

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 173/09
5138238

BETWEEN SIONE MULIKA'AMEA
 Applicant

AND CHAMPION
 CONSTRUCTION LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Aisea Laukau for the Applicant
 Costas Matsis for the Respondent

Investigation Meeting: 29 October 2009 at Wellington

Submissions Received: 29 October 2009

Determination: 10 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Sione (also known as Toa) Mulika'amea, seeks leave to bring his grievance for unjustified dismissal out of time, on the basis that he was never made aware of his rights as an employee and that he expected his sister to get legal advice from her husband who was a lawyer, but that no action was taken within time.

[2] By contrast, the respondent (Champion Construction) claims that Mr Mulika'amea had been given a copy of his employment agreement signed by both parties, and that when the principal of Champion Construction, Mr Glyn Champion, met with Mr Mulika'amea's sister she did not raise a personal grievance with him.

The Facts

[3] There can be no certainty about events that took place over a year ago. The Authority must, however, make a determination according to what it decides was more likely than not to have occurred, which is known as the balance of probabilities. In this case, I have preferred the evidence of Mr Champion over Mr Mulika'amea and his witnesses. There are two main reasons for this. The first is that Mr Mulika'amea and the workers employed at the same time as him accept that they were given two copies of the employment agreement to sign and return. Therefore it is more likely than not that they would have retained a copy, because it makes no sense for Champion Construction to have taken both the signed copies from the workers. Similarly, Mr Mulika'amea accepted that his brother-in-law, an immigration lawyer, had during the course of his employment sought a further work permit, and residence status, for Mr Mulika'amea and in doing so had obtained a copy of his employment agreement from Mr Champion. In these circumstances Mr Mulika'amea should have been aware of his employment agreement, because his brother-in-law had a copy, which was attached to documents that Mr Mulika'amea had had to verify as accurate in order to satisfy New Zealand Immigration.

[4] Second, the nature of Mr Mulika'amea's reasons for the delay have been changed in that the only ground raised in Mr Laukau's letter to Champion Construction's lawyers on the 16 September 2008 states (*verbatim*) that *they were traumatised at the time and didn't aware of their right, until when they found advices from relatives and friends* and they asked him to act on their behalf.

[5] I therefore determine the relevant facts as follows.

[6] Mr Mulika'amea was employed by Champion Construction at its factory on 27 March 2007 at the same time as two other workers. Mr Mulika'amea was given two copies of his employment agreement (signed by Mr Champion) to take home, read over and bring back the next day, which he did. The employment agreement provided a standard clause, as required by the Employment Relations Act 2000, explaining the services available for the resolution of employment relationship problems, and including a reference to the period of 90 days within which a personal grievance must be raised. When he returned the agreement the next day, Mr Champion gave Mr Mulika'amea his copy to keep.

[7] During the course of Mr Mulika'amea's employment, his brother-in-law, an immigration lawyer, dealt with Mr Champion over an extension to his work permit and an application for residence. As shown by an email between the two, the lawyer thanked Mr Champion for the copy of the employment agreement, which demonstrates that he had a copy of it.

[8] On or around 23 April 2008, Mr Mulika'amea was dismissed, purportedly for leaving work early without permission, having already been on a final warning.

[9] After Mr Mulika'amea was dismissed, he went to see his sister, hoping that she would help (given that her husband was a lawyer), and to see if she could contact Champion Construction and ask for his job back. Mr Mulika'amea's sister went to see Mr Champion the next day, wanting to know what was going on and hoping that there would be a possibility of him returning to work. As she stated in evidence, there was, however, *no mercy*. Mr Champion was not prepared to meet her request for re-hiring Mr Mulika'amea because of previous warnings and failures to follow instructions.

[10] As noted above, Mr Mulika'amea's sister's husband was not an employment lawyer and his sister did not know of the 90 day time limit. Therefore, although frustrated, she did not know of any further steps she could take to assist Mr Mulika'amea. It was not until Mr Laukau took up Mr Mulika'amea's concerns that a grievance was raised. That meeting took place, however, after the 90 day time limit provided for under the Act.

[11] Champion Construction's final response came from its lawyers on 16 September and was that the grievances were out of time and that it did not agree to them being outside of that time limit, nor was it going to take any further steps in the matter.

[12] In a case management conference held on 18 February 2009, Mr Laukau accepted that Mr Mulika'amea's grievance was raised outside of 90 days and the parties agreed to go back to mediation. At a subsequent conference call, mediation not having resolved Mr Mulika'amea's grievance, Mr Laukau noted that Mr Mulika'amea's grievance was out of time because he was not aware of his rights, nor did he have a copy of his employment agreement.

[13] Despite the mediation matters have remained unresolved and it therefore falls to the Authority to make a determination.

The Law

[14] Grievances out of time are dealt with under ss.114 and 115 of the Act. They must be raised within 90 days of the dismissal unless, as claimed here, there are exceptional circumstances.

[15] Leave may be granted to pursue a grievance out of time if the Authority is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and considers it just to do so.

[16] The two statutory grounds of exceptional circumstances claimed here are:

- 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; and
- where the employee's employment agreement does not explain the explanation concerning the resolution of employment relationship problems that is required under the Act.

Determination

[17] There are two grounds raised by Mr Mulika'amea to support his claim that his grievance should be heard out of time. The first can not be sustained because he did not make reasonable arrangements to have a grievance raised on his behalf by his sister, even if she was his agent. Asking one's sister, even when their husband happens to be a lawyer, to see if she could help him after he lost his job, does not constitute the making of reasonable arrangements to have a grievance raised. Furthermore, Mr Mulika'amea's sister did not raise a personal grievance, but rather sought information about the situation and asked whether Mr Mulika'amea might have his job back, which was refused. Mr Mulika'amea took no further steps after his sister had been to see Mr Champion, who had shown *no mercy*. In particular, Mr Mulika'amea gave his sister no further instructions after that point, so even if she had been his agent, it was clear that he continued to fail to make reasonable arrangements to have his grievance raised.

[18] Similarly, Mr Mulika'amea did have a written employment agreement that contained the explanations concerning the resolution of employment relationship

problems, including a reference to a period of 90 days within which a grievance must be raised. It is not Champion Construction's responsibility if Mr Mulika'amea was unable to locate that employment agreement after he had been given a copy, particularly when at the very least, his brother-in-law had a copy. Mr Laukau claims that the clause in the employment agreement did not meet the statutory requirement because it did not provide any telephone numbers, but there is no requirement for that.

[19] Mr Mulika'amea's claims that his grievance should be heard out of time have been found not to constitute exceptional circumstances and I therefore dismiss his personal grievance.

Costs

[20] Costs are reserved.

G J Wood
Member of the Employment Relations Authority