

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 183/10  
5305246

BETWEEN                      SARAH HOWES  
   Applicant  
  
AND                                BON TON LIMITED  
   Respondent

Member of Authority:      G J Wood  
  
Representatives:            Briony Howes for the Applicant  
   Jennifer Souness for the Respondent  
  
Investigation Meeting:     11 November 2010 at Wellington  
  
Submissions Received:    11 November 2010  
  
Determination:              15 November 2010

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**DETERMINATION OF THE AUTHORITY**

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**The Issues**

[1] This determination is about whether the applicant, Ms Sarah Howes, is precluded from bringing personal grievances for unjustified actions to her disadvantage and unjustified constructive dismissal. The respondent, Bon Ton Limited, resists these claims as being out of time, the first time the grievances were raised being over 120 days after Ms Howes resigned, which is outside the 90 days provided for in the Act. Ms Howes claims that the delay was caused by exceptional circumstances because she was not aware of the time limit.

[2] Whatever the outcome of this case, Ms Howes still has claims that she was not paid properly for work done on public holidays; that her holiday pay was not fully paid to her; that she suffered a loss by not being placed on Kiwi Saver even though she had authorised that; and that her pay was unilaterally reduced.

[3] The issues for determination here are whether the delay in raising the grievances was occasioned by exceptional circumstances and whether it is just for the Authority to hear and determine the personal grievances despite the delay.

### **Factual Discussion**

[4] After Ms Howes had been associated with Bon Ton for a while she was employed as its manager, commencing towards the end of July or the beginning of August 2008. Around this time there were a number of discussions about the terms of her employment contract, and a draft was discussed between the parties. While Ms Howes denies ever seeing the copy of the draft only recently provided to her and the Authority, I conclude that this difference of view is not important for the determination of this case.

[5] The draft employment agreement provided by Bon Ton provides for personal grievance and disputes procedures at clause 18. It states:

*The procedure for settlement of personal grievances and disputes concerning the interpretation, application, or operation of this contract shall be as referred to in the First and Second Schedules to the Employment Contracts Act 1991.*

[6] For reasons that are in dispute Ms Howes resigned as manager on 23 November 2009, with effect from 6 December, as stated in a letter dated 20 November. In that letter she raised a number of concerns about her pay, amongst other things. In December she was paid \$1,000 which was described by Bon Ton in bank records, for whatever reason, as a bonus. It now claims the payment was made to cover issues such as holiday pay and other issues addressed in the letter.

[7] Bon Ton heard no further from Ms Howes until she raised grievances through her sister on 20 April 2010, some five months after she resigned and therefore well outside the 90 day time limit set out in the Act for even the freshest grievance claim of unjustified dismissal. I accept that Ms Howes was unaware of her obligation to raise grievances within 90 days until she received advice to that effect in April 2010, and that she acted promptly thereafter to raise her grievances.

[8] On 27 May, Bon Ton responded rejecting the grievances of unjustified disadvantage and dismissal on the basis that they were out of time. However, on behalf of Bon Ton, Ms Souness accepted in evidence that there was no reason that Bon Ton could not properly defend Ms Howes' grievances on their merits.

[9] The parties having been unable to resolve the issues between them, it therefore falls to the Authority to determine the matter.

### **The Law**

[10] Section 65 of the Act requires that any individual employment agreement must be in writing and must include a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in s.114 within which a personal grievance must be raised. Such services include mediation and recourse to the Employment Relations Authority.

[11] Section 114 provides that grievances must be raised 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 later, unless the employer consents to the personal grievance being raised after the expiration of that period. However, on application, the Authority may grant leave for an applicant to raise a personal grievance after the expiration of the 90 day period despite an employer's refusal to consent, if the Authority is satisfied that the delay in raising the personal grievance 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.

[12] Section 115 provides that exceptional circumstances include where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s.65. As the Supreme Court made clear in *Creedy v. Commissioner of Police* [2008] ERNZ 109, where one of the grounds of s.115 is proven then exceptional circumstances have been made out.

[13] Furthermore, in any case where the Authority grants leave, it must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

### **Determination**

[14] Clearly, even the draft employment agreement provided (which may or may not have been sighted by Ms Howes in that form) did not contain the plain language explanation of the services available for the resolution of employment problems, and most particularly, did not contain any reference to the period of 90 days within which

a personal grievance must be raised. In fact, the only relevant clause referred to was well out-of-date at the time the parties entered into the employment agreement and even more so by the time of termination. Exceptional circumstances have, therefore, been made out.

[15] Given that I accept Ms Howes' evidence that she was unaware of the time limit and that she acted promptly to raise a grievance once she found out about it, then it follows that the exceptional circumstances occasioned the delay in raising the grievances.

[16] As Ms Souness accepted that Bon Ton was able to defend the grievances on their merits, no issue of prejudice to Bon Ton arises. In these circumstances I conclude that it is just to allow Ms Howes to bring her grievances out of time and have them determined on their merits.

[17] I therefore direct the parties, Ms Sarah Howes and Bon Ton Limited, to mediation where the parties must attempt in good faith to reach an agreed settlement of all their differences, including those not involving personal grievance claims.

**G J Wood**  
**Member of the Employment Relations Authority**