice to it caused by the delay by Mr Collins of almost three years in bringing his personal grievance to the Authority. In particular, it was unable to locate a number of witnesses who may have assisted it in defending Mr Collins' claims. Mr Collins has made wide ranging claims about his treatment involving many co-employees and supervisors. I therefore conclude that IHC would be prejudiced by the granting of an extension of time.

[25] Clearly Mr Collins, by contrast, would suffer greatly if he is unable to pursue his grievance claim. As Mr Mitchell rightly submits he would be unable to have his day in Court.

[26] The important subsequent event involves the intervention of the Authority's support staff in changing the employer's name, albeit with the concurrence of Idea Services Limited

and Mr Collins. I can only speculate what Mr Collins may have done had the Authority returned his application as suggested earlier, although it is possible that he still would have been out of time to file against IHC, given the Christmas period and his previous mistake in pursuing *Idea Services (formerly IHC)*. I conclude that Mr Collins would be seriously affected by the failure to grant an extension of time.

[27] It is impossible to determine the merits of the claim in any meaningful way in the absence of a full investigation, although it can be said that claims for constructive dismissal are more difficult to uphold than those for unjustifiable dismissal, because in claims for unjustified constructive dismissal the employer usually denies that it ever dismissed the employee. Here the IHC does deny that it dismissed Mr Collins, who must therefore satisfy the Authority that there has been a serious breach or breaches of duty causing Mr Collins' resignation and this is what led him to resign. These claims are strongly disputed by IHC.

[28] Furthermore, unlike people who have been actually dismissed, Mr Collins does not have any such stain on his record or character. He resigned of his own volition as far as the record is concerned. Although this latter point is a minor factor, on balance I conclude that the merits slightly favour IHC.

[29] In terms of the overall interests of justice, the key issues are that Mr Collins would lose his day in Court and that his mis-description of his employer have been complicated by the intervention of the Authority staff and the acquiescence by Idea Services Limited (but not IHC, which is a separate legal entity, despite one owning the other).

[30] On the other hand, three years is a long period within which to pursue a claim and IHC was entitled, at the end of those three years, to believe that the claim was not being pursued against it. There was no explanation for the almost three year delay after mediation before any application was made to the Authority, the application was not made against the proper employer until around six months beyond the three years, IHC would be prejudiced were the matter to go to an investigation, and Mr Collins' prospects of having his resignation found to actually be a dismissal are less than 50% because of the tests to be met.

[31] On balance, therefore, I conclude that the delays and prejudice outweigh the impact on Mr Collins, given that the delays were in great part of his own making (*Tu'itupou v. Guardian Healthcare Operations Ltd* unreported, Perkins J, AC50/06, 6 September 2006 applied).

[32] I therefore conclude that no extension of time should be granted under s.219. I dismiss Mr Collins' claim against Idea Services Limited and his application to pursue a claim against IHC accordingly.

Costs

[33] Costs are reserved.

G J Wood
Member of the Employment Relations Authority