

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 152
5609291

BETWEEN CHRISTINE MITCHELL
Applicant

A N D GENERAL BACK-UP
COMPANY LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Wayne Todd, Counsel for Applicant
Timothy Jackson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 August and 2 September 2016, from the Applicant
26 August 2016, from the Respondent

Date of Determination: 9 September 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

- A. Ms Mitchell, via her agent, took reasonable efforts to make the respondent aware within 90 days of the termination of her employment that she alleged a personal grievance that she wanted the respondent to address.**
- B. I therefore find that the Authority has the jurisdiction to investigate her personal grievance, although the parties must first attempt to settle their differences at mediation.**
- C. Costs are reserved.**

Employment relationship problem

[1] Ms Mitchell claims that she was unjustifiably dismissed by the respondent on 2 September 2015. She claims compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), together with reimbursement of lost wages. She also claims that she is owed outstanding holiday pay in an amount to be determined, and that the respondent allegedly failed to take KiwiSaver deductions out of her wages, and did not contribute to KiwiSaver, despite her notifying it that she wanted to join KiwiSaver.

[2] Save other than to say that Ms Mitchell was not dismissed but resigned, the respondent denies that the Authority has the jurisdiction to consider a personal grievance for unjustified dismissal on the basis that the personal grievance was not raised by Ms Mitchell in respect of the alleged unjustified dismissal within the statutory 90 day time period stipulated by s 114 of the Act. The respondent has not addressed the claims for unpaid holiday pay or KiwiSaver contributions.

[3] Pursuant to a case management telephone conference, the parties have agreed that it is appropriate for the Authority to consider as a preliminary matter whether Ms Mitchell raised her personal grievance within the statutory 90 day period and, if she did not, to consider whether the Authority should grant leave to Ms Mitchell to raise her personal grievance outside of the 90 day period, pursuant to s 114(4) of the Act.

[4] This determination addresses that preliminary issue.

Background

[5] The respondent runs a BP petrol station trading under the name of White Horse Motors. It is not disputed that Ms Mitchell's employment ended on 2 September 2015.

[6] After her employment ended, Ms Mitchell instructed Mr Todd of Dean & Associates and Mr Todd raised a personal grievance on behalf of Ms Mitchell by way of a letter dated 5 October 2015, which was sent to the company directors of a company identified as White Horse Motors (Waimate) Limited. No reply was

received, and Mr Todd wrote another letter dated 9 November 2015. At some point after that date, one of the directors of White Horse Motors (Waimate) Limited telephoned Mr Todd's office to advise that that company had never been Ms Mitchell's employer. It would appear that White Horse Motors (Waimate) Limited and the entity for which Ms Mitchell worked, which operated under the name White Horse Motors, are situated side-by-side, but are not otherwise connected.

[7] On 18 November 2015, Mr Todd wrote to the respondent (citing it as *White Horse Motors*) at the respondent company's registered office address, marked for the attention of one of the directors, Lyall Davies, in the same terms as he had previously written to White Horse Motors (Waimate) Limited. Having received no reply, Mr Todd wrote to Mr Davies again by way of letter dated 2 December 2015.

[8] On 14 December 2015, Mr Jackson wrote a letter to Mr Todd on behalf of the respondent saying that the grievance had been raised out of time. In particular, Mr Jackson's letter stated the following:

Your letter abovementioned letter [sic] was not received by our client until Thursday 10th December 2015, when our client's principal, Mr Lyall Davies, checked his post office box. 73 High Street is not a postal address and the letter was not received there. It appears the postal staff opted to place the letter in our client's PO Box.

[9] The registered office for the respondent company is recorded in the Companies Office Register as 73 High Street, Waimate, 7924. That address is also cited as the address for service. There are two directors who are noted on the Register, Lyall Harold Davies and Cameron Lyall James Davies. Their personal addresses are shown on the Companies Register as different from the registered office and address for service of the respondent company.

[10] Section 114 of the Act provides as follows:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her 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 consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the

employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

(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.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[11] The 90th day of the period beginning with the date of the alleged dismissal fell on Monday, 30 November 2015.

[12] Mr Todd swore an affidavit in support of his submissions which stated that, on 18 November 2015, two copies of his letter to the respondent of the same date were printed, one copy being placed on the file relating to Ms Mitchell held by Mr Todd, and the second letter was signed by Mr Todd and placed in the outbound mail tray for mailing by New Zealand standard post to the respondent company's address for service.

[13] Mr Todd deposes that New Zealand Post's delivery target for standard post to a street, rural, New Zealand post box or private bag address within New Zealand, is up to three working days.

[14] Mr Jackson, on behalf of the respondent, provided an affidavit in reply by Mr Davies which stated the following:

3. The Respondent's business is a service station. The service station is located on High Street Waimate but it does not have a post box at that location and the site is not numbered. The adjacent, neighbouring site is number 71 High Street.
4. There is a car sales business on the same site and that trades as White Horse Motors. That business is not related to the Respondent and while some people may mistakenly believe it is one and the same business as the service station, it is not.

5. The Respondent's registered office and address for service are and were at the relevant time 73 High Street Waimate, however, that was listed because of the requirement for a physical address and at the time we understood that was the correct method of listing the company's location so that anything required to be physically served can be. However, mail is not delivered there. Obviously if mail was, we would accept it had been delivered. All the company's business by correspondence is in its correct name and to and from the PO Box.
6. When the respondent's physical address is searched on the New Zealand Address and Post Code Finder, it states, "this address does not receive postal mail. Not all New Zealand addresses receive mail delivery. Some addresses will receive mail via a PO Box or Private Bag". Annexed hereto marked "B" is a copy of this information.
7. For example, I have accepted, as I must, that the applicant's letter of 02 December 2015 (annexed hereto marked "C") was received by the respondent. It had been placed in the respondent's PO Box. I saw that letter on or about the 10 December when I cleared the PO Box. It had not been delivered to the service station earlier. I note that the letter did not mention a personal grievance or claim; nevertheless, I took advice and the Respondent's solicitor who wrote to the applicant on 14 December (annexed hereto marked "D").
8. The applicant responded on 21 December enclosing a copy of her letter of 18 November, annexed hereto and marked "E". At that time, I became aware the applicant was submitting a personal grievance, although our solicitor had anticipated that was the gist of the correspondence and replied accordingly.
9. The Respondent had not, prior to 21 December, seen any of the applicant's other correspondence. ...
10. If the Applicant wanted to bring a grievance to the Respondent's attention, she or her agent could simply have delivered it to the service station in October. However, as I have sworn, the letter of 2 December was not received by the respondent until 10 December, via PO Box and the grievance was not brought to the respondent's attention until after 21 December, when the letter of 18 November was posted to my solicitor.
11. The fact remains that while the address at 73 High Street is a service address for the respondent (General back-Up Company Limited), nothing was received there and what was ultimately received in December was addressed to a bare trading name, not the respondent.

[15] Mr Jackson, on behalf of the respondent, submits that the respondent complied with its statutory requirements under s 192(2) of the Companies Act 1993 by providing a physical address for service. He says that service could still have been

effected at the service address by hand delivery or by courier, but that neither was attempted.

[16] Mr Jackson submits that, in some cases, evidence of correspondence addressed to a certain address for service can be regarded as having been received in the ordinary course of post. However, that rule of practice cannot deem service where the addressee's address is not a postal address, and where that fact can be checked. In such a case, the address for service is nonetheless valid if service is effected to that address in fact, but the presumption of postal service cannot apply.

[17] Mr Jackson submits that it was incumbent on the applicant to make reasonable efforts to bring the grievance to the respondent's notice and the applicant "simply failed to take care to ensure even the simplest method was utilised, that is, having one or more letters delivered to the respondent's place of business in accordance with its lawful and publicly notified address for service".

[18] In addressing Ms Mitchell's application for leave to raise her grievance out of time under s 114(3) of the Act, Mr Jackson addresses the exceptional circumstance relied upon by Ms Mitchell; namely, Ms Mitchell having made "reasonable arrangements to have the grievance raised on her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time"¹. In addressing this, Mr Jackson states that such failures cannot amount to unreasonable failure as:

The representative made strenuous efforts to notify the grievance using the information supplied by the applicant. Even assuming there can be a failure of the representative, it is not an unreasonable one in terms of section 115.

Discussion

[19] The Companies Act 1993, at s 2(1), defines *address for service* in relation to a company, as:

... the company's address for service adopted in accordance with section 192.

[20] Section 192 of the Companies Act provides as follows:

192 Address for service

¹ Section 115(b) of the Act.

- (1) A company must have an address for service in New Zealand.
- (2) The address for service may be the company's registered office or another place, but it must not be at a postal centre or document exchange.
- (3) A company's address for service at any particular time is the address that is described as its address for service in the New Zealand register at that time.
- (4) The description of the address for service must state that it is at the registered office of the company, or if it is at another place, must—
 - (a) state the address of that place; and
 - (b) if the address for service is at the offices of any firm of accountants, barristers and solicitors, or any other person, state—
 - (i) that the address for service of the company is at the offices of that firm or person; and
 - (ii) particulars of the location in any building of those offices; or
 - (c) if the address for service is not at the offices of any such firm or person but is located in a building occupied by persons other than the company, state particulars of its location in the building.

[21] In considering whether Ms Mitchell's personal grievance was raised within the 90 day period, it is necessary to consider whether Ms Mitchell, or her agent, took reasonable steps to make the respondent aware that she alleged a personal grievance that she wanted the respondent to address. This is in accordance with s.114(2) of the Act.

[22] In deciding whether Ms Mitchell (or Mr Todd as her agent) took reasonable steps, it is necessary to consider the following:

- (a) Whether it was reasonable for the respondent's *address for service* as cited on the Companies Register to be used;
- (b) Whether it was reasonable for Mr Todd to rely on New Zealand Post to deliver to the address for service;
- (c) Whether he gave sufficient time for the grievance to be delivered; and
- (d) Whether the company name should have been used.

Was it reasonable to rely on the address for service?

[23] The answer to this question appears almost trite. The very meaning of the term *address for service* indicates that it is the address to be used for service of documents upon the company. This is made clear by other sections of the Companies Act (such as ss 387-388A). In these sections, leaving, or posting documents to the

company's registered office or address for service are expressly contemplated as effective ways of effecting service of documents on companies.

[24] I also note that the Chief Judge in *NZ Stevedoring Co Ltd and Ors v NZ Waterfront Workers Union*², at [952], stated that service at a registered office cannot normally be criticised unless it has been effected in bad faith, for example, in the knowledge that, by that mode of service, the notice will not reach the employer. There is no evidence that service was attempted to be effected in bad faith in this case.

[25] Therefore, I find that it was reasonable for Mr Todd to have addressed the personal grievance to the respondent's address for service as stated in the Companies Register.

Was it reasonable for Mr Todd to have relied on New Zealand Post to effect service?

[26] Section 387 of the Companies Act deals with the service of documents on companies in legal proceedings, and does not provide for service by post. However, the personal grievance did not constitute legal proceedings. Section 387 of the Companies Act refers to "a document, including a writ, summons, notice, or order, in any legal proceedings".

[27] Whilst the raising of a personal grievance is a required precursor to the lodging of personal grievance proceedings in the Employment Relations Authority, the personal grievance itself it is not a document in the nature of a writ, summons, notice or order in legal proceedings. A personal grievance is intended to raise the concerns of an employee or ex-employee so as to give the employer or ex-employer the opportunity to resolve those concerns. Very often, personal grievances do not result in legal proceedings. Therefore, I am satisfied that s 387 of the Companies Act does not apply to the service of a personal grievance on a company.

[28] Section 388 of the Companies Act refers to service of other documents on companies; that is, a document other than a document in legal proceedings. That makes clear, at s 388(1)(b), that a document may be served on a company by posting it to the company's registered office or address for service.

² [1990] 3 NZILR 437

[29] I do not accept the submissions made by Mr Jackson that Mr Todd or Ms Mitchell should have checked that the address given as an address for service was capable of receiving mail. This is because s 388 of the Companies Act expressly contemplates a document being served on a company at its address for service by post. It is therefore the responsibility of the respondent company to ensure that it cites an address which is capable of receiving post.

[30] In summary, I am satisfied that relying on New Zealand Post to effect delivery of the personal grievance on the respondent company at its address for service was reasonable.

[31] I note, by the way, that s 392 of the Companies Act states that a document is not to be deemed to have been served or sent or delivered to a person if the person proves that, through no fault on the person's part, the document was not received within the time specified. Ms Mitchell does not argue that the personal grievance was received. However, receipt is not a necessary requirement of the raising of a personal grievance under s 114 of the Act; taking reasonable steps to make the employer aware of the personal grievance is sufficient.

Was the letter posted in time?

[32] Mr Todd has deposed that the letter to the respondent company was placed in the outbound mail tray for mailing by New Zealand standard post on 18 November 2015. I accept that it would be reasonable to expect that the letter would have been delivered within three working days. In fact, the letter would have been received within the 90 day period even if it had taken eight working days to be delivered.

Should the company name have been used?

[33] The respondent states that the respondent company was incorrectly named, as it was addressed to *White Horse Motors*. This is not the name of the company but it is its trading name. First, I note that s 388 of the Companies Act does not require any document to be served by expressly naming the company. Second, *White Horse Motors* is the name under which the company trades. Third, it was marked for the attention of one of the directors of the respondent company. Therefore, I do not consider that addressing the company by its trading name is an impediment to concluding that reasonable steps were made to make the respondent aware that Ms Mitchell alleged a personal grievance that she wanted it to address.

Conclusion

[34] Having taken into account the above factors, I am satisfied that the personal grievance was raised by Ms Mitchell within the 90 day period because she (by her agent, Mr Todd) took reasonable steps to make the employer aware that she alleged a personal grievance that she wanted the respondent to address. Those reasonable steps were the posting of a personal grievance letter addressed to the publicised address for service of the employer company well within the 90 day period since the date of she alleges that she was dismissed.

[35] Having come to this conclusion, it is not necessary for me to consider whether the respondent should grant leave for Ms Mitchell to raise her grievance outside of the 90 day period. The Authority has the jurisdiction to investigate Ms Mitchell's personal grievance.

Directions

[36] Although the parties have apparently been to mediation in order to try to settle the matter, it is likely that an impediment to settlement would have been the respondent's insistence that the personal grievance was not raised in time. Having now determined that it was, I direct the parties to attend mediation in good faith to attempt to reach a settlement between them. If the parties are unable to reach a binding settlement between them within a reasonable period of time, then Ms Mitchell, via Mr Todd if appropriate, is to advise the Authority and a case management telephone conference will be arranged.

Costs

[37] Costs are reserved. If the matter does not settle in mediation, then the matter of costs will be considered at the end of the substantive investigation into the matter.

David Appleton
Member of the Employment Relations Authority