

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 231
5624525

BETWEEN BERNARD JOHN HOFFMAN
Applicant

A N D ARCHIBALD & SHORTER
ROVERLAND LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
S Grice, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 31 May, 15 and 16 June 2016 from Applicant
28 June 2016 from Respondent

Date of Determination: 7 July 2016

DETERMINATION OF THE AUTHORITY

- A. The application to extend time for the commencement of proceedings before the Authority is/is not granted.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Bernard John Hoffman was employed by Archibald & Shorter Roverland Limited until he was suspended then dismissed on 30 November 2012. He alleges he was unjustifiably disadvantaged and dismissed.

[2] There is a preliminary issue about the commencement of these proceedings within the statutory time limitations set out in s114(6) of the Employment Relations

Act 2000 (the Act). If the proceedings were not commenced within the time limitation and time is not extended, the application shall be dismissed.

Was this proceeding commenced in the Authority within the statutory time limitation?

[3] Mr Hoffman submits he commenced his proceeding within time because he paid his filing fee in June 2013. He accepts he did not file a statement of problem until May 2016.

[4] Section 114(6) of the Act forbids the commencement in the Authority of any personal grievance action more than three years after the date on which the personal grievance was raised. Therefore a personal grievance action must be commenced in the Authority within three years after the personal grievance was raised.

[5] It is accepted that a personal grievance was raised on 27 February 2013. The deadline for commencing an action in the Authority would have been 27 February 2016.

[6] A person commences proceedings in the Authority “by lodging with an officer of the Authority two copies of an application that complies with these regulations.” The application must be in Form 1.¹ Form 1 is an application to the Authority known as a statement of problem.²

[7] It is accepted Mr Hoffman did not file the form 1 application until 6 May 2016. Therefore he did not commence his proceedings within three years as set out in s.114(6) of the Act.

Should I exercise my discretion under s.219(1) of the Act to extend the time for filing?

[8] Section 219(1) of the Act allows the Authority to exercise its discretion to “make an order extending the time within which the thing may be done”. Mr Hoffman seeks the exercise of my discretion to allow him to commence proceedings in the Authority if he falls outside of the statutory time limitation.

¹ Regulation 5(2) and (3) of the Employment Relations Authority Regulations 2000 (Regs).
² Schedule 1, Form 1 of the Regs.

[9] The exercise of my discretion under s.219 may take consideration of the following factors:³

- (a) The reason for the omission to file the statement of problem within time and the reasons for delay;
- (b) The length of the delay;
- (c) Any prejudicial hardship to any other person;
- (d) The effect on the rights and liabilities of the parties;
- (e) Subsequent events;
- (f) Merits.

[10] The overriding consideration is the justice of the case. The burden of persuading the Authority to exercise its discretion rests upon Mr Hoffman.⁴

The reason for the omission to file the statement of problem within time and the reasons for delay

[11] Mr Hoffman states that at no point was he advised of the three year cut off by his legal advisers. He also refers to the impact of the respondent's actions upon him, incapacitation due to a sibling and friend's illness and subsequent death. He also raises issues of study load, a two week visit by a family member and having to care for three young sons and a wife.

[12] There is little evidence supporting his submission about inadequate legal advice. No copies of the legal advice received have been filed.

[13] There is no medical evidence of any physical or mental incapacity for the applicant that lasted three years.

[14] The lack of finances and a busy household cannot be an adequate reason to exercise my discretion. Nearly all applicants whether self-represented or represented by lawyers have financial constraints and numerous personal and professional

³ *Orakei Korako Geyserland Resort (2000) Ltd v Unsworth*, AKAC 50/09 17 December 2009 at [9]; *An Employee v An Employer* [2007] ERNZ 295 at [9]; *Clear v Waikato District Health Board* [2007] ERNZ 338 at [6]; *Ball v Heathcare of NZ Ltd* [2012] NZEmpC 91 at [21].

⁴ *Ibid* at [10]

commitments. The Authority does not require applicants to be represented. Mr Hoffman was capable of completing and filing his own application because he did so in May 2016.

[15] Mr Hoffman must have been under the impression he needed to do something because he allegedly paid the Authority filing fee in 2013. There is a copy of a receipt from the Authority for payment of the fee. He submitted that this led him to believe he had met any timeframes for filing. This appears to be the most likely reason for delay.

[16] It is not particularly persuasive. He had access to presumably competent legal advice during the disciplinary process. There are free legal advice resources such as community law centres. Ignorance of the law in these circumstances cannot justify exercising my discretion.

Length of Delay

[17] The delay in commencing the proceeding was a period of 69 days or just over two months. The delay is not substantial.

Prejudicial hardship/effect upon rights and liabilities/subsequent events

[18] The respondent alleges it is prejudiced because of changes in personnel. The decision maker, Darryl Ward, is currently engaged as an independent contractor. His contract for services is due to terminate at the end of this month (July 2016). The respondent has some information about the process involving Mr Hoffman, however, it is not certain whether it has retained the complete file. At the time Mr Hoffman's claim was served on the Respondent, the Respondent contacted the HR consultant it engaged at the time, requesting a copy of her file, but the consultant did not respond to that request.

[19] The above indicates some hardship to the respondent in terms of its evidence which does not favour exercising my discretion.

[20] If I do not exercise my discretion under s.219 of the Act, Mr Hoffman's application will be at an end.

[21] There are no relevant subsequent events.

Merits

[22] It is difficult to assess the merits of the case at this preliminary stage. There was a contractual right to suspend while a company is investigating suspected misconduct.⁵ The right to suspend and dismiss appears based upon an altercation between the applicant and his then manager and performance concerns generally.

[23] Given it is accepted the suspension and dismissal took place, the onus is upon the employer to justify the actions. There is nothing to suggest the applicant's case is completely without merit. This favours the exercise of my discretion.

Overall justice

[24] The overall justice of the case favours granting the extension of time by the slimmest of margins.

[25] The application to extend time for the commencement of proceedings before the Authority is granted. Costs are reserved.

[26] Given this matter has not been to mediation, a direction to mediation is made.

T G Tetitaha
Member of the Employment Relations Authority

⁵ Clause 22 Employment Agreement dated 24 February 2012.