

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 33/06
ARC 88/05**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN NEIL JONATHAN ROBERTS
Plaintiff

AND COMMISSIONER OF POLICE
Defendant

Hearing: Auckland
16 June 2006

Appearances: David Feist, Advocate for Plaintiff
Ross Burns, Counsel for Defendant

Judgment: 27 June 2006

Judgment of Chief Judge GL Colgan

[1] The essential question on this challenge to the determination of the Employment Relations Authority is whether Neil Roberts's personal grievance claim was struck out wrongly for limitations reasons. It involves interpretation and application of transitional provisions in the Employment Relations Act 2000.

Background

[2] The challenge has reached this point for decision by an unusual route. In timetabling the case to a hearing, I issued a minute on 7 November 2005 identifying what I considered to be three questions that the Court might have to determine. Because of the desirability of an early decision in this very long running case, I directed the Registrar to arrange a meeting in Chambers with a Judge to determine how and when the challenge would be dealt with. That took place on 23 November

2005. At the conclusion of that meeting the presiding Judge, Judge BS Travis, issued an interim oral judgment setting out the conclusions that he had reached on the three questions I had suggested, acknowledging that he had not heard argument from the parties' representatives, and saying that if either party (in reality the defendant) disputed his conclusion, the judgment would be set aside and the issues argued before another Judge. Judge Travis found in favour of Mr Roberts's position and would have set aside the Authority's determination dismissing his claims. The Commissioner disagreed and exercised the option to have the case argued and decided following submissions. That is what has now transpired before me.

[3] Mr Roberts was formerly a police constable. Following an inquiry under s12 of the Police Act 1958 into allegations of misconduct by him, the Commissioner removed Mr Roberts as a member of the police in October 1998. In the language of employment law, he was dismissed.

[4] As the Authority's determination sets out, in January 1999 Mr Roberts wrote to the Commissioner stating that he wished to appeal the decision to dismiss him "*by way of personal grievance*" and sought a rehearing, I assume of the police tribunal's inquiry under s12 of the Police Act that the Commissioner was empowered to direct under reg 27 of the Police Regulations 1992. In February 1999 the Commissioner rejected the request for a rehearing and sought further information from Mr Roberts about his "*challenge to the actual dismissal*". The Authority found that although Mr Roberts was then seeking information to support his claim including a transcript of the s12 inquiry, it appears that the plaintiff did not respond specifically to the Commissioner's request for further information. The Commissioner has accepted subsequently that Mr Roberts submitted his personal grievance (to use the language of s33 of the Employment Contracts Act 1991) within time.

[5] The next relevant event is said to have taken place in October 2003 when Mr Roberts filed a statement of problem in the Employment Relations Authority alleging that he had been unjustifiably dismissed and seeking reinstatement and compensation. He also sought removal of his case into this Court for hearing at first instance.

[6] There was a meeting with an Authority Member on 18 November 2003 at which both parties were represented. As the Authority determination records, it was

agreed that the parties would attend mediation, that Mr Roberts's application for removal of the proceeding to the Court would be withdrawn, and if the matter was not able to be settled at mediation, the parties would file submissions with the Authority addressing whether the grievance had been raised within the 90-day period and whether Mr Roberts had complied with s114(6) of the Employment Relations Act 2000. In the meantime, the Authority put on hold its investigation of the employment relationship problems.

The Authority's determination

[7] The determination records that from time to time, Mr Roberts advised the Authority that he wished to pursue his application but was trying "*other avenues*" first. In April 2005 Mr Roberts re-filed his statement of problem with the Authority and, shortly afterwards, the Commissioner applied for a direction that it be struck out or dismissed. The Authority records that the Commissioner acknowledged that Mr Roberts had raised his personal grievance with the Commissioner within 90 days of the date of his dismissal and so the sole question for determination by the Authority on the strike-out application was whether he was required to have filed his proceedings in the Authority within the three-year period required by s114(6).

[8] The Authority concluded, as a matter of statutory interpretation, that Mr Roberts was barred from pursuing his grievance. It held that s114(6) applied to Mr Roberts's circumstances but that he had failed to bring his case to the Authority within the period of three years of "raising" the grievance with the Commissioner in January 1999. The Authority said that was because Mr Roberts's circumstances were governed by s248 of the Employment Relations Act 2000 addressing the transition between the two pieces of legislation and that under subs (4)(b) proceedings commenced after 30 June 2001 had to be in accordance with s113(1) and Part 9 of the Act. Mr Roberts commenced his proceedings about four years and nine months after he had submitted his grievance.

[9] Turning to the question whether it was empowered to extend the time for filing the grievance to legitimise what the plaintiff had done, the Authority considered whether s219 of the Act may have applied although this had not been raised by Mr Roberts who I note was then unrepresented. Although the Authority determination refers to its consideration of s219, it then set out the provisions of s221 of the Act. It

does not appear to have considered further the application of s219. The Authority considered that s221 only applied to proceedings that were before it and could not be used to enlarge the time for filing. It went on to say that even if it had the discretion to enlarge the time, Mr Roberts had failed to provide “*any good cause, other than the failure by his representatives, for not doing so*”. The proceeding was struck out.

Decision of the challenge

[10] Decision of the case turns on the interpretation and application of ss248 and 114(6) (that is within Part 9) of the Employment Relations Act 2000. These are, respectively:

248 Existing causes of action

- (1) Subject to the applicable period of limitation, the repeal by this Act of any existing Act or provision does not extinguish any existing cause of action.
- (2) Where any cause of action has arisen before the commencement of this section under any of the provisions repealed by this Act and at that date no proceedings have been initiated in respect of that cause of action under those provisions, those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if this Act had not been passed.
- (3) Subsection (2) is subject to sections 249 to 252 and subsection (4) of this section.
- (4) Where any cause of action has arisen before the commencement of this section in relation to the dismissal of an employee, proceedings in the Employment Tribunal in respect of that cause of action,—
 - (a) if commenced before the close of 30 June 2001, may be other than in accordance with section 113(1); but
 - (b) if commenced after 30 June 2001, must be in accordance with section 113(1) and Part 9.

114 Raising personal grievance

- (6) 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.
(my emphases above)

Time limitations

[11] Section 248(4) and, thereby, s114(6) upon which the Commissioner relies must be interpreted in accordance with the relevant provisions of the Interpretation Act 1999. It is common ground that under the Employment Contracts Act 1991 which was the operative legislation when Mr Roberts’s cause of action arose, he had the

period of at least six years¹ from the arising of the cause of action to file his personal grievance in reliance on the submission of it that had been made to the Commissioner in January 1999. It can only be as a consequence of the repeal of the Employment Contracts Act and the enactment of s114(6) of the Employment Relations Act in 2000 that the Commissioner can assert both that a shorter limitation period must be deemed to have applied to Mr Roberts's grievance and that, in the circumstances, he did not file his proceedings in accordance with that subsequent and shorter limitation period. Whether s114(6) establishing that subsequent and shorter limitation can, by operation of s248, apply to Mr Roberts's circumstances, is a question of interpretation of the 2000 Act.

[12] Sections 17 and 18 of the Interpretation Act 1999 dictate how this interpretation exercise is to be undertaken by the Court. They provide:

17 Effect of repeal generally

- (1) *The repeal of an enactment does not affect—*
 - (a) *The validity, invalidity, effect, or consequences of anything done or suffered:*
 - (b) *An existing right, interest, title, immunity, or duty:*
 - (c) *An existing status or capacity:*
 - (d) *An amendment made by the enactment to another enactment:*
 - (e) *The previous operation of the enactment or anything done or suffered under it.*
- (2) *The repeal of an enactment does not revive—*
 - (a) *An enactment that has been repealed or a rule of law that has been abolished:*
 - (b) *Any other thing that is not in force or existing at the time the repeal takes effect.*

18 Effect of repeal on enforcement of existing rights

- (1) *The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.*
- (2) *A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.*

[13] Applying those interpretation principles to ss248 and 114, I conclude that Parliament cannot be said to have intended to remove accrued rights to bring proceedings by legislative amendment unless the amending enactment "*provides*

¹ It is unnecessary to determine whether there was a limitation period of six years under the Limitation Act 1950 as the Commissioner contends because the proceeding was filed within that time in any event.

otherwise” (s4 Interpretation Act 1999). Not only has the Employment Relations Act 2000 not done so, but on a plain reading of the full text of s114(6), I conclude that only such personal grievances as had been “raised” after 2 October 2000 when the Act came into force (s2) were intended to be subject to the three-year limitation set out in s114(6). Until the legislation came into force on 2 October 2000, personal grievances could not be “raised” in accordance with s114. Mr Roberts had “submitted” his personal grievance to his employer, under s33 of the predecessor 1991 Act that was necessary before proceedings could be brought in reliance on a cause of action that arose in 1998 or 1999.

[14] The Authority wrongly determined that s114(6) applied to Mr Roberts’s grievance. The grievance was not “*raised in accordance with this section*”. Section 114 did not come into effect until 2 October 2000. The three-year limitation period applied only to grievances raised under s114 after 2 October 2000.

[15] Even with the benefit of argument, I have reached, albeit independently, the same conclusion as did Judge Travis at an earlier stage of this matter.

[16] Although unnecessary in view of my primary finding, I propose nevertheless to consider the second or fall-back ground of challenge relating to whether the Authority was empowered to enlarge the time for filing the grievance.

[17] The Employment Relations Authority mentioned but did not determine the question by reference to s219 of the Act. Rather, it focused on s221 and concluded, correctly in my view, that this section could not avail Mr Roberts. That is because the power to “*extend the time within which anything is to or may be done*” (*nntc*) (subs (c)) is dependent upon the matter being “*before it*” (that is the Authority). Section 221 does not, therefore, enable the Authority to extend time to bring a matter before it that is otherwise out of time.

[18] However, it is equally clear that the Authority erred by omitting to consider and apply s219. That provides materially:

- (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.*

[19] On its face, s219(1) is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority

determinations to 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 s114(6) excluded. Most, if not all, statutory limitation periods allow for their extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed as in the Limitation Act 1950.

[20] 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.

Outcome

[21] It follows that Mr Roberts brought his proceeding in the Employment Tribunal within the time allowed for doing so. The Employment Relations Authority, acting as the Employment Tribunal, dismissed the proceeding wrongly. It must now decide Mr Roberts's grievance on its merits. Without expressing a concluded view on the point, it would appear that the Chief of the Authority may be required to appoint a member of the Authority under s252(b) to exercise the jurisdiction of the Employment Tribunal in this case. Mediation or further mediation of the grievance may also be appropriate.

[22] Mr Roberts is entitled to costs in both the Authority and in this court. If these cannot be settled, he may apply by memorandum within 28 days and the Commissioner may have 28 days within which to respond likewise.

GL Colgan
Chief Judge

Judgment signed at 10 am on Tuesday 27 June 2006

Solicitors: