

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 127/08
5100303

BETWEEN MELVYN DAVIES
Applicant

AND WORKS INFRASTRUCTURE
LIMITED (NORTHLAND)
Respondent

Member of Authority: Dzintra King

Representatives: Anne-Marie McInally, Counsel for Applicant
Chris Meade, Advocate for Respondent

Investigation Meeting: On the papers

Determination: 4 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is a 90 day issue.

[2] The respondent dismissed the applicant on 3 April 2007.

[3] Mr Mike Loughran, an organiser for the NZ Amalgamated Engineering, Printing & Manufacturing Union Inc, represented Mr Davies at the dismissal. Mr Loughran informed Ms McInally, the Union's in-house solicitor, of the dismissal and of Mr Davies' wish to pursue a personal grievance. Ms McInally agreed to attend to the personal grievance.

[4] On 18 April 2007 Mr Davies confirmed to her that he wished to pursue the grievance. She interviewed him to document the facts giving rise to the grievance.

[5] The dismissal involved a work injury in respect of which the respondent was Mr Davies' injury case manager. Ms McInally said she needed to clarify whether

that in any way precluded a grievance. She therefore asked for the injury management file and received it on 30 April 2007.

[6] During May and June 2007 she had a substantial workload and no opportunity to assess if there was a jurisdictional issue created by the injury.

[7] In June 2007 her secretary went on extended leave. That role was filled a week later on 20 June. About that time Ms McNally perused the injury file and satisfied herself there was no barrier to the grievance arising out of the ACC matter. She then drafted a letter that was subsequently dated 9 July. She drafted the letter at the beginning of the month but was distracted by other matters and did not sufficiently appreciate the risk of late notification. Ms McNally therefore failed to ensure it was sent to the respondent without delay.

[8] Section 114 provides that a grievance must be raised within 90 days, subject to the employer consenting or an application for leave being made.

[9] Section 114(4) provides:

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.*

[10] An application has been made in this case. The application is based on s.115(b):

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.

[11] Mr Meade says Mr Davies himself had a responsibility to follow up on the progress or otherwise of the personal grievance claim. There is no evidence that he made any attempt to do so. The delay was only a few days. Mr Davies had referred the matter to his Union and had been assured that it would take the appropriate action. Mr Davies was entitled to repose trust in his Union.

[12] The respondent does not accept the reasons given for the late notice of raising the personal grievance.

[13] Section 115(b) provides that where the employee has made reasonable arrangements to have the grievance raised, which Mr Davies did, and the agent unreasonably failed to ensure that the grievance was raised. The circumstances of this matter clearly satisfy s.115 (b).

[14] There is no prejudice to the respondent in having the matter heard. The delay was only a short period.

[15] I am satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and in the circumstances I consider it just to allow leave for the applicant to proceed with his personal grievance.

[16] Costs for this preliminary matter will be dealt with after the hearing of the substantive matter. If the matter does not proceed to a substantive hearing the applicant may apply for costs.

Dzintra King
Member of the Employment Relations Authority