

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 14
5357173

BETWEEN NICKA PAPERA
 Applicant

AND OCS LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Nicka Papera on his own behalf
 Paul McBride for the Respondent

Investigation Meeting: 18 January 2012 at Wellington

Submissions Received: By 26 January 2012

Determination: 2 February 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Nicka Papera, has brought personal grievances against his former employer (OCS) for being unjustly warned, transferred and dismissed. He therefore brings claims for unjustified disadvantage and unjustifiable dismissal. OCS rejects his claims and also considers them to be out of time.

[2] An investigation meeting was convened to investigate whether or not Mr Papera's claims were in time and, if not, whether exceptional circumstances existed and it is just to investigate the claims outside of the 90 days provided for by law. Mr Papera was clear that he wished to pursue his claims against OCS, whether or not he was out of time or required exceptional circumstances.

[3] While Mr Papera misdescribed his employer as OCS Cleaning Company Limited this matter was resolved in the statement in reply, which was headed between Mr Papera and OCS Limited by OCS's then representative, whose address for service

was that of the respondent company, OCS Limited. Given that no issue has been taken I have amended the error in the proceedings pursuant to s.221(b).

[4] While Mr Papera had not made a formal written application for leave to raise his personal grievance outside of 90 days, he has made it very clear throughout the proceedings that he wished to proceed with his substantive application, whether it was on the basis of being in time and/or an application for being a grievance out of time. Should such an application be considered as informal, I validate it pursuant to s.219(1).

Factual discussion

[5] There are a number of disputes in this case about what actually happened during Mr Papera's employment. This is not surprising given the fact that these events took place about three years ago and even Mr Papera does not have a good memory of many of them. From OCS's perspective, a number of the key people involved have since left its employment.

[6] Unless specified otherwise I make my determination on the basis of the uncontrovertible documentary evidence, matters that are agreed and otherwise on Mr Papera's version of events. This is not on the basis of credibility findings, but simply for the purposes of analysis on a basis most favourable to Mr Papera. My findings are as follows.

[7] Mr Papera is an experienced cleaner. He was transferred to the employment of OCS when another cleaning company lost the contract at Victoria University in mid 2008. Mr Papera was covered by a written employment agreement of which he had a copy at the time, although he does not have one now.

[8] After an issue was raised by Victoria University staff about Mr Papera's behaviour, over which he denies any wrongdoing, it exercised its right to ban him from its premises. Mr Papera was thus required to stop working on the site. He was not given any reason why. He continued to be paid from this period, being from around mid December 2008. Mr Papera made some calls to OCS thereafter, but was not given any information about why he was no longer being given any work. In fact he did not receive any clear information about his ban until 16 January 2009, when he rang OCS and was told that it was looking to place him at another suitable site.

During that conversation Mr Papera claimed to have been suspended, that he was looking at *getting a lawyer* and that he would *sue OCS*.

[9] In this period while Mr Papera was absent from work, he rang a union for advice, but came across a language barrier and could not get his concerns understood.

[10] A meeting was attended by Mr Papera on 26 January 2009 with OCS to discuss his options for a return to work. He was given two alternative possibilities, although one he dismissed out of hand at the meeting, while the other would have resulted in him being transferring to another employer's employment in a month or so, as OCS had lost that cleaning contract. Mr Papera was given time to think his options over and to come back and tell OCS what his preference was.

[11] From Mr Papera's perspective, he was then given his final pay on 25 January 2009, which in actuality constituted his ordinary weekly pay. This is shown by the pay records, which also demonstrate that OCS only paid Mr Papera his final pay, following an audit, almost two years later.

[12] After receiving what he thought was his final pay Mr Papera then rang OCS's office to ask what was happening, and was in effect told that there was nothing further that could be done to help him.

[13] Although Mr Papera felt that he had been dismissed at that time, he left it at that. His evidence was that this was his first involvement in a personal grievance situation and that if he had known of the statutory personal grievance procedures and the Employment Relations Authority he would have gone through the processes earlier. It was only in 2011 that he found out about such rights, although reference to them were made, as required by law, in his employment agreement. Therefore, he filed this application with the Authority on 19 September 2011, nearly three years later.

[14] Mr Papera also gave evidence that he was traumatised as a result of his treatment by OCS, particularly given his medical history, but that within a few months he had got over it and had found alternative employment.

The law

[15] Section 114 of the Employment Relations Act 2000 requires every employee who wishes to raise a personal grievance to do so within 90 days. To raise a grievance an employee must make, or have taken reasonable steps to make, their employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. Employees can not raise grievances in advance of time.

[16] Absent an employer's consent, an employee may apply to the Authority for leave to raise a personal grievance after the expiration of the 90 days. The Authority may grant that application if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so. Exceptional circumstances include where an employee has been so affected or traumatised by the matter giving rise to the grievance that he or she is unable to properly consider raising a grievance within the 90 days; or has 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; or where the employer has failed to comply with its obligation under s.120(1) to provide a statement of reasons for dismissal.

[17] To constitute the raising of a grievance such a grievance should be specified sufficiently to enable the employer to address it, so it is insufficient for an employee to advise an employer that the employee simply considers that he has a personal grievance, or even by specifying the type of personal grievance. Thus for an employer to be able to address a grievance, it must be given sufficient information so that it can respond to it on its merits, with a view to resolving it soon and informally (see for example *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517).

[18] Any exceptional circumstances must have a causative effect upon the delay in submitting the grievance. There is no formality or difficulty involved in notifying a grievance to an employer and failure to do so within 90 days generally will not be "occasioned by" circumstances which, on a practical approach, had left reasonable time to secure any necessary advice and raise the grievance (see for example, *GFW Agri-Products Ltd v. Gibson* [1995] 2 ERNZ 323 (CA)).

[19] Simply not knowing about one's rights to bring a personal grievance does not constitute exceptional circumstances (see for example *Thomson v. Thomson* [1992] 2 ERNZ 84), particularly where the parties' employment agreement provides, as it must, a plain language explanation of the services available for the resolution of employment relationship problems, including reference to the 90 day period.

[20] Section 114(6) provides that no action may be commenced in the Authority in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with the section.

Determination

[21] Mr Papera's claims for unjustifiable disadvantage and dismissal are clearly out of time. At the time, Mr Papera, on his own evidence, did raise a number of questions about why he was being treated in the way that he was, for instance being taken off work at Victoria University and later losing his job. However, nothing was ever sufficiently specified by him to enable OCS to address his concerns. He never said that he had a personal grievance, or specified the type of personal grievance or what he wanted to be done to resolve any such grievance. His concerns were of a general nature only. In these circumstances, there was no raising of any personal grievances (*Creedy* applied).

[22] Mr Papera therefore needs to establish exceptional circumstances in order to be able to pursue his grievances. I do not accept that he was so affected or traumatised by the matters giving rise to the grievance that he was unable to properly consider raising the grievance within 90 days. His evidence was clear that within a few months he had got over matters to the extent that he was able to take up new employment. Yet he did not raise his grievances promptly thereafter as he should have.

[23] Mr Papera's arrangements with the union he contacted were not reasonable arrangements to have a grievance raised on his behalf as required by law. He rang the union for assistance, but was unable to get the person he spoke with to understand his position. Given that the union did not understand his position, it follows that he has not made reasonable arrangements to have a grievance raised, especially given that he accepts that he did not even know of the existence of grievance procedures at that time.

[24] The other exceptional circumstance raised by Mr Papera was that he claimed that OCS had failed to comply with its obligation to provide a statement of reasons for dismissal. However, any request Mr Papera made about his treatment did not relate to his dismissal, which did not occur until late January 2009 at the earliest, because he accepted that he did not make any request for reasons over his dismissal, but only over earlier issues, which could only relate to possible disadvantage. Exceptional circumstances do not apply to provide a failure to provide a statement of reasons for an alleged unjustifiable disadvantage, for which no statutory equivalent of s.120 exists.

[25] Section 114(6) does not apply in this case because Mr Papera's grievances were commenced in the Authority at the same time that his personal grievances were raised.

[26] There are no other exceptional circumstances argued, nor that could apply in this case, where Mr Papera, through ignorance of the law, did not take any action in pursuing any concerns that he had about matters concerning his employment for well over two years.

[27] I therefore dismiss his claims in their entirety.

Costs

[28] Both parties made submissions on costs on the day. If it was successful, OCS sought the standard daily tariff, given that its costs would be around \$3,000. I accept that there is no reason to depart from applying the tariff which, for an investigation meeting lasting three hours, is approximately \$1,500.

[29] Mr Papera gave no submissions on his ability to pay any costs award, the risk of which he had been made aware throughout. He accepted that he was in work, but that he did not have a lot of money left over at the end of every week. He agreed with my suggestion that his weekly excess might be \$50-100 a week, should there not be any extraordinary bills for him to meet. He claimed not to have any significant assets.

[30] In all the circumstances, I consider in equity and good conscience that payment should be made in instalments, so that OCS can obtain some redress and so that Mr Papera is not greatly disadvantaged. I therefore order the applicant, Nicka

Papera, to pay to the respondent, OCS Limited, the sum of \$1,500 in costs. These costs shall be made by way of weekly instalments of \$30 from 28 March 2012.

G J Wood
Member of the Employment Relations Authority