

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 263
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BETWEEN MARJORIE ROTOHIKO,
 MAANE HUNIA, DARRYL
 EVELYN PHILLIPS and
 STEPHANIE HUNIA
 Applicants

A N D SEAMOUNT ENTERPRISES
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Roland Samuels, Advocate for the Applicants
 Emma Butcher, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 23 August 2015 from the Applicants
 21 August 2015 from the Respondent

Date of Determination: 02 September 2015

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

- A. The unjustified disadvantage claims were not raised within the statutory 90 day time period;**

- B. The applicants established the existence of *exceptional circumstances* under s.115(b) of the Employment Relations Act 2000 (the Act);**

- C. The Authority considers it just to grant the applicants leave to raise their personal grievance claims after the expiration of the 90 day time period and accordingly so orders;**

D. Pursuant to s.114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve their grievances.

E. Costs are reserved.

Employment relationship problems

[1] The applicants failed to raise their personal grievances with the respondent, Seamount Enterprises Limited (Seamount Enterprises) within 90 days of the alleged grievances occurring, as required by s.114(1) of the Act.

[2] Seamount Enterprises does not consent to the raising of the grievances out of time.

[3] The applicants seek the leave of the Authority to raise their alleged grievances outside the 90 day time period pursuant to s.114(3) and (4) of the Act.

The legislation

[4] Section 114 of the Act states:

...(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3,) the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[5] Section 115 states:

Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include –

...

(b) 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; ...

Issues

[6] The issues for determination by the Authority are:

(a) Was the delay in raising the applicants' grievances occasioned by exceptional circumstances? This will require the Authority to consider whether:

- the applicants made reasonable arrangements to have their grievances raised on their behalf by their agent; and
- the agent unreasonably failed to ensure that the grievances were raised within the required time (s.115(b));

(b) In the event that the answer to question (a) is "yes", the Authority will be required to consider whether it is just to grant the applicants' leave pursuant to s.114(4) of the Act to raise their personal grievances outside the statutory 90 day time period?

Investigation

[7] The parties agreed that the Authority could investigate and determine the issues in para.[6] above on the papers.

[8] An affidavit by Mr Roland Samuels and affidavits by each of the applicants were filed in support of the applications.

[9] In order for the Authority to deal with the matter, both representatives provided the Authority with submissions.

[10] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

First issue – was the delay in raising the applicants' grievances occasioned by exceptional circumstances?

[11] This will require the Authority to consider whether:

- the applicants made reasonable arrangements to have their grievances raised on their behalf by their agent; and
- the agent unreasonably failed to ensure that the grievances were raised within the required time (s.115(b)).

Alleged unjustifiable disadvantage claims

[12] Each of the applicants was employed by Seamount Enterprises until their employment was terminated on the grounds of redundancy on 31 December 2014.

[13] The applicants claim that all staff were entitled to receive the same pay and conditions as Union employees. However, upon termination of their employment agreements, the applicants did not receive the same treatment. The applicants say as a result they were unjustifiably disadvantaged.

Advice

[14] In his affidavit filed in the Authority on 14 August 2015, Mr Samuels confirms being responsible for lodging the applicants' personal grievances on 9 April 2015 and not before the due date, being 30 March 2015. Mr Samuels gives as the reason for this delay the fact that his time had been "*occupied with tending to a close friend who was at an advanced stage of Parkinsons who had a relapse during this time*".

[15] Mr Samuels states that he received a clear instruction over the telephone before 30 March 2015 to lodge the personal grievance on his clients' behalf. Mr Samuels refers to a number of emails from his clients to establish that reasonable arrangements were made by the applicants to have their grievances raised on their behalf by him and that it was he who had unreasonably failed to ensure that their grievances were raised within the required time.

[16] The email trail attached to Mr Samuels' affidavit includes an email from one of the applicants, Ms Phillips, on 25 March 2015 at 11.21am. In that email, Ms Phillips states:

*Morning Roland
Please find a brief summary of our situation ... We feel disadvantaged as we were staff, under Brett's words, that we would be treated the same. Marj has been with the Company since it started in 1995 and I have been there along with Sale since 1998, yet there are staff who joined as recent as 2 years ago who received redundancy*

remuneration and we did not receive the same ... If we are to lodge – which we will need to do in the next few days as Seamount made us redundant on 31st December, there are a lot of other people that this outcome – if positive – will effect. Thanks for your time and I await your thoughts.

[17] Ms Phillips states in her affidavit that she sent this information to Mr Samuels by email on 25 March 2015.

[18] The three other applicants, namely Ms Maxine Hunia, Ms Stephanie Hunia and Ms Marjorie Rotohiko, each say that they telephoned Mr Samuels to instruct him to pursue a personal grievance and this occurred before they received the forms from him to sign on 26 March 2015.

[19] Mr Samuels says he received an email on 26 March 2015 at 9.07am attaching a statement entitled:

*“25th March 2015
To Whom It May Concern*

*We, the undersigned wish to lodge a personal grievance against
Seamount Enterprises Limited.*

[20] The statement attached included brief details of the alleged grievances. The statement is signed by each of the applicants.

[21] In an email in response by Mr Samuels at 3.09pm on 26 March 2015, Mr Samuels requests each of the applicants to sign authorities for him to act on their behalf.

[22] On 27 March 2015 at 9.36am an email is sent to Mr Samuels attaching authorities for his company to act. These authorities to act are signed by each of the applicants.

[23] On 30 March 2015 at 6.02pm, Seamount Enterprises received an email from Mr Samuels as follows:

Good day Brett, I would like to officially raise a personal grievance on behalf of the following employees for an unfair redundancy ... I am in the process of collecting and collating the relevant information and will have it to you by the end of the week. This email serves as an official PG raised within the 90 day period.

Regards,

Roland JC Samuels

[24] Seamount Enterprises did not reply to this email and a further email from Mr Samuels was sent on 9 April 2015 at 1.45pm as follows:

Good day Brett. Please see attached the personal grievance attached together with the signed authority to act by the four employees raising the grievance. Please confirm receipt of this.

*Regards,
Roland JC Samuels*

[25] Mr Samuels, in his submission and in his affidavit, despite the above correspondence, accepts that the personal grievance was raised by him outside the 90 day period.

[26] I find on the balance of probabilities, that each of the applicants made reasonable arrangements to have their personal grievance claims raised on their behalf by Mr Samuels. The answer to the first matter requiring consideration by the Authority in para [6](a) above is “yes”.

[27] On 25 March 2015, Ms Phillips forwarded Mr Samuels an outline of the alleged claims against Seamount Enterprises. A letter was also sent to Mr Samuels at that time signed by each of the applicants headed up:

We, the undersigned wish to lodge a personal grievance against Seamount Enterprises Limited.

[28] It is my view that the conversations held with and the information provided to Mr Samuels was sufficient for Mr Samuels to know that he was instructed to bring a personal grievance claim on behalf of each of the applicants within the 90 day period.

[29] Mr Samuels did write a pro forma letter to Seamount Enterprises stating that he was raising a personal grievance on behalf of the applicants. However, Mr Samuels appears to acknowledge that that letter dated 30 March, did not have sufficient particularity to comply with s.114 of the Act. Mr Samuels said that he did not lodge a personal grievance with sufficient details until 9 April.

[30] The reason for Mr Samuels delay was because he was caring for a friend in the advanced stages of Parkinsons disease.

[31] Mr Samuels is the sole director of a company known as Unfairly Dismissed Limited, which was incorporated on 7 January 2013. Unfairly Dismissed has a website¹ which details the fees charged by the company to bring a personal grievance claim on behalf of a client. The website also states that Unfairly Dismissed has employment law specialists. The areas of speciality include:

- *being fired;*
- *unfair dismissal;*
- *personal grievance claim;*
- *workplace bullying;*
- *employment disputes;*
- *representation at disciplinary meetings.*

[32] The website also states

You have 90 days from the date your employment problem occurred (or the date you became aware of the employment problem) to lodge a personal grievance. We stress the importance of consulting us as soon as possible to allow sufficient preparation time to raise the personal grievance on your behalf. We will:

- *assess your situation*
- *provide you with options*
- *help you make a decision about pursuing the matter with your employer (or former employer).*

[33] Mr Samuels is experienced in employment matters. Mr Samuels knows the importance of the 90 day time limit in personal grievance claims and this is made clear on his company's website.

[34] Mr Samuels had all the information necessary to provide sufficient details of the applicants' personal grievance claims by 26 March 2015. On 30 March 2015, Mr Samuels sent Seamount Enterprises what can only be termed a "holding" letter when he had the information at that time to send full details.

[35] This, in my view, was an unreasonable failure by Mr Samuels.

¹ www.unfairlydismissed.co.nz

[36] Both Ms Butcher and Mr Samuels referred me to the Employment Court judgment of *Davies v. Dove Hawkes Bay Inc*² in support of the respective positions of their clients. At para.[29] of the judgment, Chief Judge Colgan stated:

If a dismissed employee engages a qualified, knowledgeable and experienced agent to advise on and protect the grievance's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievance steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievance and experience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.

[37] Such principles apply in this case. For the reasons above, I determine that the *exceptional* limb in s.114(4) of the Act has been met pursuant to s.115(b) of the Act. The answer to the second part of the first question in para [6](a) above is “yes”. Mr Samuels unreasonably failed to raise the personal grievance claims on behalf of the applicants.

Second issue – is it just to grant the applicant’s leave pursuant to s.114(4) of the Act to raise their personal grievances outside the statutory 90 day time period?

[38] While the applicants appear not to have taken steps immediately following the termination of their employment, and the reason for this is unknown, they did take steps on 25 March 2015 to do so. The grievance was ultimately raised on 9 April 2015 and I do not believe the delay of approximately 14 days has caused prejudice to Seamount Enterprises.

[39] The information provided to Mr Samuels by the applicants was of sufficient detail for him to have raised the grievances on their behalf within the required timeframe. Mr Samuels failed to do so. It was because of this failure, which I believe to be unreasonable, that has caused this current situation.

[40] I take into account the submissions on behalf of Seamount Enterprises that evidence provided in support of the applicants’ application is scant. However, the evidence that has been provided, in my view, is sufficient for me to make the findings that I have, on the balance of probabilities.

² [2013] NZEmpC 83

[41] From the evidence, the applicants may have claims which on the merits require further investigation. It is just in the circumstances to grant the applicants leave pursuant to s.114(4) of the Act to raise their personal grievances outside the statutory 90 day time period. The answer to the second issue is “yes”.

Costs

[42] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority