IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 384/10
5301487

	BETWEEN	TUSITINO SIAOSI Applicant
	AND	KENNERLEY RETAIL INVESTMENTS LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	E Telle, counsel for applicant N Taefi, counsel for respondent
Investigation meeting:	21 July 2010
Determination:	25 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tusitino Siaosi says he has a personal grievance in that his former employer, Kennerley Retail Investments Limited (KRIL) dismissed him unjustifiably.

[2] KRIL says Mr Siaosi's grievance was raised outside the 90-day period specified in s 114(1) of the Employment Relations Act 2000, and it does not consent to the grievance being raised after the expiration of that period.

[3] Mr Siaosi says the grievance was raised in time, but in the alternative has applied under s 114(3) of the Act for leave to raise the grievance out of time on the ground that exceptional circumstances exist and it is just that leave be granted.

[4] The exceptional circumstances concern Mr Siaosi's: being so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising it in time; making reasonable arrangements to have his grievance

raised by an agent, but with the agent failing unreasonably to do so; and not being in possession of a copy of the employment agreement containing the requisite information about the 90-day requirement together with other matters arising out of the employment agreement and Mr Siaosi's understanding of its contents.

[5] This determination addresses whether the grievance was raised in time, and in the event the grievance was not raised in time whether leave to raise it should be granted.

Background

[6] KRIL operates a number of petrol stations including one at Browns Road and another at Wiri in South Auckland. From December 2006 – April 2007 Mr Siaosi was employed as a customer service officer, and from time to time worked at both of these stations. The position he was offered was one left vacant by the resignation of his brother.

[7] Wayne Kennerley, KRIL's director, said that in late February or early March 2007 he began receiving reports that Mr Siaosi was allowing his brother to loiter on the Browns Rd premises, and to consume coffee and read papers without paying. Mr Kennerley also received reports that between the hours of 11 pm and 5 am Mr Siaosi had been opening the front doors of the stations and allowing customers to enter. This was contrary to policies which had been explained to Mr Siaosi, and contrary to KRIL's obligations under its Shell agency. Mr Kennerley said he spoke to Mr Siaosi about these matters, which Mr Siaosi denied.

[8] On or about 20 March 2007 there was a robbery at the Wiri station. As part of his investigation following the robbery, Mr Kennerley was reviewing recent CCTV footage taken at the Wiri station when he said he noticed Mr Siaosi engaging in similar breaches of policy while working at that station. The conduct was recorded on footage dated 16 March 2007.

[9] On or about 4 April 2007 KRIL sought a disciplinary meeting with Mr Siaosi to discuss its concerns about what was revealed on the footage. On or about the same date the Police questioned Mr Siaosi about his involvement in the robbery, but he was

released without charge. Mr Siaosi's brother was charged, although the charges were later dropped.

[10] The disciplinary meeting went ahead on 5 April 2007. During the meeting Mr Kennerley said he showed Mr Siaosi the footage in question, although Mr Siaosi denied being shown any footage of that kind. According to Mr Kennerley, Mr Siaosi acknowledged the conduct and accepted he was aware of the policies being breached. His explanation was that others committed similar breaches.

[11] Mr Siaosi said there was no such discussion. Even so, he said in a statement to the Authority that he allowed his brother to read magazines or the paper on-site, and to drink coffee, and that this was not a problem as his brother was well-known to the staff. He also said that from time to time he would open the doors during 'lock down' for people he knew, and allow those people to enter.

[12] Mr Siaosi also said a private investigator was present at the disciplinary meeting, and that the first thing Mr Kennerley said to him was that Mr Siaosi was believed to have taken the money from 'the safe'. A few days before the robbery at Wiri, a large sum of money was found to be missing from the safe at Browns Rd. KRIL engaged a private investigator, who spoke to Mr Siaosi about the matter. Mr Kennerley denied the private investigator was present at the disciplinary meeting. He believed that Mr Siaosi was confusing the disciplinary meting with the separate discussions involving the private investigator, and has also confused the robbery at Wiri and the theft from Browns Rd.

[13] Mr Kennerley did at least accept that the robbery was raised during the disciplinary meeting - although not that it was the only matter raised, that it was raised as part of the disciplinary process or that it was part of the grounds for dismissal. Because Mr Siaosi's brother was implicated in the robbery, Mr Kennerley asked Mr Siaosi if he had any information about it. For his part Mr Siaosi said the CCTV footage he was shown during the meeting was footage of the robbery, not of his actions on 16 March as KRIL alleges.

[14] The 5 April meeting was adjourned while Mr Kennerley considered what to do. He concluded that because of the repetition of the breaches of policy in the face

of prior warnings, and the inadequacy of the explanation, summary dismissal was appropriate. The meeting resumed, and Mr Kennerley advised Mr Siaosi he was dismissed for his repeated failure to follow company procedure and his facilitation of theft from the premises.

Whether grievance raised in 90 days

[15] On 17 April 2007 Mr Siaosi consulted Anna White (nee Broughton) a solicitor volunteering at the Mangere Community Law Centre. Mr Siaosi informed Ms White that he had been dismissed because of his alleged involvement in a robbery at the petrol station where he worked, despite the Police having found no wrong-doing on his part. Mr Siaosi went on to tell Ms White that Mr Kennerley refused to give him his job back or provide him with a reference unless he provided information about the robbery. Mr Siaosi was unable to provide Mr Kennerley with any information because he was not involved in the robbery.

[16] According to Ms White:

> *"Mr Siaosi made it clear to me at the meeting that what he wanted was a job reference. I gained the impression from the interview that so long as Mr Siaosi had a good reference from Mr Kennerley that would enable him to obtain another job that he was happy to resolve any issues surrounding his termination which arose between him and his employer and move on.*
>
> *I therefore told Mr Siaosi that I would attempt to contact Mr Kennerley to provide a job reference for Mr Siaosi."*

[17] Ms White telephoned Mr Kennerley to request a reference. Mr Kennerley told her he would provide one.

[18] Mr Kennerley said he began writing a reference, but it occurred to him that he could not truthfully provide a positive reference given Mr Siaosi's misconduct. He asked his solicitors to contact Ms White.

[19] On 19 April 2007 the company's solicitor spoke to Ms White. The solicitor asked whether Mr Siaosi was intending to bring a personal grievance, to which the reply was that the most important thing for Mr Siaosi was to get a reference so he could get another job. The contemporaneous file notes of both solicitors refer to Ms

White indicating she had discussed the options with Mr Siaosi, with the outcome being that Mr Siaosi wished to focus on a reference to assist him to obtain another job. As she put it in her file note, Ms White advised that she could not say a personal grievance was on the way. The file note also recorded that: *"Tusitino wants a new job but I could not say if there would be any further action as we had not looked into it at our end."*

[20] Ms White said in evidence that she believed the problem was resolved and that a reference would be forthcoming. Both sets of file notes are silent on any discussion between the solicitors about whether a reference was to be provided. I consider it unlikely there was such a discussion, except to the extent that the solicitor's evidence was that he said he would seek instructions.

[21] The same day Ms White became aware that she was in a conflict of interest through her employment at a city law firm. She contacted Mr Siaosi, KRIL's solicitor and the Mangere Community Law Centre to advise of the conflict. She advised Mr Siaosi his matter would be referred to the Mangere Community Law Centre.

[22] When KRIL's solicitor received the information from Ms White, he advised his client to take a 'wait and see approach' in the expectation that a new representative would make contact again.

[23] Mr Siaosi said he then tried calling three or four lawyers to make appointments, but none of them were interested especially because he did not have any money. He gave up trying to find another lawyer until, with encouragement from his mother and brother, he instructed Mr Telle's firm in or about early October 2007. These were bare assertions and no other details were provided.

[24] By letter dated 10 October 2007 Mr Siaosi's grievance was raised formally. The employment relationship problem was filed in the Authority on 1 April 2010.

[25] In support of a submission that the communication from Ms White was sufficient to raise a grievance, Mr Telle referred to a decision of the Employment Court in **Clark v Nelson Marlborough Institute of Technology**[1]**.** In that case the

[1] Employment Court Christchurch, Judge Couch, 19 August 2008, CC 12/08

grievant had written a letter detailing her complaints about her treatment and setting out the remedies she sought. The letter ended with the expression of a preference to resolve the matter informally, but went on to say that if this did not occur then there were strong grounds for a personal grievance.

[26] I do not accept that the facts here are comparable. Ms White did not go as far as Ms Clark had. There was simply a request for a reference, together with what I consider to be clear statements from Ms White that no grievance was being raised at the time. The question of whether anything else was said about the termination of Mr Siaosi's employment does not affect my conclusion, and does not change the essential nature of Ms White's statements. Similarly while Ms White's statements did not close the door on the raising of a grievance in the future - and that much was also understood by KRIL's solicitor - they do not amount to the raising of a grievance at the time.

[27] Accordingly I find the grievance was not raised in April 2007. It was raised out of time in October 2007.

Whether leave to raise grievance should be granted

[28] Section 114(4) of the Act provides:

> *"On an application under subsection (3) the Authority, … may grant leave, … 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 s 115); and*
> *(b) considers it just to do so."*

[29] Section 115 reads in part:

> *"For the purposes of s 114(4)(a), exceptional circumstances include –*
>
> *(a) e the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in s 114 (1); or*
> *(b) Where the employee 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*
> *(c) Where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 …"*

[30] The submission that exceptional circumstances warrant the grant of leave to raise the grievance is based on submissions that any one or all of s 115(a) – (c) apply, and that in any event exceptional circumstances existed.

1. Whether Mr Siaosi was able to properly consider raising his grievance

[31] The following tests apply where s 115(a) is relied on:

> *"First, the consequences of the dismissal or other matter giving rise to a personal grievance must be severe. That is illustrated by the use of the phrase 'has been so affected or traumatised…' . Although being affected might encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of "trauma" connotes very substantial injury. …*
>
> *Next, s 115(a) requires that these effects of the dismissal … caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to 'properly consider' raising the grievance that is required… . Finally, that incapacity appears to be required to exist for the whole of the 90 day period…"* [2]

[32] The evidence did not meet these tests. There was no independent medical evidence in support, and the assertions of Mr Siaosi's mother and brother did not reach the necessary threshold. For his part Mr Siaosi said he became distressed and depressed, and stayed in bed for much of the time, yet prior to raising the grievance in October he was able to consult Ms White and subsequently approach other lawyers, he was able to (and did) apply for another job, and he was able to (and did) approach Mr Kennerley again about a reference in association with that application.

[33] While I might accept that Mr Siaosi was distressed and depressed I do not accept that this was so to the extent that he was unable even to properly consider raising a grievance, that any such inability existed for the whole of the 90-day period, and that this was why the grievance was not raised during that period.

2. Whether reasonable arrangements were made to raise the grievance

[34] Section 115(b) has two elements. The first is whether Mr Siaosi made reasonable arrangements to have his agent raise his grievance on his behalf. The

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[2] **Telecom NZ Limited v Morgan** [2004] 2 ERNZ 9

second is whether his agent failed unreasonably to ensure that occurred within the required time.

[35] Mr Siaosi did not instruct Ms White to raise a personal grievance on his behalf. His primary concern was with obtaining a reference. Ms White acted on the instructions regarding a reference. She then took steps to advise those concerned of her conflict of interest when she became aware of it, and there has not been any criticism of her actions in that respect. As a result she was unable to take any further instructions from Mr Siaosi.

[36] Mr Telle submitted that if the Authority finds, contrary to his submissions, that Ms White did not raise Mr Siaosi's grievance, then clearly her failure to do so would amount to exceptional circumstances. I do not accept that submission. It begs the question of whether Ms White was instructed to raise a grievance. If she was not so instructed, then her failure to raise a grievance does not amount to an exceptional circumstance[3]. As I have found, she was not so instructed.

[37] As to what he did next, Mr Siaosi simply says, in effect, that on unspecified occasions he attempted to find another agent when Ms White was no longer able to act for him, but he was unsuccessful. This does not persuade me that Mr Siaosi took adequate steps to obtain another agent and instruct the agent to proceed.

[38] In turn I conclude that Mr Siaosi did not make reasonable arrangements to have an agent raise his grievance.

3. Whether the employment agreement contained the required explanation

[39] The parties' written employment agreement included in Schedule C the following provision:

> *"5. Personal grievances*
>
> *If, after bringing your concerns to our attention as outlined above you feel that you have grounds for raising a personal grievance (for unjustified dismissal …) then you*

[3] **McMillan v Waikanae Holdings (Gisborne) Limited (trading as McCannics)** [2005] ERNZ 267 at [26]

must do so within 90 days of the action occurring, or the grievance coming to your notice. Otherwise your claim may be out of time.

If you raise your grievance out of time, we can choose to accept the grievance or to reject it. If we choose to reject it, you can ask the Employment Relations Authority to grant you leave to raise the grievance out of time."

[40] The employment agreement also provided:

"Declaration

I Tino Siaosi declare that I have read and understood the terms and conditions of this agreement, or had them explained to my satisfaction and fully accept them. I further declare that I have read or had them explained to me and fully accept the terms and conditions of employment as set out in … Schedule C. … I further declare that I have been advised of my right to seek independent advice on all matters relating to this agreement."

[41] Both parties signed and dated the agreement, including the declaration.

[42] The employment agreement contained the explanation required by s 115(c). No exceptional circumstance exists under this ground. Although a number of other submissions were made in respect of the employment agreement, these are better addressed under the next heading.

4. Whether there were any other exceptional circumstances

[43] I accept that the list of exceptional circumstances in s 115 is not intended to be exhaustive.[4] However the threshold is high and requires circumstances that are unusual, outside the common run, something more than special and less than extraordinary.[5]

[44] Mr Telle submitted in effect that the additional circumstances amounting to exceptional circumstances concerned the extent to which the content of the employment agreement was explained to Mr Siaosi when it was signed, the failure to provide Mr Siaosi with a copy of the agreement until October 2007, and Mr Siaosi's limited understanding of English. Mr Telle also relied on the failure to provide the reference contrary to the promise or agreement that one would be provided, the unconscionable conduct this failure evidenced, an estoppel arising out of this conduct,

[4] **McMillan v Waikanae Holdings (Gisborne) Ltd (trading as McCannics)** at [25]
[5] Ibid at [24]

and that the 90-day provision in the employment agreement is the equivalent of an exclusion clause which cannot fairly be said to be part of the agreement because it was not properly drawn to Mr Siaosi's attention.[6] Overall it was submitted that KRIL was guilty of a gross breach of good faith.

[45] I turn first to the submissions addressing the entry into the employment agreement. Regarding the extent to which the contents of the agreement were explained to Mr Siaosi, KRIL was not able to provide direct evidence from the manager concerned and I do not give weight Mr Kennerley's account of the manager's actions. Mr Siaosi's account was that he was given the document and it was explained to him in only a minute or so. The personal grievance provision was not pointed out to him. He said further that, although he received some training, there was no training in respect of dispute resolution procedures. Finally, he said his English is poor.

[46] On the other hand, when he entered into the agreement Mr Siaosi signed a declaration that included a statement that he had read and understood the terms or that they had been explained to his satisfaction. He further declared that he had either read or had explained the provisions of Schedule C, which included the required information concerning the 90-day time limit. Now, over three years later, in effect he is attempting to resile from the declaration. I find that unconvincing.

[47] I also find unconvincing the assertion that KRIL failed to provide Mr Siaosi with a copy of the employment agreement when it was signed. It is more likely that Mr Siaosi did not retain his copy. This conclusion is influenced by Ms White's contemporaneous file note recording Mr Siaosi's acknowledgement that he had signed an agreement but that he 'no longer had it'.

[48] Regarding the reference, Mr Kennerley should have thought more carefully than he did before saying he would provide a reference. However very shortly afterwards he raised the matter with his solicitor, who in turn commenced a discussion with Mr Siaosi's solicitor.

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[6] Citing **Livingstone v Roskilly** [1992] 3 NZLR 230 in support

[49] For their part, at the time both Ms White and KRIL's solicitor were treading carefully in their handling of the matter on behalf of their respective clients. There is nothing out of the ordinary about this. It is also relevant that their discussions were essentially preliminary in nature and occurred very soon after the dismissal. Plenty of time remained to conclude the matter of the reference, including taking the not-uncommon step of attempting to negotiate a reference acceptable to both parties, and to proceed with a grievance if that was Mr Siaosi's wish. That matters did not progress as they could or should have was significantly affected by Ms White's withdrawal on the ground of her conflict of interest, and the failure of anyone else to pursue the matter on behalf of Mr Siaosi. That is unfortunate, but not exceptional.

[50] Further, if he sought a reference Mr Siaosi could have, and later did, approach Mr Kennerley directly for the reference himself. If he had done so in a timely way, his access to a reference and a review of whether a grievance would proceed could also have been addressed in time.

[51] For these reasons I do not accept that the failure to provide the reference was unconscionable, or that the circumstances amount to an exceptional circumstance such that leave to raise Mr Siaosi's grievance should be granted. Nor do I accept that by its conduct KRIL is estopped from relying on the 90-day provision in the employment agreement.

[52] Finally, Mr Telle submitted that the **Livingstone v Roskilly**[7] case applies. He submitted that Thomas J found that a key consideration was:

> *"… whether that clause is of such a nature that it must be drawn to the attention of the other party before it can fairly be said to be part of the contract."*[8]

[53] The first part of that sentence read:

> *"Even though the clause may be precise and plain the key questions remain whether the parties intended the exclusion clause to be subject to the proper and reasonable performance of the defendant's obligations and …"*

[7] See note 6
[8] At p 239

[54] The submission went on to say that it was clear from the facts that the clause was not brought to Mr Siaosi's attention. With reference to KRIL's duty of good faith the clause could be overridden as it could not fairly be said to be part of the contract.

[55] I do not accept the submission that it was clear the clause was not brought to Mr Siaosi's attention. Mr Siaosi's signing of the declaration means I consider it likely that the clause was at least brought to his attention.

[56] Further to the application of **Livingstone v Roskilly,** that case addressed whether a notice on the wall of the defendant's vehicle repair workshop stating that vehicles were stored at their owner's risk exempted the defendant from liability for negligently storing the plaintiff's car. The case was decided on the basis of the interpretation of the notice. Thomas J applied well-established law that to exclude liability for negligence an exclusion clause must be clearly and unambiguously expressed and for the most part it is to be construed contra preferentum. The reason for such requirements is that the defendant is seeking to exclude the application of the common law and his or her common law liability.

[57] Thomas J went on to refer to the 'ticket cases' and to the principle that, where clauses which are incorporated in a contract contain particularly onerous or unusual conditions, the party seeking to enforce the condition must show that it has been brought fairly and reasonably to the attention of the other party. In discussing his wider view of the role of good faith in contractual dealings, he also discussed the fairness of holding a person bound by a particular condition of an unusual or stringent nature. The unusual or stringent quality of the exclusion clause included the extent to which it sought to absolve the defendant from his obligation of care. That discussion led to the comment quoted above.

[58] I do not accept that the clause in question here is comparable with a clause excluding liability in tort, or that a direct comparison of the parties' obligations to each other in the context of the role of any purported exclusion or limitation of liability is apt. The clause here reflects the contents of a statutory provision, and its very presence is obligatory under s 65(2)(a) of the Employment Relations Act. It does not purport to exclude liability in a manner comparable to the clauses in the negligence cases and does not purport to exclude any common law liability. The

provision re-states a statutory time limit and falls to be addressed in the relevant statutory scheme.

[59] Of course that scheme includes a mutual obligation of good faith. However the discussion of the obligation of good faith in **Livingstone v Roskilly** does not address contractual clauses whose presence and content is directly related to a statute, and I do not accept the case is authority for the proposition that the clause here can be 'overridden'.

[60] For all of the above reasons I do not accept that the provision containing the 90-day time limit should be disregarded, or that there has been a breach of good faith amounting to an exceptional circumstance.

5. Conclusion

[61] Taking all of the above into account, I do not accept that the delay in raising Mr Siaosi's grievance was occasioned by exceptional circumstances. Since that means I do not accept s 114(4)(a) of the Act applies, it is not necessary to proceed to a consideration under s 114(4)(b).

[62] Accordingly leave to raise the grievance is declined.

Costs

[63] Costs are reserved. I note that Mr Siaosi has a grant of legal aid, which I understand applies to this preliminary matter.

[64] However the parties are invited to reach agreement on costs. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority