

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 109
5445442

BETWEEN DAYA NAND
 Applicant

A N D IDEA SERVICES LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Greg Bennett, Advocate for Applicant
 Paul McBride, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 13 October 2017 from Applicant
 12 October and 18 October 2017 from Respondent

Date of Determination: 29 March 2018

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The completion of this determination on what is a preliminary issue has been unreasonably delayed by failures in my office. I can only apologise to the parties for that fact.

[2] While this matter has had a long history the delay in my addressing the submissions on this preliminary issue is quite unreasonable; the submissions were received in October of last year and the issue of a determination on the matter now some six months later is, I concede, most unsatisfactory and constitutes poor service to the parties.

[3] While the only question in the present case is whether and to what extent personal grievance proceedings have been raised by the applicant (Mr Nand) the factual background, as far as I can discern it from the submissions, can be briefly sketched.

[4] Mr Nand was employed by the respondent (Idea) as a community support worker (CSW) caring for intellectually disabled people. There is an allegation that Mr Nand had assaulted such a person on 4 June 2013.

[5] After an investigation, and the sharing of information between the parties, Idea determined that the complaint was made out, that it constituted serious misconduct and that dismissal was the appropriate remedy.

[6] Idea says it was always the position that the policies and procedures of Idea required reporting of any alleged assault to police and that happened in this case, as a matter of course.

[7] Post dismissal, Mr Nand is said to have approached Idea and suggested that he be allowed to resign his employment and on that footing all matters would be at an end. Idea apparently agreed.

[8] Then by letter dated 5 August 2013, Mr Nand sought to re-litigate the whole matter and contended *inter alia* that Idea had told him that unless he resigned his employment, the assault matter would be reported to police and that course of events constituted the elements of a constructive dismissal. Idea resisted Mr Nand's position in its letter of 22 August at 2013 and on 17 January 2014 the first statement of problem was lodged. Fully three years later in March 2017, an amended application was filed on behalf of Mr Nand seeking to add additional heads of claim to the original statement of problem

Issues

[9] It will be necessary for the Authority to determine whether either the original claim for unjustified constructive dismissal can proceed and/or whether the subsequent 2017 claim for a wider series of breaches can proceed or indeed whether neither claim ought to be allowed to be considered.

[10] Accordingly, I propose to address the following questions:

- (a) Is there a basis on which the original pleading can proceed?
- (b) Can the 2017 pleading proceed?

Can the original statement of problem proceed?

[11] Put shortly, there are no technical flaws to the initial statement of problem. In that regard, I mean that the 2014 statement of problem is based on the raising of the personal grievance by Mr Nand's letter of 5 August 2013 and that letter was furnished to Idea within 90 days of the events complained of.

[12] However Idea say that Mr Nand's letter fundamentally misstates the factual position especially in its central contention that Mr Nand was given the option of resigning from his employment by Idea or Idea would put the alleged assault in the hands of the police.

[13] It will be remembered that what Idea say happened is quite different. They say that Mr Nand was dismissed after a proper inquiry and that he subsequently suggested to Idea that that dismissal be re-labelled as a resignation and that in return of that concession, all matters would then be at an end. Idea say they agreed to that.

[14] If that is so, and I say if advisedly because I have yet to hear any evidence on the point, then there can be no proper basis on which Mr Nand can raise a personal grievance because he has given Idea to understand that in return for re-labelling his departure from Idea's service as a resignation, all matters to do with the termination of the employment will be at an end.

[15] I cannot decide that question without hearing evidence from the parties then involved and accordingly, I am obliged to conclude that the initial statement of problem might be able to proceed to investigation in the Authority if I am satisfied on evidence that there was no agreement between these parties which would preclude such a proceeding.

[16] Accordingly, I will ask my Authority officer to arrange a case management conference to set up the arrangements for an investigation meeting to deal exclusively with the factual matrix around the termination of Mr Nand's employment and the events after that up to and including the exchange of correspondence between the parties in August 2013.

Is the second statement of problem filed in March 2017 able to proceed?

[17] This matter is quite straightforward. There is no proper basis on which this second statement of problem can proceed. It is precluded by force of law from so proceeding. Section 114(6) of the Employment Relations Act 2000 is as Counsel for Idea correctly observes both “specific” and “mandatory”. Put simply, the relevant provision precludes any action being commenced in this Authority if more than three years have passed since the personal grievance was raised. That is the position in this case.

[18] There is no basis in law on which the Authority has any power to correct, remedy or otherwise adjust that statutory reality. By virtue of the fact that Mr Nand has purported to file an amended statement of problem more than three years after the last action on the matter, he is out of time and that is an end of it.

[19] It follows from the foregoing analysis that the second application made by Mr Nand in March of 2017 is struck out it being inconsistent with the statutory rule enacted in s 114(6) of the 2000 Act.

Determination

[20] The amended application to the Authority filed on 22 March 2017 by Mr Nand may not proceed because it was filed outside the three year limitation period set out in s 114(6) of the Employment Relations Act 2000.

[21] However, the position is otherwise with the original statement of problem filed in the Authority on 17 January 2014. That statement of problem referring as it does to the personal grievance claim raised in Mr Nand’s own letter of 5 August 2013 may be able to proceed to investigation in the Authority.

[22] However, before that step can be contemplated, it will be necessary for the Authority to consider whether Mr Nand is estopped from that proceeding by virtue of the possibility that he has compromised his rights by entering into an understanding with Idea the effect of which was that if he was allowed to resign his employment rather than have his termination recorded as a dismissal, then all matters would be at an end.

[23] My Authority officer will now arrange a telephone conference with the representatives to timetable the giving and taking of evidence on what I will refer to as the estoppel question.

Costs

[24] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority