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Gardner v Mallowbay Holdings Limited (Auckland) [2011] NZERA 921; [2011] NZERA Auckland 526 (13 December 2011)

Last Updated: 23 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 526
5343171

BETWEEN JOHN GARDNER Applicant

AND MALLOWBAY HOLDINGS LIMITED

Respondent

Member of Authority: Dzintra King

Representatives: Ted Hipkiss, Advocate for Applicant

Stephen Franklin, Counsel for Respondent

Investigation Meeting: On the Papers

Evidence received: 28 November 2011

Submissions received: 30 August 2011 from Applicant

20 September 2011 from Respondent

Determination: 13 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr John Gardner, says he was unjustifiably dismissed by the respondent, Mallowbay Holdings Limited (“the company”).

[2] The respondent says the applicant is out of time to raise a personal grievance. Mr Gardner seeks leave to raise the grievance.

[3] After receipt of the parties’ submissions I asked the applicant to supply an affidavit and gave the parties the opportunity to comment on it if they wished to do so.

[4] Mr Gardner was employed on 30 June 2010 as a dairy farm assistant. The dismissal took place on 20 August 2010.

[5] Mr Gardner visited Gowing & Co Lawyers Limited on 24 August 2010. He had an appointment with Ms Nicki Bond but instead saw Ms Sheryl Overington. He told her he had been dismissed and wanted compensation for loss of income through the Court. I have been supplied with a copy of notes taken by Ms Overington. These refer to Mr Gardner saying he had been sacked and there is reference to a personal grievance.

[6] On 20 September 2010 he again visited the law firm to ascertain whether there had been any progress regarding his claim. He found that no progress had been made. He said he wanted the unjustified dismissal to go to Court and left feeling angry.

[7] Following that, he sent a number of texts regarding his grievance.

[8] On 15 October 2010 he again visited Gowing & Co. On that occasion he saw Mr Gene Tomlinson and Mr Charles Southall. They told him that if he wanted to pursue a personal grievance legal aid should be sought. Mr Gardner said his understanding was that a legal aid application had been filed.

[9] However, no application was actually made until 24 January 2011.

[10] On 21 December 2010 Gowing & Co referred him to Mr Ted Hipkiss for review. Mr Hipkiss told him there was no record of a formal notice of personal grievance having been served on the employer and Mr Gardner was now out of time. He agreed to arrange for a notice of personal grievance to be served.

[11] The Statement of Problem was initially sent to a director of the company in February 2011. This was 181 days after the dismissal. The correct employer was sent a Statement of Problem on 6 May 2011, 258 days after the dismissal.

[12] Section 14 (4) provides that the Authority may give leave for a personal grievance to be raised out of time if it is satisfied that the delay was occasioned by exceptional circumstances, which may include any one or more of the circumstances set out in s 115; and considers it just to do so.

[13] Section 115 (b) provides that the where an employee has made reasonable arrangements to have the grievance raised by an agent and that person has unreasonably failed to do so within the required time that will constitute an exceptional circumstance.

[14] I am satisfied that Mr Gardner made reasonable efforts to have Gowing & Co raise a personal grievance and that there was an unfortunate failure on the part of the company to do so. Mr Gardner made a number of visits and sent text messages.

[15] I do not accept the submission that Mr Gardner has been dilatory in attempting to have his grievance raised. It is clear that he indicated his wish to do so at the first meeting at Gowing & Co. The file notes seem to have been misplaced and matters not followed up properly.

[16] There is no submission that the respondent will be prejudiced by the late notification. In all the circumstances it is just that Mr Gardner be granted leave to pursue his personal grievance.

[17] Given this decision, I would advise the parties to mediate.

[18] Costs are reserved. At this stage I do not intend to make a costs determination as it may be that this matter can be resolved at mediation.

[19] If mediation is not successful, then costs on this matter are best dealt with after a hearing on the substantive issue.

Dzintra King

Member of the Employment Relations Authority

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