IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 205
5358339

	BETWEEN	JIM RICHMOND
	AND	RON HIGGINS Applicants
	AND	ASPIRE INCORPORATED Respondent

Member of Authority:	G J Wood
Representatives:	Graeme Ogilvie, for the Applicants Jenny Jermy, for the Respondent
Investigation Meeting:	8 December 2011 at Wellington
Determination:	20 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants claim that their dismissals for serious misconduct from the respondent (Aspire) were unjustified. This determination deals solely with the issue of whether or not their grievances were raised within 90 days and, if not, whether exceptional circumstances exist and it is just for the Authority to investigate and determine their grievances even though they are out of time.

Factual discussion

[2] The applicants, Messrs Richmond and Higgins, were employees and clients of Aspire. Aspire provides assistance to mental health consumers, and is run and staffed by its own clients. It is a government funded voluntary incorporation. Its registered office is on a certain level of a building in Willis Street, Wellington, but its address for communications is a Wellington Post Office Box.

[3] It appears that during the course of the disciplinary processes, when both men were being investigated for alleged serious misconduct, they were on special leave and thus away from the workplace. As a result of their mental health status it was deemed appropriate by Aspire during this investigation to provide their representative, Ms Kaye Green, a community law centre lawyer, with various items of correspondence for *passing on to Jim and Ron*. Ms Green then had to forward them to a mental health professional, who would deliver the correspondence to the applicants.

[4] As a result of its investigations, Aspire decided to summarily dismiss the applicants on 7 December 2010, which was when Ms Green was provided with the letters of dismissal. Ms Green then passed them on to the mental health professional, who was then able to make contact with Mr Higgins on 13 December to give him the dismissal letter, but who could not contact Mr Richmond until 14 December. That means that the 90 days expired for Mr Higgins on 12 March 2011, and for Mr Richmond on 13 March 2011.

[5] There were a number of communication difficulties between December and March over Ms Green contacting the mental health professional, and her contacting the applicants in turn, and vice-versa. However, I accept that the applicants wished to pursue their personal grievances throughout, and when contacted by the mental health professional raised queries about what was happening, particularly in the case of Mr Higgins. Letters were sent to Work and Income by Ms Green informing it of the applicants' *agreement* with her to pursue personal grievances, which ensured their eligibility for welfare payments.

[6] Unfortunately, Ms Green was unable to meet the mental health professional during the 90 day period and therefore had to raise the grievances without the benefit of such a meeting, or any further contact with the applicants.

[7] Clearly, Ms Green left raising the grievances until the veritable last minute, because she did not post the letters raising personal grievances until 11 March 2011. She certainly did not allow reasonable time for delivery between Porirua and Wellington, particularly given that Ms Green could not have been certain that there would be anybody at Aspire's premises on Saturday 12 March, which was the earliest that the grievance could have been received by Aspire.

[8] Unfortunately, the letters, sent only to Aspire's physical address, came back to Ms Green several days later, marked *return to sender*. I accept that in the normal course of events, NZ Post would have redirected a letter to an incorporated society such as Aspire to its known PO Box, which was its address for communication, even if addressed to its physical address in Willis Street. However, had the letters been addressed to Aspire's PO Box there was no still no likelihood that they would have been opened on a Saturday or Sunday.

[9] When Ms Green received the letters returned marked *return to sender* she reissued them, addressed to Aspire's PO Box. Accordingly, it was not until 17 March 2011 that Aspire received notice of the personal grievances. Aspire declined to accept the grievances as they were raised out of time.

The law

[10] In *Wyatt v. Simpson Grierson* [2007] ERNZ 489 it was held by the Court:

> *[18] In most cases, the 90 day period will begin when the action which gives rise to it occurs. That is because the reasons for the employer's action will be known at the time the action is taken …*
>
> *[28] To properly apply s.33(2) or s.114(1), it is also necessary to deal with the extent of knowledge the employee must have before the 90 day period starts to run …*
>
> *[29] In summary, I find that the construction to be placed on s.33(2) of the Employment Contracts Act 1999 and s.114(1) of the Employment Relations Act 2000 is that the 90-day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential part of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.*

[11] The definition to be applied to the term *exceptional circumstances* was decided by the Supreme Court on *Creedy v. Commissioner of Police* [2008] ERNZ 109. The Supreme Court held:

> *In* Wilkins v. Field*, the Court of Appeal treated 'exceptional circumstances' as those which are 'unusual, outside the common run, perhaps something more than special and less than extraordinary'.*
>
> *This formulation appears to combine two different meanings, the first that the unusual ('the exception to the rule') and the second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.*

[12] One of the grounds for exceptional circumstances under s 115 is 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. It is, however, only one of the reasons that may be accepted by the Authority.

[13] There appear to be four cases on point, two which preceded s 115. The first was *Stott v. Ministry of Agriculture* [1999] 1 ERNZ 448. In that case the Employment Court held at pp.458 and 459 that the grievance representative had

> *… made the reasonable assumption that his letter of 19 February had been duly posted and therefore would have been received in the course of post by the respondent. On that assumption no further steps were taken before the submission of the grievance. This may have been unwise with the advantage of hindsight and, as the Tribunal suggested, these difficulties could have been averted by a follow-up phone call or facsimile transmission which would undoubtedly have resulted in the submission being made within time and the present difficulties being avoided. However, as Mr Fuscic submitted, there was no statutory requirement to follow-up the submission and the provisions of s.33(4) clearly intended to deal with the situation where the grievance had not been submitted within the 90 day period.*
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> *…I am satisfied that Mr Railey and the appellant, as a result of his communications to her, were both under the assumption that the grievance had in fact been properly submitted by letter and that assumption occasioned the delay in actually submitting a grievance. The requirements of s 33(4)(a) were therefore met…*

[14] In *Newfield Supermarket (1995) Ltd v. Bogle* [1999] 1 ERNZ 788, a later Employment Court decision, but which did not refer to *Stott*, the outcome was different. At p.805 it was found that:

> *If a particular employee, either personally or through his/her representative, solicitor or advocate, neglects to submit his/her grievance by letter through the ordinary post, then it is trite to remark that the submission of the grievance will not occur until the letter is received by the affected employer, unless the employer/former employer concerned declines to accept the receipt of the contended grievance, deceitfully returning it, for example, to NZ Post in its sealed envelope. It is trite to remark that there are obvious differing risks involved by an employee choosing a submit a contended grievance by letter through the post to the affected employer/former employer and then - if receipt of the alleged letter is subsequently denied in an out of time situation affecting that contended grievant – proving that it was in fact posted at a particular time and, more importantly,*

> *received by its intended recipient employer/former employer who adamantly denies any such receipt.*
>
> *…Ms Bogle's purported submission of her grievance by letter to Newfield Supermarket on 7 November 1997 was wholly ineffectual. The company did not receive this particular letter from Ms Bogle's solicitors. The adjudicator appropriately acknowledged that there are a number of reasons that could account for this and he could not, in the particular circumstances, make any definitive explanatory determination …*
>
> *As an abstract proposition I am certainly prepared to hold that if, in any particular case, it is shown by particular parties producing evidence in a contested 'out of time' situation affecting a particular grievant and arising out of a contended submission by post of that grievance which was allegedly not received, that the particular parties had taken all appropriate steps at both the sending/postal end and in the receiving/correctly addressed end, then non-receipt of the letter, because it had gone astray in the post in such circumstances, would be exceptional.*
>
> *In the present case, however, I conclude that there was simply too many unresolved "ifs and buts" to hold that the safeguarding processes adopted in this case were such as to ensure that all necessary steps were appropriately and accurately taken to ensure this particular letter of 7 November 1997 was mailed on that date to the company, and that similarly at the receiving end (the business premises of Newfield Supermarket) all corresponding safeguarding measures were implemented and followed which would ensure the receipt by the company of the letter sent by Ms Bogle's solicitor to it on 7 November, if that letter had in fact been posted.*
>
> *… The contended attempt to submit the grievance on 7 November 1999 did not occur because of some disabling event or events which happened in the process employed. Risks of this character were inherent in this process of submission by post which Ms Bogle's solicitors deliberately elected to employ. In marked contrast risk-free personal service was readily exercisable in this case and, I conclude, could/should reasonably have been exercised, especially as by 7 November it was then late in the 90-day prescribed timeframe.*

[15] The third relevant case is *McMillan v Waikanae Holdings (Gisborne) Ltd* unreported Travis J AC27/05 27 May 2005. It was held there that the applicant had taken insufficient steps to establish whether he had a grievance and had not made arrangements that were reasonable to raise the grievance in time.

[16] In *Melville v Air NZ Ltd* [2010] NZCA 563 the Court of Appeal held that the test of *reasonable arrangements* did not require an express instruction to an agent to bring a timeous claim, but that in Ms Melville's case her failure was to not have made reasonable arrangements to ensure that her grievance was raised in time, as opposed

to her more general and broad instructions for the union to take the necessary steps to pursue her grievance.

Determination

[17] As is clear from the facts section above Aspire did not receive notice of the grievances until after the 90 day period expired. A grievance is received when it is actually received, and will not be deemed to have occurred earlier. Thus exceptional circumstances must be met, given that Aspire declined to accept the grievances out of time. Although Ms Green sent out the letters before the 90 days expired, I find, on the balance of probabilities, that in normal circumstances delivery would have been received out of time anyway. That is because Ms Green sent them on a Friday to a central Wellington building and it would have been unlikely to have been received on the Saturday or Sunday. It therefore follows that even had a delivery been made of the letters sent to Willis Street, they most likely still would have been out of time. *Stott* is therefore not on point. Thus there can be no claim for exceptional circumstances simply because the mail was returned to sender.

[18] Therefore the only issue for determination is not delays in the postal system, but whether or not Messrs Higgins and Richmond made reasonable arrangements to have their grievances raised by Ms Green, and Ms Green unreasonably failed to ensure that those grievances were raised within the required time. Both heads of the test must be met.

[19] It is clear that the applicants told their mental health representative at the outset to pursue personal grievances because they believed they had been unfairly dismissed. It was also clear that the mental health representative passed that on to Ms Green. The letters of 11 November 2010 to WINZ make it clear that Ms Green had agreed to take personal grievances on behalf of the applicants, first to mediation and then to the Authority.

[20] In order to raise a personal grievance through a lawyer, however, certain actions have to be taken, involving rather more than just writing to Work and Income about one's intentions. A lawyer needs to act according to instructions and while Ms Green could, and did, albeit very late in the piece, provide a draft letter raising the grievances, in the ordinary course of events that would need to be approved by a

client, otherwise Ms Green would not be acting on the client's instructions, which in effect she was not, when she sent the grievance letters at the last minute.

[21] Ms Green was endeavouring, with the genuine assistance of the mental health professional, to make such arrangements with the applicants. Unfortunately, the applicants were not easily contactable, did not meet regularly enough with the mental health professional and did not meet at all with Ms Green. At best Mr Higgins called in every couple of weeks and asked what was going on, rather than taking any positive action, while Mr Richmond withdrew from matters because it was too much for him to deal with. However, no claim under s.115(a) has been made. In these circumstances, the applicants can not be said to have made reasonable arrangements to have their grievances raised in time (*Melville* and *McMillan* applied).

[22] Given that there are no exceptional circumstances in Ms Green's delay in raising the grievances by post until a day or two before the 90 days was up (which was essentially because of an inability to contact the applicants) and that the applicants had not made reasonable arrangements to have their grievances raised on their behalf, it therefore follows that the applications must be dismissed, and I so order.

Costs

[23] Costs are reserved.

G J Wood
Member of the Employment Relations Authority