

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2015] NZERA Auckland 205  
5618256**

BETWEEN JJ NEW ZEALAND LIMITED  
Applicant

AND A LABOUR INSPECTOR  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Lancelot Jordan, Representative for the Applicant  
Marija Ulrich, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 30 May 2016 from Applicant  
16 June 2016 from Respondent

Determination: 22 June 2016

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1] The Applicant, JJ New Zealand Limited (JJNZL), filed an objection to an Improvement Notice served upon it by a Labour Inspector and seeks an order that it should be withdrawn on the basis that an improvement has been completed.

[2] The Labour Inspector denies that JJNZL has effected an improvement and seeks a compliance order enforcing the Improvement Notice.

[3] The Labour Inspector claims that JJNZL failed to lodge an objection to the Improvement Notice with the Employment Relations Authority (the Authority) within 28 days of the Labour Inspector issuing the Improvement Notice, and did not seek leave to bring the objection out of time, or provide an explanation as to why it was filed out of time.

[4] The Labour Inspector further claims that the Authority does not have the jurisdiction to address an objection notice that has been filed out of time.

[5] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statement of Problem and in Reply and on submissions from the parties.

### **Issue**

[6] This determination addresses as a preliminary issue whether or not the Authority has the jurisdiction to address an objection notice filed outside of the statutory time limit.

### **Brief Background Facts**

[7] JJNZL operates a blueberry business trading under the name AJ Blueberries. It is owned and operated by Mr Lancelot Jordan, director and joint shareholder, and employs casual employees to pick and pack blueberries during the harvest season.

[8] Following a complaint from two casual former employees in November 2015, a Labour Inspector investigated and subsequently wrote to JJNZL attaching the investigation report and the conclusions which identified wage arrears owing and issues of non-compliance.

[9] On or about 13 January 2016 JJNZL paid the wage arrears.

[10] On 16 February 2016 the Improvement Notice was couriered to the JJNZL’s registered address. The timeframe for JJNZL to respond was 21 March 2016.

[11] On 25 February 2016 JJNZL wrote to the Labour Inspector attaching a template employment agreement and a sample pay slip. The Labour Inspector emailed JJNZL acknowledging the employment information received and advising that the Labour Inspectorate would assess whether or not the Improvement Notice had been complied with on 21 March 2016.

[12] On 2 March 2016 JJNZL emailed the Labour Inspector advising that it was not sure what else was required in order to comply with the Improvement Notice and was advised by the Labour Inspector to seek professional guidance and assistance.

[13] On 16 March 2016 JJNZL emailed the Labour Inspector attaching further records.

[14] On 28 March 2016 JJNZL filed a Statement of Problem with the Authority seeking an acknowledgement that the Improvement Notice had been completed. The Labour Inspectorate was advised by the Authority that the Statement of Problem had been received raising an Objection to the Improvement Notice, and filed a Statement in Reply on 11 April 2016.

[15] In the Statement in Reply the Labour Inspector claimed that JJNZL had failed, and was continuing to fail, to comply with minimum employment standards. It was also claimed that JJNZL had failed to lodge the Objection within 28 days of the Labour Inspector issuing the Improvement Notice, and was therefore time barred from bringing the application without leave of the Authority.

### **Determination**

[16] Section 223D(1) of the Employment Relations Act (the Act) concerns Improvement Notices and states:

*A Labour Inspector who believes on reasonable grounds that an employer is failing, or had failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.*

[17] Pursuant to s. 223D (6) of the Act an improvement notice may be enforced by the Authority making a compliance order under section 137 of the Act.

[18] Pursuant to s. 223E (1) of the Act: *“An employer may, within 28 days after the improvement notice is issued with the employer, lodge with the Authority an objection to the notice.”*

[19] JJNZL did not file an objection to the Improvement Notice until a Statement of Problem was filed with the Authority on 28 March 2016, which was 13 days after the 28 day time limit. I note that JJNZL filed a Statement of Problem on 21 March 2016 which was not accepted by the Authority until certain amendments had been made, but even had it been accepted, the objection would still have been raised outside of the statutory time limit pursuant to s.223E(1) of the Act.

[20] There is a provision in the Act<sup>1</sup> for an application for leave to raise a personal grievance made outside the 90 day statutory time period for so doing. Pursuant to s.114(4) of the Act, the Authority may grant leave if the Authority:

*(a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances ... and*

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<sup>1</sup> S.114(3) of the Act

(b) *considers it is just to do so.*

[21] There is no corresponding provision in s.223 of the Act. Therefore it is necessary for me to consider whether or not other provisions of the Act confer a discretion on the Authority to override the specific time limit in s.223E and grant leave for an objection to an improvement notice to be filed outside of the statutory 28 day time limit.

[22] Section 219(1) of the Act states:

***219 Validation of informal proceedings, etc***

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

[23] The Respondent submits that in the case of *Otago and Southland Federated Furniture IUOW v Timbercraft Industries Ltd*<sup>2</sup> Judge Palmer held that the Court's general discretion under section 315 of the Labour Relations Act, a mirror provision to s 219 of the Act, cannot be relied upon to override a specific timeframe.

[24] Accordingly it is submitted that the case provides guidance for the Authority in that the s233E 28 day timeframe within which a notice of objection can be filed cannot be overridden by the s.219 general discretion.

[25] In *Otago and Southland Federated Furniture IUOW v Timbercraft Industries Ltd*<sup>3</sup>, Judge Palmer held that: "*The Court's broad discretionary power, pursuant to section 315(1) of the Act, to extend the time within which anything "is required or authorised to be done by this Act" plainly, I consider, cannot be invoked to effectively override the proviso to section 302(1) of the Labour Relations Act.*" Judge Palmer cited support for that view from the earlier case of *Winstones Trading v NID Distribution Workers IUOW*<sup>4</sup>.

[26] I observe that both of those cases were concerned with an application for leave for a rehearing of a matter which had been the subject of a judgment of the Employment Court.

[27] The matter before me is regarding whether or not the Authority has the jurisdiction to grant leave for JJNZL to raise an objection notice filed outside of the statutory time frame,

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<sup>2</sup> [1989] 1 NZILR 528

<sup>3</sup> [1989] 1 NZILR 528

<sup>4</sup> [1988] NZILR 1042

and is not an application for a rehearing of a matter which has been the subject of a judgment of the Employment Court, nor of a determination by the Authority.

[28] I am therefore not persuaded that s. 219 of the Act prevents the Authority exercising its discretion so as to permit an extension of the time for filing an objection to an improvement notice.

[29] I find support for that view in the *obiter* comments made by the Employment Court in *Roberts v Commissioner of Police*<sup>5</sup> that ss.219 was not limited to particular time limits and that the provision under consideration (s.114(3) of the Act) was not excluded from s.219. Judge Travis commented that:<sup>6</sup> “*equally, s. 219 allows extensions where parties are out of time*”.

[30] I have also considered the effect of the wording of ss. 114(1) and 223E of the Act. Section 114(1) states that every employee who wishes to raise a personal grievance: “*must*” raise it with the employer within the period of 90 days, whereas s.223E states that the employer: “*may*” lodge an objection with the Authority within 28 days. The one is mandatory, the other permissive. I have also taken this statutory wording into consideration in reaching my determination.

[31] I determine that s.219 of the Act does allow the Authority to exercise its discretion to make an order extending the time within which an objection to an improvement notice may be lodged with the Authority.

[32] Section 221 of the Act also refers to extensions of time limits and states:

***s. 221 Joinder, waiver and extension of time***

*In order to enable ... the Authority ... to more effectively dispose of any matter before it according to the substantial merits and equities of the 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, -*

...

*(c ) subject to section 114(4), extend the time within which anything is to or may be done ...*

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<sup>5</sup> [2005] ERNZ 755

<sup>6</sup> Ibid at page 758

[33] The Respondent submits in reliance upon *Rooney Earthmoving Ltd v McTague*<sup>7</sup> that s. 221 of the Act is not applicable to this case because it is not currently a proceeding before the Authority either because the Authority is not able to override the specific timeframe or leave has not been granted to extend that timeframe.

[34] I observe that s.219 of the Act refers to ‘*informal proceedings*’. I consider that the deliberate inclusion of the work ‘informal’ encompasses a matter which is before the Authority by virtue of the filing of Statement of Problem outlining the issue the Applicant wishes the Authority to address. On that basis I consider that the issue currently before the Authority for determination is part of a proceeding and therefore s. 221 of the Act may be applicable

[35] However, having determined the matter pursuant to s. 219 so as to allow the Authority to exercise its discretion, it is not necessary for me to consider s.221 of the Act.

[36] I observe that the Authority is to exercise discretion conferred upon it a principled manner. In so doing, due note has been made of the Respondent’s submission that maintenance of the specific timeframe brings certainty to the Labour Inspector as regulator and certainty to the employer as to the boundaries within which any concerns can be raised.

### **Next Steps**

[37] In order for the Authority to exercise its discretion I require JJNZL to file an application for leave to file outside the statutory time frame and supporting evidence by 4.00 p.m. on 30 June 2016.

[38] The parties are to file submissions on the leave application by 6 July 2016.

[39] I also note that JJNZL has taken some steps towards compliance and appears to be having difficulty understanding what is now required to fully achieve compliance.

[40] The parties have not attended mediation. I consider that mediation might be valuable bearing in mind that a function of a Labour Inspector is to assist an employer “*to implement systems ad practices that comply with provisions of the Act*”<sup>8</sup>. Accordingly I direct the parties to attend mediation by the end of July 2016.

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<sup>7</sup> [2007] ERNZ 356

<sup>8</sup> S. 223A(d) of the Act

## **Costs**

[41] Costs are reserved for determination pending the further steps to be taken in the proceeding..

**Eleanor Robinson**  
**Member of the Employment Relations Authority**