

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 232
5342397

BETWEEN

ALAN GROVES
Applicant

A N D

TUHOE WAIKAREMOANA
MAORI TRUST BOARD
Respondent

Member of Authority: K J Anderson

Representatives: W Macphail, Counsel for Applicant
R Drake, Counsel for Respondent

Investigation meeting: 6 July 2012 at Tauranga

Date of Determination: 10 July 2012

DETERMINATION OF THE AUTHORITY

Preliminary Issue

[1] The substantive claim of the applicant, Mr Alan Groves, is that he has a personal grievance in that he alleges he was unjustifiably dismissed; effective from 31 March 2010. There is also a further claim related to the failure of the respondent, Tuhoe Waikaremoana Maori Trust Board (the Trust Board), to provide an employment agreement. However, the Trust Board says that Mr Groves failed to raise a personal grievance within 90 days, as required by s. 114(1) of the Employment Relations Act 2000 (the Act). Given that it is acknowledged that a personal grievance was not raised by Mr Groves (via his solicitor), until 7 April 2011, the parties accept that a preliminary issue requires determination by the Authority. This is: Should the Authority grant leave for Mr Groves to raise a personal grievance after the expiry of the 90 days period?

[2] The matter was heard at an investigation meeting on 6 July 2012 where the Authority received evidence and oral submissions from both parties. In particular, Mr Groves answered relevant questions put to him by the Authority member and he was subjected to some pertinent cross examination by Mr Drake for the Trust Board. Upon consideration of the overall evidence, I gave an oral decision that I was satisfied that exceptional circumstances existed for Mr Groves to raise a personal grievance and that it was just for him to do so. The reasons for the oral decision are now set out in this determination.

The Law

[3] The germane provisions of s.114 of the Act provide that:

- (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 employer wants the employer to address.
- (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.

Was the delay in raising the personal grievance occasioned by exceptional circumstances?

[3] It is commonly accepted that the only real ground available for Mr Groves to argue that the delay in raising the personal grievance was occasioned by exceptional circumstances, is under s.115(c) of the Act:

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; ...

[4] The Trust Board does not dispute that it failed to provide Mr Groves with an employment agreement that contained a “plain language explanation of the services available for the resolution of employment relationship problem” as required by s.65(2)(a)(vi) of the Act.¹

[5] Given the established fact that there was not a legal employment agreement in existence, let alone that meets the requirements of s.65(2)(a)(vi) of the Act; and applying the dicta set down by *Bryson v Three Foot Six Ltd*,² I am satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances.

Is it just to grant leave to raise the personal grievance?

[6] The Trust Board largely argued that it is not just to grant leave to raise the personal grievance on the basis that Mr Groves is an experienced business consultant with an MBA degree and hence he would have sufficient knowledge of the basic requirement to raise a personal grievance within 90 days of becoming aware of such. But under cross examination, Mr Groves provided considered and credible explanations as to his lack of knowledge in regard to the details of the law pertaining to employment relationship problem resolution and the 90 days requirement of s.114 of the Act. Of particular note was the repeated (and credible) assertion by Mr Groves that he had attempted to resolve his issues with the Trust Board by constructive discussion over a period of time before obtaining legal assistance. Mr Groves told the Authority if he had been aware of the requirement to raise a personal grievance within 90 days he most certainly would have done this. I accept that this is most probably so. I also find that on the evidence currently before the Authority, Mr Groves has an arguable case to the extent that it is just that he should have the opportunity to pursue his claims.

Determination

[7] I am satisfied that pursuant to ss.114(4)(a) and 115(c) of the Act, the delay by Mr Groves in raising his personal grievance was occasioned by exceptional

¹ It is accepted that Mr Groves was not provided with an employment agreement.

² [2006] ERNZ 781 at para [51].

circumstances. And on the weight of the evidence that is available to the Authority, I also find, pursuant to s114(4)(b) of the Act, that it is just to grant leave for Mr Groves to raise his personal grievance after the expiry of the 90 days period.

Mediation

[8] Under the provisions of s.114(5) of the Act, where the Authority grants leave under subsection (4), a direction to mediation is required. The parties are directed to use mediation to attempt to mutually resolve Mr Groves' personal grievance. It is expected that the applicant (most probably via Ms Macphail) will contact the mediation service in Hamilton and make the usual arrangements for mediation to occur. Following mediation, it is the responsibility of the applicant to notify the Authority if the problem has been resolved, or alternatively, whether further proceedings within the Authority are required.

Costs: Costs are reserved.

K J Anderson
Member of the Employment Relations Authority