

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZ ERA Auckland 161
5361292

BETWEEN MARY MACDONALD
 Applicant

A N D THE OPTIMUM CLOTHING
 COMPANY LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Michael Richardson, Counsel for Applicant
 Paul Tremewan, Advocate for Respondent

Investigation meeting: On the papers

Date of Determination: 11 May 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms MacDonald) alleges that she was unjustifiably dismissed from her employment. The respondent (Optimum) resists that contention but more particularly, for present purposes, alleges that the personal grievance was not raised within the statutory time period.

[2] Correspondence between the parties' representatives became fixed on the issue of whether the personal grievance had been raised within time or not, and without a determination on that question, any progress toward resolution became stalled.

[3] The Authority set the matter down for an investigation meeting on 27 March 2012 but an adjournment was granted because of the unavoidable absence of an important witness. Consequent upon that delay, the parties' representatives began talking again and, amongst other things, explored whether the matter could be dealt with on the papers. An agreement to that effect was reached. Like the investigation

meeting previously scheduled, the proposed determination by the Authority was only to involve the preliminary question of whether the personal grievance had been raised in time, or not.

[4] Submissions and supporting affidavit evidence have now come to hand and the Authority is able to issue this determination.

[5] Ms MacDonald was employed by Optimum and made redundant from her position on 29 April 2011. The impetus for the termination of her position was a fall off in orders. She raised no personal grievance within 90 days of the effective date of the redundancy.

[6] Then, she says that her "*former position*" was advertised on 3 June 2011, but on a part time basis. She applied for the part time position, got a bare acknowledgment, but was not interviewed. Ms MacDonald says that her grievance was raised within 90 days of the advertisement for the part time position because it was only then that she became aware that the position she had previously occupied was not in fact redundant at all and thus it was not until 3 June 2011 that it came to her notice (as the Act prescribes) that the position was not redundant at all, thus giving rise to the existence of a personal grievance. As a matter of fact, Ms MacDonald caused a personal grievance letter to be written on 29 July 2011 which was within 90 days of 3 June but of course not within 90 days of 29 April 2011.

Issues

[7] There are only two issues that the Authority needs to investigate:

- (a) Did Ms MacDonald raise her grievance in time; and
- (b) If she did not, is it just to allow her grievance out of time?

Did Ms MacDonald raise her grievance in time?

[8] The Authority has considered the helpful material provided by the parties' representatives and has reached the conclusion that Ms MacDonald's grievance was raised within time. There can be no question that if the operative date from which time was to run is 29 April 2011, then she is out of time, but the Authority is satisfied that the operative date in fact is 3 June 2011, that is the date that the advertisement appeared which raised the issue about whether the redundancy previously declared

was a genuine one or not. In the Authority's view, the question is whether on and from 3 June 2011 there were issues which required answer in respect of the genuineness of the previous redundancy. To meet the statutory test, it is not necessary to reach a conclusion on the genuineness of the redundancy, only that the issue is raised and therefore that the time runs from that point.

[9] By virtue of the Authority's determination that Ms MacDonald has raised her grievance within time, it does not follow that Ms MacDonald's grievance is made out. That is a separate question which requires further assessment and consideration and is not the subject matter of the present determination.

[10] Section 114(1) of the Employment Relations Act 2000 (the Act) sets out the statutory time limit for raising a personal grievance. The essence of that provision is the requirement that the employee must raise the grievance with the 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 agrees otherwise.

[11] In the present case, Optimum has quite properly refused to allow the grievance to proceed out of time in reliance on this statutory provision and so the matter must be considered by the Authority and permission given to proceed, either on the footing that the 90 days' time limit is met by the action of the employee or on the footing that leave should be granted to allow the matter to proceed out of time.

[12] Counsel for Ms MacDonald relies on the case of *Drayton v. Foodstuffs South Island Ltd* [1995] 2 ERNZ 523. That case defines "*come to notice*" as equivalent to the actual knowledge of the action giving rise to the grievance. In addition, Judge Travis made the point that, in a number of dismissals, the fact of the dismissal and the reason for it were separated in time. His Honour then goes on to use as an example of that precept a redundancy situation where the basis of the dismissal turned out to be different from that which originally advanced.

[13] This is just such a case. Here, the dismissal proceeded on the grounds that the position was surplus to the requirements of the employer and on that footing it was accepted by Ms MacDonald. However, within a span of no more than a month or so, Optimum had decided (and their own evidence is clear on this point) that they actually

had cut too far into their human resources and they needed to effectively recreate part of Ms MacDonald's position back again.

[14] It is clear then that the basis of the original decision (that the position was surplus to the requirements of the employer) was not borne out by the passage of a short period of time and once the employer signalled that position by running an advertisement which Ms MacDonald saw, the law is clear that she is entitled to, as it were, run up a flag of protest and raise questions about the genuineness of the original decision.

[15] The Authority is again at pains to emphasise that its decision that Ms MacDonald's grievance is within time is not an indication that the Authority considers that Ms MacDonald has a viable grievance. That is not a matter that the Authority has even considered at this point and will not do so until the parties have been heard again.

Determination

[16] The applicant has satisfied the Authority that she has raised her personal grievance within the statutory timeframe.

[17] The parties are encouraged to use this decision of the Authority to inform their future engagement on this issue. Mediation is available if the parties wish it; in the alternative, leave is reserved for either party to make application to the Authority for the substantive matter to be dealt with.

Costs

[18] Costs are reserved.

James Crichton
Member of the Employment Relations Authority