

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 52/09
5136613

BETWEEN TIMOTHY JENKINSON
Applicant

AND B O T OF BAYVIEW
PRIMARY SCHOOL
Respondent

Member of Authority: James Wilson

Representatives: Andrew Hooker for the applicant
Richard Harrison for the respondent

Investigation Meeting: Determined on the papers

Submissions received: 4 November 2008 from the applicant
19 November 2008 from the respondent

Determination: 17 February 2009

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY MATTER**

Timothy Jenkinson's employment relationship problem

[1] Mr Timothy Jenkinson says that he was unjustifiably constructively dismissed from his position as Principal of the Bayview Primary School, on or about 30 August 2006. However his employer, the Board of Trustees of the school, (the Board/Bayview Primary) says that Mr Jenkinson did not raise a personal grievance within the 90 days provided for in the Employment Relations Act 2000 (the Act) and have declined to consent to his grievance being raised out of time.

[2] Mr Jenkinson asserts that he did raise his personal grievance with the Board within the 90 day time limit and is not therefore required to make application for leave to raise the grievance out of time. However in the event that the Authority determines

that his grievance was not raised Mr Jenkinson has made application, in the alternative, in accordance with s.114(3) of the Act, for leave to raise the grievance out of time

[3] The parties have agreed that, as a preliminary matter, the Authority should determine whether or not Mr Jenkinson raised his grievance within the 90 day time limit or, in the alternative whether he should be granted leave to raise the personal grievance out of time.

The relevant legal considerations

[4] The Employment Relations Act, at section 114(1), requires that when an employee wishes to raise a personal grievance they must *raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action occurred or came to the notice of the employee... unless the employer consents to the personal grievance being raised after the expiration of that period.*

[5] In this case the Board says that Mr Jenkinson did not raise his grievance within the 90 day period and have not consented to his grievance being raised out of time. In the event that the Authority accepts that Mr Jenkinson did not raise his grievance he has applied, in terms of s. 114(3), for leave to raise the grievance out of time. S.114(4) requires that when the Authority receives an application for leave under s.114(3) it may grant leave if it:

- 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.*

Section 115 says:

115 Further provision regarding exceptional circumstances under s.114

For the purposes of section 114(4)(a), exceptional circumstances include -

(a) ...

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or...

(c)...

(d) ...

[6] The Supreme Court addressed the provisions of section 114 in ***Creedy v. the Commissioner of Police*** (SC 57/2007 [2008] NZSC 31, 23 April 2008). In particular at para [29]

Mr Creedy had an agent, Mr Barraclough. Section 115(b) is therefore relevant. On any view of the present facts they do not come within either limb of that paragraph. Mr Creedy did not make any arrangements with Mr Barraclough to raise a grievance on his behalf grounded on his departure from the police, and Mr Barraclough cannot therefore be said to have failed unreasonably to ensure that it was. There is no evidence that Mr Creedy ever told Mr Barraclough that he wanted to challenge his departure or even that Mr Barraclough was still acting for him 90 days after it.

And at para [31]

*In Wilkins and Field, the Court of Appeal treated "exceptional circumstances" as those which are unusual, outside the common run, perhaps something more than special and less than extraordinary. This formulation appears to combine two different meanings, the first that of being unusual ("exception to the rule") and a second and more stringent interpretation of somewhere between special and extraordinary. **For a number of reasons, we prefer the first meaning.** (emphasis added)*

and then at para [33]

Having said that, we also emphasise that Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only as exceptional circumstances are truly established and, in addition the overall justice of the case (which includes taking account of the position of an employee facing a late claim) so requires.

The issues for determination

[7] Taking into account s.114 and s.115 of the Act and the comments of the Supreme Court in *Creedy*, the issues which I must determine are:

- (i) Did Mr Jenkinson *make, or take reasonable steps to make*, his employer aware of his alleged personal grievance within the statutory 90 day time limit.
- (ii) If Mister Jenkinson did not raise his grievance with his employer within the requisite 90 days was that delay *occasioned by exceptional circumstances* and in particular
- (iii) Did Mr Jenkinson *make reasonable arrangements to have his grievance raised by his agent* (Ms Cole) and did Ms Cole *unreasonably fail to ensure that that grievance was raised* within the required time

and finally,

- (iv) if exceptional circumstances did exist *is it just* to grant leave to Mr Jenkinson to raise his grievance out of time.

What did the various parties do?

The steps Mr Jenkinson took

[8] Mr Jenkinson says that shortly after he was *forced to resign* he approached Ms Cole for advice and assistance. He says he met with Ms Cole on 13 September 2006 and after a meeting lasting almost 2 hours Ms Cole dictated a letter over the phone (apparently to her secretary). He says that his recollection is that this letter set out the nature of his grievance and claimed constructive dismissal. Although he did not see a copy of the letter Mr Jenkinson says that towards the end of the following week he telephoned Ms Cole who told him that the letter had been sent. Mr Jenkinson then says that about the end of February 2007 he contacted Ms Cole again and she advised that she would follow it up with the Board. He says that at around the time he first

met with Ms Cole he had received a letter from the Teachers Council advising him of a complaint regarding the issues leading to the termination of his employment. He says that from then until May 2008 he was involved in defending the charges against him. In a sworn affidavit he says:

During this period I was not concerned about the limitation timeframe because I knew that Patricia Cole had written twice to Bayview Primary. On 22 January 2008, my current solicitor wrote to Bayview Primary..... I was very surprised by (a letter from the Board stating that they had never received Ms Cole's letters) as Patricia Cole had already written to Bayview Primary.

[9] Mr Jenkinson is supported in his evidence by an affidavit from his wife who has produced a diary note from a personal diary recording the date and time of his appointment with Ms Cole. Mrs Jenkinson also says that she recalls discussing the meeting with her husband at the time.

What did Ms Cole do?

[10] In her affidavit Ms Cole says that she recalls meeting with Mr Jenkinson in September 2006, dictating a letter to her secretary and subsequently signing and posting the letter to Bayview Primary. She says she is unable to find a copy of the original letter but has been able to produce a copy of the letter sent to Bayview Primary on 27 February 2007. This letter refers to the earlier letter and alleges that Mr Jenkinson was given no alternative but to resign and that that amounted to constructive dismissal. Attached to that letter was a form which Ms Cole says was forwarded to the Board and the Mediation Service in which she alleges that Mr Jenkinson was constructively dismissed and seeking remedies of both lost wages and compensation for hurt and humiliation. In her affidavit Ms Cole says unequivocally:

Tim Jenkinson definitely instructed me to raise a personal grievance with his employer and I did so in accordance with his instructions. When I did not receive a reply I sent a follow-up letter on 27 February 2007.

What did Bayview Primary receive?

[11] Bayview Primary say that they received neither Ms Cole's letter of September 2006 nor her follow-up letter of February 2007. In support of this assertion the chairperson of the Board has provided a sworn affidavit and copies of the list of correspondence received by the Board between September 2006 and March 2007. The Board says that the first it knew of Mr Jenkinson's alleged grievance was a letter received from Mr Jenkinson's new representative in January 2008.

Did Mr Jenkinson raise his grievance within 90 days?

[12] Mr Jenkinson did attempt to raise his grievance with his employer within the 90 day time period. I accept that Mr Jenkinson did meet with Ms Cole on or about 13 September 2006 and that it was his clear understanding that Ms Cole would raise his grievance on his behalf with Bayview Primary. He contacted Ms Cole the following week and was assured that the letter raising his grievance had been sent. Having heard nothing he contacted Ms Cole again in February 2007 and was advised that she would pursue the matter. He was entitled to rely, at least to that point, on his agent to do what she said she would do. However I also accept that Bayview Primary did not receive notification from either Mr Jenkinson or Ms Cole. Despite Ms Cole's assertion that she sent two letters to Bayview primary I find, on the balance of probabilities, she did not do so. Despite Mr Jenkinson's attempt to raise his grievance within 90 days his grievance was not raised with Bayview Primary within 90 days.

Was the delay in raising Mr Jenkinson's grievance *occasioned by exceptional circumstances?*

[13] Mr Jenkinson did *make reasonable arrangements to have his grievances raised* on his behalf by Ms Cole. Ms Cole failed to ensure that the grievance was raised within the required time. Not only had she been directly instructed by Mr Jenkinson to raise his grievance but a week later he prompted her in this regard and was assured that the letter raising the grievance had been sent. A little over three months later Mr Jenkinson again spoke to Ms Cole and again she reassured him. This failure on the part of Ms Cole was, I find, unreasonable. Both limbs of section 115(b) are therefore satisfied and I find that this failure by Mr Jenkinson to raise his personal grievance with his employer was *occasioned by exceptional circumstance*.

Is it just to grant leave for Mr Jenkinson to raise his grievance out of time?

[14] The Supreme Court in *Creedy* made it clear that leave should be extended, in terms of section 114, only if exceptional circumstances are truly established and, *in addition the overall justice of the case (which includes taking account of the position of an employer facing a late claim) requires it.*

[15] Mr Harrison, for the Board, has submitted that issues surrounding Mr Jenkinson's resignation gave rise to media attention at the time and would no doubt do so again were he granted leave to pursue his grievance. Mr Harrison says that this publicity would only serve to cause harm to the school community. Mr Harrison also says that the Board would have difficulty in preparing a defence against Mr Jenkinson's claim as the Board Chairman at the time is no longer on the Board and other changes have occurred which would raise issues regarding potential witnesses.

[16] I accept Mr Harrison submission that to grant leave to Mr Jenkinson would create some difficulties for the Board and this is a factor to be weighed in considering whether the overall justice requires the granting of leave. Another factor is Mr Jenkinson's inaction over a lengthy period of time (from February 2007 to January 2008). Mr Jenkinson says that during this time he was *involved in defending the charges brought against him* with the New Zealand Teachers Council and that he was *not concerned about the limitation timeframe because he knew that his representative had written to Bayview Primary.* However by late 2007 or early 2008, despite the ongoing involvement with the teachers Council (that case, finally concluded in May 2008) Mr Jenkinson eventually found time to brief a new representative who subsequently wrote to Bayview Primary in January 2008. While it seems reasonable that Mr Jenkinson relied on Ms Cole initially he was aware that there was a limitation period. The lack of any response either from Ms Cole or the Board should have prompted further enquiry and action. While *exceptional circumstances* (as defined by s.115(b)) certainly existed as at early 2007, the weight to be given to those exceptional circumstances diminished as the months went by.

[17] The final issue to be considered when assessing the *overall justice* of granting leave is the relative merits of the respective cases. I have read both the statement of problem and supporting affidavits supplied by Mr Jenkinson and the statement in reply supplied by the Board. I must emphasise that this information has not been properly tested by a full and in depth investigation. However on a preliminary assessment Mr Jenkinson's the evidence in support of his assertion that he was forced to resign is relatively weak. To require the Board to defend its position in these circumstances with the attendant difficulties and costs and after such a lengthy period, goes against the overall justice of granting Mr Jenkinson leave.

Determination

[18] Although I have found that the delay in Mr Jenkinson raising his personal grievance with his employer was *occasioned by exceptional circumstances*, it would not be just to grant Mr Jenkinson leave to raise his grievance out of time. **Leave is therefore declined.**

Costs

[19] Costs are reserved. The parties are requested to attempt to settle this matter between themselves in the first instance. If they are unable to do so the Board may file and serve submissions within 28 days of the date of this determination. Mr Jenkinson will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority