

not consented to a personal grievance being brought out of time and has not opposed the application, leaving the matter to the Authority to determine (28 April 2008).

[3] The second issue is a claim from Mr Dickson for arrears of wages. He claimed that he is owed arrears of wages in the sum of \$62,935 when he was not paid properly as an employee in accordance with the Minimum Wage Act and other considerations for an appropriate wage. That matter is awaiting investigation.

The Facts

[4] The events associated with the claim for personal grievance are best summarised by the correspondence between the parties.

[5] A decision was made to terminate Mr Dickson's contract on 22 November 2005 and is confirmed in a letter dated 22 November 2005.

[6] In a letter dated 22 February 2006 a personal grievance was purportedly raised by Mr Dickson's representative.

[7] The first letter, from the respondent reads as follows (verbatim):

22 November 2005

*Phil Dickson
86 Main Road
Wainuiomata*

Dear Phil,

On 18 October 2005, I wrote to you asking you to attend a meeting to explain the situation where [name withheld] was placed in Craig Rankin's care without consultation with the social work team. I advised in that letter that if this incident did occur, it may result in the termination of your contract.

You attended the meeting and explained that you had indeed organised this respite without consultation with the social work team. I said I would consider your response and write to you with it.

On 1 November 2005, I wrote to you, and amongst several matters, I advised you that:

- *I did believe you had breached your terms and conditions of your contract by arranging respite with a non-accredited caregiver without consulting with the social work team.*

- *If an instance of this kind occurred again, it may result in the termination of your contract.*
- *My expectations of you as a contracted caregiver, that you attend all supervision and team meetings, and to advise social work staff if you could not attend.*

On 4 November 2005, [name withheld] advised you, in a telephone call, that you would be expected to attend all team meetings as part of your contractual obligation.

On Monday 7 November you did not attend team meeting.

On 9 November 2005, I wrote to you again stating that you were expected at all team meetings and asking you to meet with me to discuss your absence from these meetings. I advised if you were not able to provide a satisfactory response, it may result in the termination of your contract. You did not attend that meeting or advise me prior that you would not be attending.

On 11 November 2005, I received a letter from you in response to my letter of 1 November. You stated that on some Monday mornings you are still on “respite” and in your view, you should not be expected to attend team meetings.

On Monday 14 November you did not attend supervision, and you were not on “respite”. You did not attend team meeting on 21 November 2005, and are not on “respite”.

On 17 November 2005, I received another letter from you, in response to my letter of 9 November, advising that you believed you were operating on “good faith” as in your view your contract had not been renewed.

On 17 November 2005, Brian informed me Ash had advised him that you had made direct contact with Ash to arrange respite for [name withheld] the weekend following.

On 17 November 2005, you wrote an incident report at the request of [name withheld], in relation to an incident where [name withheld] alleges he was “pushed” by you. In your incident report you “brushed” against him.

As you can see there have been a number of issues that have occurred over the past several weeks. I have made time available to meet with you to discuss matters. You did not attend. I have clarified for you what Wesley Community Action’s expectation is of you as a contracted caregiver, to attend all team meetings. The last three you have not attended. This gives me cause to have major concern about your willingness to participate in professional processes and conduct yourself in a manner that is professionally safe. I believe Wesley have made every effort to ensure you are supported professionally by providing these facilitated meetings, and by asking you to participate in discussion about identified issues.

It is after careful consideration of these factors and your demonstrated lack of participation and commitment to professional processes, that I advise you your contract to deliver caregiver services is terminated immediately, effective as at today’s date, under clause 26.9 of your agreement:

“Wesley considers the contractor is incapable of performing the services in the manner and to a standard accepted to Wesley; ...”

I will advise payroll of this outcome and your final service fee will include any outstanding entitlement to paid non-care days.

[8] The second letter, from Mr Dickson's representative reads as follows (verbatim):

22 February 2006

re: Philip Dickson

1. *We have instructions to act for Philip Dickson. Your letter of 22 November 2005 refers.*
2. *We allege that Mr Dickson is employed under a contract of service notwithstanding that express inclusion, for reasons outlined as follows:*
 - *He is a "homeworker";*
 - *Wesley has a substantive level of control over the execution of his services;*
 - *His is a full-time position that requires exclusive commitment.*
3. *All allegations contained within your letter are denied. They are not sufficient grounds to conclude that Mr Dickson is "incapable of performing the services in the manner and to a standard acceptable to Wesley". A reasonable employer would not have dismissed Mr Dickson in the circumstances as they arose. Wesley Community Action has an obligation as an employer to work through these issues and build a productive employment relationship.*
4. *Accordingly this letter serves as notice of personal grievance. We invite you to a mediation to resolve these issues. We look forward to your positive response.*

I have deleted the names for privacy reasons in the above letters.

[9] The personal grievance was raised 93 days after the applicant's employment was terminated having regard to the above correspondence. An affidavit has been provided from Mr Dickson's lawyer that he gave instructions to pursue his claim, including raising a personal grievance, and now it turns out that there had been a mistaken calculation of time, and the grievance was three days out of time.

[10] No objection was initially raised by the respondent to the personal grievance until an objection was raised in an amended statement in reply and reiterated on 9 November 2007.

[11] The Authority issued a determination on 15 October 2007 that Mr Dickson was an employee. All along there has been a disagreement on his status until the Authority's determination and Mr Dickson and his lawyer recognised that the issue would require sorting out, and the Trust had always been of the opinion Mr Dickson was a contractor. Mr Dickson says the personal grievance was raised on 7 November 2007 by letter after it came to his notice that he was an

employee by virtue of the Authority's determination. The letter and the respondent's reply have been produced.

[12] In the event that the Authority does not agree that the personal grievance was raised in time following the determination in the applicant's favour that he was an employee, it has been submitted the delay was occasioned by exceptional circumstances by relying on the grounds in s 115 (b) and 115 (c) of the Act. That is the applicant made reasonable arrangements to have the grievance raised by his representative, but the representative failed to ensure the grievance was raised in the required time; and the applicant's employment agreement had no explanation concerning the resolution of employment relationship problems that is required by s65 of the Act

Determination

[13] The first issue concerns the raising of the personal grievance. The employment relationship problem involved an immediate issue on whether or not Mr Dickson was an employee or contractor at the time his contract was terminated.

[14] I find that Mr Dickson's personal grievance was not raised by letter dated 7 November 2007 when he says it came to his notice that he was an employee from the date of the Authority's decision *Dickson and Wesley Community Action Trust PR Stapp (unreported) 15 October 2007 WEA 5038168 Determination Number WA 137/07*. His original application presumed he was an employee, but it was understood that the Trust would probably contest that. Also section 114 (1) of the Act refers to the raising of "*the grievance with his...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...*". The key words are "*...the action alleged to amount to a personal grievance...*". In this case that related to the termination of the arrangement between Mr Dickson and Wesley on 22 November 2005 and not a finding that Mr Dickson was an employee.

[15] If I am wrong he certainly would be successful on one of his alternative arguments that related to the delay being occasioned by exceptional circumstances on the grounds in s 115 (b) of the Act. The delay was occasioned by Mr Dickson's representative failing to ensure the grievance was raised in the required time after he made reasonable arrangements to have the grievance raised by his representative. It has not been challenged that he made reasonable arrangements to have the grievance raised by his representative.

[16] However, on the other claim of exceptional circumstances under s 115 (c) of the Act I am not satisfied that the delay was occasioned by the applicant's employment agreement not having an explanation concerning the resolution of employment relationship problems that is required by s 65 of the Act. This is because he had made reasonable arrangements for his representative to raise the grievance and the representative failed to ensure the grievance was raised in the required time. There was no direct evidence deposed that the failure of the agreement to have the explanation concerning the resolution of employment relationship problems was actually the cause of the delay.

[17] I have considered mediation and I am of the opinion this remains a matter that mediation could constructively assist the parties. Indeed as the alternative argument of delay and exceptional circumstances was my primary finding then the matter must be sent to mediation.

[18] Next I turn to the arrears of wages claim. That matter remains outstanding because the investigation meeting scheduled to consider it was adjourned on 8 May 2008 to enable Ms Buckettt to get instructions from the applicant on the admissibility of evidence that the Trust wished to produce. Now any further investigation can deal with the personal grievance and the arrears claim if necessary. In the meantime those issues would be open to the benefit of further mediation having regard to costs and the relevant evidence worthy of private discussions between the parties.

Orders of the Authority

[19] Mr Dickson's grounds for exceptional circumstances have been met. The delay in raising his personal grievance in time was occasioned by exceptional circumstances under s 115 (b) of the Act. I consider it just to grant leave to proceed out of time because of the notice and preparation that has already been involved in the matter as it is ready to proceed and the details have been provided. I grant leave for the grievance to be raised out of time.

[20] I direct the parties to attend mediation. The support officer will also be in touch with both parties to organise a mutually acceptable date, if it is necessary, for the Authority's investigation to continue.

[21] Costs are reserved

P R Stapp
Member of the Employment Relations Authority