

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 165  
5408873

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| BETWEEN | HAYDEN NASH<br>Applicant                                       |
| A N D   | WELLINGTON REGIONAL<br>CHAMBER OF COMMERCE<br>First Respondent |
| A N D   | NEW ZEALAND TRADE<br>AND ENTERPRISE<br>Second Respondent       |

Member of Authority: Trish MacKinnon

Representatives: Applicant self-represented  
Susan Jane Davies, Counsel for First Respondent  
Maria Berryman, for Second Respondent

Submissions received: From the Applicant 22 April and 27 September 2013  
From the First Respondent 18 September 2013  
From the Second Respondent 16 September 2013

Date of Determination: 20 December 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Hayden Nash asks the Authority to exercise its discretion under s. 219 of the Act to extend the timeframe for commencing an action in the Authority. The Wellington Regional Chamber of Commerce (WRCC) and New Zealand Trade and Enterprise (NZTE) oppose the granting of an extension. The parties have agreed to the matter being determined on the papers following submissions.

**Background**

[2] Mr Nash raised a personal grievance for unjustifiable dismissal against WRCC and NZTE by letters dated 24 November 2009. He also wrote to Business Capability New Zealand Society Incorporated (CapabilityNZ) on 24 November 2009, stating his belief that the organisation had exhibited a lack of good faith towards him. He said he felt extremely aggrieved by this.

[3] Mr Nash pursued an employment relationship problem against CapabilityNZ, which he claimed had taken over responsibility for his employment from WRCC in 2008. The Authority determined in January 2011<sup>1</sup> that he had been employed by WRCC and not by CapabilityNZ.

[4] Mr Nash filed a statement of problem in the Authority on 28 January 2013, citing both WRCC and New Zealand Trade and Enterprise (NZTE) as respondents. He claims unjustifiable disadvantage and unjustifiable dismissal against each respondent. WRCC, which says it was Mr Nash's sole employer for the period in question, claims he is statute barred from pursuing his personal grievances by operation of s. 114(6) of the Employment Relations Act 2000 (the Act). Additionally, it says he did not raise a personal grievance for unjustifiable disadvantage against WRCC.

[5] NZTE asserts that it has never been Mr Nash's employer. It agrees with WRCC that Mr Nash's current action cannot proceed as it was filed more than three years after he had raised personal grievances. The Authority struck out NZTE as a party to the proceedings in March 2013,<sup>2</sup> a decision Mr Nash has successfully challenged.<sup>3</sup>

### **Issue**

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

### **The Act**

[7] Section 114(6) provides that:

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<sup>1</sup> [2011] NZERA Wellington 12

<sup>2</sup> [2013] NZERA, Wellington 31

<sup>3</sup> [2013] NZEmpC 101

*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.*

[8] 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.*

### **Discussion**

[9] Colgan CJ's judgment in *Roberts v Commissioner of Police*<sup>4</sup> 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 1990's, must be exercised judicially and in accordance with established principles.

[10] 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*<sup>5</sup>, are:

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

[11] Mr Nash attributes his failure to commence proceedings within three years to a number of factors. These include:

- a. Inadequate (Community Law Centre) legal representation in the early stages of his dismissal;
- b. Impecuniosity;
- c. Lack of employment for some time;

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<sup>4</sup> EmpC Auckland AC 33/06, 27 June 2006

<sup>5</sup> [1997] ERNZ 541 at 548

- d. WRCC requesting a copy of “*a signed personal grievance*” which took him six months to locate amongst his documents;
- e. His time consuming voluntary work;
- f. Time devoted to defending a Disputes Tribunal matter;
- g. His incorrect understanding from his employment adviser that he had six years, not three years, within which to file proceedings.

[12] I find that none of those reasons, other than the last one, has particular merit. While the first six factors may have reflected Mr Nash’s situation at the time, they do not, individually or in combination, constitute good reason for not complying with a statutory time frame.

[13] The final factor, however, requires consideration. Mr Nash has submitted that he asked a Barrister, Ms Jills Angus Burney, to approach WRCC in August 2011 to obtain that organisation’s agreement to attend mediation. WRCC’s response was to ask for a copy of “*a signed personal grievance*”, which I interpret to refer to a signed copy of his letter of 24 November 2009 raising personal grievances.

[14] It took six months for Mr Nash to locate a signed copy, which he says he provided to WRCC on 24 March 2012 with a request for mediation. Mr Nash submits that when there was no response from WRCC, he “*started to progress this matter further with the express purpose of filing in the Authority*”. He says he “*kept in touch with his employment adviser during this process to ensure that (he) was following correct procedure in outlining the statement of problem*”.

[15] He says that he had sought advice from his employment adviser in May 2012 “*regarding limitations on the timeframe for filing and understood that he had a six year limitation period on which he could file proceedings*”. When he filed proceedings in the Authority on 28 January 2013 he says he believed this to be within the statutory timeframe.

[16] Mr Nash submitted an affidavit sworn by Ms Angus Burney in which she outlines the assistance she provided to Mr Nash. In March 2011 she had been instructed to facilitate mediation with Capability NZ over the costs it was seeking against Mr Nash. She recalled discussing a “*significant wage loss with Mr Nash on 22 March 2011*”. She says she advised he had six years under the statute of limitations for his claim for losses. She assisted in the provision of a joint

memorandum to the Authority in April 2011 “*where costs against the Applicant were withdrawn from the Wellington ERA*”.

[17] In September 2011 Ms Angus Burney says she communicated with Ms Davies, counsel for WRCC, to facilitate mediation between the current parties and “*assisted the Applicant by forwarding a letter to EMA Central a letter to Mr Charles Finny (former CEO, WRCC)*” (sic). She says instructions to her office from the Applicant ceased when “*prior to October 2011 he had failed to gain full time employment*”.

[18] Ms Angus Burney’s affidavit ends by noting that her records show that on 24 May 2012 she spoke with the Applicant and reminded him that he was required to file in the ERA within a specific timeframe. She says she referred to the same wages losses timeframe as she had in March 2011.

[19] I note that Ms Angus Burney’s affidavit does not refer to providing information or advice about personal grievances to Mr Nash. She refers to discussing a significant wage loss with him in both March 2011 and May 2012. The timeframe she advised Mr Nash is consistent with that applicable to a claim for wages arrears under s. 131 of the Act.

[20] Her instructions from Mr Nash, by her account, were in relation to an issue of costs, a wage loss issue, and an attempt to facilitate mediation. Ms Angus Burney’s affidavit does not specify the subject matter of the proposed mediation. Mr Nash ceased instructions to her in, or before, October 2011, some 15 months before he filed personal grievance proceedings in the Authority.

[21] I do not find Mr Nash’s reason for failing to comply with the statutory time limit compelling. He is representing himself in the current proceedings and in doing so has demonstrated knowledge of employment legislation. I am not convinced that he relied on Ms Angus Burney’s advice relating to the statutory time frame for a wages losses claim in filing his personal grievance proceedings. If he did, I am not persuaded that his reliance is a relevant factor in my consideration of this issue.

[22] I find the length of the delay in commencing proceedings to be significant. Even allowing for the fact that Mr Nash erred in identifying his employer, by initially filing proceedings against Capability NZ, he had 22 months following the Authority’s determination of that matter in which to commence proceedings against the current

respondents. He filed proceedings exactly two years after the date of the Authority's determination. That was a little over two months outside the statutory time frame.

[23] WRCC and NZTE submit that the delay in commencing proceedings has been prejudicial. Neither of the two principal witnesses for WRCC is still employed by that organisation. WRCC submits that its records are minimal and there is no historical knowledge within the organisation of Mr Nash's employment, or its termination.

[24] NZTE describes the delay in commencing proceedings against it as extraordinary. It says that only one of the individuals named by Mr Nash is still employed by it. NZTE submits that it would be unreasonably prejudiced if it had to respond to allegations involving people and alleged discussions in 2007 to 2009.

[25] Mr Nash submits that there will be no prejudice to either respondent and they would be in no more disadvantageous a position than if he had commenced proceedings on 23 November 2012, which was the last day within the statutory time frame.

[26] There is some merit in Mr Nash's submission. While both respondents are prejudiced by the time taken from raising the personal grievance to filing proceedings, there is no particular additional prejudice arising from the additional two months and five days delay.

[27] Mr Nash claims that he has a right under natural justice to have the matter heard and that, if it is not heard, there would likely be an ongoing effect on him. WRCC submits that Mr Nash squandered his rights to pursue his claims by prioritising other matters, such as his voluntary work, over pursuing his claims in the Authority.

[28] I am not persuaded by Mr Nash's submission. His right in this matter is subject to a statutory time frame. He chose not to comply with that time frame in pursuing the current respondents, citing a variety of reasons, most of which I have already found to have little worth.

[29] I have considered Mr Nash and the respondents' submissions on the merits of his substantive claims to have been unjustifiably dismissed and unjustifiably disadvantaged. Mr Nash raised unjustifiable dismissal claims in his letters to WRCC

and NZTE of 24 November 2009. He did not raise claims of unjustifiable disadvantage. In his submissions he cites s. 122 of the Act, which provides that the nature of a personal grievance may be found to be of a different type from that alleged.

[30] Section 122 does not assist Mr Nash in his attempt to raise a separate personal grievance for disadvantage more than three years after the expiration of the 90 day time limit. I find his claim to have been unjustifiably disadvantaged to have no chance of being heard, and therefore any consideration of the merits of such a claim to be unnecessary.

[31] It is not possible properly to assess the merits of Mr Nash's claim to have been unjustifiably dismissed in the absence of a full investigation. Mr Nash's employment was terminated for redundancy, following the decision to disestablish his position. Documents he included with his statement of problem show that a consultation process was followed, before the decision to disestablish his position was taken. WRCC claims that a full and fair redundancy process was followed and that there were substantive reasons for the redundancy.

[32] While I am unwilling to assess the merits of his claim, I can say that it does not appear strikingly compelling on the basis of the documentation provided to date. As I have already noted, however, the fundamental principal is the justice of the matter. The main issue for Mr Nash if the Authority determines not to exercise its discretion in his favour is that he would lose the opportunity to pursue his personal grievance.

[33] From WRCC and NZTE's perspectives, Mr Nash identified his employer unsuccessfully and filed a challenge to the Authority's determination of that matter, which he later withdrew. They submit he had plenty of time to commence proceedings against the current respondents following the Authority's determination of 28 January 2011. He failed to do so until 28 January 2013, well after the three year time frame had expired and it would be unjust to allow him to proceed.

[34] I am not satisfied that justice would be served by allowing Mr Nash to proceed. Three years is ample time within which to pursue a claim. Even allowing for the time taken up by his initial unsuccessful identification of his employer, Mr Nash had two years in which to file proceedings. His explanations for the significant

delay are unconvincing. They are substantially of his own making and do not justify the prolonging of this matter.

[35] I find it is not appropriate to exercise my discretion under s. 219 to extend the timeframe for commencing an action in the Authority. His claims against WRCC and NZTE are dismissed.

**Costs**

[36] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority