

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 352/09
5157513**

BETWEEN TONI O'DONOGHUE
 Applicant

AND REGENT TRAINING
 CENTRE LTD, Respondent

Member of Authority: James Wilson

Representatives: Toni O'Donoghue in person
 Sally Leftley for the respondent

Investigation Meeting: Determined on the papers

Submissions received: 20 July 2009 from the applicant
 7 August 2009 from the respondent

Determination: 6 October 2009

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY MATTER**

Preliminary issue for determination

[1] On 2 June 2009 Ms Toni O'Donoghue filed an application in the Authority alleging that she had been constructively dismissed and unjustifiably disadvantaged by her employer, Regent Training Centre Ltd (Regent). In their statement in reply Regent argued that Ms O'Donoghue had not raised her grievance with them *within the 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to (her) notice*", as required by section 114 of the Employment Relations Act (the Act).

[2] Before proceeding with the substantive issue raised by Ms O'Donoghue's claim, Regent have requested that I determine the question of whether Ms O'Donoghue had raised her grievance within 90 days, as a preliminary issue. During

a telephone conference on 7 July 2009 the parties agreed that I should determine this issue “on the papers”.

Background

[3] It is not necessary or appropriate at this point to set out in any detail Ms O'Donoghue's claims. These will be dealt with if and when this matter proceeds to a substantive investigation. The chronology of events set out below is simply to establish the factual background relating to the determination of the preliminary issue i.e. whether or not Ms O'Donoghue raised her alleged grievance with her employer within the 90 days required by the Act.

[4] Ms O'Donoghue was employed as Mid-North Manager by Regent Training from March 2007 to October 2008. Ms O'Donoghue says that in February 2008 she wrote to Regent's Managing Director, Mr Ian Davidson, asking that her salary be increased in the light of her work during 2007. Over the next few months, she says, she raised a number of concerns with Mr Davidson, and other Regent managers regarding such issues as the lack of management training, additional extra work expected of her and a lack of administrative support. In early September 2008 Ms O'Donoghue says she conveyed to Mr Davidson that she was *feeling very stressed due to the unnecessary extra pressure* and that she was going to take a few days off for her *personal well-being*.

[5] On 8 September 2008 Ms O'Donoghue wrote to Mr Davidson resigning from her position and saying:

Unfortunately for many reasons that I have continuously raised over time in my role as Mid-North care manager it has become the only option left for my physical and emotional well-being. I have been a loyal employee for a number of years now but in recent months there has been an escalation of lack and support from upper management, administration personnel and in general that has made my role extremely difficult to the point now that I submit my resignation.

[6] On 12 September 2008 Mr Davidson responded to Ms O'Donoghue accepting her resignation, and commenting:

I am not aware of any outstanding issues that you have raised and that have not already been addressed.

and offering her an opportunity to meet with her manager, during the course of her notice period, to raise any issues she believed were still outstanding.

[7] On 7 October 2008 Ms O'Donoghue again wrote to Mr Davidson. This letter set out *to highlight some of (Ms O'Donoghue's) concerns* about the circumstances that led to her resignation. The letter concluded by saying that Ms O'Donoghue had sought legal advice and had been informed that she had 90 days from the time of her resignation to decide whether she wanted to take legal action regarding the circumstances that led to her resignation. On 15 October Mr Davidson responded again saying that he believed that *nearly all the issues raised... had been previously discussed* and that he did not feel that further discussion would be helpful.

[8] On 4 December 2008, Ms O'Donoghue's representative wrote to Regent Training formally notifying them that Ms O'Donoghue was *raising a personal grievance for constructive dismissal and unjustified disadvantage*.

Regent Training Centre's argument

[9] Regent argues that the Act, at section 114, says that *an employee who wishes to raise a personal grievance must..... raise the grievance 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.....* They point out that the issues that led to Ms O'Donoghue's resignation occurred prior to the date of her resignation and therefore *well in access of the 90 days* stipulated in the Act.

Legal considerations and discussion

[10] While at first blush the point raised by Regent appears to have some merit the argument has previously been dealt with, and rejected, by the Employment Court. In *Meyer vs. Ports of Auckland Ltd* (AC 41/04 28 July 2004, unpublished) Judge Shaw said:

[23] Mr Meyer's resignation and claim for constructive dismissal means that time for notifying his employer of his grievance began to run from the date of the termination of his employment.

[11] Judge Shaw based this statement on the judgement of a full bench of the Employment Court in *Para Franchising Ltd v Whyte* [2002] 2 ERNZ 120. In *Para Franchising* the Court specifically endorsed an earlier judgement of Colgan J. in *Charlton v Colonial Homes Ltd* [2001] 1 ERNZ 756 where he said:

A constructive dismissal is not a termination of employment by resignation. It is rather what appears to be a resignation. That is however simply an acknowledgement by an employee that by virtue of unexpressed or otherwise exhibited intention of an employer not to be bound by the contract, it (the contract) will come to an end. It is characterised in part (albeit significant part) by the initiative for termination having come from the employer. It is, in law, a dismissal and the employer is obliged, if called upon, to justify its actions leading to the acceptance by the employee of that fundamental breach or other manifestation of intention by the employer not to be bound. I do not think that termination of employment by constructive dismissal should be treated any differently to the more conventional and usual unilateral dismissal so far as submission of a personal grievance alleging unjustified dismissal is concerned.

[12] In *Para Franchising* the Court also confirmed that the 90 day time period (for raising a personal grievance) should run from the expiration of any period of notice of dismissal and that the same rule should apply in cases of constructive dismissal.

Determination

[13] Ms O'Donoghue resigned on 8 September and her last day of employment was on or about 9 October 2008. She raised her personal grievance on 4 December 2008. In the light of the Court judgements set out above **it is clear that Ms O'Donoghue did raise here personal grievance with her employer within the 90 days required by section 114 of the Act.**

Mediation

[14] Given this determination Ms O'Donoghue is now entitled to pursue her grievance in the Authority. However I note that the parties have not yet attempted mediation and it is appropriate that they do so before I proceed with my investigation. **The parties are directed to attend mediation within six weeks of the date of this determination.** To that end the Authority support officer will forward a copy of the relevant papers to the Labour Department mediation service who will contact the parties shortly.

[15] Should the parties be unable to settle this matter between themselves Ms O'Donoghue should contact the Authority support officer with a view to setting up a further telephone conference to arrange a timetable for the investigation of her employment relationship problem.

Costs

[16] Costs are reserved pending the final disposal of this matter.

James Wilson

Member of the Employment Relations Authority