IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 129/08
5112987

	BETWEEN	RODGER GRAEME BEATSON Applicant
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Rodger Beatson in person Megan Richards, counsel for Respondent
Consideration of papers:	26 March and 3 April 2008
Date of Determination:	3 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has considered as a preliminary issue the question of whether Mr Rodger Beatson is barred from proceeding with a claim recently lodged by him in the Authority.

[2] His statement of problem lodged on 15 January 2008 refers to his previous employment as a Probation Officer serving the Department of Corrections at Kaitaia. Mr Beatson described the problem he wishes to have the Authority investigate and resolve to be the following:

> *Seeking reinstatement to my former position as a Probation Officer … compensation to offset lack of income between 2000 and 2007. A written apology from the Department and perpetrator for my ruined health and life.*

[3] Mr Beatson also expressly sought compensation for loss of dignity and health, and for humiliation and mental anguish.

[4] Reinstatement and compensation are remedies the Authority may order where it has determined that an employee has a personal grievance. They are specifically referred to as such under s 123 of the Employment Relations Act 2000, part of the law relating to personal grievances.

[5] Mr Beatson commenced employment as a Probation Officer in about August 1998. He later became ill so badly that by the end of 2001 he could not continue working and went on extended sick leave for about 20 months.

[6] On 23 October 2003 Mr Beatson and the Department signed a Medical Retirement Agreement. An express term of that agreement was that the employment relationship was to terminate on 31 October 2003 by way of "*medical retirement*."

[7] The agreement provided for certain payments to be made to Mr Beatson upon termination of his employment. It also provided for a debt he had outstanding in relation to overpaid leave to be waived upon execution of the agreement.

[8] The agreement further provided that its terms were entered into in full and final settlement of any and all claims that Mr Beatson or the Department had against each other arising out of the employment relationship and its termination.

[9] In signing the agreement Mr Beatson expressly consented to becoming bound by the terms and conditions detailed in it. He expressly acknowledged taking legal advice before agreeing to those terms. A solicitor witnessed his signature placed on the agreement.

[10] By mid-2006 Mr Beatson fortunately had recovered from his illness and began writing to the Department requesting reinstatement to his former position of employment. The Department advised that because he had taken retirement his reinstatement was not an option but that he could still apply for vacancies as they arose and in that way seek to become employed again.

[11] Mr Beatson then wrote to the Department in September 2006 advising that the issue had become an Employment Relationship Problem needing resolution,

particularly in relation to his reinstatement and loss of income and other matters he set out in the letter.

[12] Later in September 2006 a barrister retained by Mr Beatson wrote to the Department advising of his wish to pursue a personal grievance. The basis of his claim was described as being a serious breach of his employment agreement with the Department leading to a breakdown in his health that had left him unable to continue working. As a consequence it was claimed that "*his retirement on medical grounds in 2003 was in reality a constructive dismissal*."

[13] In his letter of 18 September 2006 the barrister sought the Department's consent to bring a personal grievance outside the 90 day limitation period under the Act. He advised that if consent was not forthcoming an application would be made to the Authority for leave under s 115(a) of the Act to bring the grievance out of time. As to the grounds for applying for leave, the barrister gave the following advice:

> *Mr Beatson's claim will be that he was so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within the 90 day period. It has only been very recently that Mr Beatson has recovered sufficiently for him to be able to address the situation.*

[14] Between this correspondence in September 2006 and January 2008, there was no application of any kind made by Mr Beatson to the Authority.

[15] It is clear that Mr Beatson's employment with the Department did not continue after the execution of the Medical Retirement Agreement in October 2003. The parties behaved from then on as if the employment had ended, and of course the agreement they had signed purported to evidence their mutual consent given to termination of the employment.

[16] Nearly three years after termination, in 2006 and well outside the 90 day period prescribed in the Act, Mr Beatson sought to raise a grievance. He did so on the basis that either the Department would consent to that course or, if not, the leave of the Authority would be sought. Now, in January 2008 over four years after termination, Mr Beatson has sought to commence an investigation of his grievance in the Authority.

[17] The Act provides at s 114(6);

> *No action may be commenced in the Authority……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.*

[18] Initially the Authority thought that this was a case where Mr Beatson, if he had proper grounds, could apply under s 219 of the Act for the exercise of a discretion by the Authority to make an order extending the three year time limit within which action is required to be commenced under s 114(6).

[19] Upon further consideration it seems that a grievance has yet to be raised and that until that has been done, in accordance with s 114 of the Act, the three year time limit does not come into play.

[20] Mr Beatson and counsel for the Department Ms Richards upon being heard further agreed that this case may properly be dealt with as an application under s 114 to the Authority for leave to raise a personal grievance after the expiration of the 90 day period.

[21] Written material has been supplied by Mr Beatson and the Department for the consideration of the Authority.

[22] There are two limbs to an application under s 114(4). First, the Authority must be satisfied that the delay in raising the grievance was occasioned by exceptional circumstances, and second the Authority must consider it just to grant leave.

[23] In relation to the first limb, undoubtedly Mr Beatson was seriously ill by the time he signed the Medical Retirement Agreement. He attributes his illness to the Department's failure to manage workplace safety and also to the actions of a particular controlling officer.

[24] The Authority is not however satisfied that he was so affected or traumatised that he was unable to properly consider raising a grievance within 90 days following his termination on 31 October 2003. His execution of the Medical Retirement Agreement on particular terms favourable to him is evidence that he was capable of giving thought to his future and welfare and was able to make decisions about that.

[25] Mr Beatson has acknowledged that when he signed the Medical Retirement Agreement he was at that time taking advice from a lawyer, a doctor and other professionals about his condition and situation.

[26] No doubt it was with considerable reluctance and despair that he signed the agreement but I am unable to accept from the material I have seen that he was not capable of considering the professional advice available to him or of thinking reasonably clearly about what he should do in the dire circumstances he was faced with at that time. While suffering a serious illness was something exceptional or out of the ordinary, I am not satisfied this prevented Mr Beatson from raising a grievance either personally or by instructing the legal advisor retained by him at the time.

[27] As to the second leg under s 114(4), I consider it would be now quite unjust to in effect set aside the Medical Retirement Agreement. I am not satisfied that any of the usual grounds for setting aside a contractual arrangement are present in this case. There is no evidence of duress, undue influence, misrepresentation or other vitiating feature attending entry into that agreement.

[28] Although recovery for Mr Beatson was a slow process, by mid-2006 he was well enough to contemplate returning to work for the Department. He then sought the Department's consent to raise a grievance, but when this was not given he did nothing further for some 16 months before applying to the Authority.

[29] Given the passage of over 4 years since the termination of employment in October 2003, I consider it would be unjust in the circumstances to now allow Mr Beatson to revisit the termination of his employment and/or the employer's conduct prior to that. The policy intent of s 114(6) of the Act is plain. The investigation of a grievance by the Authority is to be commenced by the grievant within 3 years (plus 90 days) after the cause of the grievance arose. That period may be extended if the grievant was unaware at the time of all the circumstances giving rise to the grievance, or if special leave is given by the Authority to extend the time for raising a grievance or for commencing an investigation.

[30] I find that Mr Beatson must remain bound by the particular undertaking given in the agreement he entered into in October 2003, that:

> *The terms of this Agreement are entered into in full and final settlement of any and all claims that either party may have against the other whatsoever arising out of the Employee's employment with the Department, holiday pay, and the termination of his employment.*

[31] That agreement in itself provides contemporaneous evidence as to how the employment ended in 2003, by mutual consent and not by dismissal. The claim most recently made in 2008 of constructive dismissal runs contrary to that evidence. It would not be just to allow a challenge to be brought against the consensus apparent in the formation of the Medical Retirement Agreement.

[32] The determination of the Authority is that the delay by Mr Beatson in seeking to raise his grievance was not occasioned by exceptional circumstances within the meaning of s 114 and s 115 of the Act. In any event it would not be just to grant leave for a grievance to now be raised. Leave must therefore be declined and consequently the Authority's investigation is at an end.

A Dumbleton
Member of the Employment Relations Authority