

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Joyce Fallon (applicant)
AND	Barnados New Zealand Inc (respondent)
REPRESENTATIVES	Gail Irwin for the applicant Bridget Fleming for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED BY	28 March 2006
DATE OF DETERMINATION	31 March 2006

DETERMINATION OF AUTHORITY: Preliminary Matter

Employment Relationship Problem

1. Ms Joyce Fallon brings various claims against Barnados – statement of problem received on 3 November 2005. Barnados says the applicant did not raise her grievance within 90-days and it does not consent to it being raised outside of the required period – statement in reply received on 21 November.
2. Mediation did not settle this employment relationship problem.

Investigation

3. During a telephone conference call on 9 February 2006 the parties agreed that the preliminary 90-day issue would be dealt with by way of submissions. A timetable was agreed.

The Parties' Positions

Applicant's Position

4. Ms Fallon was employed by Barnados as a senior social worker from 15 July 2002 until 23 December 2004. Ms Fallon believes her employment may have continued past that date because of the effect of statutory holidays.
5. Because she was distressed over her treatment during the later part of her employment, Ms Fallon says she composed a letter advising the respondent of a personal grievance. Ms Fallon accepts that her letter is undated but says the computer file is dated 21 January 2005. She says she posted the letter to Barnados around 22 January 2005. Ms Fallon says an employee of Barnados responded to her by letter: she says this exchange shows the respondent received her grievance within the 90-day time frame.
6. Ms Fallon also says that she contacted an employment law advocate, Mr John Cuttance, on 3 February and asked him to represent her grievance against Barnados: he agreed. The applicant says she gave Mr Cuttance copies of her letter of 21 January and Barnados' response and that he indicated the grievance had been properly raised. He undertook to attend to her case as soon as his heavy workload permitted.
7. Ms Fallon subsequently appointed her present advocate, Dr Gail Irwin, to represent her grievance.
8. Ms Fallon believes her letter of about 21 January meets the 90-day requirements of the Employment Relations Act 2000 and, in the alternative, if it does not, that she

should not be penalised for the failure of her then-representative to rectify any inadequacies in respect of the notification of her grievance.

9. A statement from Mr Cuttance confirms that he was consulted by Ms Fallon about her grievance on 3 February, that she showed him both her undated letter and Barnados' response of 7 February and that it was his opinion Ms Fallon's advice amounted to a clear statement of her grievance against her former employer. Mr Cuttance accepts that, despite several emails from the applicant and because of his workload, he delayed in dealing with her any further. On 28 March he returned Ms Fallon's documents to her and withdrew from any further involvement in her grievance.
10. Doctor Irwin submits that her client's actions, in particular her undated letter and her approach to Mr Cuttance, satisfy the requirements of, respectively, ss. 114 (1) (*Winstone Wallboards v Samate* [1993] 1 ERNZ 503, etc) and ss 114 (4) of the Act.

Respondent's Position

11. Barnados acknowledges receipt of, and responding to, an undated letter from Ms Fallon indicating that she *intended* initiating a personal grievance and would be *taking legal advice regarding* the same and would be *contacting us further*.
12. From Barnados' perspective, unlike its usual experience and because it did not hear further from the applicant until 9 May, and as Ms Fallon's advice did not state a grievance or outline its substance, Barnados formed a view that the grievance had not been raised.
13. Barnados relies not only on the fact that it heard nothing further from the applicant until the 9 May approach by Dr Irwin on her behalf, but that the only subsequent communications in respect of Ms Fallon were received on 14 July and 3 November.
14. The respondent says it would be significantly disadvantaged if Ms Fallon was now allowed to pursue a grievance: its then area manager now lives in East Timor and it would be difficult if not impossible for Barnados to respond to a grievance without her participation.

15. Barnados relies on the general rule that an employee who wishes to raise a grievance must do so within 90-days – s. 114 of the Act. It is commonly accepted that raising a grievance involves taking reasonable steps to ensure the employer is aware of the alleged grievance: *Goodall v Marigny (NZ) Limited* [2000] 2 ERNZ 60, etc. What is required, objectively, is a positive notice of a grievance raised at the time, as opposed to notice of a potential or intended grievance.
16. In this case, while specifying the type of action, the applicant only advised Barnados of an intended initiation of a grievance, would be seeking advice on it and would contact the respondent further (which did not happen until 9 May 2005). By way of an analysis of her undated letter, and because of its ambiguity, Barnados was not of a clear opinion that Ms Fallon was raising a grievance.
17. Barnados says Ms Fallon did not make reasonable arrangements such as to qualify for the exceptional circumstances provisions of s 115 (b) of the Act: *McMillan v Waikanae Holdings (Gisborne) Limited* (2005) 7 NZELC 97,859, etc.
18. In the absence of any contact until May 2005 it was reasonable for Barnados to conclude that Ms Fallon had taken legal advice and elected not to pursue a grievance.
19. In the alternative, delays by Mr Cuttance or Dr Irwin do not fall within the scope of “exceptional circumstances” provide by s. 115 of the Act.

Discussion and Findings

20. I am satisfied Ms Fallon’s preliminary application must succeed for the following reasons.
21. I am satisfied that the applicant’s initial, undated, advice of a grievance was clear notice to Barnados of her grievance: this is because Ms Fallon believed she had “*been constructively dismissed ... and humiliated ...* “ and that she was “*... left with no alternative but to believe that Barnados wanted me to leave*” (attachment to statement of problem, etc).

22. The evidence for that conclusion lies, by way of an objective assessment, not only in the language of Ms Fallon's advice but in the respondent's reaction: its representatives were sufficiently alerted as to its potential to discuss whether or not the letter amounted to advice of a grievance.
23. In this instance, and because of the language and sentiment expressed in the applicant's letter, and because of the respondent's own uncertainty and internal debate about whether the applicant's letter amounted to advice of a grievance, and because of the express good faith obligations set out in the present Act, I find that Barnados was under an obligation to advise Ms Fallon **it would not** be regarding her advice as formal notice of a grievance and to explain to her the reasons for their position.
24. In the alternative, I am confident that s. 115 (b) of the Act specifically applies to the situation Ms Fallon found herself in: having made reasonable arrangements to have the grievance raised by her agent the latter unreasonably failed to ensure it was raised within the required time. As his statement makes clear at par 7, because of "*other commitments and despite several emails from*" her, the applicant's then-advocate delayed in dealing with Ms Fallon's matter.
25. I find that these circumstances establish that Ms Fallon, having met and instructed her then-representative on 3 February 2005 – a time well within the 90-day period – made reasonable arrangements to have the grievance raised, but that it was her agent who unreasonably failed to act on her behalf: ss 114 (4) & 115 (b) of the Act applied. The delay in raising the grievance was occasioned by exceptional circumstances, i.e. the then-agent's failure to act.
26. The respondent must accept some responsibility for the disadvantage it now says derives from the delay in the applicant bringing her grievance: in addition to not advising the applicant of its uncertainty as to the status of her January advice (and its final conclusion the letter did not amount to notice of a grievance), Barnados also failed to respond in 2005 to Ms Fallon's request the parties undertake mediation, relying instead on the position that her claim was out of time. Barnados was not obliged to undertake mediation. However, mediation is undertaken on a without

prejudice and in confidence basis. Had it undertaken mediation on those terms Barnados would have benefited from the participation of its principal witness, who was apparently – for some of that period – still in New Zealand. Given that lost opportunity, it is unfair of Barnados to now say it is disadvantaged by Ms Fallon's failure to promptly pursue her grievance.

27. I am satisfied that, in all the circumstances, particularly the reliance placed by Ms Fallon on her then-agent's advice that her undated letter was sufficient advice of a grievance and that he unreasonably failed to ensure her grievance was raised within the required time, that it is just to grant leave to the applicant to raise her grievance.

Determination

28. For the reasons set out above I find in favour of the applicant, Joyce Fallon's, claim that she properly raised her grievance against the respondent, Barnados New Zealand Inc, within the 90-day period required by s. 114 of the Act and, alternatively, that it is just for her to be given leave to raise the same grievance after the expiration of that period.

Costs

29. At the request of the parties costs are reserved.

Denis Asher

Member of Employment Relations Authority