

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 128
5364463

BETWEEN SHERRY PRAUNER
 Applicant

AND ENVIRONMENTAL
 DECONTAMINATION SYSTEMS
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Applicant In Person
 B Nathan, Counsel for Respondent

Hearing: 17 April 2012

Determination: 27 June 2012

DETERMINATION OF THE AUTHORITY

[1] This is an application by Ms Sherry Prauner that she be permitted to commence her personal grievance action outside the three year time limit prescribed in s114 (6) Employment Relations Act 2000. Although she referred to the exceptional circumstances provisions set out in ss 114 and 115 those provisions do not apply other than in a situation where there is a 90 day issue. This application is to be determined in accordance with s 219 which gives a discretionary power to extend time limitations.

[2] Section 114 (6) provides that no action may be commenced in either the Court or Authority in relation to a personal grievance more than three years after the date on which the grievance was raised.

[3] Ms Prauner was employed in 2006 to assist in the decontamination or remediation of the former Fruitgrowers Chemical Company ("FCC") site at Mapua near Nelson. FCC manufactured pesticides including organochlorine and organophosphorus pesticides. According to the Ministry for the Environment's website the Mapua site was considered the worst contaminated site in New Zealand.

It is likely that Ms Prauner and other workers were exposed to toxic substances including evaporating pesticides, dioxins and benzene. It seems there were problems with some of the experimental cleaning processes used by EDS.

[4] Ms Prauner raised her grievance on 27 November 2006. The Statement of Problem was not lodged until 24 November 2011, more than two years after the limitation period expired.

[5] In *Roberts v Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006 the Court considered that s 219 enabled the Authority to extend the three year limitation in s 114 (6).

[6] The principles regarding the exercise of discretion were outlined in *Stevenson v Hato Paora College* [2002] 2 ERNZ 103. The overriding consideration is the justice of the case. The following matters may be material to the exercise of the discretion:

- The reason for the omission to bring the case in time.
- The length of the delay.
- Any prejudice or hardship to any other person.
- The effect on the rights and liabilities of the parties.
- Subsequent events.
- The merits.

[7] Ms Prauner sought advice from Nelson Community Law when she initiated her personal grievance. She was given two booklets and looked at the Employment Relations Authority and Department of Labour (“DOL”) websites. None of that material referred to a three year limitation period. She consulted two legal professionals in 2006 to get some basic assistance.

[8] She communicated with Mr Nicholas Burley in November 2006. He gave some advice but did not refer to the three year limit. In an email dated 6 November 2006 Mr Burley says he is available to act and refers to the 90 day limit in the Employment Relations Act 2000 and to time limitations in the Health and Safety in Employment Act and limits for accident compensation and the importance of ensuring these are abided by.

[9] Mr Steven Zindel checked and signed the personal grievance letter but did not advise her of the three year limit. At that stage of proceedings it is not surprising that there was no reference to the limitation period.

[10] After the mediation on 6 March 2007 she spoke to a lawyer who indicated he would not take the case as he felt it would be hard to prove illness due to an unsafe workplace. There was no further contact with lawyers for some time.

[11] Ms Prauner provided information pursuant to the Protected Disclosures Act 2000 to an Environmental Investigator acting under the delegated authority of the Parliamentary Commissioner for the Environment. That person, Ms Deborah Mills, informed Ms Prauner that she had consulted with the Ministry of Health and the Department of Labour and that the matter would be appropriately dealt with by the Ministry and the Departmental investigations being carried out.

[12] Dr David McBride was commissioned by the Department of Labour to review the cleanup of the Mapua site. Unfortunately, the review took much longer to complete than anticipated and was only finalised very shortly before the hearing of this matter, although at that stage the report was not publicly available. It had been expected that the report would be available in 2008. The report was not publicly available until 22 May 2012.

[13] In December 2010 Ms Prauner contacted another solicitor. She could not recall the name of this person or the firm. Ms Prauner said the woman she consulted did say the matter was out of time but also said she would need the final copy of the DOL report in order to begin any action. This was unfortunate advice. Ms Prauner therefore felt she had no option other than to await the report.

[14] In October 2011 Ms Prauner saw an employment advocate, Ms Shayne Boyce, who told her it would be unlikely that her case could be heard because it was out of time.

[15] Ms Prauner says the delays were not of her making. She did not receive advice regarding the three year limitation from the first two lawyers she consulted and

that information was not available from the research she did. She says she was ill and having difficulty concentrating. A letter from Dr Tim Ewer to ACC dated 22 April 2010 states that Ms Prauner is suffering from poor comprehension, concentration and memory; and she has mild cognitive impairment and malaise which began when working at EDL, together with marked pain which fits the diagnostic criteria for fibromyalgia, which is marked by chronic fatigue.

[16] In its Statement in Reply EDS said it did not consider that Ms Prauner could maintain a claim for constructive dismissal in relation to an unsafe workplace. Reference was made to a Labour Department letter of 2006 stating that EDL had taken all practicable steps. This was clearly incorrect. Ms Prauner says it caused difficulties in pursuing the grievance and she felt she had to wait for the full report in order to have the material to be able to have her case conducted properly with full evidence.

Reasons for and length of delay

[17] Ms Prauner did not file proceedings in the Authority for a variety of reasons. These included lack of knowledge of the limitation period, poor legal advice, significant medical problems and what she believed to be a need to wait for the final DOL report, an assumption reinforced by legal advice.

[18] The length of the delay is significant. This is an unusual case and what in other circumstances may militate against the exercise of discretion in Ms Prauner's favour is not the case here.

Prejudice or hardship

[19] Mr Nathan submitted that it was not clear whether witnesses would still be available as the people involved may no longer work for the respondent. There was a potential for significant costs given the number of witnesses that would be required and the difficulties and costs of locating them would have been avoided if the matter had been filed earlier. Mr Nathan was unable to tell me who the witnesses would be. His argument is hypothetical. Ms Prauner said her ex work colleague, who suffered similar symptoms and was witness to the events, was available and that the Managing

Director was still with the respondent. A further key witness, Mr Brent Pascoe, is still in the employment of EDS. Ms Prauner had recorded a number of critical conversations and I have seen transcripts of those. There is considerable documentary evidence. Apart from the fact that recollections can fade and change over time, I see no real prejudice to EDS if the matter is allowed to proceed.

Effect on rights or liabilities of parties

[20] If the matter is unable to be heard Ms Prauner will lose her right to have a significant matter litigated. I accept that the respondent would have formed the view that the matter was at an end.

Subsequent events

[21] These must include the DOL report. Mr Nathan correctly conceded that the report was not irrelevant but did not concede that it was relevant to the personal grievance issue. The excerpts I have seen from the draft report (and the perusal of the full report which is now available) clearly indicate its relevance to personal grievance proceedings that have workplace safety issues as an intrinsic element of the personal grievance.

[22] Ms Prauner's continuing ill health and post mediation legal advice she received in 2010 and 2011 are also relevant factors.

Merits

[23] It is readily apparent that the applicant has an arguable case.

The justice of the case

[24] In *Dienes v Allevay* CA205/84, 17 December 1984 Richardson J said that the jurisdiction to abridge times and dispense with procedures depended on balancing a wide variety of factors and deciding where the overriding interests of justice lay in a particular case.

[25] In *Schafer v Blyth* [1920] 3 KB 140 at 143 the Court stated that the object of using the discretion was to avoid injustice. Each case was to be considered on its merits: *Wright v Anderson* [1936] NZLR 315 (SC).

[26] Taking into account the unusual circumstances of this case I find that despite the substantial delay it would be unjust to deny Ms Prauner the right to have her personal grievance heard. I exercise the discretion pursuant to s 219 in Ms Prauner's favour and grant her leave to file her personal grievance outside the three year limit.

Statement in reply

[27] As discussed at the hearing, the respondent is granted an extension of time to file its Statement in Reply. The Statement should be filed within 14 days of the date of this determination.

[28] I ask that the parties consider whether a further mediation would now be useful.

Costs

[29] Costs were reserved. Ms Prauner indicated that if the matter were to proceed she would wish to instruct counsel. In the circumstances, it would seem preferable to leave costs to be determined until after the substantive matter has been dealt with.

Dzintra King

Member of the Employment Relations Authority