IN THE EMPLOYMENT COURT
WELLINGTON

[2018] NZEmpC 128
EMPC 57/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BLUE WATER HOTEL LIMITED Plaintiff
AND	VBS Defendant

Hearing:	30 August 2018 (heard at Wellington)
Court:	Chief Judge Christina Inglis Judge B A Corkill Judge K G Smith
Appearances:	P McBride, counsel for plaintiff S Govender, counsel for defendant
Judgment:	7 November 2018

JUDGMENT OF THE FULL COURT

Introduction

[1] The legal issue for resolution in this judgment is whether the three-year time limit referred to in s 114(6) of the Employment Relations Act 2000 (the Act) is absolute; or whether that period is capable of being extended under ss 219(1) or 221, which contain broad powers for extending time.

[2] The issue arises from a challenge to a determination of the Employment Relations Authority (the Authority), which concluded that the employee could make an application under s 219(1) for an extension of the period described in s 114(6), so

as to allow her to commence a late action asserting a personal grievance.[1] After considering a range of factors, the Authority concluded that it should in fact exercise its discretion to extend time, so that the employee could pursue her claim of unjustified dismissal.[2]

[3] The employer challenges those conclusions. The parties have agreed that the Court should resolve the legal issue referred to earlier as a preliminary question.

[4] Chief Judge Inglis considered that the issue was an important one, which warranted the constitution of a full Court.

Facts

[5] A statement of agreed facts was placed before the Court for the purposes of the preliminary question. It relevantly stated:

> 1. The defendant was employed by the plaintiff as a driver during 2011. The terms of the engagement(s) are in dispute.
> 2. Employment ended, at latest, in early February 2012.
> 3. The defendant alleges the end of the employment to have been a constructive dismissal.
> 4. The defendant's lawyer raised a personal grievance, at latest, by letter dated 27 April 2012.
> 5. Save for seeking mediation in or about March 2015, the defendant took no steps in her employment claim down to filing proceedings in the Authority, on or about 28 September 2015.

[6] On these facts, the proceedings were filed some three and a half years after the employee raised her personal grievance. Unless the time limit as expressed in s 114(6) of the Act can be extended, her claim asserting a personal grievance will be time-barred.

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1 *VBS v FCL* [2018] NZERA Wellington 8 at [42].
2 At [60].

Key provisions

[7] Part 9 of the Act contains the provisions relating to the raising of a personal grievance which an employee may have against his or her employer or former employer. The key sections within that part are now set out.

[8] Section 102 is the anchor provision, allowing an employee to pursue a grievance. It states:

> **102 Employee may pursue personal grievance under this Act**
>
> An employee who believes that he or she has a personal grievance may pursue that grievance under this Act.

[9] Sections 114 and 115 contain the detailed provisions governing the raising of a personal grievance. These provisions state:

> **114 Raising personal grievance**
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> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
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> (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
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> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
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> (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
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> (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
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> (b) considers it just to do so.
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> (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the 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.

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[10] Section 142 of the Act describes a limitation period for actions other than personal grievances as follows:

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.

[11] Part 10 of the Act deals with employment "Institutions", which relevantly include the Authority and the Court. It contains a subpart entitled "Miscellaneous provisions". The employee's case focuses on one of those provisions, s 219, which states:

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.

[12] A related provision which will also need consideration is s 221, which provides:

> **221 Joinder, waiver, and extension of time**
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> 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,—
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> (a) direct parties to be joined or struck out; and
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> (b) amend or waive any error or defect in the proceedings; and
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> (c) subject to section 114(4), extend the time within which anything is to or may be done; and
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> (d) generally give such directions as are necessary or expedient in the circumstances.

Submissions

[13] Mr McBride, counsel for the plaintiff, submitted in summary:

a) Section 114(6) of the Act sits within the provisions of Part 9 which provide carefully defined timeframes for the raising of the statutory cause of action of a personal grievance, and its associated remedies.

b) The text used in the subsection is clear and emphatic in its terms. The remainder of the section contains a specific and tightly fettered ability to extend time and the section should be understood in that context. The subsection does not provide for the commencement of any action outside the mandated timeframes.

c) Such a conclusion is consistent with the policy of dealing expeditiously with personal grievances, the legislative history at the Select Committee stage when s 114(6) was enacted, and the inter-statutory and extra-statutory contexts.

d) Section 219 is in a different part of the Act, Part 10. Section 219(1) deals with circumstances which have already occurred – either things "not

done within the time allowed, or ... done informally". The section cannot be used to create jurisdiction if it does not otherwise exist. It is "to put valid proceedings back on the rails as it were, not to create the rails".[3]

e) Previous cases have not expressed uniform views as to the scope of s 219; some of those judgments express or rely on obiter dicta.

f) A general provision such as s 219 cannot reverse what the specific provision of s 114(6) provides.

[14] Mr Govender, counsel for the defendant, submitted in summary:

a) The use of the word "may" in s 114(6) of the Act suggests it was not intended that there be an absolute prohibition on the time limit for commencing actions. If an absolute limitation was to apply, the word "shall" or similar would have been used.

b) Although the intention of s 114 was to provide for the prompt raising of personal grievance claims, the availability of an extension of the 90-day period for doing so was a recognition that in some circumstances, a claimant may not be able to adhere to that time limit. The need for speedy resolution of such claims was accordingly fettered by the dictates of fairness and justice, as reflected for example, in s 114(4) of the Act. The same imperatives should apply to the three-year time limit period in s 114(6).

c) Section 219 of the Act is expressed in broad terms, when it refers to "anything which is required or authorised to be done by this Act". There is no proviso to the section, such as appears in s 221(c); this confirms the broad reach of the section.

d) On the plain and ordinary meaning of the words used in s 114(6) on the one hand, and in s 219(1) on the other, there is no conflict and the two sections are able to be read in harmony.

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[3] *New Zealand Workers IUOW v Otway* [1989] 3 NZILR 503 (LC).

e) An issue as to whether a personal grievance is able to be commenced more than three years after the date on which the personal grievance was raised will invariably be considered by the Authority or Court after the action has been brought. The question which thus arises is whether the matter can proceed further "on its rails".

f) Maxims such as *generalia specialibus non derogant* (general things do not derogate from specific things), or the converse, *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) should be applied with care, and primarily in circumstances where there are conflicts between enactments, or where general provisions impliedly repeal specific provisions.

g) There is persuasive support for the employee's position in the judgments of *Roberts v Commissioner of Police*[4] and *Tu'itupou v Guardian Healthcare Operations Ltd*.[5] These and other cases will be considered in more detail later.

[15] During his submissions, Mr Govender also stated that s 221 might provide an alternative jurisdiction for the requested extension of time. Although he did not make a formal application to amend the statement of defence to that effect, for the sake of completeness we will consider that section where relevant.

Analysis

[16] In this statutory interpretation exercise, the Court is cognisant of the directions given in s 5 of the Interpretation Act 1999, and the observations made by Tipping J about that provision in *Commerce Commission v Fonterra Co-operative Group Ltd*:[6]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe

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4 *Roberts v Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006.

5 *Tu'itupou v Guardian Healthcare Operations Ltd* (2007) 8 NZELC 98,505, (2006) 4 NZELR 1 (EmpC).

6 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

> the dual requirements of s 5. In determining purpose, the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[17] It will be seen that a key issue arising from counsel's submissions is whether the specific provisions of s 114(6) trump the general provisions of ss 219 and 221. In our view, Mr Govender was right to submit that maxims such as those referred to earlier do not necessarily assist interpretation in the present case; they most usually apply where a statute is enacted containing a general power which apparently conflicts with a specific provision contained in a special statute which remains in effect.[7]

[18] In the end, the Court's task is to consider the particular statutory context. That context may give rise to a conclusion that within a single statute a general provision should not derogate from a specific one.[8]

[19] It is appropriate to first consider, s 114(6), and second, ss 219(1) and 221.

Section 114(6)

Text

[20] The first question relates to the meaning to be attributed to the word "may". Cases are legion where it has been necessary to determine whether a provision bestowing a power using that word is intended to be obligatory or permissive.[9] Words of an imperative character such as "shall" tend to suggest the bestowing of a duty. Words of a permissive character such as "may" tend to suggest a discretion; but a range of factors such as those summarised by Tipping J in *Fonterra* may lead to a conclusion that an expression of this type should be construed as obligatory.[10] It is well recognised that the question is ultimately one of construction based on standard principles. The analytical approach adopted in such instances is of assistance when considering whether the word "may" is absolute or permissive.

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7 RI Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington 2015) at 475.

8 Such an example is found in *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160, [2015] 1 NZLR 573 at [13].

9 See *Laws of New Zealand* Statutes (online ed, LexisNexis) at [93].

10 See cases gathered in *Laws of New Zealand*, above n 9, at [93], footnote 3.

[21] The subsection must be construed as a whole. The word "may" cannot be considered in isolation. It is qualified by the words which surround it. In our view, the interpretation advocated by Mr Govender, that the use of the word "may" denotes something less than an absolute prohibition as to the commencement of an action, involves a strained and unnatural construction. We accept Mr McBride's submission that the words used should not be read as "an action may be commenced", which might have suggested that the time limit of the subsection was not necessarily absolute. On its face, the plain and ordinary meaning of the words used is that the time limit is of mandatory effect.

[22] The time limit in s 114(6) of the Act is "in relation to a personal grievance". That reference makes it clear that the subject matter of the provision is the statutory form of claim described in Part 9. Such a claim is defined with precision in provisions such as ss 102 and 103. Section 113 makes it clear that any challenge to a dismissal, or any aspect of it, must be the subject of a personal grievance. All this emphasises that a personal grievance is a highly prescribed creature of statute.

[23] Section 114(6) itself makes it clear that the time limit for commencing a personal grievance is dependent on the prior steps described earlier in the section.

[24] The first of these is the raising of a personal grievance within 90 days of the date in which the action alleged to amount to that personal grievance occurred or came to the notice of the employee whichever is the latter, unless the employer consents to the personal grievance being raised thereafter: s 114(1) of the Act.

[25] The second of these relates to the means by which that 90-day period may be extended if exceptional circumstances can be established, and it is just to do so: s 114(3), s 114(4), and s 115 of the Act. There is no time limit within which such an application may be made.

[26] The third of these is the three-year time limit in s 114(6). It does not contain any express power to extend the limitation period of three years. We note, however, that if there are exceptional circumstances under s 114(4), the start of the three-year period can be delayed.

[27] In our view, the language used in s 114 is precise; it is strongly suggestive of a standalone set of interlocking provisions which culminate in s 114(6), a subsection which describes a longstop limitation period.

Purpose

[28] It has long been recognised that the policy of the provisions relating to personal grievances requires them to be dealt with expeditiously. This was, for example, referred to by the Court of Appeal in *Air New Zealand Ltd v McIntosh*[11] with regard to the Industrial Relations Act 1973,[12] and the Labour Relations Act 1987.[13]

[29] The current Act confirms this policy. Section 101(ab) describes the objects of Part 9 of the Act. The subsection provides that it is desirable for employment relationship problems to be resolved "quickly" by direct discussion between the parties;[14] in that context, the Part also facilitates the raising of personal grievances with employers, and gives special attention to such claims.

[30] The 90-day requirement for raising a personal grievance emphasises the need to act promptly. This requirement is plainly important; it must be expressly referred to in employment agreements: the provisions which describe the form and content of employment agreements state there must be a plain language explanation of services available for the resolution of employment relationship problems, including a reference to the period of 90 days in s 114 within which a personal grievance must be raised.[15] As noted, this time limit may be extended, but only if there are exceptional circumstances. The limitation period of three years within which proceedings must be commenced is also consistent with an obligation on applicants to act promptly.

[31] This theme is also reflected in Part 10, which describes the procedures and institutions which are to apply if the parties are unable to resolve employment relationship problems such as personal grievances directly. One of the objects of that

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11 *Air New Zealand Ltd v MacIntosh* [2002] 1 ERNZ 1 (CA).
12 At [26].
13 At [25].
14 In *BDM Grange Ltd v Parker* [2006] 1 NZLR 353, the High Court referred to this provision acknowledging that a feature of the fresh approach to dispute resolution, as introduced by the Act was that it would be "efficient, prompt and cheap"; at [33].
15 Employment Relations Act 2000, ss 54(3)(a)(iii) and 65(2)(a)(vi).

Part emphasises the desirability of prompt resolution of those problems: s 143(b)-(c) of the Act.

[32] The same imperative is applied to the work of the Authority, which deals with all personal grievances at first instance, unless removed to the Court. Section 166A emphasises that the Chief of the Authority may make arrangements to ensure members discharge their functions in an "expeditious way": s 166A(1)(a)(i) of the Act. The Chief may issue instructions which among other things outline expectations as to timeliness: s 166A(2)(a) of the Act. The relatively informal processes of the Authority are a yet further reflection of the statutory emphasis on determining matters promptly.

[33] Although in the subordinate Employment Court Regulations 2000 (the Regulations), and although it relates to the disposition of proceedings once commenced, reg 4 also emphasises promptitude. The Regulations stipulate that the procedural regulations are to be construed in a manner that best secures "the speedy", as well as fair and just, determination of proceedings before the Court.

[34] The various statutory references strongly suggest that the purpose of s 114(6) is to describe an absolute time limitation period which is to play its part in the "speedy resolution" of personal grievances;[16] and where possible to limit stale grievances from being litigated.

Legislative history of s 114(6), and related provisions

[35] The legislative history discloses further elaboration of purpose.

[36] In the Employment Relations Bill 2000 as originally introduced, a general six-year time limitation period was introduced; cl 117A stated:[17]

> **117A Time for commencement of actions relating to employment relationship problems**
>
> No action may be commenced in the Authority or the Court in relation to an employment relationship problem more than 6 years after the date on which the cause of action arose.

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16 *Tu'itupou v Guardian Healthcare Operations Ltd*, above n 5, at [69].

17 Employment Relations Bill 2000 (8-1), cl 117A.

[37] In a subsequent report of the Department of Labour (DOL) to the Employment and Accident Insurance Legislation Select Committee of June 2000, the DOL provided this comment and recommendations:[18]

> (i) This clause provides *consistency with the statutory limitation period of 6 years in the Limitation Act 1950*, *and was therefore intended to confirm the status quo. This clause makes it clear that there is a limitation period for all causes of action under the Act*, as in the absence of an explicit provision, it may be possible to argue that claims could be brought outside of 6 years. This clause will not create uncertainty or risk for employers, as employees are required to submit a grievance to their employer within 90 days of the cause of action arising, unless there are exceptional circumstances.
>
> There are currently few cases where significant delay is an issue. The Court or the Authority retains the right to strike out a case where there has been gross and inexcusable delay in bringing a case, and where the delay will cause prejudice to one of the parties.
>
> (ii) *Six years provides consistency with the Limitation Act 1950, and with the limitation period for arrears of wages, but the Fair Trading Act does have a three year limitation period which may be fairer in a personal grievance context.*
>
> (iii) A number of submissions demonstrated a lack of understanding about the interface between the 90-day period for submitting a grievance to an employer, and the 6 year limitation period for filing in the employment institutions, which suggest further clarity is required.
>
> **Recommendations**
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> (i)-(iii) It is recommended that this clause be omitted and replaced by two provisions which deal separately with the personal grievance situation and other matters. For personal grievances, a three-year limitation should apply, dated from when the personal grievance is raised with the employer. For other matters, the six years should remain.
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> (emphasis added)

[38] In reporting back to the House of Representatives, the Select Committee stated in its commentary:[19]

> A number of employers, employer organisations, community organisations and academics thought that the 6 year limitation period was too long. The majority agrees, and recommends that clause 117A be omitted and replaced

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[18] Department of Labour *Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee* (June 2000) at 115.

[19] Employment and Accident Insurance Legislation Committee *Employment Relations Bill and Related Petitions* (29 July 2000) at 28.

> by two provisions which deal separately with the personal grievance situation and other matters. For personal grievances, a three-year limitation should apply, dated from when the personal grievance is raised with the employer. For other matters, such as wage arrears claims, the six-year limitation should remain.

[39] Although there are no express references in Hansard to this topic, it is apparent the recommendation was accepted: cl 117A became ss 114(6) and 142. It was expressly stated that the general limitation period of six years would not apply to personal grievances.

[40] In fact, Parliament considered a range of time limitation provisions. Not only did it adopt a limit of three years for personal grievances and six years for all other actions, it also altered the previous time limits relating to claims for wages, and for penalties.

[41] Section 48 of the Employment Contracts Act 1991 (the ECA) had contained a provision providing a six-year limitation period for wage actions. That was not repeated in s 131 of the Act; rather, the general time limitation period in s 142 would apply as the Select Committee acknowledged in its commentary.

[42] Section 53 of the ECA had provided that no action could be commenced for the recovery of a penalty except within 12 months after the cause of action had arisen. Section 135(5) of the Act maintained the 12-month limitation, but Parliament also introduced the possibility of a later date being appropriate if that is the date when the cause of action for recovery of a penalty "should reasonably have become known to the person bringing the action".[20]

[43] As already noted, the recommendations of the Select Committee came about as a result of advice from the DOL regarding the statutory limitation periods of the Limitation Act 1950, and the Fair Trading Act 1986. Although the Select Committee did not refer expressly to these statutes, it is not unreasonable to infer that the references to them by the DOL underpinned their conclusions as to the various periods to be adopted.

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[20] A concept which was repeated in s 142I, when that provision was inserted by s 19 of the Employment Relations Amendment Act 2016.

[44] In light of these considerations, it is appropriate to reflect on general principles of limitation, although of course these must be considered in light of the objects and policies of the Act.

[45] In *Amaltal Corp v Maruha Corp*, the Court of Appeal noted:[21]

> Limitation principles embody a tension between competing policies of:
>
> - finality in civil litigation and that defendants should have the opportunity to avoid meeting stale claims as secured by the imposition of limitation periods; and
>
> - justice being done in the individual case, which is secured by the facility for extension or postponement of the limitation periods.

[46] On the latter topic, the Court cited the observations of McHugh J in *Brisbane South Regional Health Authority v Taylor* where he stated:[22]

> A limitation period should not be seen ... as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. Against this background, I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case.

[47] The need for an express statutory recognition of any exception is illustrated by the conclusions in *Murray v Morel & Co Ltd*, where the Supreme Court found that there was no general principle that a cause of action did not accrue for limitation purposes until the elements were reasonably discoverable under the provisions of the Limitations Act 1950.[23] In other words, an extension on the grounds of reasonable discoverability could not override a prescribed limitation period unless such an

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21 *Amaltal Corp v Maruha Corp* [2007] 1 NZLR 608 (CA) at [147] (citations omitted).

22 *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25, (1996) 186 CLR 541 at 553. See also, as to general principles, *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [155]; and *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, [2003] 1 AC 384 at [5]-[6].

23 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [38] and [69].

exception is expressly provided for. Where there is such a provision, its disadvantages might be tempered by enacting an overriding longstop period.[24]

[48] In our view, the Legislature must be regarded as having had such distinctions in mind when enacting the suite of provisions relating to limitations for the purposes of the Act, in 2000, since it adopted a reasonable discoverability test with regard to penalties in s 135(5) of the Act; but did not with regard to s 114(6) or s 142. Even though the Select Committee was referred to the three-year limitation period of the Fair Trading Act 1986 which contained a reasonable discovery provision, such a test was not introduced in s 114(6) or s 142.[25]

[49] In summary, different periods were adopted for different causes of action. Where Parliament considered it appropriate to allow for the possibility of an extension of a time limit, it did so. The absence of any express discretion to extend the longstop period in s 114(6) must be regarded as deliberate.

Disability

[50] Mr Govender strongly argued that the Court should adopt an interpretation which would, as he put it, allow for flexibility if for good and proper reasons an employee could not meet the three-year time limit. Not to do so, he said, could lead to harsh and adverse consequences for an employee which would be contrary to underlying principles of fairness and equity.

[51] An obvious example is where an employee has suffered a disability such as post-traumatic stress disorder following a dismissal, which impedes that person's ability to pursue a personal grievance within time.

[52] Mr McBride submitted that the scheme of s 114 could accommodate such events with such a person having the ability to seek an extension of time to raise a personal grievance on the basis of exceptional circumstances.

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24 At [74].
25 Which was s 43(5) in 2000; subsequently it became s 43A.

[53] This submission goes some way to addressing such an issue. It does not, however, address the perhaps rare case where an employee raises a personal grievance and then suffers a disability which precludes the claimant from being able to commence his or her proceeding, or to issue instructions to a representative to do so.

[54] We return to our earlier analysis. Parliament re-enacted the provisions which had previously allowed for the extension of the 90-day period for raising a personal grievance, where there were exceptional circumstances. However, it went further. It also introduced a new provision, s 115, which specified four examples of such circumstances.[26] The first of these is in point. It relates to the case where an employee has been "so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in s 114(1)": s 115(a) of the Act.

[55] These provisions confirm that Parliament acted deliberately. Exceptional circumstances may warrant the late raising of a personal grievance; indeed, where there are such circumstances, there is no time limit for doing so. The particular example of disability was referred to in s 115(a), along with the other illustrations of that subsection. It is clear that policy choices were made. However, in contrast to the scheme outlined in ss 114(4) and 115, Parliament did not allow for an extension of time on any ground in s 114(6). That it did not do so should not, in our view, lead to the interpretation advocated by Mr Govender, that the subsection is permissive and not mandatory.

Conclusion as to s 114

[56] Drawing these threads together, we are satisfied that s 114 is intended to provide a complementary set of provisions as to how a personal grievance is raised; and within that context s 114(6) is intended to describe the period within which commencement of any action can occur. This is to provide an end point for commencement of proceedings, and thus certainty for a potentially liable employer; it means that personal grievances have to be the subject of an action in the Authority within the defined period of three years.

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[26] The effect of the new provisions was later considered by the Court of Appeal in *Commissioner of Police v Creedy* [2007] NZCA 311, [2007] ERNZ 505 at [22]-[26].

Sections 219 and 221

[57] We must now consider whether the broad powers bestowed in ss 219 and 221 can avail a claimant who commences proceedings after three years from when the personal grievance was raised, notwithstanding the conclusions we have reached as to s 114(6). Our considerations on this topic will likely have implications for s 142.

[58] We adopt the same approach to construing this section, as was adopted when considering s 114. Text, purpose and context all require careful consideration.

[59] As will be evident shortly, it is not altogether clear how Parliament intended these two provisions to interrelate with one another. That may be because these sections have a long history, and appear to have been re-enacted without any obvious consideration as to their continued applicability to other provisions in a given statute. We consider they are not helpfully worded, and could be more clearly expressed.

Text

[60] Two situations are referred to in s 219(1). In respect of the first, the language is broad. It refers to *anything* which is required or authorised to be done by the Act. If that thing is not done within time, the Authority or Court can in its discretion extend time. It is also broad in the second case; the Authority or Court may validate *anything* which is being done informally.

[61] Section 221 is also expressed in broad terms. A wide range of powers are bestowed to enable the Authority or Court to more effectively dispose of any matter at any stage of proceedings which are before either body; those powers are to be exercised according to the substantial merits and equities of the circumstances of the case.

[62] The view has been expressed that s 221 is limited to proceedings of the Court or Authority which are "before it", whilst s 219 does not. However, we do not think this is a distinguishing feature. Section 221(c) contains a cross-reference to s 114(4), which relates to the extension of time for raising a personal grievance where there are exceptional circumstances. Such a case is not able to be brought unless leave is

granted; but it clearly falls for consideration under that section, even though it is time-barred without leave. In effect, such a time limitation case is "before" the Court or Authority for consideration. The power to extend time is sufficiently important as to be referred to in the heading of the section.

[63] In summary, both sections bestow broad and general powers for extending time. We conclude that having regard to the plain and ordinary meaning of both provisions, it is evident that the Court has a broad discretion to extend time under each section. Both provisions may apply potentially to a particular situation.

[64] It is necessary to consider this language further, in light of purpose and context, to which we now turn.

Purpose

[65] As already noted, the sections appear in a part of the Act which defines the institutions of the Act; and in a subpart entitled "Miscellaneous provisions". They obviously describe general powers which may potentially apply to an assortment of circumstances.

[66] The purpose of s 219(1) is to provide a wide-ranging discretion to correct non-compliance with times allowed for in the Act, if that has occurred, or anything done informally.

[67] As for the purpose of s 221, a variety of procedural powers are provided; these include amending or waiving any error or defect in the proceeding, extending time within which anything is or may be done, and more generally to make directions which are necessary or expedient, all to facilitate the disposition of a proceeding according to its substantial merits and equities.

[68] In summary, the purpose of both provisions is to provide a broad range of procedural powers that may be exercised in the interests of justice.

Section 216

[69] In Part 10, and a subpart entitled "Special provision in respect of appeals", s 216 provides:

> **216 Obligation to have regard to special jurisdiction of court**
>
> In determining an appeal under section 214 or section 218, the Court of Appeal must have regard to—
>
> (a) the special jurisdiction and powers of the court; and
>
> (b) the object of this Act and the objects of the relevant Parts of this Act; and
>
> (c) in particular, the provisions of sections 189, 190, 193, 219, and 221.

[70] This section suggests that ss 219 and 221, amongst others, are particular examples of the powers of the Court which go to make up its special jurisdiction, being powers that must be construed in light of the objects of the Act and its relevant parts.

[71] This provision is relevant to a submission made by Mr Govender, although he did not refer to the section. He stressed that the provisions under review should be construed by recognising the need for flexibility where the interests of fairness and justice require it. It is necessary to consider whether s 216 reinforces that submission.

[72] The special and exclusive role of the employment institutions has been emphasised on many occasions by the Court of Appeal. The older cases were conveniently summarised by the Court of Appeal in *New Zealand Van Lines v Gray.*[27] In *Canterbury Spinners Ltd v Vaughan,* the Court of Appeal confirmed that the current Act reaffirms this Court has special characteristics.[28]

[73] Section 216 relates to the interface between the Employment Court on the one hand, and the Court of Appeal on the other. It describes in light of the special jurisdiction and powers of the Court, the limitations which apply when considering an appeal under s 214, or an application for judicial review under s 218 of the Act.[29]

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27 *New Zealand Van Lines v Gray* [1999] 2 NZLR 397, [1999] 1 ERNZ 85 (CA) at 91 – 94.

28 *Canterbury Spinners Ltd v Vaughan* [2003] 1 NZLR 176, [2002] 1 ERNZ 255 (CA).

29 All of which was recently discussed in some detail by the Supreme Court in *New Zealand Airline Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [21]-[66].

[74] The references to ss 219 and 221 in s 216 reinforce the importance of these powers, as an aspect of the Court's special jurisdiction.

[75] However, that fact does not derogate from the necessity of considering whether the specificity of s 114(6) rules out the application of the general powers described in either s 219(1) or s 221.

Previous provisions and cases

[76] Provisions containing powers such as those now found in ss 219 and 221 of the Act, are of very longstanding.

[77] A s 221-type power was first introduced in 1905, and could be exercised by Boards of Conciliation or the Court of Arbitration.[30]

[78] A s 219-type power was first introduced in 1908, being a power that could be exercised by the Court of Arbitration only. The context in which that provision first arose involved the repealing of provisions relating to Boards of Conciliation, and the introduction of provisions relating to Councils of Conciliation;[31] these changes became part of the principal Act, the Industrial Conciliation and Arbitration Act 1908.

[79] From then on, every statute relating to industrial, labour or employment relations matters contained both powers; initially, the 1908 Act as amended, then the Industrial Conciliation and Arbitration Act 1925 (ss 113 and 156), the Industrial Conciliation and Arbitration Act 1954 (ss 169 and 221), the Industrial Relations Act 1973 (ss 226 and 229), the Labour Relations Act 1987 (ss 315 and 317), and the Employment Contracts Act 1991 (ss 138 and 140).

[80] Notwithstanding the many substantive alterations that were made under those statutes over many years, the provisions containing these powers were largely unaltered.

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30 Industrial Conciliation and Arbitration Acts Compilation Act 1905, s 111.
31 Industrial Conciliation and Arbitration Amendment Act 1908.

[81] It is understandable that they were expressed in broad terms, because they had to be applied to a very wide range of circumstances, structures and institutions of the employment relations system. As far as provisions as to time are concerned, they applied not only to proceedings, some of them before relatively informal bodies such as Councils of Conciliation or Disputes Committees, but also to time limits in arbitral awards in which parties had been involved in creating, rather than time provisions which were defined in a particular statute. As we observed earlier, there is no obvious evidence of consideration being given by Parliament to the overlapping nature of the two provisions.

[82] Turning to the potential application of these powers to a time limitation provision, it is apparent that for much of the period, the possibility of extending a fixed time for commencing an action was not considered.[32]

[83] But in 1979, Chief Judge Jamieson when considering whether there was a power to grant an extension of the 12-month time limit for commencing a penalty action,[33] commented in an oral judgment that the Court possessed a discretion to grant such an extension; he did not, however, exercise it in that instance: *Inspector of Awards v Scholl*.[34]

[84] In 1984, Chief Judge Horn was required to consider whether s 226 of the Industrial Relations Act 1973 could bestow jurisdiction to extend the six-year time limit for commencing a wages action which was provided for in s 160. The Court found that notwithstanding the generality of s 226, s 160 was specific and must apply: *Inspector of Awards and Agreements v Wight*.[35]

[85] In 1988, Judge Finnigan reached a similar conclusion when considering s 315 of the Labour Relations Act 1987; he held that the provision could not operate to

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32 For example, *Lopdell v Hovell* [1939] NZLR 186 (SC); *Hill v United Repairing Co Ltd v Tasman Empire Airways Ltd* [1946] NZLR 585 (SC).

33 Under s 157 of the Industrial Relations Act 1973.

34 *Inspector of Awards and Agreements v Scholl (NZ) Ltd* [1979] ACJ 261. A short time later, Judge Williamson also declined an application under s 128 of the Industrial Relations Act 1973, when considering s 229 of that Act: *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Ford Motor Company of New Zealand Ltd* [1979] ACJ 305.

35 *Inspector of Awards and Agreements v Wight* [1984] ACJ 491.

authorise the Court to extend retrospectively the six-year period of limitation which that Act imposed, again in respect of wage claims: *Auckland Local Bodies Labourers etc IUOW v Auckland City Council*.[36]

[86] In 1988, in *Winstones Trading v NID Distribution Workers IUOW*, these sections were considered by Judge Nicholson when deciding if an extension of time could be brought to an application for a rehearing, under s 302 of the Act.[37] That section itself provided for an extension of time, if the Court was satisfied the relevant application could not have reasonably been made sooner. The Court held that the specific provision relating to rehearings was plain, and the general powers contained in s 315 did not override that language.[38]

[87] In 1989, Judge Colgan stated in *New Zealand Timber Industry IUOW v FL Anderson Ltd*, that the question of whether s 315 and/or s 317 could be applied to limitation periods of six and one years respectively for arrears and penalty actions had received some judicial consideration, but had not been authoritatively determined.[39] However, he went on to find that the case was not one where it was necessary to consider that issue.[40]

[88] Prior to the inception of the Employment Relations Act in 2000, then, there had been reference to the present issue from time to time, with most judicial opinions being to the effect that the general powers contained in the sections under review did not override specific time limitation provisions, whether with regard to commencement of actions involving claims for wages or penalties, or where there was a specific reference to time limits such as in provisions relating to an application for a rehearing. There was no single example where a time limitation provision had in fact been extended. That was the position when the Act was enacted.

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36 *Auckland Local Bodies Labourers etc IUOW v Auckland City Council* [1988] NZILR 648 (LC).
37 *Winstones Trading v NID Distribution Workers IUOW* [1988] NZILR 1042 (LC) at 1044.
38 This decision was followed a few months later by Judge Palmer in *Otago and Southland Federated Furniture etc IUOW v Timbercraft Industries Ltd* [1989] 1 NZILR 528 (LC) at 534.
39 *New Zealand Timber Industry IUOW v FL Anderson Ltd* [1989] 3 NZILR 94 (LC).
40 At [95].

Cases under the Act

[89] The issue has arisen from time to time under the present Act over the last 18 years. Those instances can be briefly summarised.

[90] In *Roberts v Commissioner of Police,* the possibility of s 219 being available to extend time under s 114(6) was considered, apparently without the benefit of argument, in the context of a transitional claim initiated under the Employment Contracts Act 1991.[41] Chief Judge Colgan said:[42]

> On its face, s 219(1) is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority determinations to this Court within the statutory period of 28 days following their issue ... Section 219 is not limited to any particular time limits; nor is that contained in s 114(6) excluded. Most, if not all, statutory limitation periods allow for their extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed as in the Limitation Act 1950.

[91] In that instance, because the claim was a transitional one, s 248 applied; accordingly, these comments were not dispositive of the issues before the Court.[43]

[92] More recently, the issue was raised before Judge Smith when considering the six-year time limitation provision under s 142, in *Maharaj v Wesley Wellington Mission Inc*.[44] In that context, he stated that he had reservations ss 219 and 221 could operate to circumvent s 142, observing that even if the sections could be used to avoid the consequences of s 142, the application to do so would not have been granted. He referred to the public policy objective of time limitation periods being used to prevent stale litigation. He also noted that although the six-year limitation period under the limitation statutes[45] could be deferred in certain circumstances such as one involving disability, they did not contain a general discretion so that a court could grant leave to commence a proceeding that was otherwise out of time.[46]

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41 *Roberts v Commissioner of Police,* above n 4.
42 At [19].
43 This observation has been relied on in subsequent cases: *Orakei Korako Geyserland Resort (2000) Ltd v Unsworth* [2009] ERNZ 403 (EmpC), and *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91, (2012) 10 NZELR 84.
44 *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129.
45 Limitation Act 1950 and Limitation Act 2010.
46 *Maharaj v Wesley Wellington Mission Inc,* above n 44, at [60]-[62].

Analysis of ss 219 and 221

[93] In the end, the question before us is whether the particular time limitation provisions in s 114(6) are to have primacy over the general powers contained in ss 219 or 221.

[94] The answer in our view is tolerably clear. In s 114, Parliament laid out time limits for pursuing personal grievances with considerable specificity, and after careful consideration of the issue at the Select Committee stage. No fewer than three steps as to time were described, as discussed earlier.[47]

[95] This new provision was enacted in the context of general powers to extend time having been in place for more than a century. Common sense suggests that this is a clear case of Parliament intending that a subsequent special enactment would take priority over longstanding powers of a general nature.

[96] The possibility of extension of time under ss 219(1) or 221 would defeat Parliament's intention with regard to the imposing of precise time limits, which it introduced in respect of personal grievances (three years) and all other actions (six years) in 2000. Were the general powers of extension to be available, there would be no time limits at all. Time limits are just that; if they are to be open to extension, express language is required.

[97] In *Roberts*, the Court gave the example of the use of s 219(1) when it extends time to challenge a determination of the Authority. We do not think that the use of the general power to extend time in that situation supports a conclusion that it can be used with regard to s 114(6). As we explained earlier, s 114 is a standalone provision with a detailed description of the manner in which time limitation provisions are to work. The same cannot be said of s 179; the legislative history of that section,[48] and the use

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47 Above at paras [24]-[26] of this judgment.

48 Department of Labour Report, above n 18, at 173 – 174. The Department of Labour referred to a submission which had been made that cl 190 (the forebear of s 179) should provide for a power to extend the period of 28 days to challenge; it commented that this would be done under cl 231 (the forebear of s 221).

of the general power to extend time with regard to similar previous provisions in the past,[49] suggest that a section of this kind is in a different category.

[98] For completeness, we refer to the cross-reference to s 114(4) contained in s 221. Does its presence lead to a conclusion that the absence of such a qualification in s 219(1) is significant? We do not think so. As discussed earlier, s 221(c) is simply an update of the provision which appeared in s 33 of the Employment Contracts Act 1991, when there was no equivalent to s 114(6). It appears to suggest that if considering the possibility of extending the 90-day time limit, the threshold to be applied is not one which is wholly in the discretion of the Court as would otherwise be the case; rather, the applicable threshold would be that of exceptional circumstances as described in ss 114 and 115. The qualifier in s 221(c) has no greater significance than that.

[99] In conclusion, we find that the powers in s 219(1) or s 221 cannot be used to extend the time limitation provisions of s 114(6).

Disposition

[100] Because the Court does not have the ability to extend time under s 114(6) of the Act, the preliminary question must be resolved against the employee. The challenge is accordingly allowed.

[101] We reserve costs, which should follow the event. On a provisional basis, we fix these on a Category 2, Band B basis. If counsel are unable to agree the amount involved, a memorandum should be filed and served within 21 days; any response should be filed and served within 21 days thereafter.

[102] At the hearing, an interim order of non-publication of the name, address and occupation or identifying details of the employee was made. Since the hearing, the employee has filed an application for a permanent non-publication order. The grounds

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[49] For example, *Auckland Regional Authority v New Zealand Tramways & Public Passenger Transport Authorities Employees IUOW* [1986] ACJ 126; *New Zealand Engineering, Coachbuilding, Aircraft, Motor etc IUOW v New Zealand Refining Co Ltd* [1987] NZILR 119 (AC); *New Zealand (with exceptions) Food Processing, Chemical etc IUOW v Expandite Ltd* [1989] 1 NZILR 251 (LC); *Day v Whitcoulls Group Ltd* [1997] ERNZ 541 (EmpC).

relied on are that she is the subject of an order under s 203 of the Criminal Procedure Act 2011 in a related proceeding;[50] and on the grounds of significant stress as described in an affidavit. Having particular regard to the order of the Court of Appeal, it is essential we make a parallel non-publication order in this Court, and on the same terms. Accordingly, we now make a permanent order of non-publication of name, address, occupation or identifying particulars of the employee.

B A Corkill
Judge
for the full Court

Judgment signed at 2.45 pm on 7 November 2018

[50] *Green v R* [2015] NZCA 324.