IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 92
3013191

	BETWEEN	NEIL COLIN LORIMER Applicant
	AND	UNITED STATES EMBASSY Respondent
Member of Authority:	M B Loftus	
Representatives:	Neil Lorimer, on own behalf Alan Knowsley, Counsel for Respondent	
Investigation Meeting:	On the papers with final input on 25 September 2017	
Determination:	25 September 2017	

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] The applicant, Neil Lorimer, claims he was unjustifiably dismissed, albeit constructively, from his employment at the United States Embassy on 31 May 2012.

[2] The Embassy advises the employer should properly be identified as the Federal Government of the United States of America (the US Government). It says the claim cannot proceed for a multiplicity of reasons and should be struck out.

Background

[3] On 31 May 2012, and in the face of a prospect he would not survive a probationary period, Mr Lorimer tended a written resignation.

[4] Nothing further occurred until 16 June 2017 when Mr Lorimer lodged an application with the Authority in which he claimed his resignation was in fact a constructive dismissal.

[5] As already said the response is Mr Lorimer's ex-employer was the US Government. It says there are three possible reasons the claim cannot proceed.

[6] The US Government's prime argument is it has sovereign immunity and that gives absolute protection against the claim.

[7] Without prejudice to that argument the US Government says the grievance was not raised within 90 days as required by s 114(1) of the Employment Relations Act 2000 (the Act). It does not consent to a grievance being raised out of time.

[8] The US Government also notes s 114(6) of the Act. If, notwithstanding its contrary belief, there is evidence the claim was raised, the resulting action was not commenced in the Authority within the required three years.

Conduct of the investigation

[9] Having considered the US Government's reply I asked Mr Lorimer comment on the issues raised. I also advised that depending on his response I might determine the claim on the papers. That I chose to do and originally issued a determination on 18 September 2017.[1]

[10] An issue then arose about the immunity upon which the Embassy relied due to a letter from the Ministry of Foreign Affairs and Trade. It had commented on Article 22 of the Vienna Convention on Diplomatic Relations 1961 and the Diplomatic Privileges and Immunities Act 1968 and challenged the legitimacy of service on the Embassy.

[11] As a result I reopened the investigation[2] and sought further comment from Mr Lorimer. That has now been received and results in this determination which replaces the earlier one.

Determination

[12] The citation of the respondent raises a further possible issue. The claim, as lodged, identified the respondent as the United States Embassy. That is a physical edifice/location and was the place of employment. It is not a legal entity capable of

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[2] Section 4(1) of Schedule 2 to the Employment Relations Act 2000

being an employer and for that reason alone there might be grounds to dismiss the claim.

[13] As already said the respondent identifies itself as the Federal Government of the United States of America and says it is immune to the claim by virtue of sovereign immunity.

[14] Mr Lorimer's response is there should be a moral obligation on the US Government to entertain his claim. He then cites two instances where foreign nationals were prosecuted as examples. They were Mohammaed Rizzleman of the Malaysian Embassy and the French agents who sunk the Rainbow Warrior. Finally Mr Lorimer asks how can the Embassy say it is not bound by New Zealand employment law when it uses a New Zealander to administer its local employees?

[15] In considering the defence of sovereign immunity I am cognisant of a key decision on its effect in respect to employment by foreign governments under New Zealand law.[3] I note a finding the doctrine of sovereign immunity means a sovereign State cannot be prosecuted in New Zealand without its consent. The US Government has refused to give consent. I conclude it therefore has immunity against the claim.

[16] Mr Lorimer's arguments do nothing to persuade me otherwise. Even if there could be said to be a moral obligation the US Government consider the claim (and that is arguable) morality cannot trump accepted law. To that I add the fact the situation of the individuals Mr Lorimer uses as examples of why an action against foreign nationals can proceed were quite different. The Malaysian Government waived immunity in respect to Mr Rizzleman and the French agents never had diplomatic immunity in the first place. Finally I note the use of a New Zealander as HR manager does not alter the fact the employer is the US Government.

[17] The defence of sovereign immunity is absolute and for that reason alone Mr Lorimer's claim cannot proceed.

[18] Even if that were not the case the 90 day issue would undoubtedly prevent the claim from proceeding. Mr Lorimer does not dispute he failed to raise the claim until it was filed in the Authority. That is over five years after the resignation. It is

[3] *Governor of Pitcairn v Sutton* [1994] 2 ERNZ 492 (CA)

well beyond the 90 days specified in s 114(1) and as already said the US Government does not consent to the grievance being raised out of time.

[19] Mr Lorimer says the Embassy was aware he was dissatisfied. Even if that were the case there are certain minima that must be satisfied when bringing a claim. At the very least the nature of the grievance should be identified even if the remedies sought are not enunciated.[4] There is no evidence that occurred in this instance.

[20] Mr Lorimer also says he sought legal advice at the time and was incorrectly told he could not proceed more than 30 days after his resignation. Even if that is true there is no attempt to rectify the failure to initiate a grievance by making a remedial application pursuant to s 114(3) of the Act. There is not, therefore, a legitimate application before the Authority for it to consider.

[21] The fact the claim was not raised earlier means the effect of s 114(6) need not be considered. I do however observe that had it been relevant the failure to meet the requirements of s 114(6) would have formed another significant barrier to the claim proceeding.

Conclusion and Costs

[22] For the above reasons Mr Lorimer's claim cannot proceed. It is therefore dismissed.

[23] The US Government has advised it does not seek costs which shall therefore lie where they fall.

M B Loftus
Member of the Employment Relations Authority

[4] *Idea Services v Barker* [2012] ERNZ 454 at [34]-[40]