IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 211
5465412

	BETWEEN	SAMUEL GARTRELL Applicant
	AND	DAVRON TELCO INSTALLATION SERVICE NZ LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	James Donovan, Counsel for the Applicant Ron Knauss, Director of the Respondent
Determination:	17 July 2015

DETERMINATION OF THE AUTHORITY

A. The personal grievance application of Samuel Gartrell is dismissed after failing to proceed with his claim in a timely manner.

[1] Samuel Gartrell failed to lodge a witness statement in accordance with timetable directions set at an Authority case management conference held on 11 May 2015. His witness statement was due on 10 July 2015, some nine weeks after the directions were set.

[2] His was one of four applications involving the same respondent former employer and was being jointly investigated by the Authority. The four applications were lodged in the Authority in June 2014. Each applicant sought remedies for unjustified dismissal by Davron Telco Installation Service NZ Limited in May 2014 and also claimed wages for amounts said to be still due to them.

[3] On 16 July 2014 the Authority directed the parties to mediation under s159 of the Employment Relations Act 2000 (the Act). Mediation was held on 19 August

2014. On 21 August 2014 the Authority asked the applicants' representative James Donovan to advise whether the four applicants wished to proceed to an Authority investigation. No reply was received from Mr Donovan until 4 March 2015 – that is more than six months later. The 11 May case management conference was held after early suggested dates of 24 April and 4 May were unsuitable for either Mr Donovan or Mr Knauss.

[4] Mr Donovan, who is a lawyer, participated in the 11 May 2015 telephone conference at which the directions were set for lodging witness statements and documents in advance of an Authority investigation meeting notified for 27 and 28 August 2015. The respondent's representative – its director, Ron Knauss – did not join the conference call at the appointed time. The timetable directions set by the Authority were confirmed by a Member's Minute sent to the parties on 11 May 2015.

[5] Prior to 10 July Mr Donovan did not advise the Authority of any reason that the applicants' witness statements could not be lodged on the date set by the directions. An Authority officer contacted Mr Donovan on 13 and 14 July and advised him that he would need to apply for a variation of the timetable directions made by the Authority for its investigation and that a variation may or may not be granted depending on the reasons given for any application made. On 15 July Mr Donovan's secretary sent the Authority an email on Mr Donovan's behalf stating that his clients were now scattered throughout New Zealand and he was having difficulty in locating and having meaningful discussions with them but he expected to complete all documentation early in the week commencing 20 July. Such an email was not a satisfactory application for variation of timetable directions. A relatively long period had been allowed to prepare and lodge witness statements.

[6] In light of the more than six month gap between the unsuccessful mediation and advising the Authority that the applicants wished to proceed with an investigation, the failure to abide by the timetable directions given to try and bring this matter on for investigation, and the uncertainty as to whether the 'scattered' applicants could or would provide any witness statements, I formed the view that the Authority should dismiss these four applications on the grounds that the applicants were not sufficiently diligent in progressing their claims. I advised the parties of that view by a Member's Minute of 15 July and provided a further period of 48 hours for applications or

submission in relation to the proposed dismissal. That period expired without any such applications or submissions from or on behalf of the parties.

[7] I then resolved to dismiss the applications for the following reasons. Authority timetable directions are made to be kept. Where parties are legally represented, those representatives have obligations to the tribunal as well as their clients, which include following directions made (after being heard on suitable directions) or, if there is some real difficulty in meeting those requirements, advising the tribunal beforehand so that any necessary or reasonable adjustments can be considered. Further, in circumstances where it has not been possible to give advance notice, a legal representative could still be expected to then properly apply for some variation, with reasons and supporting information or documents, especially if asked by the tribunal to do so (as the Authority did here with Mr Donovan).

[8] A countervailing factor in considering dismissing the applications was the question of access to justice. However in seeking such access parties must also play their part. The consequence of not having done so here is that the Applicants have lost their opportunity in the second stage of the Act's regime to resolve employment relationship problems (that is an investigation by the Authority). However, because dismissal of their applications by the Authority has a substantive effect on their rights, each applicant now has a right to challenge this determination (within 28 days of it being issued) and seek a de novo hearing in the Employment Court.[1] While a Court hearing might prove relatively more expensive, it is a means of access to justice if one or more of the applicants wished to pursue their claims.

[9] While it might also be possible for one or more applicant to, alternatively, seek a reopening of the Authority investigation, they would need to be mindful that the 28-day challenge period to seek an Employment Court hearing runs from the date of the present determination.[2]

Robin Arthur
Member of the Employment Relations Authority

[1] Section 179 of the Employment Relations Act 2000 (the Act) and H v A Limited [2014] NZEmpC 92 at [28].
[2] Clause 4 of Schedule 2 of the Act and *Georgetti v Compass Communications Limited* [2015] NZEmpC 101 at [8] and [9].