

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 178/09  
5276268

BETWEEN

SEAN MCFADGEN  
Applicant

AND

DENNIS INDUSTRIES  
LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Justine Baird, Counsel for the Applicant  
Nick Dennis, Advocate for the Respondent

Investigation Meeting: 12 October 2009 at Cromwell

Determination: 16 October 2009

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr McFadgen worked for Dennis Industries Limited based in Cromwell but was summarily dismissed on 6 November 2008. On 10 August 2009 Mr McFadgen commenced personal grievance proceedings in the Employment Relations Authority. In its statement in reply, the company asserted that Mr McFadgen did not raise a grievance with it within 90 days so he is not entitled to have his grievance investigated and determined by the Authority. During the phone conference arrangements were made to investigate the 90 day issue as a preliminary matter. Before the date for that investigation meeting Mr McFadgen applied in the alternative for leave to raise his grievance out of time. I decided to investigate that application at the same time as a further preliminary issue. This determination therefore resolves whether Mr McFadgen raised his grievance in time; and if not, whether he should be granted leave to raise his grievance anyway.

[2] I will briefly explain what happened before resolving these issues.

**Mr McFadgen's grievance**

[3] Mr McFadgen left work to have lunch at about 2.00pm on 4 November 2008 but he did not return to work after lunch because he felt that he had been unfairly reprimanded over an issue earlier on. He did not tell his employer about this.

[4] Instead of going to work next morning Mr McFadgen went to a job interview some distance away. Nick Dennis is the company's principal. Mr McFadgen apparently sent a text message to Mr Dennis that morning alerting him to his absence for a few hours but Mr Dennis says that he did not receive it. On his way back to Cromwell Mr McFadgen's car broke down. He did not contact his employer because he had no credit on his cellphone.

[5] Mr McFadgen reported to work on 6 November in the morning as usual. There is some divergence in the various statements about precisely what happened but it seems that Mr McFadgen was dismissed and told to come back a bit later in the morning to hand in his keys and so forth. Mr Dennis says that Mr McFadgen threatened him when he came back later in the morning but Mr McFadgen denies doing that. There were also several exchanges between the two men over the following few weeks. These exchanges are not relevant for present purposes since it is not suggested that a grievance was raised during any of them. It is common ground that Mr McFadgen's employment ended on 6 November 2008 as a result of a summary dismissal so nothing more needs to be said about the disputed evidence over precisely what happened that day.

[6] Some time after the dismissal Mr McFadgen applied for an unemployment benefit. That included seeking information from the company about pay and how the employment ended. Mr McFadgen took the form to the company and asked for it to be completed. Again, there is no suggestion that a grievance was raised at this time. The company's representative completed the form, dated it 5 December 2008 and forwarded it to WINZ. One question on the form is *Did employee terminate employment?* and the answer given is *YES*. The form then says *Please state reasons given by employee or reasons why you terminated employment* and the answer is *Sean walked off the job*. Because of these answers Mr McFadgen was denied the unemployment benefit in early December. The answer to the first question is false – it was the employer who terminated the employment. If that is understood, the answer to the second question is correct at least from the company's perspective.

[7] Mr McFadgen spoke to a solicitor on 8 December who referred him to Ms Baird who is experienced in employment law. When Ms Baird was not able to contact Mr McFadgen she wrote to him on 22 December seeking instructions. Mr McFadgen contacted Ms Baird on 22 January 2009 who sent him a legal aid form to be completed and returned. Mr McFadgen returned the form incomplete so it was resent to him on 28 January and he returned it properly completed on 4 February 2009. Ms Baird then sent a fax to the company on 5 February 2009 raising Mr McFadgen's grievance. 5 February 2009 is the 92<sup>nd</sup> day commencing with the day of the dismissal.

[8] In its first response and subsequently the company challenged the timeliness of the grievance.

[9] I should mention two other facts. Following a referral from his doctor on 28 November 2008 Mr McFadgen was assessed on 9 January 2009 and treated as an outpatient of the Otago District Health Board drug and alcohol service between 12 January and 16 January 2009. He is still engaged in this treatment. Second, Ms Baird's office was closed for several weeks over Christmas.

#### **Was the grievance raised in time?**

[10] S.114(1) of the Employment Relations Act 2000 says *Every employee who wishes to raise a personal grievance must, ..., raise the grievance with his or her employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee, whichever is the later, ....*

[11] Mr McFadgen learnt of his dismissal on 6 November 2008, the same day it happened. The statement of problem describes Mr McFadgen's grievance as unjustifiable dismissal for lack of good cause and procedural unfairness. These complaints were all known to Mr McFadgen on the day of his dismissal. As he says himself in his statement of problem he thought at first he would be able to move on with his life despite being devastated by the unfairness of the dismissal.

[12] There is a submission for Mr McFadgen that the incident giving rise to his grievance is the company's false assertion to WINZ that he terminated his own employment which resulted in him being denied an unemployment benefit. I do not accept this submission. The company's statement to WINZ made no difference to

Mr McFadgen's belief about having been unjustifiably dismissed; it just motivated him to do something about that belief. Put another way, the factual basis for his personal grievance claim was fully apparent to Mr McFadgen on the day of his dismissal. He decided to get advice about his rights because of the WINZ form but that made no difference to when his grievance arose or came to his attention.

[13] There is a further submission that the company's conduct in falsely completing the form gives rise to a separate grievance. I do not accept that submission either. S.103(1)(b) of the Act includes as a grievance any claim *that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.* I was not directed to any condition of Mr McFadgen's employment said to have survived its termination that was affected disadvantageously by the employer's action. None of the other definitions of a personal grievance assist either.

[14] For the foregoing reasons I find that Mr McFadgen did not raise his personal grievance claim within time. If it is to be dealt with, leave is required.

### **Leave**

[15] The Authority may grant leave for an out of time grievance if satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it is just to do so: see s.114(4).

[16] There are several grounds said to constitute exceptional circumstances. First, it is said that Mr McFadgen was not given a copy of his employment agreement. I am referred to s.115(c) of the Act and the submission is made that not being given a copy of the employment agreement is an analogous circumstance. Mr McFadgen cannot rely on s.115(c) itself because the signed agreement includes a plain language explanation of the services available for the resolution of employment relationship problems and mention of the requirement to raise any grievance within 90 days. The agreement has a declaration clause immediately above Mr McFadgen's signature by which he acknowledges being advised to seek independent advice and having had a reasonable opportunity to do so. In light of that I do not accept the suggestion that he

never had a copy of the agreement. If he did not have a copy at the time he was dismissed it must be because he did not keep the one given to him earlier.

[17] Another exceptional circumstance is said to be the need to seek legal aid by completing the appropriate form. I do not accept that is an exceptional circumstance. It is not necessary to instruct counsel before a grievance can be raised but an employee is entitled to seek representation. There are likely to be arrangements between the employee and the representative over payment of fees such as the requirement for a properly completed legal aid form before work begins. There is nothing exceptional about this, nor should it occasion any material delay.

[18] A third ground relates to s.115(a). The evidence is that Mr McFadgen probably was so affected by consequences which flowed from the dismissal between about 12 January and 16 January 2009 so that he was unable to properly consider raising his grievance for that time. Apart from that period, the evidence is not such as to bring him within s.115(a). Given that the statutory ground applied for about a week during the 90 day period I do not accept that Mr McFadgen has established that the delay in raising his grievance was occasioned by him being so affected or traumatised by the dismissal so as to have been unable to properly consider raising his grievance within time.

[19] The next ground mentioned is the interruption created by the closure of the solicitor's office over the Christmas period. There is nothing exceptional about this.

[20] I have also considered whether these factors in combination amount to exceptional circumstances. However I do not accept that there is anything exceptional about the factors in combination so as to permit a finding of exceptional circumstances. Nor in large measure was the delay in raising the grievance occasioned by these factors. The substantial part of the delay was caused by Mr McFadgen's initial decision not to challenge his dismissal and the lack of contact between him and Ms Baird during December.

[21] Since I am not satisfied that Mr McFadgen has made out any exceptional circumstances it is not necessary to decide whether it would be just to grant leave.

**Summary**

[22] Mr McFadgen did not raise any grievance within time and there are no exceptional circumstances so as to permit a grant of leave for him to raise a grievance out of time.

[23] Costs are reserved. I understand that Mr McFadgen was granted legal aid for proceedings to mediation and that an amended application was made for the Authority's investigation but no response has yet been received. A grant of legal aid for this investigation will affect the issue of costs so counsel is to advise the Authority and the respondent of the outcome of the legal aid application following which the respondent may seek costs by lodging and serving any submissions within 14 days and Mr McFadgen may lodge and serve any submissions in reply within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority