Employment Court of New Zealand

Duffy v Ngatahi Horticultural Partnership [2012] NZEmpC 146 (30 August 2012)

Last Updated: 8 September 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 146

CRC 5/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JOHN WILLIAM DUFFY Plaintiff

AND NGATAHI HORTICULTURAL PARTNERSHIP

Defendant

Hearing: 20 October 2011 (Heard at Nelson)

Appearances: Steven Zindel and Heather Mckinnon, counsel for the plaintiff

Martin Logan and Nick Mason, counsel for the defendant

Judgment: 30 August 2012

JUDGMENT OF JUDGE A A COUCH

[1] The Ngatahi Horticultural Partnership ("Ngatahi") was a partnership between the Wakatu Incorporation and the Ngati Rarua Atiawa Iwi Trust. It operated a horticultural business in the Nelson region. Mr Duffy says that, in May 2009, his employment was affected to his disadvantage when Ngatahi unjustifiably denied him work. He also says that he was subsequently unjustifiably dismissed. Ngatahi denies both allegations.

[2] Mr Duffy pursued his claims in the Employment Relations Authority as personal grievances under Part 9 of the Employment Relations Act 2000 ("the Act"). To do so, he needed to establish that he raised those grievances with Ngatahi within the 90 day period provided for in s 114(1) of the Act or to obtain leave of the

Authority under s 114(4) to raise them out of time. Ngatahi denied that the

grievances had been raised in time and opposed the grant of leave. These issues were the subject of a preliminary hearing by the Authority which determined that Mr Duffy did not raise his personal grievances within the statutory 90 day period and that it was not appropriate to grant him leave to pursue them out of time.1

[3] Mr Duffy challenges that determination. Although the entire matter is before the Court,2 I directed that the jurisdictional issues which had been determined by the Authority should also be dealt with as preliminary issues in the Court. This judgment relates solely to those preliminary issues which proceeded before the Court in a hearing de novo.

Sequence of events

[4] Ngatahi operated a substantial horticultural business growing apples, pears, kiwifruit and hops. Its requirements for labour were seasonal and varied greatly throughout each year. There was a team of managers and supervisors who were permanent employees but the large majority of its employees were engaged on a seasonal or casual basis.

[5] Mr Duffy began working in the orchards subsequently operated by Ngatahi in about 1995 when it was owned solely by Wakatu Incorporation. His evidence was that this was initially on a casual basis but that he became a permanent employee in about 1997. In 2005, when the Ngatahi partnership was formed, Mr Duffy was dismissed by Wakatu Incorporation on grounds of redundancy but was engaged shortly afterwards by Ngatahi.

[6] Mr Duffy's evidence was that he also became a permanent employee of Ngatahi, working consistently throughout the year, apart from a two week break in May each year following the end of the season. Pay records which were produced during the hearing showed that this was not entirely correct as there were other periods when he was not paid. These were not fully explained in the evidence and,

for the purposes of this decision, I accept Mr Duffy's evidence that, for the period of

1 [2011] NZERA Christchurch 8.

2 In accordance with the full Court decision in *Abernathy v Dynea New Zealand Ltd (No 1)* [2007] NZEmpC 83; [2007] ERNZ 271.

several years prior to May 2009, there was an ongoing employment relationship between the parties.

[7] Once Ngatahi took over the orchards, it followed a practice of entering into written employment agreements with its employees including those who were engaged on a fixed term basis for the season or on a casual basis. There was inconsistent evidence about how this was done and whether it extended to all employees. The witnesses for Ngatahi said that it was an invariable practice that an agreement was signed by each employee each year. There was also evidence that these agreements were literally read out loud to each employee to ensure that they knew and understood the contents.

[8] The original case for Mr Duffy was that he had never signed an employment agreement with Ngatahi and it appears he initially gave evidence to this effect to the Authority. When presented with copies of two such agreements in the course of the investigation meeting, however, Mr Duffy had to concede that he had been wrong. His evidence to the Court was that he had "forgotten" signing those two agreements and having copies of them. They were dated 5 September 2005 and 13 April 2006. Each contained a plain English explanation of the personal grievance procedure including the 90 day requirement in s 114(1) of the Act.

[9] The general manager of Ngatahi, Martyn King, gave evidence that similar employment agreements had been signed by Mr Duffy in 2007 and 2008 but he was unable to produce them. He said that he had seen the signed documents and described where they had been kept. Mr Duffy denied having signed or even seen those agreements.

[10] Ngatahi was a recognised seasonal employer of Pacific Island workers under the scheme operated by what was then the Department of Labour. In early 2009, Ngatahi was given approval to recruit 12 workers from Tonga, which it subsequently did. The terms of their engagement required Ngatahi to provide each of them with at least 30 hours work per week. Mr Duffy was aware of these Tongan workers being at Ngatahi. There was also evidence from Mr Duffy that some 15 or so Thai workers were also employed by Ngatahi.

[11] During the 2008-2009 season, Mr Duffy had been working in Ngatahi's hop gardens. When the work there came to an end in April 2009, he expected to be given other work such as vehicle maintenance or spraying. He was not provided with any such work. Instead, all employees were told to take two weeks off. Permanent employees were told to return to their positions after that period. Seasonal and casual workers were told that, if they wanted further work, they should enquire after two weeks to see if any work was available. This was the message Mr Duffy was given.

[12] When the two weeks was over, Mr Duffy went back to Ngatahi where he spoke to Luke Hawthorne, who was then in charge of all field work. Mr Hawthorne told Mr Duffy that there was no work available for him but that he could check again the following week if he wanted to.

[13] Mr Duffy duly returned to Ngatahi the following week where he again spoke to Mr Hawthorne. Mr Hawthorne told Mr Duffy there was still no work available for him and that he was having difficulty finding work for the Tongan workers. In his evidence, Mr Hawthorne said that, on this second occasion, he suggested to Mr Duffy that he look for work elsewhere. When this was put to Mr Duffy in cross examination, he agreed that the possibility of his getting work elsewhere was discussed.

[14] This second discussion between Mr Duffy and Mr Hawthorne appears to have taken place in mid-May 2009. By that time, Ngatahi had engaged three workers called Rueben, Marty and Jared to do particular maintenance tasks about the property. Mr Duffy was aware of this. He regarded the work being done by these three men as work he could otherwise have done.

[15] Mr Duffy returned to Ngatahi for a third time near the end of May 2009. Neither Mr Hawthorne nor Mr King was available, so he spoke to the office administrator. He gave her his new address and telephone number and asked to be contacted if work was available.

[16] Following that third visit by Mr Duffy to Ngatahi, his wife suggested to him that he ask to be paid out the balance of holiday pay which was still owing to him. Mr Duffy duly did that and payment was made on 27 May 2009.

[17] After that, Mr Duffy had no further contact with Ngatahi until October 2009.

[18] In late June 2009, Mr Duffy accepted an offer of work from Andrew Horrocks, a former supervisor at Ngatahi, on a property in Motueka known as Dicks' orchard. Mr Duffy said in his evidence in chief that this was for three weeks beginning in June 2009 but documents produced in the course of the hearing showed that it was for nearly six weeks from 16 July to 25 August 2009.

[19] While Mr Duffy was doing this work, he told Mr Horrocks about his recent experience at Ngatahi. Mr Duffy said in his evidence: "He told me they had treated me badly. He told me to get a lawyer and take a personal grievance against Ngatahi." Mr Duffy went on to say that he was concerned about the cost of seeking legal advice but that Mr Horrocks told him that he could get free legal advice at the local Community Law Centre in Motueka. As best Mr Duffy could recall, this conversation took place during the second week after he began working for Dicks which would place it near the end of July 2009.

[20] Mr Duffy made initial enquiries of the Community Law Centre and was told that employment law advice was available but he chose not to pursue this option at then.

[21] On 27 August 2009, Mr Duffy began working for McGlashan Hops in Motueka. That was on a property next door to the Ngatahi orchards but he did not make contact with anyone at Ngatahi. Mr Duffy continued working there continuously for seven months until the end of March 2010.

[22] In September 2009, Mr Duffy decided to seek advice from the Motueka Community Law Centre. This eventually led to a letter to Ngatahi being drafted on his behalf. That letter was dated 21 October 2009 and read:

John Duffy

[address]

21 October 2009

To whom it may concern

I am writing to inform you that I am giving one week's notice of termination of my employment.

This decision has been brought about by me not having had any work since the end of May and has left me financially embarrassed.

I have enjoyed my 14 years with the company but I need to find steady employment to meet my financial obligations.

Yours faithfully

John Duffy

[23] Subsequently, Mr Duffy sent a second letter to Ngatahi. This was dated 28

October 2009 but was not received by Ngatahi until 3 November 2009. It read:

John Duffy

[address]

28th October 2009

To whom it may concern

I am writing to inform you that I intend to take out a personal grievance against your company for constructive dismissal under the Employment Relations Act.

I had been working for your organisation for 14 years on a permanent full- time basis, and to find out in May of this year when I returned from holidays that there was no work for me. I kept corning back for 3 weeks but was told there was no work, which meant I had to go and seek employment

elsewhere.

Once when I returned I was informed that it was hard to find enough work for 15 Thai's, and 10 Tongans.

I have been working to pay the debt I accrued while unemployed and have just recently sent my resignation in, which was done so because I felt I had little option but to terminate my employment in the appropriate manner.

I am therefore seeking compensation of loss of wages of $7200 being 12 weeks unemployment, and $7500 for hurt, humiliation, and embarrassment, giving a total compensation claim of $14700.

I am happy to meet with you to discuss the matter and would consider mediation through an external service, or one through the Employment Relations Service.

If I have not heard from you within 10 days I will take the matter to the

Employment Authority.

Yours faithfully

John Duffy

[24] Ngatahi promptly replied to this second letter, expressing surprise at receiving it, rejecting the claims made and making it clear that Ngatahi did not accept the personal grievance being raised outside the statutory 90 day time period.

Issues and legislation

[25] Two issues are decided in this judgment:

(a) Whether Mr Duffy's personal grievance was raised within the statutory 90 day period provided for in s 114(1) of the Act and amplified by subsection (2):

114 Raising personal grievance

(1) 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.

(2) 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.

(b) If the personal grievance was not raised within that time period, the second issue is whether Mr Duffy should be granted leave to raise his personal grievance subsequently. That process is governed by subsections (3) and (4) of s 114 and by s 115:

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90- day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) 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 1 or more of the circumstances set out in section

115); and

(b) considers it just to do so.

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(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; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Was the personal grievance raised in time?

[26] The case for Mr Duffy was advanced on two alternative bases. The first was that he was actually dismissed but that the reality of this did not come to his notice until August 2009. On that basis, the personal grievance raised in the letter of 28

October 2009 would have been within the 90 day period. In support of this proposition, Mr Zindel focussed on the meaning of the expression "came to the notice of the employee" in s 114(1) and referred me to several decided cases on that issue.

[27] While the discussion of principle in those previous decisions is helpful, the question of when it came to Mr Duffy's notice that his employment by Ngatahi was at an end is essentially a matter of fact to be determined on the evidence in this case.

[28] In addition to the evidence recorded above in my narrative of events, there were several other aspects of the evidence which bore directly on this issue. In answer to questions in cross examination and from me, Mr Duffy gave the following evidence:

(a) Other than holiday pay, he received no payment from Ngatahi after the end of April 2009.

(b) When Mr Duffy was told in early May 2009 that there was no work for him, this was something which had never happened before during his employment by Ngatahi. He agreed that this was a very different situation to that which he had experienced at this workplace over many years.

(c) He knew at the time that payment of the balance of his holiday pay was something normally associated with the end of the employment relationship and it occurred to him that this may be what was happening when he received payment of holiday pay on 27 May 2009. Specifically, when asked whether it went through his mind that he was being paid holiday pay because his employment was coming to an end, he replied" Yeah it probably was part of the memory banks there yeah."

(d) On 17 June 2009, Mr Duffy went to see his doctor. The doctor's notes record that Mr Duffy was experiencing insomnia "after he was

retrenched from a job." When this was put to Mr Duffy, he said that he would not have used the word "retrenched" but agreed that he gave his doctor the impression that he had lost his job and that this was causing him to lose sleep.

(e) Mr Duffy said that he came to a final conclusion that he would get no more work from Ngatahi shortly after he began work at Dicks' orchard. This was partly as a result of what Mr Horrocks said to him but also because a regular visitor to both that property and to Ngatahi told him he should not expect any further work at Ngatahi.

[29] Having regard to all the evidence, I find on the balance of probabilities that Mr Duffy knew in late May or early June 2009 that he would get no more work from Ngatahi. To the extent that there is a measure of uncertainty in that primary conclusion, I have no doubt that he realised that before the end of June 2009.

[30] This finding of fact means that the primary argument relied on by Mr Duffy must fail. If he was dismissed by Ngatahi, that came to his notice before the end of June 2009. He raised his personal grievance when his letter of 28 October 2009 was received by Ngatahi on 3 November 2009. That was considerably more than 90 days later.

[31] The alternative argument relied on by Mr Duffy was that he was not dismissed and that the employment relationship remained intact until he ended it by resignation on 21 October 2009. If that termination of employment was regarded as a constructive dismissal, the raising of a personal grievance less than two weeks later would be well within the 90 day time period.

[32] In support of this argument, Mr Zindel submitted that Ngatahi's refusal or failure to provide Mr Duffy with work after April 2009 was no more than a repudiation of the employment agreement between the parties and that it remained open to Mr Duffy to rely on that repudiation five months later.

[33] I do not accept that argument. The flaw in it lies in the assumption that Mr Duffy was not dismissed. The generally accepted meaning of "dismissal" is a permanent sending away of an employee by an employer. It has the effect of ending the ongoing employment relationship. In *Jinkinson v Oceana Gold (NZ) Ltd*3, I analysed authorities from a number of common law jurisdictions which discussed the essential nature of an ongoing employment relationship. I concluded:

[52] The common theme of these cases is that, where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding obligation on the parties to satisfy those expectations.

[34] In this case, by the end of May 2009, Ngatahi had told Mr Duffy twice that there was no work available for him and had discharged the only remaining obligation it had to him by paying out the balance of his holiday pay. Faced with that conduct,

Mr Duffy could not have had any legitimate expectation that he would be provided with further work by Ngatahi. In his evidence, Mr Duffy acknowledged that, by the end of June at the very latest, he had realised this and, as a result, had taken work elsewhere. That realisation was also reflected in the fact that Mr Duffy made no further contact with Ngatahi after the end of May 2009. In other parts of his evidence, Mr Duffy said that he still retained hope that Ngatahi might offer him work but, even if I accept that evidence, it does not support his claim. Mere hope of work does not create or sustain an employment relationship.

[35] I find as a fact on the evidence before me that the employment relationship between the parties ended in late May 2009 and that Mr Duffy recognised this by the end of June 2009. It follows that his purported resignation in late October 2009 was of no effect.

[36] Overall, I conclude that Mr Duffy did not raise his personal grievance within the 90 day time period provided for in s 114(1) of the Act.

3 [2009] ERNZ 225

Application for leave

[37] In the event that I reached the conclusion that he had not raised his personal grievance within the statutory 90 day period, Mr Duffy sought leave to raise his personal grievance out of time. To succeed in such an application, the Court must be satisfied that the delay was "occasioned by exceptional circumstances" and that it is just to grant leave.

[38] Mr Zindel submitted that there were two exceptional circumstances in this case. The first was that referred to in s 115(c), being that the employment agreement between the parties did not contain the explanation concerning the resolution of employment relationship problems required by s 65 of the Act.

[39] On the evidence, Mr Duffy cannot succeed on this ground. He accepted that he had signed two employment agreements in 2005 and 2006, each of which contained the required explanation. Witnesses for Ngatahi said that Mr Duffy also signed similar agreements in 2007 and 2008, the latter covering the period up until the end of his employment. If that evidence is accepted, the requirement of s 65 was met and there was no exceptional circumstance in terms of s 115(c).

[40] Mr Duffy, in his evidence, denied that he signed or even saw any new employment agreement after 2006. If that evidence is accepted, the terms of the

2006 agreement must have continued to govern the parties' employment relationship until it ended. Although the 2006 employment agreement purported to be for a fixed term, it did not meet the requirements of s 66 of the Act necessary to make the fixed term nature of it effective. In any event, the employment relationship continued after the end point contemplated by the 2006 agreement and it therefore became an ongoing relationship.

[41] Mr Zindel's alternative submission was that "the totality of the circumstances affecting the plaintiff and his assessment of the his situation are sufficiently unusual so as to warrant the allowing of his personal grievance to proceed notwithstanding that it is arguably out of time."

[42] While acknowledging that ignorance of the law does not, of itself, constitute an exceptional circumstance, Mr Zindel submitted that "ignorance of personal grievance rights, when arising in conjunction with the plaintiff's personal factors, a situation where communication as to the plaintiff 's status was poor and also where there is uncertainty as to whether information about resolving employment relationship problems has consistently been provided does constitute exceptional circumstances."

[43] I do not accept these submissions. On the evidence, it is clear that Mr Duffy was alerted to his personal grievance rights by Mr Horrocks some time in late July

2009. At the same time, Mr Duffy was told that he could obtain free advice about the exercise of those rights by going to the Motueka Community Law Centre. He chose not to do so until more than two months later. The only explanation he gave was that he was engaged in work which did not make it convenient for him to go to the Community Law Centre on a Wednesday when the lawyer specialising in employment matters was routinely available. That is very far from an exceptional circumstance. There were many other options open to Mr Duffy to seek advice about exercising his personal grievance rights. The reality of the situation is that he simply chose not to take any of those options. Even when he did obtain advice, he delayed for a month or more in raising his personal grievance.

[44] In the absence of any exceptional circumstances occasioning Mr Duffy's delay in raising his personal grievance, I decline his application for leave to raise it out of time.

Conclusion

[45] In summary, my judgment is:

(a) Mr Duffy was dismissed.

(b) That dismissal occurred no later than the end of May 2009 and was recognised by Mr Duffy no later than the end of June 2009.

(c) His personal grievance alleging unjustifiable dismissal was raised outside the 90 day period provided for in s 114(1) of the Act.

(d) There are no grounds on which to grant leave to Mr Duffy to raise his personal grievance out of time and his application to do so is dismissed.

(e) The challenge is unsuccessful.

(f) Although my conclusions are similar to those reached by the Authority, the effect of s 183(2) of the Act is that the Authority's determination is set aside and this decision stands in its place.

[46] The conclusions set out above mean that Mr Duffy is not entitled to proceed further with his personal grievance claims and they are dismissed.

Costs

[47] Ngatahi has been put to significant expense in resisting Mr Duffy's challenge. In the normal course, it would be entitled to a reasonable contribution to those costs from Mr Duffy but I was informed in the course of the hearing that Mr Duffy was legally aided for the purposes of this proceeding. Section 45(2) of the Legal Services Act 2011 provides that no order for costs may be made against a legally aided person except in exceptional circumstances. If Ngatahi wishes to argue that there are exceptional circumstances in this case which warrant an award of costs, a memorandum and any relevant evidence should be filed and served within 20 days after the date of this judgment. Otherwise there will be no order for costs.

A A Couch
Judge

Signed at 3.00 pm on 30 August 2012
