

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Russell Ernest Hyslop (Applicant)
AND Danube Southern Limited (Respondent)
REPRESENTATIVES Russell Ernest Hyslop in person
Len Andersen, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 18 April 2005
DATE OF DETERMINATION 27 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Russell Hyslop and Lindsay Clark have known each other for many years. In 1997 they commenced a business relationship. In 2000, Mr Hyslop and his family moved into temporary accommodation in a building in Dunedin called Cargill House that was being redeveloped as part of their business relationship. On 30 October 2002, the business relationship ended acrimoniously, Mr Hyslop and his family were evicted from Cargill House, Mr Hyslop was served with a trespass notice and he was summarily dismissed.

[2] On 5 June 2003, Mr Hyslop lodged a statement of problem in the Authority in which he identified a company, Danube Southern Limited (DSL), as his employer and the respondent to an employment relationship problem arising from the dismissal. As Mr Hyslop then recognised, his intended personal grievance claim had not been raised with his employer within 90 days commencing on 30 October 2002 so he sought leave to raise a grievance out of time. He also sought to recover arrears of holiday pay against his employer.

[3] In his original application, Mr Hyslop raised the possibility that Mr Clark personally was his employer at relevant times. That issue has not yet been determined. Its resolution makes no difference to the aspect of the problem which is resolved by this determination. The current proceedings under the Employment Relations Act 2000 are but a small part of Mr Hyslop's attempts to resolve his differences with Mr Clark arising from their business relationship. Those attempts include High Court proceedings which are now on appeal to the Court of Appeal. There remains the possibility that the parties will resolve all their differences without further litigation.

[4] While the direction to the parties (consistent with Mr Hyslop's statement of problem) was that the meeting would only investigate Mr Hyslop's application for leave to raise a grievance out of time, Mr Hyslop contended at the meeting that leave was not required because he had raised the grievance within time. Accordingly, in this determination I will first review the actions taken by

Mr Hyslop to see if he did raise his grievance within time. If he did not, I will outline the law relating to applications for leave and apply the law to the facts of this case as found.

Was the grievance raised within time?

[5] The High Court has found that issues between Mr Hyslop and Mr Clark about their legal relationship came to a head during the Cargill House project. Mr Hyslop considered there was a partnership and wanted to secure his position, whereas Mr Clark considered Mr Hyslop was only an employee. Mr Hyslop rejected a settlement offer from Mr Clark and then lodged a caveat against the Cargill House title. That had serious implications for the redevelopment of the property. After mediation failed, DSL dismissed Mr Hyslop and he was evicted from the property.

[6] Mr Hyslop gave me a copy of a letter dated 24 October 2002 from his solicitors to Mr Clark's solicitors. It refers to earlier correspondence and the *purported suspension of his* [Mr Hyslop's] *employment*. It then refers to correspondence dated 10 October 2002 and says *You have also purported to suspend our client's employment. This is a fundamental misunderstanding. Our client is not an employee of Mr Clark or any of his companies. He draws a salary by way of advance against the share of Partnership profits accruing to his family trust. He cannot be suspended by Mr Clark as this constitutes one partner purporting to exercise control over the other*. The text of the letter appears to contradict Mr Hyslop's current claim that he was an employee but Mr Hyslop sought to reconcile that by saying that DSL was never one of Mr Clark's companies. I disagree with the attempted rationalisation. At the time, Mr Hyslop was at pains to point out that the substance of his business relationship with Mr Clark was a partnership rather than engagement as an employee of DSL. The letter explained the circumstances by which the relationship had taken the form of employment of Mr Hyslop by DSL without disturbing the continuance of the partnership.

[7] Mr Clark's solicitors replied by a letter dated 29 October 2002. That letter denies the existence of any partnership and gives notice of dismissal *forthwith* to Mr Hyslop. The letter was personally delivered to Mr Hyslop on 30 October 2002 along with the trespass notice.

[8] There was a without prejudice mediation between the parties over the breakdown in their business relationship but that did not resolve the problems. The mediation did not involve the Department of Labour mediation service but was the type of mediation common in commercial disputes. There is no evidence that the personal grievance was raised during the mediation process. Mr Hyslop lodged proceedings in the High Court on 20 December 2002 in which he (and associated interests) claimed that a partnership existed between him (or the associated interests) and Mr Clark. The High Court eventually decided that a partnership did exist between Mr Clark and Libra Investments Limited (a company owned by Mr Hyslop's family trust) in respect of various property developments, including Cargill House.

[9] Mr Hyslop lodged a statement of problem in the Authority on 5 June 2003 which was served on Danube Southern Limited soon after. I find that Mr Hyslop raised his grievance with his employer in this manner, about 7 months after the dismissal.

[10] I reject Mr Hyslop's suggestion that he raised his personal grievance in the letter dated 24 October 2002. First, the letter preceded the dismissal so it is difficult to see how a dismissal personal grievance could be raised before it occurs. More significantly, the letter expressly denies that Mr Hyslop was an employee. There is no mention of a personal grievance claim although the letter advances the commercial dispute between Mr Hyslop (or associated interests) and Mr Clark. It must have been thought by Mr Clark with expert advice at the time that asserting a claim only able to be made by an employee undermined or drew attention away from his commercial dispute based on the existence of a partnership. I take from the 24 October 2002 letter and the surrounding

circumstances that Mr Hyslop made a deliberate choice not to raise a personal grievance for such tactical reasons.

[11] Mr Hyslop told me that there were verbal communications between his solicitors and Mr Clark's over this time. They no doubt discussed the commercial dispute, but there is no evidence that a personal grievance was raised.

[12] Mr Hyslop sees significance in some of his actions being in his capacity as a trustee of his family trust. The distinction is material in respect of the partnership arrangements, because of Mr Hyslop's (now discharged) bankruptcy and Libra Investments Limited's striking from (but restoration to) the register of companies. His employment by the partnership and subsequently Danube Southern Limited, the dismissal and therefore the personal grievance claim must be in his personal capacity. But that is no reason to place any different construction on events. For example, it does not matter whether Mr Hyslop personally, or in his capacity as trustee or on behalf of Libra Investments Limited instructed his solicitors to write the letter dated 24 October 2002. The letter still contained the assertion from Mr Hyslop that he was not an employee.

[13] Accordingly, I find that Mr Hyslop did not raise his personal grievance until June 2003. His personal grievance can only be dealt with on its merits if the employer consents (which it does not) or with leave in accordance with sections 114 and 115 of the Employment Relations Act 2000.

Delay occasioned by exceptional circumstances?

[14] Section 114 (4) of the Act provides that the Authority may grant leave if satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it is just to grant leave. Section 115 sets out a non-exhaustive list of exceptional circumstances.

[15] In his statement of problem, Mr Hyslop seeks leave because he was evicted on 30 October 2002 without his personal possessions, which were held by Mr Clark until they (or at least most) were dumped outside Cargill House at the beginning of March 2003. At the investigation meeting, Mr Hyslop also said that he was in a state of upheaval over this time. That claim tends to invoke section 115 (a) of the Act.

[16] I find that the cause of the delay in raising the grievance is the decision to concentrate on the High Court partnership proceedings as explained above. I accept that Mr Hyslop was in a state of turmoil after 30 October 2002, but he was able to commence those proceedings less than two months after the dismissal. He no doubt had the same capacity to raise a personal grievance claim if he had thought at the time that it was appropriate to do so. The delay was not occasioned or caused by Mr Hyslop's summary dismissal, eviction and dispossession from his property.

Conclusion

[17] There is no basis to grant leave for Mr Hyslop to raise his grievance out of time and this application must be declined.

[18] Costs are reserved.

[19] The claim for arrears of holiday pay and the correct identity of Mr Hyslop's employer remain for future investigation. However, as we discussed at the investigation meeting, the commercial dispute may yet be resolved between the parties. Also, the arrangement between the parties about accounting for Mr Hyslop's salary (presumably including holiday pay) may mean that there is little practical point in a determination on the holiday pay alone. The respondent (Mr Clark – the

appellant from the High Court judgment) should advise the Authority as soon as a date is set for the hearing of that appeal and the Authority will then consider an investigation into the remaining claims.

Philip Cheyne
Member of Employment Relations Authority