New Zealand Employment Relations Authority Decisions

VBS v FCL (Wellington) [2018] NZERA 2008; [2018] NZERA Wellington 8 (31 January 2018)

New Zealand Employment Relations Authority

VBS v FCL (Wellington) [2018] NZERA 2008 (31 January 2018); [2018] NZERA Wellington 8

Last Updated: 13 February 2018

ATTENTTION IS DRAWN TO THE NON-PUBLICATION ORDER AT PARAGRAPH [1]

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 8
5585596

BETWEEN VBS Applicant

AND FCL Respondent

Member of Authority: Michele Ryan

Representatives: Satchie Govender, Counsel for the Applicant

Paul McBride, Counsel, and Gary Taylor, Advocate, for the Respondent

Investigation Meeting: 3 May 2017

Submissions Received: 3 May 2017, 16 June 2017 and 14 July for the Applicant.

3 May 2017, 12 May 2017 and 7 July 2017 for the

Respondent

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY ON PRELIMINARY MATTERS

[1] To avoid inadvertent identification of the applicant and/or publication of the applicant's medical and/or sensitive information, a non-publication order has been made prohibiting publication of the identity of the applicant and the respondent in this matter, and any medical and/or sensitive information held by the Authority in connection with this file, without the Authority's leave.

Employment relationship problem

[2] There are three issues to be decided in this determination. The first concerns whether the applicant raised a personal grievance in accordance with the requirements of s 114(2) of the Employment Relations Act (the Act).

[3] The second issues is whether s 219(1) provides jurisdiction for the Authority to grant an extension to the limitation period set out at s 114(6) of the Act.

[4] Finally, if the Authority does have jurisdiction, the third issue is whether an extension should be granted to allow the applicant to pursue her personal grievance.

Summary of relevant background information

[5] The applicant was employed on a casual basis by the respondent for approximately 8-9 months. On the night of 28/29 January 2012 she was indecently assaulted by the director of the respondent.

[6] I am satisfied by the evidence provided that between 29 January 2012 and 3

February 2012 (inclusive):

(a) the applicant sent an email to her manager which was pejorative (but

not specific) about the director's behaviour;

(b) the applicant complained to the manager about the assault who in turn took the matter up with the director.

(c) the manager subsequently advised the applicant that the director had been unresponsive to her queries regarding the events of 28/29 January

2012;

(d) the manager offered the applicant further work which involved transporting the director to an event;

(e) the applicant told the manager she could no longer work for the director;

(f) following the applicant's verbal resignation the director required the

applicant to obtain her wages from him personally;

(g) the applicant subsequently confirmed her resignation with the manager

[7] On 27 April 2012 - 89 days after the assault, the applicant, via her then solicitor, wrote to the manager of the respondent, as follows;

I have been instructed to act for [the applicant] in an employment grievance matter relating to her employment by you which terminated in circumstances that amount to a constructive dismissal.

This is your statutory notice of a personal grievance pursuant to s.114 of the Employment Relations Act 2000.

The grounds on which my client has a grievance include, *inter alia*;

1) The employer failed to adequately protect her from unwanted

attention and advances made to her [...] Sunday morning

29 January 2012.

2) The employer failed to make an appropriate investigation when her complaint concerning the difficulties was made a day or two later.

3) Her wages were withheld the following week, in circumstances that were not explained properly or at all.

4) The employer failed to support her adequately during the ensuing period which was a hugely stressful and upsetting time for her.

My instructions relating to the employment are that my client did not receive a written contract even though she was employed for several months preceding this incident.

[8] The director accepts he received the correspondence written on behalf of the applicant and that he obtained advice on the matter. He says the letter did not request a response and therefore no reply was sent.

[9] Sometime in 2012 charges were laid against the director in connection with the events of 28/29 January 2012. Those matters proceeded to a jury trial and in May

2014 the director was convicted of two counts of indecent assault.

[10] On 13 June 2014 the applicant's solicitor sent a letter to the respondent requesting a response to the letter of 27 April 2012. The respondent's advocate replied on 25 June 2014. Amongst other things he said the manager had long since left employment with the respondent. It went on to say:

From the outset we note that [the] letter does not meet the requirements of section 114 of the Employment Relations 2000 and does not seek a response.

The letter simply makes comment about allegations of "unwanted attention and advances" ... [on] 29 January 2012 and proceeds to lay blame at [the manager's] feet for her failure to investigate and provide processes for protecting against such advances...

It provides no factual details as required by section 114 and significantly seeks no remedy for the employer to consider. It is little wonder [the manager] did not respond when no response was requested.

...consent to raise a personal grievance out of time is declined...

[11] On 2 September 2014 counsel for the applicant sought assistance from mediation services.1 The parties attended mediation almost 6 months later on

5 March 2015. The director did not attend. At some point the mediation was adjourned with a view to meet again on 25 March 2015. For reasons not relevant to the matter the parties did not reconvene as planned.

[12] On 23 July 2015 the director's appeal against his conviction and sentence was

dismissed.

[13] A statement of problem was initially filed by the applicant's solicitor on 4

September 2015. The document was incomplete. The defects were subsequently rectified and the statement of problem was lodged on 28 September 2015. In a very brief statement in reply dated 13 October 2015 the respondent's advocate observed noted "*the applicant never properly raised the grievance as required by law*" and [therefore] the Authority had no jurisdiction to deal with the matter.

[14] In a case management conference call on 9 November 2015 the parties were directed to return to mediation. The respondent noted no application had been made to bring a personal grievance out of time, or to commence a personal grievance action more than 3 years after the event.2

[15] Between November 2015 and June 2016 the Authority received an amended statement of problem,3 an application pursuant to s 219(1) to extend the time period to bring a claim to the Authority,4 and an application to raise a personal grievance out of time.5

[16] Unfortunately the parties did not attend mediation until late April 2016 but were unable to resolve the matter.

[17] The Authority made preparations to determine the two preliminary matters on the papers.

[18] On 10 May 2016 the respondent's representative informed the Authority that

the respondent "*never employed the applicant, but rather (the director) personally engaged*

1 From the Ministry of Business, Innovation and Employment

2. These matters were repeated on 25 November 2015 in response to an amended statement of problem

3 20 November 2015

4 20 January 2016

5 1 June 2016

[the applicant]". This alteration to the respondent's defence raised a further issue concerning the identity of the employer. I considered an investigation meeting would be better suited to determine all three preliminary matters and this was set down for 14

October 2016.

[19] In late September 2016 the respondent's advocate informed the Authority that

the director was incapacitated and would not be able to attend the scheduled meeting.

[20] An investigation meeting was finally held on 3 May 2017. At the conclusion of the meeting the respondent withdrew its challenge concerning the identity of the employer but asked the Authority to refer a question of law to the Court for its opinion (pursuant to s 177). A formal application was subsequently made. I declined the request and the parties provided submissions on the 3 preliminary matters to be determined.

[21] This determination has been issued outside the timeframe set out at s

174C(3)(b) where the Chief of the Authority has decided exceptional circumstances exist.6

Did the applicant sufficiently specify her personal grievance in accordance with section 114(2) of the Employment Relations Act 2000.

[22] Section 114 provides that personal grievances must be raised within 90 days of the date on which the action alleged to constitute a personal grievance occurred or came to the notice of the employee.7

[23] Section 114(2) states:

"...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer, or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address."

[24] In assessing whether a grievance has been raised the Employment Court has held that that the grievance should be specified sufficiently to enable the employer to

address it.[8] A series of communications may, in totality, raise a personal grievance.[9]

[6] pursuant to s 174C(4)

[7] the exceptions to this provision is where an employer consents to the late raising of a

grievance or where the employee apply to and satisfies the Authority that exceptional circumstances occasioned the delay in raising the personal grievance and that it would be just for the Authority to grant leave to allow the personal grievance to be lawfully raised.

The respondent's challenges to the applicant's personal grievance

[25] It is apparent that the absence of a request for remedies in the letter raising the grievance caused the respondent to consider the notice of the personal grievance invalid.10 That position is not an accurate reflection of the law. In *Idea Services Ltd*

(in Stat Man) v Barker11 Judge Inglis (as she was then) observed that while an

employee's particularisation of the remedies may assist an employer in understanding what the employee wants addressed, section 114(2) did not require an employee to specify the precise nature of the remedies sought.12

[26] Next, the respondent submits that the substance of the applicant's personal grievance letter was levelled at the manager. The inference is that the personal grievance was the responsibility of the manager. Even if I were to accept the respondent's view as to the focus of the personal grievance letter (which I do not, noting that the letter specifically refers to the employer's alleged actions and omissions as giving cause to the grievance), the respondent was not able to ignore the applicant's personal grievance claim. The ability to raise a personal grievance is governed by the Employment Relations Act 2000. The Act provides that an employee who wishes to raise a personal grievance must raise it with the employer. As noted, the respondent accepts it was the applicant's employer.

[27] The respondent further says the manager no longer worked for it when it received the personal grievance letter and therefore it could not "address" the matter. I do not accept this submission. The respondent's explanations as to why it did not address the personal grievance claim are not relevant to whether the applicant sufficiently raised her grievance to enable it to address it.

[28] In any event, whether or not the manager received the applicant's grievance before her employment also finished (on 1 May 2012), the director accepts that the manager informed him of the discussions she had with the applicant between 29

January and 3 February 2012.[13] That concession leads me to conclude that the

[8] *Creedy v the Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 at [35]- [37]

[9] *Phillips v Nettel Communications* [2002] NZEmpC 138; [2002] 2 ERNZ 340

10 contents of the respondent's letter of 25 June 2014 and reiterated in the director's verbal

responses to questioning by the Authority

11 [2012] NZEmpC 112

12 Ibid at [40]

13 during the Authority's investigation

respondent was cognisant of the allegations raised in the applicant's correspondence

and in a positon to address the allegations.

[29] Finally the respondent alleges that while the applicant may have raised *a* personal grievance, she did not raise *the* personal grievance. It complains that the focus of the applicant's statement of problem is placed on the assault itself whereas the emphasis of the letter of 27 April 2012 was toward events after that incident. I am unwilling to accept the sexual assault does not form an intrinsic aspect of the applicant's written notice of a personal grievance. I consider the complaint is sufficiently captured in the 2012 written allegation that she was not adequately protected from "*unwanted attentions and advances*".

[30] I am further satisfied the matter of the assault was specifically raised by the applicant with her manager. This prompted the manager to question the director about it. I note the director does not deny he was asked by the manager about what had occurred on 29 January 2012. That he later sought to meet with the applicant, purportedly to apologise, reinforces my view that the applicant had raised her concerns about the assault, that the director (as the controlling mind of the employer) was aware of the nature of the concern, and that the applicant wanted the matter addressed. I do not accept that the substantive claim before the Authority is at variance with the nature of the personal grievance raised with the employer between January and April 2012.

[31] The applicant's personal grievance with the respondent was raised in

accordance with s 114(2).

Does s 114(6) preclude the applicant from advancing her claim or does s 219(1)

apply?

[32] Section 114(6) of the Act states:

No action may be commenced in the Authority or the court 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.

[33] There is no dispute that the statement of problem was lodged outside the 3 year limitation set out at s 114(6). The respondent challenges the Authority's jurisdiction at s 219 to grant an extension to the timeframe on which to commence action concerning the grievance.

[34] Section 219 of the Act provides the following:

219 Validation of informal proceedings, etc

(1) 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 court, or the Authority, as the case may be, may in its discretion, on the application of any persons interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[35] The respondent refers to the legal principle that specific provisions override general provisions: '*generalia specialibus non derogant*'. It submits s 219(1) is a general provision whereas s 114(6) is specific, and provides an express mandatory constraint to the timeframe required to commence a personal grievance action. In the absence of any reference at s 114(6) to allow for that requirement to be altered it says there is no general statutory power to extend the limitation.

[36] Counsel refers to two separate judgments determined under the Labour Relations Act 1987 to support the respondent's position. In *Winstones Trading Ltd v NID Distribution Workers IUOW14* the Labour Court held that the discretionary power

in a materially identical section15 to s 219, was not available to extend a limitation

period regarding re-hearings.16 I note the re-hearing provision itself contained a discretion to extend the time frame. The judgment therefore determined which of two discretionary powers should prevail as opposed to whether a discretion to extend the limitation period in question existed.

[37] In *Otway17,* the Labour Court refused to apply provisions equal to that of s 221 and s 219 stating " '*the power to amend or waive any error or defect in the proceedings' is to put valid proceedings back on the rails...not to create the rails".* However time-based limitation concerns were not at issue in that case and the finding was made on the basis that the substance of the claim was invalid. Neither judgement assists the respondent.

[38] Counsel also pointed to the recent case, *Maharaj v Wesley Wellington*

Incorporated,18 where Judge Smith expressed reservations as to whether s 219 (and s

14 [1988] NZILR 1042

15 Section 315 Labour Relations Act 1987

16 Section 302 Labour Relations Act 1987

17 *New Zealand IUOW v Otway and Otway t/a Charnley Health Park* [1989] 3 NZILR 503

18 [2016] NZEmpC 129

221) can operate to circumvent the limitation to non-personal grievance actions after 6 years (at s 142). The issue was not decided.

[39] In *Roberts v Commissioner of Police19* the Court advanced a view that s 114(6) does not exclude the application of the discretion at s 219(1). The respondent notes that *Roberts* was not determined by the application of s 219 and submits the analysis in that case is obiter and incorrect.

[40] The approach foreshadowed in *Roberts* has, however, been subsequently applied by the Court.20 *In Orakei Korako Geyserland Resort (2000) Ltd v Unsworth*21 the Court considered it to be settled that s 219(1) provided jurisdiction to extend the time limit at s 114(6).22

[41] I am not persuaded that the *generalia specialibus* maxim applies to this matter. If there is a way of reconciling statutory provisions without resorting to the maxim the Authority should do so.23 I do not perceive there is a conflict between the contents of s 114(6) and s 219(1) such that one provision should be preferred over the other. They can be read together. Section 114(6) provides a statutory timeframe limitation period to commence personal grievance proceeding. Section 219 provides the Court

or the Authority with a discretionary power (subject to established principles) to extend statutory timeframes limitations in the Act. There is nothing within s 219 that limits which timeframe provisions the discretion may be applied, nor does s 114(6) prohibit the application of s 219 to it.

[42] I am satisfied s 219(1) provides jurisdiction to extend the timeframe limitation expressed at s 114(6). The time frame the applicant is seeking to extend is permissible under the Act.

Should the Authority grant an extension to the limitation period set out at s. 114(6) of the Employment Relations Act

[43] In assessing whether an extension of time should be granted the primary consideration is whether the justice of the case requires the grant. That factor,

alongside an inquiry into;

19 EmpC Auckland AC 33/06, 27 June 2006

20 Supra at n 21; *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91

21 [2009] ERNZ 403

22 Ibid at n 23, para [9]

23. *Ross Carter* Burrows and Carter Statute Law in New Zealand (5th ed, LexisNexis NZ Ltd, Wellington, 2015) at 477

(a) the reason for the omission to bring the case in time

(b) the length of the delay

(c) any prejudice or hardship to any person

(d) the effect of the rights and liabilities of the parties

(e) subsequent events

(f) the merits,

provides a useful and principled means to evaluate whether the Authority's discretion

should be applied.

The reason for the omission to bring the case in time and the length of the delay

[44] It is useful in this matter to consider the length of the delay and the reason for it together.

[45] The personal grievance was raised (at the latest) on 27 April 2012. The

applicant's statement of problem was lodged with the Authority on 28 September

2015. Applying s 135(2) of the Interpretation Act 1999 the applicant's statement of problem should have been lodged on or by 28 April 2015. The personal grievance action therefore commenced exactly 5 months after the timeframe prescribed under s

114(6) had crystalized.

[46] The applicant says she was advised by her doctors against pursuing her personal grievance whilst the criminal process was live as she was too emotionally fragile.24 Counsel further submits that the applicant's attempts to resolve her employment relationship problem have been frequently obstructed by the respondent. He refers, by way of example, to the 6 months period (or thereabouts) between the request for mediation and the respondent's agreement to attend (albeit by its advocate)

that event.

[47] In contrast, the respondent submits the applicant was represented by counsel as early as April 2012 and must be taken to have been well enough to provide instructions as evidenced by the letters of 2012 and 2014 and her attendance at mediation in March 2015.

[48] It has been not been difficult to form an impression that the respondent has

contributed to the slow progress of the applicant's claim but it is not necessary to determine that matter.

24 Applicant's sworn affidavit dated 15 January 2016 (this document received by the Authority

on 12/05/2016

[49] The applicant provided a redacted psychiatric report dated 21 August 2013, various letters from health service providers and four assessment/review reports compiled separately by two clinical psychologists between 2013 and November 2015. None of the documents appear to have been created for the purpose of providing evidence to the Authority.

[50] Within weeks of the assault the applicant was attending therapeutic counselling (and continues to do so at the time of the investigation meeting) for anxiety and 'post-traumatic stress disorder' arising out the events connected to the assault. There is no direct evidence that the applicant was recommended to halt her personal grievance action until the criminal processes were concluded. But in various ways the reports each comment that the applicant's symptoms appeared to be

exacerbated when she was required to engage in the criminal prosecution process25

and later when she became aware of the director's appeal.26

[51] It is notable that soon after the director's conviction on 9 May 2014 the applicant, by her solicitor, sought a response to her personal grievance. The respondent points to a statement made in that correspondence which advised if no reply to it

was received "*we are to proceed by way of litigation*". The respondent says the statement indicates the applicant was able to pursue her claim at this point. I am not persuaded. It is clear the applicant's recovery has not been linear. I accept her evidence that her progress was undermined by news of the director's appeal in mid-

2014 and that she unable to advance her claim at that time.

[52] The criminal proceedings were concluded almost 3 months after the s 114(6) timeframe expired. While concurrent participation in legal processes external to those in the Authority does not provide absolute justification for delay in bringing an action I have found the applicant's explanation to this effect accounts for this period of the applicant's delay and is both understandable and credible.

[53] A further 7 weeks and 1 day passed before the applicant commenced her action. Just over half this time (25 days) accrued while the applicant's solicitor amended the defective statement of problem originally sent to the Authority. I am

unwilling to apportion blame to the applicant for that oversight.

25 Psychiatrist's report, 2013, pg 3; ACC Sensitive Claims report, 18 August 2014

26 ACC Client Wellbeing Plan, 8 July 2015, pg 1.

[54] While 5 months delay to commence action after the prescribed time frame may be regarded as substantial, I am persuaded that the reasons for the applicant's delay have largely been accounted for and are reasonable in all the circumstances.

Prejudice or hardship, and effects on parties' rights and liabilities

[55] I have considered whether, as a consequence of the delay, there is prejudice or hardship on a person or parties' rights and liabilities are affected, as matters that are interlinked. The respondent repeated its view that the applicant was legally represented and the onus lay with her to exercise her rights in a timely manner. The reasons as to why she did not have been examined and accepted. I was not provided with any evidence of the respondent's rights or liabilities being detrimentally altered as a consequence of the applicant's delay.

[56] As to the issue of prejudice, the respondent says there have been staff changes between 2012 and when the claim was lodged in the Authority. No mention is made as to how the respondent has been prejudiced by that. It is the potential for prejudice arising between the expiry of the statutory three year period and the date in which the

action to commence began that is relevant.27 I have also already noted at para's [29]-

[30] that I do not accept the respondent's view that the substance of the allegations raised in 2012 are manifestly different to the claim lodged at the Authority in September 2015. It follows that there is no evidence of the respondent suffering any particular prejudice by the delay in bringing those matters for determination.

Merits

[57] Although it is not appropriate to determine the substance of the applicant's claim at this juncture but I am satisfied the applicant has a strongly arguable case for a constructive dismissal.

Overall justice

[58] In assessing the overall justice of the case the applicant's position is favoured. This is not a case where the applicant negligently ignored the statutory timeframes to commence her claim. It is clear she faced considerable personal and external challenges dealing with both the direct and incidental effects of an incident that

27 *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91 at [35]

occurred whilst engaging in activities she was employed by the respondent to perform. Those challenges remain extant when the requirements of s 114(6) passed.

[59] It would be contrary to interests of justice to deprive the applicant of her right to pursue claims against her employer about actions (and omissions) that occurred during her employment, where, as I have found, the effect of the actions have directly significantly contributed to the delay in bringing this claim to the Authority.

Determination

[60] I am satisfied that the discretion available to the Authority at s 219(1) should be exercised in favour of extending the timeframe so that the applicant may pursue her claim of an unjustified dismissal. The application is accordingly granted.

Where to from here

[61] The parties are encouraged to resolve the applicant's claim. If they are unable or unwilling to do so the applicant should contact the Authority so that this matter can be progressed.

Costs

[62] Costs associated with this preliminary determination are reserved.

Michele Ryan

Member of the Employment Relations Authority