

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 175
5619819

BETWEEN PETER ROBINSON
 Applicant

A N D ACM NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Anna Oberndorfer, Advocate for Applicant
 Michael O'Brien, Counsel for Respondent

Investigation Meeting: 20 July 2016

Submissions Received: At the investigation meeting

Date of Determination: 30 September 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] Peter Robinson asks the Authority to exercise its discretion under s.219 of the Employment Relations Act 2000 (the Act) to extend the timeframe for commencing personal grievance actions in the Authority. ACM New Zealand Limited (ACM) oppose the granting of an extension.

[2] If I do not grant an extension then Mr Robinson cannot proceed with his personal grievance claims.

Background

[3] Mr Robinson worked for ACM as a Business Development executive from November 2010 until his dismissal for serious misconduct on 28 February 2013.

[4] ACM transports large sums of cash in armoured cars between retailers and banks. Mr Robinson was instrumental in attracting the business of a New Zealand casino.

[5] The contract between ACM and the casino was to commence on 20 December 2012. On 19 December 2012 it became clear that there was disagreement about a clause in the contract that ACM says would adversely affect its insurance. ACM considered that Mr Robinson had misrepresented its position to the casino and when asked for an explanation had misled ACM.

[6] In January 2013, ACM initiated a disciplinary process. In February 2013, ACM suspended Mr Robinson without pay pending resolution of the process. On 19 February 2013, he raised a personal grievance about the suspension alleging that it was an unjustified disadvantage.

[7] ACM held a disciplinary investigation meeting on 15 February 2013. Peter Moore attended as Mr Robinson's advocate.

[8] On 28 February 2013, ACM summarily dismissed Mr Robinson. On 1 March 2013, Mr Moore raised a personal grievance of unjustified dismissal on Mr Robinson's behalf.

[9] The parties attended mediation on 14 May 2013 but there was no resolution.

[10] On 7 April 2016, Mr Robinson lodged an application under s.219 for leave to lodge proceedings out of time. He attached a proposed statement of problem claiming unjustified disadvantage (related to the suspension), unjustified dismissal, breach of contract by ACM failing to undertake annual performance appraisals and breach of an implied term of contract by ACM failing to adequately train, support and supervise him.

[11] Mr Moore, Mr Robinson and two witnesses for ACM provided written witness statements, gave affirmed evidence in response to my questioning and were cross-examined by Mr O'Brien.

Issues

[12] The sole issue for determination is whether I should exercise my discretion under s.219 of the Act to extend the timeframe for commencing an action in the Authority.

[13] There are two personal grievances that Mr Robinson wishes to claim. They were raised on different dates. The three-year timeframe for bringing proceedings for unjustified disadvantage expired on 19 February 2016, and the three-year timeframe for bringing proceedings for unjustified dismissal expired on 1 March 2016.

The law

[14] Section 114(6) provides that:

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.

[15] The purpose of the time limit is to provide some certainty to an employer that if no proceedings have been lodged three years after a grievance has been raised it will not face any proceedings in relation to that grievance.

[16] The relevant part of s.219, which is entitled “Validation of informal proceedings, etc.” provides that:

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[17] Chief Judge Colgan’s decision in *Roberts v Commissioner of Police*¹ confirmed that the Authority may exercise its discretion under s.219 to extend the three year limitation of s.114(6). That discretion is not subject to any statutory criteria but, as confirmed in a line of Employment Court cases dating back to the 1990s, must be exercised judicially and in accordance with established principles.

¹ EmpC Auckland AC 33/06, 27 June 2006

[18] In order for the Authority to exercise its discretion to extend a time limit there must be some material on which it can exercise its discretion. That is, there is no unqualified right to an extension of time.

[19] The most fundamental principle is the justice of the case. Some other relevant factors to consider, as noted by Goddard CJ in *Day v Whitcoulls Group Ltd*,² are:

- (a) The reason for the omission to bring the case within time.
- (b) The length of the delay.
- (c) Any prejudice or hardship for any other person.
- (d) The effects on the rights and liabilities of the parties.
- (e) Subsequent events.
- (f) The merits.

The reason for the omission to bring the case within time

[20] Mr Robinson attributes his failure to commence proceedings within three years to one main factor. His advocate inadvertently failed to lodge proceedings within the three-year timeframe. Mr Moore was Mr Robinson's advocate when he raised his personal grievances and had meetings with ACM that led to his dismissal.

[21] Mr Moore's evidence explained his inaction over differing parts of the three-year period. First, the parties continued to attempt to resolve differences between themselves as is evidenced by the fact they had mediation in May 2013.

[22] Mr Moore also says that he tried to negotiate directly with ACM staff by telephone after mediation. Mr Moore says that it was always Mr Robinson's intention to lodge proceedings for personal grievances.

[23] Mr Robinson's evidence is that he always intended to take things further and instructed Mr Moore to lodge proceedings in the Authority. He understood that Mr Moore had dropped everything to assist him in early 2013 and so did not want to put undue pressure on Mr Moore to lodge proceedings.

[24] He says that after his dismissal he was unable to pay his bill to Mr Moore immediately. He says he spoke to the office manager who told him that no further work would be done for him if he did not start paying his bill off. He says that in about December 2014 he began to make regular payments on his bill.

² [1997] ERNZ 541 at 548,

[25] Mr Robinson's evidence is that in June 2015 he telephoned Mr Moore's office manager and expressed a concern about "the statute of limitations". He says he was told the time-period was three years, so there was plenty of time.

[26] On 18 June 2015, Mr Robinson received an email from Mr Moore that said he was working on getting Mr Robinson's case filed.

[27] On 18 March 2016, Mr Robinson again rang Mr Moore's office, spoke to Mr Moore's boss, and asked when his hearing would be. Not long after that Mr Moore telephoned him and arranged to meet him in person. On 23 March 2016, Mr Moore explained to Mr Robinson he had missed the deadline for lodging the claims. Mr Robinson instructed him to bring these proceedings.

[28] Mr Moore says he has no memory of sending his June 2015 email to Mr Robinson, in which he indicated that he was very busy with other work until mid-July 2015. Mr Moore says that due to pressure of other work he did not turn his mind to Mr Robinson's case again until about late September 2015. He says he checked the file and somehow understood that the deadline for lodging the personal grievance claims was mid-April 2016.

[29] Mr Moore says that he only became aware when his boss telephoned him on 18 March 2016 that he had missed the lodgement deadline. He says he then got the application for extension and the proposed statement of problem lodged as soon as he was able.

[30] ACM questions Mr Robinson's commitment to making the personal grievance claims given that once he had paid his bill he first contacted Mr Moore's office in June 2015, and then not again until March 2016. It says that he cannot have been too concerned to pursue the claims. ACM says Mr Robinson acquiesced in Mr Moore's failure to lodge the claims, at least between June 2015 and March 2016. From June 2015, Mr Robinson was aware of the three-year time limit and yet made no effort, prior to 18 March 2016, to ensure his claims were lodged.

[31] ACM also submits that Mr Robinson's impecuniosity is not a factor that has merit in explaining the failure to lodge on time. I agree, and consider that was not the primary reason for a failure to lodge within time.

Length of the delay

[32] Mr Robinson submits that the 48-day delay in lodging the unjustified disadvantage claim and the 38-day delay in lodging the unjustified dismissal claim are not significant delays.

[33] ACM submits that the proper measurement of the delays should be the date on which supporting evidence in the form of Mr Moore's and Mr Robinson's witness statements were filed; which was 20 June 2016.

[34] On 18 March 2016, the date Mr Moore discovered the three-year time limit had passed, the lodgement of the unjustified disadvantage grievance was 28 days overdue, and the lodgement of the unjustified dismissal grievance was 17 days overdue.

[35] I consider the proper measurement of delay is the date the application for extension and the accompanying Statement of Problem were lodged on 7 April 2016. Therefore, I agree with Mr Moore that the delays are 48 and 38 days.

[36] I am puzzled by the delay of a further 20 days between Mr Moore realising the deadline/s had been missed and him lodging the proceedings. I would have thought that upon realising the lodgement deadline/s had been missed urgency was paramount to get Mr Robinson's application before the Authority.

Prejudice/effects on the rights and liabilities of the parties

[37] Mr Robinson submits that he is the only one that would be prejudiced or suffer hardship in that he would be prevented from pursuing his grievances if no extension is permitted. Mr Robinson says that his dismissal for alleged dishonesty has prevented him being re-employed in the field of cash handling and security services in New Zealand. He would like to get back into that industry in the future. He says the case is about getting his integrity back.

[38] ACM questions how important to Mr Robinson his integrity must be since he waited over three years to commence proceedings.

[39] Despite Mr Robinson bearing some responsibility for failing to check-in with Mr Moore in the period July 2015 to March 2016, I consider that the main failing was that of Mr Moore. I accept that Mr Robinson is keen to defend his integrity in the context of a number of years of working in the cash handling and security business.

[40] ACM submits that its ability to defend its position has progressively weakened over the three-year timeframe as a number of key witnesses have left its employment. ACM acknowledges that even if the proceedings had been lodged on time the unavailability of witnesses may still have been a problem for it. However, ACM submits that the purpose of a statutory timeframe is to create an unequivocal cut-off point.

[41] Mr Robinson submits that all of the evidence relied on by ACM that led to his suspension and dismissal is in written form. The fact that key ACM staff involved in the disciplinary process are no longer employed does not preclude it giving evidence as there is no evidence witnesses could not be located or would refuse to give evidence.

[42] I accept that to be the case. Even if proceedings had been commenced just within three years a number of those key staff had already left. I note that the decision maker, Richard Oliver, is still employed by ACM, as is the complainant, Kerrie-Anne Hutchins.

Subsequent events

[43] Mr Robinson submits that no subsequent events are relevant.

[44] ACM submits that Mr Robinson must bear some of the responsibility for the failure to progress lodging proceedings, particularly for not following up between June 2015 and March 2016.

[45] I am inclined to think that Mr Robinson was justified in placing his full trust in Mr Moore to lodge proceedings within time.

The merits

[46] Naturally, Mr Robinson submits that his case is strong in relation to what he says were an unjustified suspension and unjustified dismissal. Just as naturally, ACM submits that Mr Robinson's case is weak. It says that even if personal grievances were to be proved Mr Robinson's behaviour was so serious that reduction of remedies by 100% would be justified.

[47] It is difficult to assess the strength of the claim without access to full evidence. However, there is certainly an arguable case for Mr Robinson in relation to both the unjustified disadvantage claim and the unjustified dismissal claim. In addition, I am

less certain than ACM that Mr Robinson can be said to have contributed so significantly to the circumstances leading to his suspension and dismissal. There is some merit in Mr Robinson's claims.

Overall justice

[48] While I have sympathy with ACM's position, I consider that the overall justice of the case merits Mr Robinson being granted an extension of time to commence his personal grievance actions on both the unjustified disadvantage and unjustified dismissal.

Determination

[49] Therefore, I find that the lodgement of the statement of problem on 6 April 2016 commenced the personal grievance actions as well as the other claims made. The next step is for ACM to lodge a Statement in Reply within 14 days of the receipt of this determination.

[50] The parties are directed to attend mediation again before I will consider setting down a date for an investigation meeting. At this stage dates are available in February and March 2017.

Costs

[51] I reserve the issue of costs to be dealt with along with the substantive matter. However, this is not the kind of case in which the successful applicant can expect to have the respondent make a reasonable contribution to his costs. Mr Robinson has been granted an indulgence and ACM may reasonably look to him for its costs.

Christine Hickey
Member of the Employment Relations Authority