

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 397/10
5078408**

BETWEEN REBECCA BALL
applicant
AND HEALTHCARE OF NEW
ZEALAND LTD respondent

Member of Authority: James Wilson
Representatives: Kevin Murray for the applicant
Carolyn Heaton for the respondent
Investigation Meeting: Determined on the papers
Submissions received: 4 May 2010 from the applicant
28 April 2010 from the respondent
Determination: 3 September 2010

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

The issue for determination

[1] On 12 February 2010 the applicant in this matter, Rebecca Ball, filed a statement of problem in the Authority alleging that she has a personal grievance against the respondent, Healthcare of New Zealand Ltd. (HCNZ). In a statement in reply HCNZ says that Ms Ball first raised that personal grievance with them on or about 15 December 2006 and that she is therefore precluded by section 114(6) of the Employment Relations Act (the Act) from pursuing a claim in the Authority.

[2] The sole issue for determination at this point is whether or not Ms Ball should be able to pursue her claim.

The Statutory provisions

[3] Section 114 of the Act sets out the requirements on an employee who wishes to bring a personal grievance against their employer. That section sets out the time frames in which an employee must raise their grievance with their employer and subsequently pursue that grievance in the Authority. In particular:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (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, whichever is the later,

(2) For the purposes of subsections (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 representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

(3)...

(4)...

(5)...

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this section.

A brief history

[4] During the second half of 2006 Ms Ball raised a number of concerns with her employer regarding her feeling unsafe in the workplace. Although the exact dates on which these concerns were raised is a little unclear, on 22 January 2007 HCNZ's Service Manager, Ms Anna O'Connor, wrote to Ms Ball saying:

I met with you several times last year (13 and 18 December 2006) following concerns that had been raised by several parties including yourself, regarding: feeling unsafe whilst working with one of HCNZ's clients. At these meetings I requested that you put your concerns in writing so that I was able to investigate more fully some of the issues you are facing as an employee.

As a way of maintaining your safety you were removed from working with the client concerned, but retained your other clients.

[5] HCNZ say that in raising these concerns (i.e. regarding her safety at work) Ms Ball raised a personal grievance. They say that the statutory time frame for pursuing that grievance should start, therefore, from December 2006.

[6] In the same letter to Ms Ball, dated 22 January 2007, Ms O'Connor said:

A further meeting was booked for early in the New Year (10 January 2007) to discuss your employee citizenship with HCNZ. The agenda was to have covered signing your employment contract (as we have not got one on file, although I note 2 have been sent out, and you have stated that you returned one), the performance appraisal processes and to meet with the coordinator who would be your main contact in terms of work with HCNZ.

I understand that you were not confident enough to attend this meeting on your own.

Since that time I have contacted you via phone (12 January 2007) to discuss the reasons why you are unable to attend the meeting and have followed this up with an e-mail stating that I and/or my manager would be happy to meet with yourself and a support person/agent of your choosing....

As at today's date I have yet to receive a response to any of the correspondence that has been sent (via e-mail or letter). We do not have a signed employment agreement and do not have a record of a phone number or residential address that you can be reached at despite having requested this information.

*...
If I do not hear from you by 30 January 2007 advising of when we are able to meet to cover the agenda items as per our intended meeting on 10 January 2007, I will consider this misconduct and will need to follow due process according to Healthcare NZ policies and procedures.*

[7] Ms Ball did not respond to Ms O'Connor's letter and on 5 February 2007 Ms O'Connor wrote again saying:

The letter referred to above was couriered to your address. The tracking system indicates that this was collected and I assume you received this correspondence. Within the letter it was stated that a response was required by 30 January 2007, in order to avoid further disciplinary action.

This new letter invited Ms Ball to a meeting to be held on the 16 February as the first step in the Company's disciplinary procedure. However prior to that date Ms Ball approached the Department of Labour mediation service and on 12 February 2007 the parties attended mediation. Regrettably they were unable to resolve the outstanding issues.

[8] Ms Ball, through the submissions of her advocate, argues it was by contacting the mediation service, (on 5 February 2007) and/or subsequently attending mediation, (on 12 February 2007) that Ms Ball raised a personal grievance with her employer in accordance with section 114.

[9] Following the unsuccessful mediation HCNZ recommenced its disciplinary process by requesting Ms Ball to attend a meeting on 13 March 2007. Ms Ball did not attend that meeting and in a letter dated for 15 March 2007 she was advised:

Given that you have not attended this meeting (of 13 March 2007) and the meetings previously arranged on the 22 January, and 5 February 2007 without providing a suitable reason to your employer for non-attendance, a preliminary decision has been made after careful consideration by Healthcare NZ that your employment will be terminated as of Friday, 23 March 2007, if we do not hear from you.

[10] Ms Ball did not contact her employer as requested and was dismissed in accordance with the letter of 15 March 2007.

[11] HCNZ says, and Ms Ball does not dispute, and that they heard nothing further from Ms Ball until she filed her statement of problem in the Authority in February 2010.

[12] In late March 2007 Ms Ball approached the Department of Labour to express some concerns regarding the way the mediation in February 2007 had been conducted and seeking copies of information held on the Department's file. It appears that at the Department's instigation, HCNZ were approached (on or about 29 March 2007) regarding the possibility of attending a further mediation, but declined to do so. Ms Ball was then advised, according to the Departments records (as supplied by Ms Ball's advocate) that she was entitled to pursue her grievance in the Authority. In July 2007 Ms Ball again approached the Departments mediation service seeking information from the Departments file.

[13] Ms Ball does not appear to have taken any further action in respect to her alleged grievance until October 2009. However on 20 October 2009 she met with two representatives of the Department of Labour. Following that meeting the mediation service made contact with HCNZ and subsequently advised Ms Ball that:

The individual responsible for representing the company at mediation is no longer employed by them and neither the Head Office Human Resources contact nor the current Auckland branch manager had any relevant information to hand about your employment or your dismissal. The Auckland manager has, however, agreed to do a further search of her files to see if any information about your employment comes to light.

[14] Following the meeting with the mediation service Ms Ball, at 4:58 PM on 20 October 2009 contacted the Authority by phone. The Authorities file indicates that Ms Ball enquired about how bringing a case to the Authority. Following this call Ms Ball was sent an information pack which included a **Fact Sheet** entitled **Taking a Personal Grievance**. This fact sheet included the following statement:

Three-year limitation period on personal grievances

Employees may not start a personal grievance action in the Employment Relations Authority or the Employment Court more than three years after they have raised it with the employer.

[15] Significantly Ms Ball says that she had been advised, at some unspecified time during this three-year period, by a staff member at the mediation office, that the commencement date of the three-year timeframe was from the date upon which it had been lodged with the mediation service. (Refer letter from Keith Shaw, 8 March 2010.)

[16] On 12 February 2010 Ms Ball filed a Statement of Problem in the Authority. This statement indicated that Ms Ball's problem related to:

Health and safety issues. I worked as a support person to one client for one year and a half with Healthcare NZ when my employer had given (me?) another client to take shopping and clean the house. I had clear reasons to discuss my concerns of the placement under this client. I felt at risk to my personal safety and this was clearly not addressed by my employer.

[17] In a statement in reply filed on 5 March 2010, HCNZ pointed out that Ms Ball's statement of problem had been filed in the Authority more than three years after the date on which the grievance was raised (being 15 December 2006). HCNZ submitted that the Authority should not exercise its discretion under section 219(1) of the Act to extend the time limit imposed by section 114(6).

[18] On 24 March 2010 I issued a minute requesting that the parties file submissions in support of their respective positions.

[19] On 23 April 2010 Mr Murray, on behalf of Ms Ball, filed what appears to be an additional statement of problem and an application and submissions requesting that the Authority extend the time in which Ms Ball should be allowed to pursue her applications in the Authority. The new/amended statement of problem, raised for the first time, the allegation that Ms Ball had been unjustifiably dismissed.

[20] On 28 April 2010 Ms Heaton, for HCNZ filed submissions in opposition to Ms Ball's various applications, including pointing out that, prior to Mr Murray's submissions of 23 April 2010 no allegation of unjustified dismissal had previously been raised.

Legal considerations

[21] In a case explicitly addressing the question of the discretion of the Court or the Authority to extend the three-year time limit in section 114(6), Chief Judge Colgan said in *Roberts v Commissioner of Police* (AC 33/06, 27 June 2006):

[19] On its face, section 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 in this Court within the statutory period of 28 days following their issue. As a discretionary power, the Court applies 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 section 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 limitations act 1950.

[20] So even if, contrary to my conclusion, Mr Roberts had been out of time for issuing his proceedings, it would have been open to the Authority to extend the time for doing so if he had met the requisite discretionary tests.

[22] In *Stevenson v Hato Paora College* [2002] 2 ERNZ 103 Judge Shaw in the Employment Court said:

There are well established principles for the exercise of the Court's discretion to make orders extending time. The jurisdiction is derived from section 219 of the Employment Relations Act 2000 which, apart from a style change, is identical to s.138 of the Employment Contracts Act 1991. The principles which were established pursuant to s.138 and a number of authorities of this Court were summarized by Chief Judge Goddard in Day v. Whitcoulls Group Ltd [1997] ERNZ 541. The overriding consideration is the justice of the case. The following matters, where relevant, are material to the exercise of the discretion:

- 1. The reason for the omission to bring the case within time.*
- 2. The length of the delay.*
- 3. Any prejudice or hardship to any other person.*
- 4. The effect on the rights and liabilities of the parties.*
- 5. Subsequent events.*
- 6. The merits.*

These principles were confirmed by the Court in *An Employee v An Employer* [2007] ERNZ 295 and *Clear v Waikato District Health Board* [2007] ERNZ 338.

Unjustified dismissal grievance

[23] Prior to the filing of Ms Ball's second statement of problem in April 2010 she had not raised a personal grievance with her employer in respect to her dismissal and it is arguable that she has not done so by the filing of that statement of problem. In any event HCNZ have not consented to Ms ball raising that grievance outside of the 90 day statutory period provided for in s.114(1). I have received no application from Ms Ball in terms of section 114(3) of the Act for leave for her to raise her personal grievance out of time. Nor have I received any submissions from Mr Murray as to any exceptional circumstances which may have existed which precluded Ms Ball from raising a grievance within the required timeframe.

[24] Unless or until Ms Ball files an application in terms of section 114(4) it is not appropriate that I make any comment regarding whether or not leave to pursue that grievance is likely to be granted. Should she file an application for leave, HCNZ will be given an opportunity to comment on the matter in accordance with that subsection.

Extension of time to commence action in the Authority

When was Ms Ball's grievance raised with her employer?

[25] HCNZ say that Ms Ball first raised her concerns regarding her safety in the latter part of 2006 and that this constituted her raising a personal grievance. They point to the meetings on the 15th and 18th of December 2006 which, they say, were held in response to Ms Ball *raising her concerns regarding: feeling unsafe whilst working with one of HCNZ's clients*. Regrettably there appears to be neither formal nor written record of Ms Ball raising her concerns, or of the meetings.

[26] It is arguable that Ms Ball did not in fact raise a grievance with her employer at all -- at least not to the standard required by section 114(2) of the Act. However HCNZ have accepted that she did so. I think there can be no doubt that, accepting that Ms Ball did raise a grievance, she did so not later than 18 December 2006.

[27] I turn now to consider Ms Ball's request that I use my discretion, in terms of s.219 of the Act to extend the time in which she is able to pursue her grievance in the Authority. I do so in terms of the principles, as far as these are applicable, set out in *Day v Whitcoulls Group*.

The reason for the omission to bring the case

[28] Mr Murray says that Ms Ball believed that, based on advice she received from the Department of Labour, she had three years to commence proceedings from the date of mediation. As mediation occurred on 12 February 2007 her filing of a statement of problem on 12 February 2010 was within the three-year timeframe.

[29] It is not at all clear what advice, if any, was given by the Department Labour regarding the three-year time limit for pursuing a grievance in the Authority. However even if I accept that Ms Ball was misinformed, that misinformation was corrected not later than October 2009 when she received information from the Authority which clearly spelt out the requirement to file her application within three years of raising a grievance with her employer. Had she done so immediately she would have been well within the three-year time limit. I do not therefore accept that any incorrect information provided to Ms Ball was a factor in her not filing her statement of problem within the time required by the statute.

[30] In his submissions Mr Murray says that Ms Ball had received death threats from a client and sought assistance from her employer by requesting them to remove her immediately from that workplace. He says Ms Ball was in fear of her life because of these threats and the belief that the client was capable of carrying out those threats. He says that she commenced a course of action including regularly changing her place of abode and refusing to give her address to government agencies. Although it is not clear from his submissions, Mr Murray appears to suggest that although these threats occurred while Ms Ball was still employed by HCNZ (in 2006) the traumatic effect continued well after she had left her employment. Unfortunately Mr Murray offers no evidence as to the extent, duration or impact of these events on Ms Ball or why she was unable to file an application in the Authority. As early as March 2007 Ms Ball was able to approach the Mediation service in person and discuss her concerns regarding the mediation process. In October 2009 she was able to meet with representatives of the department to discuss the mediation process and was advised at that time of the process (and time limitations) for filing a statement of problem in the Authority.

[31] I find that the reasons proffered by Ms Ball for not pursuing an action in the Authority do not provide sufficient cause for her not to do so.

The length of the delay

[32] Accepting that Ms Ball raised a grievance with her employer in December 2006 the filing all her statement of problem in the Authority on 12 February 2010 was some two months outside of the statutory limitation. Under the circumstances this delay is unlikely by itself, to have made any significant difference to the granting of an extension of time. As it happens other factors have weighed more significantly in my consideration of this matter.

Any prejudice or hardship to any other person?

[33] HCNZ says, and I accept, that the senior managers involved in both dealing with Ms Ball's original grievance and her later dismissal have left the company and that HCNZ would face very real prejudice in trying to defend itself against Ms Ball's allegations. While these concerns are of course a matter to weigh in my considerations, it must also be said that Parliament clearly accepted the possibility that an employee may wish, and was entitled, to pursue a grievance against their employer for up to three years (plus 90 days) after they perceived that a grievance had arisen. Ms Ball is only a few months outside of the statutory timeframe and the prejudice to HCNZ is unlikely to be greater than it would have been had she pursued her claim within, but at the end of, the statutory timeframe.

The effects on the rights and liabilities of the parties

[34] Should I refuse to grant the extension of time Ms Ball is seeking it could be said that she will lose her right to pursue a grievance. It can equally be said that Parliament deliberately circumscribed those rights by the imposition of the statutory time limits set out in section 114. On the other hand it can be said that, should I allow the extension, HCNZ will be exposed to a potential liability of which until recently they were unaware and which in any event had been extinguished with the passage of time in accordance with the limitation set out in section 114(6).

Subsequent events

[35] I have already outlined above the fact that Ms Ball felt sufficiently confident to raise concerns regarding the mediation process with the Department of Labour and, by October 2009, attend a meeting with representatives of the Department. Also in October she was advised of the requirement that she must pursue her case in the Authority within three years of raising a grievance with her employer. These events are, in my assessment, significant and suggest that by October 2010, Ms Ball was aware of the time limitations and sufficiently recovered from any emotional trauma she may have suffered to undertake the relatively simple step of filing an application in the Authority.

The merits

[36] Other than the short statement in her Statement of Problem to the effect that her employer had failed to provide her with a safe workplace, Ms Ball has provided very little on which to base an assessment of the merits of her case. Correspondence provided by HCNZ would suggest that in fact the company attempted to address the issues she raised by removing her from the situation and asking that she provide further written information regarding her concerns to allow HCNZ to properly investigate them. Regrettably other events overtook the situation and HCNZ were not able to properly consider and respond to this Ball's concerns before she was dismissed. Had the Authority had an opportunity to investigate Ms Ball's employment relationship problem there would no doubt have been evidence regarding the link between Ms Ball's concerns about her safety and her subsequent refusal to attend meetings with managers which eventually led to her dismissal.

[37] Based on the scanty evidence before me I can only say with any certainty that Ms Ball has an arguable case. Any assessment beyond that would require speculation and would be inappropriate.

The overall justice

[38] I accept that Ms Ball suffered a good deal of stress and anxiety as a result of circumstances which may or may not have been within the control of her employer. I also accept that she believed that her employer should accept some responsibility for not protecting her from the events that caused that stress and anxiety. For reasons which have not been clearly enunciated to me by either Ms Ball or her advocate she failed to prosecute the claims against her employer within the time frame set out in the legislation. As detailed above I have found that Ms Ball's actions in October 2009 suggests that she had sufficiently recovered from her traumatic experiences to be capable of filing an application in the Authority and that by that time she was aware of the three-year time limit in which she had to do so. Under the all the circumstances I find that on balance the overall justice of this matter is against granting the extension of time which Ms Ball seeks.

Determination

[39] For the reasons set out above Ms Ball's application for an extension to the 3 year statutory timeframe time for her to pursue her personal grievance against her former employer, Healthcare of New Zealand Ltd, is declined.

Costs

[40] Costs are reserved and the parties are requested to attempt to resolve this issue between themselves in the first instance. If they are unable to do so HCNZ, should they wish to pursue costs, may file and serve submissions within 28 days of the date of this determination. Ms Ball will then have 14 days in which to file a response. I will not accept submissions outside of this timetable without leave.

James Wilson

Member of the Employment Relations Authority