New Zealand Employment Relations Authority Decisions

Faga v New Zealand Aluminium Smelters Limited (Christchurch) [2017] NZERA 1214; [2017] NZERA Christchurch 214 (11 December 2017)

Last Updated: 2 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 214

3009592

BETWEEN IONA FAGA Applicant

NEW ZEALAND ALUMINIUM SMELTERS LIMITED

AND Respondent

Member of Authority: Representatives:	Andrew Dallas Mary-Jane Thomas, Counsel for the Applicant	
	Geoff Carter and Jeremy Upson, Counsel Respondent	for the
Investigation Meeting:	On the papers	
Submissions:	21 August 2017 for the Applicant 11 September 2017 for the Respondent	
Determination:	11 December 2017	

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. **Iona Faga's claim for arrears of holiday pay is barred by s 142 of the Employment Relations Act 2000.**

B. Costs are reserved. Employment relationship problem

[1] Iona Faga was employed as an operator by New Zealand Aluminium Smelters Limited (NZAS). NZAS operates a smelter at Tiwai Point, Southland. Mr Faga's employment was governed by a series of employment agreements including an individual employment contract entered into by the parties in 1991.

[2] During the 1990s, NZAS moved from 8 to 12 hour shifts. Due to the continuous nature of the roster, employees were sometimes required to work on statutory holidays. A dispute arose about how NZAS was accruing days in lieu of statutory holidays. NZAS calculated leave in hours and credited employees with 8 hours for each day in lieu. When a holiday was taken, the employee's leave balance was debited by the number of hours that would otherwise be worked. So, employees were being credited with 8 hours for each statutory holiday worked but having their leave balance deducted at 12 hours (the length of their shift) for each day taken as leave. Expressed another way, employees were using the equivalent of 1.5 days in lieu to take one day's leave.

[3] The Authority determined the claim in *Weller and Others v New Zealand Aluminium Smelters Limited*1 in favour of a group of workers who argued each day in lieu was a whole day regardless of the number of hours which might otherwise be worked. Mr Faga, whose employment terminated in 31 October 2008 due to ill health, was not one of the 64 applicants to the proceeding commenced in the Authority or subject to any negotiated settlement arising out of confirmation of the Employment Court's judgement. 2

[4] Mr Faga had a materially similar clause in his agreement to that which was at issue in the litigation. This clause relevantly provided:

ANNUAL LEAVE

The basic annual leave provision for monthly paid staff on daywork is at the rate of four weeks per annum which becomes due each year on the anniversary of your date of appointment. This leave must be taken in the twelve months after it becomes due unless deferred by special approval of management. Statutory holidays are additional to annual leave for staff on daywork.

Alternatively, the annual leave provision for monthly paid staff on a shift roster that involves working statutory holidays, is at the rate of either 20 paid days leave per annum for a 20 shift per four weeks roster, or 21 paid days leave per annum for a 21 shift per four week roster. Additionally, shift staff as above shall accrue a day's leave in lieu of a statutory holiday as it occurs.

1 *Weller and Others v New Zealand Aluminium Smelters Limited* [2013] NZERA Christchurch 75

2 See, *New Zealand Aluminium Smelters Limited v Weller and Others* [2016] [2016] NZCA 19 and *New*

Zealand Aluminium Smelters Limited v Weller and Others [2016] NZSC 44

[5] Mr Faga lodged a statement of problem in the Authority on 5 May 2017 seeking arrears of holiday pay from NZAS based on the outcome of the Court's decision in Weller, which was an unsuccessful de novo challenge by NZAS to the Authority's determination.

The Authority's Investigation

[6] As part of its reply to Mr Faga's application, NZAS filed a strike-out application relying on s 142 of the Employment Relations Act 2000. However, during a case management conference convened with counsel, it was agreed to set aside the strike out application and deal, as a preliminary issue, with the question of whether s 142 (read in conjunction with s 131) operates to prevent Mr Faga's bringing a claim for holiday pay arrears.

[7] The parties, who provided relevant documents and submissions through counsel to the Authority, were content to have to matter heard on the papers.

S**ubmissions of the parties**

Mr Faga

[8] Mr Faga said based on the Court's judgment, NZAS did not have a defence other than limitation. Mr Faga advanced three arguments about limitation.

[9] First, he submitted the Authority had discretion under s 219 to extend time, in proper cases, under s 142. Section 142 of the Act relevantly provides:

142 Limitation period for actions other than personal grievances

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[10] The term "employment relationship problem" is defined in s 5 of the Act as:

employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

[11] Secti**o**n 219 of the Act relevantly 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.

[12] Second, Mr Faga submitted, in the alternative, that his was a "late knowledge claim" under s 14 of the Limitation Act 2010, which could, therefore, proceed in the Authority. The recognition of late knowledge claims appears to be statutory expression of the common law "knowledge/imputed knowledge test", which the Supreme Court found did not apply in New Zealand.3

[13] A review of s 14 of the Limitation Act discloses it provides:

14 Late knowledge date (when claimant has late knowledge) defined

(1) A claim's **late knowledge date** is the date (after the close of the start

date of the claim's primary period) on which the claimant gained

knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of all of the following facts:

(a) the fact that the act or omission on which the claim is based had occurred:

(b) the fact that the act or omission on which the claim is based was

attributable (wholly or in part) to, or involved, the defendant:

(c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had

suffered damage or loss:

(d) if the defendant's liability or alleged liability is dependent on the

claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:

(e) if the defendant's liability or alleged liability is dependent on the

act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that

the act or omission on which the claim is based is one that was

induced by fraud or, as the case may be, by a mistaken belief.

(2) A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the

claimant neither knew, nor ought reasonably to have known, all of the facts

specified in subsection (1)(a) to (e).

(3) The fact that a claimant did not know (or had not gained knowledge), nor ought reasonably to have known (or to have gained knowledge), of a

particular fact may be attributable to causes that are or include fraud or a mistake of fact or law (other than a mistake of law as to the effect of this Act).

[14] Third, Mr Faga submitted NZAS had admitted liability for arrears of holiday pay in communications to him. He said this brought his claim within the ambit of s 47 of the Limitation Act 2010 which should either influence the interpretation of s 142 by the Authority or encourage the Authority to exercise its power under s 219.

[15] Section 47 of the Interpretation Act 2010 relevantly provides:

47 Acknowledgment or part payment

(1) This section applies if the claimant proves that, after the start date of a

claim's primary period, longstop period, or Part 3 period, the defendant—

(a) acknowledged to the claimant in writing a liability to, or the right or title of, the claimant; or

(b) ...

(2) If this section applies, the claimant is deemed for the purposes only of this Act to have a fresh claim on the day after the date, or the latest of the dates, on which an acknowledgment or part payment was given or made.

(3) An acknowledgment or part payment of the kind specified in subsection

(1)—

(a) is binding on the defendant's successors; and

(b) may be given or made by the defendant or an agent of the defendant and to the claimant or an agent of the claimant.

(4) ....

NZAS

[16] NZAS said Mr Faga's claim for unpaid holiday pay crystallised on his last day of employment which was 31 October 2008 and he was required to bring his claim by

31 October 2014 to prevent it being time-barred by s 142 of the Act. 4

[17] NZAS said it has an absolute defence under s 142 of the Act to Mr Faga's claim for arrears of holiday pay under s 131. It submitted the six year limitation runs from the day the cause of action arose, being the last day of Mr Faga's employment with NZAS, rather than as a result of actual knowledge or reasonable discoverability arising out of the Employment Court's decision. NZAS said the common law "knowledge/imputed knowledge test" did not apply to s 142 of Act nor did the Limitation Act 2010 apply, including s 14 of that Act.

[18] NZAS submitted s 219 of the Act could not be used to extend the six year limitation under s 142. It said s 219 dealt with miscellaneous matters that were properly before the Authority (or Court) not those which were time-barred.

[19] NZAS submitted even if the Authority had discretion to extend the limitation period under s 142, the Authority should not do so because Mr Faga delayed bringing his claim for two and a half years after the limitation period expired and three years after the Court's judgment in *Weller*.

Evaluation

[20] Mr Faga's claim for arrears of holiday pay confronts three immediate, interrelated problems. First, the Court has held that s 142 of the Act governs limitation in respect of employment relationship problems in the employment jurisdiction.5

Second, the Court has said a claim for arrears of holiday pay is an "employment relationship problem"6 (and to which s 142 logically applies). Third, the Court has held the limitation for accumulated leave owing at the time of termination runs from the date of termination of employment.7

[21] The cumulative effect of these Court decisions effectively means s 142 covers the field in relation to the limitation question for employment relationship problems. Unfortunately, for Mr Faga this conclusion is also problematic for his second substantive submission, which, expressed as alternatives, sections 14 or 47 of the Limitation Act 2010 applied. However, it is clear s 14 of that Act, as attractive as it might be in the present circumstances, does not apply. Further, it also clear s 47 does not apply either. However, and in any event, I did not believe the evidence relied upon by Mr Faga in support of his submission in regard to the applicability of s 47 in the present – communications between solicitors for NZAS and his solicitor in response to his claim was an acceptance of, or expression of liability for, his claim. Rather on their face they seem more directed at rejecting his claim for arrears of holiday pay based on

a defence of limitation under s 142, which NZAS said was "absolute".

5 See, *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [77], *Haig* at [6] and

Pretorius v Marra Construction (2004) Limited [216] NZEmpC 95 at [43]

[22] As a further alternative argument, Mr Faga submitted the Authority should use its discretion under s 219 of the Act to extend the limitation under s 142 or as a basis for informing an interpretation of that section. In this regard, he relied on the Authority determination in *Rika v Beulah Services Limited8* where the time to extend the lodgement of a personal grievance beyond three years was granted.

[23] Limitation in relation to raising a personal grievance with employers and, subsequently, lodging with the Authority appears to be "carve out" from the limitation that applies to employment relationship problems under the Act. The requirement to raise a personal grievance within 90 days is not absolute.9 However, the factually specific determination in *Rika* relied upon by Mr Faga drew support from the Court's judgment in *Roberts v Commissioner of Police10* that held the

Authority could extend time under s 114(6) of the Act in respect of the lodgement of personal grievance claims within three years. The Court has expressed a contrary position in relation to s 142.

[24] NZAS submitted these broader approaches to limitation for personal grievance claims is recognition of the shorter timeframes for raising them with employers and lodging them with the Authority than more general employment relationship problems. I accept this submission.

[25] Finally, adopting the interpretative approach to s 142 with reference to s 219 preferred by Mr Faga would find the Authority falling into interpretative error by using procedural powers to alter a statutory requirement and, as a consequence, a substantive right, which by operation of that statutory requirement has been extinguished. For completeness, while not argued by Mr Faga, s 221 of the Act would not assist him in the particular circumstances of the case because the Court has found the discretion available in that section requires a matter to be before the Authority before the

discretion can be exercised.[11]

8 [2014] NZERA Auckland 250

9 Employment Relations Act, ss 114(3), 114(4) and s 115.

[26] In my view, Mr Faga could rightly feel aggrieved by the circumstances he has found himself in. Having believed NZAS was correctly applying the law in relation to his holiday pay, and relied on it to do, he subsequently discovers as a consequence of third party litigation this was not the case and he, through operation of s 142, has no effective remedy. The scheme of the Act means arrears claims under s 131 are not self- executing and, therefore, pro-active steps must be taken to enforce rights. However, if one is not even aware one has right to such a claim, s 142 is a blunt, but highly effective, tool in extinguishing what is not known to exist.

[27] It is clear from the circumstances of this case, the concept of limitation in the employment jurisdiction has not kept pace with either common law developments or legislative reform as reflected in the Limitation Act 2010, particularly the enactment of ss 14 and 47. However, any movement in this area is properly a matter for

parliament.12

Costs

[28] Costs are reserved. I understand Mr Faga may have had a grant of legal aid to bring his claim in the Authority. Consequently, the question of costs may be subject to the requirements of ss 45 and 46 of the Legal Services Act 2011.

[29] If a determination of the Authority is required on costs, NZAS may lodge a memorandum with 28 days of the date of this determination and Mr Faga would then have 14 days from the date of service to lodge a memorandum in reply. No submission on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas

Member of the Employment Relations Authority

12 As was previously observed by (then) Chief Judge Colgan in *Haig* at [113]
