

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Russell Clarke (Applicant)
AND Tempz Personnel Limited (Respondent)
REPRESENTATIVES Brent Climo, Advocate for applicant
Sophie Lucas, Counsel for respondent
MEMBER OF AUTHORITY Paul Montgomery
AFFIDAVITS RECEIVED 22 July 2004
DATE OF DETERMINATION 11 August 2004

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] This employment relationship problem relates to an application for leave to bring a personal grievance out of time. Mr Clarke, through his representative Mr Climo, claims he was unjustifiably dismissed from his employment with the respondent on 2 May 2003. He, through his advocate, says that his dismissal was *procedurally unfair* (paragraph 4 of the letter notifying the grievance). At paragraph 5 the applicant also claims his dismissal was *substantively unjustified*. The notice of alleged personal grievance to the respondent is dated 3 February 2004.

[2] Following the application for leave the Authority undertook a conference with Mr Climo and Ms Lucas on Wednesday, 30 June 2004 when I was in Nelson on an unrelated matter. At that conference, as is confirmed by notice of direction dated 5 July 2004, both representatives were to file affidavits in support of their respective clients' views relating to a meeting held between the applicant and the respondent on 2 May 2003. The affidavits from each party were to be filed and served concurrently by 4.00 pm Wednesday, 21 July 2004 and both parties complied with this direction.

The legal principles

[3] Section 115 Employment Relations Act 2000 provides that in exceptional circumstances an applicant may apply for leave to pursue a personal grievance not notified to the employer within the 90 day statutory period established by section 114 (3). In this particular case the subsection relied on in section 115 is that set out in (c) which states *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*. Mr Clarke says he was never

provided with a written employment agreement and so relies on the failure of the respondent to provide such an agreement which includes a description of the process to be followed should a personal grievance arise between the parties.

[4] The respondent accepts in this case it failed to provide an individual employment agreement with the required information to the employee as to how a personal grievance is to be pursued. It relies on two matters. Firstly, that the applicant was a former employee of Work and Income NZ and would have, or ought to have known, of his rights in this regard, but more particularly that in the course of his work for the respondent Mr Clarke was consistently recruiting temporary employees for the respondent's business. In the course of undertaking these duties Mr Clarke was required to take each prospective temp through the individual employment agreement that the respondent used and that this form required Mr Clarke to advise the process to be followed should the employee wish to pursue a personal grievance or dispute against the respondent, Tempz, who was in fact the employer of the temp regardless of where he or she may be deployed.

[5] Following the severance of the employment relationship on 3 May 2003, whatever the circumstances of that may have been, Mr Clarke was offered work as a temp with the respondent's business and in agreeing to accept such work signed an individual employment agreement as a temporary employee which includes the required explanation of the procedures to be followed should a personal grievance arise.

Determination

[6] In determining this application for leave I have been mindful that an organisation which provides individual employment agreements for each of its temporary employees, agreements which fully comply with the requirements of the Employment Relations Act 2000, failed to provide such an IEA to Mr Clarke when he was working as a permanent employee.

[7] I have also taken into account that in the absence of such an agreement and the required advice to a prospective employee who wishes to pursue a personal grievance and who may therefore be unaware of his/her need to advise the employer of any grievance within 90 days, that such an omission may constitute exceptional circumstances under section 115 (c) of the Act.

[8] In this case I do not accept that Mr Clarke can credibly claim he was unaware of the requirement that he needed to advise his former employer of a personal grievance within 90 days of the action alleged to constitute the grievance. I accept the affidavit evidence of Susan Gallagher that in the course of Mr Clarke's period of permanent employment with the respondent, he was required consistently to explain to temps enrolling for work their rights under section 114 of the Act.

[9] I am confirmed in this view by the clear and undisputed evidence that when enrolling as a temporary worker with the respondent, Mr Clarke himself signed an employment agreement well within 90 days of the action he now claims amounts to a personal grievance in respect to his period of permanent employment. Section 22 of the document "Individual Agreement Temporary Staff" is clearly headed "Resolution of Employment Relationship Problems", and makes explicit reference to the 90 day notification requirement.

[10] Accordingly I decline Mr Clarke's application for leave.

Costs

[11] I reserve costs to allow the parties the opportunity to resolve this issue between them. Should that not be achieved Ms Lucas has 14 days from the date of this determination to file and serve her memorandum. Mr Climo is to have a further 14 days in which to respond.

Paul Montgomery
Member of Employment Relations Authority