IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 61
5312108

	BETWEEN	SEAN BEATTIE Applicant
	A N D	ZOOMTECH LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Janet Copeland, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	16 March 2011 and 12 April 2011 from Applicant 8 April 2011 and 21 April 2011 from Respondent
Date of Determination:	3 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Beattie) seeks leave to bring his personal grievance for unjustified dismissal out of time. That application is resisted by the respondent employer (Zoomtech).

[2] Mr Beattie was employed by Zoomtech in April 2007 and he was at the time Zoomtech's only full time employee. The principal of Zoomtech, Mr Cathro, and Mr Beattie were friends at the time the employment commenced.

[3] There are a number of factual differences between the parties which have been raised by both of them in the course of dealing with the present application. The Authority's focus, however, is exclusively on the question of whether the application to grant leave to bring the personal grievance out of time ought to be granted, or not. The factual matters raised by the parties which are relevant to this central issue are

commented on in this determination; those that do not bear on the decision the Authority has to make, are not.

[4] The short point is that Mr Beattie was made redundant by Zoomtech and his employment came to an end on 8 May 2009. The personal grievance was first raised with Zoomtech on 10 August 2010, some 14 months later.

[5] Mr Beattie says that he did not know that there was an ability to bring a claim against his employer alleging unjustified dismissal until he raised the matter for the first time in 2010. In the alternative, Mr Beattie says that he raised a personal grievance verbally with Mr Cathro at the time he was dismissed for redundancy, an allegation which Mr Cathro denies. There is also dispute between the two men about when the dismissal for redundancy took place; Mr Cathro says that four weeks' notice of redundancy was given in April 2009 while Mr Beattie maintained initially that notice was given on 4 May 2009 with his final day of work being 8 May 2009. Mr Cathro gives evidence that he was not physically at work on 4 May 2009 and he has provided documentary evidence to support that contention. Mr Beattie then contended notice must have been given the following day.

[6] A further factual matter that is relevant to the issues between the parties is the question of whether an employment agreement was provided or not. Mr Beattie is adamant that there was never an employment agreement offered. Mr Cathro is equally adamant that an employment agreement was developed using the Department of Labour's website and that a version of the generic employment agreement which has been supplied to the Authority was made available to Mr Beattie. Mr Cathro says that Mr Beattie never executed the agreement nor returned it. Mr Cathro accepts that the form of agreement appended to the documents before the Authority is simply a generic agreement developed from the Department of Labour website and is not the specific agreement which was provided to Mr Beattie. A copy of that specific agreement has apparently disappeared.

[7] The importance of this issue is that Mr Beattie says that if he had received the agreement (as Mr Cathro claims), he would have been aware of his rights to bring a personal grievance because that is provided for in the document. He says the fact that he did not bring his personal grievance within time confirms the truth of his allegation that there was no written employment agreement provided. Further, s.115(c) gives as an "exceptional circumstance" justifying relaxing the 90 day rule, the example of a

failure to provide explanation of resolution of employment relationship problems in the operative employment agreement.

Issues

[8] It will be convenient for the Authority to consider and determine four issues:

(a) Was a grievance raised within the statutory 90 day timeframe?

(b) Alternatively, are there exceptional circumstances?

(c) Was the delay occasioned by the exceptional circumstance?

(d) Is it just to allow the grievance out of time?

Was the grievance raised within 90 days?

[9] I am satisfied on the evidence before the Authority that the grievance was not raised within 90 days of the employment coming to an end. Mr Beattie seems to argue the matter in the alternative. On the one hand he says in early correspondence that he raised the grievance verbally with Mr Cathro immediately that he was given notice, but he maintains that that notice was given to him on 4 May 2009. Mr Cathro was not at work on that day according to his evidence and the documentary evidence provided by him in support of that contention. Mr Beattie then argued that notice must have been given a day later.

[10] Having maintained in early correspondence that he had raised the grievance verbally immediately that he was advised that he was dismissed for redundancy. Mr Beattie's application before the Authority proceeds essentially on the basis that he had no knowledge of his right to bring personal grievance proceedings until the middle of 2010, at which point he promptly wrote to the employer seeking redress.

[11] Both positions cannot be right; either Mr Beattie knew about the personal grievance procedure in order to make a claim against his employer at the time or he did not. On balance I prefer the view that Mr Beattie did not know about his rights to progress the matter and therefore it is more rather than less likely that he did not raise the grievance with Mr Cathro on 5 May 2009. That finding, of course, is consistent with Mr Cathro's own evidence.

Are there exceptional circumstances in the present case?

[12] The ground for exceptional circumstances in the present case appears to be based exclusively on the claim that no employment agreement was provided and therefore there was no *aide memoir* for Mr Beattie to indicate to him that he had rights of personal grievance. The explanation, though, for the delay of over 12 months is that Mr Beattie did not understand he had those rights of personal grievance until the very point at which he raised his grievance for the first time. He says that, had he received a copy of the employment agreement, its provision relating to personal grievance would have been digested by him and he would then have been aware of his rights and capable of pursuing them in time.

[13] The difficulty with that argument is, amongst other things, that it ignores the large number of other sources of information available to anyone in the community about employment matters. It also overlooks the evidence of both Mr and Mrs Cathro to the effect that an employment agreement was prepared for Mr Beattie and provided to him and the only failure that the employer would plead to is its failure to ensure the agreement was signed and returned.

[14] Of course, the effect of s.115(c) of the Act must also be considered. As I have already noted, that sub-section is one of the examples offered in the statute of an "exceptional circumstance" which might justify the bringing of a grievance out of time.

[15] The provision is in the following terms:

> *" … exceptional circumstances include …*
>
> *(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required (by the statute) …"*

[16] In the present case, it is common ground that no signed employment agreement was completed although Zoomtech says one was offered, a view which Mr Beattie denies. It seems to the Authority to follow that if there was no completed agreement between the parties, it cannot be said that there is a provision setting out how to deal with employment relationship problems. On that basis then, one of the tests for "exceptional circumstances" is met.

Was the delay occasioned by the exceptional circumstance?

[17] In *McCullough v. Affco New Zealand Ltd* [1998] 2 ERNZ at 367, the Employment Court held that the Parliament had provided a time limit (90 days), which was to be given effect to. The employee had to show that the exceptional circumstances on which she/he relied upon were "causative" of the delay in submitting the grievance. In the present case, Mr Beattie says the moment he realised he had rights of grievance he pursued the matter but, of course, that "moment" happened fully 14 months later and some 11 months outside the time limit provided by law. Mr Beattie's "exceptional circumstances" were his ignorance of the law but ignorance of the law is usually not enough to ground a claim especially where Parliament has enacted a specific time limit.

[18] However, in *Bryson v. Three Foot Six Ltd* [2006] ERNZ 781 (Employment Court) Her Honour Judge Shaw found that because Mr Bryson did not have access to "the required explanation of his rights … (he) could not be presumed to have had knowledge of those rights in order to raise his employment issues in the correct manner and within the correct time-frame. … the lack of the explanation of rights occasioned his delay in bringing the personal grievance." (Para.[51])

[19] *Bryson* is directly on point here. Mr Beattie was denied the opportunity of having his rights set out for him because he did not have a completed employment agreement with the appropriate information in it. Even if Mr Beattie had a draft or unsigned version of the agreement in his possession, as Zoomtech alleges, that would hardly be compelling enough to consider in any detailed fashion. The law requires the provision of this information for the very good reason that employees are entitled to know what their rights are. The best way in which an employer can demonstrate an employee knew her/his rights, is to produce a signed employment agreement, something which does not exist in the present case.

[20] I am satisfied then that, applying the *Bryson* dicta above, the delay in Mr Beattie's case was occasioned by exceptional circumstances.

Would it be just to grant leave?

[21] It is clear from the submissions made by Mr and Mrs Beattie that Mr Beattie has significant issues with the way in which he was treated by Zoomtech. Despite being articulate and writing fluently and well, Mr Beattie's evidence on his own

behalf (supported by the evidence of his wife) is that he has never had to apply for a job and has always been offered work. Apparently he has had only three jobs in his working life and he has never so much as had a CV. In that context, it is perhaps not surprising that he would have no knowledge of his rights as an employee.

[22] The parties have very different views about what happened when the employment relationship came to an end, and while it is difficult to make an assessment of the merits of any claim with the present state of the evidence, it does seem to the Authority to cry out for the parties to talk to one another, in a controlled environment. It might be that mediation would resolve the issues between them and enable the parties to put the matter to rest on their own terms.

[23] Moreover, this is not a case where as in *Melville v. Air New Zealand* [2010] NZEMPC 87, the evidence available discloses a grievance which has limited or little real chance of success. The evidence available simply does not give that level of certainty. It follows that Mr Beattie **may** have a viable cause of action.

[24] I conclude then that the justice of the case requires that leave be granted, particularly because of the effect of s.114(5) of the Act, which requires the Authority to direct the parties to mediation to seek a mutual resolution of their grievance, where the Authority allows a grievance to be raised out of time.

Determination

[25] For the reasons I have already enunciated I find:

(a) The grievance was not raised within 90 days of the events complained of; but

(b) There were exceptional circumstances within the meaning of the Act; and

(c) The delay was occasioned by the exceptional circumstances; and

(d) In consequence, it would be just to allow the grievance to be raised out of time.

[26] It follows that Mr Beattie is successful in his application to bring his grievance outside the 90 day time limit required by law.

[27] Pursuant to s.114(5) of the Act, the parties are directed to mediation and a Support Officer from Mediation Services will make contact to arrange a time for this to happen.

[28] If mediation does not resolve the matter satisfactorily, the Authority will give urgency to a substantive hearing.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority