

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 225
5554468

BETWEEN

ASH MATHEW
Applicant

A N D

MAINLAND POULTRY
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Paul Muller, Counsel for the Applicant
Diana Hudson, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 22 July 2015 from the Applicant
28 July 2015 from the Respondent

Date of Determination: 31 July 2015

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

- A. The unjustified dismissal claim was not raised within the statutory 90 day time period;**
- B. The applicant, Mr Mathew, established the existence of *exceptional circumstances* under s.115(b) of the Employment Relations Act 2000 (the Act);**
- C. The Authority considers it just to grant Mr Mathew leave to raise his personal grievance claim after the expiration of the 90 day time period and accordingly so orders;**
- D. Pursuant to s.114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve the grievance.**
- E. Costs are reserved.**

Employment relationship problem

[1] The applicant, Mr Ash Mathew, failed to raise his personal grievance with the respondent (his employer), Mainland Poultry Limited (Mainland Poultry) within 90 days of the alleged grievance occurring, in accordance with the requirements of s.114(1) of the Act. Mainland did not consent to the raising of the grievance out of time.

[2] Mr Mathew seeks leave to raise his alleged grievance outside the 90 day period pursuant to s.114(3) and (4) of the Act.

The legislation

[3] Section 114 of the Act states:

(3) *Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

(4) *On an application under subsection (3) the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

(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.*

[4] Section 115 states:

Further provision regarding exceptional circumstances under section 114

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

...

(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; ...*

Issues

[5] The issues for determination by the Authority are:

(a) Was the delay in raising Mr Mathew's grievance occasioned by exceptional circumstances? This will require the Authority to consider whether:

- Mr Mathew made reasonable arrangements to have the grievance raised on his behalf by his agent; and
- the agent unreasonably failed to ensure that the grievance was raised within the required time (s115(b));

(b) In the event that the answer to question (a) is "yes", the Authority will be required to consider whether it is just to grant Mr Mathew leave pursuant to s.114(4) of the Act to raise his personal grievance outside the statutory 90 day time period?

Investigation meeting

[6] The parties agreed that the Authority could investigate and determine the issues in para.[5] above on the papers.

[7] Affidavits by Mr Mathew and his counsel, Mr Akeripa Seumanutafa, were filed in support of Mr Mathew's application.

[8] For Mainland Poultry, Mr Michael Kidd, Mainland Poultry's National Livestock Manager, filed an affidavit in opposition.

[9] In order for the Authority to deal with the matter expeditiously, both counsel provided the Authority with comprehensive and helpful submissions.

[10] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

First Issue

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

[11] This will require the Authority to consider whether Mr Mathew:

- made reasonable arrangements to have the grievance raised on his behalf by his agent; and
- the agent unreasonably failed to ensure that the grievance was raised within the required time (s115(b));

Employment by Mainland Poultry

[12] Mr Mathew was employed by Mainland Poultry for a fixed term from 3 March 2014 until 27 February 2015. The parties signed a fixed term employment agreement on 3 March 2014. Mr Mathew's role was that of a site maintenance fitter.

Dismissal

[13] Mr Mathew was dismissed on 4 July 2014 and alleges his dismissal was unjustified. On 23 July 2014, Mr Mathew instructed the Community Legal Services South Trust (CLSST) to act for him and to raise a personal grievance on his behalf in relation to the dismissal.

Legal Advice

[14] Mr Akeripa Seumanutafa, a senior solicitor at CLSST was assigned Mr Mathew's file. A meeting was held with Mr Mathew on 23 July 2014 about his dismissal.

[15] In his affidavit of 17 March 2015, Mr Seumanutafa confirms interviewing Mr Mathew about his dismissal on 23 July, along with a junior colleague at his office. After the meeting, Mr Seumanutafa signed CLSST's engagement letter and the first reporting letter to Mr Mathew. Mr Mathew was informed in this letter that his grievance was to be raised with Mainland Poultry no later than 1 October 2014. Mr Mathew was asked for further information in relation to some aspects of his dismissal. Mr Seumanutafa concluded the letter stating:

We will contact you to come for another meeting once we have received a response from your employer. In the meantime you may provide written responses as to the issues we have raised in the preceding paragraphs.

[16] In a subsequent letter of 25 July 2014, Mr Seumanutafa confirmed Mr Mathew's instructions and corrected the date upon which the personal grievance was required to be raised. He stated:

*We have reviewed the circumstances of your summary dismissal. First of all, we wish to correct the date of your dismissal between 04 July and not 01 July. Therefore, **your personal grievance must be raised no later than 04 October 2014.***

[17] On 25 July 2014, Mr Seumanutafa wrote to Mainland Poultry requesting a copy of Mr Mathew's employment file. Mainland Poultry provided the file on 6 August 2014. On 28 August 2014, Mr Mathew met with a junior colleague of Mr Seumanutafa to discuss the file received from Mainland Poultry. Sometime after this meeting, Mr Seumanutafa's colleague moved to another team and Mr Mathew's file was returned to Mr Seumanutafa.

Raising personal grievance

[18] On 2 October, Mr Seumanutafa prepared a personal grievance letter and this was faxed to Mainland Poultry on 3 October. The final day for submitting the grievance should have been 2 October 2014. It appears that the personal grievance claim was raised one day outside the 90 day time period.

[19] Upon receipt of the personal grievance claim, Mainland Poultry instructed Otago Southland Employers Association Inc (OSEA) to act for it.

[20] On 20 October 2014, Ms Hudson wrote to CLSST for the attention of Mr Seumanutafa as follows:

... we have been provided with your letter of 3 October 2014, and we are currently taking instructions to provide you with a response. In the interim we note that your letter makes no reference to mediation as a mechanism to resolve this dispute. Please advise whether your client would be prepared to attend mediation in the first instance.

[21] According to Mr Kidd, Ms Hudson informed Mainland Poultry on 17 November that the personal grievance claim had been raised outside the 90 day period and that no further steps would be taken in relation to addressing Mr Mathew's claimed grievance.

[22] On 17 November OSEA emailed a letter to CLSST stating:

... your correspondence of 3 October 2014 is the first communication received by the company in respect of an alleged personal grievance, beyond the request for a copy of Mr Mathew's personnel file. By our calculations, the 90 day period allowed for the raising of a personal grievance expired on 2 October 2014, therefore the matter has been raised out of time and there is no requirement that our client address this matter further. It certainly does not consent to the raising of the grievance out of time.

[23] Mr Seumanutafa did not discover this letter from Ms Hudson until early 2015. It appears the letter from OSEA had been misfiled at the offices of CLSST.

[24] Mr Mathew was informed of the issue on 3 January 2015. On 16 February 2015 at a further meeting with Mr Mathew, Mr Seumanutafa informed Mr Mathew that the personal grievance claim had been raised one day after the 90 day period had expired. Mr Seumanutafa apologised for his error and the delay.

[25] Mr Seumanutafa has taken responsibility for failing to raise the grievance within 90 days. In February 2015, Mr Muller was instructed as Counsel to take over Mr Mathew's file.

The legal position

[26] Clause 22 of the fixed term employment agreement signed by the parties states:

22. If you have employment issues these should be raised with us as soon as possible so that they can be resolved. If the matter is not resolved either of us can seek assistance from the Department of Labour's mediation service. If the issues are not resolved at mediation, they may be referred to the Employment Relations Authority. If the issue is a personal grievance, you must present that grievance to us within 90 days of the event giving rise to the grievance unless there are exceptional circumstances.

[27] In clause 29 of the employment agreement, Mr Mathew acknowledged being given a chance to obtain independent advice and acknowledged that he had read the employment agreement.

[28] Mr Mathew consulted CLSST on 23 July 2014, which was shortly following his dismissal on 4 July. Mr Mathew, on being told he had a personal grievance claim, and that it had been raised on his behalf, in my view has grounds to claim the delay in

raising the personal grievance within 90 days, falls within an “*exceptional circumstance*” as set out in s.115(b) of the Act.

[29] Mr Mathew consulted with CLSST a matter of weeks after being dismissed. After receiving his personnel file from Mainland Poultry, Mr Mathew had another meeting at CLSST and understood that a grievance was being raised on his behalf. Mr Mathew was not aware there was a problem with the raising of the grievance until early February 2015. It was at this time Mr Mathew was informed that Mr Seumanutafa failed to raise his grievance within the 90 day time period. Ms Hudson, Counsel for Mainland Poultry accepts, in para [19] of her submissions, that Mr Mathew “...*did make reasonable arrangements to have his grievance raised on his behalf and that the failure to do so was one of miscalculation as to the time limit by his representative*”.

[30] It is my view that Mr Mathew made reasonable arrangements to have the grievance raised on his behalf by his agent, Mr Seumanutafa.

[31] Ms Hudson argues that the miscalculation as to time limit by Mr Seumanutafa was not sufficient to constitute an unreasonable failure by him in his role as Mr Mathew’s agent. I disagree.

[32] There were a number of issues which arose within the offices of CLSST causing delays in the personal grievance being raised within the 90 day timeframe, including Mr Seumanutafa’s incorrect calculation of the 90 day time period. These failures to ensure the grievance was raised in time were in my view unreasonable.

[33] Mr Seumanutafa is a senior lawyer, experienced in employment matters and knows the importance of the 90 day time limit in personal grievance claims. This was an unreasonable failure as in my view, were the failures within the office of CLSST to ensure the time limit was properly notified and correspondence filed correctly.

[34] Both Counsel referred me to the Employment Court judgment of *Davies v Dove Hawkes Bay Inc*¹ in support of the respective positions of their clients. At para [29] of the judgment, Chief Judge Colgan stated:

If a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant’s interests following a dismissal with which the former employee is dissatisfied,

¹ [2013] NZEmpC 83

it is reasonable to expect such an agent to do so. The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.

[35] Such principles apply in this case. For the reasons above, I determine that the exceptional "limb" in s.114(4) of the Act has been met pursuant to s.115(b) of the Act. The answer to the first question is "yes".

Second Issue

Is it just to grant Mr Mathew leave pursuant to s.114(4) of the Act to raise his personal grievance outside the statutory 90 day time period?

[36] Mr Mathew's employment agreement did contain the explanation as to resolution of employment problems as required by s.115(c) of the Act. Mr Mathew did take steps to raise his grievance with his employer within the 90 day period by instructing CLSST within a matter of weeks following his dismissal. The letter sent on his behalf finally raising the grievance was outside Mr Mathew's control and regrettably the grievance was raised one day late. This delay was minimal.

[37] I find that Mr Mathew took steps very soon after being dismissed to ensure the raising of his grievance with Mainland Poultry. It was because his agent unreasonably failed to ensure that the grievance was raised within the required time that has caused the current situation. In my view these factors are relevant to the question of whether it is just to grant leave for Mr Mathew to raise his grievance outside the 90 day time period.

[38] I accept Ms Hudson's submissions regarding the effect of delays on Mainland Poultry. However, denying Mr Mathew the opportunity to bring his claim in the particular circumstances of this matter, will outweigh the prejudice to Mainland Poultry, in my view.

[39] The other relevant factor when determining this issue, is the letter sent by Ms Hudson to CLSST on 20 October. In that letter, Ms Hudson suggests mediation as a means of resolving Mr Mathew's claim.

[40] Consent to raising a personal grievance out of time may be implied by conduct. It is arguable that Ms Hudson's letter asking whether or not Mr Mathew

would consider mediation as a means to resolve the matter, could be regarded as impliedly consenting to the grievance being raised out of time.²

[41] In all the circumstances I consider it is just for leave to be granted to Mr Mathew to raise his grievance outside the 90 day time period and I so order. The answer to the second issue is “yes”.

[42] Accordingly, pursuant to s.114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve the grievance.

Costs

[43] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority

² *Phillips v. Net Tell Communications* [2002] 2 ERNZ 340