

Under the Employment Contracts Act 1991

**BEFORE THE EMPLOYMENT TRIBUNAL
AUCKLAND REGISTRY**

BETWEEN Patricia Duigan

AND The British High Commission

REPRESENTATIVES Patricia Duigan in person
Andrew Scott-Howman, counsel for the British
High Commission

MEMBER OF TRIBUNAL R A Monaghan

DATE OF DETERMINATION 13 March 2007

**DETERMINATION OF THE TRIBUNAL ON
PRELIMINARY MATTER**

[1] In June 1997 Ms Duigan's former employer, the British High Commission,¹ notified her that her employment would end on 30 November 1997, being the date of the expiry of her fixed term employment contract. The employment relationship ended accordingly. Ms Duigan submitted a personal grievance to her employer by letter dated 3 December 1997. She said she had been made redundant and sought redundancy compensation under a document entitled 'Conditions of Service for Locally Engaged Staff in New Zealand', saying too that her redundancy amounted to an unjustified dismissal. The High Commission relied on the expiry of what it said was a genuine fixed term agreement, said Ms Duigan had no legitimate expectation of ongoing employment, and denied there was a redundancy.

[2] The matter went no further until, on 13 October 2006, Ms Duigan filed a statement of problem in the Employment Relations Authority seeking redundancy compensation and compensation for her unjustified dismissal. The Authority drew to her attention the provisions of the Limitation Act 1950, and Ms Duigan indicated that she wished to proceed. The High Commission says the matter should be struck out because of Ms Duigan's failure to file proceedings within the six year time limit in the Act.

[3] This determination addresses whether the Limitation Act provides a bar to Ms Duigan's pursuit of her grievance.

The transitional provisions in the Employment Relations Act

[4] There is another preliminary matter. Ms Duigan's causes of action arose on the date of termination of her employment in 1997. The Employment Contracts Act 1991 was in force at the time, but was repealed and replaced with the Employment Relations Act 2000 which came into force on 2 October 2000. As at that date, no proceedings had been initiated in respect of Ms Duigan's grievance or claim for compensation.

[5] Section 248 of the Employment Relations Act provides:

¹ At the relevant time Ms Duigan was employed by the former British Consul-General in the office of the Consulate-General in Auckland. Counsel advised that, because of changes made in 2005, the British High Commissioner has assumed the responsibilities of the former Consul-General. For convenience, I refer to the employer as the British High Commission.

"(1) Subject to the applicable period of limitation, the repeal by this Act of any existing Act or provision does not extinguish any existing cause of action.

(2) Where any cause of action has arisen before [2 October 2000] under any of the provisions repealed by this Act and at that date no proceedings have been initiated in respect of that cause of action under those provisions, those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if this Act had not been passed.

(3) Subsection (2) is subject to sections 249 to 252 and subsection (4) of this section.

(4) ..."

[6] In the present context, subsection (1) means the repeal of the Employment Contracts Act did not extinguish Ms Duigan's right to pursue her personal grievance and claim for redundancy compensation, but relevant provisions in the Limitation Act still apply.

[7] Subsection (2) means the provisions of the repealed Employment Contracts Act apply to Ms Duigan's grievance and claim for compensation. That means, in turn, that the Employment Tribunal should be addressing Ms Duigan's claims, not the Employment Relations Authority.

[8] With reference to subsection (3) so far as it is relevant, s 252 of the Employment Relations Act permits the Chief of the Employment Relations Authority to appoint a member of the Authority to exercise the jurisdiction of the Tribunal. He has done so here. I proceed accordingly.

The Limitation Act

[9] Section 4 (1) of the Limitation Act provides:

"Except as otherwise provided in this Act ... the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say, -

(a) actions founded on simple contract or on tort:

(b) ..

(c) ..

(d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture."

[10] This section is subject to Part 2 of the Act, including s 24 which provides:

"If, on the date when any right of action accrued for which a period of limitation is prescribed by ... this Act the person to whom it accrued was under a disability, -

(a) .

(b) ... the action may be brought before the expiration of 6 years from the date when the person ceased to be under a disability ...

notwithstanding that, in any case to which either of the foregoing paragraphs of this section applies, the period of limitation has expired:

[11] Ms Duigan has initiated proceedings just short of 9 years after her causes of action accrued. I asked a support officer to seek from her an indication of why she had not pursued her claims any earlier.

[12] Ms Duigan responded by saying that, following attempts to resolve the matter before the termination of employment took effect, she was too distressed to take the claim any further and did not have sufficient funds to pay her solicitors to continue to act. She experienced financial difficulty and eventually sold her home. She said that, after repaying debt, she used the remaining proceeds of the sale for rent and living expenses while she undertook study for a nursing degree. She obtained work in the medical field, where she has been employed for at least 4 1/2 years. In 2002 and again in 2004 she obtained what I assume were the blank statement of problem forms which the Authority makes available, but she did not file any application because she felt that a meeting with staff from the consulate and the Authority would cause her to become distressed and emotional.

[13] Despite having filed her statement of problem outside the time limit in s 4 of the Limitation Act, it was open to Ms Duigan to proceed if her circumstances fell within s 24 of the

Act. As Ms Duigan is unrepresented I convened a conference call to explain what kind of evidence would be necessary to establish this. In response Ms Duigan indicated she may seek legal advice. She was given time to seek such advice and to obtain assistance regarding her evidence.

[14] No evidence has been provided and Ms Duigan has indicated that no evidence of the kind discussed is available.

[15] I have therefore viewed Ms Duigan's account with reference to whether it indicated that she was under a disability, and if so, whether she had ceased to be under that disability within 6 years of the date when she filed her claims.

[16] The meaning of 'disability' for the purposes of the Limitation Act has been the subject of a number of decisions in the courts. Not only that, s 2(2) of the Act deems a person to be under a disability if the person is an infant or of unsound mind. The latter's unfortunate phraseology has been acknowledged, and it is probably better to consider whether the person concerned has, from established psychiatric or psychological causes, been unable to bring him or herself to initiate proceedings.² The question is one of capacity to sue, and an inability to face up to issuing proceedings does not suffice.³

[17] Here there is no evidence of any psychiatric or psychological cause leading to an inability to initiate proceedings. Ms Duigan's account is indicative of an inability to face up to issuing proceedings, but not of anything more. Even if I accepted the possibility that, for a period after her employment ended, Ms Duigan was under a disability in terms of the Act, there was nothing to indicate the disability continued until at least 13 October 2000 (being 6 years before the date of filing).

[18] Finally, Ms Duigan asked that the provisions of the Limitation Act be waived. The Employment Tribunal has no power to do that. I therefore find Ms Duigan's personal grievance and claim for redundancy compensation have been filed too late, and the provisions of the Limitation Act prevent both from proceeding.

R A Monaghan
Member of Employment Relations Authority

² See: **S v Attorney-General** [2003] 3 NZLR 450 [41].

³ See observations in **T v H** [1995] 3 NZLR 37, 49