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Robson v Ihug Ltd (Auckland) [2007] NZERA 91 (21 March 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 87/07 5074153

BETWEEN

AND

Blair Robson Applicant

Ihug Ltd Respondent

Member of Authority: Representatives:

Submissions received:

James Wilson

Barry J Hart for the applicant Dean J Organ for the respondent

19 December 2006 (letter from Mr Hart)

5 February 2007 (submission from Mr Organ)

Determination:

21 March 2007

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

The preliminary issue for determination

[1] On Monday 11 December 2006 Mr Blair Robson filed a statement of problem with the Authority. In this statement Mr Robson alleges that he was unjustifiably dismissed by Ihug Ltd on 2 December 2003. Mr Robson also says that he raised a personal grievance with Ihug in a letter, dated 4 December 2003, received by Ihug on 9 December 2003

[2] In their statement in reply, Ihug say Mr Robson is not able to *commence his action* in the Authority because his application is outside of the three-year period stipulated in [section 114\(6\)](#) of the [Employment Relations Act 2000](#).

[3] The parties have not, at this point, attended mediation regarding Mr Robson's grievance. However, in a telephone conference with the respective representatives on Friday 2 February 2007, it was agreed that, as a preliminary matter, I would determine the issue of whether or not Mr Robson was debarred from pursuing his grievance because of the delay in commencing his action in the Authority.

The statutory timeframe

[4] The [Employment Relations Act](#), at [section 114](#), sets out the statutory timeframe for the raising of a personal grievance and

for commencing action in respect to that grievance in the Authority. [Section 114](#) says:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) ... (3)... (4) ... (5)...

(6) 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.

Mr Robson's argument

[5] Mr Hart, for Mr Robson, argues that Mr Robson did meet the statutory requirement to commence his action in the Authority within 3 years after the date the personal grievance was raised with Ihug. Mr Hart argues:

(i) Ihug accepts that Mr Robson raised his personal grievance on 9 December 2003.

(ii) Mr Robson's statement of problem is dated, and was received by the Authority, on 11 December 2006.

(iii) Section 35(2) of the [Interpretation Act 1999](#) states:

A period of time described as beginning from or after a specified day, act or event does not include that date or the date of the act or event

(iv) Section 35(6) of the [Interpretation Act](#) states:

A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or the last day of that period is not a working day, be done on the next working day.

(v) In accordance with section 35(2) of the [Interpretation Act](#) the 3-year period during which Mr Robson was entitled to commence his action in the Authority began on 10 December 2003. The last day of the three year period was, therefore, Sunday 10 December 2006. As this date was not a working day Mr Robson was entitled to commence his action on the next working day i.e. 11 December 2006.

Ihug's arguments

[6] Ihug accept that Mr Robson raised his grievance, in accordance with section 114(1), on the day his letter of 4 December 2003 was received i.e. on 9 December 2003. However Mr Organ argues that Mr Robson's application to the Authority was outside the three-year statutory maximum and he should not therefore be able to pursue his claim. Mr Organ's argument is:

(i) [Section 114\(6\)](#) of the [Employment Relations Act](#) states:

No action may be commenced more than 3 years after the date on which the personal grievance was raised in accordance with this section (emphasis added).

(ii) The definition of how a grievance is raised is defined in [section 114\(1\)](#) which states that this shall be:

... within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee (emphasis added)

as such, calculations for the year should include the actual date that the grievance was submitted - in this matter 9 December 2003.

(iii) From 9 December 2003 to 8 December 2006 constitutes a three-year period. From 9 December 2003 to 9 December 2006, would be a period of three years and one day and as such outside the period defined in [section 114\(6\)](#) of the [Employment Relations Act](#).

(iv) 8 December 2006 is a Friday and therefore section 35(6) of the [Interpretation Act 1999](#) has no application.

(v) Of relevance is section 35(1) of the same Act, which confirms the pertinence of [section 114](#) (1) of the [Employment Relations Act](#) and states:

A period of time described as beginning at, on, or with a specified day, act, or event includes that day or the day of the act or event.

(vi) Mr Robson's application was received by the Authority on 11 December 2006, a period of 3 years and 3 days and therefore outside the 3 year statutory period allowed.

[7] In addition to arguing that Mr Robson is excluded from bringing his claim by [section 114\(6\)](#) of the [Employment Relations Act](#), Mr Organ argues that Ihug has gone through two changes of ownership and considerable changes of personnel since Mr Robson left its employment. Mr Organ says it would be unjust and disadvantageous to revisit this historical matter. He says that Mr Robson has had ample opportunity to proceed earlier with his claim, no reasons have been advanced as to why the matter has been delayed and no evidence of any exceptional circumstances have been provided.

Discussion

[8] I accept as a matter of fact that Ihug has had two complete changes of ownership, and had considerable changes of personnel since Mr Robson's departure. This will no doubt cause some difficulty if Mr Robson is allowed to pursue his claim. However this cannot be a consideration. The [Employment Relations Act](#) sets out a statutory time period (3 years) during which Mr Robson was entitled to commence an action in the Authority. If his application meets this statutory requirement then he is entitled to pursue his claim albeit that this might provide some logistical difficulties in obtaining evidence relevant to the Authority's investigation.

[9] [Section 114\(6\)](#) of the [Employment Relations Act](#) provides that *no action may be commenced in the Authority ... more than three years after the date on which the personal grievance was raised....* Mr Organ has pointed me to [section 114\(1\)](#) which refers to *... the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred....* However [section 114\(1\)](#) refers to the time during which the personal grievance must be raised with the employee's employer - not to the period during which the employee can commence an action in the Authority. This timeframe, i.e. during which an action must be commenced in the Authority, is a period of (not more than) *three years after the date on which the personal grievance was raised.* (my emphasis) In this regard clause of 35(2) of the [Interpretation Act 1999](#) applies. That is:

(2) A period of time described as beginning from or after a specified date, act, or event does not include that day or the day of the act or event (my emphasis)

In other words the point beyond which Mr Robson could not commence his action in the Authority was a 3 year period commencing from 10 December 2003 - the day after the date on which he raised his personal grievance with Ihug. This 3 year period ended on 9 December 2006 - a Saturday. In terms of [section 35\(6\)](#) of the [Interpretation Act](#) Mr Robson was entitled to commence his action in the Authority, that is file his statement of problem, on the next working day - Monday 11 December 2006.

Determination

[10] Mr Robson filed his statement of problem with the Authority within the statutory timeframe provided for in [section 114\(6\)](#) of the [Employment Relations Act](#). He is entitled to have his claim, that he was unjustifiably dismissed by Ihug, investigated by the Authority.

Mediation.

[11] As noted earlier, the parties have not yet attempted to mediate this matter. Before I continue my investigation they are directed, in terms of [section 159](#) of the [Employment Relations Act](#), to attempt to settle Mr Robson's grievance by the use of mediation. The Authority's investigation of this matter is suspended until the parties have done so or the Authority otherwise directs.

Costs

[12] Costs are reserved.

James Wilson

Member of the Employment Relations Authority