

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 170
3080038

BETWEEN PETER JOHN O’RAFFERTY
Applicant

AND SURVEY WORX LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Clinton Healy for Respondent

Investigation Meeting: On the papers

Submissions and Further 21 April 2020 from Applicant
Information: 23 April 2020 from Respondent

Date of Determination: 28 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 16 November 2019 Mr Peter O’Rafferty lodged a wage arrears claim against Survey Worx Limited (Survey Worx). Mr O’Rafferty’s wage arrears claims related to the period 4 February 2013 (being his first day of work for Survey Worx) to 30 August 2013, being his last day of work.

[2] On 1 September 2013 Mr Clinton Healy text Mr O’Rafferty that there was no more work for him to do. Mr O’Rafferty never returned to work after that.

[3] Survey Worx denied that it ever employed Mr O’Rafferty. It said he was engaged as a subcontractor, on the basis that he was self-employed, on a temporary basis to help out on a particular contract.

[4] Survey Worx therefore disputed the Authority’s jurisdiction to investigate Mr O’Rafferty’s claim on the grounds that:

- (a) The parties were never in an employment relationship; and
- (b) Even if there had been an employment relationship Mr O’Rafferty’s claims are time barred.

[5] The matter was referred by Mr O’Rafferty to the Labour Inspectorate in November 2013. The Labour Inspectorate Standards Team decided not to take any further action, on the basis the parties would attend mediation, given that Survey Worx disputed the existence of an employment relationship.

[6] The parties were advised on 8 November 2013 that the Labour Inspector had closed the file.

[7] Survey Worx subsequently declined to accept mediation dates offered by Mediation Services, so this matter was allocated to a Presiding Member to resolve.

[8] However the Authority does not have jurisdiction to investigate or determine Mr O’Rafferty’s claims because they are time barred. The status of the relationship therefore cannot be investigated, as there are no valid claims currently before the Authority that it has jurisdiction over.

[9] Although Mr O’Rafferty attached to his Statement of Problem a copy of a letter he said he had sent the Authority on 29 November 2013 that stated he wanted to lodge a claim, he confirmed that he had never actually lodged a Statement of Problem, before doing so on 16 November 2019.

[10] Section 158 of the Employment Relations Act 2000 (the Act) requires Authority proceedings to be commenced by the lodging of an application in the prescribed form.

[11] Regulation 5(3) of the Employment Relations Authority Regulations 2000 (the Regulations) states that commencement of proceedings must be in Form 1. Schedule 1 of the Regulations has a link to Form 1.

[12] The 29 November 2013 letter is not in Form 1 format. It therefore cannot in itself have commenced proceedings. Even if it had, then clause 14(2) of the Second Schedule of the Act applies.

[13] Clause 14(2) of the Second Schedule of the Act states that a matter is to be treated as withdrawn if no action has been taken in at least three years. Even if the letter of 29 November 2013 had been associated with a Form 1, Statement of Problem, more than six years has elapsed since then.

[14] There has been no action regarding Mr O'Rafferty's claims for well over three years, so any matter that could have been arguably have been lodged in 2013 is by now withdrawn under clause 14(2) of the Second Schedule of the Act.

[15] Mr O'Rafferty's attempt to recommence his claims by way of a 16 November 2019 Statement of Problem does not succeed. The claims in his 2019 Statement of Problem relate to alleged wage arrears that occurred well outside the required six year time frame for recovery.

[16] Section 142 of the Act states that a cause of action cannot be commenced more than six years after the cause of action arose. That meant that Mr O'Rafferty's claims had to be lodged with the Authority by no later than 30 August 2013. He did not in fact lodge a claim until 16 November 2019, being almost three months outside the six year cut off period.

[17] Mr O'Rafferty is therefore out of time to pursue Authority claims relating to his work with Survey Worx. Because his claims are time barred, there is no need to determine the second jurisdiction issue of whether or not the parties were in an employment relationship.

Costs

[18] Costs are to lie where they fall.

Rachel Larmer
Member of the Employment Relations Authority