

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 184/10
5166402

BETWEEN KUNAL MUKHERJEE
 Applicant

A N D LAST TRAIN TO INDIA
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mohammed Shahadat, Advocate for Applicant
 Robert Thompson, Advocate for Respondent

Submissions Received: 6 July 2010 from Applicant
 21 July 2010 from Respondent

Determination: 17 September 2010

DETERMINATION OF THE AUTHORITY

Introduction

[1] This matter has a tortured history. A statement of problem was filed in the Authority on 23 June 2009. By August of that year, there was still no statement in reply filed but the respondent had provided a medical certificate, the effect of which was to make it impossible for her to deal with the Authority's processes for three months. In November 2009, the matter was referred to mediation but the mediation was not successful. A statement in reply was finally filed on 18 January 2010.

[2] In May 2010, the matter came onto my list and a telephone conference was convened with the parties' representatives on 17 June 2010 which was primarily directed at the contention that the personal grievance had not been raised within time. I timetabled the application for leave to pursue the grievance out of time together with supporting documentation and papers in opposition and on receipt of that documentation, a further telephone conference was to be held to decide on the process that the parties wished the Authority to adopt in investigating the problem. At that

subsequent telephone conference on 9 August 2010, the parties agreed to the matter being dealt with on the papers and the purpose of this determination is to progress that issue. It follows that the only matter for determination here is the question whether leave should be granted for the applicant to proceed with his personal grievance claim out of time, or not.

The applicant's claim

[3] The applicant (Mr Mukherjee) seeks the Authority's leave to raise his personal grievance outside of the expiration of the 90 day period during which the law requires that personal grievances are brought to the attention of the employer. As the respondent (LTTI Limited) declined to consent to the grievance being raised out of time, Mr Mukherjee must obtain the consent of the Authority pursuant to s.114 of the Employment Relations Act 2000 (the Act). The Authority's powers to grant leave is subject to whatever conditions (if any) it thinks fit but the Authority must be satisfied that the delay was occasioned *by exceptional circumstances* and that it is *just* for the application to be granted.

[4] Mr Mukherjee has filed an affidavit in support of his application to raise his personal grievance out of time. In that affidavit, he deposes that, like many Indian chefs working on work permits in New Zealand restaurants, he saved up his holiday leave in order to take a significant period of annual leave to go home to India. He says he applied for leave from LTTI Limited and was granted leave to travel home to India such that his last day of work was 24 September 2008. He was due to return to New Zealand departing Calcutta on 26 November 2008 but was prevented from boarding his aircraft because LTTI Limited had withdrawn his job offer meaning that he no longer had a work permit to enter New Zealand.

[5] It follows that Mr Mukherjee was effectively stranded in his home country but without work and in circumstances where he was owed money by his former New Zealand employer, LTTI Limited, had personal property in his flat in Christchurch and had no way of returning to this country. Mr Mukherjee said that eventually he rang New Zealand and spoke to a director of LTTI Limited but she denied that there was money owing to him and Mr Mukherjee did not know that he should have raised his personal grievance with her at that time. Subsequently, Mr Mukherjee got work in New Zealand, returning to this country on 11 May 2009. He contacted the advocate

who now acts for him on 19 May 2009 and a personal grievance was raised on 28 May 2009.

The employer's response

[6] The submissions filed on behalf of LTTI Limited stoutly resist the prospect that leave be granted. Interestingly, there is nothing in those submissions about the earlier claim made on behalf of LTTI Limited that Mr Mukherjee's annual leave was not approved and thus presumably there was no dismissal but an abandonment. The submissions deal with the various elements of Mr Mukherjee's claim arguing first that Mr Mukherjee's lack of familiarity with New Zealand law and in particular the 90 day requirement, was not persuasive. LTTI Limited refers to the fact that Mr Mukherjee had an employment agreement in writing which clearly set out the legal requirements and the process for attending to any employment relationship problems. The difficulty with that argument is that Mr Mukherjee (not unnaturally) left his employment agreement at home in Christchurch and he was not able to access that information from India.

[7] LTTI Limited then alleges that it was clear that Mr Mukherjee could have sought advice from a friend (and indeed he did just that), and that if he was capable of getting advice from a friend over the internet about what he should do, there was no reason why he could not appropriately pursue the issue via the internet. Tellingly, LTTI Limited points to the fact that one of the links forwarded to Mr Mukherjee via the internet was a link that his friend had found to the Department of Labour's website which, of course, would have given Mr Mukherjee all the information he needed.

[8] LTTI Limited dismisses Mr Mukherjee's claim that, as English is not his first language, he had difficulty with understanding English and the requirements of New Zealand law expressed in English. LTTI Limited points out that Mr Mukherjee appeared as a witness in another matter before the Employment Relations Authority and was apparently fluent in both written and spoken English.

[9] LTTI Limited notes that Mr Mukherjee did in fact speak with the director of the respondent employer and so he could have raised his unhappiness about the way he was treated. To be fair though, Mr Mukherjee's affidavit deposes that the director of LTTI Limited rather gave him the brush off, claiming amongst other things that the line was bad and that she could not hear what he was saying.

[10] Finally, the submissions of LTTI Limited refer to the fact that Mr Mukherjee was outside New Zealand during the passage of the 90 day period. It is contended that Mr Mukherjee must have had some ability to act in respect of his personal grievance at some point during that 90 day period, notwithstanding that he was out of the jurisdiction for all of it.

Determination

[11] I am satisfied this is a case where it is appropriate to exercise the Authority's discretion and allow the raising of a personal grievance outside of the statutory 90 day period because I consider it just to do so by reason of my accepting that there are indeed exceptional circumstances at play in the present case.

[12] First and most importantly, I am satisfied that by reason of the fact that the applicant, Mr Mukherjee, was out of the jurisdiction for all of the period of the 90 days it was, in truth, an unusual situation and exceptional in the sense that it was *more than special and less than extraordinary: Wilkinson Field Ltd v. Fortune* [1998] 2 ERNZ 70. In the present case, the very fact that Mr Mukherjee was out of the jurisdiction for all of the period of the 90 days in my opinion created a *factor affecting the ability of an employee to respond within 90 days*. I call in aid of this view the fact that Mr Mukherjee promptly raised a personal grievance within very short order on his return to New Zealand.

[13] I think, notwithstanding the efforts of LTTI Limited to convince me otherwise, that there is force in Mr Mukherjee's claim that he was not sure how to raise a grievance from India. It is a fact that his employment agreement was at his home in Christchurch and so whether or not the employment agreement spelled out his obligations is neither here nor there; he was unable to consult it because it was not physically available to him. It is true that Mr Mukherjee could have attended to matters via the internet and, had he searched the website of the Department of Labour, as LTTI Limited suggest he ought, he might well have established what he had to do. However, Mr Mukherjee's affidavit evidence suggests that he was depressed as a consequence of his inability to return to his livelihood in Christchurch and notwithstanding being in his home country, he was financially embarrassed and had no gainful means of support. His affidavit speaks of suicidal feelings as a consequence of a \$10,000 debt which he had undertaken in the expectation of continued income.

[14] In all the circumstances, on the balance of probabilities, I think it just to grant Mr Mukherjee the indulgence of being allowed to raise his grievance out of time. There is in the material before the Authority just the sense that Mr Mukherjee may have been wronged by his former employer and that he deserves the opportunity to progress his claim.

[15] Mr Mukherjee is granted his application to raise his personal grievance out of time.

Costs

[16] Costs are reserved.

James Crichton
Member of the Employment Relations Authority