

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Jonathan Roberts (Applicant)

AND Commissioner of New Zealand Police (Respondent)

REPRESENTATIVES Applicant in person assisted by Eugene Morgan-Coakle
Helen Gilbert for the respondent

MEMBER OF AUTHORITY James Wilson

INVESTIGATION 18 November 2003
MEETINGS 1 June 2005

SUBMISSIONS RECEIVED 25 July 2005

DATE OF DETERMINATION 15 September 2005

DETERMINATION OF THE AUTHORITY

History

[1] In October 1998 Senior Constable Neil Roberts (the applicant in this case) was dismissed from the New Zealand police. Mr Robert's dismissal followed a hearing by the Police Disciplinary Tribunal, conducted by Dame Augusta Wallace. In January 1999 Mr Roberts wrote to the Assistant Commissioner stating that he wished to appeal the decision to dismiss *by way of personal grievance* and seeking a rehearing. In February 1999 the Deputy Commissioner replied to Mr Roberts, rejecting his request for a rehearing and advising:

In order to consider your challenge to the actual dismissal, I will need to know:

- *Your version of the facts : and*
- *What specific remedy you are seeking in this matter.*

[2] While Mr Roberts continued to seek information to support his claim (including pursuing transcripts of Dame Augusta's hearing), he apparently did not respond specifically to the Deputy Commissioner's letter of February 1999.

[3] In October 2003 Mr Robert's filed a statement of problem in the Authority alleging that his dismissal had been unjustified and seeking reinstatement and compensation. He also requested that his application be removed to the Employment Court. In a statement in reply the Commissioner of Police asserted that Mr Roberts had not raised his grievance within the required 90 days and was therefore unable to pursue his personal grievance.

[4] On 18 November 2003 I met with the parties' representatives (Paul Wicks for Mr Roberts and Angela Gallagher for the Commissioner of Police). At that meeting it was agreed that:

- The parties would attend mediation
- The application for removal to the Court was withdrawn
- If the matter could not be settled at mediation the parties would file submissions with the Authority. These submissions would address
 - (a) Whether Mr Roberts had or had not raised his grievance within the required 90 days and
 - (b) Whether Mr Roberts was debarred from bringing his grievance by section 114(6) of the Employment Relations Act 2000 (the Act).
- The Authority would put its investigation on hold pending the outcome of mediation and further advice from Mr Roberts.

[5] Mr Roberts advised the Authority from time to time that he still wished his application to stand but that he was pursuing "other avenues" first. In April 2005 Mr Roberts refilled his statement of problem with the Authority. Shortly afterwards the Commissioner of Police requested that the Authority order that Mr Roberts application be struck out or dismissed. In this application the Commissioner acknowledged that Mr Roberts had raised his grievance with his employer within 90 days of his dismissal but had failed to pursue his application to the Authority within the 3 years required by the Act.

The issue for Determination

[6] The issue for Determination at this point is whether Mr Roberts is entitled to pursue his application. The decision on this issue turns on the relevant sections of the Employment Relations Act 2000 (the Act). The Act provides that:

- Causes of action existing at the time the Employment Relations Act 2000 (the Act) came into force are not extinguished. (Section 248 (1).)
- Proceedings in the Authority in relation to a dismissal must be brought as a personal grievance under section 113(1) of the Act.

And section 114 (6) provides:

No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section."

And s.158:

Proceedings before the Authority are to be commenced by the lodging of an application in the prescribed form.

The specific points for determination by the Authority are therefore:

- Whether Mr Roberts commenced proceedings in terms of sections 158 and 114(6) of the Act;
- If not, whether the Authority has a discretion to extend the three year time limit in section 114(6) of the Act;
- If there is such discretion, whether the Authority should exercise that discretion in Mr Roberts' favour.

Discussion and Determination

[7] The Commissioner has conceded that Mr Roberts did raise his personal grievance with his employer within the required 90 days of his dismissal. In terms of the Act:

- Mr Roberts rights to pursue a personal grievance against his employer were preserved by section 248 of the Act; and
- In terms of section 248(4)(b) proceedings commenced after 30 June 2001 must be in accordance with section 113(1) and Part 9.
- Section 114(6) of the Act requires that:
No action may be commenced in the Authority or the Court...more than 3 years after the date on which the personal grievance was raised.
- Mr Roberts *commenced proceedings* in the Authority by filing a statement of problem in October 2003 i.e. some 4 years and 9 months after he had raised his grievance with his employers

[8] Mr Roberts argues that *there had already been employment court proceedings in the form of the Police Disciplinary Tribunal*, and that, as proceedings had commenced prior to 31 January 2001, his case should proceed in terms of section 248(2). However, while section 248(2) does provide that *those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if this Act had not been passed*, this must be read in conjunction with, and is subject to, section 248(4) which requires that section 113(1) and Part 9 apply i.e. including section 114(6). The proceedings before the Police Disciplinary Tribunal cannot be taken to fulfil the requirement that “proceedings be commenced within 3 years. (Section 114(6)). Proceedings must be commenced *in the Authority or the Court and by the lodging of an application in the prescribed form. (Section 158)*

[8] Mr Roberts is, by strict interpretation of the Act debarred from pursuing his grievance. That leaves only the question of whether the Authority has discretion to allow Mr Roberts to pursue his claim and if so whether it should do so. In this regard Mr Roberts argues that:

...I relied on my representatives to get on with proceedings and lodge the case and get it moving in the right direction. This did not happen and I have never stopped pursuing the action, even moving to Auckland City to facilitate what has occurred since 2001. I was a front line Policeman and I relied on my representatives who I had supported for some 19 years with subscriptions. Unfortunately for sound reason which has come to light during the course of proceedings they let me down. This jurisdiction was outside my knowledge. Following very recent advice from another senior employment lawyer I have been re-directed in my energies. I now accept that a previously advised course of action inevitable.

[9] Although not raised specifically by Mr Roberts, I have considered whether Section 219 of the Act may provide the Authority with the discretion to allow Mr Roberts to pursue his application. Section 221 provides:

221 Joinder, waiver, and extension of time

In order to enable the Court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,-

- (a) *direct parties to be joined or to be struck out; and*
- (b) *amend or waive any error or defect in the proceedings; and*
- (c) *subject to section 114(4), extend the time within which anything is to or may be done; and*

(d) generally give such directions as are necessary or expedient in the circumstances.

However this section applies to matters *before* the Authority. Mr Robert's request is that I use my discretion to extend the time provided by the Statute for him to bring his grievance to the Authority. I do not interpret the section as providing the Authority with discretion in this regard.

[10] Even if the Authority did have the discretion to allow Mr Roberts to pursue his application – and I do not believe such discretion exists- it must be exercised equitably. Mr Roberts did not to pursue his grievance *in the Authority* within three years, as is required by the Act. He has failed to provide any good cause, other than the failure by his representatives, for not doing so. He did not miss a statutory cut off point by a short period. His application was almost two years out of time.

[11] I am of the firm view that Mr Roberts is debarred from pursuing his grievance by Section 114(6) of the Act, that the Authority has no discretion to allow Mr Roberts to pursue his grievance out of time, and even if such discretion existed no grounds have been established upon which to allow his application to proceed.

[12] **I order that Mr Robert's application be struck out.**

Costs

[13] Costs are reserved.

James Wilson
Member of Employment Relations Authority