IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 185
3064878

BETWEEN	IAN GORDON MANAWAITI Applicant
AND	SECRETARY OF MINISTRY OF FOREIGN AFFAIRS AND TRADE Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Applicant in person Susan Hornsby-Geluk, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further Information Received:	23 September and 2 December 2019 from the Applicant 21 November from the Respondent
Date of Determination:	6 May 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Manawaiti has been employed as a Diplomatic Courier by the Secretary of the Ministry of Foreign Affairs and Trade (MFAT) since 2007. He claims there is disparity between his total remuneration and that of a colleague who was already employed by MFAT when his employment commenced. Mr Manawaiti raised the matter with his employer in 2017 and requested a salary review.

[2] Following a review of Mr Manawaiti's position MFAT amended his Pay Band to that of his colleague. It also offered Mr Manawaiti an increase in salary backdated to 1 July 2015.

Following submissions by Mr Manawaiti, MFAT revised its backdating of the salary increase to 30 August 2012. MFAT says his position was banded correctly until August 2012 but that from 30 August 2012 it should have been placed in the same pay band as the other Diplomatic Courier. In June 2019 MFAT paid Mr Manawaiti just under $42,000 as backpayment of Total Remuneration from 30 August 2012.

[3] Mr Manawaiti remains dissatisfied that the backpayment was not made effective from the commencement of his employment in April 2007. He seeks an order from the Authority directing such payment be made and that consideration be given to paying interest on the sum owing.

[4] MFAT rejects Mr Manawaiti's claim and says he has no legal basis for it. It says he had not raised a personal grievance arising out of his employment with MFAT and it did not consent to his doing so out of time. It further says that, if Mr Manawaiti was claiming breach of contract, then the relevant breach occurred when he was first employed by MFAT in 2007 and his claim is well beyond the six-year limitation period for such a claim.

[5] Mr Manawaiti maintains he had raised a personal grievance although he conceded in the course of a case management conference with the Authority and MFAT that he had not explicitly done so. If necessary, he seeks leave from the Authority to raise a grievance out of time for disadvantage sustained as a result of an unjustifiable action by his employer. It was agreed with the parties the Authority would determine this as a preliminary issue by way of submissions and would also consider whether a six year limitation period applies.

[6] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

Relevant law

[7] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins 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 the period.

[8] The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.[1]

[9] Under s 114(4) of the Act the Authority has the discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

> (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
>
> (b) considers it just to do so.

[10] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

> For the purposes of section 114(4)(a), exceptional circumstances include—
>
> (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
>
> (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
>
> (c) where the employee’s employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
>
> (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Was a personal grievance raised?

[11] Mr Manawaiti submits the problem is and has always been a personal grievance. He says it has been referred to as a personal grievance in correspondence between himself and MFAT from time to time, and has been clearly acknowledged as such. Mr Manawaiti has not referred me to any specific documents to support that claim. MFAT rejects the claim that the issues have ever been described or acknowledged as a personal grievance.

---

[1] Section 114(2) of the Act.

[12] Mr Manawaiti submits his claim relates to an unjustifiable action by MFAT that affected his employment to his disadvantage. He describes the unjustifiable action as a "*discriminatory approach*" which was "*a breach of the principle of fairness and pay equity relationships*". In the alternative, Mr Manawaiti submits it was a breach of his employment agreement.

[13] MFAT submits that Mr Manawaiti at no time raised a personal grievance and objects to the granting of leave for the late raising of his personal grievance claim. It further submits that, if Mr Manawaiti is found to have raised a personal grievance, he is prohibited by the Limitation Act from pursuing any loss of earnings further back than the preceding six years.

[14] In his reply submissions Mr Manawaiti notes he had thought "*it was perfectly plain and obvious that a pay equity matter could only be described as a grievance*" and that he had been more concerned with the content of the issue than its technical description.

[15] I have reviewed all the documentation provided by both parties and have found no explicit references to a personal grievance. However, as Judge Holden observed in *Chief Executive of Manukau Institute of Technology v Zivaljevic*[2], it is not necessary for an employee to name her/his problem as a personal grievance. In that judgment, Judge Holden summarised the principles applicable to the raising of a personal grievance, including the informal and accessible nature of the grievance process.[3] The judge noted there was no particular formula of words that had to be used and she referred to the situation where there had been a series of communications. In that instance, each would be examined as to whether it might constitute raising the grievance but also the totality of the communications might raise the grievance.

[16] Mr Manawaiti submitted a one page "Request for Salary Review" on 8 May 2017 in which he referred to a disparity between his base salary and that of a co-worker. In the statement of problem he lodged in the Authority on 25 June 2019, Mr Manawaiti said he had become aware in May 2017 that he was being paid less than the co-worker.

[17] His request acknowledged it had been necessary for his starting salary in 2007 to be "slightly less" than that of his co-worker because he needed to upskill to perform the requirements of the role. However, he now believed his skills and those of his co-worker

[2] [2019] NZEmpC 132.
[3] N2 at [36] to [38].

were so similar, and applied in an identical manner, that "*there should be a closing of the gap*" between their base salaries. Mr Manawaiti asked for his request to be considered separately from that year's annual performance round.

[18] I do not consider that letter raises a personal grievance. The letter is what its heading suggests – a request for a review of remuneration. Mr Manawaiti was informing his employer that, having recently become aware of the difference between his remuneration and that of his colleague and, although he was content that a difference in remuneration was appropriate at the outset of his employment, he believed it was not justified after he had been in the role for ten years.

[19] Mr Manawaiti's next correspondence with his employer over the matter was dated 5 December 2017, within a week of receiving MFAT's response of 29 November 2017. In the employer's letter, MFAT noted it had been "*a very complicated matter to work through…*". It had found Mr Manawaiti's role had been placed in a different salary band from that of the other Diplomatic Courier: Mr Manawaiti had been placed in band 11 while his colleague was in band 12.

[20] MFAT advised Mr Manawaiti it had addressed this by assessing his role and placing it in the same band as his colleague. It noted that, while they had been in different bands, Mr Manawaiti's range of remuneration had still been within the range of band 12, which it agreed was the correct band for the position. MFAT proposed "*as a gesture of goodwill…*" to increase Mr Manawaiti's salary and backdate it to 1 July 2015.

[21] Mr Manawaiti stated his appreciation for his employer's efforts to progress his request in his 5 December 2017 letter but disputed the date from which MFAT proposed backdating his salary. In his view, his salary should be backdated to 1 July 2008. His rationale was that this was fourteen months after he had commenced in the position, by which time he was "*fully conversant with the role and was totally competent*".

[22] Mr Manawaiti's letter of 5 December 2017 referred to pay inequity and cited the application of MFAT's HR systems and policies being unfair to him and "*causing this serious and long-standing financial disadvantage*" to him.[4] Mr Manawaiti did not explicitly use the words "*personal grievance*" but it was clear from this second letter that he believed

[4] The applicant's letter to MFAT dated 5 December 2017 at page 4.

himself to be treated unfairly with regard to remuneration in relation to the co-worker whose duties were almost identical.

[23] However, at this stage the issue appeared to be more of a wage arrears conversation than one about a personal grievance. It is not a situation where the totality of communications raised a grievance, as the 8 May letter was a request for a salary review, not the raising of a personal grievance. It is not evident that Mr Manawaiti turned his mind at that time to the issue of backdating any salary adjustment that might result from a salary review. It was only after his employer had proposed "*as a gesture of goodwill*" to backdate the proposed salary increase to 1 July 2015 that Mr Manawaiti raised the matter of how far back he believed he should be recompensed.

[24] I find Mr Manawaiti's letter of 5 December 2017 does not raise a personal grievance: it raises an issue over the extent of back pay or wage arrears. Mr Manawaiti seeks to amend his statement of problem to describe his claim as a personal grievance. I have no issue with his doing so but he would be effectively raising a grievance through the statement of problem. That requires the Authority to find exceptional circumstances for the delay of more than two years in raising it.

Are there exceptional circumstances?

[25] Mr Manawaiti cites as exceptional circumstances his employer's "*excessive delay and the withholding of pivotal documents*", and his "constant concern and upset by the unfairness element that I have had to carry…" while continuing to perform the requirements of his position.

[26] With regard to the first circumstance cited, I am not persuaded from the documentation provided by the parties that there is validity to the claim. While MFAT took some time to respond to Mr Manawaiti's initial letter requesting a salary review, it explained this in its response, thanking Mr Manawaiti for his patience and stating that the matter had been very complicated to work through. I have no reason to doubt that it was.

[27] Other documentation provided to the Authority by the parties does not support the claim of excessive delays or the withholding of pivotal documents.

[28] It appears from MFAT's correspondence that some documents sought by Mr Manawaiti could not be found. As a result MFAT advised him it was refusing his request under s 29(2)(b) of the Privacy Act 1993. At least one other document that was provided by MFAT had redactions made under s 29(1)(a) of that Act as release of the information would involve the unwarranted disclosure of the affairs of another person.

[29] With regard to the second circumstance, I am not satisfied that carrying on with his job while conducting correspondence and having discussions with his employer over matters relating to backpay constitutes an exceptional circumstance.

[30] As neither of the circumstances Mr Manawaiti has cited to support his application warrants the granting of leave to raise a personal grievance out of time, I decline his request.

Breach of contract

[31] In the alternative, Mr Manawaiti submits this is a breach of contract matter. MFAT submits Mr Manawaiti is barred from pursuing such a claim where it has been more than six years from the date on which the cause of action arose, in accordance with s 142 of the Act and the Limitation Act 1950.

[32] I accept that submission. Section 142 concerns the limitation period for actions other than personal grievances, which have their own prescribed timeframes. Section 142 provides:

> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[33] The employment relationship problem, in this instance the breach of contract that is claimed in the alternative by Mr Manawaiti, was MFAT's placement of him at the commencement of his employment in April 2007 in a different pay band from that of his co-worker, resulting in his receiving lesser remuneration. Mr Manawaiti claims he became aware of the salary discrepancy between himself and his co-worker in May 2017 and submits that is when the timeframe should begin.

[34] The limitation period in s 142, however, takes no account of the date from which an employee becomes aware of a cause of action. This was the conclusion former Chief Judge Colgan reached in *Haig v Edgewater Developers Ltd & ors*, after considering whether s 142

could be said to include an additional implied provision of knowledge or imputed knowledge by the claimant.[5] He concluded it could not, observing that s 142 was materially identical to s 4(1)(a) of the now repealed Limitation Act 1950.

[35] Section 4(1)(a) provided that, except as otherwise provided in that Act, actions founded on simple contract or tort could not be brought after the expiration of six years from the date on which the cause of action accrued. Section 28 of the Limitations Act provided exceptions in the case of fraud or mistake.

[36] The former Chief Judge noted that the Employment Relations Act contained no equivalent provision to s 28. He referred to the Supreme Court judgment in *Murray v Morel & Co Ltd* where the court determined that there is no general principle of law that a cause of action did not accrue for limitation purposes until the elements were discovered or reasonably discoverable by the claimant if they had accrued more than six years before proceedings were issued.[6] The Chief Judge concluded that, "*(b)ecause of its material identity to the relevant Limitation Act 1950 provisions, the same interpretive conclusion must therefore be reached in respect of s 142 ERA*".[7]

[37] I accept that Mr Manawaiti became aware of the pay discrepancy between himself and a colleague in May 2017. However, applying *Haig*, the critical time under s 142 is when the cause of action arose, not when Mr Manawaiti gained knowledge of it. I accept MFAT's submission that the cause of action arose in 2007 when Mr Manawaiti was employed and placed into pay band 11. The effect of this is that Mr Manawaiti is out of time under s 142 for bringing an action under breach of contract.

Summary

[38] Mr Manawaiti did not raise a personal grievance within the statutory timeframe and I have determined there are no exceptional circumstances that would justify leave being granted to raise a grievance after the expiration of that timeframe.

[39] Mr Manawaiti's alternative claim alleging breach of contract by his employer cannot proceed as it is time-barred by s 142 of the Employment Relations Act 2000.

---

[5] [2012] NZEmpC 189.
[6] N5 at 15 referencing [2007] NZSC 27, [2007] 3 NZLR 721.
[7] N5 at 15.

Costs

The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority