

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 47  
5528260

BETWEEN           ASHISH MAHARAJ  
                          Applicant

AND                   WESLEY WELLINGTON  
                          MISSION INCORPORATED  
                          Respondent

Member of Authority:    M B Loftus

Representatives:        Gregory Bennett, Advocate for Applicant  
                              Matthew Dearing, Counsel for Respondent

Investigation Meeting:   14 April 2016 at Wellington

Submissions Received:   At the investigation meeting

Determination:           14 April 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]    The applicant, Ashish Maharaj, seeks to pursue a claim for breaches of the Minimum Wage Act 1983 alleged to have occurred while he was engaged by the respondent, Wesley Wellington Mission Incorporated (Wesley), between August 2003 and June 2006.

[2]    Wesley seeks to have the claim dismissed on the grounds Mr Maharaj is precluded from pursuing it given a settlement pursuant to s149 of the Employment Relations Act 2000 (the Act) dated 14 December 2006. It also says the claim has been made beyond the six year period of limitation specified in s142 of the Act.

[3]    The parties agreed the question of whether or not Mr Maharaj could proceed be determined as a preliminary matter.

### **Citation of the Respondent**

[4] The claim, as initially filed cited the respondent as Wesley Community Action Trust. That has since changed and the citation has been amended by agreement.

### **Background**

[5] As already noted, Mr Maharaj was engaged by Wesley between 2003 and 2006. That said, and notwithstanding later events, there was at the time of cessation a dispute as to whether or not he was engaged as a contractor or an employee. Here it should be noted the Authority has, in the case of one of Mr Maharaj's colleagues who performed a similar role, found the relationship was that of employee and employer.<sup>1</sup> That said the issue is not being pursued by Wesley at present though it reserves the right to do so should he be allowed to proceed with his substantive claim.

[6] Mr Maharaj was tasked with caring for adolescent clients of Wesley in his home. As such he claims he was effectively working 24 hours a day, seven days a week, if only on call at times. It is that which gives rise to his arrears claim which, while couched in slightly different terminology, is, as Mr Bennett acknowledges, essentially a 'sleepover' type case (*Dickson v. Idea Services*<sup>2</sup> and *Law v. Board of Trustees of Woodford House*<sup>3</sup>).

[7] On 19 May 2006 Child, Youth and Family ceased funding care for the person then in Mr Maharaj's care. That led to discussions between Wesley and Mr Maharaj which resulted in advice his services could no longer be afforded and the arrangement was being terminated.

[8] Mr Maharaj challenged that decision and filed a statement of problem in the Authority on 21 August 2006. While the statement of problem primarily addressed a claim he had been unjustifiably dismissed it intimated there was also a wage arrears claim. In particular it states:

3. I, the applicant, would like the problem to be resolved in the following way:

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<sup>1</sup> *Dickson v Wesley Community Action Trust* ERA Wellington, WA137/07, 15 October 2007

<sup>2</sup> *Dickson v Idea Services Ltd* ERA Wellington, 5 September 2008, WA117/08 (and subsequent challenges / appeals)

<sup>3</sup> [2014] ERNZ 576

...  
 (b) *Arrears of wages (to be quantified); ...*

[9] Subsequent discussions between Mr Maharaj and Wesley resulted in agreement to settle his claim. The agreement was signed by Mr Maharaj and Wesley's counsel. It was in the form required by s.149 of the Act and was signed by a Labour Department Mediator (ss.149(1) and (3) of the Act) on 14 December 2006.

[10] Contained therein is a provision which reads:

*This Agreement represents a full and final settlement of any and all matters between the parties arising out of the relationship between the Applicant and Respondent. The parties will notify the Employment Relations Authority that the proceedings before it (file No. 5051428) are settled and for all purposes at an end, by virtue of this Agreement and should accordingly be withdrawn.*

[11] Mr Maharaj says he does not consider he was waiving his right to pursue the wage claim and he continued to raise it with Wesley. He says the response was effectively stonewalled on the grounds his claim had been settled. In 2010 he approached the Labour Inspectorate and asked it further the issue but it declined on the grounds the claim had been settled. He tried again in 2012 with the same result.

[12] Mr Maharaj subsequently approached Mr Bennett who wrote to Wesley on 15 September 2014 formally raising Mr Maharaj's arrears claim.

[13] Wesley responded on 10 October 2014 rejecting the claim on the grounds it had already been settled so Mr Maharaj lodged the claim with the Authority on 7 November 2014.

### **Determination**

[14] Having considered the evidence and submissions (particularly Mr Bennett's attempts to convince me otherwise) I conclude Mr Maharaj's claim faces two insurmountable impediments.

[15] The first is the s 142 defence. Section 142 reflects the provisions of more specific but equally applicable legislation - the Limitation Act 2010 and its predecessor, The Limitation Act 1950.

[16] The Limitation Act 2010 defines a money claim as including a claim for monetary relief under any enactment.<sup>4</sup> That is exactly what Mr Maharaj is attempting to do with the enactment in question being the Minimum Wage Act 1983.

[17] Section 11(1) provides:

It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's **primary period**).

[18] The defence is absolute and is available here as Mr Maharaj's claim could have arisen no later than 26 June 2006 (his date of cessation). He then had six years in which to file his application. He did not do so, at least as a specific claim with sufficient detail that Wesley knew what it was being asked to address. I use this terminology given the argument used by Mr Bennett to overcome the limitation impediments and which are outlined below.

[19] Nor can Mr Maharaj seek to apply a late knowledge period<sup>5</sup> due to his acquaintance with Mr Dickson's sleepover claim and the fact it was resolved in Mr Dickson's favour in 2008. Again this shall be explained later though it is probably irrelevant here as Mr Maharaj's cause of action arose before the 2010 Act came into force and the provisions of the Limitation Act 1950 continue to apply.<sup>6</sup>

[20] The applicable limitation provision of the previous Act<sup>7</sup> is simply a time test as opposed to the new *knowledge plus accrual test*.<sup>8</sup> Six years is six years and the defence provided is absolute.

[21] The following is a simplistic summary of the considerably more detailed argument Mr Bennett is employing to try and overcome the above impediment.

[22] He is saying Mr Maharaj actually lodged his arrears claim via the 2006 application. Due to a lack of legal representation he was unaware he was conceding it when signing the settlement. Given the existence of a claim which is not barred by the above limitation provisions I should now exercise the extension of time provisions

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<sup>4</sup> Section 12

<sup>5</sup> Section 11(3)(a) of the Limitation Act 2010

<sup>6</sup> Section 59 of the Limitation Act 2010

<sup>7</sup> Section 4(1)(d) of the Limitation Act 1950

<sup>8</sup> *Haig v Edgewater Developers Ltd (No 5)* [2012] NZEmpC 189

in section 221 of the Act and allow Mr Maharaj to proceed given the evidence he did not sit on his hands and do absolutely nothing for some eight years.

[23] Wesley's response is the 2006 application no longer exists. It was withdrawn in its entirety 2006. That must therefore include the wage claim specified in clause 3(b) and neither party has done anything to revitalise or pursue it. As Mr Dearing put it *How can a cause of action exist when it was settled, withdrawn and not pursued for eight years?*

[24] For a number of reasons I agree. Firstly withdrawal means it has gone and no longer exists.

[25] Second it was settled. I conclude the words *full and final settlement of any and all matters* leave no room for interpretation and here I note paragraphs [19] and [20] of the Employment Court's decision in *Young v Board of Trustees of Aorere College*.<sup>9</sup> There the Court said:

[19] The plaintiff's decision to enter into a full and final settlement agreement with the defendant represents an additional hurdle for him. Mr Bennett submitted that he was attempting to weave a "fine line" around s 149 but I consider that it presents an insurmountable hurdle for the plaintiff in the circumstances of this case. The agreement represented a full and final settlement of the plaintiff's personal grievance according to its terms. Not only was it expressed to be on a full and final basis but the agreement was also signed off by a Department of Labour mediator pursuant to s 149 of the Act. As Mr Harrison points out, s 149(1) requires a mediator to explain the effects of such an agreement to the parties, before they commit to it, as set out in s 149(3), including that:

That the terms of the settlement are final and binding on and enforceable by the parties;

The terms may not be cancelled under s 7 of the Contractual Remedies Act 1979;

Except for enforcement purposes, no party may seek to bring these terms before the Authority or the Court, whether by action, appeal, application for review, or otherwise.

[20] The combined effect of these provisions is that a settlement agreement which has passed through the s 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds.

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<sup>9</sup> [2013] NZEmpC 111

[26] There is no suggestion Mr Maharaj was subjected to duress here; just that there was a lack of knowledge.

[27] In any event and if I had to consider it I would reject the argument Mr Maharaj was unaware of the implications of the settlement and the fact he was conceding his arrears claim.

[28] The evidence is Mr Maharaj was a friend of Mr Dickson and they were colleagues at Wesley. It was around the time Mr Maharaj was pursuing his claim against Wesley that Mr Dickson commenced one. On 11 September 2006 Mr Dickson lodged a claim which included what can now be characterised as a sleepover claim against Wesley.<sup>10</sup> Mr Maharaj says the issues were well canvassed in the workplace and he was sufficiently au-fait with them to provide a witness statement in support of Mr Dickson. As it transpires Mr Dickson went on to have considerable success with this approach against a subsequent employer, Idea Services Ltd.<sup>11</sup>

[29] I conclude that by entering into a full and final settlement with this knowledge he conceded the possibility he could later follow a similar course as he is now attempting to do.

[30] Finally I must say I would not grant an extension of time even if that was a course of action available to me. The claim, as filed in 2006, has absolutely no detail. There is no indication of the allegations Wesley was being asked to answer and no advice of relevant supporting facts. To wait eight years to provide the detail puts the respondent at an unacceptable disadvantage. This would, if it were still alive, undoubtedly be struck out for want or prosecution.

### **Conclusion and Costs**

[31] For the above reasons I conclude Mr Maharaj is precluded from pursuing his wage claim. His application is dismissed.

[32] Costs are reserved.

**M B Loftus**  
**Member of the Employment Relations Authority**

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<sup>10</sup> n 1 above and an earlier determination, ERA Wellington, WA72/08, 27 May 2007

<sup>11</sup> n 2 above, [2009] ERNZ 116 (NZEmpC) and [2011] ERNZ 192 (CA)