

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 58
5360197

BETWEEN

ROLAND COTTER
Applicant

AND

JOHN WILLIAMS AND
CAVALIER SPINNERS
LIMITED
Respondents

Member of Authority: P R Stapp

Representatives: Michael McAleer, Counsel for the Applicant
Dave McLeod, Advocate for the Respondents

Investigation Meeting: 17 May 2012 at Napier

Determination: 30 May 2012

DETERMINATION OF THE AUTHORITY

Background

[1] Mr Cotter was dismissed on 21 June 2011 by Cavalier Spinners Limited (Cavalier) and he went to Mr McAleer, solicitor, for assistance. Mr McAleer wrote on 23 June 2011 to Cavalier requesting the reasons for the dismissal and a document that he believed was missing from the documents that Mr Cotter had given him from Cavalier, and which would have been used by Cavalier in a dismissal. Cavalier replied, and Mr McAleer and Mr Cotter had a discussion about that reply on 8 July 2011, in assessing the risk given they considered Cavalier would defend their action and resist reinstatement. Mr McAleer withdrew from taking employment work and referred the matter to another lawyer and nothing happened.

[2] Mr Cotter's personal grievance was not raised within 90 days as required under the Employment Relations Act 2000.

[3] An application for leave to proceed out of time was formally raised at the Authority's investigation meeting, and is based on the grounds of exceptional

circumstances under s.115 (b) of the Employment Relations Act 2000. The exceptional circumstances that are relied upon relate to Mr Cotter having made reasonable arrangements to have his grievance raised on his behalf by his lawyer (that is Mr McAleer at the time). Mr McAleer says that he unreasonably failed to ensure that the grievance was raised within the required time.

[4] Mr McAleer has provided information to the Authority that the failure to reasonably raise the grievance related to a personal matter in his life and work and he did not take the proper steps to raise the grievance with the employer. I do not need to go into the details that have been raised by Mr McAleer, except to say that I accept the details he has provided, and they are such that I also accept they caused him not to take the steps to raise the personal grievance with the employer.

Issues

[5] The applicant is seeking the leave of the Authority to raise the personal grievance out of time, and has requested the matter be referred back to mediation pursuant to s.114 (5) of the Act. It is accepted that the applicant's employer is Cavalier Spinners Limited and the grievance is raised against that company only.

[6] During the Authority's investigation meeting the primary issues were identified as follows:

[7] First there has been a delay and the personal grievance was not raised in time under s 114 of the Act. Was the delay occasioned by exceptional circumstances?

[8] Second if the answer to the above is yes, then is it just to grant leave to proceed out of time?

Determination of the Authority

Has there been a delay in raising the personal grievance and if so was the delay occasioned by exceptional circumstances?

[9] It is clear that a personal grievance was not raised properly in Mr McAleer's letters to Cavalier.

[10] On 8 July 2011 Mr Cotter and Mr McAleer met where they discussed Cavalier's responses. Mr McAleer informed Mr Cotter of his risks and that he would

have to “throw some money at it” to proceed and get the remedies Mr Cotter was after, because Cavalier was clearly going to resist any challenge to the dismissal.

[11] At the same time Mr McAleer’s personal circumstances occurred involving a medical matter. What followed was that Mr McAleer ceased dealing with employment work and went on sick leave. He never followed up Mr Cotter’s matter after 8 July 2011.

[12] Mr Cotter says he raised with Mr McAleer the matter of raising his personal grievance with his employer. But nothing more happened after 8 July 2011 involving Mr McAleer.

[13] Instead Mr Cotter filed his statement of problem on 14 October 2011, without requesting leave to proceed out of time when he should have had the knowledge it was out of time.

[14] I hold that Mr McAleer had done all that he had been asked to do at least until 8 July 2011, which involved him seeking information and any other documents from Cavalier. Prior to that date I hold that the action being taken was solely related to Mr McAleer getting information about what had happened from Cavalier and to provide a letter for Mr Cotter to send to WINZ. I am supported in this conclusion by the unambiguous meaning of the letter that had been forwarded to Cavalier, and another letter dated 23 June 2011 from Mr McAleer to Mr Cotter about WINZ.

[15] Mr McAleer to his credit believes that he was solely responsible for the personal grievance not being raised in time. Exceptional circumstances under s 115 (b) of the Act has been relied upon relating to Mr McAleer’s failure to raise the personal grievance in time. The test here is that any delay had to be occasioned by the exceptional circumstances.

[16] Mr Cotter did enough to make reasonable arrangements to have his personal grievance raised, because he was relying on Mr McAleer. Mr McAleer took what he considered was appropriate action to get relevant information first and then failed to do anything else. What this boils down to was that Mr Cotter did go to a lawyer and appears to have waited for some action before taking the matter into his own hands. Mr Cotter reasonably arranged for Mr McAleer to raise his personal grievance from the time of their meeting on 8 July 2011 because:

- a. Mr Cotter says he believed Mr McAleer would raise the personal grievance for him with his employer.
- b. Mr McAleer says he was clear that Mr Cotter wanted him to raise a personal grievance.
- c. The above was supported by Mr Cotter's wish to get his job back and be reinstated. Mr Cotter has always claimed he wanted reinstatement, and continues now with that claim.
- d. Mr Cotter and Mr McAleer met on 8 July 2011 and discussed the risk and Mr Cotter was told that "he would have to throw some money at it". Mr Cotter decided nevertheless that the personal grievance should be pursued.
- e. Mr McAleer says that he would have raised the grievance but for his personal circumstances that prevented it being raised in time and the personal circumstances came about at about the same time.
- f. I am not reliably informed of any dates and handover of Mr McAleer's employment work and it appears that another lawyer became involved after the time had expired for the raising of the personal grievance.

[17] Against the above Mr McAleer at no stage gave any written alert that he would be raising a personal grievance in his first letters. The letters were for another purpose, I hold. Mr Cotter and Mr McAleer do not appear to have had any contact at all after 8 July, and Mr Cotter was left to wait, and ultimately to act on his own even if he attempted to make any enquiries of Mr McAleer. Mr Cotter filed his statement of problem in October 2011 after nothing had happened. His lack of any apparent knowledge of the time requirement for raising a personal grievance adds to his underlying belief that Mr McAleer would act for him. However, he was informed that his grievance was out of time by another solicitor much later after filing the statement of problem.

[18] The delay from the time of the expiry of the 90 days until Mr Cotter filed the statement of problem on 14 October 2011 was 31 days (6 September 2011 to 14 October 2011). The only explanation of what happened between 4 July and 6 September is that Mr Cotter apparently was waiting on Mr McAleer who in mid

August stopped his employment work. There has been no clear explanation provided about any arrangements for that work. That is not Mr Cotter's fault because he was relying on Mr McAleer.

[19] On balance I hold that the delay was occasioned by exceptional circumstances because I am satisfied that Mr Cotter made reasonable arrangements with Mr McAleer to raise his personal grievance with Cavalier. Mr McAleer failed to raise the grievance properly with Cavalier. It was reasonable to expect Mr Cotter to rely on Mr McAleer's expertise when he wanted reinstatement, I hold.

[20] In this regard I am supported by what the Court of Appeal said in *Melville v Air New Zealand Limited* [2010] NZCA 563 CA 500/2010. The court said :

[27] If the Judge is taken to be saying...that there must always be an express instruction by the claimant to the agent to bring a timeous claim, then we could not accept that, as a matter of law. That would amount to a quite unwarranted narrowing down of the statutory provision in s 115 (b). In the words of the provision, the employee has to make "reasonable arrangements" to have the particular grievance raised on her behalf

Is it just or not to allow leave?

[21] I have not been alerted to anything about the case that would be prejudicial to the employer such as the availability of witnesses and personnel and documents. Both parties have outlined in sufficiently clear terms their positions in regard to the dismissal. However, there are some arguable issues that are likely to arise on the reason for dismissal and the procedure that was involved and the legal requirements on an employer to act fairly. There was thus is reason to expect that the personal grievance claim may be unsuccessful. The employer has accepted that there has been a dismissal, and it will have to justify that substantively and procedurally. The arguable issues require the strengths and weaknesses to be assessed by the parties, and mediation will help this.

[22] There will be an issue about whether or not the claim for reinstatement will be practicable and reasonable. This is a very risky prospect for Mr Cotter. It is clear that there is information from the employer that if it is correct and accurate will assist the employer and make it difficult for Mr Cotter to be reinstated.

[23] I hold that granting leave will be just.

Order of the Authority

[24] Leave is granted for Mr Cotter to raise his personal grievance out of time.

[25] The parties are also directed to attend further mediation.

Costs

[26] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority