

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** John Welten (Applicant)  
**AND** ABB Limited (Respondent)  
**REPRESENTATIVES** Electrical Workers Union for Applicant  
Kylie Dunn for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**DETERMINATION ON PAPERS** Submissions received 14 July & 21 July 2006  
**DATE OF DETERMINATION** 2 August 2006

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

On 25 May 2006 Mr Welten lodged a problem with the Authority alleging he was unjustifiably constructively dismissed from his employment with the respondent on 23 May 2003.

The respondent claims the applicant has commenced his alleged grievance in the Authority more than 3 years after he raised it pursuant to s.114 (1) of the Act and that pursuant to the provisions of s.114 (6) of the Act he is out of time to have his grievance dealt with by the Authority.

The applicant submits he commenced his grievance in the Authority within the 3 year period allowed pursuant to s.114 (6). In the event the Authority finds otherwise, the applicant asks the Authority exercise discretion pursuant to s. 219 and/or s.221 to extend the time allowed to the applicant to commence his claim in the Authority.

The parties have agreed that the preliminary question relating to whether or not the applicant commenced his claim in the Authority within 3 years of the date he raised his grievance with the employer and the application for an extension of time will be determined by the Authority having regard to written submissions of the parties.

**Background**

Mr Welten was employed by ABB Ltd as a Senior Field Service Engineer, for a period of approximately 5 years from July 1998 until he resigned his employment with effect from 23 May 2003.

His letter of resignation was dated 17 April and stated:

**“It is with great disappointment that I hereby give notice of my resignation from my position with ABB as at 5 pm on 23 May 2003. This difficult decision comes as the result of the continuing lack of support on a number of important issues and concerns including serious health and safety matters, and repetitive breaches of my employment contract. As a further consequence, I am also considering taking legal action”.**

As I understand it the employer did not provide a formal written response this letter. However, I understand that Mr Welten left his employment on 23 May 2003 in accordance with the notice given.

On 29 August 2003 Mr Welten wrote to the HR Manager of ABB (Peter Henderson) as follows:

*“As indicated in my resignation letter dated 17 April 2003, and subsequently re-iterated during my aborted exit interview, I wish to re-confirm my intention to pursue a personal grievance claim against ABB. This claim for constructive dismissal and unnecessary and preventable workplace stress, results from a number of breaches of duty by ABB, including lack of appropriate action on many important issues and concerns raised repeatedly by myself, and repetitive breaches of my employment contract.”*

*Please advise a date on which you will be available to meet with myself and my legal representative”.*

On 9 September, Mr Henderson replied to Mr Welten’s letter. He advised:

**“Thank you for your letter of 29 August. I am surprised at its contents. I do not wish to meet with you and your legal representative”**

Despite this rather blunt and negative response the respondent met with Mr Welten in mediation on December 2003. Matters were not resolved at that meeting.

## **Legal Considerations**

Section 114 of the Act deals with the raising of a personal grievance.

S.114 (1) & (2) of the Act provide:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) & (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, which ever is the later, unless the employer or a representative consents to the personal grievance being raised after the expiration of that period.*
- (2) For the purposes of subsection (1), 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.*

Section (3) of s.114 outlines a provision enabling an employee to apply to the Authority for leave to raise a grievance out of time (where the employer does not consent to a grievance being raised out of time) and sections 114 (4) & 115 set out the criteria to be considered by the Authority in determining such applications.

Section 114 (6) provides:

**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.**

*Sections 219 & 221 of the Act give the Authority and the Court (within their respective jurisdictions) discretion to extend time limits/validate things done informally (s.219) and to make orders that will enable the effectual disposal of any matter according to the substantial merits and equities of the case and allows (subject to s.114 (4)) a discretion to extend the time within which anything is or may be done (s.221(c)).*

### *Applicant's Submissions*

*It is submitted for the applicant that he has raised not one but several grievances over time.*

- *The first grievance was raised on 17 April 2003 when the applicant resigned his employment.*
- *The second grievance was raised on 20 May 2003 at an interview with Peter Henderson (HR Manager).*
- *The third grievance was raised on 29 August 2003 by letter to Mr Henderson.*
- *The fourth grievance was raised in mediation on 17 December 2003.*

*However, it is the applicant's position that up to 9 September 2003 the grievance had not been raised with the employer in a manner that made the employer aware the applicant had a grievance which the applicant wanted the employer to address. The applicant relies on the statement of surprise in Mr Henderson's letter to the applicant of 9 September as evidence of the fact that at that date the employer had still had not been made aware of Mr Welten's grievance and the fact that Mr Welten wanted ABB to address his grievance. While the point is not made in Mr Welten's submissions on the point, it appears the applicant is relying on an earlier letter to the Authority (dated 16 June 2006) where it is submitted that it was not until the parties attended mediation on 17 December 2003 that the applicant was able to discuss his grievance with the respondent.*

*In the event that the Authority does not accept that Mr Welten has commenced his personal grievance in the Authority within the time frame allowed pursuant to s.114 (6) of the Act, the Authority is requested to allow an extension of time pursuant to sections 219 and/or 221 of the Act. The trauma suffered by Mr Welten as a result of his grievance and the absence (from Mr Welten's employment agreement) of a plain language explanation of the process for resolving employment problems are cited as grounds for allowing an extension of time pursuant to SS. 219 or 221.*

### *Respondent's Submissions*

*It is the respondent's position that the applicant first raised his grievance with the respondent on 17 April 2003 when he resigned his employment with the respondent. If there were any doubt on this point it is clear it was raised at Mr Welten's exit interview with Mr Henderson on 20 May 2003.*

*The respondent relies on the applicant's letter of 29 August 2003 in support of its submissions on this point. In that letter Mr Welten was adamant that he had raised his grievance with the respondent on 17 April 2003 and that he had reiterated it on 20 May to Mr Henderson. The respondent submits this was an important issue for Mr Welten at the time in order to establish the had raised his grievance within 90 days pursuant to the provisions of s.114 (1) of the Act.*

*The applicant now submits he raised he grievance on four occasions between 17 April and 17 December 2003.*

*The respondent notes that the time frame for meeting the requirements of s.114 (6) commences when the grievance is first raised with the employe. Subsequent restatements of a grievance relating to the same set of facts do not restart the three year time period. If this were the case employees could have an indefinite period to commence action in the Authority. This is clearly not the intention of s.114 (6) of the Act.*

*It is also the respondent's position, that Mr Henderson's expression of surprise (letter to Mr Welten dated 9 September 2003) does not show that Mr Henderson was unaware of Mr Welten's grievance at that date. The Authority is asked to have regard to the large amount of correspondence between the applicant and respondent leading to Mr Welten's resignation as evidence that the respondent was aware that Mr Welten was raising a grievance and that it knew the substance of that grievance.*

*In respect to Mr Welten's application to have the time extended (pursuant to the provisions of sections 219 & 221) to allow Mr Welten's claim to be addressed by the Authority the respondent notes that the reliance by the applicant on the 'exceptional circumstances' provisions of s.115 is irrelevant to the application as this is not an application to grant leave to raise a personal grievance outside of the 90 day period (s.114 (1)). In this regard it is noted that the respondent accepts the applicant raised his grievance within 90 days.*

*The respondent notes the applicant has provided no explanation for the extraordinary delay in commencing his action in the Authority.*

*It is also the respondent's position that ABB would be seriously prejudiced if Mr Welten were to be allowed to commence his action out of time because key management personnel are no longer employed by ABB, and at least one of these persons is overseas.*

## *Discussion & Findings*

*The Act sets time limits on the raising of a personal grievance (90 days) and the commencement of action in the Authority (3 years). This is to ensure that matters are progressed diligently and within a timeframe that will allow employment relationship problems to be disposed of promptly. Where there are inordinate delays in raising and commencing personal grievance proceedings there will be a real possibility of prejudice to an employer defending a claim due to the lapse of time, loss or disposal of relevant documentation and key witnesses moving on.*

*In this case Mr Welten wrote to his former employer on 29 August 2003 and clearly asserted he had raised his grievance with ABB on 17 April and that he had reiterated it verbally on 20 May.*

*If this were a case where the respondent was disputing whether a grievance was raised on 17 May 2003 I might have upheld that submission because at that date Mr Welten said only that he was considering taking legal action.*

*However, this is not a case where I am being asked to decide if Mr Welten raised his grievance within 90 days. On 29 August 2003 Mr Welten asserted had raised his grievance on 17 April and reiterated it again on 20 May 2003. The respondent accepted that Mr Welten had raised his*

*grievance and attended mediation on 17 December to discuss the claim. I note too, that the grievance has always encompassed the same set of facts and it is not the case that the applicant has raised four grievances with the respondent on various dates including dates in August and December 2003. It is not open to applicants to cherry-pick dates to suit themselves. To support such an approach would, in this case, call for me to ignore the facts, including the assertions in Mr Welten's own letter to the respondent dated 29 August, the fact the respondent accepted the submission of grievance and attended mediation to discuss it and the intention of the time limit provided in s.114 (6) of the Act.*

*As a result, I find that Mr Welten raised his grievance with his employer at the latest on 20 May 2003. He did not commence his action in the Authority until 25 May 2006. The Authority has no discretion under s.114 (6) to allow Mr Welten to commence his claim in the Authority and he is therefore barred by the provisions of this section from having his grievance dealt with by the Authority.*

*In the event of this finding, the applicant asks that I exercise the discretion available to the Authority (pursuant to the provisions of sections 219 and/or 221) to allow him an extension of time to commence his action in the Authority.*

*An application for validation of a past error or defect is probably best considered pursuant to S.219 of the Act. The Authority's discretion in the matter is wide and should be exercised judicially having regard, among other things, the extent of the delay and the reasons for it, the merits of the case and to the question whether prejudice will be suffered by the other party if the time for commencing the action sought is extended.*

*In this case I note, that while the applicant commenced his claim in the Authority within days of the expiry of the three year limitation there has been no explanation for the failure to commence proceedings within 3 years. I note that the applicant appears to have had representation throughout.*

*It is simply not possible to assess the merits of the case. Mr Welten's claims are multitudinous encompassing almost every aspect of this 5 year employment with ABB. The Authority is also hampered by the fact that no Statement in Reply has been lodged. Nor is there any other documentation that would assist in providing a balanced view of the merits of the case.*

*The respondent on the other hand has explained the prejudice it will suffer if leave to commence his action is granted to Mr Welten. I accept the respondent's submissions that the departure of critical management personnel from the company will prejudice its defence to Mr Welten's claim were I to allow the application.*

*On balance, given the absence of any explanation for the failure to commence his proceedings within 3 years and the prejudice the employer will experience in defending a matter of enormous breadth I do not consider it appropriate to exercise discretion pursuant to s.219 to grant leave to Mr Welten to commence his claim in the Authority.*

*The application cannot be granted pursuant to s.221 because leave to extend time pursuant to this section requires that the matter be properly before the Authority and Mr Welten's claim is*

*not properly before the Authority (Neil Jonathon Roberts v Commissioner of Police AC 33/06 unrept.) I note too (in this regard) that the reference in s. 221 (c) of the Act to s. 114 (4) does not open the door to Mr Welten to argue that the exceptional circumstances provisions of s.114 (4) and s.115 should be considered be me in determining whether an extension of time should be granted in the circumstances. That reference is a reminder that s. 221 (c) must be read in light of the grounds on which the Authority may grant leave to raise a grievance out of time. The ‘exceptional circumstances’ argued for Mr Welten are irrelevant to my consideration of Mr Welten’s application pursuant to s.122 of the Act for an extension to the time limit set in s.114 (6) of the Act.*

#### *Determination*

*Mr Welten did not commence his personal grievance claim in the Authority within 3 years of raising the grievance with his former employer. He is therefore barred from having his grievance dealt with by the Authority.*

*Mr Welten’s application, pursuant to s. 219 and/or 221, for an extension of time to commence his claim in the Authority is declined.*

*As a result the Authority declines to take further action in respect to Mr Welten’s claim.*

#### *Costs*

It does not appear either party is seeking costs in this preliminary matter. If I am wrong then costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott  
Member of Employment Relations Authority