



year time limit in s.114(6) of the Employment Relations Act 2000. It was agreed by counsel that the Authority could determine the matter on the basis of statements of facts and issues and submissions provided by counsel for the applicant and second respondent. The first respondent was given an opportunity to provide any submission in relation to the matter before the Authority but elected not to do so.

### **The history of the proceeding**

[3] The following facts have been ascertained from the documentation provided and statements of facts and issues from Mr Zindel and Mr Shingleton. The matters in relation to these facts are not in dispute and are capable of verification from the documents provided.

[4] W worked in a part-time role for a restaurant from 10 December 2004 until she resigned on or about 4 January 2005. W was 14 years of age at the time she was employed at the restaurant and her day-to-day contact during the employment was largely with Y. Y was employed by Z Limited and carried out managerial functions at the restaurant. There is an issue as to whether or not W knew who her employer was. She did not have a written employment agreement and was paid for the short period of her employment by automatic payment into her bank account. It is not clear what W filled out in terms of any documentation for Inland Revenue Department purposes.

[5] W alleges that she was indecently assaulted and sexually harassed by Y. She left her employment in early January 2005 and lodged a complaint with the Police.

[6] On 24 January 2005, W's employment advocate wrote a letter to Y at the restaurant address raising a personal grievance that W had been disadvantaged in her employment, sexually harassed and that she had been constructively dismissed. That letter was attached and numbered "1" to the statement of problem lodged with the Authority on 22 January 2008 and described as *P.G. raising*. W's advocate asked in his letter that *the company provide the full name to which the employee's advocate can service documentation*.

[7] On 2 February 2005, there was a letter from Y's then barrister. It was sent close enough to the seven day timeframe given by W's advocate in his letter of 24 January 2005 for a conclusion to be reached that this letter was in the nature of a response. The letter from the barrister provided that Y denied the allegations and that

the advocate was free to issue proceedings but that it might be more appropriate to defer doing so until the conclusion of the prosecution and that no issue would be taken of any time limits if that course was adopted.

[8] On 14 March 2005, W received a statement that she had requested from the Inland Revenue Department. That statement showed that her employer was recorded as Z Limited in terms of income earned at the restaurant during the period 1 December 2004 to 31 January 2005.

[9] In or about September 2005, the allegation made by W against Y was the subject of a criminal jury trial in the District Court. Y was found not guilty.

[10] There were no documents provided to the Authority to support that any further steps were taken with respect to the grievance until 14 January 2007. On that date, the same letter that had been sent to Y on 24 January 2005 was provided again by W's then advocate. The only difference between the two letters was that W's advocate advised at the top of the letter that he now wished to move the alleged grievance to mediation and the previous part that stated mediation was not contemplated as appropriate was removed.

[11] On 2 February 2007, Mr Praat advised the advocate in a letter that he had been instructed by Y. Mr Praat asked for information about several matters and said in his letter that Y denied the allegations and further he denied that he was W's employer.

[12] On 31 May 2007, W's advocate sent a response by letter to Mr Praat. W's advocate attached amongst other matters copies of IRD statements with respect to PAYE and a copy of W's bank statements showing payment of wages.

[13] On 6 June 2007, another letter was provided by Mr Praat to W's then advocate. Mr Praat's letter acknowledged the letter from the applicant dated 31 May 2007 and then stated that the IRD statements and bank statements tended to confirm Y's view that W was not employed by him.

[14] On 19 June 2007, there was another letter from Mr Praat to W's advocate which was copied to the Mediation Service. That letter advised that Y was not W's employer and therefore that it was not appropriate for Y to attend mediation. Mr Praat went on in his letter to advise that their respective clients were at the

material time co-employees and that the Mediation Service was a service to parties to an employment relationship.

[15] On 13 August 2007, Mr Praat wrote a further letter addressed to the Employment Relations Authority. W's then advocate was provided with a copy. Although the letter was addressed to the Employment Relations Authority, it is clear from its content that it was referring to a matter within the jurisdiction at that time of the Mediation Service. The letter provided, amongst other matters, that Y did not consent to mediation when a claim was maintained against him in own right and that W's employer may well be willing to participate if named as the respondent. Mr Praat advised that he was happy to act as a point of contact for the employer in that regard.

[16] It is not clear what, if any, further steps were taken between 13 August 2007 and 22 January 2008 when the statement of problem was lodged with the Authority by W's then advocate naming Y as the only respondent.

[17] A statement in reply was lodged on 27 February 2008 on behalf of Y setting out that there was a dispute as to whether Y was the correctly named respondent. Attached to the statement in reply, among other matters, was a copy of an agreement for the sale and purchase of the business owned by Z Limited, a company search of Z Limited showing it was incorporated on 25 January 2001, and a company search of another company which could be related to Z Limited which was incorporated on 9 June 2005. The company search of Z Limited revealed that Y was not a director of the company.

[18] Mr Praat also lodged at the same time a memorandum of counsel which set out the history of the matter and asked the Authority to deal with the issue of the respondent's identity as a discrete preliminary question for determination to avoid the lengthy and expensive hearing of factual evidence.

[19] The Authority held a telephone conference with W's advocate and Mr Praat on 6 March 2008. The Authority gave W's advocate a week to consider the issue about the identity of the respondent and also timetabled for submissions as to the identity of the respondent to be provided so that the Authority could consider the matter as to whether Y was a correctly named respondent could be dealt with on the papers.

[20] Following this, W's advocate became very unwell and then unfortunately died. Mr Zindel then took over W's file. On 28 April 2008, Mr Zindel lodged an amended statement of problem with Y named as the first respondent and Z Limited named as the second respondent.

[21] For a variety of reasons for which the Authority accepts responsibility, the amended statement of problem was not served on the registered office of the second respondent until October 2008. When the amended statement of problem was lodged with the Authority, it assumed incorrectly that the applicant had already attended to service and/or that the solicitor for the first respondent was also acting for the second respondent.

[22] When the proceeding was eventually served on Z Limited there was a response from Mr Shingleton to the effect that W was barred from having her claim against the second respondent heard by virtue of s.114(6) of the Employment Relations Act 2000.

### **The issues**

[23] The issues for the Authority to determine are as follows:

- When was the personal grievance raised against Z Limited;
- Was the proceeding against Z Limited commenced outside the limitation period in s.114(6) of the Employment Relations Act 2000;
- If the proceeding was commenced more than three years after the personal grievance was raised, then do the powers under s.219 and/or s.221 of the Employment Relations Act 2000 enable the Authority to extend the time for commencing an action against Z Limited;
- If the grievance was not raised against Z Limited within the period of 90 days and it cannot be sent through Z Limited's counsel's concession that a grievance was raised within the 90 days, then should leave be granted under s.114(4) of the Employment Relations Act 2000?

**When was the personal grievance raised against Z Limited?**

[24] Mr Zindel's primary submission is that Z Limited was not notified of the grievance by the letter dated 24 January 2005. He submits that the grievance could be seen as having been raised against Z Limited by the letter dated January 2007 or it could be said that the personal grievance was not raised until the amended statement of problem was served on Z Limited.

[25] Mr Shingleton accepted for the purposes of this preliminary issue that the personal grievance was raised within 90 days against Z Limited by the letter dated 24 January 2005 and that for the purposes of this preliminary issue Z Limited was W's employer.

[26] Standing back and objectively assessing the communication dated 24 January 2005 I find that W, through her advocate, took reasonable steps to make her employer aware of her grievance. The personal grievance was raised with a representative of Z Limited, Y, in writing to the restaurant premises where the employment had taken place. There was a request within the correspondence for the full name of the company. I find that the grievance was raised in such a way that it was clear W alleged personal grievances that she wanted addressed. These were described as unjustified disadvantage, sexual harassment and constructive dismissal. There was a response to the allegations with a denial that the conduct alleged had occurred. The letter written by W's advocate made it quite clear that it was the intention of W to lodge papers with the Employment Relations Authority and that any investigation would be at the conclusion of the criminal proceedings.

[27] In conclusion, I find that a personal grievance was clearly raised within 90 days with Z Limited by virtue of the letter from W's advocate dated 24 January 2005. The letter would have been received a day or so after it was posted.

[28] The proceedings against Z Limited which were commenced in April 2008 were commenced after the three year time limit set out in s.114(6) of the Employment Relations Act 2000.

[29] As an aside, if the grievance against Z Limited had not been found to have been raised within the 90 day period, the Authority would have had to have been satisfied that the delay was occasioned by exceptional circumstances. On a preliminary analysis against the factual background and the correspondence, that

would prove a somewhat difficult hurdle, although given my conclusion, then I do not need to say anything further about that.

**If the proceedings were commenced more than three years after the personal grievance was raised, then do the powers of s.219 and/or s.221 of the Employment Relations Act 2000 enable the Authority to extend the time for commencing an action against Z Limited?**

[30] Neither counsel referred to s.219 of the Employment Relations Act 2000 in their initial submissions. The Authority gave the representatives additional time to provide submissions on that section and both Mr Zindel and Mr Shingleton duly provided submissions. Mr Zindel made it clear that the applicant did apply under s.219 for an extension of time for commencing an action against Z Limited if the Authority concluded that a grievance had been raised on 24 January 2005.

[31] Section 221 of the Act does not enable the Authority to extend time to bring a matter before it that is otherwise out of time – *Roberts v. Commissioner of Police* (unreported, AC33/06, Colgan CJ). The proceedings were lodged against Y on 22 January 2008. No action had at that time been commenced against Z Limited and there was no matter properly before the Authority against Z Limited in terms of which the Authority could extend time under s.221 of the Act.

[32] I now consider s.219 of the Employment Relations Act 2000 which section provides:

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 person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*
- (2) *Nothing in this section authorises the Court to make any such order in respect of judicial proceedings then already instituted in any Court other than the Court.*

[33] In *Roberts*, Chief Judge Colgan made the following statement at para.[19]:

*On its face, s.219(1) is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority determinations to this Court within the statutory period of 28 days following their issue. As a discretionary power, the Court provides a number of tests, all of which assist it to determine whether, in all the circumstances of the case, the interests of justice require an extension of time. Section 219 is not limited to any particular time limits: nor is that contained in s.114(6) excluded. Most, if not all, statutory limitation periods allow for their extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed as in the Limitation Act 1950.*

[34] Since *Roberts*, the Employment Court and Authority have considered the discretionary power under s.219 in cases where personal grievance actions have not been commenced within three years after the raising of a personal grievance. Amongst others are the Employment Court judgment in *Tupou Tu'itupou v. Guardian HealthCare Operations Ltd* (unreported, AC50/06, 6 September 2006, Judge Perkins), and the Employment Relations Authority determination in *Collins v. Idea Services Ltd and IHC New Zealand Incorporated* (WA125/08, Member Wood).

[35] Both counsel agreed that the principles for the exercise of the Authority's discretion to make orders extending time are set out in the Employment Court judgment of *Stevenson v. Hato Paora College* [2002] 2 ERNZ. The overriding consideration in exercising the discretion is the justice of the case. The following matters, where they are relevant, are material to the exercise of a discretion:

- (a) The reason 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.

[36] There has to be a proper basis for which the Authority can exercise its discretion and extend time. The failure to commence a personal grievance action within three years from the raising of the personal grievance is not, as seems to be suggested by Mr Zindel in the final paragraph of his submission with respect to the discretion under s.219, a technicality. As was stated in *Tupou Tu'itupou*, the starting

point to be adopted given the intention of the Employment Relations Act 2000 to provide for speedy resolution of employment disputes is that the proceedings must be filed within the time limitation described and there would need to be clearly established facts before an appeal to the equitable jurisdiction of the Court could be successful.

[37] Proceedings could have been commenced against Z Limited at any time within the three years until late January 2008. Mr Zindel took over the file on 27 March 2008. An amended statement of problem was lodged with the Authority on 28 April 2008, some 12 or so weeks after the expiration of three years naming Z Limited as the second respondent. The delay between late January 2008 and 28 April 2008 is not the fault of Mr Zindel who had to take over the file from W's advocate and make decisions and take instructions on matters in that file.

[38] Mr Zindel submits that the reason for the omission for W's advocate to commence a personal grievance against Z Limited within the three year time limit was a mistake or inadvertence.

[39] W knew from the statement from IRD received in or about March 2005 that she was paid by Z Limited for the few weeks that she worked at the restaurant. Her advocate had the same information at least from early 2007. Mr Praat wrote to W's advocate stating that the IRD record and indeed W's own bank statement supported Y's view that W was not employed by him. The matter did not end there, however. W wanted to attend mediation. Mr Praat wrote a letter on 13 August 2007 which was copied to W's advocate. I am satisfied that W's advocate must have received the letter because it was attached to the statement of problem lodged on 22 January 2008 with the Authority. Mr Praat said, amongst other matters in his letter:

*For reasons that are not known to me, W's advocate has not chosen to name W's employer but has chosen instead to name her co-employee, our client Y. ... Mr Y does not consent to mediation, either at the proposed date or indeed on any basis, while this claim is maintained against him in his own name. W's employer however may well be ready to participate in mediation if it were named as the respondent and I am happy to act as a point of contact for the employer in that regard.*

[40] There did not appear to be a response to that letter by W's advocate before proceedings were lodged on 22 January 2008. The statement in reply that Y was not

the correct named respondent could not have been a surprise, therefore, for W's advocate because that was the nature of Y's response from early 2007.

[41] Against that history and the background of the matters, the delay in proceeding against Z Limited could be seen as a decision to commence and maintain an action against Y rather than a mistake or inadvertence.

[42] There was an early indication in 2005 that no issue would be taken with time limits. The criminal proceedings, however, against Y was concluded by the end of September 2005 and then there was a further period of one year before virtually the same letter that raised the personal grievance was sent again.

[43] I do accept Mr Zindel's submission that from January to April 2008 the delay was not so substantial when account is taken, as it must be, of W's advocate's deteriorating health and then his death. In terms of the history, I do, however, consider that there is prejudice to Z Limited. The matter that was the subject of criminal proceedings was concluded in September 2005 and Y was acquitted of the charges. Any delay until after the criminal proceedings was understandable. In terms of the employment relationship between Y and Z Limited though reliance would have been placed on that verdict at the time. There was then a long period until January 2007 before there was any further correspondence that took place about the personal grievance. That was focused on mediation and who the correct parties should be who attended at that mediation.

[44] I conclude that whilst the delay from January to April 2008 is not substantial, the delay when one considers the history of the matter in proceeding against Z Limited is substantial. The allegations are serious ones. I accept Mr Zindel's evidence that Y will be the primary witness but Z Limited was entitled to conclude that it would not be facing personal grievance action after the expiration of three years with respect to any allegations against its then employee Y. In those circumstances, I find Z Limited would be prejudiced in defending the matter in terms of its dealings with Y and other witnesses. Witnesses who gave evidence at the criminal trial in 2005 may be unavailable but more importantly memories will have almost certainly started to fade.

[45] Subsequent events referred to in submissions are that W has declared herself under the no asset procedure as having no assets and is under the management of the

Official Assignee. Mr Shingleton submits that this and the fact that she is legally aided would mean that the second respondent could not recover costs. There are some other matters referred to by Mr Zindel, however, I do not find any subsequent events material in the exercise of my discretion and they are not the main factors.

[46] The merits of the case are difficult to determine in any meaningful way in terms of the exercise of a discretion. This is a claim that will be determined largely on the basis of credibility. W alleges certain events took place and Y denies that they did. The material before supports that the events were not witnessed. Mr Shingleton submits that the same facts relied on for the personal grievance were rejected by a jury in 2005 and that any chance of success in terms of any investigation undertaken by the Authority for the applicant would be well below 50%.

[47] All that can really be said is that the outcome of the criminal trial does not give W any advantage but equally in terms of personal grievance allegations are required to be established to a different civil standard of proof. On that basis, I do not find that merit can be the main deciding factor in terms of the exercise of a discretion.

[48] I now stand back and consider the overall justice of the case. If the application to extend time is not granted and if it is found that Y is not the correctly named respondent, then W will clearly be prejudiced in not being able to pursue her personal grievance claim against Z Limited. In saying that, however, it is clear that W and her advocate knew of the existence of Z Limited well before the three year period expired. W and her advocate knew that Z Limited paid W for her work at the restaurant and Y had made it clear that he did not accept that he employed W. There had been an offer by Y's representative to act as a go-between with the company for the purpose of mediation in August 2007 which was not taken up. There was sufficient information available for a company search to have been undertaken by W's advocate and for an action to have been commenced in those circumstances against the company within three years. It was not. There was time between Mr Praat's letter dated 13 August 2007 and the lodging of the statement of problem on 22 January 2008 to give careful consideration to who should be named as the respondent or respondents when proceedings were commenced. Only Y was named in the statement of problem. Z Limited would be prejudiced if the matter was now to go to an investigation meeting given the delay and the difficulties, particularly with witness memory and recall in all

the circumstances. The failure to proceed against Z Limited within a three year period and the delay in doing so is not adequately explained.

[49] I do not find in all the circumstances when I consider the overall justice of the case that there is a sufficient basis for me to exercise my discretion now to extend time. I do not grant the application by W to extend time so that a claim may be pursued against Z Limited. The claim against Y remains to be dealt with by the Employment Relations Authority and the Senior Support Officer will organise a telephone conference to set that matter down for an investigation meeting.

## **Costs**

[50] I reserve the issue of costs. I understand from Mr Shingleton's submission that W is legally aided and agreement may be able to be reached on that matter.

Helen Doyle  
Member of the Employment Relations Authority