IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 144
WRC 3/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	HAYDEN NASH Plaintiff
AND	NEW ZEALAND TRADE AND ENTERPRISE First Defendant
AND	WELLINGTON REGIONAL CHAMBER OF COMMERCE Second Defendant

Hearing:	(on the papers by submissions dated 30 April, 23 May and 6 June 2013)
Representation:	Plaintiff in person M Berryman, counsel for the first defendant S J Davies, counsel for the second defendant
Judgment:	14 August 2014

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Section 114(6) of the Employment Relations Act 2000 (the Act) provides, relevantly, that no action may be commenced in relation to a personal grievance claim more than three years after the date on which the personal grievance was raised. It is accepted, however, that a litigant can apply pursuant to s 219(1) of the Act for an extension of time in which to commence proceedings. The issue in the present case is whether the plaintiff, Mr Hayden Nash, should be granted an extension of time so as to enable him to proceed with his intended action against the defendants.

[2] Mr Nash raised a personal grievance for unjustified dismissal against both defendants by letter dated 24 November 2009. More than three years later, on 28 January 2013, he filed a statement of problem in the Employment Relations Authority (the Authority). There was no dispute that the three-year time limit within which proceedings could be commenced ended on 23 November 2012. Both defendants claim that the action is statute barred by operation of s 114(6) of the Act.

[3] In response to the filing of the statement of problem on 28 January 2013, the Authority convened a telephone conference between the parties on 4 March 2013 and indicated its intention to strike out the first defendant, New Zealand Trade and Enterprise (NZTE) as a party to the proceedings on the basis that in an earlier determination dated 28 January 2011 the Authority had found that at all material times the second defendant, Wellington Regional Chamber of Commerce (WRCC) had been Mr Nash's employer.[1] The Authority then issued a formal determination dated 25 March 2013 in which it struck out NZTE as a party.[2] It also recorded that Mr Nash reserved the right to challenge the strike-out determination,[3] and confirmed his intention to seek an extension of time under s 219 of the Act in which to commence proceedings.[4]

[4] Mr Nash's challenge to the determination of the Authority striking out NZTE as a party to the proceeding was heard before me on 31 May 2013. In a judgment dated 5 June 2013, I set aside the Authority's determination and ordered that NZTE was to remain a party to the proceedings while the Authority heard and determined what I referred to as "the critical preliminary issue" namely, whether an extension of time should be granted to Mr Nash under s 219 of the Act for commencing proceedings against the defendants.[5] My decision proceeded on the basis that neither of the present defendants were a party to the earlier proceeding resulting in the Authority's determination dated 28 January 2011. I found that the Authority in that determination had not given any consideration to the issue of whether it could be

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[1] *Nash v Business Capability New Zealand Society Inc* [2011] NZERA Wellington 12.
[2] *Nash v Wellington Regional Chamber of Commerce* [2013] NZERA Wellington 31 [Authority strike-out determination] at [11].
[3] At [8].
[4] At [10].
[5] *Nash v New Zealand Trade and Enterprise* [2013] NZEmpC 101 at [15].

said, as Mr Nash claimed, that NZTE had been a joint employer with WRCC at the material time.[6]

[5] Following delivery of my judgment, the matter was referred back to the Authority. In a further determination dated 20 December 2013, the Authority, after a detailed consideration of the submissions presented by the parties, concluded that it was not appropriate in the exercise of its discretion under s 219(1) to extend the time frame for commencing an action in the Authority and it dismissed Mr Nash's claims.[7] Mr Nash has now challenged that determination in this Court. Submissions have been filed by the parties and they have agreed that the matter can be dealt with on the papers. Mr Nash also filed and served on the defendants a bundle of documents which strictly speaking, if they were going to be relied upon, should have been produced as exhibits to a supporting affidavit but they were freely referred to and relied upon in submissions and no objection was taken by any of the parties to their informal production.

The background

[6] Given the unusual and rather unique circumstances surrounding Mr Nash's employment situation, it is appropriate to provide a brief summary of the historical narrative in order to better appreciate the context in which the application for an extension of time now arises.

[7] In about 2007, the government made funding available through NZTE for a joint initiative between public and private sector organisations aimed at helping businesses develop their capabilities through the provision of high-quality, assessable and appropriate services. WRCC was the relevant private sector member of the joint initiative. The joint initiative itself was known as the Business Capability Partnership (the Partnership). As part of its contribution, WRCC agreed to recruit, contract and manage project management services. For its part, NZTE, described in the documentation as the New Zealand government's economic development agency, managed the partnership and the funding.

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[6] At [9].

[7] *Nash v Wellington Regional Chamber of Commerce* [2013] NZERA Wellington 165 [Authority time extension determination] at [35].

[8] At the end of 2007 Mr Nash was employed as Systems Administrator to the Partnership. The Partnership was not a legal entity and, so as to overcome that problem, in December 2007, Mr Nash entered into an individual employment agreement with WRCC which was to take effect from 23 January 2008. The employment agreement was described as a fixed term agreement with an expiry date of 30 June 2008 but two further fixed term agreements were subsequently signed off covering the periods 1 July 2008 to 30 September 2008 and 1 October 2008 to 30 January 2009 respectively. It appears that the latter agreement was then simply rolled over until Mr Nash's employment was eventually terminated for redundancy by WRCC on 2 October 2009.

[9] Mr Nash's principal duties related to the development and operation of a business website for the Partnership and an online business assessment tool. From all accounts he performed his role with distinction and he was involved in several governance meetings with key stakeholders. No performance issues appear to have arisen about the way in which Mr Nash carried out his functions as Systems Administrator.

[10] On 6 November 2008 the New Zealand Business Capability Society Inc (Capability NZ), was incorporated under the Incorporated Societies Act 1908. This was a new legal entity established to take over the work of the Partnership. Capability NZ had no employees, however, until August 2009 when Ms Roisin King took up the position of Chief Executive Officer. Ms King proceeded to carry out a review of the Partnership's management and staffing needs going forward. She decided that Capability NZ did not need a Systems Administrator and advised WRCC to that effect. WRCC in turn informed Mr Nash on 27 August 2009 that the Systems Administrator role was to be disestablished. Subsequently WRCC conducted a restructuring process regarding Mr Nash's position. On 18 September 2009, it advised Mr Nash that his employment would be terminated on 2 October 2009 on the grounds of redundancy.

[11] The background matters I have touched upon are uncontroversial. On 24 September 2009, Mr Nash raised a disadvantage grievance with Capability NZ and on 24 November 2009 he raised a personal grievance with NZTE and WRCC

respectively, based on his alleged unjustified dismissal. The thrust of all the alleged grievances centred upon Mr Nash's allegation that from the outset of his employment arrangement with the Partnership it was always understood that NZTE and WRCC would be acting as temporary employers on behalf of the Partnership but once Capability NZ was incorporated then it would take over as Mr Nash's employer. That allegation has consistently been denied by the other parties. In particular, Capability NZ and NZTE denied that they were ever Mr Nash's employer. For its part, WRCC has never disputed, that at all material times, it alone was Mr Nash's employer.

Proceedings

[12] Against this background, perhaps somewhat surprisingly, Mr Nash brought a claim in the Authority against Capability NZ only. The Authority carried out its investigation meeting in November 2010. Mr Nash alleged that as from 6 November 2008 when Capability NZ came into existence, it had taken over responsibility for his employment. He claimed 20 weeks' lost wages from 3 October 2009 to 1 March 2010 and he also sought compensation in the sum of $10,000 for hurt, humiliation and injury to feelings. In its determination dated 28 January 2011, the Authority rejected Mr Nash's claim, holding that he had been employed by WRCC and not Capability NZ.[8]

[13] In February 2011, the plaintiff filed a challenge in this Court to the Authority's determination of 28 January 2011. Mr Nash had been represented in his case against Capability NZ by an employment advocate from the Community Law Centre but in March 2011 he instructed Ms Jills Angus Burney, a Wellington barrister, to facilitate mediation with Capability NZ over the costs it was seeking against him in respect of his unsuccessful claim in the Authority. Mr Nash's challenge against the Authority's determination was withdrawn in April 2011 following on from an agreement he was able to reach with Capability NZ that it would not seek costs against him.

[14] On 23 August 2011, Ms Angus Burney sent a letter to WRCC pointing out that the Authority had confirmed that WRCC was Mr Nash's employer. Ms Angus

[8] *Nash v Business Capability New Zealand Society Inc*, above n 1.

Burney alleged that the personal grievance Mr Nash had raised on 24 November 2009 was based on his claim that he had been "subject to unjustified disadvantage" in his employment by WRCC. The allegation was that WRCC had allowed his employment to continue under an expired employment agreement. Ms Angus Burney stated that by way of remedy, Mr Nash sought $10,000 compensation for distress, humiliation and injury to feelings together with costs. She requested a response within 14 days and also sought confirmation as to whether WRCC would agree to take part in mediation.

[15] In response, Ms Davies, WRCC's solicitor, requested from Ms Angus Burney a signed copy of Mr Nash's personal grievance letter dated 24 November 2009 but a copy could not be located. Although the reason for this request does not appear from the documentation, I suspect that it may well have been because the letter from Mr Nash dated 24 November 2009 was based on his alleged unjustified dismissal and it made no reference to any alleged "unjustified disadvantage". In all events, it was not until 19 March 2012 that Mr Nash was able to forward to Ms Davies a signed copy of the personal grievance letter in question. On the same date, Mr Nash sent a reminder to NZTE in relation to the personal grievance he had also raised against that organisation on 24 November 2009. In his covering letter to both defendants, Mr Nash queried their availability to attend mediation. Mr Nash received no response from WRCC's solicitor to his letter but NZTE responded by letter dated 20 March 2012 stating that Mr Nash had never been an employee of NZTE.

[16] The next development in the narrative appears to have been the filing by Mr Nash in the Authority on 28 January 2013 of his statement of problem against NZTE and WRCC. Mr Nash claimed that he had been unjustifiably disadvantaged and unjustifiably dismissed by both WRCC and NZTE. It is the filing of this proceeding which fell outside the three-year limitation period. I have dealt with subsequent developments in the introductory section of this judgment. The upshot of those developments was that Mr Nash accepted that his proceedings were commenced more than three years after the date on which his personal grievance was raised and, accordingly, he now requires leave of this Court to enable him to proceed with his intending action.

[17] The Authority's determination of 25 March 2013 records that Mr Nash was self-represented. With one notable exception, it would appear that Ms Angus Burney had no further involvement in connection with Mr Nash's claim after about September 2011. In para 56 of his statement of claim Mr Nash pleads that in May 2011 he discussed with Ms Angus Burney the timeframe for commencing proceedings in the Authority and he was advised that he had six years "in relation to making a claim for loss of wages". The "notable exception" I refer to above relates to another inquiry Mr Nash made of Ms Angus Burney in May 2012 about the timeframe for filing in the Authority and he pleads:

> 67. In May 2012 Plaintiff asked Jills Angus-Burney the time frame to file in the Authority. Again the plaintiff was told he had six years from this date of the Personal Grievance.

This evidence forms a critical part of Mr Nash's present challenge. In support of his application, Mr Nash filed an affidavit from Ms Angus Burney. I will need to return to this issue.

The law

[18] In *Ball v Healthcare of New Zealand Ltd*, the Court was faced with an application under s 219 of the Act for an order extending the three-year limitation period prescribed in s 114(6) of the Act for pursuing an action.[9] Judge Inglis noted that the following matters are relevant to the exercise of the Court's discretion but in all cases the overriding consideration must be the interests of justice:[10]

(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.

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[9] *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91, (2012) 10 NZELR 84.
[10] At [21].

[19] In *Ball* the Court found that the plaintiff, Ms Ball, had filed her statement of problem in the Authority "approximately" two months after the three-year timeframe provided for in s 114(6) had expired.[11] Judge Inglis found that the most likely reason for the delay in filing the statement of problem in the Authority was that Ms Ball had relied on (erroneous) advice she had received from a staff member at the Mediation Service.[12] In terms of the length of delay criteria, Judge Inglis concluded: "The length of the delay was not substantial and was explicable having regard to the misinformation Ms Ball received."[13] Ms Ball was granted an extension of time in which to pursue her disadvantage grievance.[14]

[20] In *Tu'itupou v Guardian Healthcare Operations Ltd*, there was a delay of 10 weeks between the expiration of the three year limitation period and the commencement of proceedings in the Authority.[15] As in *Ball*, the Court held that the relevant period for determining the potential for prejudice is the period in time between the expiry of the statutory 3 year period and the date on which the statement of problem is filed in the Authority. The reasoning for this proposition being that the grievant was entitled to pursue a grievance at any time within the three year period and no issue of prejudice could have arisen during that period.[16]

[21] In *Tu'itupou* Judge Perkins held that the 10-week period of delay was in itself "not substantial" but in considering the overall justice of the case, His Honour noted that the employee had done nothing to progress her grievance but maintained "complete silence" during the three year limitation period.[17] The Court in that case declined, in the exercise of its discretion, to grant the extension of time applied for.

[22] As *Ball* and *Tu'itupou* demonstrate, the factual circumstances are infinitely variable and each case has to be judged on its own facts. The overriding issue always is whether it is equitable or fair and just that the applicant should be granted leave to proceed with the intending claim. In this regard there are two long

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[11] At [32].
[12] At [31].
[13] At [32].
[14] At [40].
[15] *Tu'itupou v Guardian Healthcare Operations Ltd* (2006) 4 NZELR 1 (EmpC).
[16] At [68].
[17] At [72]-[73].

recognised general principles which have particular relevance to the facts of the present case. They were affirmed by the Court of Appeal in *Wall v Caldow*[18] and *Peihopo v Amuri County,*[19] respectively. Each of those cases was concerned with an application under s 4(7) of the Limitation Act 1950 for leave to bring an action for bodily injury outside the two year statutory limitation period. Although s 4(7) prescribed a particular criteria for dealing with applications for leave and bodily injury cases no longer exist, the general principles I refer to were stated in respect of the Court's residual discretion as to whether it is just or unjust to grant the leave sought and to that extent the authorities still have relevance.

[23] In *Wall* it was stated that "it will not generally be 'just' where the delay is substantial, and no reasonable excuse is put forward for it, to grant an indulgence which withdraws from the defendant a statutory shield expressly given to him by the Legislature".[20] In *Peihopo,* it was held that while the period of delay which should be taken into account by the Court is the period which has elapsed after the end of the limitation period, in discharging its residual discretion as to whether it is just or unjust to grant the leave sought, the Court may look at the conduct of parties and enquire whether there is anything in that conduct over the whole period since the cause of action accrued which renders it just or unjust to grant the application.[21]

Discussion

Legal advice

[24] In the present case Mr Nash seeks to rely on *Ball*. There is a similarity in the length of the delay in both cases. There is also a similarity in the nature of the "misinformation" Ms Ball received from the Mediation Service and the advice Mr Nash claims to have received from Ms Angus Burney, which he described in one of his submissions as "solicitor inadvertence". Mr Nash seeks to distinguish *Tu'itupou* on the basis that the applicant in that case had taken no action within the three year limitation period whereas he had communicated with the defendants suggesting mediation but his suggestion was not taken up. Counsel for the

[18] *Wall v Caldow* [1964] NZLR 539 (CA).
[19] *Peihopo v Amuri County* [1966] NZLR 161 (CA).
[20] *Wall*, above n 18, at 544.
[21] *Peihopo*, above n 19, at 168.

defendants, Ms Berryman and Ms Davies, both note in their submissions that in her affidavit, Ms Angus Burney did not make any reference to giving advice to Mr Nash about the applicable limitation period in relation to personal grievance claims.

[25] The two relevant paragraphs in Ms Angus Burney's affidavit dated 22 April 2013 relating to the limitation issue state:

> 5. I recall that I discussed a significant wage loss with Mr Nash on 22 March 2011. I advised that he had SIX (6) years under the statute of limitations for his claim for losses. It is correct that I referred to the timeframe under the statute of limitations.
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> …
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> 9. On 24 May 2012 my records show that I spoke with the Applicant and reminded him that he was required to file in the ERA within a specific time. I referred to the same wages losses timeframe as in paragraph 5 of this affidavit.

[26] I must admit to being somewhat puzzled about the advice Ms Angus Burney claims to have given to Mr Nash on the limitation issue. She states that on both occasions she told Mr Nash that he had six years in which to make a claim and the claim she was referring to was for his wage losses which she described in para 5 of her affidavit as "significant". The problem with that assertion is that Ms Angus Burney does not explain what wage losses she was referring to. As noted in [14] above, in her letter of 23 August 2011 to WRCC, Ms Angus Burney particularised Mr Nash's claim, but the claim that she identified was a personal grievance claim and in the remedies she sought in her letter she claimed $10,000 compensation for distress and humiliation. No mention was made of any claim for loss of wages.

[27] Having said that, however, it is noted that in his original claim against Capability NZ and in his pleadings in his intending action against the defendants, Mr Nash has claimed loss of wages in addition to compensation for distress and humiliation and presumably that is the wage loss Ms Angus Burney would have been referring to but they were claims for future loss of wages after the termination of his employment. As such, they formed part of the relief Mr Nash was able to seek under his personal grievance claim. Section 123(1)(b) of the Act provides that one of the remedies available in a personal grievance claim is reimbursement of wages lost by

the employee as a result of the grievance. However, the limitation period for commencing an action to recover such wage losses, as with any other relief claimed under a personal grievance, is three years not six years.

[28] For its part, the first defendant accepts that based on the decisions of this Court in *Barnett v Northern Region Trust Board of the Order of St John*[22] and *McDonald v Raukura Hauora O Tainui*,[23] solicitor inadvertence on its own may be a factor but will not bring about "an entitlement as of right to leave".

[29] I turn now to consider the accepted criteria relevant to the exercise of the Court's discretion in granting Mr Nash an extension of time under s 219(1) for pursuing his personal grievance claim.

The reason for the delay

[30] In his submissions, Mr Nash described in some detail the various reasons for his failure to commence his action within time. The Authority summarised the position in these terms:[24]

> [11] Mr Nash attributes his failure to commence proceedings within three years to a number of factors. These include:
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> a. Inadequate (Community Law Centre) legal representation in the early stages of his dismissal;
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> b. Impecuniosity;
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> c. Lack of employment for some time;
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> d. WRCC requesting a copy of "*a signed personal grievance"* which took him six months to locate amongst his documents;
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> e. His time-consuming voluntary work;
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> f. The time devoted to defending a Disputes Tribunal matter;
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> g. His incorrect understanding from his employment adviser that he had six years, not three years, within which to file proceedings.
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> [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

[22] *Barnett v Northern Region Trust Board of the Order of St John* [2003] 2 ERNZ 730 (EmpC) at [19].
[23] *McDonald v Raukura Hauora O Tainui* [2003] 2 ERNZ 322 (EmpC) at [16].
[24] Authority time extension determination, above n 7.

> situation at the time, they did not, individually or in combination, constitute good reason for not complying with a statutory time frame.

[31] There was another reason Mr Nash put forward for the delay and that was his pre-occupation with attempting to arrange mediation. He suggested mediation to WRCC in November 2009, August 2011 and March 2012. He suggested mediation to NZTE in November 2009 and again in March 2012. He received no response from WRCC and NZTE denied that it had ever been his employer. While the defendants were under no obligation to take up Mr Nash's mediation proposal and the onus was on him to pursue his claim it cannot be said, as it was in *Tu'itupou*, that the intending plaintiff maintained "complete silence" during the three-year limitation period.[25]

[32] In relation to the final factor listed by the Authority, which was the advice Mr Nash received from Ms Angus Burney, the Authority said this:

> [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 on both March 2000 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.

[33] The difficulty with that finding, however, is that the claim Mr Nash makes for loss of wages is not a claim for arrears of wages under s 131 of the Act but, as noted in [27], a claim under s 123(1)(b) of the Act for reimbursement of wages allegedly lost as a result of his personal grievance. While the limitation period for commencing an action for arrears of wages is six years, a claim for loss of wages under s 123(1)(b) of the Act must be made within the three-year limitation period applicable to the personal grievance claim itself.

[34] The Authority went on to state:

> [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 timeframe for 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.

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[25] *Tu'itupou*, above n 15, at [72]-[73].

[35] I agree with the observation made by the Authority that Mr Nash has demonstrated an impressive knowledge of employment law. The letters he wrote on 24 November 2009 raising personal grievances against the two defendants were well structured and they correctly referred to the relevant provisions in the Act. His amended statement of claim is also well structured and runs to 83 paragraphs. His lengthy submissions in support of the present application and submissions in reply are impressive for a layperson and they include relevant quotations from reported legal authorities. In response to the Authority's observations, however, Mr Nash said:

> 28.17 … The Authority member should not assume that the Plaintiff is well researched in Employment Law as they intimate at clause [21], as the Plaintiff has only researched matters relating to his particular situation and in particular s 114(6) since becoming aware of this clause.
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> 28.18 Had the Plaintiff been aware of s 114(6) or indeed, that the wage claim limitation period was materially different from a limitation period of pursuing a Personal Grievance through the Authority, the Plaintiff would actively have endeavoured to ensure that any such proceedings were filed within the statutory timeframe and prioritised his volunteer activities accordingly.

[36] I accept that submission. From everything that I have seen and read in this case I am satisfied that Mr Nash is both conscientious and responsible. I have no doubt that had he been aware that s 114(6) prescribed a three-year limitation period for commencing a personal grievance action then he would have left no stone unturned in ensuring that he had his proceedings filed within that timeframe.

[37] The Authority dismissed Ms Angus Burney's advice as a relevant factor in its consideration of the reasons for the delay. With respect, I take a different view. I consider that Ms Angus Burney's advice that Mr Nash had six years in which to commence proceedings was a crucial factor in explaining the delay. Ms Angus Burney's account of her two discussions with Mr Nash on the limitation point is set out in [25] above. She deposed that she had discussions with Mr Nash on 22 March 2011 and 24 May 2012 respectively and on each occasion she told him that he had six years in which to bring his claim for wage losses. In his submissions, Mr Nash confirmed that on the second occasion, namely in May 2012, he approached Ms Angus Burney regarding the timeframe for filing and she confirmed

that he had six years in which he could file proceedings for wage claims. Unfortunately for Mr Nash, for the reasons explained in [27] and [33] above, that advice was wrong.

[38] Ms Angus Burney knew or ought to have known that Mr Nash was seeking advice about the limitation period for commencing a personal grievance proceeding. He was not seeking advice about a claim for arrears of wages. There was nothing, therefore, relating to his case that was governed by a six-year limitation period. There was only the one relevant limitation period and that was the three-year period prescribed in s 114(6) for commencing a personal grievance proceeding. Relying on the legal advice he had received from Ms Angus Burney, however, Mr Nash said that he finalised his claim during the 2012/2013 Christmas break and filed it in the Authority on 28 January 2013 "believing this was within the statutory timeframe of six years".

[39] Having concluded that the principal reason for the delay was the incorrect legal advice that Mr Nash had received regarding the limitation period, I acknowledge that that finding in itself does not automatically bring about an entitlement as of right to leave. It is just one element in the array of factors which needs to be taken into account by the Court when it comes to determining the justice of the case but I accept that it is a crucial factor in explaining the reason for the delay.

Length of the delay

[40] Although I suspect that there may be room for some difference of opinion as to the appropriate description of a delay of approximately two months, which was the period in the present case, I note that in both *Ball* and *Tu'itupou* it was described as "not substantial" and, with respect, I accept that description.[26] In all events, I would not be prepared to describe it as the type of inordinate delay that would warrant the invocation of the principle in *Wall* referred to in [23] above.

[26] *Ball*, above, n 9, at [32]; *Tu'itupou*, above n 15, at [72].

Prejudice/effect on rights

[41] Counsel for NZTE submitted that her client "would be unreasonably prejudiced if it had to respond to allegations involving people and alleged discussions in 2007 to 2009, raised for the first time in 2013". Without providing any particulars, she submitted that persons alleged to have been involved back in 2007 no longer work for NZTE. Counsel for WRCC described the grievance as "stale" and submitted that its two principal witnesses, Ms Caroline Ward and Mr Charles Finny left its employment "some time ago".

[42] As the Court of Appeal noted in *Peihopo*, the relevant period for determining potential prejudice is the period that has elapsed since the expiration of the limitation period.[27] In *Ball*, Judge Inglis explained the logic behind the principle in this way:[28]

> 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.

In the present case, there is no evidence of any identifiable prejudice or adverse effect on rights having arisen within the two months period following the expiry of the statutory three year limitation period.

The merits

[43] Departing a little from the criteria listed in *Ball*, I turn now to consider the merits of Mr Nash's application. In previous cases I have cautioned against too much reliance being placed on the merits element of the accepted criteria for determining out of time applications. I expressed that caution principally because of the paucity of reliable evidence which would normally be before the Court at that early stage in the proceedings. In *McLeod v National Hearing Care (NZ) Ltd*,[29] I adopted the approach of Judge Perkins in *Clear v Waikato District Health Board*,[30] which recognised that any evaluation of the merits or chances of success at the application for leave stage can only be assessed at a relatively basic threshold level.

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[27] *Peihopo*, above n 19, at 168.
[28] *Ball*, above n 9, at [35].
[29] *McLeod v National Hearing Care (NZ) Ltd* [2012] NZEmpC 120 at [33].
[30] *Clear v Waikato District Health Board* [2007] ERNZ 338 (EmpC).

[44] This same approach was taken by Judge Perkins in *Tu'itupou* where His Honour stated:[31]

> So far as substantial merits are concerned … it would be dangerous of me to deal with that issue on anything other than at a prima facie level.

[45] Likewise in *Ball*, in relation to the merits issue, Judge Inglis said:[32]

> It is however difficult to assess the strength of the claim at this early stage, and without the benefit of full evidence about the matters said to have given rise to the grievance.

[46] In the present case, the Court has before it more documentation relating to the merits than would otherwise normally be available to it at this stage of the proceedings. In this regard I refer to the earlier determination of the Authority dated 28 January 2011 and to the extensive bundle of documentation referred to in [5] above. In his submissions, Mr Nash summarised the merits of his case in these terms:

> 5.1 Whether the First Defendant was a conjoint employer and as such, had a responsibility to undertake proper process in transferring their responsibilities in regard to the Plaintiffs role to the BCS and;
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> 5.2 Whether the Second Defendant, as an employer party, in being directed by the BCS to undertake a redundancy process were entitled to do so, given that the role [the] Plaintiff was doing was not directly related to the work of the Second Defendant, nor for the benefit of the Second Defendant or;
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> 5.3 Whether the changed nature of the employment agreement, which was not recorded nor discussed prior to the BCS taking over the direction of the Plaintiff, meant that the Second Defendant did not have a contractual right to undertake the redundancy process.

The "BCS" referred to in Mr Nash's submissions is a reference to "Capability NZ" which is the entity described in [10] above.

[47] Mr Nash further submitted:

> 10. The Plaintiff believes that there are exceptional circumstances surrounding this case which have been outlined. Not the least that this is a complex matter which raises key questions in the formation of the contract, and in particular, tripartite employment relationships. …

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[31] *Tu'itupou*, above n 15, at [37].
[32] *Ball*, above n 19, at [37].

[48] Earlier Mr Nash had referred to the recent decision of the full Court in *McDonald v Ontrack Infrastructure Ltd*, which was the first case in New Zealand to deal with triangular or tripartite employment relationships.[33] That case was more concerned with whether, on the facts, a triangular employment relationship could be implied. In the present case, as I understand it, Mr Nash does not rely on any implied relationship but he contends that there was a triangular employment relationship from the outset and NZTE and WRCC were his "conjoint" employers. NZTE denies that it was ever Mr Nash's employer. WRCC, on the other hand, claims that it was Mr Nash's sole employer.

[49] As I observed in my judgment dated 5 June 2013, the Authority did not appear to give consideration in its initial determination to the role NZTE may have played in Mr Nash's employment.[34] Whether Mr Nash will be able to establish his case on the facts is, of course, another question which can only be decided at a substantive investigation or hearing. In support of his submissions on the merits, however, Mr Nash has been able to point to documentation which, on the face of it, appears to show that NZTE did have a role in hiring him for the position; that NZTE was a co-signatory with WRCC to his employment agreement; that NZTE did manage his day-to-day duties and that NZTE did provide the funding for his position.

[50] While it is always difficult, without the benefit of full evidence tested under cross-examination, to assess the strength of an intending plaintiff's case, I am not able to say that, based on the evidence before the Court, Mr Nash's claim is unmeritorious.

Overall justice

[51] As noted above, in exercising its residual discretion the Court may have regard to the conduct of the parties over the whole period since the raising of the personal grievance to see if there is anything in that conduct which renders it just or unjust to grant the application.

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[33] *McDonald v Ontrack Infrastructure Ltd* [2010] NZEmpC 132, [2010] ERNZ 223.
[34] *Nash v New Zealand Trade and Enterprise*, above n 5, at [9].

[52] I do not consider that this case comes within the category of the case referred to by the Court of Appeal in *Wall* where the delay has been substantial and no reasonable excuse has been put forward for it. On the contrary, I hold that the delay was not substantial and I am satisfied that the principal reason for it has been adequately explained. I also accept that the intended action does not appear to be wholly without merit. Although the delay in the case is unfortunate, I am satisfied, for the reasons outlined above, that the justice of the case requires leave to be granted to enable Mr Nash to pursue his dismissal grievance and his application is accordingly granted.

Conclusion

[53] The matter is referred back to the Authority for its substantive investigation. The Court has not seen the statement of problem before the Authority and, conceivably, it may be necessary for Mr Nash to file an amended pleading in keeping with the draft amended statement of claim before the Court but that is a matter to be pursued in the Authority if necessary.

[54] Costs normally follow the event but as Mr Nash was self-represented and did seek an indulgence from the Court, I do not propose to make any order as to costs.

A D Ford
Judge

Judgment signed at 3.00 pm on 14 August 2014