

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 65/09
5150389

BETWEEN Philip Paul
Applicant

AND New Zealand Bus Limited
Respondent

Member of Authority: Denis Asher

Representatives: Bede Laracy for Mr Paul
Andrew Caisley for the Company

Investigation Meeting The Parties Agreed to an Investigation on the Papers

Submissions Received By 17 April 2009

Determination: 22 May 2009

DETERMINATION OF THE AUTHORITY: Strike Out Application

Employment Relationship Problem

[1] Mr Paul filed a grievance alleging that, after 25 years of employment he had been unjustifiably disadvantaged, discriminated against, that his termination because of redundancy was unjustified and that the Company did not act in good faith.

- [2] The Company agrees that Mr Paul raised a grievance on 28 November 2005 but says that, as he did not file a statement of problem in the Authority until 30 January 2009, it should now be struck out under s. 114 (6) of the Employment Relations Act 2000.
- [3] Following a telephone conference on 27 February 2009 the parties arrived at an agreed timetable for filing evidence and submissions by which the Authority would determine the strike out application on the papers.

Background

- [4] From the material provided to me I am satisfied that the following is agreed by the parties:
- [5] Mr Paul commenced employment with the respondent, then Wellington City Transport Limited (WCTL), in April 1980 and was made redundant on 21 October 2005. WCTL is now a wholly owned subsidiary of the respondent (which in turn is owned by Infratil) and now trades under the name 'Go Wellington': it runs a bus public transport system in Wellington.
- [6] Mr Paul raised a personal grievance by fax on 28 November 2005. At that time WCTL traded as 'Stagecoach Wellington'.
- [7] Mediation was undertaken unsuccessfully in June 2006.
- [8] Mr Paul's present representative telephoned and wrote to the Company on 24 July 2008: the respondent acknowledged the communications in its reply of 18 August. Despite further letters from the applicant no further response was made by the Company.
- [9] Mr Paul's present representative, Bede Laracy filed a statement of problem on his behalf with the Authority on 30 January 2009.

The Issue

- [10] I agree with the Company's position when it says, as it is common ground Mr Paul's statement of problem was filed outside of the 3-year time limit, the issues before the Authority are therefore:

- a. Does the Authority have the discretion to extend that time limit? And,
- b. If it does have the discretion, should the Authority exercise that discretion in these circumstances?

Parties' Positions

Applicant's Position

- [11] Mr Paul agrees he was paid redundancy by way of a contracted formula. However, he also filed a grievance in respect of that termination shortly afterward. Following mediation in 2006 his then-representative was unable to proceed with his case. Mr Paul says (but does not detail how) he attempted to keep his case moving forward throughout.
- [12] Following the filing of his grievance and unsuccessful mediation in June 2006 Mr Paul's file came before his present representative in July 2008. The applicant says Mr Laracy has been attempting from that time to establish dialogue with the Company but without success: Mr Paul says the Company refused to deal with his representative.
- [13] Mr Laracy says that, having spoken to the Company's human resources manager about Mr Paul's grievance, and at that person's invitation, he forwarded a letter to the respondent on Mr Paul's behalf seeking, amongst other things, further mediation (attachment 1 to the applicant's submissions of 8 April 2009).
- [14] As it makes clear, the purpose of the letter was – in light of the delay – to initiate dialogue.
- [15] In reply, and by letter dated, 18 August 2008 the Company promised to respond before the end of that month (attachment 2).
- [16] On 15 September, having received no further contact, Mr Laracy wrote again to the Company (attachment 3). A further letter followed dated 1 October (attachment 4). No reply was ever received from the Company to the subsequent letters or to telephone calls on Mr Paul's behalf.

- [17] Mr Laracy says the reason for the failure to commence the action in the Authority within 3-years is entirely his fault. As set out in his correspondence to the Company, and because of reliance on a mistaken operations manual, Mr Laracy was under the mistaken belief that the 3-years were “*only a guide*” (attachment 4): in response to explicit inquiries Mr Laracy advised his client accordingly.
- [18] To allow the strike out application will disallow Mr Paul’s pursuit of justice, and punish him, for mistakes that were not his own.
- [19] The Company has not acted in good faith regarding the grievance and the correspondence it received from Mr Laracy and is looking to take advantage of Mr Paul’s representative’s error.
- [20] Had the grievance been properly commenced in the Authority before November 2008 the Company would be faced with similar difficulties to what it faces now, after that date.
- [21] The applicant relies on the observation of Thomas J in his dissenting opinion in *Lowe Walker Paeroa Ltd v Bennett* [1998] 2 ERNZ 558, at p 582 in respect of a party taking advantage of a human error: “*In such circumstances, the Court has the power, if not the obligation, to seek to achieve justice between the parties according to the equity and merits of the case*”.
- [22] In the interest of equity Mr Paul asks the Authority to decline the strike out application and extend its discretion so that this matter might proceed before it.

Respondent’s Position

- [23] Amongst other things, the Company says Mr Paul’s position was disestablished in late 2005 in the context of a number of WCTL restructure. Prior to the restructure WCTL met with affected staff and their union: it also met with Mr Paul personally and his representative.
- [24] Mr Paul was not interested in alternatives to redundancy but pushed to access his redundancy money as quickly as possible.

[25] It was agreed his position would be disestablished with effect from 21 October 2005 and he received a final payment of almost \$80,000.

[26] Mr Paul raised a grievance for “*discrimination, unjustified disadvantage and unjustified dismissal*” by fax on 28 November 2005 (attachment to affidavit from Gavin Cook). The Company responded. Mediation was undertaken on 22 June 2006. Proceedings were then lodged in the Authority on 30 January 2009.

[27] Section 114 (6) of the Act provides:

No action may be commenced in the Authority ... in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[28] The applicant’s statement of problem is three years, two months and two days outside of the 3-year term provided for in s. 114 of the Act.

[29] The last day on which an action could be commenced in the Authority was on or about 28 November 2008. No such action had been commenced at that time.

[30] Section 114 (6) of the Act gives no discretion or power to waive the time limit set out therein.

[31] Section 219 (1) of the Act provides:

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 the application of any person interested, make an order extending the time within which the thing may be done... .

[32] No application has been made by or on behalf of Mr Paul for any order extending time: the claim must therefore be struck out under s. 114 (6).

[33] No justification has been offered by Mr Paul as to why the limit should be waived in his instance, nor has he explained his failure to pursue his grievance within the statutory 3-year period.

- [34] Mr Paul has not applied under ss. 114 (3) of the Act for leave to raise his grievance out of time, nor has he sought the application of s. 115 of the Act.
- [35] Mr Paul has not offered any reasonable explanation for his omission to bring his case within time per the guidelines set out in *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103.
- [36] There is no suggestion his failure to comply with the time limit was caused by any extraordinary supervening event which physically restrained him. There is no evidence of extraordinary circumstances which might justify a departure from the time limit set by Parliament in the Act.
- [37] Even if there were discretion the Company would now be seriously prejudiced in responding to the claim given the lapse of time: key witnesses have since died, moved overseas or otherwise left the respondent. The original management team is no longer available. Various allegations with the personal grievance claim pre-date by several years the actual redundancy itself: it is unlikely there is anyone still employed by the Company with first hand knowledge of these matters.
- [38] Mr Paul's claim is also intrinsically unmeritorious in light of the facts set out in pars 10-12 inclusive above.
- [39] This is a case in which the Authority ought not to exercise any discretion to extend the time limit on the basis that to do so would be against the overall interests of justice.

Discussion

- [40] Does the Authority have the discretion to extend the time limit? As is made clear, albeit by *obiter*, in *Roberts v Commissioner of Police*, unreported, 27 June 2006, Colgan C J, AC 33/06, and accepted by the parties in this application, s. 219 of the Act provides the Authority with the discretion to extend the time limit: that is the relevant provision in respect of applications such as this. Section 114 (6) is not excluded from the application of s. 219.
- [41] Should the Authority exercise that discretion in these circumstances? As is also made clear in *Roberts* (above) the answer to that question is arrived at by application of the "*requisite discretionary tests*".

[42] The well-established principles for the exercise of discretion to make orders extending time were summarised by the then Chief Judge Goddard, in *Day v Whitcoulls Group Ltd* [1997] ERNZ 541. They are:

- a. The reasons for the omission to bring the case within time.
- b. The length of the delay.
- c. Any prejudice or hardship to any other person.
- d. The effect on the rights and liabilities of the parties.
- e. Subsequent events.
- f. The merits.

[43] The above can be summarised under the headings of delay, prejudice and the merits of the case.

Delay

[44] Mr Paul does not account for his failure for over 2-years to take no steps to commence his grievance in the Authority, following unsuccessful mediation; he took no visible action until Mr Laracy's telephone calls and letters to the Company starting in July 2008.

[45] While promising to respond to Mr Laracy's communications, the Company did not. Arguably, that is in breach of its statutory good faith obligation, in particular to be "*responsive and communicative*" (s. 5); however, it goes without saying that Mr Paul's current residence is made of glass.

Prejudice

[46] Had Mr Laracy been properly informed and commenced proceedings in the Authority at that point, within the statutory 3-year period, the parties would not be requiring this determination. While it can be predicted the Company would be still be arguing it was disadvantage as a result of delay in Mr Paul bringing

on his grievance, it would nevertheless be obliged to address his substantive concerns.

[47] Section 115 of the Act expressly defines exceptional circumstances for allowing the raising of grievances out of time under s. 114 as those wherein an applicant has *“made reasonable arrangements to have the grievance raised ... by an agent ... and (their) agent unreasonably failed to ensure the grievance was raised within the required time”* (ss 115 (b)). That is, however, for the purposes of s. 114 (4) (a), and not ss 114 (6). Nonetheless, Mr Paul stands to be clearly prejudiced if his agent’s error causes his grievance to be halted by the 3-year requirement.

[48] But for Mr Laracy’s error, and as can be seen in his correspondence to the Company in the second half of 2008, it can be reliably said that Mr Paul’s grievance, while undesirably late, would have been filed within the statutory 3-year term set out in ss. 114 (6) of the Act.

[49] However, now the Company can affix the effect of the death and dispersal of key witnesses to a statutory entitlement, that grievances are commenced within 3-years.

The Merits

[50] From the modest and untested evidence before me I am not confident Mr Paul’s claim can be said to be so intrinsically unmeritorious that it can be said to have no prospect of success.

[51] Were Mr Paul’s grievance to proceed to an investigation, the onus of proof of course would be on the respondent in respect of its decision to terminate Mr Paul’s employment because of redundancy. However, it can also be said that the passage of time will also represent a similar, significant hurdle for Mr Paul to overcome, on a balance of probabilities basis, if his claim were to succeed: that is because he is claiming disadvantage and discrimination. In effect his claiming the Company’s decision to make him redundant was a sham. These are serious allegations and a corresponding level of evidence would be required for Mr Paul to succeed.

- [52] Win or lose, there might well be significant cost issues confronting the applicant any way, because of the unexplained delay in him bringing this matter on.

Findings

- [53] It is necessary to now step back and consider the entire history of this matter and the overall justice of the case. An appropriate starting point is the scheme of the Act: amongst other things it makes clear that the duty of good faith is wider in scope than the implied mutual obligations of trust and confidence and requires of parties that they be responsive and communicative. For two of the 3-year statutory period (and for reasons that are not explained) Mr Paul was not responsive and communicative. He did make contact with the Company at the end of that period, but because of erroneous advice commenced his action in the Authority after its expiry. That delay is significant, being more than two-months.
- [54] The Company's ability to respond to Mr Paul's grievance and defend its position progressively weakened over the 3-year period: key witnesses have died, moved overseas or otherwise left. Those claims are not challenged by Mr Paul. Those with first hand knowledge of relevant matters are now very thin on the ground. It could be said that the Company's position two months after the 3-year anniversary is no different than in the months leading up to the end of that period. However, what is different is that a statutory deadline has come and gone. Because of the inevitable effects of the passage of time in grievances such as this I find that the significance of the cut-off point – in the context of the Act – must favour the respondent. Mr Paul had, but failed to use, a generous period of time that was otherwise available to him. A reason for his failure to act, albeit very late in the piece, was erroneous advice from his representative: I do not accept that that error is now sufficient reason to extend the 3-year period. The prejudice to the respondent is now too great to be overlooked. The applicant's opportunity to pursue his grievance has therefore come and gone.
- [55] The sympathy I feel for Mr Paul's position is, unfortunately for him, outweighed by the application of the legislation and case law.

Determination

[56] The application for striking out Mr Paul's application is granted.

[57] As requested costs are reserved.

Denis Asher

Member of the Employment Relations Authority