IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 526
3233399

	BETWEEN	ROSHNI DEVI KRISHNA Applicant
	AND	VALLEY KING LIMITED Respondent
Member of Authority:	Sarah Blick	
Representatives:	Jerry Noble, counsel for the applicant Chris Eggleston, counsel for the Respondent	
Investigation Meeting:	On the papers	
Determination:	15 September 2023	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Roshni Devi Krishna says she was underpaid $164,706.00 in minimum wages while working for the respondent Valley King Limited (Valley King) in its shop, Village Food Mart in Papatoetoe. Her application in the Authority relates to work over a 14 year period between February 2007 to November 2021. It is common ground Valley King paid Ms Krishna $40,000 as a lump sum in August 2017. Ms Krishna says it was paid on the understanding she had worked very hard underpaid over the years and that it was also holiday pay.

[2] At some stage during the employment relationship, Ms Krishna and Valley King's director Prem Ram appear to have developed personal relationship, and Ms Krishna says she moved in with Mr Ram in August 2017, being the same month as the payment.

[3] In its statement in reply, Valley King denied Ms Krishna is entitled to any remedies, including by saying her claim for arrears relates to work performed more than six years prior to April 2022 (when the statement of problem was lodged) and is time barred by s 142 of the Employment Relations Act 2000 (the Act). Valley King says the payment of $40,000 made to Ms Krishna was part of her "remuneration package".

[4] Ms Krishna is also claiming penalties pursuant to the Minimum Wage Act 1983 (MWA) for failing to pay her the minimum wages.

The Authority's process

[5] The parties took considerable time before seeking to have this matter investigated by the Authority, apparently due to ongoing discussions between them which also concern civil proceedings between Ms Krishna and Mr Raju relating to personal relationship matters. In April 2023 the parties agreed two preliminary matters should be investigated and determined prior to a substantive investigation. The preliminary matters were whether Ms Krishna's application for recovery of wages and penalties were time barred by s 142 and s 135(5) of the Act, respectively.[1]

[6] Shortly prior to the investigation meeting set down for 7 June 2023, Ms Krishna lodged an application for removal to the Employment Court. Her application also sought, in the alternative, that the Authority "extend the time within which these proceedings …may have been brought for the whole claim for recoverable wages from February 2007 to 2021 to 13 April 2022… on the grounds it would be merited and equitable". Sections 219 and 221 of the Act were cited in support.

[7] Valley King opposes the application for removal of Ms Krishna's claim.

[8] By consent, the Authority determines the application for removal and alternative request for an extension of time on the papers. The parties' submissions have been considered along with the information outlined in the statements of problem and statements in reply.

[1] Ms Krishna has not to sought to recover arrears of holiday pay or penalties in relation to any holiday pay.

Legal framework for removal applications

[9] The Act sets out the grounds on which the Authority may order removal of a matter to the Court. The relevant provisions Ms Krishna relies upon are ss 178(2)(a) and (d). Section 178 relevantly provides:

> **178 Removal to court**
> (1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.
> (2) The Authority may order the removal of the matter, or any part of it, to the court if—
> (a) an important question of law is likely to arise in the matter other than incidentally; or
> …
> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[10] Relevant in this application is whether an important question of law is likely to arise. The s 178(2)(a) test is met if the issue arises other than incidentally so that the outcome turns on the answer.[2] In other words, a question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.[3] Questions of law do not need to be complex, tricky or novel to be important.[4]

[11] If a removal application satisfies one of the s178(2) grounds, the Authority must then exercise its residual discretion by considering whether there may be a good and sufficient reason not to remove a particular matter in spite of the establishment of one or more of the grounds in s 178(2).[5]

Ms Krishna's application for removal

[12] Ms Krishna's application for removal is brought on the grounds that:

(a) an important question of law arises around the relationship between provisions of the Limitation Act 2010 and the Act on the issue of when a cause of action arises where an employer has partially paid an employee for

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[2] *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].
[3] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.
[4] *Johnson v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].
[5] Employment Relations Act 2000, s 178(2)(d).

their work more than six years prior to the date of lodging a claim in the Authority (s 178(2)(a)); or

(b) in all the circumstances the Court should determine the matter (s 178(2)(d)).

[13] Central to Ms Krishna's application is her argument that the $40,000 payment was an acknowledgement by Valley King that it underpaid her wages between 2007 and 2016. She says any holiday pay amount accrued by August 2017 would have been significantly less than the lump sum payment, such that the balance more than likely related to previous wage underpayments.

[14] Counsel for Ms Krishna submits the Act is silent on when a cause of action arises, and that s 47 of the Limitation Act 2010 may apply to enable the Authority or Court to determine the cause of action arose at a later date.

[15] Section 47 of the Limitation Act 2010 relevantly states:[6]

> **47 Acknowledgment or part payment**
> (1) This section applies if the *claimant proves* that, after the start date of a claim's primary period, longstop period or Part 3 period, *the defendant*-
> …
> (b)*made a payment to the claimant in respect of a liability to*, or the right or title of, *the claimant*."
> (2) If this section applies, the claimant is *deemed* for the purposes only of this Act *to have a fresh claim on the day after the date*, or the latest of the dates, on which an acknowledgment or part payment was given or made.

[16] Ms Krishna notes the Limitation Act 2010 generally applies to civil money claims in courts and tribunals after 1 January 2011.[7] She says from that date to the end of employment she was paid around $109,000 less than the minimum wage. Only a small portion of that however relates to the period between 2016 and 2021.

[17] Section 142 of the Act is of importance, which provides:

> **Limitation period for actions other than personal grievances**
> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

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[6] Emphasis added.
[7] Ms Krishna had previously suggested provisions of the Limitation Act 1950 applied but now says due to a "fresh claim" arising in or around August 2017, provisions of the Limitation Act 2010 apply.

[18] The term "employment relationship problem" is defined in s 5 of the Act as:

> employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[19] Ms Krishna says the Limitation Act sets out the date upon which a claim arises/cause of action accrues, and it is not inconsistent with s 142 of the Act and they should be read together. Ms Krishna submits the payment was an acknowledgement of liability under the MWA and so the date the cause of action accrued was in August 2017. More accurately, she says s 47 would deem her to have a fresh claim on the day after the "part payment" was made. She says the Authority (or the Court) is therefore able to award to Ms Krishna the entire $164,706.00 sought.

Valley King's response to removal

[20] Valley King submits it is clear s 142 limits Ms Krishna's claim to the period after 13 April 2016, her statement of problem having been lodged on 13 April 2022. It says the interaction between the Limitation Acts (1950 and 2010) and the Act has been the subject of a number of Employment Court decisions. Counsel traversed relevant decisions which are discussed below.

[21] Valley King also says the issues for resolution in this matter are matters within the Authority's jurisdiction to determine as provided for in clause 2, Schedule 2 of the Act – which includes any question relating to the construction of an employment agreement and statutory provisions of the Act and any other Act. Valley King says the issues are not in any way unique or unusual, and something the Authority is well-equipped to deal with.

[22] Valley King observes that in the event either party disagrees with the Authority, they have the right to seek a challenge pursuant to s 179 of the Act.

Discussion

[23] Valley King refers to former Chief Judge Colgan's judgment in *Law v Board of Trustees of Woodford House*[8], which addressed whether the plaintiffs could recover minimum wages, the liability for which may have arisen more than six years before the plaintiffs' issued proceedings in the Authority. The Court found there was no need to

[8] *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25.

determine the point by reference to the Limitation Act 2010 (or to determine whether the Act or its predecessor the Limitation Act 1950 applies under the transitional provisions of the 2010 Act) because the position was dealt with specifically by s 142 of the Act.[9] The Court observed:

> [78] The plaintiffs' proceedings began in the Authority before their removal to this Court. The proceedings were and are "in relation to an employment relationship problem". … The proceedings issued are not personal grievances. The plaintiffs' causes of action arose on the dates on which they claim they should have been paid minimum wage rates for sleepovers…
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> [79] Section 11 of the MW Act provides that recovery actions may be brought by a worker or by a labour inspector for the use of the worker, by action commenced in the Employment Relations Authority in the same manner as an action under s 131 of the Employment Relations Act. Section 131 deals with remuneration arrears proceedings generally and is subject to s 142.

[24] The court concluded, applying s 142 of the Act, that the plaintiffs' claims could not relate to breaches of the MWA where the causes of action accrued before six years before the claims were brought to the Authority.

[25] Valley King also refers to *Pretorius v Marra Construction (2004) Ltd* in which Judge Corkill considered limitation issues, including the impact of s 40 of the Limitation Act 2010:[10]

> [36] Although the Employment Court is a "specified court" under the Limitation Act 2010, there are several limitation time limits and periods that apply to many claims which are within the jurisdiction of the Court, as prescribed by the Employment Relations Act. In those instances, s 40 of the Limitation Act 2010 applies; it provides that a defence under that Act does not apply to a claim where there is specific legislation prescribing a limitation period.
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> [37] For the purposes of the present case, the relevant provision is s 142…

[26] Recently in *Zara's Turkish Limited (In Liquidation) v Kocaturk* Judge Smith addressed a claim based on a reference to s 48 of the Limitation Act 2010.[11] The employee's argument rested on a claim that because of fraud by or on behalf of his employer, the six-year limitation period applied by the Authority did not apply to his situation (or more accurately the start of the limitation period was delayed, similar in kind to s 47). The Court found the Limitation Act 2010 and its predecessor were "irrelevant", and observed:

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[9] Above n 8, at [77].
[10] *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95.
[11] *Zara's Turkish Limited (In Liquidation) v Kocaturk* [2021] NZEmpC 117.

> [47]… Section 142 is an absolute bar to a proceeding that is stale, meaning where the cause or causes of action are more than six years old before the action commenced.
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> [48] Section 142 does not contemplate delaying the beginning of the limitation period. That was the conclusion in *Blue Water Hotel Ltd v VBS*. While that case dealt with the time limit for raising personal grievances in s 114(1) of the Act the full Court also commented that its analysis had implications for s 142. I consider *Blue Water* is applicable. The Authority was right to conclude that Mr Kocatürk's claims that were more than six years old as at the date when his proceeding was lodged were time-barred.

[27] Even prior to *Blue Water* and *Zara's Turkish Limited*, in also considering s 47 of the Limitation Act 2010, the Authority noted the cumulative effect of relevant Court decisions effectively meant s 142 covers the field in relation to the limitation question for employment relationship problems.[12]

[28] These Court decisions have established s 142 operates to prevent stale claims from being pursued – to a point where the suggested important issue of law regarding s 47 of the Limitation Act is unlikely to require further significant judicial comment. I am therefore not satisfied an important question of law is likely to arise sufficient to justify removal.

[29] Finally, I do not agree with the suggestion that there is an absence of guidance as to when a cause of action arises. The date a cause of action arises in relation wages or other money involves an assessment of the circumstances of a particular case. This would include a factual consideration of the parties' interactions and of any relevant terms and conditions of employment, in conjunction with applicable employment legislation as to when wages or other money became payable. Such legislation could foreseeably include provisions of the MWA, the Wages Protection Act 1983, the Holidays Act 2003, and potentially others.

[30] I am also not satisfied that the Authority should exercise its discretion to remove the matter on the basis of s 178(2)(d) of the Act. The issues raised by Ms Krishna are such that the Authority is not only able to investigate and determine them, but that it is Parliament's intention that it do so on the basis that the Authority's role is to establish the facts and make determinations according to its findings. This is a case in which factual

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[12] *Faga v New Zealand Aluminium Smelters Ltd* [2017] NZERA Christchurch 214, at [21].

findings will be intrinsic to the determination, including testing what may be disputed evidence as to hours of work and pay received and what the $40,000 payment related to.

[31] Given the historic nature of aspects of the claim and the impact this may have on the evidence, combined with the backdrop of Ms Krishna and Mr Raju's relationship matters, the Authority is reluctant to lightly dispense with Valley's King's entitlement to challenge in the Court.

[32] Having concluded that the grounds relied on in s 178(2) of the Act have not been met, I do not need to consider the discretion to consider any residual factors against removal.

Extension of time to bring claim

[33] In the alternative, Ms Krishna sought to make an application pursuant to s 219 or 221(c) of the Act to extend time to bring the whole claim for recoverable wages on the grounds it would "merited and equitable". Valley King did not separately address this request in its responses. However, the Authority deals with it briefly.

[34] Sections 219 and 221 were analysed in *Blue Water*, in which the Full Court stated:

> [96] The possibility of extension of time under ss 219(1) or 221 would defeat Parliament's intention with regard to the imposing of precise time limits, which it introduced in respect of personal grievances (three years) and all other actions (six years) in 2000. Were the general powers of extension to be available, there would be no time limits at all. Time limits are just that; if they are to be open to extension, express language is required.

[35] In *Blue Water*, the Court noted in each previous authorities referred to, that there was no single example where a time limitation provision had in fact been extended by the Court and its predecessors. In line with settled case law, I find the powers in s 219(1) or s 221 cannot be used to extend the time limitation in s 142 of the Act. That request is also declined.

Outcome

[36] In conclusion I am not satisfied that the grounds for removing the matter to the Employment Court pursuant to s 178(2) of the Act have been met. Ms Krishna's application for removal to the Court is declined.

[37] Ms Krishna's request for an extension of time pursuant to ss 219 and 221 of the Act is also declined.

Costs

[38] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority