

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 193
5373788

BETWEEN TONY SMITH
 Applicant

AND HEINZ WATTIE'S LIMITD
 Respondent

Member of Authority: David Appleton

Representatives: Andy Ogilvie, Counsel for Applicant
 Raewyn Gibson, Advocate for Respondent

Investigation Meeting: Determined on the papers by consent

Submissions received: 9 August 2012 from Applicant
 20 August 2012 from Respondent

Determination: Monday 3 September 2012

DETERMINATION OF THE AUTHORITY

- A. Leave is granted for the applicant to raise his personal grievances for unjustified dismissal and unjustified disadvantage out of time.**
- C. Costs are reserved.**

Employment Relationship Problem

[1] Mr Smith claims that he was unjustifiably dismissed by the respondent and unjustifiably disadvantaged in his employment. Mr Smith's counsel concedes that the personal grievances were brought to the employer's attention outside of the 90 day time limit stipulated in s.114 of the Employment Relations Act 2000 (the Act). The respondent does not consent to the personal grievances being raised after the expiration of the 90 day period and, accordingly, Mr Smith applies to the Authority for leave to raise the personal grievances after the expiration of that period, in accordance with s.114(3) of the Act.

[2] Section 114(4) of the Act states as follows:

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.*

[3] Section 115 of the Act sets out the exceptional circumstances referred to under s.114. The exceptional circumstance relied on by Mr Smith falls under s.115(b) which provides as follows:

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;

[4] Mr Smith and Mr Smith's former representative, Mr Goldwater, lodged and served sworn affidavits in support of Mr Smith's application. The respondent lodged a response to those affidavits on 20 June 2012 and the parties lodged and served their submissions in August.

Brief account of the facts leading to the personal grievance being raised out of time

[5] Mr Smith deposes that he was informed by the respondent on or around 4 August 2011 that his position was no longer available and that there were no other positions available to him on his collective agreement terms. He initially asked the union representative to assist him but, as Mr Smith was not a union member at that time, he was advised to seek legal advice. He initially contacted the Community Law Centre in Riccarton which referred him to Mr Goldwater.

[6] Mr Smith deposes that his initial discussions with Mr Goldwater took place in August 2011. He had been offered a job on a different collective agreement (a casual worker agreement) for the balance of the then current season which he had declined to take because he was of the view that his job on his permanent collective agreement should have been kept open for him. Mr Smith deposes that the season ended mid to

late September 2011 and he had discussed with Mr Goldwater about applying to be re-employed on his normal permanent employee's agreement for the new season commencing in September/October 2011. Mr Goldwater had suggested to him, Mr Smith deposes, that it would be counter-productive to have an employment dispute going on at the same time as he was applying for a new job.

[7] Mr Smith applied for re-employment but, on 6 October 2011, the company declined to re-employ him in the new season due to him having too many sick days in the previous season. Mr Smith deposes that, when he received the advice that he was not able to be re-employed in the new season, he gave Mr Goldwater instructions to commence the grievance with Heinz Wattie's. He deposes that he met with Mr Goldwater in early November 2011 at the food court in Northlands Mall and gave Mr Goldwater instructions to commence the proceedings.

[8] Mr Smith deposes that he had heard nothing further from Mr Goldwater and had thought that the process was underway. It was only in early March 2012 that, having heard nothing from Mr Goldwater since November, he telephoned him to ask about progress with the file. Mr Goldwater said that he had given the file to a new lawyer, Mr Ogilvie, because he had been unable to do the work due to sickness and family reasons. Mr Smith deposes that he told Mr Goldwater that he had had no contact with Mr Ogilvie and had never heard of him. Mr Goldwater made inquiries on behalf of Mr Smith and shortly after that Mr Ogilvie contacted Mr Smith and explained that there had been a procedural problem in the briefing of him by Mr Goldwater and that he had only just received instructions from Mr Goldwater. Mr Smith deposes that he attended Mr Ogilvie's office virtually within two days and the file was obtained from Mr Goldwater's office and matters then came on track.

[9] Mr Smith deposes that he had *never done anything like this before*, and so had no idea of the process or the timelines involved. He thought that matters were slow in progressing *following the earthquake or just as part of the system*.

[10] Mr Goldwater deposes in his sworn affidavit that he had had conversations with Mr Smith during August and September of 2011 and confirms that it was agreed between them that it would be counter-productive to raise a grievance with the respondent whilst Mr Smith's job application was proceeding.

[11] Mr Goldwater deposes that, for most of 2011, he had been suffering from an illness which had become chronic by the end of September 2011. For that reason, he began briefing out many of his files to lighten his workload. In late October 2011, Mr Goldwater suffered a family bereavement and that caused further familial responsibilities to fall on his shoulders.

[12] Mr Goldwater deposes that he met again with Mr Smith at Northlands Mall on 3 November 2011 when Mr Smith advised him that he had been unsuccessful in his job application and that he wished Mr Goldwater to raise a personal grievance on his behalf. Mr Goldwater deposes that he recalled that his physical and emotional state at the time led him to brief out Mr Smith's file to Mr Ogilvie as he had done with previous files over the period of his debilitation.

[13] Mr Goldwater deposes that he was *genuinely horrified by the nasty surprise [he] received when Mr Smith called [him] in early March 2012 to ask how his case was going*. Mr Goldwater states that, immediately following Mr Smith's call in March 2012, he rang Mr Ogilvie who advised him that he had not heard of the *Smith file* and that he did not believe he had been briefed.

[14] Mr Goldwater deposes that he then went on a search of his records and:

... much to my chagrin I found Mr Smith's file at the back of a pile of completed matters. This confirmed Mr Ogilvie's advice of never having been briefed, obviously the file would have travelled to his office had that been the case.

The issues

[15] The Authority must determine the following issues:

- (a) Whether the delay in raising the personal grievances was occasioned by exceptional circumstances;
- (b) Whether it is just to grant leave for Mr Smith to raise the personal grievances after the expiration of the period set out in s.114(1) of the Act.

Was Mr Smith's delay in raising the personal grievances occasioned by exceptional circumstances?

[16] The respondent's position is that Mr Smith's employment was terminated on 14 August 2011. Mr Smith did not instruct Mr Goldwater to lodge the personal grievances until 3 November 2011. Whilst Mr Smith is not able to explain why he waited nearly a month (between 6 October 2011 when Mr Smith was told that he was not to be re-hired) until 3 November 2011, it is my view that he is under no obligation to do so. As the respondent points out, Mr Smith waited 82 days from his dismissal until instructing Mr Goldwater to raise the personal grievances and that self-evidently falls within the 90 day period allowed by s.114(1). Notwithstanding this, in any event, Mr Smith does credibly explain why the personal grievances were not raised in August or September 2011; namely, that to do so could have prejudiced his application to be re-hired. This is a perfectly reasonable conclusion for Mr Smith and Mr Goldwater to have reached (although I am not commenting whether having raised a grievance would have adversely affected his chances of being re-hired).

[17] In short, I do not accept that Mr Smith's application to the Authority under s.114(3) can in any way be adversely affected by him having waited 82 days before instructing his lawyer to raise a grievance on his behalf.

[18] Ms Gibson refers me to the case of *Melville v. Air New Zealand Ltd* [2010] NZEmpC 87 which was upheld by the Court of Appeal and which made clear that to fulfil the criteria in s.115(b), Mr Smith must establish:

- (a) *That the employee made reasonable arrangements to have the grievance raised on his or her behalf; and*
- (b) *That the agent unreasonably failed to ensure that the grievance was raised within the required timeframe.*

[19] It is the respondent's submission that Mr Smith did not make reasonable arrangements to have the grievances raised on his behalf and maintains that it was Mr Smith's delay until 3 November 2011 in attempting to instruct Mr Goldwater to pursue the personal grievance claim which occasioned the delay, not Mr Goldwater's inability to deal with the issue and his failure to brief out Mr Smith's claim. I do not share this view, however. As I have stated above, the requirement is for a grievant to raise the grievance within 90 days. There is no requirement to raise the grievance *as quickly as is possible* or *as quickly as practicable* for example. I do not accept that Mr Smith waiting until 3 November 2011 to instruct Mr Goldwater, leaving the latter

eight days within which to raise the personal grievances on his behalf, constitutes a failure to make *reasonable arrangements*.

[20] In my view, Mr Smith was entitled to assume that his elected counsel, an experienced professional with a practice in employment law, would do as instructed. There is no evidence before the Authority that Mr Goldwater advised Mr Smith that he did not believe he had been given enough time to raise the personal grievances and there is no evidence that Mr Goldwater advised Mr Smith that he felt he was incapable of raising the grievances on his behalf and so would brief the file out. As far as Mr Smith was concerned, in my view, it was entirely reasonable for him to assume that his lawyer would carry out his instructions.

[21] There is also no evidence that, had Mr Smith not waited till 3 November to instruct Mr Goldwater, the latter would not have accidentally failed to brief the matter out to Mr Ogilvie.

[22] Furthermore, I am not of the view that it was unreasonable for Mr Smith not to have checked on Mr Goldwater's progress in raising the grievances for a period of four months. I accept Mr Smith's evidence that he believed that progress may have been slowed down because of the situation prevailing in Christchurch due to the ongoing uncertainty caused by the earthquake (by which I infer he means the February 2011 earthquake) and also because Mr Smith believed that that was *the system*. Once again, I think it is reasonable to infer that Mr Smith put his faith and trust in Mr Goldwater to raise the grievance on his behalf and to be dealing with it.

[23] Furthermore, I do not believe that four months is a particularly long period to wait before checking on progress of the matter under these circumstances.

[24] The respondent also submits that the Authority has before it no evidence as to what the basis of the personal grievance claim was that Mr Smith instructed Mr Goldwater to raise, and whether it was a personal grievance claim for unjustified disadvantage and/or unjustified dismissal. I do not accept that the lack of evidence on those issues requires me to find that Mr Smith did not make *reasonable arrangements*. Again, it is my view that it was entirely reasonable for Mr Smith to have relied on the expertise and experience of his chosen counsel to have raised the personal grievances in such terms as was required or, if Mr Goldwater had felt he had insufficient information on which to do so, to have sought further instructions from

Mr Smith. I infer from Mr Smith's affidavit evidence that, having instructed Mr Goldwater to carry out his instructions, he went away confident in the knowledge that his instructions would be carried out, not just in terms of when the personal grievances would be raised, but also that they would cover all relevant issues that were required.

[25] The respondent does not seek to argue that it is not the case that Mr Goldwater unreasonably failed to ensure that the grievances were raised within the requisite timeframe. Therefore, I am satisfied that both limbs of the test propounded in *Melville* have been satisfied.

[26] Accordingly, I am satisfied that exceptional circumstances did occasion the delay in raising the personal grievance.

Is it just to grant leave to Mr Smith to raise the personal grievances after the expiration of the 90 day period?

[27] It is the respondent's case that it is not just to grant this claim. The respondent argues that Mr Smith deliberately chose to delay raising the personal grievance claim until eight days before expiry of the 90 day timeframe. She refers me to the case of *Peck v. Retail Franchising (Palmerston North) Ltd*, WT/141/93, WET 146/93, 29 October 1993. However, it is clear that, in that case, the Employment Tribunal believed that the applicant's delay was deliberate, and that *she indulged in brinkmanship in the exercising of her legal rights*. There is no evidence before the Authority to suggest that Mr Smith deliberately chose to delay instructing Mr Goldwater to submit his personal grievances in order to inconvenience the respondent or indulge in brinkmanship.

[28] Finally, the respondent argues that the applicant's claim is clearly without merit, being premised upon the basis that Mr Smith was engaged in a permanent position, when it is clear that he was engaged on a *temporary seasonal basis* to assist with seasonal production requirements. However, it is not appropriate for me to assess at this stage, and for these purposes, the strength or weakness of the case being brought by Mr Smith and I do not believe that it is therefore a relevant factor.

The unjustified disadvantage personal grievance

[29] The respondent argues that a distinct claim of unjustified disadvantage was raised for the first time in the statement of problem received by the respondent on 27

April 2012. The reference to the claim in the statement of problem refers to an allegation that the respondent failed to return the employee to a position equal to or on similar terms to the position that the applicant held prior to his accident, and that this failure was in breach of s. 80 of the Accident Compensation Act 2001. The statement of problem also states that the lack of negotiation about the return to work was a breach of the employer's problem of good faith.

[30] The jurisdiction of the Authority to consider a claim of a breach of s. 80 of the Accident Compensation Act 2001 was discussed during the directions conference on 25 May 2012, and Mr Smith's counsel clarified that Mr Smith was actually relying on an alleged promise contained in a letter from the respondent to Mr Smith that he would be returned to his role as a team leader, and that the disadvantage claim derives from an alleged failure to comply with this promise.

[31] I do not agree with the submission of the respondent's advocate that the disadvantage claim, as clarified by Mr Smith's counsel, arises from an alleged action by the respondent that is distinct from the dismissal. It seems clear that the complaint relates to an alleged failure which led directly to the dismissal, and which therefore must be part and parcel of the dismissal claim. I therefore consider that the disadvantage claim constitutes an alternative claim to the unjustifiable dismissal claim, rather than a distinct, additional claim.

[32] Therefore, in granting leave for Mr Smith to raise his personal grievance in relation to the dismissal out of time I consider that that leave also correctly covers the disadvantage claim in relation to the alleged breach of promise.

Conclusion

[33] In my view, due to the unfortunate circumstances in which Mr Goldwater found himself, I believe that exceptional circumstances did occasion the late raising of Mr Smith's personal grievance for unjustifiable dismissal. Furthermore, for the reasons given above, I believe it is just to grant leave for his personal grievance for unjustified dismissal to be considered by the Authority.

[34] A directions conference will now be arranged to set down the next steps to enable the Authority to investigate the personal grievances.

Costs

[35] Costs are reserved until the conclusion of the substantive investigation.

David Appleton

Member of the Employment Relations Authority