**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2012] NZEmpC 91**
**ARC 107/10**

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| IN THE MATTER OF | challenge to a determination of the Employment Relations Authority |
| BETWEEN | REBECCA BALL<br>Plaintiff |
| AND | HEALTHCARE OF NEW ZEALAND LTD<br>Defendant |

Hearing: 25 May 2012
(Heard at Auckland)

Counsel: Mark Ryan, counsel for plaintiff
Carolyn Heaton, counsel for defendant

Judgment: 13 June 2012

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**JUDGMENT OF JUDGE CHRISTINA INGLIS**

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[1] This is a de novo challenge against a determination of the Employment Relations Authority (the Authority) dated 3 September 2010,[1] declining an application for an extension of time to pursue a grievance beyond the three year timeframe specified in s 114(6) of the Employment Relations Act 2000 (the Act).

[2] The application was dealt with on the papers before the Authority. Ms Ball gave evidence in these proceedings. No evidence was produced by the defendant other than an affidavit from the current National Human Resources Manager for the defendant, Ms Brosnan. Ms Brosnan has no direct knowledge of the events in question and deposed that Ms Ball's manager at the relevant time (Ms O'Connor)

[1] AA 397/10.

had since left the company and that her whereabouts were unknown. Ms Brosnan was, however, able to put a number of relevant documents before the Court.

**Background**

[3] Ms Ball was employed as a support person with Healthcare of New Zealand Limited in 2006. A number of issues soon arose. She developed concerns about her safety at work (particularly in relation to a client she was working with). She raised her concerns with her employer towards the end of 2006. Correspondence followed, which Ms Ball failed to respond to. Ms Ball says that she was very stressed at the time and that she was forced to move house to protect her safety.

[4] Ms O'Connor wrote to Ms Ball on 22 January 2007 setting out the steps taken to engage with Ms Ball, and advised that if she did not hear from Ms Ball by 30 January to arrange a time to meet, she would consider this to be misconduct.

[5] The letter appears to have been couriered to Ms Ball's address. No response was received. Ms O'Connor wrote to Ms Ball again on 5 February 2007 advising that she was proceeding to a formal investigation, as foreshadowed in her earlier letter. Ms Ball was invited to attend a meeting on 16 February 2007.

[6] The 16 February meeting did not take place. Rather, the parties attended mediation on 21 February 2007. The mediation did not resolve matters. Following mediation, the defendant recommenced its disciplinary process by requesting Ms Ball attend a meeting on 13 March 2007. She did not do so and was subsequently advised that a preliminary decision had been made to terminate her employment on 23 March 2007 if she did not contact her employer. In the event, Ms Ball did not contact her employer and she was accordingly dismissed.

[7] Ms Ball gave evidence that she was advised of her dismissal at a client's home, and that she was deeply shocked by the news. She says that she made it clear to Ms O'Connor that she would be pursuing the dismissal and seeking further mediation. This aspect of her evidence tends to be corroborated by correspondence from the Mediation Service dated 29 March 2007, which refers to the defendant

being approached about the possibility of attending a further mediation. The defendant declined this invitation.

[8] It is not in dispute that nothing further was heard from Ms Ball by the defendant until she filed her statement of problem in the Authority on 12 February 2010. However, on 13 October 2009, Ms Ball had approached the Mediation Service of the Department of Labour to discuss some issues she had with the way in which the February 2007 mediation had been conducted, and seeking documentation from the Department's file. A meeting took place. The mediator subsequently wrote to Ms Ball expressing regret for anything that had happened at the mediation that had caused Ms Ball distress.

[9] A week later (on 20 October 2009) Ms Ball contacted the Authority. The Authority member recorded in his determination that the Authority's file indicates that Ms Ball made enquiries about how to bring a case in the Authority. She was sent an information pack which included a fact sheet entitled "Taking a Personal Grievance". The fact sheet incorporated the following statement:

> Employees may not start a personal grievance action in the Employment Relations Authority or the Employment Court more than three years after they have raised it with the employer.

[10] Ms Ball accepted in evidence that she had contacted the Authority and accepted that she may have been sent an information pack. She said that if she had been sent one she had not received it. She remained adamant that this was so throughout her evidence.

[11] On 12 February 2010, Ms Ball filed a statement of problem in the Authority. The defendant took issue with the timing of the statement of problem and submitted that the Authority should not exercise its discretion under s 219(1) of the Act to extend the time limit imposed by s 114(6).

[12] Ms Ball contacted the Department of Labour on 16 February 2010, following the filing of her statement of problem. She raised concerns about misinformation she said she had received from the Mediation Service about the amount of time she had to pursue her grievance. She advised the Department of Labour that she had

been informed by a staff member at the Mediation Service that the commencement date for the three year timeframe for pursuing a grievance was the date on which it had been lodged with the Mediation Service. Mr Shaw (of the Department of Labour) met with Ms Ball to discuss the issue. It is apparent that he then conducted an investigation into Ms Ball's complaints.

[13] Mr Shaw wrote to Ms Ball on 8 March 2010 stating that:

> In your conversation with us, and through the contents of your letter, you state that you were informed by a staff member at the Mediation office that the commencement date of the three year time frame was from the date upon which it had been lodged with the Mediation Service. ...
>
> After my investigation, I cannot be satisfied on the balance of probabilities that you were given accurate information.
>
> **So where to from here?**
>
> I am aware that you filed your case with the Employment Relations Authority. I can tell you that the Employment Relations Authority is an Institution under the Employment Relations Act that has the overall powers of Equity and Good Conscience. This means that if they deem it appropriate, they can waiver or extend the three year time period in question as they deem necessary to ensure that justice has the opportunity to be served. If [your] Legal Counsel brings out to the Authority your truly held belief about being misinformed in relation to that time frame by this office, it is possible that they may exercise their equity and good conscience jurisdiction to so waiver the period.

[14] The concerns identified in Mr Shaw's letter are consistent with Ms Ball's evidence at hearing. She said that she was told that the three year window was from the date on which she presented her case at mediation. She was firm about the nature of the advice she had received and was able to recall the first name of the staff member involved. Ms Ball was clear that she had been given the advice more than once, and was unshaken in cross-examination.

[15] Ms Ball took up the invitation in Mr Shaw's letter to file an application to extend time. The application related to her alleged disadvantage grievance (which the defendant conceded was notified within the statutory 90 day timeframe). Ms Ball did not give evidence before the Authority.

**Authority's determination**

[16] The Authority declined to extend time. The Authority member held that she had raised a grievance with her employer no later than 18 December 2006.[2] He found that even if Ms Ball had been misinformed about the statutory timeframe, any misinformation was corrected no later than October 2009 when she received the information pack from the Authority, clearly spelling out the requirement to file her application within three years of raising a grievance with her employer. As the Authority member noted, had she done so immediately following receipt of the information pack she would have been well within the three year time limit. He concluded, after carefully considering each of the relevant considerations, that the balance of justice weighed against the grant of an extension of time.

[17] The Authority member adopted an entirely conventional approach to determining whether or not an extension should be granted, having regard to the factors identified in the relevant authorities. He concluded that leave should not be granted, for reasons fully set out in the determination. But for the evidence presented in Court, and which the Authority did not have the advantage of (given that the parties agreed that the application could be dealt with on the papers), I would have reached the same conclusion.

## The statutory framework

[18] Section 114(6) of the Act provides that:

> 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.

[19] Section 114 does not contain provision for extending the limitation period for pursuing a grievance. On its face it appears to be a finite period, without exception. However, the Court has previously confirmed that recourse may be had to the general powers contained within s 219, which is entitled: "Validation of informal proceedings etc". Section 219(1) provides that:

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[2] At [26].The Authority also records at this paragraph that the defendant conceded that Ms Ball had raised a grievance.

> 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.

[20] In *Roberts v Commissioner of Police*[3] the Chief Judge observed that:[4]

> On its face, s 219(1) is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority determinations in this Court within the statutory period of 28 days following their issue. As a discretionary power, the Court applies a number of tests, all of which assist it to determine whether, in all the circumstances of the case, the interests of justice require an extension of time. Section 219 is not limited to any particular time limits: nor is that contained in s 114(6) excluded. Most, if not all, statutory limitation periods allow for an extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed as in the Limitation Act 1950.
>
> So even if, contrary to my conclusion, Mr Roberts had been out of time for issuing his proceedings, it would have been open to the Authority to extend the time for doing so if he had met the requisite discretionary tests.

[21] Counsel were agreed that the following matters are relevant to the Court's consideration of whether the discretion in s 219 ought to be exercised:

(1) The reason for the omission to bring the case within time;

(2) the length of the delay;

(3) any prejudice or hardship to any other person;

(4) the effect on the rights and liabilities of the parties;

(5) subsequent events;

(6) the merits.[5]

[22] These principles were endorsed in *An Employee v An Employer*[6] and *Clear v Waikato District Health Board.*[7]

[23] Counsel for the defendant focussed her submissions on three main points. Firstly, she submitted that even if Ms Ball had been misinformed about the

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[3] AC 33/06, 27 June 2006 at .
[4] At [19]-[20].
[5] *Stevenson v Hato Paora College Trust Board* [2002] 2 ERNZ 103 at [8].
[6] [2007] ERNZ 295 at [9].
[7] [2007] ERNZ 338 at [6].

timeframe for pursuing a grievance that misformation was corrected in October 2009 when the Authority sent her an information pack containing a clear statement of the legal position.

[24] Secondly, the plaintiff chose to wait for almost the full three years (as she says she understood it) before filing a statement of problem on 12 February 2010, and did not communicate with the defendant during this time. It was submitted that this was relevant to the overall justice of the case.

[25] Thirdly, it was submitted that the defendant will suffer prejudice if an extension is granted because Ms O'Connor left the company some time ago (in December 2007) and the defendant has failed to prosecute her grievance with diligence.

*The reason for the delay*

[26] Counsel for the plaintiff submits that Ms Ball was late in filing a statement of problem because she relied on erroneous advice she received from a staff member at the Mediation Service. Ms Ball's evidence was that she was told that she had three years from the date of mediation to file her statement of problem in the Authority. While the plaintiff's evidence was at times discursive and difficult to follow, she was clear (and unshaken in cross examination) that she had received such advice.

[27] Ms Ball's evidence was consistent with complaints she raised with the Department of Labour, as reflected in Mr Shaw's correspondence. His letter went on to effectively invite Ms Ball to pursue an application for an extension of time, which she did.

[28] And it is notable that, following investigation, the Department of Labour could not be satisfied, on the balance of probabilities, that Ms Ball had been given correct advice.

[29] The fact that Ms Ball filed a statement of problem (on 12 February 2010) within three years of the date on which the original mediation occurred (21 February 2007) also tends to support her version of events.

[30] Ms Ball also gave evidence that she did not receive the information pack from the Authority, which included a clear statement about the applicable timeframes. She agreed that she had contacted the Authority to make inquiries about the process, but was very firm that she had not received an information pack. I am prepared to give Ms Ball the benefit of the doubt on this point, particularly in the absence of any other countervailing evidence.

[31] I conclude that it is more likely than not that the reason for the delay in filing a statement of problem in the Authority was that Ms Ball had relied on (erroneous) advice she received from a staff member at the Mediation Service.

*Length of delay*

[32] Ms Ball filed a statement of problem in the Authority within the timeframe that she believed applied. As it transpired, that was approximately two months after the timeframe provided for in s 114(6) expired. The length of the delay was not substantial and was explicable having regard to the misinformation Ms Ball received.

*Prejudice/effect on rights?*

[33] The plaintiff submits that she is the only party who would suffer prejudice or hardship due to her detrimental reliance on the information proffered by the Department of Labour, in the sense that she would be prevented from pursuing her grievance. It was also submitted that the defendant would not suffer any real prejudice if an extension of time were granted. This submission was essentially restated in relation to possible effect on rights.

[34] Counsel for the defendant conceded that the potential for prejudice was not significant. She did however make the point that the defendant will likely face

difficulties responding to the grievance, given that a key witness has not been located. While Ms Brosnan's affidavit referred to Ms O'Connor having left the company in 2007, no detail was provided as to what steps had been taken to locate her. There is accordingly little basis for concluding that the defendant will face difficulties in terms of witness availability.

[35] In any event, it is the potential for prejudice arising out of the lapse in time from the expiry of the statutory three year period and the date on which the grievance was filed in the Authority that is relevant. That is because Ms Ball was perfectly entitled to pursue her grievance at any time within the three year period, and no issue of prejudice could have arisen during this period. I do not consider that the additional two month timeframe presents the defendant with any identifiable issues of prejudice that would not otherwise have arisen.

*Subsequent events*

[36] Ms Heaton submitted that Ms Ball failed to progress her proceedings with diligence, and that this is relevant to a determination of her application. She pointed to the fact that an "unless" order had been made by the Court following a failure to file a compliant statement of claim in this Court and that the hearing was subsequently adjourned at the request of counsel for the plaintiff. I agree with Mr Ryan that any failures on his behalf[8] to meet timetabling orders made by the Court, and an adjournment granted by consent, ought not to weigh against the plaintiff's application in the circumstances.

*Arguable case?*

[37] Ms Heaton referred to Ms O'Connor's correspondence with the plaintiff as reflecting attempts by her employer to address Ms Ball's concerns. I accept Ms Heaton's submission that the correspondence indicates that Ms O'Connor took a number of steps to engage with Ms Ball and to constructively deal with the issues that she had identified. It is however difficult to assess the strength of the claim at

[8] See *Costley v Waimea Nurseries Ltd* [2011] NZEmpC 59 at [9].

this early stage, and without the benefit of full evidence about the matters said to have given rise to the grievance.

*Overall justice*

[38] I accept that in assessing the overall justice of the case the Court may have regard to events which occurred since the accrual of the action, namely following notification of the personal grievance.[9] Ms Heaton submitted that the lack of communication between the plaintiff and the defendant from February 2006 to 12 February 2010 was relevant, referring to *Tu'itupou v Guardian Healthcare Operations Ltd*[10] in support of this submission. There the Court observed that a failure to engage following notification of a grievance amounted to a failure to comply with the objectives and scheme of the Act for the resolution of her personal grievance and was relevant to a determination of whether (in the overall interests of justice) an extension of time ought to be granted under s 219.[11]

[39] Employees and employers owe obligations of good faith to one another during the course of their employment relationship. This includes the obligation to be responsive and communicative. However, the statutory obligations of good faith end when the employment ends.[12] It is not clear (in terms of the analysis in *Tu'itupou*) what obligations an ex-employee has and breaches by failing to engage with their ex-employer following dismissal. In any event, in *Tu'itupou* it appears that the employee deliberately decided to do nothing to progress her grievance. That is not the situation in the present case. Ms Ball made the point in evidence that she requested further mediation with the company following notification of her dismissal and that that request was declined. While the mutual lack of communication following the plaintiff's dismissal is unfortunate, I do not consider that the failure by Ms Ball to engage with her employer during the three year period that was statutorily available to her materially affects the overall justice of the case.

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[9] *Harris v McIntosh* [2001] 3 NZLR 721 (CA) at [33].
[10] (2006) 4 NZELR 1.
[11] At [73].
[12] The obligation of good faith in s 4 of the Act is specifically linked to the existence of an employment relationship. See too *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808.

**Result**

[40] In the circumstances, and having regard to the evidence before the Court, I am satisfied that the discretion in s 219(1) ought to be exercised in favour of extending the timeframe for Ms Ball to pursue her disadvantage grievance. The application is accordingly granted.

[41] Issues arose at hearing in relation to whether the plaintiff had notified an unjustified dismissal personal grievance, in addition to a claim for disadvantage, in her original statement of problem. It is apparent that this argument had not been advanced before the Authority. The Authority member recorded in his determination that an application would be required under s 114(3) of the Act, to enable the issue of whether Ms Ball could proceed with a claim for unjustified dismissal to be determined.[13] Counsel were in agreement that if an extension was granted for Ms Ball to pursue her disadvantage grievance out of time, issues relating to the alleged unjustified dismissal would be pursued before the Authority.

[42] Costs are reserved. If they cannot otherwise be agreed they are to be the subject of an exchange of memoranda, with the plaintiff filing a memorandum within 60 days of the date of this judgment and the defendant filing within a further 30 days.

Christina Inglis
Judge

Judgment signed at 1pm on 13 June 2012

[13] At [23].