IN THE EMPLOYMENT COURT
AUCKLAND

AC 50/06
ARC 41/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TUPOU TU'ITUPOU Plaintiff
AND	GUARDIAN HEALTHCARE OPERATIONS LIMITED Defendant

Hearing: 9 August 2006
(Heard at Auckland)

Counsel: Ms A Schaaf, Counsel for Plaintiff
Mr R Searle and Mr P Akbar, Counsel for Defendant

Judgment: 6 September 2006

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mrs Tu'itupou was employed as a relief caregiver for the defendant and predecessor proprietors at Cornwall Park Hospital (Cornwall). She worked night shifts and was employed as a permanent employee under an individual employment contract.

[2] She was dismissed on 13 June 2002. This followed a final written warning being issued to her on 31 May 2002. In addition to raising grievances arising out of these events, she also alleges that she was subject to rude and humiliating treatment by her employer at a meeting on 5 June 2002.

[3] Mrs Tu'itupou claims to have been unjustifiably dismissed, and that the employer carried out unjustifiable action, and that she suffered disadvantage arising out of the warning and the humiliation.

[4] There are two issues to be decided in this matter. The plaintiff, Mrs Tu'itupou has commenced a challenge de novo against a decision of the Employment Relations Authority ("the Authority") dated 3 May 2006. The first issue is whether the alleged personal grievance was filed with the Authority within 3 years of raising the grievance as is required by s114(6) of the Employment Relations Act 2000 ("the Act"). If the personal grievance was not filed with the Authority within the 3 year period then the second issue arising is whether the Court should exercise its discretion pursuant to ss 219 or 221 of the Act to extend time and allow the claim to continue.

[5] If the declarations sought from the Court are to the effect that the proceedings were lodged within time or that an extension to do so is to be granted, then the substantive matter needs to be referred back to the Authority to be determined on its merits. It will be plain that the Authority has held that the proceedings were not lodged within time and that an extension to do so should not be granted.

Factual Background

[6] It is not necessary in this decision to deal with the substantive issues arising from the alleged grievance. The final warning related to an allegation that Mrs Tu'itupou alone was lifting and turning patients. This was contrary to a house rule that lifting and turning was to be carried out by two persons for health and safety reasons. At a disciplinary meeting on 5 June 2002 Mrs Tu'itupou says that she was treated rudely by her employer and accused of lying in alleging that a fellow worker had abused a patient. On 13 June 2002 Mrs Tu'itupou was dismissed for alleged sleeping while on duty. Incidental to these matters and no doubt likely to be canvassed in detail if the case proceeds, is a complaint and subsequent successful criminal prosecution against the person Mrs Tu'itupou accused of abusing a patient.

[7] The present argument arises primarily out of four matters. The first is an oral statement made by Mrs Tu'itupou's lawyer, Ms Schaaf at a meeting with the representatives of the employer at the dismissal. The remaining three items relate to letters Ms Schaaf wrote to Ms Jolly, the employer's representative, on 14 June 2002,

28 August 2002 and 29 August 2002. The issue is, which of these four matters amount to the initial raising of the grievance. This then would set the date for the commencement of the three year limitation period during which proceedings must be commenced in the Authority.

[8] There is no dispute between the parties that whichever of the several matters to which I have referred raises the grievance, the 90 day period required by the Act for the raising of the grievance has been complied with. That is so even if the final letter of 29 August 2002 is regarded as the time when the grievance was raised, for it was within 90 days of the first alleged incident on the 31 May 2002.

[9] The oral statement alleged to have been made by Ms Schaaf is referred to in two affidavits. One is from Shirley Jean Colbeck, presently Facility Manager at Beachhaven Hospital and Resthome. At the time of the dismissal, she was Principal Nurse/Manager with supervision of employment problems at Cornwall. The other affidavit is from Gordon Turnbull Rodger, now retired, but formerly a director of a predecessor proprietor of Cornwall.

[10] The passage from Ms Colbeck's affidavit is hearsay. When I raised this with Mr Searle he justified its inclusion in the affidavit on the basis that one of the major problems now facing the defendant in this proceeding is the length of time elapsed since the incidents complained of. He submits that with the passage of time there is a difficulty with potential witnesses remembering all the details. He used this as an instance of prejudice suffered to which I shall refer later. In any event Ms Schaaf acknowledged her use of the words and conceded that she would not be stepping down as Counsel to enable the presentation of any rebuttal evidence. In view of this, weight can attach to Ms Colbeck's recall of events.

[11] The relevant paragraph in Ms Colbeck's affidavit reads as follows:

> *7. The Applicant was dismissed on 13 June 2002 after a resident had complained that he had found her asleep while on the job. Although I was not involved in the disciplinary process I was kept informed of developments. The complainant was not an elderly resident. He suffered from bi-polar mental health issues which is why he was in the hospital. He was a lucid gentleman. When interviewed was adamant that the caregiver (subsequently identified as the Plaintiff) was asleep. This is a very serious matter and was treated by Havencare (and now by Guardian) as serious misconduct as it puts the health and wellbeing of the residents at risk. As I recall, after the disciplinary meeting I was told, probably by Gordon Rodger or Kim Jolly, that at the end of the meeting the Plaintiff's representative Amelia Schaaf*

said something like "You haven't heard the last of this, we will be bringing a personal grievance". I can't remember the exact words used but that is the impression I got.

[12] The relevant paragraph from Mr Rodger's affidavit, corroborated by Ms Colbeck's memory of events, reads as follows:

4. When the Plaintiff was dismissed at the end of the meeting I remember her lawyer, Amelia Schaaf, saying that Havencare would be receiving a personal grievance. As the events in question occurred over four years ago I cannot remember the exact words she used, but I do know she put the point forcefully. I think I said something along the lines of "Well that's your right" in reply. I fully expected her to be filing personal grievance papers with the company after that day.

[13] Mr Rodger also refers in his affidavit to a file note that was taken at the termination meeting and written up by Tuaine Tiaiti, who was then the Clinical Manager at Cornwall. The file note is annexed as an exhibit to Mr Rodger's affidavit and the final endorsement is as follows:

"Solicitor [Ms Schaaf] to lodge personal grievance".

In an affidavit of Mrs Tu'itupou sworn on 9 August 2006 but filed at the hearing, she states that this file note was not disclosed to Ms Schaaf when information was requested. Another file note prepared at the dismissal meeting was disclosed and is annexed to this subsequent affidavit. The two documents were clearly prepared by different persons present. Ms Tiaiti's note appears to be more in the form of a minute. I place primary weight on Mr Rodger's statement and in any event there is no dispute from Ms Schaaf that these words or words similar to them were used.

[14] The correspondence following the dismissal meeting is annexed to both Mrs Tu'itupou's brief of evidence, now sworn as an affidavit, and the affidavit of Mr Walter Bruce Wall, National Human Resources Manager for the defendant. Mr Wall's affidavit was sworn on the 2 August 2006.

[15] On the 14 June 2002 Ms Schaaf wrote to Ms Jolly as follows:

As indicated to you yesterday, Mrs Tupou Tu'itupou will be lodging a personal grievance action against Havencare Hospitals Ltd. I have firm instructions from Mrs Tu'itupou to pursue a personal grievance action against Havencare. I had intended to notify Havencare of this today, but will now await the receipt of the information requested below before doing so.

As requested yesterday, can you please send me copies of all information on Mrs Tu'itupou's personnel file. I would like to obtain all the information relating to the investigation of the complaint by Ray Farrell, including the

names of everyone spoken to and any information received from them. I would like to know the dates and times that any witnesses were spoken to. Can you also send me a copy of Mrs Tu'itupou's employment agreement and a copy of the house rules. I enclose a copy of a form signed by Mrs Tu'itupou, authorising the release of the information to me.

Once I receive the information requested and the letter confirming Mrs Tu'itupou's dismissal, then I will then formally notify Havencare Hospitals Ltd of Mrs Tu'itupou's personal grievance. I assume that Havencare is the employer and would appreciate if you could confirm this. Can you let me know the name of the Chief Executive or General Manager of Havencare and the address for correspondence.

[16] Mr Wall states that by the stage that this letter was written, it, in combination with the oral statement made by Ms Schaaf at the dismissal meeting the previous day led Guardian (he means the predecessor proprietor HavenCare Hospital Limited) to consider Mrs Tu'itupou was raising a personal grievance. This evidence is also hearsay and again demonstrates the difficulty in endeavouring to reconstruct matters so long after the events themselves.

[17] Cornwall wrote to Ms Schaaf on 14 June 2002. That letter obviously crossed with Ms Schaaf's letter of the same date. The purpose of Cornwall's letter was to simply confirm the grounds for the dismissal. Cornwall subsequently responded to the request for information.

[18] On 28 and 29 August 2002 two further letters were sent to Cornwall by Ms Schaaf. I set these out in full as follows:

(a) Letter 28 August 2002–

> *"I write to notify HavenCare Hospital Limited of Mrs Tu'itupou's personal grievance action in accordance with section 114 of the Employment Relations Act 2000. This is a summary of her claims. The full details will be outlined in a letter that will be sent tomorrow.*
>
> *Her grievances are as follows –*
>
> *(1) Unjustifiable action causing a disadvantage. This is in relation to the final written warning that she was given in the letter dated 31 May 2002. The correct procedures were not followed before Mrs Tu'itupou was disciplined and the warning was also not justified;*
>
> *(2) Unjustifiable action in the manner that Mrs Tu'itupou was treated by HavenCare when she was subjected to disciplinary action after reporting the claim by a resident that Soane had assaulted him. The correct procedures were not followed in this instance and Mrs Tu'itupou was treated rudely and unfairly during the disciplinary meeting; and*
>
> *(3) Unjustified dismissal when she was dismissed on 13 June2002 for "sleeping' while on duty. Mrs Tu'itupou did not sleep on this occasion and the matter was not investigated properly. Bridget was not interviewed and she was a main witness identified by Mrs Tu'itupou.*

Mrs Tu'itupou is claiming $20,000.00 compensation for the humiliation, loss of dignity, and injury to her feelings arising out of her treatment by HavenCare".

(b) Letter 29 August 2002–

> *"Further to my letter dated 28 August notifying HavenCare Hospital Limited of Mrs Tupou Tu'itupou's personal grievance action, I provide the full details of Mrs Tu'itupou's case.*
>
> *There are three elements to Mrs Tu'itupou's personal grievance action. They are:*
>
> *(1) Unjustifiable action causing a disadvantage arising out of the final written warning that she was given in the letter dated 31 May 2002 (section 103(1)(b) of the Employment Relations Act 2000 ("the Act");*
>
> *(2) Unjustifiable action and the employer breaching its duty of trust and confidence in a manner that Mrs Tu'itupou was treated by Havencare when she reported a claim by one of the residents that Soane had assaulted him, resulting in two bruises on his back (section 103(1)(b) of the Act); and*
>
> *(3) Unjustified dismissal when she was dismissed on 13 June 2002 for "sleeping" while on duty (section 103(101)(a) of the Act).*
>
> *Mrs Tu'itupou was given a final written warning in a letter dated 31 May 2002 which she received at a later date. The letter of 31 May stated that, "It is clearly documented in your personnel file that this issue has been discussed with you on a previous occasion therefore this letter is a final warning and a copy will be kept in your personnel file." Mrs Tu'itupou's is not aware of this issue of lifting and turning being discussed with her or documents before.*
>
> *According to Mrs Tu'itupou, she was called to a meeting with all other night staff to discuss what happened to one of the patients "Babs". Babs had suffered some injury. Mrs Tu'itupou does not know exact details of the injuries, but apparently Babs suffered broken bones to her ankle.*
>
> *At the meeting, you (Kim Jolly) informed the night staff about the injury to the patient and that her family were quite angry and they wanted staff to be dismissed. Staff were also informed that they would all receive warnings and asked about their availability to see management individually. They were not informed about the nature of the individual meetings. Mrs Tu'itupou met with three people, Ms Jolly, Ms Tuaine Tiaiti and Ms Jean Colbeck. She had not expected a meeting of this nature. At this meeting, Mrs Tu'itupou was told that she was going to receive a final written warning. Mrs Tu'itupou was also asked questions during the meeting about the claim by one of the patients that he had been assaulted by Soane. She was then requested to attend another meeting to discuss why she had not reported that Soane had assaulted patients before. The next meeting occurred on 5 June 2002.*
>
> *In terms of the turning of patients, the normal practice has been for an employee to use a draw sheet. It is only if the patient is heavy that a second employee is required to assist. Mrs Tu'itupou understood that two employees were required to lift a patient. In conclusion, the final written warning was not justified.*
>
> *In relation to the second aspect of Mrs Tu'itupou's personal grievance action, she was treated in a very rude manner and accusations were made against her in the meeting of 5 June 2002. In particular, she was accused by Ms Jean Colbeck during the meeting that I attended of making a complaint against Soane because of something that occurred outside work. She was also accused of being an abuser because she condoned abuse of patients. How Mrs Tu'itupou was treated on this*

occasion went beyond what would normally occur at a disciplinary meeting. Rather than giving her an opportunity to explain herself, she was treated in an aggressive and accusatory manner. There was no justification for Mrs Tu'itupou being subjected to a disciplinary meeting when she was doing the Hospital a favour by reporting alleged abuse of patients. Any reasonable employer would have been grateful that an employee had put herself at risk of retaliation by other staff by reporting incidents of physical abuse of patients. Instead she was subjected to a disciplinary meeting because she was an 'abuser', condoning abuse of patients. This was aggravated by the fact that Mrs Tu'itupou was not advised that this was a disciplinary meeting and that she could be dismissed. Indeed, I sent a facsimile message and the only reply from Ms Jolly was that it was meeting to explore further the issue of Mrs Tu'itupou admitting that she had witnessed Soane assaulting a patient before. Ms Jolly would not confirm whether the meeting was a disciplinary meeting in a telephone conversation on 5 June 2002.

It was clear after the meeting that the correct procedures were not followed and that it would have been clearly wrong to discipline Mrs Tu'itupou. However, this has not diminished the unfair treatment that Mrs Tu'itupou received on this occasion.

In relation to the last incident leading to her dismissal, Mrs Tu'itupou denied that she slept and still denies it. During the disciplinary meeting to discuss this issue, Mrs Tu'itupou denied the matter and also wanted one of the other residents, "Bridget" to be spoken to. Bridget was the resident who gave Mrs Tu'itupou the massage and Bridget was around at the time that Mr Farrell alleged that a nurse aid had slept. Bridget was not spoken to before the decision to dismiss Mrs Tu'itupou was made.

The other nurse aide on duty at the time, Leata, was also not spoken to about her whereabouts and whether she had slept while on duty. Mr Farrell had not identified Mrs Tu'itupou as the one who had slept. Apart from the fact that Mrs Tu'itupou did not sleep, HavenCare management did not conduct the investigation with an open mind. It is therefore Mrs Tu'itupou's case that her dismissal was not justified because she had not slept while on duty and that the procedures followed were flawed. The dismissal is also not justified as the earlier final written warning was issued without justification.

The disciplining of Mrs Tu'itupou in quick succession would seem to betray an eagerness and an intent to terminate her employment. Mrs Tu'itupou is of the opinion that she has been victimised because of her reporting of the abuse of the patients. She had made a previous complaint against another employee Salote and reported it later to an outside organisation. I understand that this employee has now left. I have referred to some of these issues in my letter of 11 June 2002.

In terms of remedies sought, Mrs Tu'itupou has found another job. However, she is claiming $20,000.00 damages for pain and humiliation arising out of her treatment by the Hospital and her unjustified dismissal from her position.

Can you please respond to the issues raised above. Can you also indicate whether HavenCare would consent to the matter being referred to the Mediation Service of the Labour Department for resolution.

[19] I have set these letters out in full because they disclose the extent to which Mrs Tu'itupou had formulated her claim as early as August 2002, slightly over two months after her dismissal from employment. One wonders why it was necessary

for there to be two letters on subsequent days. Certainly the first letter appears to be confirmation of the three matters discussed at the time of dismissal and earlier.

[20] Solicitors acting for HavenCare Hospitals (subsequently amalgamated with the defendant) responded to those letters on 12 September 2002 and 10 October 2002. There is no need to set them out in this decision. The first letter was simply an acknowledgment of receipt. The latter set out fully, the basis for rejecting the notified claims.

[21] Nothing further transpired in this matter until Mrs Tu'itupou lodged a statement of problem with the Authority on 26 August 2005, which would have been two and three days respectively before the expiry of the three year period from the letters of 28 and 29 August 2002. That lodging of the statement of problem was met by an application to strike out on the basis of limitation. That application proceeded to a hearing before the Authority. I will deal with the decision shortly.

[22] Before dealing with the decision appealed against and legal issues, I refer to one further factual matter having significance in respect of a submission made by Ms Schaaf. This was whether, even if the time limitation had expired for commencing proceedings in respect of the dismissal, each of the three grievances raised should be dealt with as discrete issues. Her submission was that the earlier statements and correspondence related to the dismissal alone and that the grievances in respect of the final warning and the humiliation were not specifically raised until the letters of 28 and 29 August. Even if time for the dismissal grievance had expired those grievances were preserved, she submitted.

[23] The defendant in anticipation of this argument filed a supplementary affidavit from Mr Wall. On 11 June 2002 Ms Schaaf had written a letter to Ms Jolly at Cornwall. This letter is annexed to that supplementary affidavit from Mr Wall, sworn on 3 August 2006. The text of the letter reads as follows:

> *I understand from Tupou that she has been asked to attend yet another meeting with management. She was requested to meet with management today or tomorrow about a complaint that she slept during work hours on Friday last week. I also understand that Tupou has denied this allegation.*
>
> *Tupou is very busy with her studies as she is preparing to sit examinations for her nursing qualification. She is therefore unable to attend a meeting until Thursday. We will be available to meet with you at 5.00 pm on Thursday. As you can appreciate, Tupou needs to have time for her studies.*

> *It is of grave concern that Tupou is going to be subjected to yet another disciplinary meeting after the meeting on 5 June 2002. It would appear that Tupou is being victimised because of the recent complaint that she has made against another staff member and also the previous complaint against Salote Koloi. I understand from Tupou that she was also contacted recently about a complaint that she left work early.*

[24] The point of this letter being raised by the defendant is that its tenor may in any event constitute the raising of a grievance in respect of one of the disadvantage grievances as early as 11 June 2002. At the very least it sets the context for the matters raised in the subsequent letter of 14 June 2002 from Ms Schaaf. The defendant therefore relies upon this letter to rebut Ms Schaaf's contention that it was only the dismissal, which was being referred to in the letter of 14 June 2002.

The Authority's decision

[25] Against the background I have set out, the Authority did not deal with the substantive issues involved in the alleged grievance. The Authority member ruled that the proceedings were lodged out of time and therefore could not be determined by the Authority.

[26] It is clear that the Authority had the same or similar evidence before it as is now before this Court. The Authority considered legal issues arising as to when a grievance is 'raised'. It applied an objective standard and held that if the grievance was not raised orally on 13 June when the dismissal occurred, it certainly was raised by the letter from Ms Schaaf dated 14 June 2002. In making this finding the Authority did not distinguish between the three separate grievances nor deal with them as discrete issues.

[27] It appears that there was no application to the Authority to exercise the discretion to extend time under ss219 or 221 of the Act. There is some suggestion in the decision that the Authority felt it may not have such a discretion. However, it decided that, even if such a discretion existed there was no information before it to warrant such an extension.

Legal submissions

[28] Ms Schaaf, as I have indicated, had to acknowledge that there was no evidence in rebuttal to the statement she was alleged to have made at the dismissal meeting. However, her primary submission was that the statement in company with the letter she wrote the following day, was merely preliminary to the raising of the

grievance. She submitted that at that stage the plaintiff and she as legal advisor were merely seeking information before making a decision to raise a grievance. She submitted that the grievance was not raised until the letters of 28 and 29 August 2002. She submitted that the information was needed before a grievance could be formulated. That request consisted of the need for house rules, documentation and information as to procedures adopted, warnings issued, investigations carried out, confirmation in writing of dismissal and information as to the correct identity of the employer. Ms Schaaf submitted that items such as house rules, personnel files and the other documents were important in advising Mrs Tu'itupou as to whether she had a grievance or not.

[29] She submitted that the letter of 14 June 2002 could not amount to the raising of a grievance nor could it be taken as such by the employer because the letter, being a request for information, did not contain matters substantive to the grievance to which the employer could realistically respond. She submitted that there is corroboration for this in the form of the letters the employer wrote to her on 21 and 28 June 2002 in which information was provided without any response to the grievance itself.

[30] She submitted that having regard to the totality of the correspondence, to an objective observer the grievance or grievances could not be said to have been raised until the final letters in August 2002. If that is not accepted then she says the earlier grievances are preserved in time because the earlier utterance and correspondence could only have related to the dismissal.

[31] An alternative argument although not pursued with any vigour by her, concerned the failure of the employer to respond to the earlier correspondence in a way which indicated it was reacting to the raising of a grievance. This led the plaintiff to assume that the employer's view was that no grievance had by that time been raised. This, she submitted, gives rise to an estoppel. A further alternative argument was that the Authority should have approached the matter consistent with its equity and good conscience jurisdiction. That the right to take a grievance should not be removed lightly and that the employer would in any event suffer no prejudice if the grievance proceeds. Certainly it had provided no evidence of any such prejudice. This latter submission I perceive is more appropriately lying within the

consideration the Court needs to make as to whether an extension of time should be granted if the proceedings were indeed commenced out of time.

[32] Finally, Ms Schaaf appealed to the Court to exercise the discretion under ss219 or 221 of the Act if the Court holds that limitation applies. In this regard she relied upon there being an absence of any evidence of prejudice, that Mrs Tu'itupou could justify the failure to file proceedings by the need to first see the resolution of the criminal prosecution against the person she had accused, and that in any event Ms Schaaf was unable to act throughout the period through illness. Ms Schaaf produced from the bar a brief medical report but conceded that without her stepping down and providing evidence little weight could be given to it. In any event the medical report would not explain the failure over the three years. The criminal prosecution at first instance, it seems, was completed in 2004. In response to Mr Searle's submission that Ms Schaaf could have arranged for her instructing solicitors to commence the proceedings or re-brief the matter, Ms Schaaf indicated that there were substantial language difficulties. Mrs Tu'itupou, a Tongan, spoke little English.

[33] Mr Searle submitted that the plaintiff in clear language raised the grievance at the dismissal meeting. If not then certainly in the letter the following day. That letter, he submitted, needs to be judged in its context. He submitted that a grievance can be submitted or raised orally – that there is no need for formality nor does the nature of the grievance or the remedies need to be specified. He relied upon a long line of authority in which the Court, for reasons different to the present case, has taken a liberal approach to what constitutes the submission or raising of a grievance.

[34] As to whether the Court should exercise its discretion to extend time, he submitted the following as relevant:

(a) The extent of the delay;

(b) the explanation for the delay;

(c) whether it was excusable;

(d) the entire history;

(e) the merits of the substantive "evidence", and;

(f) the overall justice.

[35] In this case he submitted the failure was extensive – the full three years' time limit had expired. However, it needs to be said that the actual delay since expiry of the three year period for the commencement of proceedings, if indeed it had expired, was a matter of only two or three months. The plaintiff could as of right and without leave have filed proceedings at any time within the three year period.

[36] Mr Searle further submitted that there is no real explanation for the delay. The criminal proceedings referred to had an outcome in 2004. Ms Schaaf's illness did not cover the full period, the employer was never informed, and in any event Ms Schaaf appeared in the Employment Court and Authority throughout 2004. So far as prejudice is concerned he submitted the defendant is inevitably prejudiced by the passage of time as witnesses will be difficult to locate. It is apparent already from the affidavits that have been filed that there are signs of the witness's recollection of events differing in some respects from each other. These of course are witnesses who are still available. Other potential witnesses have moved from the employment of the defendant. Their willingness to attend or being released by their present employers to attend is apparently in doubt.

[37] So far as substantial merits are concerned Mr Searle has pointed in his submissions to the strength of the defendant's case in respect of the notified claims. However, it would be dangerous of me to deal with that issue on anything other than at a prima facie level.

Principles applying and conclusions

[38] In this case there is no dispute that the grievance was raised within the 90 day period running from the alleged events giving rise to the grievance. Even if there is more than one grievance, for example the allegations relating to 31 May 2002, the correspondence on 28 and 29 August 2002 would still have been within the 90 day period. The issue, however, in this case is when the grievance or grievances were actually raised. There is a line of authority in this Court dealing with this primary issue. The Court has held that the word *"raised"* in the Act is virtually synonymous with the word "*submit*" used in the Employment Contracts Act 1991: *Ruebe-Donaldson v Sky Network Television Ltd* (No 1) [2004] 2 ERNZ 83; *Creedy v Commissioner of Police* unreported Chief Judge Colgan, 23 May 2006, AC 29/06. Accordingly, authorities decided under the previous legislation are relevant to principle when considering circumstances arising since its repeal.

[39] The position under the Act is covered by s114. Sections 114(1) and 114(2) of the Act read as follows:

> ***114 Raising personal grievance***
>
> *(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.*
>
> *(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.*

There is no definition of the word "*raised*" but, as already indicated, it is synonymous with the word "*submit*" in the previous legislation. The test is firmly established in subsection (2). If the grievance is not raised within the 90 day period the Court may grant leave to do so if the delay was occasioned by exceptional circumstances (elaborated in s115) or if it is just to do so. In any event s114(6) requires proceedings to be commenced in the Authority or Court within three years after the personal grievance was first raised in accordance with the provisions of the Act.

[40] Counsel referred me to *Houston v Barker* (*t/a Salon Gaynor*) [1992] 3 ERNZ 469. In that case the employee was apparently summarily dismissed. She was so shocked that she did not respond in any way at the time. She soon after departed for overseas. Upon her return she employed an advocate, Mr Mace, who wrote to the employer requesting information as to the reasons for the termination of employment. The letter contained the following sentence:

> *It is not decided as yet whether there exists grounds for an alleged grievance, for it is not known why Leeanne Houston was dismissed.*

The Court held that the letter did not amount to the submission of a personal grievance. The appeal against the Employment Tribunal's decision that it had no jurisdiction to hear the grievance as the time for submission had expired was dismissed.

[41] Ms Schaaf in the present case relied upon *Houston* for the obvious reason that the letter written by the advocate in that case had some similarities to her letter of 14 June 2002. Obviously, if her own letter was not held to be a submission or the

raising of a grievance then time is extended to August 2002 for the commencement of the three year limitation period.

She relied particularly upon the following comment from the decision of Judge Palmer in *Houston* (page 479):

> *Before considering past Tribunal decisions touching upon ss 33 and 38 of the Act and past Labour Court decisions dealing with s 225 Labour Relations Act 1987 (the equivalent of s 38) there remains the question of whether there is anything in the 26 August letter which could constitute both a request for reasons and a submission of the grievance. It is difficult to understand why anyone would do this but no doubt it would be possible to couch a letter in terms so as to serve both purposes.*

In circumstances where a reservation such as this was taken the Court held no grievance had been submitted. I infer from Ms Schaaf's reference to this passage that she submits the circumstances are so similar that the same finding should be made in the present case.

[42] On the other hand Mr Searle, to support the proposition that even oral statements at dismissal will be sufficient, referred to another passage at page 478 in the same judgment:

> *I would add that I can see no reason why protests made by the employee at the time of their dismissal, if couched in language clear enough to alert the employer to the fact that there was disagreement with his or her actions, could not constitute a submission of the grievance.*

[43] I do not think *Houston* assists the plaintiff in this case. The circumstances facing Miss Houston were totally different from those with which Mrs Tu'itupou was presented. Mrs Tu'itupou had the benefit of legal representation at the meeting when her employment was terminated. Miss Schaaf had attended the meeting, would have been aware of the allegations and presumably had the opportunity of making representations on behalf of her client. When she made the statement at the conclusion of the meeting it would have been from a fully informed position. Clearly there had been lengthy discussion between the parties as to the matters relied upon by the employer. Her correspondence the following day must be considered in that light. Mr Mace, on the other hand, representing Miss Houston, had come into the picture a long time after the event. Clearly he could not advise Ms Houston until he got up to speed. His correspondence, which Judge Palmer has fully set out, discloses the disadvantage Mr Mace faced and the need for information. The correspondence Mr Mace wrote has a different context from that of Ms Schaaf. Read in the context of the oral statement, I interpret Ms Schaaf's letter as stating a

concluded position that a grievance was being raised. How else could the words "I have firm instructions from Mrs Tu'itupou to pursue a personal grievance action against HavenCare" be interpreted? The information sought was not to gather documents in order to make a decision but to gather documents to shore up the case. It was clear by that stage the employee alleged a personal grievance that she wanted her employer to address.

[44] Another point enabling comparison between the two is that even though *"raised"* and "*submitted"* are synonymous, the Employment Contracts Act 1991 contained a far more formal process than the new Act in advancing the grievance beyond the original submission. (See the procedure set out in the first schedule to the 1991 Act). This may have led to the slightly different approach and emphasis between Judge Castle's decision in *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512 and Judge Finnigan in *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503. Judge Castle held that a submission could be made by protests (presumably orally) but that they had to be of sufficient strength and purpose to alert the employer to make a response under clause 5 of the First schedule. Such an approach was not taken by Judge Finnigan in *Samate*. Incidentally, he answered the question posed by Judge Palmer in *Houston* as to whether a letter requesting reasons could at the same time submit the grievance. Judge Finnigan's statement at page 509 as follows has been applied since that time:

> *In my view if the Tribunal and the Court are to be aided in the present case by definitions these definitions should be of the words in the statute. The words "personal grievance" are defined in the statute at s 27. The word "submit" is defined in (among other places) the dictionary relied upon by Mr Kiely, the* Concise Oxford*. It is there defined as meaning (in the present context) "to present for consideration or decision". No more is needed than that. The Legislature has left the matter for decision on the facts of each case. I would not limit s 33(2) by unnecessary definitions.*
>
> …
>
> *I add one, but only one, important qualification and state the question this way*: to an objective and disinterested observer, *does the letter (in this case) present to the employer for consideration or decision any grievance that the employee may have against his or her employer or former employer because of one or more of the claims that are defined in s 27 of the Act? In this case I think the Tribunal applied that test. My own observation is that the request for reasons coupled with a claim that the dismissal was unlawful amounted from the outset to a request for justification of the dismissal. Objectively viewed, that should have made it clear to the employer that the employee was submitting a grievance about his dismissal.*

[45] These statements have since been applied in *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958; *Farmers Trading Company Ltd v Opuariki* [1998] 1 ERNZ 313; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60. If such an approach was taken within the more formal confines of the Employment Contracts Act procedure, then the same approach would be even more justified within the context of the new Act.

[46] Counsel did not refer in their submissions to *Creedy v Commissioner of Police* (supra). In many respects the issues dealt with in that decision differ from the present. The case predominantly turned on the issue of whether the unjustified disadvantage grievance and the constructive dismissal (the latter clearly speculative and raised out of time) were occasioned by an exceptional circumstance to allow the Court to grant leave under s114(4) of the Act. However, Chief Judge Colgan dealt with the issue of when a grievance is raised and some of his comments have significance. I have already noted that the decision confirmed the finding in *Ruebe-Donaldson v Sky Network Television Ltd* (No 1) (supra). The new word in the Act, *"raised"*, is synonymous with "*submit*" as used in the Employment Contracts Act 1991.

[47] In elaborating upon that the Chief Judge stated (para [32]):

> *The legislative purpose of requiring a grievance to be raised was found to have been the same as that requiring its submission under the former legislation, namely to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin, to use the words of clause 3 of the First Schedule to the 1991 Act. Although done orally or in writing, to have enabled an employer to know of the complaint and to address it by way of remedy, cases under the previous legislation required a minimum level of sufficiency of detail of the complaint. The position is no different now.*

[48] At first glance other statements in *Creedy* (supra) appear to retreat to the position taken by Castle J in *Wilkinson* (supra). However, the position existing with Mr Creedy was substantially different from the present case. The grievance, as mentioned, was placed before the employer in a speculative way, in circumstances where the employee was still undergoing separate disciplinary procedures under the Police Act 1958 and Police Regulations 1992. In judging the specifity of the notification, there needs to be consideration in light of the fact that Mr Creedy alleged unjustified disadvantage at the time of notification and ultimately a constructive dismissal, following an election to resign in the face of mounting evidence that he was about to be dismissed.

[49] Against the considerations existing for Mr Creedy, the circumstances for Mrs Tu'itupou were considerably different. The notification that a grievance was being taken was clear:

> *"…Mrs Tu'itupou will be lodging a personal grievance against HavenCare Hospitals Limited. I have firm instructions from Mrs Tu'itupou to pursue a personal grievance action against HavenCare."*

This was in the context where a full dismissal meeting had taken place and there had been previous discussions and correspondence.

[50] The circumstances between the two are clearly distinguishable. Chief Judge Colgan's following statements in *Creedy* (supra) confirm the position consistently taken since *Samate* (supra) [paras 36 & 37]:

> *As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*
>
> …
>
> *It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

It seems to me that what Ms Schaaf stated at the conclusion of the dismissal meeting and confirmed in writing the following day, fits clearly within these criteria.

[51] Ultimately the Court is required to stand back and objectively observe the alleged submission or raising of the grievance against the entire factual background. Sometimes the position will be clearly stated. On other occasions the position may be clouded and equivocal. Sometimes the raising of the grievance will be by way of a mere oral statement. It may on occasion be the briefest reference in correspondence as for example the statement in *Liumaihetau*; 'They have instructed the Union to act for them in the matter of their dismissal'. Against the factual background in that case, that was held to be a submission.

[52] Judging the present matter as an objective observer, it seems to me that the tenor of the letter from Ms Schaaf of 14 June 2002 in the context of her oral

statement the previous day will have clearly alerted the employer that it was facing a personal grievance. Sufficient information was available by then to address the grievance with a view to resolving it. I do not accept Ms Schaaf's submission that because it failed to isolate the dismissal from the disadvantage allegations that those earlier matters are in any event preserved. As Mr Searle has submitted, that is not the way the plaintiff dealt with matters in subsequent correspondence, in the presentation of the problem to the Authority or in the evidence supporting the present challenge de novo. In all those subsequent instances the defendant has claimed one set of remedies and presented one grievance.

[53] For these reasons I decide that the grievance was clearly raised on 13 June 2002 or at the latest in the letter the following day. It is possible that one of the disadvantage claims may even have been raised as early as the letter from Ms Schaaf on 11 June 2002. If that is not the position then certainly the letter of 14 June must be taken as raising all three grievances. Accordingly, the proceedings were not lodged with the Authority within the three years required in s114(6) of the Act.

[54] It is therefore necessary to consider the application to exercise my discretion under either s219 or s221 of the Act. Before doing so, however, I briefly deal with Ms Schaaf's estoppel argument.

[55] Her submission in this regard states:

> *37. The employer, when responding to correspondence made on behalf of Mrs Tu'itupou, has referred to the raising of her grievance in its lawyer's letter dated 10 October 2002. Prior to that, there was no communication that it ever treated any prior correspondence, including the letter of 14 June as the raising of Mrs Tu'itupou's grievance. It cannot now state that it had considered the letter of 14 June as the raising of the grievance.*

[56] She referred me to two authorities. The first of these is *Waitemata Electric Power Board v King Builders Ltd* [1993] 1 NZLR 312. The second is *Gold Star Insurance Company Ltd v Gaunt* [1998] 3 NZLR 80. The submission was somewhat tentatively put by Ms Schaaf. I am unsure whether it had been notified to Mr Searle in advance of the hearing.

[57] The principles relating to estoppel are well established. In the context of the present case the *King Builders* decision is not that helpful as it relates specifically to the issue of an estoppel if upheld having the potential to lead to evasion of a statutory

obligation. However, the modern position on estoppel was clearly set out by the Court of Appeal in the *Gaunt* case (supra, 86) as follows:

> *There have been substantial developments in the law relating to estoppel in the last decade or so. There may now be no distinction in result between what was once called common law estoppel and equitable estoppel and any suggestion that estoppel is available only as a shield has disappeared. (See* Gillies v Keogh *[1989] 2 NZLR. 327;* Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd *[1989] 1 NZLR. 356;* and Waltons Stores (Interstate) Limited V Maher *(1988) 164 CLR. 387). There are also several High Court decisions where the doctrine has been used as a sword but it is not helpful to refer to any more.*
>
> *Counsel for the appellant submitted that the modern approach to equitable estoppel appears to require proof of at least three elements which he described as:—*
>
> *(i) The creation or encouragement of a belief or expectation;*
>
> *(ii) A reliance by the other party; and*
>
> *(iii) Detriment as a result of that advice.*
>
> *The judgments in* Gillies v Keogh *(supra) disclose a tendency to depart from strict criteria and to direct attention to overall unconscionable behaviour. It nevertheless remains clear that before judgment can be given against a defendant on the grounds of estoppel, some action, or representation, or omission to act, must have been carried out by, or on behalf of, that defendant causing the plaintiff to have acted in a manner causing loss.*

[58] The main problem I face in the light of Ms Schaaf's submission is that if estoppel arises it could only be from some omission to act by the defendant. There is simply no evidence of that. Indeed the evidence clearly discloses that on each occasion Ms Schaaf wrote to Cornwall, it replied either directly or through its solicitors. There could be no obligation upon Cornwall to do other than that. Further to that, however, there is no evidence whatsoever to support Ms Schaaf's submission as to reliance or that any silence from Cornwall created or encouraged in Mrs Tu'itupou's mind a belief or expectation that Cornwall was not treating Ms Schaaf's statement at the dismissal meeting or her letter the following day as other than the raising of the grievance. Looking at it more widely, there is no evidence that Cornwall indulged in unconscionable behaviour.

[59] Mr Searle submitted that the estoppel argument was weak. It goes beyond that and is simply untenable.

[60] Both Counsel referred me to ss219 and 221 of the Act as providing the Court with jurisdiction to extend the time for filing of proceedings with the Authority. Neither made any distinction between the two sections. Mrs Schaaf appeared to rely

solely on s221. Clearly there must be a distinction between the sections, although when considering whether to extend time similar considerations would apply under each.

[61] The sections read as follows :

> ***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.*
>
> …
>
> ***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.*

[62] I disagree with Ms Schaaf's submission that it is s221, which would in this case allow the extension beyond the three year limitation provided in s114(6). The distinction between the two sections was considered by Judge Travis in *Roberts v Commissioner of New Zealand Police* [2005] 1 ERNZ 755. This was an interim oral decision dealing with procedural aspects of a de novo challenge against the Authority's refusal to extend time where there had clearly been oversight of Section 219 of the Act. The matter was subsequently substantively dealt with by Chief Judge Colgan (*Roberts v Commissioner of Police* unreported, 27 June 2006 AC 33/06). As it turns out the ratio of the case turned on a consideration of the transitional provisions of the Act and preservation of rights under previous legislation. Accordingly, the considerations in the decisions of the distinctions between the two sections were obiter. Chief Judge Colgan had this to say in his decision:

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

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

> (1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[19] On its face, s219(1) is a discretionary power to extend time limitations. It is invoked, frequently, by persons who have not taken steps to challenge Authority determinations to this Court within the statutory period of 28 days following their issue. As a discretionary power, the Court applies a number of tests, all of which assist it to determine whether, in all the circumstances of the case, the interests of justice require an extension of time. Section 219 is not limited to any particular time limits: nor is that contained in s114(6) excluded. Most, if not all, statutory limitation periods allow for their extension in exceptional cases, even if the tests for doing so are expressly provided and tightly expressed as in the Limitation Act 1950.

[20] So even if, contrary to my conclusion, Mr Roberts had been out of time for issuing his proceedings, it would have been open to the Authority to extend the time for doing so if he had met the requisite discretionary tests.

[63] On the basis of this it is clear that the consideration in the present case falls under s219.

[64] Mr Searle referred me to *Pacific Plastic Recyclers Ltd v Foo* [2002] 2 ERNZ 75 as setting out the principles to be considered. This was a case, which was clearly more appropriately considered under s221; it being a consideration of a purely procedural matter arising within a case already validly before the Court. Then Chief Judge Goddard made no real distinction between the two sections but his statements of principle and as to settled jurisprudence on the point were clearly intended to apply under both sections when extension of time was to be considered. The relevant portions of the headnote (p76) read as follows:

…

The option available to the defendant was to file a separate and timely challenge, and to specify either a different part of the determination, or the entire determination as the subject of the challenge. It followed from that conclusion, that if no challenge was filed within 28 days after the date of the determination to any additional matter, it was then out of time. Consequently, it could only proceed if

such a course was authorised under the empowering provisions of ss 219 and 221 ERA. There was no restriction on the amendments that might be made to the statement of claim, within the permitted period of 28 days. However, once that period had expired, an application to the Court under one or both of those sections was necessary. (paras 19, 21)

(3) The Court had a general discretion under ss 219 and 221 ERA to allow an amended statement of claim to be filed outside the 28 day time limit. The exercise of this discretion was wide. It was not confined to a set of criteria or pre-conditions. In seeking the favourable exercise of the discretion, a number of factors were to be addressed to the Court's satisfaction. These included the extent of the delay, the explanation for it, and whether the delay was excusable. The discretion was to be exercised judicially in accordance with established legal principles governing the exercise of directions generally. It was necessary to take into account the history of the entire matter and the overall justice of the case. As the Court's rules had not been observed, there needed to have been some material on which the Court could exercise its discretion, otherwise the purpose of the rules were defeated. The party seeking leave must also have shown that the matter being advanced out of time had some reasonable prospects of success. If it did not, then the discretion ought not to be exercised in favour of allowing the late filing. (para 24)

[65] Mr Searle paraphrased these principles in paragraph 51 of his submissions. Ms Schaaf did not rely upon any authority to support the submission that the Court should exercise it's discretion to extend time. In her written and oral submissions she referred to the factors of the criminal prosecution and her own health difficulties as grounds for the exercise of the discretion in favour of her client. She maintained that the difficulty with witnesses alleged by the defendant was not a substantial reason to decline and that the substantial merits and equities warranted an extension of time.

[66] Mr Searle submitted as follows :

(53) The Defendant submits that the application of equitable discretion in this case counsels against the time limit being extended for the following reasons:

- *The Act stipulates a time limit for filing a claim in the Authority and this rule has not been complied with. The purpose of the rule will be defeated if an extension is allowed at this time;*
- *There is really no justification for failing to comply with the three year time period;*
- *The burden and onus of proving that the actions complained of were substantively justified and procedurally fair lies with the Defendant; The Defendant's ability to defend its actions has inevitably diminished in the years since the actions complained of;*
- *There was no communication with the employer to explain the delay between January 2003 and August 2005;*

- *The Plaintiff's explanation that she was waiting for the outcome of a separate criminal trial is insufficient excuse. The criminal matter is wholly irrelevant to the Plaintiff's personal grievance as it was not and could not have been within the employer's contemplation at the time of actions complained of;*
- *The criminal trial referred to took place in November 2004. The Statement of Problem could have been filed shortly thereafter;*
- *Any illness suffered by Ms Schaaf does not explain satisfactorily why there was no action in this case between January 2003 and 26 August 2005;*
    - *A grievance could have been filed by the instructing solicitors: Otene & Ellis;*
    - *Ms Schaaf''s illness does not cover the whole period from mediation on 31 January 2003 to the date of filing on 26 August 2005;*
    - *Ms Schaaf appeared in the Employment Court and the Authority in 2004 so the claim could have been filed in the Authority that year;*
    - *The employer was never informed of this problem;*
- *The Defendant is inevitably prejudiced due to the passage of time as witness recollection is adversely affected;*
- *Witnesses are not readily locatable (see Bruce Wall affidavit para.27);*
- *Even if witnesses are locatable, they may be unwilling to attend (see Bruce Wall affidavit para, 30; Exhibits WBW 13, 14 ,15).*

[67] Mr Searle then went on to consider the substantial merits of the plaintiff's claim from the defendant's point of view. As I have said, in the circumstances where the evidence as to merits has not been canvassed by the Court (nor indeed the Authority) it would be dangerous to reach any final conclusion on that.

[68] As I have also indicated, the plaintiff as of right could have issued proceedings any time up to 13 or possibly 14 June 2005. The period of delay from those dates to 26 August 2005 when the proceedings were actually filed was only a matter of 10 weeks. While the reasons for failure to file within the three year period must be considered in the Court's discretion as part of the entire period from raising of the grievance, any issue of prejudice needs primary consideration in the context of that 10 week period of delay. While availability of witnesses and fading memories would be a problem after three years and 10 weeks, the problem would not be exacerbated any further by the period of 10 weeks from the three year anniversary.

[69] In exercising my discretion, I have regard to the objects and provisions of the personal grievance procedures under the Act. The clear intention is to ensure speedy

resolution of such disputes. Hence the provision requiring 90 days to raise a grievance and three years thereafter to commence proceedings. Not only that, there is also a rapid mediation service available to abrogate the need for proceedings where possible.

[70] Clearly the starting point to be adopted against such principles is that proceedings must be filed within the time limit prescribed. In enacting s114(6) of the Act the Legislature effectively reduced the time limit from six years under the Employment Contracts Act 1991 to three years under the new Act. The reasons for that were clearly in keeping with the overall objects to provide speedy resolution of disputes.

[71] In saying that, some amelioration is provided by the discretionary powers to extend time. There would need, however, to be clearly established facts before an appeal to the equitable jurisdiction of the Court could be successful. This is not a case where preservation of the integrity of the proceedings is necessary by the extension of time as I perceive to be provided under s221 and as for example occurred in *Foo*. The position here involves more substantive considerations.

[72] There is in this case inadequate explanation for the failure and delay. While the reasons put forward may be understandable, they do not explain the entire period. Indeed the evidence on this point is quite unsatisfactory. The actual extent of the delay being in fact the 10 week period is not substantial but in combination with the three year limitation the failure to file and the subsequent delay in its entirety has clearly led to an unsatisfactory position now where witnesses may or will not be available or contactable. There is already clear evidence just from the affidavits filed in the present application that memories are clearly starting to fade and there is conflict between witnesses. The plaintiff's explanation that she wished to see resolution of the related criminal proceeding, being the primary reason put forward, simply doesn't hold weight when incontrovertibly, that criminal proceeding was resolved many months before the time limit expired. Ms Schaaf's submission as to her own health difficulties, even if I could place weight on the raising of those matters from the bar, does not explain or answer why she could not have briefed the matter, or got her instructing solicitors to file, or answer the allegations that she was observed appearing in both the Court and the Authority during the relevant period. I

agree with Mr Searle that if these difficulties were known, as they must have been, why wasn't the defendant informed?

[73] Finally, I step back to consider the entire history of this matter and consider the overall justice of the case. The tone of the conversation between Ms Schaaf and the employer's representative at the dismissal meeting and in the subsequent correspondence (including the letters of 28 & 29 August 2002) would have left the employer with no illusions that a personal grievance was pending and seriously pursued. It met it's obligations to respond properly to the allegations. At a time when matters were fresh in the minds of available employees involved on its behalf, it clearly stood ready and willing to meet the challenge, which had been notified. With the period of complete silence, which followed from November 2002 to June 2005, the plaintiff failed in her obligations to comply with the objects and scheme of the Act for resolution of her personal grievance.

[74] While I might have sympathy for her position now, the equity of each side's position must be considered. The plaintiff held back apparently hoping for an outcome in the criminal proceedings, which in turn might give her an advantage in the personal grievance proceedings. Inexplicably when such an outcome indeed arose she then failed to do anything about it. Certainly the illness of her Counsel does not explain that delay. In the meantime the defendant employer has continued to suffer disadvantage by the elapse of time.

[75] If the statement of problem had been filed with the Authority a matter of days after the expiry of time through some inadvertence or oversight, then the discretion might have been readily exercised. Having regard to the entire history of this matter, I am not prepared to exercise my discretion now to extend time. The challenge de novo is accordingly dismissed.

[76] Costs are reserved. I was informed by Ms Schaaf that Mrs Tu'itupou is in receipt of legal aid but an extension is now necessary. She will need to confirm the position as soon as possible. Each party has 14 days to file memoranda as to costs.

ME Perkins
Judge

Judgment signed at pm on 6 September 2006

Representatives: Otene & Ellis, Onehunga, Auckland for Plaintiff
Employers' & Manufacturers' Association Central Inc. for Defendant