



**The facts**

[4] Mr Davies was employed by Dove. Dove provides social work services in regard to domestic violence. Mr Davies was employed by Dove as a social worker, working at Flaxmere. He was dismissed on or about 15 September 2011. He consulted Ms Beacham on 25 September 2011 as he had been dismissed and was also going through a separation from his wife. He deposed that this was a stressful time in his life and that he contacted Ms Beacham to get her to explain to him and make sense of it all. His primary needs related to the family matters. He also wanted help in regard to his employment problems that he says related to him not wanting to be “ripped off” in regard to any holiday pay. Mr Davies deposed that the family matters needed to be dealt with urgently first and that in the 90 days he wanted someone to represent him on the matters of his employment that included:

- (a) The loss of his job;
- (b) That he wanted to know if he had grounds for redress;
- (c) That he believed he had been wrongly dismissed.

[5] On 15 December 2011, Mr Davies sent a text message to Ms Beacham to ask her if “*the Dove case was due shortly*”. He deposed recalling meeting with Ms Beacham at her office later that day to go through a letter written by Ms Beacham that needed to be sent to Dove raising his personal grievance. It is common ground that the grievance was raised in an email sent to Dove and received on 16 December 2011. It is common ground that the letter raised Mr Davies’ personal grievance on three causes of action, but the letter raising the personal grievance to Dove was out of time.

[6] Ms Beacham has deposed that on 6 October 2011 she wrote to Dove advising that she had been instructed and that Mr Davies was in the process of considering his options with regard to the termination of his employment. She also requested documentation and a written statement of the reasons for the dismissal. She did nothing more but to prepare a draft grievance letter prior to the expiry of the 90 day period for Mr Davies to review and return it to her prior to sending it to Dove. However, given the time that became available that did not happen and Mr Davies went into her office, as set out above, his visit could have only been to consider the information and letter prepared by Ms Beacham.

## Determination

[7] Section 114(1) of the Act requires a personal grievance claim to be raised with the employer within 90 days of it arising, or the employee becoming aware of it (whichever is the later), unless the employer consents to extend time. The latter has not been done in this case nor has the personal grievance been raised in the 90 days as required. It was out of time.

[8] Section 114(3) of the Act provides that where an employer does not consent to a personal grievance being raised after the expiration of the 90 day time limit:

*The employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period". That has been done in this case.*

[9] Section 114(4) of the Act sets out the basis on which the Authority may consider granting leave:

*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 s.115); and*
- (b) *considers it just to do so.*

[10] The granting of leave is discretionary. Section 114(4) proscribes two conditions, both of which must be satisfied before leave may be granted. First, the delay in raising the grievance must have been occasioned by exceptional circumstances. Secondly, the justice of the case must require an extension of time.

[11] Sections 114 and 115 of the Act establish a high threshold for employees seeking to establish exceptional circumstances. *Telecom New Zealand Ltd v. Morgan* [2004] 2 ERNZ 9 (EmpC) (cited in *McMillan v. Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) NZELR 402 (EmpC)); and *Melville v. Air New Zealand Ltd* [2010] NZEmpC 87, (2011) 9 NZELC 93,700 and (2010) 8 NZELR 190 set out the principles that apply.

[12] Mr Davies has solely relied on s.115 (b) of the Act. This provides that, for the purposes of s.114(4)(a), exceptional circumstances includes:

*Where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.*

[13] Reliance on an agent will amount to exceptional circumstances if the requirements of s.115 (b) are met. Section 115 (b) will only apply where the employee has made reasonable arrangements to have the grievance raised and the agent unreasonably failed to ensure that it was raised within 90 days.

[14] Mr Davies deposed that he was getting Ms Beacham to represent him. His primary concern was in regard to his family matters first. In regard to his employment he did not want to be ripped off in respect of his holiday pay and that he believed he had been wrongly dismissed. From the first meeting that he had with Ms Beacham, it is abundantly clear that he left it to her to provide him with advice in making sense of the situation. In that regard, Ms Beacham did contact Dove for documentation and a written statement of the reasons for the dismissal. Mr Davies' evidence and Ms Beacham's action make it more likely than not that she was left to make sense of the situation and then advise Mr Davies of his options.

[15] Nothing happened until Mr Davies contacted Ms Beacham about his "case". She deposed that she had prepared the draft grievance letter prior to the expiry of the 90 day period but that that *"did not allow enough time for the applicant to review and return it to her prior to sending it to the respondent"*. Instead she had to advise Mr Davies and he had to make a decision, and in doing so time ran out to raise the personal grievance in 90 days, I hold.

[16] In its most liberal interpretation, Mr Davies' and Ms Beacham's position does not reflect that Mr Davies made reasonable arrangements to have the grievance raised. He cannot just rely on referring to the word his "case". That is not enough to support that he made reasonable arrangements because he wanted to sort out his family matters first and Ms Beacham needed to find out information and to make sense of what had happened. The fact that Ms Beacham did not further contact him earlier is beside the point. It is self-evident that Mr Davies had not provided a clear request to have his personal grievance raised until 15 December when he had a session with Ms Beacham in regard to the grounds and claims available just before the 90 day period ended. He has to take responsibility, not the agent. There was no clear

indication before their session that a personal grievance would be raised. Therefore he left it too late when he contacted Ms Beacham about his case.

[17] The personal grievance was clearly out of time by a few days and in regard to the situation I have described, it does not meet exceptional circumstances I hold.

[18] The reason for the delay clearly related to Mr Davies returning to Ms Beacham in regard to his wish for her to make sense of the situation and him wanting to know if he was being ripped off in regard to his holiday pay. The fact that he left it so long meant that he did not leave Ms Beacham time to raise the grievance in the 90 days and she could not raise it in the remaining time available. This can not be construed to mean that she unreasonably failed to ensure that the grievance was raised in 90 days.

### **Outcome**

[19] From the evidence I have heard, I am not satisfied that Mr Davies made reasonable arrangements to have his dismissal grievance raised on his behalf by Ms Beacham in the 90 days, albeit at least until 15 December. I hold that he left it with Ms Beacham until he raised it again with her in regard to sorting the matter out and wanting to be satisfied that he was not being ripped off. Once he had been briefed by Ms Beacham and wanted the letter sent she had to responsibility to send it and it never arrived in the 90 days because of Mr Davies' delays. In any event Ms Beacham's requirements were to make sense of what had happened and that falls short of being required to raise a personal grievance, and the time left to her to raise it was affected by Mr Davies' own delay in getting back to her in time.

[20] The evidence from Mr Davies does not discharge the onus on him of establishing he made reasonable arrangements to have the grievance raised on his behalf by Ms Beacham in the time required.

[21] I hold that Mr Davies has not satisfied the first requirement under s.115 (b) of the Act. Given my findings, there is no necessity for me to consider the rest of the issues that require determination.

[22] The application is declined and Mr Davies is time-barred from bringing a personal grievance claim for unjustified dismissal against Dove.

**Costs**

[23] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority