

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 339/07
5084744

BETWEEN SHARYN MCLEOD
 Applicant

AND HARPERS FASHIONS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Glenys Steele, for Applicant
 Kelly Rowell, for Respondent

Investigation meeting: On the papers

Submissions and further 15, 16 and 26 October 2007
information received

Determination: 30 October 2007

DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Ms McLeod seeks to raise her personal grievance out of time on the grounds that exceptional circumstances exist under section 115 (b) Employment Relations Act 2000.

[2] Harpers Fashions opposes Ms McLeod's application. It says the delay in raising Ms McLeod's personal grievance was not occasioned by exceptional circumstances and that it would not be just to grant leave.

[3] By agreement this matter is determined on the papers. The parties have filed evidence and submissions in support of their respective positions which I have carefully read and fully considered.

Leave to raise a personal grievance out of time

[4] Ms McLeod says she instructed Mrs Patricia Cole, an employment advocate, to raise a personal grievance on her behalf on 14 July 2004, the first working day after her employment ended with Harpers Fashions, and that Mrs Cole unreasonably failed to ensure her grievance was raised within time.

[5] The first issue to consider is whether Ms McLeod made reasonable arrangements with Mrs Cole to raise a personal grievance on her behalf ie, is the first leg of section 115(b) satisfied?

[6] Ms McLeod wrote to Mrs Cole on 17 December 2004:

Dear Patricia

Further to our brief conversation (in response to your letter of 13 December) on Tuesday evening (14 Dec) I thought I had better forward you copies of documentation relating to my grievance against Harpers Fashions Limited (trading as Hartleys).

I have in fact furnished you with the paperwork previously, but I think there is some confusion on your part as to who I am. And I mean no disrespect when I say this, it is just that I have called a number of times, to get an update on where we are at with my situation and on each occasion you have asked me to reiterate what my grievance is.

So in closing I would ask that you please give me an update, either way whether I am wasting my time with this grievance or whether action has been instituted.

In the mean time, thanking you for your assistance.

Yours sincerely

...

[7] It can be reasonably taken from this letter that by 17 December 2007 Ms McLeod did not know what action Ms Cole had taken in relation to her grievance, 5 months after Ms McLeod's employment ended and well outside the 90-day statutory time limit for raising a personal grievance. This letter does not support Ms McLeod's assertion that she unequivocally instructed Mrs Cole to raise a personal grievance on her behalf.

[8] Ms McLeod's next letter to Mrs Cole is dated 5 June 2006 and reads:

Dear Patricia

I first called you in July 2004 requesting that you represent me in a grievance I had with the above company.

After I discussed with you verbally my "situation", you assured me I had a strong case against this company, and I substantiated our discussions with hard copies of details outlining my grievance, which I mailed to you shortly thereafter (these are further attached for your reference).

In mid November 2004 I was concerned that I had not received your acknowledgement so I called you by phone, and you had difficulty in recalling me or my case. I faxed you copies of what I had previously mailed you with a covering letter, and you responded with a brief letter on 13 December 2004 (further attached for your reference).

...

[8] This letter records that Ms McLeod telephoned Mrs Cole in July 2004, that she then posted her documentation in support of her claim and in mid-November 2004 telephoned Mrs Cole because she had not received an acknowledgement from Mrs Cole that she had received the posted material. Again this letter does not support Ms McLeod's claim that she gave Mrs Cole clear instructions to raise her personal grievance.

[9] Ms McLeod has stated in her evidence that she telephoned Mrs Cole regularly after her initial consultation and received assurances that her grievance was in-train. This evidence is at odds with the contents of the letters. It is also inconsistent with Mrs Cole's evidence, which is that she did not give Ms McLeod a satisfactory answer to her inquiries.

[10] Mrs Cole has produced two letters dated 14 July 2004. The first is addressed to Harpers Fashions and the second to Mediation Services. Neither of these letters were received by the addressees and there is no evidence that they were sent. There is no evidence that Ms McLeod had any knowledge of these letters within the 90-day statutory time limit. If these letters were not sent, which seems likely on the evidence, such inaction is consistent with Mrs Cole not having received clear instructions from Ms McLeod. The letter to Harpers Fashions' falls short of raising a personal grievance; it asks for agreement to attend mediation. Again such tentative correspondence is consistent with tentative instructions.

Determination

[11] Ms McLeod's application for leave to raise her personal grievance out of time is declined. The first leg of section 115(b) Employment Relations Act 2000 has not been made out.

Costs

[12] Costs are reserved. If the parties cannot resolve this issue themselves then Ms Rowell should apply for a timetable to be set within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority