

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 411
5416046**

BETWEEN JASON HAWTHORNE
Applicant

AND RADIOWORKS LIMITED (in
Receivership)
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Freeman, Advocate for Applicant
Clare Bradley, Counsel for Respondent

Investigation Meeting: 22 August 2013 at Auckland

Submissions received: 22 August 2013 from Applicant and from Respondent

Determination: 11 September 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Jason Hawthorne, claims that the restructuring exercise carried out by the Respondent, Radioworks Limited (Radioworks) which resulted in his position being made redundant, was not a genuine process or carried out in a fair and reasonable manner.

[2] Mr Hawthorne applies to the Authority pursuant to s 114(3) of the Act for leave to raise a grievance outside the 90 day time period on the basis that “*exceptional circumstances*” pursuant to s115 and s 115(b) of the Act had occasioned the delay.

[3] Specifically Mr Hawthorne claims that exceptional circumstances exist based on (i) genuine uncertainty about the triggering date, (ii) the intervention of Christmas and New Year, (iii) the lack of prejudice to Radioworks by the additional days, and (iv) the fact that there is a serious question to be tried.

[4] Radioworks claims that the redundancy of Mr Hawthorne’s position was genuine and carried out in accordance with a fair and reasonable process, and opposes Mr Hawthorne’s application for leave to be granted out of time on the basis that it does not accept that Mr

Hawthorne's delay in raising the personal grievance was caused by exceptional circumstances.

[5] Radioworks further claims that all matters between the parties were concluded by a settlement having been reached on 31 October 2012 (the Settlement Agreement), and which was stated to be "in full and final settlement of all claims either party might have against the other such as to constitute accord and satisfaction.

Issues

[6] The issues for determination are whether:

- Mr Hawthorne's personal grievance has been raised outside the 90 day statutory time period pursuant to s. 114 (1) of the Act, and if so, should leave be granted to raise the personal grievance out of time
- the Settlement Agreement reached on 31 October 2012 constituted a valid settlement between the parties such that there has been full and final settlement of all claims, and accord and satisfaction between the parties.

Background Facts

[7] Mr Hawthorne commenced employment with Radioworks as a Network Sales Consultant on 1 July 2008. Mr Hawthorne was employed pursuant to a written individual employment agreement (the Employment Agreement) which he signed on 5 May 2010.

[8] Clause 13 of the Employment Agreement headed 'Standard Terms of Employment' stated:

General conditions of your employment are governed by the Company's Standard Terms of Employment, as amended from time to time, which form a part of this employment agreement. You are required to read and comply with these Standard Terms of Employment, and all other policies and procedures of the Company applicable from time to time during the entire term of your employment with the Company and any breach thereof shall be deemed a breach of this agreement.

[9] Mr Hawthorne confirmed that he had taken legal advice before signing the Employment Agreement.

[10] The Standard Terms of Employment in force at the time of the commencement of Mr Hawthorne's employment with Radioworks provided an explanation of the procedure to be followed in the event of employment relationship problems, and advised that the employee should: "*Raise the matter as soon as possible with your Manager. Personal grievances must be raised within 90 days of the matter arising or coming to your attention*".

Restructure exercise

[11] On 1 October 2012 Mr Hawthorne attended a meeting which had been called by Radioworks to address a restructuring proposal for the Network Sales team of which he was a member. The rationale for the restructuring was confirmed in a letter copied to Mr Hawthorne dated that same day, 1 October 2012.

[12] The letter advised that the existing sales positions were being considered and assessed as to their ability to deliver growth and innovation: "*in a rapidly evolving environment*". As a result of this process it was anticipated that new positions would replace the existing Network Sales Consultant positions: "*We would like to propose that the traditional Account Managers' role evolves into a new breed of client focused, campaign lead, strategic 'National Media Consultant – Radio, Online and Branded Content.'*" Attached to the letter was a proposed job description for the new National Media Consultant role. The letter concluded:

Due to this process having possible employment consequences you should take advice and feel free to involve a representative in our future meetings. If ultimately it transpires that your position is redundant then, of course, we will want to agree a redundancy compensation package with you which we can discuss at our next meeting".

[13] At a further meeting to discuss the proposed restructuring held the following day, 2 October 2012, Mr Hawthorne said he had been vocal in his views that he did not consider his position to have been affected by the restructuring.

[14] Mr Hawthorne had subsequently applied for the proposed new National Media Consultant position, however he had been advised by letter dated 25 October 2012 that he had not been successful. The letter advised that Radioworks would like to meet with him to discuss the terms of a redundancy package.

[15] The letter dated 25 October 2012 stated that Mr Hawthorne was entitled to notice: “*plus redundancy compensation of two weeks’ pay for each complete year of service to a maximum of 8 weeks’ notice.*” The entitlements were set out in a table which stated:

<i>Departure date</i>	<i>31 October 2012</i>
<i>Notice (paid in lieu) of one month’s salary paid upon departure date</i>	<i>\$8,001.00*</i>
<i>Redundancy compensation of eight (8) weeks</i>	<i>\$16,002.00*</i>
<i>All outstanding annual leave</i>	
<i>10% commission on November 2012 sales (to be paid 1 Dec 2012)</i>	
<i>10% commission on December 2012 sales (to be paid 1 Jan 2013)</i>	
<i>*these figures are an estimate only and are based on your earnings for the last 12 months of \$104,018.00</i>	

[16] Mr Hawthorne said he had taken legal advice on 26 October 2012 and at that time had been advised, and had formed a view, that he had a personal grievance for unjustifiable dismissal.

[17] Mr Hawthorne said that he had decided not to pursue a personal grievance claim at that date as he believed that Radioworks still wanted to work through him in connection with the clients for whom he had been responsible at Radioworks.

[18] On 29 October 2012 Mr Hawthorne sent an email to Ms Wendy Palmer, Regional Manager, and Mr Matt Headland, Network Sales Manager, requesting a meeting the following day to discuss an attached letter.

[19] The attached letter dated 29 October 2012 addressed to Ms Palmer and Mr Headland and signed by Mr Hawthorne, contained a similar table to that of the letter dated 25 October 2012 sent by Radioworks to Mr Hawthorne, but proposed: “*in order to maintain the excellent rapport I have with Mediaworks*” that the redundancy payment amount of \$16,002.00: “*be viewed as ‘compensation’ for the loss incurred by this redundancy, however I wish it to be identified as being a payment in lieu of s.123(1)(c)(i) of the ERA 2000 and paid ex-gratia*”.

[20] The letter further proposed that the 10% commission payments in respect of the sales for November and December 2012 both be made on the earlier date of 31 October 2012.

[21] Ms Palmer said that she and Mr Headland had met with Mr Hawthorne on 30 October 2012 and agreement had been reached on the payments to be made in respect of the termination of his employment.

[22] Following the meeting Ms Palmer said she had sent a letter to Mr Hawthorne confirming the agreed payments. The letter to Mr Hawthorne dated 1 November 2012 stated:

Dear Jason,

As discussed in our recent meetings we would like to mutually agree to settle all matters arising from the redundancy of your role.

Jason, this offer to settle can be accepted by you within the next two (2) days (by close of business 2 Nov 2012) if it is not accepted then it will be withdrawn.

We have agreed the following:

<i>Departure date</i>	<i>31 October 2012</i>
<i>October commissions as contracted</i>	
<i>Notice (paid in lieu) of one month's salary paid upon departure date/Redundancy</i>	<i>\$9,671.03 gross*</i>
<i>Payment without deduction as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000</i>	<i>\$15,000.00</i>
<i>All outstanding annual leave</i>	
<i>10% commission on November 2012 bookings (to be paid 15 Nov 2012)</i>	
<i>10% commission on December 2012 bookings (to be paid 1 Dec 2012)</i>	

Please sign your acceptance to this on the duplicate of this letter to confirm that this settles all aspects of your employment.

[23] Ms Palmer said she had not received a signed copy of the letter from Mr Hawthorne, however as it had been agreed in the meeting on 30 October 2012 that Mr Hawthorne would be paid on 31 October 2012, and she had no reason to believe that Mr Hawthorne had been unhappy with what had been discussed, she had instructed the Radioworks payroll department to make the agreed payments to Mr Hawthorne.

[24] The amounts in respect of notice and compensation had been paid to Mr Hawthorne on 31 October 2012.

[25] Mr Hawthorne said he had not agreed to the terms of the letter, and therefore he had not signed and returned it. Mr Hawthorne confirmed that he had received the notice and compensation payments as stated in the letter from Radioworks dated 1 November 2012, and that he had not returned these payments to Radioworks.

Events following 31 October 2012

[26] Ms Palmer said that, following 31 October 2012, she had received text messages from Mr Hawthorne concerning the delayed payment of the commission payments; however there had been no mention that he was raising a personal grievance for unjustifiable dismissal.

[27] Ms Palmer said that the commission payments as agreed had been paid, albeit late, but nonetheless being paid in November and December 2012. Ms Palmer said that Mr Hawthorne had retained the commission payments.

[28] Mr Hawthorne said that on 14 November 2012 he had informed Ms Palmer and Mr Headland that he had formed an agency, Trigger Limited, and that he wanted to continue to service some of the clients he had dealt with during his employment with Radioworks through this company.

[29] Ms Palmer said that there had been a meeting between Radioworks and Mr Hawthorne in connection with his proposal concerning Trigger Limited, however although there had been further discussions between the parties after this date, the arrangements had not been finalised.

[30] Throughout the discussion period Ms Palmer said Mr Hawthorne had not mentioned that he had been unhappy about the manner in which his employment had ended; nor had he

mentioned that he intended to raise a personal grievance in respect of the termination of his employment.

[31] Mr Hawthorne confirmed that he had not raised a personal grievance with Radioworks during the discussion period regarding the engagement of Trigger Limited as he had not wanted to: “*rock the boat*”.

[32] On 28 February 2013 Radioworks received a letter from Mr Hawthorne’s legal counsel raising a personal grievance for unjustifiable dismissal.

Determination

Has Mr Hawthorne’s personal grievance been raised outside the 90 day statutory time period pursuant to s. 114 (1) of the Act, and if so, should leave be granted to raise the personal grievance out of time?

[26] Section 114 of the Act is the section governing the raising a personal grievance. Section 114 of the Act states:

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.*

[33] Mr Hawthorne said he had taken legal advice in connection with the termination of his employment on 26 October 2012 and confirmed at the Investigation Meeting that he had formed a view at that date that he had a personal grievance for unjustifiable dismissal.

[34] Mr Hawthorne had been informed on 25 October 2012 that the decision had been made to terminate his employment, and on 31 October 2012 his employment had ended.

[35] Mr Hawthorne had 90 days from the date on which the action alleged to amount to a personal grievance came to his notice, or occurred. Taking the earlier date of 26 October

2012 as the date when the action alleged to amount to a personal grievance came to his attention, Mr Hawthorne had until 24 January 2013 to raise a personal grievance.

[36] Alternatively taking the late date of 31 October 2012 as the appropriate date, being the date when the action alleged to amount to a personal grievance occurred, Mr Hawthorne had until 28 January 2013 to raise a personal grievance.

[37] I find that irrespective of which date is adopted as the appropriate date from which to calculate the start of the 90 day period, the letter dated 28 February 2013 raising the personal grievance is significantly outside the 90 day period.

[38] Mr Hawthorne is applying for leave to raise his personal grievance outside the 90 day statutory time period.

[39] An employee who has failed to raise a personal grievance within 90 day time limit and the employer has refused to grant leave for it to be raised out of time, may apply to the Authority to raise a personal grievance out of time as set out in s 114 (3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it :

- i. *is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances*
- ii. *considers it just to do so*

[40] In regards to the first limb of the test, ‘exceptional circumstances’, the meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune*¹ as being those which are “*unusual, outside the common run, perhaps something more than special and less than extraordinary*”².

[41] The exceptional grounds upon which Mr Hawthorne seeks to apply are:

- i. Uncertainty about the triggering date
- ii. The intervention of the Christmas/New Year period and consequent closure of legal offices

¹ [1998] 2 ERNZ 70

² [1998] 2 ERNZ 70

Uncertainty about the triggering date

[42] Mr Hawthorne said that whilst he had been aware that he needed to raise a personal grievance within 90 days, he had believed that the 90 day statutory period would commence at the end of his contractual notice period i.e. at the end of November 2012.

[43] Section 114 (1) of the Act states clearly the events which will trigger the commencement of the 90 day period. I do not accept that in light of this section there is uncertainty about the triggering date, or that any uncertainty about the triggering date would constitute an exceptional circumstance. Moreover I observe that Mr Hawthorne had taken legal advice about the termination of his employment from an experienced practitioner.

Intervention of the Christmas and New Year period and consequent closure of legal offices

[44] Section 114 of the Act does not make provision for the filing of a personal grievance outside the 90 day period if some of that period happens to coincide with the Christmas and New Year period. Further I note that the 90 day statutory period extended a significant time after the New Year period.

[45] I do not accept that in light of this section that the intervention of the Christmas and New Year period acts to extend the statutory 90 time period, or that it constitutes an exceptional circumstance. Moreover I observe that Mr Hawthorne had taken legal advice about the termination of his employment from an experienced practitioner.

[46] I determine that the 'exceptional limb' part in s 114(4) of the Act has not been met, and I therefore proceed to consider whether it is just in all the circumstances to grant Mr Hawthorne leave to raise the grievance out of time.

Just to grant leave

[47] When considering this issue Mr Hawthorne submits that there is no prejudice to Radioworks in the additional days and/or that there is a serious question to be tried.

[48] I observe that Mr Hawthorne's personal grievance had not been raised until 28 February 2013, almost one month after the expiry date of the statutory 90 period.

[49] During the period from 31 October 2012 when Mr Hawthorne's employment had terminated until 28 February 2013 when the personal grievance had been raised, Mr Hawthorne had :

- received the payment in respect of notice in lieu and compensation under s 123(1)(c)(i) of the Act relating to the termination of his employment as stated in the Radioworks letter dated 1 November 2012 on 31 October 2012, and he had not returned these amounts;
- contacted Radioworks about the late payments of his commission amounts making no mention of his concerns or that he would be raising a personal grievance in connection with the termination of his employment;
- engaged in discussions throughout November 2012 with Radioworks regarding a future role for Trigger Limited during which discussions he had made no mention of his concerns or that he would be raising a personal grievance in connection with the termination of his employment; and
- received the commission payments as stated in the Radioworks letter dated 1 November 2012 on 31 October 2012, and he had not returned these amounts.

[50] Mr Hawthorne has not specified what serious question arises in this matter. This is an area in which the law is well established and I do not find that a serious question arises *per se*.

[51] Moreover I find that the evidence traversed during the Investigation Meeting process pointed to Mr Hawthorne having been aware from legal advice received on 26 October 2012, and as a result of the information contained in the Standard Terms of Employment, of the requirement to raise a personal grievance within 90 days, but that he had chosen not to do so in a timely manner due to his belief that it might adversely affect the possibility of Trigger Limited being engaged by Radioworks.

[52] Having considered all the circumstances I find that the overall justice of the matter rests with Radioworks.

[53] I determine that Mr Hawthorne should not be granted leave to raise a personal grievance outside the 90 day statutory time period pursuant to s. 114 (1) of the Act.

Does the Settlement Agreement reached 31 October 2012 constitute a valid settlement between the parties such that there has been full and final settlement of all claims, and accord and satisfaction between the parties?

[54] I have determined that Mr Hawthorne did not raise his personal grievance within the statutory 90 day time period, and that he should not be granted leave to raise the personal

grievance outside the 90 day statutory time period, and therefore I do not find that it is necessary for me to address this issue. However I shall proceed to do so for the sake of completeness.

[55] In *Cabletalk Astute Network Services Limited v Cunningham*³ Judge Shaw set out the classic definition of accord and satisfaction, defined in the case of *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd*⁴ as:

Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of valuable consideration, not being the actual performance of the obligation itself.

[56] Chief Judge Colgan in *Graham v Crestline Pty Limited*⁵ explained that⁶

whether accord and satisfaction has been made is a question of fact requiring a finding of a meeting of the parties' minds or that one of them must act in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of the claim.

[57] I find that the Settlement Agreement was reached on the basis that in relation to Mr Hawthorne it resolved: “*all matters arising from the redundancy of your role*”.

[58] In reliance on the Settlement Agreement Radioworks paid not only the notice and compensation payments as stated in the letter dated 1 November 2012, but in further reliance on the Settlement Agreement Radioworks completed the payments in respect of the commission payments earned by Mr Hawthorne during November and December 2012.

[59] Mr Hawthorne has retained all of these payments and I find that his doing so constitutes his acceptance of the terms reached in the Settlement Agreement on 31 October 2012 as being a full and final settlement of all matters arising from the termination of his employment by way of redundancy, such that there has been accord and satisfaction.

[60] Notwithstanding my findings in paragraph 53, I determine that Mr Hawthorne is precluded by virtue of the Settlement Agreement from taking his claim any further.

³ [2004] 1 ERNZ 506

⁴ [1933] 2 KB 616, at 643-644

⁵ [2006] ERNZ 848

⁶ Ibid at para [49]

Costs

[61] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority