

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 432
5403967**

BETWEEN NEVILLE BRADFORD
Applicant
AND EARTH CREST LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Jill Ward, Advocate for Respondent
Investigation Meeting: 11 September 2013 at Whangarei
Submissions received: 17 September 2013 from Applicant and Respondent
Determination: 23 September 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether the Applicant, Mr Neville Bradford, raised his personal grievances with his employer, Earth Crest Limited (Earth Crest), within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

[2] In the event that it is determined that Mr Bradford failed to raise his personal grievance within the statutory 90 day period Mr Bradford applies pursuant to s 114(3) of the Act for leave to raise a grievance outside the 90 day time period on the basis that “*exceptional circumstances*” pursuant to s115 and s 115(b) of the Act had occasioned the delay.

Issues

[3] The issues for determination are whether:

- Mr Bradford raised a personal grievance within the statutory 90 day time period,
or

- If it is determined that Mr Bradford did not raise a personal grievance within the statutory 90 day time period, whether: he should be granted leave pursuant to s.155 (b) of the Act to raise a personal grievance outside the statutory 90 day time period

Background Facts

[4] The Kingdom of Zion (the Park) is a privately owned zoo housing big cats of varying species, which had been acquired out of receivership by Zion Wildlife Kingdom Limited. Earth Crest manages the Kingdom of Zion on behalf of Zion Wildlife Kingdom Limited.

[5] Mr Stephenson, one of the directors of Zion Wildlife Kingdom Limited, the accountant for Earth Crest, and also Mr Bradford's own personal accountant, said it had been agreed with Ms Eisenhut, sole Director of Earth Crest, that Mr Bradford would work at the Park

[6] Mr Bradford said he had commenced working at the Park on 30 January 2012 in a full-time groundsman capacity at an hourly rate of \$18.00, and that he lived onsite with the costs of rental, power and telephone costs being paid by Earth Crest.

[7] Mr Bradford said he had been provided with a job description, but had not been issued with an employment agreement.

[8] Initially Mr Bradford said he had reported to Mr Craig Busch, the Park representative, but subsequently he had reported to Ms Eisenhut, and then latterly to Ms Michelle Potter, who had been appointed as the Park Manager on or about March 2012, and they had directed him as to the work they required to be carried out on a daily basis.

[9] With effect from late March 2012 Mr Bradford said that Ms Potter began to exercise control over the hours he had worked, requiring him to reduce these to 40 hours per week, and to take tea and meal breaks, however his responsibilities and workload expectations had started to increase.

[10] Mr Bradford said he had been presented with a Contract for Services on or about May 2012 and had been told by Ms Potter that it was the contract he was expected to sign. Mr Bradford said he had read the Contract for Services and made some notes on it, but he did not agree to it, or sign it.

[11] Mr Bradford said that some three weeks prior to the Queen's Birthday weekend at the beginning of June 2012, he had been told to take the Queen's Birthday weekend as leave. However because he had realised that if he took the leave, the Park would not have staff available with the requisite heavy traffic and gun licenses, he had offered to work, and this offer had been accepted by Ms Potter.

[12] On 6 June 2012 Ms Potter sent Mr Bradford an email in which she had noted that he had been: '*advised formally on several occasions that all staff are to work a maximum of 80 hours per fortnight*', and stated:

It has become clear over the past few weeks that you are attempting to choose your own work days and hours is suiting no-one, and we will notify you next week of a meeting to address this, and any other issues.

[13] In the email of 6 June 2012 Ms Potter also referred to Mr Bradford having worked the Queen's Birthday weekend, and instructed him to take substitute time off during that week:

... It would be remiss of me as Manager, to not heed these signs of an over tired employee, in a physically demanding, potentially dangerous workplace. You will be taking Thursday to Sunday (7th – 10th June) off work. If you wish to have extra days after this, (Monday, Tuesday) please let me know and it will be accommodated..... If you still insist you want to work on Thursday, then I will have to enforce that stress leave be taken.

[14] Mr Bradford said he had taken leave with effect from 6 June 2012 and expected to return to the Park on 12 June 2012.

[15] During the period following 6 June 2012, Mr Bradford said he had asked Earth Crest for relevant information relating to the proposed meeting to be held on his request, however there had been no response. Further, although he had received a salary payment on 7 June 2012, he had received no further payments after that date.

Meeting held on 21 July 2012

[16] Mr Bradford said he had continued in his attempts to have the proposed meeting take place, and Earth Crest had finally agreed to a meeting which was held on 21 July 2012. Present at that meeting had been Mr Bradford, Mr Stephenson and Mr Busch, who said he had been authorised to represent Earth Crest at the meeting.

[17] Mr Bradford said that Mr Busch had referred to the fact that there had been serious allegation made about him, but when questioned about the nature of the allegations, Mr Busch had provided no details.

[18] During the course of the meeting, Mr Bradford said he had reached the conclusion that Earth Crest no longer wanted him to work at the Park, and he decided that he no longer wanted to work there. Accordingly he had entered into negotiations with Earth Crest which resulted in an agreement of the terms on which his employment would end.

[19] Mr Bradford said it had been agreed that Earth Crest would pay him all the monies to which he was entitled in terms of outstanding wages, plus his holiday pay entitlement, until 6 June 2012 with fortnightly periodic payments beginning from the date of the meeting until the total amounts due had been made in full.

[20] Mr Bradford said that he had stipulated at the meeting that provided the agreed payments were made in full, there would be full and final settlement of all matters arising out of his employment. However if the agreed payments were not made in full, Mr Bradford said he had told Mr Busch that: "*all bets were off the table*" and the agreement would be "*null and void*". Mr Bradford said he had made it clear that this meant he would proceed by way of legal redress.

[21] Mr Stephenson confirmed the terms of the agreement as stated by Mr Bradford, and explained that there had been an advance payment of \$600.00 made in order that Mr Bradford could hire a trailer to remove his personal possessions from the Park.

[22] Mr Bradford said that he had received some fortnightly payments from Earth Crest, but although the final payment date should have been 28 February 2013, he had received no payments after 30 September 2012. Although he had requested Earth Crest by emails why the payments had ceased, he had received no response.

[23] Ms Ward, Office Manager of Earth Crest, explained that the payments to Mr Bradford had been suspended due to concerns about the nature of payments which appeared to have been made to Mr Bradford through various entities. Ms Ward said that Mr Bradford had been emailed asking for information; however no response had been received.

[24] In early October 2012 Mr Bradford said he had contacted the Authority helpline and sought legal guidance, and on 30 November 2012 he had filed a Statement of Problem in respect of unjustifiable dismissal with the Authority.

Determination

Did Mr Bradford raise a personal grievance within the statutory 90 day time period?

The Law

[25] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss. 114(1) and (2) of the Act which state:

1. Raising a Personal Grievance

- (1) Every employee who wishes to raise a personal grievance must ... 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.*

[26] Mr Bradford said that he had been aware on 21 July 2012 that Earth Crest no longer wanted to continue his employment, and on that basis a mutual agreement had been reached on the terms which, if adhered to by the parties, would constitute a full and final settlement of all matters arising out of Mr Bradford's employment.

[27] I find that on 21 July 2012 Mr Bradford had been aware of the action by Earth Crest which amounted to a personal grievance; however he had decided not to pursue a personal grievance at that stage.

[28] Mr Bradford had 90 days from the date on which the action alleged to amount to a personal grievance came to his notice, or occurred. On that basis Mr Bradford had until 18 October 2012 to raise a personal grievance. As a result when Mr Bradford filed the Statement of Problem on 30 November 2012, this was significantly outside the statutory 90 day time period.

Should Mr Bradford be granted leave pursuant to s.115 of the Act to raise a personal grievance outside the statutory 90 day time period?

[29] Earth Crest has not consented to Mr Bradford raising his personal grievance outside the statutory 90 day time period.

[30] An employee who has failed to raise a personal grievance within the statutory 90 day time limit and the employer has refused to grant leave for it to be raised out of time, may apply to the Authority to raise a personal grievance out of time as set out in s 114 (3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it :

- i. *is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances*
- ii. *considers it just to do so*

[31] Further provisions regarding exceptional circumstances are stated in s 115 of the Act to include:

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), 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 section 54 or section 65, as the case may be ..

[32] Mr Bradford had received no employment agreement from Earth Crest at any time during the period of his employment, and consequently no explanation regarding the resolution of employment relationship problems.

[33] Accordingly I determine that the 'exceptional limb' part in s 114(4) of the Act has been met pursuant to s 115 (c) of the Act, and I therefore proceed to consider whether it is just in all the circumstances to grant Mr Bradford leave to raise the grievance out of time.

Just to grant leave

[34] When considering this issue there are a number of relevant considerations. The first consideration concerns the length of the delay in filing proceedings and the reason for the delay.

[35] Mr Bradford filed a Statement of Problem in the Authority on 30 November 2012, some 6 weeks after the expiry of the statutory 90 day time period. Whilst this delay was not minimal, I have found that the reason for the delay is explained by Mr Bradford's ignorance of the statutory 90 day time period due to the non-provision by Earth Crest of an employment agreement and the fact that he did not obtain legal guidance or advice from the Authority helpline until early October 2012.

[36] Following the obtaining of guidance and advice, Mr Bradford had filed a Statement of Problem at an early stage thereafter. Accordingly I do not find the delay to be prohibitive to the question of whether it is just to grant leave.

[37] It is also relevant to consider the relevant merits of Mr Bradford's case. The merits have yet to be tested; however the facts as presented are that Mr Bradford was advised by Earth Crest that there were serious allegations against him, but he had not been given any details of what these allegations comprised despite his request for this information, however he had been given sufficient information for him to reach the conclusion that Earth Crest did not want to continue his employment at the meeting on 21 July 2012.

[38] It is for Earth Crest to justify the actions taken throughout the disciplinary process, and to establish that the disciplinary process was thorough and conducted in a fair and reasonable manner without bias. If it is unable to do so, Mr Bradford may have grounds to support an unjustifiable dismissal personal grievance.

[39] Further Mr Bradford had entered into the discussions which had resulted in an agreement as to the terms on which his employment with Earth Crest would end. Mr Bradford's evidence is that, provided Earth Crest made the payments as agreed, he would not pursue legal action. Earth Crest breached that agreement when it ceased to make the agreed payments on 30 September 2012, in full knowledge that Mr Bradford had advised that he would take legal action should that circumstance eventuate. I find that the issues are sufficient to merit an investigation by the Authority.

[40] Finally, in *Gibson v GFW Agri-Products Ltd*¹ the Court suggested that unless the employer can show that it would be substantially disadvantaged by the granting of leave, it will normally be just to grant leave. Earth Crest has not shown this to be the case.

[41] Taking all these considerations into account I determine that it is just to grant Mr Bradford leave to raise the personal grievance out of time

¹ [1994] 2 ERNZ 309

[42] The Authority will shortly contact Mr Bradford and Ms Ward for a telephone conference to progress the matter.

Costs

[43] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority