

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 450
5337216

BETWEEN	KAREN CHERYL DEAN HEREWINI Applicant
A N D	TE PUNA ORA O MATAATUA CHARITABLE TRUST Respondent

Member of Authority: K J Anderson

Representatives: A Hope, Counsel for Applicant
T Hipkiss, Advocate for Respondent

Investigation Meeting: On consideration of the papers

Date of Determination: 12 December 2012

DETERMINATION OF THE AUTHORITY

The preliminary matter

[1] Via a statement of problem received by the Authority on 16 February 2012, the applicant, Ms Herewini alleges that she was unjustifiably dismissed on 13 August 2010. Ms Herewini also alleges that she was disadvantaged in her employment by various unjustifiable actions by her employer; albeit at face value, it appears that the latter claim may be more appropriately treated as a component of the former.

[2] However, the respondent, Te Puna Ora O Mataatua Charitable Trust (the Trust) says that the action that Ms Herewini complains of (alleged unjustifiable dismissal) occurred on 13 August 2010, when her employment ended by reason of redundancy; but a personal grievance was not raised until 17 November 2010. The respondent says that as 94 days elapsed from the date of the dismissal, Ms Herewini

raised her grievance out of time, in that it does not comply with the 90 days requirement of s.114(1) of the Employment Relations Act 2000 (the Act).

[3] The statement of problem filed for Ms Herewini appears to anticipate that an issue would arise in regard to the 90 days requirement, as in addition to setting out the matter of the two grievances, an order is sought (at para 1.3):

[... granting the applicant leave to raise her personal grievance out of time, or

1.4 In the alternative the applicant seeks a declaration that she raised her grievance by her letter dated 4th October 2010 to the respondent.¹

[4] The outcome of a conference call with the parties is that it is agreed that the Authority will determine the 90 days issue as a preliminary matter “on the papers.” Affidavits for the applicant and submissions for the respondent have been provided.

Discussion

[5] Section 114(1) of the Act requires an employee to raise a personal grievance within 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 grievance being raised after the expiration of the 90 day period. The Trust does not consent to the grievance being raised out of time.

[6] While the Trust says that the grievance was raised 94 days after the 13 August 2010, that is 17 November 2010, by my calculation, the grievance was raised 96 days after 13 August 2010; but in any event, the argument for the respondent remains the same.

[7] While there has been very little submitted in support of Ms Herewini’s application to be granted leave to raise her grievance out of time, it seems that on the basis of the affidavits provided, Ms Herewini relies on s.115(b) of the Act, in that there is an exceptional circumstance:

Where the employee made reasonable arrangements to have the grievance on his/her behalf by an agent of the employee, and the

¹ While it has not been necessary to determine this alternative ground, I do make the observation that the content of this letter is (most probably) not sufficient to raise a personal grievance.

agent unreasonably failed to ensure that the grievance was raised within the required time;

[8] In her sworn affidavit Ms Herewini refers to meeting with her (then) lawyer, Ms Paula Sullivan, on 26 October 2010. Ms Herewini attests that she told Ms Sullivan that she wanted to pursue a personal grievance against the Trust. Ms Herewini also attests to providing Ms Sullivan with a [“...more detailed account of my unfair treatment ...”]. This written account is attached to the statement of problem and is a quite comprehensive summary. The evidence of Ms Herewini is that she only became aware in early December 2010, that Ms Sullivan had failed to raise the grievance in time.

[9] The Authority has received a sworn affidavit from Ms Paula Sullivan in which she confirms Ms Herewini’s account of meeting on 26 October 2010. Ms Sullivan also acknowledges that she was instructed to raise a personal grievance with the Trust on behalf of Ms Herewini. Ms Sullivan attests that she prepared a personal grievance letter and spoke to Ms Herewini on 16 November 2010; obtaining her approval of the content. The letter was sent to the Trust on 17 November 2010. But of course, this was outside the 90 days time limit required by the Act.

The submissions for the Trust

[10] The Trust submits that in addition to its primary position that the grievance has been raised out of time, Ms Herewini entered into a “*Separation Agreement*” and she received consideration in the form of a one-off payment of \$3,500, over and above any entitlements due to her, when her employment came to an end on the grounds of redundancy. The purported agreement has been produced to the Authority. It is unsigned and I do not know if a signed version exists. And, the circumstances relating to this document, and/or its intended effect, are unclear. It may, in due course, transpire that the contractual status of this document becomes relevant to the substantive investigation of the Authority. But given the current lack of clarity, I am unable to accord it any particular weight in determining this preliminary matter.

Determination

[11] Pursuant to s.114(4) of the Act, I am satisfied that the delay in raising Ms Herewini’s personal grievance was occasioned by exceptional circumstances. This is because the circumstances fall within s.115(b) of the Act; whereby Ms Herewini

made reasonable arrangements to have the grievance raised on her behalf by her lawyer (agent); but Ms Sullivan failed to ensure that the grievance was raised within the required time.

[12] Further, in considering if it is just to grant leave for the grievance to be raised out of time, while the contractual status of the “*Separation Agreement*” referred to by the Trust may be arguable, I conclude that this is a matter that will require closer analysis in a substantive hearing.

[13] For the purposes of deciding this preliminary matter, I consider that further to the existence of exceptional circumstances, it is also just to grant leave to Ms Herewini to raise her grievance after the expiration of the 90 day period, as there is nothing tangible to suggest that her claims are so lacking in merit that they should not be investigated and determined by the Authority.

Direction to mediation

[14] Pursuant to s114(5) of the Act, given that leave to raise a grievance after the expiration of the 90 days period has been granted, the parties are directed to participate in mediation and attempt to mutually resolve the grievance. A copy of this determination, along with the statement of problem and statement in reply, shall be provided to the Mediation Service in Hamilton, who will contact the parties in due course to discuss appropriate arrangements for mediation to occur.

Costs

[15] Costs are reserved.

K J Anderson
Member of the Employment Relations Authority