

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 81/09
5032572

BETWEEN QUENTIN UNSWORTH
 Applicant

AND ORAKEI KORAKO
 GEYSERLAND RESORT
 (2000) LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Brendan Wall for Respondent

Investigation Meeting: On the papers

Determination: 20 March 2009

DETERMINATION OF THE AUTHORITY

[1] On 19 December 2005 Mr Unsworth raised a personal grievance for unjustified dismissal from his employment with Orakei Korako Geyserland Resort (2000) Limited (“the Resort”). Attempts to engage the respondent in mediation during March 2006 were unsuccessful.

[2] On 17 December 2008 Mr Unsworth lodged a Statement of Problem in the Wellington Office of the Employment Relations Authority (“the Authority”). There were some omissions and errors on the Statement of Problem and Mr Unsworth was requested to correct these and lodge the corrected Statement of Problem in the Auckland office of the Authority as that was the nearest office to where the employment relationship took place. Mr Unsworth’s statement of problem, together with the filing fee was returned to him and his application was not processed.

[3] In accordance with the advice given to him by the Wellington Office Mr Unsworth lodged his corrected Statement of Problem in the Auckland Registry of the Authority. This was received by that office on 13 January 2009.

[4] The Resort has raised a challenge to jurisdiction. It says Mr Unsworth's Statement of Problem was filed outside the 3-year time limit prescribed by the Act and as a consequence he can not commence a personal grievance in the Authority.

[5] By consent, this preliminary matter as to jurisdiction is being dealt with on the papers. The issue for determination is whether Mr Unsworth is barred by section 114(6) from pursuing his personal grievance.

3-Year Time Limitation

[6] Section 114(6) of the Employment Relations Act 2000 provides:

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

[7] Mr Unsworth raised his grievance on 19 December 2005. Mr Wall, on behalf of the Resort submits that given that the Statement of Problem was not lodged in the Authority until 13 January 2009 Mr Unsworth is outside the three year limitation period which ended on 18 December 2008. Further Mr Wall submits that the respondent is disadvantaged by the passage of time as recall is dimmed and records may have become deteriorated or mislaid. I note that the Resort does not go so far as to claim that the records are no longer available, or that key witnesses are no longer employed.

[8] The wording of s.114(6) refers to actions being "commenced" in the Authority. Regulation 5(2) of the Employment Relations Authority Regulations 2000 specifies that a person has commenced proceedings when two copies of an application that complies with the regulations are lodged with an officer of the Authority.

[9] The regulations require the application to be in Form 1 (Statement of Problem) and accompanied by the prescribed fee. The letter from the Authority dated 18 December under which Mr Unsworth's application and filing fee were returned, indicates the areas where Mr Unsworth's application did not meet the requirements of the Regulations. The errors and omissions included the name and contact details of

the person lodging the application, a question as to the correct identity of the employer (this appears to have been based on an email exchange attached to the Statement of Problem which identifies a different respondent to that which Mr Unsworth had cited on his Statement of Problem), and a lack of information with regard to the remedies being sought.

[10] I am satisfied that the errors and omissions by Mr Unsworth in his original application were significant and needed to be addressed before the Statement of Problem could be processed by the Support Officer concerned. The Statement of Problem completed by Mr Unsworth did not comply with the regulations and therefore Mr Unsworth's argument that he had commenced his proceedings within time is not accepted.

[11] It is noteworthy that Mr Unsworth has provided no explanations to the Authority as to the extraordinary delay in commencing his action. In 2006 when Mr Unsworth was pursuing mediation he had legal representation and advice. On 20 March 2006 Mr Unsworth was advised by Counsel that as the Resort was refusing to attend mediation he could file with the Employment Relations Authority. Mr Unsworth was asked if that was what he wanted and advised that Counsel would require \$70 for the filing fee.

[12] As already stated Mr Unsworth took no further steps in this matter until he attempted to lodge a Statement of Problem in the Wellington Registry of the Authority on 17 December 2008. This was the penultimate day of the three year limitation period. As already stated that Statement of Problem had errors and omissions which Mr Unsworth was required to correct before re lodging it, which he did on 13 January 2009.

[13] If s.114(6) was the only consideration I would uphold the Resorts challenge to jurisdiction as a result of Mr Unsworth not commencing his proceedings within the three year time limitation period. It is for an applicant to ensure the details contained within the Statement of Problem are accurate and completed in full. Mr Unsworth, due to his own lack of diligence in pursuing his personal grievance in the Authority left himself no room for error.

[14] However, the Employment Relations Act at s.219 confers a wide discretion on the Authority for anything required to be done by the Act and which is not done within the time allowed, to make an order extending the time within which the thing may be done.

[15] The fundamental principle guiding the Authority in the exercise of its discretion must be the justice of the case. Issues to be considered include the length and reason for the delay; prejudice to the parties; and the merits of the matter. (*Day v Whitcoulls Group Limited* [1997] 1 ERNZ 541; *An Employee v An Employer* [2007] 1 ERNZ 295)

The length of the delay

[16] As already stated the three-year time limit ended on 18 December 2008. Mr Unsworth's new Statement of Problem was lodged in the Auckland Office on 13 January 2009. This was a delay of 13 days. I have taken into account that the Christmas/New Year period fell within this time frame and have not counted the 12 days starting with 25 December 2008 and ending with 5 January 2009.

[17] On any view of it, the delay is lengthy and is almost equivalent to the longest extension of time granted for an appeal or challenge to the Employment Court which was 14 days (*An Employee v An Employer* [2007] 1 ERNZ 295, p300). The delay of 13 days is right at the outer limit of an acceptable delay.

The reasons for the delay

[18] Mr Unsworth is an unrepresented applicant. When he lodged his Statement of Problem in Wellington with the prescribed fee, he believed he had commenced his proceedings.

[19] No matter what had to be done to comply with the Regulations, Mr Unsworth was out of time the day the Wellington Office of the Authority sent the papers and filing fee back to him. There was always, in that event, going to be a delay.

Prejudice

[20] The Resort has submitted that it will be prejudiced by the delay as evidence has become stale and recollections have dimmed. On behalf of the Resort Mr Wall submits that records may have deteriorated or become mislaid. However, there is

nothing in his submissions which lead me to conclude that documents or witnesses will not be available for the Authority's investigation of Mr Unsworth's application.

[21] I have taken into account the fact that Mr Unsworth made no efforts after March 2006 to inform the Resort that he was intent on pursuing his personal grievance. This would at least, have put the Resort on notice that an action was in the wind and this would have reduced any prejudice resulting from his delay in commencing his action in the Authority.

The merits of the matter

[22] Mr Unsworth has provided very little information as to the facts of the problem he is asking the Authority to resolve. Mr Unsworth simply states that he called in sick on 25 September 2005 and was dismissed the following day. Mr Unsworth refers to some affidavits and the information contained in those affidavits but he has not attached these to his Statement of Problem.

[23] The Authority is also hampered by the fact that no Statement in Reply has been lodged. Nor is there any other documentation that would assist in providing a balanced view of the merits of the case.

Conclusion

[24] In reaching my conclusions I am cognisant that the overriding consideration must be whether the justice of the case requires that the time for commencing an action in the Authority should, in all the circumstances be extended in this case.

[25] The time limits set in the Act are there to ensure that matters are progressed diligently and within a timeframe that will allow employment relationship problems to be disposed of promptly.

[26] Mr Unsworth believed he had met his obligations under the Act when he lodged his original Statement of Problem together with the filing fee in the Authority on 17 December 2008. However, that document was incomplete and returned on the very day the three-years expired. The explanation for the delay is reasonable in all the circumstances and I find that the justice of the case requires the exercise of the

Authority's discretion in extending the time for commencing Mr Unsworth's actions in the Authority by 13 days.

[27] To progress this matter, the Authority will arrange a directions conference within the next 14 days at a time suitable to the parties to set a timetable for the investigation meeting.

[28] In the meantime the Respondent is to lodge a Statement in Reply by 3 April 2008.

[29] I am aware that the parties have not yet attempted to resolve this employment relationship problem with the assistance of mediation. The parties are directed to attend mediation within 28 days of the date of this determination and attempt in good faith to resolve the problem. The mediation service will be advised of this direction and will contact the parties to set up a date for mediation.

Costs

[30] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority