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Coleman v Jetconnect Limited (Auckland) [2018] NZERA 152; [2018] NZERA Auckland 152 (8 May 2018)

Last Updated: 18 May 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 152

3023734

BETWEEN CHELSEA COLEMAN Applicant

AND JETCONNECT LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Moss, Advocate for Applicant

Aaron Lloyd/Emily Partridge, Counsel for Respondent

Investigation Meeting: 19 April 2018 at Auckland

Submissions received: 20 April 2018 from Applicant

23 April 2018 from Respondent

Determination: 08 May 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Chelsea Coleman, claims that she was constructively dismissed by the Respondent, Jet Connect Limited (Jetconnect), on 24 August 2017.

[2] This Determination addresses two preliminary issues:

(a) Firstly, whether or not Ms Coleman raised her personal grievance with Jetconnect within 90 days of the grievance occurring or coming to her notice, whichever is the later, in accordance with the requirements of [s.114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act), such that she is entitled to pursue her grievance before the Authority;

(b) Secondly, whether nor not the confidential settlement and release agreement (Agreement) entered into by Ms Coleman and Jetconnect is binding and therefore a bar to Ms Coleman bringing a personal grievance.

[3] Jetconnect denies that Ms Coleman raised her personal grievance within the requisite

90 day statutory period and does not consent to a personal grievance being raised outside the time period specified in the Act.

[4] Jetconnect further does not accept that Ms Coleman applied for leave from the Authority or that it is just to allow her to raise her personal grievance outside that time on the basis that there are no exceptional circumstances occasioning the delay, and it is not just for leave to be granted.¹

[5] Jetconnect claims that the Agreement was entered into with accord and satisfaction and that Ms Coleman was not under

duress when she entered into the Agreement but did so willingly.

Issues

[6] The issues for determination are whether or not:

- Ms Coleman raised her personal grievance within the 90 day statutory limitation period?

If not:

- Ms Coleman should be allowed to raise her personal grievance outside the 90 day statutory time limit?

If so:

- The Settlement was obtained by duress or the result of accord and satisfaction?

Background Facts

[7] Ms Coleman commenced employment with Jetconnect as a Short Haul Flight

Attendant in October 2016.

[8] On 11 August 2017, Ms Coleman was observed drinking alcohol at a hotel bar with two of her colleagues. This was within an eight-hour period of signing on for her duty on

12 August 2017.

[9] The incident was observed and reported to Jetconnect, as a result of which

Ms Coleman was invited to attend a disciplinary meeting by means of a letter dated 17 August

2017. The letter set out the allegation that she had, as a result of consuming alcohol within eight hours of sign-on for her duty on Saturday, 12 August 2017, breached the Qantas Group

Standards of Contact Policy and the Cabin Crew Operations Manual.

1 Section 114(4)(a) and (b) of the Act.

[10] The letter invited Ms Coleman to attend a formal disciplinary meeting with Mr Jon Butler, Short Haul Flight Attendant Manager, and Mr Clayton Franks, Senior HR Consultant. Ms Coleman was also informed that the allegations potentially amounted to serious misconduct, and if substantiated, her employment could be terminated. Ms Coleman was also instructed that she was entitled to bring a support person or representative to the meeting with her.

First disciplinary meeting, 23 August 2017

[11] Prior to the meeting held on 23 August 2017, Ms Coleman emailed a written statement to Mr Butler.

[12] Prior to the meeting commencing, Mr Franks said that he had noted that Ms Coleman did not have a support person with her, and queried if she was prepared to continue without one. Ms Coleman had confirmed she wanted to continue.

[13] At the meeting on 23 August 2017, Ms Coleman read out her pre-written statement in which she admitted she had breached the eight hour rule and stated:

I am deeply sorry for breaching my contract and would like an opportunity to learn my mistake and prove I am worthy of my job ... I would never want to jeopardise my job that I love and wish to keep and make a career out of.

[14] Ms Coleman said she had been informed at the conclusion of the meeting that Ms Shelley Musk, Head of Jetconnect, would be making the final decision at the meeting to be held the following day.

Second disciplinary meeting, 24 August 2017

[15] Ms Coleman attended the meeting on 24 August 2017 with Mr Butler, Mr Franks and

Ms Musk accompanied by a support person, Ms Charlotte Noble.

[16] Mr Franks said that Ms Musk had been provided with a thorough briefing of (i) the events of the disciplinary meeting held the previous day; (ii) the investigation carried out by Jetconnect and (iii) Ms Coleman's written statement.

[17] Mr Butler said that Ms Musk had asked if Ms Coleman was happy to proceed with Ms Noble as her support person as Ms Noble was an internal employee rather than an external support person, and Ms Coleman had confirmed that she wanted to continue with the meeting.

[18] During the meeting Mr Butler had asked Ms Coleman if there was anything she would like to say directly to Ms Musk and in reply Ms Coleman had re-read her original written statement.

[19] Ms Musk had asked Ms Coleman to provide her version of events. Ms Coleman said Ms Musk referred to the eight-hour rule and told her that the amount of alcohol was not important, but that there had been a breach of the Jetconnect policies as contained in the Drug and Alcohol Management Programme and associated Cabin Crew Operations Manual.

[20] Mr Franks said that Ms Coleman, as part of her statement, had made it clear that she did not want to lose her job, that she had had to deal with family issues, and thought she should be given a second chance. The meeting was then adjourned.

[21] When it reconvened, Ms Musk had informed Ms Coleman that the preliminary view she had reached was that her (Ms Coleman) conduct amounted to serious misconduct and that dismissal was the appropriate outcome.

[22] Following an adjournment in which Ms Musk, Mr Butler and Mr Franks discussed the situation, it had been decided to offer Ms Coleman the opportunity to resign because of her representations by means of the written statement.

[23] When the meeting resumed, Ms Musk initiated a without prejudice discussion and offered Ms Coleman the opportunity to resign.

[24] Ms Coleman said she had not understood what 'without prejudice' meant, and no-one had explained it to her, nor had she asked for clarification.. Mr Franks said his impression was that Ms Coleman had understood clearly what without prejudice meant.

[25] Ms Musk had explained to Ms Coleman that if she chose to resign then after six months had elapsed she could re-apply to Jetconnect and in addition, receive four weeks' notice in lieu. The alternative was that the meeting would proceed with the current process, the likely outcome of which would be the termination of her employment.

[26] Ms Coleman and Ms Noble went into another room to discuss the option of resignation, following which Ms Coleman informed Mr Butler that she had decided to resign.

[27] Ms Coleman confirmed at the investigation meeting that she had understood that termination was the proposed outcome and that an alternative had been presented of resignation.

[28] Mr Butler said he had provided pen and paper because Ms Coleman had requested such items, and he had advised her that all she needed to state in the resignation letter was the date that she was resigning and to sign it. He denied that he had coerced Ms Coleman into writing her resignation.

[29] Ms Coleman said that she did not feel she had any other choice but to resign. After giving Mr Butler the resignation letter she was told to sign the Agreement Ms Coleman said no explanation was given as to what was contained in the documents and she was under the impression they needed to be signed immediately.

[30] Mr Butler and Mr Franks said that Ms Coleman was given an opportunity to take the Agreement away to review it, however she had taken it into an another room with Ms Noble.

[31] Ms Coleman had then provided the signed Agreement to Mr Butler.

[32] Mr Butler denied that any pressure had been placed on Ms Coleman to sign the documents immediately and that he had told her, or stated in words to the effect of, "*Take as long as you need*".

The raising of the personal grievance

[33] Ms Coleman said that she had been speaking to a former Jetconnect employee in November 2017 as a result of which she contacted Worklaw, an employment advocacy firm, and completed its online enquiry form on 14 November 2017.

[34] She was contacted by Ms Moss the following day, 15 November 2017 and her understanding was that between 17 and 22 November 2017 Ms Moss attempted to contact Mr Butler by telephone.

[35] Mr Butler said he was aware that a message had been left on his phone which said the call was in relation to an employment matter concerning Ms Coleman, but he did not know concerning what, nor did he know who had left the message. He had attempted to return the call, but he and Ms Moss did not end up speaking.

[36] Ms Moss emailed Mr David Edwards, listed on the airline's form on the website as the point of contact for Jetconnect, and who was based in Australia. The email was dated 21 November 2017 and stated:

I have been engaged by a former employee here in NZ to represent her in relation to the termination of her employment. I've left a number of messages for John Butler ... but not heard back from him. Are you able to please send me his email address, so I am able to send through our concerns.

[37] On 22 November 2017, Ms Moss emailed Ms Sarah Keene at Russell McVeagh, lawyers stating that: "I have a personal grievance to raise on behalf of a former employee. She also emailed Mr Franks stating: "... Chelsea will be raising a personal grievance ...".

[38] Ms Moss emailed to Mr Franks a letter dated 24 November setting out the personal grievance on behalf of Ms Coleman.

Determination

Did Ms Coleman raise her personal grievance within the 90 day statutory limitation period?

[39] Section (1) of the Act states:

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.

[40] It must be a personal grievance as categorised in s.103 of the Act which is raised with the employer and not some other action.

[41] In *Wyatt v Simpson Grierson (A Partnership)*² the Employment Court stated:³

... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[42] I find that the language of s 114(1) as applied by the Employment Court in *Wyatt v Simpson Grierson (A Partnership)*⁴ makes it clear that it is necessary that there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised.

(i) *When did Ms Coleman become aware of the circumstances that gave rise to a personal grievance?*

[43] Ms Coleman's evidence is that she did not become aware of the circumstances giving rise to a personal grievance until November 2017 when a former Jetconnect employee made her aware that in essence, an employer could not ask an employee to resign.

² [\[2007\] ERNZ 489](#)

³ Ibid at para [29]

⁴ [\[2007\] ERNZ 489](#)

[44] Once she became aware that she might have a personal grievance she contacted via the Worklaw (an employment advocacy firm) website on 14 November 2017 and completed an online enquiry form. Ms Moss contacted her the following day.

[45] Ms Coleman was advised by Ms Musk on 24 August 2017 that the outcome of the disciplinary process would be dismissal.

[46] Jetconnect's evidence was that, having considered Ms Coleman's statement and disappointment at the outcome, it was decided to provide her with an opportunity to resign. Ms Coleman adjourned to consider the proposal with Ms Noble. After she had decided to resign, Jetconnect asked her to sign the Agreement.

[47] At that stage I find that Ms Coleman was aware of the circumstances to the extent necessary to enable her to build a reasonable view that the actions of Jetconnect were unjustifiable. It was not necessary for Ms Coleman to have a belief in the existence of a personal grievance.⁵

(ii) *Raising the Personal grievance with Jetconnect*

[48] The individual employment agreement (the Employment Agreement) provided to Ms Coleman and signed by her and Jetconnect contained a full explanation of the procedures an employee was to use for resolving an employment relationship problem at Schedule 2. This included the statutory 90 time limit within which a personal grievance must be raised.

[49] From the moment Ms Coleman became aware of the circumstances to the extent necessary for her to form a view that Jetconnect's actions were unjustifiable, she had 90 days in which to raise the personal grievance. The 90 day statutory period came to an end on 21

November 2017.

[50] Section 114(2) of the Act states:

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.”

[51] Ms Coleman spoke to Ms Moss on 15 November 2017. Her understanding was that following that date and 21 November 2017, Ms Moss had left a number of messages for Mr Butler. Mr Butler's evidence was that the messages referred to an employment matter

concerning Ms Coleman, but they did not specify the nature of the employment matter.

5 *Silver Ferns Farms Ltd v North* [2010] NZEmpC 79; [2010] ERNZ 172 at [43] – [44]

[52] The leading case on the interpretation of this section of the Act is *Creedy v*

Commissioner of Police.⁶ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. ... for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[53] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer⁷.

[54] Ms Moss emailed Ms Keene at Russell McVeagh, lawyers on 22 November 2017 stating that: “*I have a personal grievance to raise on behalf of a former employee*”. The same day she also emailed Mr Franks stating: “*Miss Coleman will be raising a personal grievance*”

[55] In *Creedy v Commissioner of Police*⁸ the Employment Court observed: “*The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event*”⁹ An intention to raise a personal grievance does not constitute the actual raising of the grievance at that time¹⁰.

[56] I find that the emails to Ms Keene and Mr Franks did not constitute the raising of the personal grievance on behalf of Ms Coleman.

[57] I find it was not until the following day, 24 November 2017, that the personal grievance was raised by Ms Moss writing to Mr Franks, setting out in detail the nature of the personal grievance she was raising on behalf of Ms Coleman.

[58] By 24 November 2017 I find that the 90 day statutory time limit had expired.

[59] I determine that Ms Coleman did not raise her personal grievance within the 90 day statutory limitation period.

⁶ *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517

⁷ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

⁸ [2006] NZEmpC 43; [2006] ERNZ 517

⁹ *Ibid* at para [29]

¹⁰ *Dickson v Unilever New Zealand Limited* [2009] NZEmpC 35; (2009) 6 NZELR 463

Should Ms Coleman be allowed to raise her personal grievance outside the 90 day statutory time limit?

[60] Jetconnect does not consent to Ms Coleman raising her personal grievance outside the 90 day statutory time limit.

[61] An employee who has failed to raise a personal grievance within 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

[62] Whilst I acknowledge that Ms Coleman had taken steps within the statutory time period to raise the personal grievance, I find that Ms Moss, the employment advocate she had engaged to act on her behalf, had failed to do so for the reasons set out above.

[63] Ms Coleman has not applied to the Authority for leave to raise the personal grievance pursuant to s 114(3) of the Act.

[64] Having determined that Ms Coleman had not raised her personal grievance within the statutory time limit, or applied for leave to raise the personal grievance pursuant to s 114(#) of the Act, I turn to consider whether or not she would nonetheless be precluded from doing so by the terms of the Agreement.

Was the Settlement reached by accord and satisfaction or was it obtained by duress?

[65] Employment disputes are not uncommonly resolved by means of confidential settlement agreements between the parties.

[66] Ms Coleman claims that she believed when she resigned that she had no other option

i.e. that there was ‘duress’.

[67] Lord Scarman in the case of *Pao On v Lau Yiu Long*¹¹ defined duress as follows:¹²

Duress, whatever form it takes, is a coercion of the will so as to vitiate

consent. ... [In] determining whether there was a coercion of the will such as

¹¹ [\[1979\] UKPC 17](#); [\[1980\] AC 614](#)

there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are ... relevant in determining whether he acted voluntarily or not.

[68] In subsequent cases, the focus shifted to concentrate more on the quality of the consent in terms of the degree to which consent was impaired, rather than on duress being seen as vitiating consent, as consent would exist in virtually all cases.

[69] In *Pharmacy Care Systems Ltd v Attorney-General*¹³ the Court of Appeal listed what

were referred to as seven “elements” of duress recognised in New Zealand Law:¹⁴

In summary, the elements of duress in New Zealand law today are these: First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim’s will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim’s manifestation of assent. .Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

[70] Jetconnect had advised Ms Coleman during the meeting held on 24 August 2017 that it had reached a preliminary decision based on a finding of serious misconduct and that the appropriate outcome was dismissal.

[71] Jetconnect’s evidence is that taking into account Ms Coleman’s disappointment at the outcome together with her references in the written statement to family circumstances and wanting to keep her job, Ms Coleman was presented with the option of entering into the Agreement with Jetconnect under which she would be allowed to resign.

[72] Ms Coleman had the opportunity to consider the proposal with Ms Noble prior to signing the Agreement, and she had done so. Moreover I note the evidence of Jetconnect that Ms Coleman was not placed under any time pressure to sign it immediately and could have taken the Agreement away to consider it.

[73] The Agreement stated that Ms Coleman would receive a payment in lieu of notice and be permitted to apply for re-employment with Jetconnect from 28 February 2018.

13 Court of Appeal, CA 198/03, 16 August 2004

[74] I note that Ms Coleman by means of the Agreement avoided the detriment of dismissal and received the benefit of a monetary payment and the offer of re-application in due course. Jetconnect gained the assurance in clause 11 of the Agreement that it was: "*in full and final settlement of all claims, grievances, rights and entitlements*".

[75] I find that there was a real benefit to both parties in entering into the Settlement.

[76] Following the signing of the Agreement on 14 August 2017, Ms Coleman took no steps to avoid it until 14 November 2017, nearly 3 months later.

[77] I do not find any evidence of duress and determine that there was accord and satisfaction such that the Agreement is binding and a bar to Ms Coleman raising a personal grievance.

Costs

[78] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[79] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority

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