

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN James David Bryson (Applicant)
AND Three Foot Six Limited (Respondent)
REPRESENTATIVES Applicant in person¹
Phillipa Muir for Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 13 October 2005²
DATE OF DETERMINATION 10 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. This is an employment relationship problem that relates to whether the applicant raised his grievance with the respondent in the required 90 day timeframe? Alternatively, the applicant seeks leave to raise his grievance out of time relying upon a delay occasioned by exceptional circumstances.

The facts

2. Mr Bryson was engaged by Three Foot Six Limited on 3 April 2000 as a crew member for the provision of services as an on-set model technician in the main miniatures unit for *The Lord of the Rings* project. Mr Bryson reported to Paul van Ommen, Head of Department, Onset Miniatures FX Technicians, who in turn reported to Marty Walsh, a First Assistant Producer of the Onset Miniatures unit.

¹ Mr Bryson elected not to have his representative present. Leave was given for his representative to make any submissions on his behalf on matters raised by Counsel for the Respondent.

² The Authority's investigation was suspended. Employment Court judgment dated 14 December 2005 from Judge Shaw says that the Authority continues to have jurisdiction.

3. On 30 October 2000, Mr Bryson signed a written agreement that set out the terms on which he was engaged, "*the crew deal memo*". The crew deal memo provided for Mr Bryson to be engaged by Three Foot Six as an independent contractor at the time. Also, the crew deal memo provided, under clause 27, that any disputes between the parties were to be referred to arbitration.
4. Three Foot Six in mid-August 2001 decided it was necessary to reduce the number of crew in the main miniatures unit as the filming for *The Lord of the Rings* project wound down. A selection was made that did not include Mr Bryson. Notice was given to Mr Bryson that his contract would be terminated due to the downsizing of the miniatures unit and his engagement was terminated on 28 September 2001.
5. It was agreed that sometime between 5 and 7 November (before the Prime Minister visited Three Foot Six) that Mr van Ommen telephoned Mr Bryson twice requesting the whereabouts of some property. Mr Bryson telephoned Marty Walsh in regard to the telephone call he had received from Mr van Ommen.
6. On or about 8 November 2001, there was a further telephone conversation between Mr Bryson and Marty Walsh. It was decided that Mr Walsh would act as a sort of mediator on the topics that Mr Bryson was raising regarding his relationship with Paul van Ommen. It was agreed that Mr Bryson would provide a written list of topics that could be discussed. He did this after some delay.
7. Subsequently, there were two lengthy telephone conversations held between Messrs Bryson, Walsh and van Ommen on 14 and 15 February 2002. They discussed the topics Mr Bryson set out in the list.
8. Mr Bryson says he obtained legal advice, first from a community law centre and then from Gibson Sheat, and learned that the termination of his employment technically involved a timeframe for raising a "personal grievance", if he decided to contest the termination of the contract. In the course of these proceedings, it has been determined that the real nature of Mr Bryson's relationship with Three Foot Six was as an employee.

Discussion

9. This problem involves a matter of fact as to whether Mr Bryson raised his grievance with the respondent in the required 90 day period required under section 114 of the Employment Relations Act.

10. Section 114 of the Act provides that:

- “(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 which the employee wants the employer to address.*
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*
- (a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115: and*
- (b) Considers it just to do so.*
- (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.*
- (6) No action may be commenced in the Authority or the Court in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this section.”*

11. Mr Bryson claims he raised a grievance with Marty Walsh in November 2001. He pointed to this in his written statement of evidence that stated:

“In late February 2001 I spoke with Marty Walsh in his office. I informed him of my observation of an obvious bias against me on Paul’s part, and that this had reached a point, due to a specific incident that morning, where it was threatening my job. I also raised the issue that Paul had been keeping me off stage-work for some considerable time. I asked Marty if there were anything he could do to rectify the situation. Marty answered that he would not interfere with the way his HOD’s chose to run their departments, as he didn’t want to micromanage them, as he put it. The only action Marty told me he could take was to ascertain if Paul’s anonymous accusations from that morning were directed at me. Following Marty’s refusal to act on my behalf, I asked Paul directly about getting back to work on stage. Paul’s only reply to this request was we’ll see. I continued to question the situation, and was proactive in attempting a return to stage-work. I never gave management any direct or implicit

indication that I had dropped the matter or that I was happy to work in the manner left open to me.”

12. The evidence indicates that Mr Bryson certainly had a range of issues about his relationship with Mr Van Ommen. However, I am not satisfied that this evidence satisfies the requirement that Mr Bryson had taken a positive step and put his employer on notice that he was aggrieved about the termination of his contract to sufficiently enable the respondent to remedy the problem as soon as possible, including invoking the arbitration clause in the crew deal memo. He never followed it up in a reasonable time. He did not put anything in writing. Moreover it is probable that the nature of his relationship with Three Foot Six was not even an issue at that time for a grievance.
13. The evidence does not establish that the respondent's witnesses had any idea in November 2001 that Mr Bryson was aggrieved about the disestablishment of his role, or what if any remedies he sought. I have to accept that he certainly had a range of issues and amongst those issues he would have wished to continue in some role with Three Foot Six. These findings are supported by the following:
 - The crew deal memo was not intended at the time that Mr Bryson signed it on 30 October to constitute an employment agreement but at that time was an independent contract.
 - Mr Bryson did not allude to any provision for arbitration in the event the topics he raised were not resolved.
 - The 90 day time requirement, from the date of Mr Bryson's termination with Three Foot Six, expired on 27 December 2001. The applicant has given no evidence to show that he even looked at or relied upon the crew deal memo to invoke even the arbitration clause in the event the topics he had raised were not resolved. Indeed, it was his evidence that he wished to be conciliatory and wanted to be able to continue in some way with Three Foot Six.
 - Mr Bryson's only effort to get legal advice was from January 2002 despite the knowledge that another crew member was taking some action. He did not take any reasonable steps at the time.

- I find the evidence of Mr Bryson's statement that he assumed Mr Van Ommen disliked him caused him not to be kept on, and Mr Bryson saying that he wanted to stay on but was given no choice: were insufficient to constitute the raising of a grievance because:
 - (i) The statements were made in the context of a request to have a discussion about the topics; that is, to check whether any assumption was correct, rather than wanting to bring them as a claim or putting them forward for the company to consider in a legal setting. The issue in regard to the selection process did not appear on the written list of topics submitted by Mr Bryson in January 2002.
 - (ii) The context of the statements was that Mr Bryson was annoyed with Mr van Ommen and not with anything Mr Walsh or the company had done. Mr Bryson was concerned that Mr van Ommen had taken an antagonistic approach to him and that such an approach could threaten to prejudice him. Mr Bryson said that he felt if they could sit down at the table they could put their feelings in a better place. He wanted to find out why Mr van Ommen treated him the way he did over the last year of his employment and he felt uncomfortable walking away with no further information from Mr van Ommen.
 - (iii) It appears that Mr Bryson's statement in regard to his non-selection was of a passing moment or an assumption. Mr Walsh's response was that Mr van Ommen was not involved in the decision to select the applicant as one of those to be let go and that this clearly satisfied Mr Bryson because that issue did not make it onto the list of issues he sent to Mr Walsh in January. Nothing else was put forward for the company to consider regarding determination of Mr Bryson's employment. Mr Bryson appears to have accepted that two other crew members should have been retained ahead of him. Thus, the inference can be taken that the selection was not a burning issue but more it was Mr van Ommen's attitude to him that was.
14. Mr Bryson, for the first time at the Authority's investigation meeting, says that he raised a grievance with Three Foot Six during his conversation with Marty Walsh in February 2001. I simply cannot accept that that is the case because it has never been argued prior to the Authority's investigation meeting. Indeed, the tone and context of Mr Bryson's evidence was that there were personal issues between him and Paul van Ommen and that those topics were what was being raised, and indeed, this is consistent with Mr Bryson not knowing the technical requirements for raising a grievance or even the legal terminology for such. Indeed,

at that time, Mr Bryson had been engaged as a contractor and never raised any question at all of the status of an employee bringing a claim against an employer.

15. On balance I therefore decide that Mr Bryson did not raise a personal grievance in either February 2001 or November 2001 against Three Foot Six.

Application for leave for exceptional circumstances

16. Mr Bryson's application for leave to bring a personal grievance rests on an exceptional circumstance that the crew deal memo did not contain an explanation concerning the resolution of employment relationship problems required by s.54 or s.65 of the Act.
17. In applying the law under s.114(4) of the Act, the Authority may grant leave where it is satisfied that:
- There are exceptional circumstances;
 - The delay in raising the personal grievance is *occasioned by exceptional circumstances*; and
 - It is *just to grant leave to bring the personal grievance outside the 90 day period*.
18. It is a fact that the crew deal memo did not contain the explanation concerning the resolution of employment relationship problems required by ss.54 or 65 of the Act. That was because at the time that it was entered into between the parties and signed by Mr Bryson on 30 October it was signed as a contract for services between the parties. Since then, the Courts have determined that the real nature of the relationship was a contract of service. However, the contract between the parties cannot be deemed to apply retrospectively as an employment agreement when the parties put the label of an independent contract on it. Also the crew deal memo had an arbitration clause in it. This was never activated by Mr Bryson, and nor did he put his employer on notice of any claim that he might have wished to enforce over that contract. In this regard, Mr Bryson did not give positive notice that he was aggrieved about the termination of the contract to sufficiently enable the respondent to remedy that as soon as possible.
19. It was also open for me to conclude that the respondent's witnesses (Mr Walsh and Mr van Ommen) had no idea in November 2001 that Mr Bryson was aggrieved sufficiently about the disestablishment of his role or what if any remedies he sought from their conversation that was interpreted at least by two of them to bring closure for Mr Bryson. Mr Bryson's

subsequent delays left it open for them to reasonably conclude that the telephone conversations and the process brought closure for Mr Bryson on his topics that he had raised and put in writing.

20. Mr Bryson has not established that the lack of an employment relationship problem clause in his contract occasioned the delay in filing his personal grievance. This is because:

- Mr Bryson has not claimed in evidence that he read the crew deal memo carefully and relied on the arbitration clause. There is no evidence that he even looked at the agreement again after he signed it. He has not referred to it in any of his evidence and having been given an opportunity to discuss his evidence in the Authority at the investigation meeting.
- There is no evidence that the failure by the respondent to include provisions complying with s.65 of the Act is why it took Mr Bryson six months to raise his personal grievance. Indeed this is supported and underpinned by Mr Bryson focusing on topics that related to his personal relationship with Mr van Ommen.

21. Moreover, given the context and the nature of the parties' employment arrangement, and that the crew deal memo contained a provision for arbitration, and did not contain provisions under s.65 of the Act, cannot give rise to an exceptional circumstance. It is my decision that no exceptional circumstances exist here.

22. Even if I am wrong and exceptional circumstances do apply to this setting, I am not satisfied that the delay in raising the personal grievance was occasioned by those exceptional circumstances. My conclusion for this finding is that Mr Bryson says:

- That he wanted to be conciliatory, he did not want to jump on "*a soapbox*" and took no action until January/February to obtain legal advice to assist him.
- The crew deal memo had an arbitration clause that Mr Bryson did not activate.
- Mr Bryson explained the delay in producing his list of topics related to "*his daughter needed a break from her crèche, so I was looking after her at home, through November*".

23. Mr Bryson's application is declined.

24. Costs are reserved.

P R Stapp
Member of Employment Relations Authority