IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 66
5458459

	BETWEEN	MALCOLM CRAIGIE Applicant
	AND	KIWIRAIL LIMITED t/a TRANZ METRO WELLINGTON Respondent

Member of Authority:	M B Loftus
Representatives:	Malcolm Craigie, on own behalf Peter Chemis, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	21 July 2014 and 16 February 2015 with further information on 6 May 2015 from Applicant 11 August 2014 and 20 February 2015 from Respondent
Determination:	15 July 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Malcolm Craigie, claims he was both unjustifiably disadvantaged and constructively dismissed by the respondent, Kiwirail Limited. He filed a statement of problem in the Authority on 28 April 2014.

[2] The events about which Mr Craigie complains occurred between September 2002 and early 2007 which necessitated an application the three year limit imposed upon the bringing of a claim[1] be extended.[2] The extent of the inquiry has since been extended with a recent submission I also consider s.221(c) when determining this application (see [9] below).

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[1] Section 114(6) of the Employment Relations Act 2000 (the Act)
[2] Section 219(1) of the Act

[3] Kiwirail opposes the application Mr Craigie be allowed to pursue his grievance and the parties agreed it be determined on the papers.

Citation of the respondent

[4] The grievance, as initially filed, cites the respondent as Tranz Metro Wellington. That is a trading name and the citation has been changed with the agreement of the parties.

Background

[5] Over a period between mid 2002 and mid 2003 Mr Craigie was disciplined for various safety related transgressions. These resulted in his being demoted and removed from footplate (locomotive driving) duties.

[6] He challenged the demotion and raised a personal grievance. Whether that occurred within 90 days as required by the Act is unclear though Mr Craigie says it was and Kiwirail does not deny that is correct. In any event it is probably irrelevant as the parties addressed the claim to the extent mediation occurred but did not resolve the issues. At this time Mr Cragie was assisted by his union.

[7] In early 2007, and following what appears to have been considerable interaction between Mr Craigie and his union he was advised the union had decided not to pursue the matter following receipt of legal advice from one of its solicitors. Mr Craigie says he ceased interacting with the union at this time and briefly sought advice from a legal practitioner.

[8] It would appear it was around this time, perhaps a little earlier, Mr Craigie resigned though no date has been identified. He also decided to study 'law' in order he be better informed about his rights. About this he says *It is an utter obscenity that anybody should have to study at university for several years just to learn what their rights should have been to bring a personal grievance…*

[9] Here it is worth noting Mr Craigie's legal studies were compromised as he enrolled in what he said was the *wrong degree* though he asserts he still managed to learn a lot about personal grievances studying Commercial Law and it appears he is now studying toward an LLB. His learnings led to the recent addition of s.221(c) as a ground for allowing the substantive application to proceed.

[10] Attached to Mr Craigie's statement of problem (28 April 2014) was a document entitled 'To Whom It May Concern'. It contained the s.219 application, gave some background information and explained why, in Mr Craigie's view, the delay occurred and he should be allowed to pursue his grievance. Those reasons include:

a. A tardy response by both his Union and its lawyers with each said to be blaming the other for not progressing the claim after the unsuccessful mediation;

b. The decision to study so as to be better informed about his rights;

c. The time taken to consult with another legal practice;

d. Others have been similarly ill-treated; and

e. Exceptional circumstances exist. Here Mr Craigie refers to s.115(b) of the Act which implies he is asserting he made arrangements for his agents to raise his grievance but they unreasonably failed to do so.

[11] As already said Kiwirail opposes the claim and gives brief reasons as to why the s.219 application should not be granted.

Determination

[12] I will approach this as initially raised by Mr Craigie – as a s.219(1) claim. I do this as I consider s.221 inappropriate. It is an established principle that where a specific statutory provision applies it be used in preference to a general one. Section 221(c) is a general provision which may be applied to *anything*. Section 219(1) is more specific in that it addresses things not done within the time required by the Act. The time frame Mr Craigie is seeking to have extended is one required by the Act.

[13] In any event a s.221 application would fail. Section 221 is applied in order to more effectively dispose of something according to its substantial merits. This matter has not yet progressed to a consideration of the substantial merits and there is no evidence which might shed any light on the merits of Mr Craigie's claim. I am still dealing with an interlocutory question which is addressed by a subject specific provision – s.219.

[14] The issue is not, therefore, that Mr Craigie's claim is out of time (it is) but whether or not the time period should be extended to allow it to proceed. That I can do so in situations such as this was confirmed by Court in *Roberts v Commissioner of Police.*[3]

[15] In determining the issue I am required to consider:

a. The reasons for the delay;

b. The length of the delay;

c. Any prejudice and hardship to any other person;

d. The effects on the rights and liabilities of the parties;

e. Subsequent events;

f. The merits of the case.[4]

[16] Not one of the reasons Mr Craigie cites for the delay convinces me an extension is warranted.

[17] There is no evidence the union was tardy. According to Mr Craigie it raised his initial disadvantage grievance in a timely way and there is no evidence it was ever advised of the alleged constructive dismissal. It can not act on something it has not been appraised of. With respect to the decision not to advance Mr Craigie's disadvantage claim in the Authority the evidence, again offered by Mr Craigie, is it did so upon legal advice. There is no evidence to suggest that advice was flawed or the decision unreasonable and absolutely nothing to support Mr Craigie's allegation the union and its lawyers were blaming each other for failing to act.

[18] The decision to study is, in my view, irrelevant. There is absolutely nothing which suggests one must study for a law degree in order to source information about ones rights. Most people go to a legal advisor as Mr Craigie originally did.

[19] The consultation with a second advisor appears to have occurred in early 2007 and there is no indication as to why a further seven year passed before Mr Craigie eventually acted.

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[3] Unreported, Colgan CJ, 27 June 2006, AC 33/06
[4] *Orakei Korako Geyserland Resort (2000) Ltd v Unsworth* [2009] ERNZ 403

[20] Similarly ill-treatment of others may be a consideration in the determination of Mr Craigie's substantive claims but there is absolutely no information as to how or why it influenced the delay in filing.

[21] There is then the claim of exceptional circumstances due to Mr Craigie's various advisors unreasonably failing to advance his claims. Again there is no evidence offered supporting the claim but, in any event, I note it would fail for other reasons. Section 115 cites issues to be considered when determining an application under s.114(3). That is an application a grievance can be raised beyond 90 days of the cause of action. As already said the first grievance was raised in accordance with this requirement and no evidence Mr Craigie's advisors were advised of the constructive claim. In other words there is no evidence Mr Craigie made reasonable arrangements to have the second grievance raised let alone a subsequent failure by a recalcitrant advisor.

[22] There is then the length of the delay. Indeed it is so long the claim would also be barred by the Limitation Act 2010. So much time has passed the parties must be disadvantaged if only because of fading memories and the availability of relevant witnesses. Even Mr Craigie comments on this issue and the resulting problems.

[23] Finally I note Mr Craigie's actions in recent times. It still appears he is in no hurry to advance this matter and here I note it took him over six months to file his response to Kiwirail's submissions.

[24] Having weighed the evidence and considered the tests I conclude there is absolutely no reason to exercise a discretion under s219 and allow Mr Craigie to proceed with his substantive claim. I decline to do so.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority