IN THE EMPLOYMENT COURT
WELLINGTON

[2016] NZEmpC 129
EMPC 110/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application to strike out proceedings
BETWEEN	ASHISH MAHARAJ Plaintiff
AND	WESLEY WELLINGTON MISSION INCORPORATED Defendant

Hearing:	7 September 2016 (heard at Wellington)
Appearances:	G Bennett, advocate for the plaintiff M Dearing, counsel for the defendant
Judgment:	27 October 2016

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] The plaintiff, Mr Ashish Maharaj, has challenged a determination by the Employment Relations Authority (the Authority) in which his claim against Wesley Wellington Mission Incorporated (Wesley) for arrears of wages under the Minimum Wage Act 1983 was dismissed.[1]

[2] Wesley has applied to strike out Mr Maharaj's challenge relying on cl 15 of Sch 3 of the Employment Relations Act 2000 (the Act) on two bases. First, because of a record of settlement entered into between them. Second, because it has an absolute defence arising from the limitation on commencing proceedings in s 142 of

[1] *Maharaj v Wesley Wellington Mission Inc* [2016] NZERA Wellington 47.

the Employment Relations Act 2000 (the Act), or alternatively, under s 4(1)(a) of the Limitation Act 1950.

Background

[3] The background to this proceeding is set out in affidavits by Ms Andrea McKenzie and Mr Maharaj and is not in dispute. From August 2003, Mr Maharaj was engaged by Wesley as a Relief Caregiver. In August 2005 he was contracted to provide full-time care on a referral basis. In that capacity he would be asked to provide care for teenagers referred to Wesley by Child, Youth and Family (CYF). Care took place in Mr Maharaj's home.

[4] In April 2006, Mr Maharaj agreed to a contract to provide care for a young person referred to by Ms McKenzie as Mr "C". The care for Mr C was funded externally by CYFs. That funding ceased on 19 May 2006 because, by that date, Mr C had returned to his family home.

[5] On 30 May 2006, Ms McKenzie informed Mr Maharaj by letter that his contract was being terminated, having previously made him aware that funding for caring for Mr C had ended and there was no further funding to continue with Mr Maharaj's services. That decision was unwelcome and on 20 June 2006 Mr Maharaj informed Wesley that its decision was unjustified.

[6] On 30 June 2006, after exchanges of correspondence and a meeting, Mr Maharaj notified Wesley that he considered the termination of his contract to be unjustified and that he would be seeking legal redress.

[7] Correspondence between Wesley's lawyer and Mr Maharaj continued until eventually Mr Maharaj filed a statement of problem in the Authority on 21 August 2006. Mr Maharaj's stated employment relationship problem was a personal grievance and he also sought to establish that he was employed by Wesley as a homeworker. The remedies sought were reinstatement to his position, arrears of wages to be quantified, compensation for hurt, humiliation, loss of dignity and injury to his feelings, costs, or any other remedy the Authority considered just.

[8] Wesley defended the proceeding. Although not now material, one of its defences was to dispute that Mr Maharaj was an employee maintaining, instead, that he was at all times an independent contractor.

[9] On 14 December 2006 a record of settlement pursuant to s 149 of the Act was signed by Mr Maharaj and Wesley following mediation. That record of settlement was also signed by a mediator employed by the Chief Executive of the (then) Department of Labour who was the holder of a current general authority to sign agreed terms of settlement for the purposes of s 149 of the Act. The record of settlement noted the mediator had been requested by the parties to sign the terms of settlement and, before signing that he had described the effect of s 149(1) and (3) of the Act to them. In signing the record the mediator stated in relation to s 149(3):

> I am satisfied that the parties understood the effect of that sub-section and have affirmed their request that I should sign the agreed terms of settlement.

[10] The nub of the settlement between Mr Maharaj and Wesley is in para 4 of the record of settlement that reads:

> 4. This Agreement represents a full and final settlement of any and all matters between the parties arising out of the relationship between the Applicant and Respondent…

[11] In the record of settlement Wesley formally denied liability to Mr Maharaj but agreed to pay him $6,000 for what was called humiliation and distress.

The determination

[12] Just short of eight years later, on 11 November 2014, Mr Maharaj filed a new statement of problem in the Authority. This proceeding purported to be a claim for arrears of wages arising from the time when he worked for Wesley. Between the date of the settlement in 2006, and this new statement of problem in 2014, the Employment Court had issued its judgment in *Idea Services Ltd v Dickson* dealing with entitlement to payment for sleepovers.[2] Mr Maharaj considered he had a substantial claim for arrears of wages, calculated under the Minimum Wage Act, because he had provided sleepovers for Wesley. Before filing his new proceeding

---

2 *Idea Services Ltd v Dickson* [2009] ERNZ 116 (EmpC).

there had been an exchange of correspondence between Mr Maharaj and Wesley in which Wesley rejected this claim.

[13] Wesley's response to this new proceeding was to request that the Authority determine a preliminary matter and dismiss Mr Maharaj's proceeding based on the full and final settlement in the record of settlement signed in 2006. Wesley also argued that the proceeding was out of time.

[14] The Authority agreed to hear Wesley's application.[3] The Authority found against Mr Maharaj, concluding that the record of settlement applied to all of the matters in issue in this 2014 proceeding. The Authority also concluded that Mr Maharaj was out of time to file a proceeding seeking the recovery of arrears of wages, and any jurisdiction the Authority had to extend time would not be exercised in his favour.

The challenge

[15] Mr Maharaj has challenged that determination and is seeking a hearing de novo. He is seeking to recover a substantial sum for arrears of wages, interest, holiday pay, disbursements and costs. His claim is still based on having provided sleepovers and, therefore, to be entitled to payment for that work, calculated pursuant to the Minimum Wage Act. There is no pleading that Mr Maharaj was underpaid or unpaid in any other way.

[16] In his statement of claim Mr Maharaj pleaded employment with Wesley between 2003 and 2006. He also pleaded raising a personal grievance and subsequently attending mediation on 14 December 2006. Paragraph 5 of his statement of claim reads:

> … My personal grievance was for wages and unjustified dismissal as there had been issues with not being paid the minimum wage throughout my employment. The defendant, Wesley was aware of the minimum wage issues one of my co-workers, Phillip Dickson sued them and I supported him with an affidavit so in my mind Wesley was fully aware of the issues.

---

3 *Maharaj v Wesley Wellington Mission Inc,* above n 1.

[17] The proceeding referred to by Mr Dickson against Wesley was an arrears of wages claim in *Dickson v Wesley Community Action Trust*.[4] Mr Dickson was also the successful party in *Idea Services*. Finally, Mr Maharaj pleaded that the record of settlement had not compromised his minimum wage claim.

[18] Mr Maharaj's affidavit explained the circumstances leading up to mediation in 2006 and his subsequent dealings with a Labour Inspector over his claim for arrears of wages. He also deposed to providing evidence to assist Mr Dickson in his case.[5]

This application

[19] Wesley has applied to strike out this proceeding relying on the record of settlement being binding and enforceable or, alternatively, that s 142 of the Act or s 4(1) of the Limitation Act 1950 apply.

[20] Jurisdiction to consider Wesley's application is provided by cl 15 of Sch 3 of the Act which reads:

> **15 Power to dismiss frivolous or vexatious proceedings**
>
> (1) The court may, at any time in any proceedings before it, dismiss a matter or defence that the court considers to be frivolous or vexatious.
>
> (2) In any such case, the order of the court may include an order for payment of costs and expenses against the party bringing the matter or defence before the Authority.

[21] For Wesley, Mr Dearing submitted that Mr Maharaj's claim is frivolous within the meaning of cl 15(1) because of the record of settlement and the statutory limitation provisions just referred to. For Mr Maharaj, Mr Bennett submitted that the record of settlement did not and could not have compromised Mr Maharaj's claim for arrears of wages for three reasons. First, Mr Maharaj did not know that a potential cause of action arising from arrears of wages based on the Minimum Wage Act was possible when he entered into the record of settlement with Wesley, because that issue had not then been decided by the Court in *Idea Services*.[6] Second, it is not

---

4 *Dickson v Wesley Community Action Trust* ERA Wellington WA 72/08, 27 May 2008.
5 *Idea Services v Dickson*, above n 2.
6 *Idea Services v Dickson*, above n 2.

possible as a matter of law to contract out of entitlements under the Minimum Wage Act and the settlement agreement needed to be looked at in that light. Finally, Mr Bennett submitted that s 142 did not operate as a bar to Mr Maharaj's present proceeding, because of s 6 of the Minimum Wage Act and, in any event, filing a proceeding in the Authority in 2006 was a sufficient step to prevent any statutory limitation from applying. As an alternative Mr Maharaj sought an extension of time.

[22] Before examining these submissions it is necessary to consider the Court's jurisdiction under cl 15. Mr Dearing relied on *STAMS v MM Metals Ltd*.[7] He submitted that *STAMS* remains good law despite the repeal of the Employment Contracts Act 1991, which applied when that case was decided, and frivolous in cl 15 should be equated with futile. In *STAMS* the proceeding before the Court was considered frivolous because it was misconceived. It was misconceived because the appeal in that case had not survived a settlement negotiated in the lead-up to trial. Mr Dearing submitted that, applying this approach, the same outcome should be reached in relation to Mr Maharaj's proceeding. Mr Maharaj had settled his claim for arrears of wages in 2006 and any consideration of his present claim for the same thing would be futile.

[23] Mr Bennett relied on *Lumsden v Skycity Management Ltd* and submitted that a high threshold is required for a claim to be dismissed as frivolous.[8] Relying on *Lumsden*, he submitted that the existence of a signed record of settlement under s 149 did not necessarily determine Mr Maharaj's prospects of success and, when analysed, his proceeding could not be said to be frivolous. A trial was needed to determine the issues Mr Maharaj had raised in his proceeding.

[24] In *Lumsden* the Court considered *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre*.[9] In *Gapuzan* Judge Corkill reviewed several cases about the meaning of frivolous in cl 15(1) beginning with

---

7 *STAMS v MM Metals Ltd* [1993] 1 ERNZ 115 (EmpC).
8 *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225.
9 *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206.

New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW.[10] In *Shipwrights* Chief Judge Goddard said:[11]

> Frivolous cases are more than just cases which disclose no cause of action. A frivolous case is one, to use the words of Lush J in *Norman v Mathews*:
>
> > Which on the face of it is clearly one which no reasonable person could properly treat as bona fide, and contend that he had a grievance which he was entitled to bring before the Court.
>
> It is one which is impossible to take seriously.

[25] Judge Corkill also referred to *Creser v Tourist Hotel Corp of New Zealand* and the following observation from that case:[12]

> … to categorise a case as frivolous it is not necessary for the Court to be able to make a positive finding that the applicant or plaintiff is trifling with the Court or is in any way insincere or moved by wrong motives. It is sufficient if, as a result of some patent and glaring error of law, the plaintiff or applicant has brought a case which is entirely misconceived.

[26] Later in his decision, Judge Corkill also noted with approval the comments by Judge Palmer in *Smith v Attorney-General* that futile was an adequate synonym for frivolous.[13] That review of the cases, and dictionary definitions of frivolous, led Judge Corkill to reach the following conclusion:[14]

> The underlying theme of these statements is that there must be a significant lack of legal merit so that it is impossible for the claim to be taken seriously.

[27] In *Gapuzan* the pleading in question was one alleging bad faith by the employer resulting in the denial of the plaintiff's Accident Compensation Corporation (ACC) claim. On analysis the Court held that the decision to decline the plaintiff's ACC claim was made by a reviewer appointed under the Accident Compensation Act 2001, based on evidence he received. Any step taken by the employer was taken to comply with its statutory obligations under that legislation and occurred after the employment relationship had ended. The claim attempting to

---

10 *New Zealand (with exceptions) Shipwrights Union v New Zealand Amalgamated Engineering IUOW* [1989] 3 NZILR 284.
11 At 289, (citations omitted).
12 *Creser v Tourist Hotel Corp of New Zealand* [1990] 1 NZILR 1055 (LC) at 1069.
13 *Smith v Attorney-General* [1991] 3 ERNZ 556 (EmpC) at 589.
14 *Gapuzan*, above n 9, at [58].

pursue the employer arising from ACC cover being declined was misconceived and therefore frivolous within the meaning of cl 15.[15]

[28] In *Lumsden* the Court was considering the Authority's jurisdiction under cl 12, Sch 2 of the Act to deal with frivolous or vexatious proceedings. Judge Inglis said:[16]

> It seems to me that the matter is not frivolous simply because it has no reasonable prospect of success. Something more is required. A matter is frivolous where it trifles with the Authority's processes, lacking the degree of seriousness required to engage the attention of the Authority in the sense referred to in the *Shipwrights* case. A matter may be said to trifle with the Authority's process where it is, to use Chief Judge Goddard's terminology, impossible to take seriously.

[29] The Court also observed that whether a matter is frivolous is to be determined objectively. What followed in *Lumsden* was a comparison between the matters placed in issue by the pleading and the record of settlement. The proceeding was not struck out because the pleaded allegations claimed that the settlement agreement had been breached, that the resignation forming part of that agreement was a constructive dismissal, and that the plaintiff had been duped into resigning as part of that settlement agreement. The pleading also raised an issue about the scope of s 238 of the Act. In those circumstances the Court was not prepared to say that the record of settlement was determinative and that the proceeding was frivolous.

[30] Mr Bennett attempted to draw a comparison between *Lumsden* and Mr Maharaj's case, by submitting that Mr Maharaj's cause of action was tenable and raised an important aspect of law relating to the payment of minimum wages. I will return to this subject.

[31] What emerges from *Gapuzan* and *Lumsden* is that a proceeding should only be dismissed as frivolous under cl 15 if there is a significant lack of legal merit so that it is impossible for the claim to be taken seriously. A careful analysis of the subject matter of the proceeding is required to make that decision and the existence of a record of settlement may not be determinative.

---

15 At [65].

16 *Lumsden*, above n 8, at [37].

The record of settlement

[32] Mr Dearing began his submissions by analysing the record of settlement and s 149 of the Act.[17] He submitted that the settlement was very clearly worded, compromising all and any disputes between the parties which, given the matters pleaded by Mr Maharaj in his statement of claim, included any claim for arrears of wages.

[33] Section 149 of the Act reads:

> **149 Settlements**
>
> (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
>
> (a) who is employed or engaged by the chief executive to provide the services; and
>
> (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—
>
> may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.
>
> (2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—
>
> (a) explain to the parties the effect of subsection (3); and
>
> (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.
>
> (3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—
>
> (a) those terms are final and binding on, and enforceable by, the parties; and
>
> (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and
>
> (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.
>
> (3A) For the purposes of subsection (3), a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity.

---

[17] The record of settlement wrongly named Mr Maharaj's employer as Trustees in The Wesley Community Project Trust when he was at all times employed by the present defendant, Wesley. In a joint memorandum of 19 October 2016, both parties acknowledged that the record of settlement was entered into by Wesley.

> (4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[34] Central to this submission is the effect of s 149(3)(a), making the settlement signed by a mediator final and binding on the parties. The requirements of s 149(2) mean that a mediator must confirm, before signing, that the effect of s 149(3) of the Act was explained to the parties.

[35] Mr Dearing relied on *Young v Board of Trustees of Aorere College*, where Judge Inglis said:[18]

> The plaintiff's decision to enter into a full and final settlement agreement with the defendant represents an additional hurdle for him. Mr Bennett submitted that he was attempting to weave a "fine line" around s 149 but I consider that it presents an insurmountable hurdle for the plaintiff in the circumstances of this case. The agreement represented a full and final settlement of the plaintiff's personal grievance according to its terms. Not only was it expressed to be on a full and final basis but the agreement was also signed off by a Department of Labour mediator pursuant to s 149 of the Act. As Mr Harrison points out, s 149(2) requires a mediator to explain the effects of such an agreement to the parties, before they commit to it, as set out in s 149(3)…

[36] Later Judge Inglis said, after referring to s 149(3):[19]

> The combined effect of these provisions is that a settlement agreement which has passed through the s 149 process cannot be challenged or set aside, except with the possible exception of duress on public policy grounds. There is no suggestion, as Mr Bennett accepted, of duress in this case.

[37] I agree with those views, but it is necessary to determine what was settled.

[38] The mediation in 2006 was about the whole employment relationship problem raised by Mr Maharaj, encompassing his employment status, his personal grievance and his claim for arrears of wages. Mr Maharaj's pleading in his statement of problem was explicit. The only potential liability for arrears of wages Wesley had to Mr Maharaj was the possibility of payment for sleepovers. Nothing else was outstanding and Mr Bennett did not submit that the arrears referred to in the 2014 proceeding referred to any other alleged failure to pay wages.

---

[18] *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [19].
[19] At [20] (footnotes omitted).

[39] Against that background, the record of settlement was designed to be comprehensive, ensuring the whole dispute was resolved. In para 4 the resolution recorded was of "any and all matters between the parties arising out of the relationship". Furthermore, at the time settlement was reached, Mr Maharaj knew Mr Dickson was taking action about sleepovers and payment of wages for them,[20] and provided evidence to support Mr Dickson's case. It follows that at the time settlement was reached, both parties knew about the possibility of an action for arrears of wages based on providing sleepovers.

[40] In *Marlow v Yorkshire New Zealand Ltd* this Court observed that only the clearest words might be capable of compromising a cause of action which was not known to exist at the time a settlement was entered into.[21] *Marlow* was not about a record of settlement under s 149 of the Act, but a similar principle must apply. With that note of caution, Mr Bennett's first submission cannot succeed. While *Idea Services* had not been decided at the time settlement was reached, both parties were aware that there was at least a potential claim for arrears of wages for sleepovers. With that knowledge they settled, electing to use clear language to record that "any and all matters" had been resolved. Those words satisfy the requirements in *Marlow* to use clear words to compromise a cause of action. In the context of an all encompassing settlement, the intention of para 4 was to bring to an end any potential liability for arrears of wages for sleepovers while also compromising all of Mr Maharaj's other claims.

[41] Mr Bennett's second submission was that the record of settlement could not have compromised Mr Maharaj's entitlements under the Minimum Wage Act. He was relying on the introductory words of s 6 of the Minimum Wage Act which reads:

> **6 Payment of minimum wages**
>
> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

---

[20] *Dickson v Wesley*, above n 4.

[21] *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 (EmpC).

[42] Mr Bennett submitted that s 6 means an employer cannot avoid paying the minimum wage where the Minimum Wage Act applies and, therefore, the record of settlement could not be a barrier to this proceeding. I do not accept Mr Bennett's submission. While s 6 of the Minimum Wage Act provides an entitlement for a worker to receive from his or her employer payment for the work at not less than the minimum rate, the agreement reached between Mr Maharaj and Wesley did not involve him foregoing an entitlement under that Act or lead to Wesley avoiding its statutory obligation. Mr Maharaj and Wesley compromised a cause of action, Mr Maharaj's ability to proceed with his claim to attempt to establish he had an entitlement to arrears of wages based on the Minimum Wage Act. Whether or not he was entitled to any arrears of wages under that legislation was disputed and would have been the subject of the investigation meeting, evidence and legal argument. Mr Maharaj chose to avoid the risk of that litigation and settled in exchange for a compensatory payment.

[43] I am satisfied the record of settlement in 2006 brought to an end Mr Maharaj's claim for arrears of wages arising from his employment with Wesley including any arrears he may have pursued under the Minimum Wage Act for sleepovers. In that situation the 2014 proceeding cannot produce a successful outcome for Mr Maharaj.

Section 142

[44] Wesley's second ground for dismissing this challenge is that the limitation on issuing proceedings in s 142 of the Act applies. Mr Maharaj's employment ended in 2006 and he did not file his new proceeding in the Authority until 2014, well outside the six years referred to in that section.

[45] Section 142 reads:

> **142 Limitation period for actions other than personal grievances**
>
> 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.

[46] Mr Bennett submitted that the introductory words in s 6 of the Minimum Wage Act were sufficient to avoid the limitation that would otherwise apply through s 142. He also submitted that the decision in *Law v Board of Trustees of Woodford House,* which previously addressed the relationship between s 6 of the Minimum Wage Act and s 142, is wrongly decided and it is necessary for a trial to be conducted to explore those issues.[22] I do not agree with either proposition.

[47] In *Law*, the Court considered whether the plaintiffs could recover remuneration where liability for it had arisen more than six years before the proceeding had been filed in the Authority. As in this case, the submission was made that the introductory words of s 6 of the Minimum Wage Act meant that an action for recovery of wages did not need to be commenced within six years of the cause of action accruing and was not barred by s 142. The Court determined that the entitlement referred to in s 6 of the Minimum Wage Act was for the receipt of wages whereas limitation periods affect rights to issue proceedings, even if those proceedings may be for remuneration not paid in breach of s 6.[23] The Court held that there was no need to consider the Limitation Act 2010, or the Limitation Act 1950, because of s 142.[24] The Court also held that the proceeding was in relation to an employment relationship problem.[25]

[48] As part of this analysis the Court considered that s 11 of the Minimum Wage Act provided a mechanism for arrears of wages to be recovered where there had been a default in payment, or payment at a lower rate than that prescribed, or as was otherwise legally payable to the employee. Section 11(2) of the Minimum Wage Act provides that an action for the recovery of wages may be brought by the worker concerned or a Labour Inspector on his or her behalf in the same manner as an action for arrears in s 131 of the Act.[26] The Court held that s 142 applied, and the plaintiffs in that case could not maintain claims for breaches of the Minimum Wage Act where

---

22 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576.
23 At [76].
24 At [77].
25 At [78].
26 At [79].

the cause of action had accrued more than six years before the date on which the proceeding was filed in the Authority.[27]

[49] Mr Bennett's submission did not elaborate to explain what aspects of the decision in *Law* are wrong beyond relying on s 6 of the Minimum Wage Act. I agree with the analysis in *Law*. Furthermore, the introductory words in s 6 of the Minimum Wage Act are a drafting tool, making it clear that no other statute or agreement could be interpreted to allow payment to a worker at a rate lower than one allowed by it, but those words are not designed to circumvent a limitation on commencing a proceeding more than six years after the cause of action has accrued. Section 142 operates to prevent stale claims from being pursued. That section did not prevent Mr Maharaj from relying on the Minimum Wage Act, it just required him to start his action within six years of the cause of action accruing. Consequently, Wesley has an absolute defence based on s 142.

[50] Mr Bennett's submission that the "clock stopped" in 2006 because Mr Maharaj filed his claim for arrears then, and that proceeding was within six years of the accrual of his cause of action, is unsustainable. The issue is the timeliness of the 2014 proceeding, not the 2006 proceeding, and he has overlooked the fact that the proceeding in 2006 was compromised.

[51] Furthermore, as I put to Mr Bennett, his submission would mean that there would never be a limitation on when a claim for arrears of wages based on the Minimum Wage Act might be commenced, no matter how long the delay or how compromised a defence might be because of that delay. Mr Dearing responsibly conceded that his client has maintained business records from 2006 and would not necessarily be compromised as a result, but it is easy to envisage cases where an employer could be seriously disadvantaged by having to deal with an arrears of wages claim many years after the employment relationship ended. That outcome cannot have been intended.

[52] It is not necessary to consider the applicability of the Limitation Act 1950 in this case.[28] That is because s 33 of that Act provided it did not apply where there is a

---

[27] At [80].

period of limitation prescribed in any other enactment, in this case s 142. Section 33 reads:

> **33 Savings for other limitation enactments**
>
> (1) This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment, or to any action or arbitration to which the Crown is a party and for which, if it were between subjects, a period of limitation would be prescribed by any other enactment.
>
> (2) Any reference in any enactment to any of the enactments specified in Schedule 1 to this Act or to any provision of any such enactment shall be construed as a reference to the corresponding provision of this Act.

[53] Even if the Limitation Act 1950 did apply, Mr Maharaj would still have faced difficulty given s 4(1)(d) of that Act. That section provided that no action was entitled to be brought after the expiration of six years from the date on which the cause of action accrued, including actions for recovery of any sum recoverable by virtue of any enactment. Conventionally, s 4(1) of the Limitation Act 1950 applied as a defence, not extinguishing the right of action but removing the remedy. Consequently, the approach taken to s 4(1) was that a defence based on a limitation period had to be pleaded.[29]

[54] The absolute nature of the defence is exemplified by the following statement from *Ronex Properties Ltd v John Laing Construction Ltd* where the English Court of Appeal stated the principles as follows:[30]

> Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the ground that no cause of action is disclosed.

[55] Wesley has filed a statement of defence pleading the six-year limitation relying on both s 142 of the Act and s 4(1) of the Limitation Act 1950. Had the Limitation Act 1950 applied then the same result would have been reached.

---

[28] The parties referred to the Limitation Act 1950 because of the transitional provisions in the Limitation Act 2010.

[29] *Official Assignee v Fuller* [1982] 1 NZLR 671 (CA) at 672.

[30] *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 at 405.

Application to extend time

[56] The final matter to consider is Mr Bennett's submission applying to extend the time for Mr Maharaj to file a proceeding relying on ss 219 and 221 of the Act. No formal application was filed but there is no detriment to Wesley in considering Mr Bennett's submission because Mr Dearing made submissions on the subject.

[57] Section 219 reads:

> **219 Validation of informal proceedings, etc**
>
> (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.
>
> (2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

[58] Section 221 reads:

> **221 Joinder, waiver, and extension of time**
>
> In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—
>
> (a) direct parties to be joined or struck out; and
>
> (b) amend or waive any error or defect in the proceedings; and
>
> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
>
> (d) generally give such directions as are necessary or expedient in the circumstances.

[59] Mr Bennett began this application by drawing on this Court's exclusive jurisdiction referring to *Winstone Clay Products Ltd v Cartledge.*[31] He submitted that the Court is concerned primarily with fairness relying on the Court's equity and good conscience jurisdiction. Mr Bennett drew on what he referred to as the principles under which the Court operates when considering those sections derived

---

[31] *Winstone Clay Products Ltd v Cartledge* [1984] 2 NZLR 209 (CA) 283.

from *Pacific Plastic Recyclers Ltd v Foo*[32] and obiter remarks in *Roberts v Commissioner of Police*.[33] However, aside from stating that there is jurisdiction in those sections to grant an application for an extension of time, Mr Bennett did not analyse s 142, or the relationship between that section and ss 219 and 221. An assumption was made that ss 219 and 221 were sufficient so that what was in issue was the exercise of a discretion conferred on the Court.

[60] I have reservations that ss 219 and 221 can operate to circumvent s 142 as submitted by Mr Bennett and he did not refer to any cases where that had happened. In the absence of submissions about the relationship between s 142 and ss 219 and 221 it would not be appropriate to express anything other than preliminary comments about that relationship. However, it may be significant, from the scheme of the Act, that s 142 is in Part 9 dealing with personal grievances, disputes and enforcement and is written in emphatic terms: "No action may be commenced …". That drafting may be intended to make clear that a proceeding under Part 9 must be commenced within the six-year limitation in s 142, preventing stale litigation as a matter of public policy. The public policy of avoiding stale litigation is illustrated by the Limitation Act 1950 and the Limitation Act 2010. Although the six-year limitation in those statutes could be deferred in certain circumstances, such as where the Limitation Act 1950 deferred the limitation period for commencing actions by persons under a disability, neither of them contains a discretion so that a court may grant leave to commence a proceeding that is otherwise out of time.

[61] In contrast, ss 219 and 221 appear in Part 10 dealing with miscellaneous matters. Had Parliament intended ss 219 and 221 to be used to extend time and therefore avoid the six-year limitation in s 142, the drafting of those sections could easily have said so, but they do not. It is doubtful Parliament intended the express words of s 142 to be circumvented in this oblique way.

[62] In any event, it is not necessary for me to address the point because, even if ss 219 and 221 could be used to avoid the consequences of s 142, I would not have granted that application. Mr Bennett submitted that allowing Mr Maharaj to file his

---

[32] *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 (EmpC).
[33] *Roberts v Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006.

proceeding now would be just in the circumstances. In support of that submission, he referred to the discussion in *AFT v BCM* and a statement by the Court in that case that the discretion to grant such an application is a broad one where the interests of justice between the parties is the paramount consideration.[34] Mr Bennett also referred to *Ball v Healthcare of New Zealand Ltd* for the criteria that might be taken into account.[35] In *Ball*, where the Court was considering s 219, the criteria included:[36]

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; and

6. the merits.

[63] A similar expression of those principles can be found in *Liu v South Pacific Timber (1990) Ltd.*[37] Mr Bennett confined his submissions to the lack of any prejudice to Wesley.

[64] Each of the criteria from *Ball* are considered in turn. Mr Maharaj has not explained the reason for his omission to file a proceeding against Wesley within time. In 2009 he knew the outcome of *Idea Services*, so that a claim for minimum wages for providing sleepovers was at least, potentially, open to him. No steps were taken until November 2014 and the only reason given for that omission was an approach by Mr Maharaj to a Labour Inspector in 2010. That does not explain the continuing omission to file his proceeding. Effectively, no reason for the omission to file the proceeding before 2014 has been given.

---

34 *AFT v BCM* [2015] NZEmpC 234.
35 *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91, (2012) 10 NZELR 84.
36 At [21].
37 *Liu v South Pacific Timber (1990) Ltd* [2011] NZEmpC 100.

[65] The next matter is the length of the delay. Mr Maharaj's employment ended in June 2006. He knew about the possibility of a Minimum Wage Act claim then and was certainly aware of it in 2009 when *Idea Services* was decided, but did not file a proceeding until 11 November 2014; just over two years after the time limit in s 142 expired. That delay is considerable.

[66] The next matter is prejudice or hardship. There is no prejudice to Wesley because it still has business records from 2006. There was no evidence from either the plaintiff or defendant about the effect on the rights and liabilities of each of them or on subsequent events that may have made it appropriate, or inappropriate, to grant this application. This matter is neutral.

[67] The last matter to consider is the merits. I have already concluded that Mr Maharaj's case was compromised in 2006, making an assessment of merits in this situation redundant. However, even if Mr Bennett had been able to argue successfully that there were meritorious points to pursue in Mr Maharaj's proceeding I doubt that would have been enough to justify granting an extension in this case. The failure to explain the omission to file his proceeding on time and the lengthy delay outweigh all other considerations and are fatal. Wesley was entitled to consider that this dispute with Mr Maharaj was well behind it, having settled and with the limitation period in s 142 having elapsed.

[68] Even if I had been persuaded that ss 219 and 221 go so far as Mr Bennett submitted they do, I would not have considered it just to exercise that discretion in favour of granting an application for Mr Maharaj to file his proceeding now.

Outcome

[69] The application seeking to strike out Mr Maharaj's statement of claim is successful. The challenge is frivolous within the meaning of cl 15 because it is misconceived and therefore unable to be taken seriously. Having settled all wage arrears there is nothing left for the Court to determine. The proceeding is struck out. Wesley is entitled to costs. In the absence of agreement between the parties, Wesley

may file a memorandum claiming costs within 20 working days and Mr Maharaj has a further 20 working days to respond.

K G Smith
Judge

Judgment signed at 8.45 am on 27 October 2016