

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 293
5337951

BETWEEN ANDREW DAVID
 ROBERTSON
 Applicant

AND M & L MEXTED LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jullie Robertson, Advocate for Applicant
 Stephen Clews, Counsel for Respondent

Investigation Meeting: 2 April 2012 at Auckland

Additional evidence 17 and 19 June 2012 from Applicant
received: 27 April 2012 from Respondent

Determination: 28 August 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This case deals with three issues:
- Holiday pay;
 - Unpaid wages;
 - An application to have a personal grievance heard outside the three year limit specified in s 114 (6) Employment Relations Act 2000. The issue is whether the Authority should exercise its discretion pursuant to s 219.
- [2] Mr Robertson was employed by Mr Michael and Mrs Linda Mexted of M & L Mexted Limited as a farm worker.



[3] Mr Robertson was employed from 18 April 2007 to 31 May 2007.

[4] On 2 June 2007 Mr Robertson raised a personal grievance.

[5] Mrs Robertson gave the relevant documents to Mr Gary Watson of Employment Relations Consultants Ltd ("ERC") on 20 June 2007.

[6] An annual leave complaint was made to the Labour Inspectorate on 13 July 2007. The Labour Inspector found that \$333.84 was due. The money has not been paid as the respondent alleged payment for annual holidays was included in the pay rate.

[7] In early 2009 Mrs Robertson became aware that Mr Watson had disappeared with the fee she had paid and with the paperwork.

[8] She contacted Mr Mark Nutsford, a director of ERC, and also the police, in an endeavour to get the documents back.

[9] On 27 May 2009 Mrs Robertson wrote a letter to the respondent saying the delay in processing the claim was due to two deaths in the immediate family in 2007 and the birth of a child.

[10] Mrs Robertson said she had posted a letter to the Authority in June 2010.

[11] On 27 August 2010 a telephone enquiry was made.

[12] On 29 August an email was sent claiming proceedings had been lodged.

[13] On 30 August the Authority's files were checked and there was no record of the proceedings.

[14] On 31 August Mrs Robertson said she would check her bank statements and asked how she could relodge the documents.



[15] On 30 November the documents were resent.

[16] A Statement of Problem dated 13 November 2010 was filed on 17 February 2011 and an amended Statement of Problem dated 6 July 2011 was filed on 14 July 2011.

[17] The time for commencing a proceeding expired on 3 June 2010.

[18] In *Roberts v Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006 the Court considered that s 219 enabled the Authority to extend the three year limitation in s 114 (6).

[19] The principles regarding the exercise of discretion were outlined in *Stevenson v Hato Paora College* [2002] 2 ERNZ 103. The overriding consideration is the justice of the case. The following matters may be material to the exercise of the discretion:

- The reason for the omission to bring the case in time.
- The length of the delay.
- Any prejudice or hardship to any other person.
- The effect on the rights and liabilities of the parties.
- Subsequent events.

[20] Mr Clews submitted that Mr Robertson had not explained his failure to file proceedings within the given time. Nothing was done for about two years after ERC were instructed. In the letter sent in May 2009 there was no reference to any dereliction on the part of ERC.

[21] Mr Clews submitted that despite knowing there was a problem with ERC nothing was done to rectify the problem.

[22] However, Mrs Robertson said she rang ERC and the person to whom she spoke, who may have been Mr Nutsford (but she was unsure) had assured her that the matter would be dealt with.



[23] When I contacted Mr Nutsford he said that he had had problems with Mr Watson and that some clients had telephoned him regarding problems with Mr Watson, who was a contactor to his company. He could not recall having spoken to Mrs Robertson but said he had told clients that if they could supply the relevant documents their cases would be dealt with. Mr Nutsford thought Mr Watson had interfered with the company's computer files. Consequently there were no computer records of Mr Watson's cases.

[24] No explanation was provided by the applicant for the delay in filing proceedings between 30 August 2010, when the Authority advised that nothing had been filed, and 17 February 2011 when proceedings were received by the Authority.

[25] The matter was eight and a half months out of time. There was a two year delay between ascertaining that ERC had not filed proceedings and the filing of proceedings.

Prejudice or hardship

[26] Clearly, the passage of time means that memories dim and information may be lost. As the respondent did not appear I had no evidence about any potential prejudice. Both Mr and Mrs Mexted are available to give evidence and are still running the farm.

[27] As well as not appearing (which I accept was on legal advice) the Mexteds have not responded to the Statement of Problem and the matter has not been to mediation.

Effect on the rights and liabilities of the parties

[28] The Mexteds will lose the benefit of a statutory deadline and will be exposed to litigation risks and costs they thought were behind them. Conversely, Mr Robertson will lose the ability to have his personal grievance heard and determined.



The merits

[29] Mr Clews properly conceded that the claim could not be said to be so unmeritorious that it had no prospect of success.

[30] On 27 April 2012 Mr Clews provided an affidavit sworn by Mrs Mexted. Mrs Mexted comments on the wages claim made by Mr Robertson and alleges that two of the time sheets supplied to the Authority by Mrs Robertson are fraudulent. These are serious allegations. Mrs Mexted attached a time sheet which she said was the original time sheet which clearly differs from the sheet received from Mrs Robertson.

[31] The major point of contention is whether Mr and Mrs Robertson spent time painting the farm house and carrying out garden maintenance during the week of 14 May 2007 and whether there was an agreement that payment be made for that work.

[32] The time sheets provided for the week beginning 28 May 2007 also differ.

[33] I asked Mrs Robertson if she wished to reply to the affidavit. She responded by saying they were not fraudulent; and that there was no fraudulent intent. She said the data was provided by Mr Robertson and entered in accordance with his instructions. She provided no explanation for the difference between the time sheets.

[34] On the balance of probabilities I accept the time sheets provide by the respondent as being the correct time sheets.

[35] The Mexteds accept that payment of holiday pay of \$404.46 net should be made. They also accept that arrears of \$923.56 net should be paid.

[36] The Mexteds claim the employment was casual. No employment agreement was provided. The time sheets do not appear to substantiate a claim that the nature of employment was casual.

[37] Mr Robertson endeavoured to obtain professional assistance. Unfortunately the assistance proved to be less than professional. Had that been the sole cause of the



delay it is highly likely that I would have exercised the discretion in s 219 in favour of Mr Robertson.

[38] Unfortunately, the delays have been caused not only by the dereliction of an advocate but also by the inaction on the part of the applicant. This is not a case in which I can exercise the discretion to allow the personal grievance to proceed.

[39] The respondent is to pay the applicant the sum of \$923.56 net wages arrears which includes \$404.46 net holiday pay.

[40] The respondent is to pay interest on the unpaid wages at the rate prescribed under s 87 Judicature Act 1908, being 5% per annum. The interest is to run from 31 May 2007 until the amounts owed are paid in full.

Costs

[41] Neither Mr nor Mrs Mexted appeared at the hearing. When I asked Mr Clews why they were not there he said he had advised them they did not need to be present. That necessitated additional time being taken to obtain further evidence. Although the applicant was unsuccessful in his claim to have his grievance heard, he was successful in part in his wages claim. In the circumstances, costs are to lie where they fall.



Alastair Dumbleton

Member of the Employment Relations Authority

(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)

