

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 78
3023268

BETWEEN AMIT SHARAN
 Applicant

AND ZOYA SAAD CARS LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Peter McKenzie-Bridle, Counsel for Applicant
 Emily Hartson-Maea, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 3 July 2018 from Applicant
 19 July 2018 from Respondent

Determination: 6 September 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The Applicant (Mr Sharan) alleges that he has raised a personal grievance in respect to his employment by the Respondent (Zoya Saad) and he seeks to have the Authority confirm that that is the position; in the alternative, he advances in “exceptional circumstances” argument for raising his personal grievance out of time.

[2] Zoya Saad maintain that if the personal grievance were raised within the justiciable period, it was dealt with and resolved by the effect of an investigation undertaken by the Labour Inspector.

[3] Mr Sharan is a Fijian national who arrived in this country in September 2014. He was offered employment by Zoya Saad and obtained a work visa in October 2014

so as to enable work to commence on 4 November 2014. Mr Sharan was employed as a mechanic by Zoya Saad.

[4] After work commenced, Asif Muhammad, the owner/operator of Zoya Saad demanded that Mr Sharan provide him with his bank card and pin number allegedly so that the employer could pay wages.

[5] Extensive hours were allegedly worked by Mr Sharan.

[6] Between January 2015 and June 2016, it is alleged that Asif Muhammad withdrew over \$20,000 in cash from Mr Sharan's bank account. Asif Muhammad was prosecuted for that conduct by police and subsequently pleaded guilty in the Hutt Valley District Court to the charge of obtaining money by deception.

[7] Mr Sharan says that he raised a personal grievance with Zoya Saad by letter dated 1 August 2016. The relevant sentence in that letter reads as follows:

“Thank you for attending the meeting today with my client and your former employee, AMIT DEO SHARAN in relation to his employment grievances with your company.”

[8] It appears that that sentence, the first sentence in the 1 August 2016 letter from Mr Sharan's then advocate to Asif Muhammad of Zoya Saad, is the only relevant part of that communication. In particular, reference is to the expression “employment grievances” in that sentence.

[9] The rest of that letter simply dwells on argument about whether holiday pay and statutory holiday pay had been correctly paid to Mr Sharan or not.

[10] The issues between the parties were not resolved as a consequence of the correspondence just referred to, and the matter was referred to a Labour Inspector who appears to have conducted inquiries into whether Mr Sharan had been correctly paid holiday pay and statutory holiday pay, or not, and concluded that Mr Sharan had been paid correctly.

[11] Zoya Saad say that if the letter of 1 August 2016 does constitute a proper raising of a personal grievance, then that personal grievance has been resolved as a consequence of the Labour Inspector's conclusion that nothing is owed to Mr Sharan by way of wages.

Issues

[12] It will be necessary for the Authority to determine:

- (a) Whether a personal grievance has been raised within time; and/or
- (b) If no personal grievance has been raised then whether s.114(3) and (4) of the Employment Relations Act (“the Act”) should apply.

Was a personal grievance raised within time?

[13] I am satisfied no personal grievance was raised within time. This is so notwithstanding the contention apparently advanced for Zoya Saad that a grievance was raised by correspondence dated 1 August 2016 and then dealt with by the Labour Inspector’s investigation, and failure to find wrongdoing by Zoya Saad.

[14] Whatever the apparent admission made on behalf of Zoya Saad, I am satisfied a proper construction of the 1 August 2016 letter does not allow of the conclusion that a personal grievance was raised. There is one single reference in that letter to a grievance when the writer refers to Mr Sharan’s “employment grievances”.

[15] But the body of the letter following on from that reference is concerned exclusively with a claim for unpaid wages. There is no other claim made, no suggestion that there is any underlying grievance other than the simple wage claim and no intimation that any non-economic loss has been suffered which might sound in compensation.

[16] In those circumstances, I am not persuaded that the letter in question constitutes a proper raising of a grievance as for example *Creedy v Commissioner of Police* [2006] ERNZ 517 mandates.

[17] In *Creedy*, the Employment Court decided that a grievance was raised when the employer was made sufficiently aware of its nature to be able to respond as the legislation contemplated. The whole point of the statutory enactment requiring a grievance to be raised within 90 days of the events complained of is to give an employer so notified a proper opportunity to put things right as quickly as possible and as close to the events complained of as is possible.

[18] In the present case, I am satisfied that Zoya Saad could not have been aware of the nature of the grievance in order to respond to it.

[19] All the letter is concerned with is a claim for unpaid wages and I am satisfied that the referenced to “employment grievances” is no more than a loose use of language and/or not to be taken as being a proper referral of a personal grievance to the employer.

[20] After all, if the writer of that letter had not used the word “grievances” at all, but had used some other form of words to describe the nature of his then client’s instructions, it seems implausible that anyone would have concluded that a personal grievance had been raised, because the substance of the matter as detailed in the letter is exclusively about a wages claim which is a different class of action altogether.

[21] A wages claim is able to be brought up to six years after the loss is said to have occurred, that is within the time frame of a normal civil claim as mandated by the Limitation Act, 2010.

[22] Unlike a personal grievance, a wages claim need not be brought within a reduced statutory period (90 days, versus 6 years) and unlike a personal grievance, a wages claim can and often is investigated by Labour Inspectors who are statutory officers empowered to deal, *inter alia*, with claims of unpaid wages.

[23] So put shortly, I am not persuaded that a personal grievance was ever raised in the 1 August 2016 letter to Zoya Saad and it follows from that conclusion that I need now to consider whether exceptional circumstances may justify the raising of a personal grievance out of time and if so whether it is just to do so.

[24] However, before turning to deal with that question, it is appropriate that I comment briefly on the proposition advanced for Zoya Saad to the effect that if a personal grievance had been raised in the 1 August 2016 letter, then it was dealt with by the investigation of the Labour Inspector given the inspector found nothing amiss in the payment of wages to Mr Sharan and two other named employees.

[25] Assuming, for the sake of argument, that I had been satisfied that a personal grievance was raised by the 1 August 2016 letter, it could not be right that the inspector had resolved that grievance because the inspector has no power to resolve a personal grievance. The inspector has a power to resolve wage claims and regularly does so but she or he has no power whatever to deal with personal grievance claims

which must be brought and prosecuted by the grievant; the grievant cannot subrogate her or his right so as to allow the inspector to run a grievance action.

Are there exceptional circumstances?

[26] I think it difficult not to conclude that exceptional circumstances do exist in the present case. Of course it would have been better if Mr Sharan had raised his personal grievance within time. It may be that he thought he was doing precisely that when he instructed his then advocate to write the 1 August 2016 letter but as I have not heard from Mr Sharan on this point, I can only speculate on what his intention may have been. In any event, as I have already made clear, I have not been persuaded that the 1 August 2016 letter did raise a personal grievance.

[27] The submission for Mr Sharan on the issue of exceptional circumstances is quite stark; it is said on his behalf that during the employment, it became apparent that Asif Muhammad was taking money from Mr Sharan's bank account.

[28] Based on the affidavit filed in this matter by Mr Sharan but which was prepared and filed in the District Court in pursuit of a summary judgment in favour of Mr Sharan and against Asif Muhammad, Mr Sharan recites that he first became aware of Asif Muhammad taking money from his account in about December 2015 but that he felt confident that the money would be returned and he was frightened of losing his work visa and thus being deported back to Fiji because his work visa stipulated Zoya Saad as his employer.

[29] The employment relationship concluded at the end of June 2016 and in late September 2016 Mr Sharan gave statements to police at Lower Hutt about the alleged offending of Asif Muhammad.

[30] Those interviews given by Mr Sharan to police in September 2016 resulted in police conducting further inquiries and ultimately charges were brought against Asif Muhammad in the Hutt Valley District Court on 27 and 28 November 2017 and the matter was finally resolved by sentencing of Asif Muhammad on 26 January 2018.

[31] A statement of problem and a memorandum of counsel raising a personal grievance outside the 90 days were both filed in the Authority on 12 December 2017. It is of course established law that a personal grievance can be raised in a statement of problem.

[32] The sequence of events from the point of discovery of Asif Muhammad's criminal behaviour through to its resolution in the criminal courts at the end of January 2018 has been described above. Mr Sharan could have raised a personal grievance immediately that he first became aware of the money being taken from his bank account but had he done that, there would have been no ability for this Authority to proceed to investigate the matter unless and until the criminal proceedings had been concluded.

[33] In the particular circumstances of this case, I am satisfied that there are exceptional circumstances here which entitle Mr Sharan to satisfy the first leg of s.114(4) of the Act. Those exceptional circumstances are the fact of Asif Muhammad stealing Mr Sharan's money. I am satisfied that that single fact would be sufficient to traumatise and confuse any reasonable person and especially a recent immigrant to this country who arguably was so trusting as to allow his employer to not only have access to his bank card but also be told of his pin number.

[34] So I am satisfied that exceptional circumstances exist because of the discovery of the theft of Mr Sharan's money by his employer, the devastating effect that discovery must have had on him and the understandable concentration that he put into dealing with the matter first of all through the criminal courts.

Is it just for leave to be granted by this Authority?

[35] Here, I can do no better than quote directly from the submissions filed on Mr Sharan's behalf by his able counsel:

“...counsel submits it would be extraordinary if Mr Sharan were denied access to the Employment Relations Authority in these circumstances.

On the face of Mr Sharan's allegations, he has been subject to sustained and deliberate criminal activity by his employer whilst employed under a work visa which tied him to the respondent. ...

To deny Mr Sharan leave in these circumstances would be akin to giving Mr Muhammad the benefit of his own breach. Counsel submits that these are circumstance in which the Authority cannot in good conscience countenance.”

[36] I venture to agree with those views and add nothing further. I am satisfied that a case has been made out for Mr Sharan to be granted leave to raise his grievance out of time having satisfied myself first that there are exceptional circumstances for

reasons that I have described and second, that the interests of justice require the granting of the right to proceed with his grievance for reasons set out by his counsel and referred to above.

Determination

[37] I have heard the employer as the law requires and notwithstanding that, I have decided that Mr Sharan has satisfied me that he should have leave to raise his personal grievance out of time and I so order: s.114(4) of the Act applied.

[38] In terms of sub-section 5 of s.114, I am required to direct the parties to mediation to try to resolve the grievance on a mutually satisfactory basis and I now do so. Counsel for Mr Sharan is to advise my Authority officer of when mediation has been arranged and subsequently of the outcome of that mediation.

[39] If mediation does not successfully resolve the employment relationship problem between these parties, my Authority officer will then arrange a telephone conference to enable me to set the matter down for investigation.

James Crichton
Chief of the Employment Relations Authority