

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 103  
5360658

BETWEEN

SHARON SMITH  
Applicant

A N D

USHER GROUP HOLDINGS  
LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: David Collins, Advocate for Applicant  
John Farrow, Counsel for Respondent  
Investigation meeting: 4 April 2012 at Dunedin  
Submissions Received On the day  
Date of Determination: 25 May 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Authority is determining a preliminary issue whether Sharon Smith raised her personal grievances within 90 days under s.114 of the Employment Relations Act 2000. Her employment relationship problem was described in her statement of problem as false redundancy due to manager sexual harassment and verbal harassment. Within the part of the statement of problem requiring the facts that give rise to the problem to be set out there is separation of the grievances into redundancy/lack of process and harassment.

[2] In the event that the Authority determines that the grievances were not raised within 90 days, there is an application for leave to extend time on the grounds set out in s.115 (b) of the Act that Ms Smith made reasonable arrangements to have the grievances raised on her behalf by her representative and the representative

unreasonably failed to ensure the personal grievances were raised within the required timeframe.

[3] Usher Group Holdings Limited (Usher Group) is a duly incorporated company having its registered office in Dunedin. As part of its business it owns and operates the BP 2go Service Station in Gore. Jonathan Usher is a director of Usher Group. Mr Usher gave evidence at the Authority investigation meeting for the company. Usher Group say that the applicant has failed to raise her personal grievances within 90 days and that it does not consent to the personal grievances being raised after the expiry of this period. It says that the delay in raising the grievance was not occasioned by exceptional circumstances and further that it would not be just if the Authority found the delay in raising the personal grievances was occasioned by exceptional circumstances to grant leave.

### **The issues**

[4] The issues before the Authority are as follows:

- Were the personal grievances raised within 90 days in accordance with s.114(1) of the Employment Relations Act 2000;
- If the personal grievances were not raised within 90 days, then was the delay occasioned by exceptional circumstances and would it be just for the Authority to grant leave to raise the personal grievances outside of that period?

### **Were the personal grievances raised within 90 days?**

[5] Ms Smith worked as a forecourt attendant/supervisor at the BP 2go in Gore from in or about 2007. After a morning meeting with respect to her redundancy on 11 February 2011 she did not return to work again at the station.

### **Personal grievances**

[6] Ms Smith says that the manager of BP 2go who was not, at the time of the investigation meeting still employed at the station in Gore, sexually and verbally harassed her over a period of months commencing in or about June 2010. In October 2010, Ms Smith telephoned Mr Usher, and advised him that her manager had sexually/verbally harassed her. Ms Smith had some text messages from the manager

that she says she referred to during the conversation. Ms Smith told Mr Usher she could no longer continue to work with the manager.

[7] Mr Usher was in London at the time of the telephone call from Ms Smith and was not able to immediately deal with the matter. He advised Ms Smith to take time off work for a week which would be fully paid and that he would then deal with the matter on his return.

[8] Ms Smith took a week off work and on her return to the station said that the manager then called her into his office and told her to tell Mr Usher that everything was fine and that *if she didn't shut her mouth she would lose her job*.

[9] It is common ground that when Mr Usher returned from London and followed up in person with Ms Smith she told him that things were fine and that she did not wish to pursue the matter further. She said in her evidence that she did this because she was fearful of losing her job.

[10] Ms Smith said the next time that she raised an inappropriate behaviour on the part of her manager with Mr Usher was on the telephone on Saturday, 5 February 2011. This telephone call took place in the context of Mr Usher talking to Ms Smith about a complaint the manager had about her making verbal threats about him to another staff member. Ms Smith said that, during the telephone call to Mr Usher she told him again that she could not work with the manager and that the manager had referred to her and her daughter as "*bitches*".

[11] Mr Usher accepted that he telephoned Ms Smith with a complaint from the manager on 5 February but did not accept that she raised any issues regarding the manager's conduct towards her during that telephone call. Mr Usher had advised Ms Smith during the telephone call that he intended to come to Gore on Monday, 7 February 2011 to talk to both her and the manager about the matter.

[12] Matters were then overtaken by the advice that Ms Smith's position was redundant leading on to the second personal grievance that Ms Smith alleges in the statement of problem lodged with the Authority on 19 October 2011 as *false redundancy/process*.

[13] Ms Smith received a letter dated 7 February 2011 proposing that her role be disestablished with the consequence that she would become redundant with 4 weeks

notice effective from 11 February 2011. Mr Usher wrote in the letter that he intended to meet with Ms Smith at 8am on 11 February 2011 to discuss the proposal. After the meeting on 11 February Ms Smith was advised her position was redundant and that her last day of employment would be 11 March 2011. Ms Smith did not have to work out her notice period although continued to receive ordinary weekly salary payments up to 11 March 2011 after which time she received her outstanding holiday entitlements.

[14] The timeframe, therefore, for lodging a personal grievance with respect to an unjustified dismissal with respect to the redundancy was 90 days from 11 March 2011, being 9 June 2011.

### **Steps taken by Ms Smith**

[15] Ms Smith made initial contact with Employment Dispute Services in Auckland in or about mid-March 2011 with no significant delay between her employment terminating on 11 March and seeking advice. A two page email dated 23 March 2011 was provided by Ms Smith to the Employment Dispute Services at their request. Ms Smith does not have her own computer and therefore has to arrange for emails to be sent on a friend's computer.

[16] The email of 23 March 2011 starts with:

*This is the email that I was asked to write in regard to what led to me being made redundant.*

Ms Smith sets out the history of her difficulties with her manager and details of verbal and sexual harassment referring then to the events of the week commencing 7 February and ending on 11 February when her position was declared redundant.

[17] May Moncur from Employment Dispute Services, responded to Ms Smith on 23 March 2011 and advised her as follows:

*Dear Sharon,*

*Thank you for your email. I believe that you have a good case as the redundancy may not be genuine and there was no consultation. The procedure used by your employer was seriously defective and the improper motive was quite evident.*

*I forwarded your email to Georgina Burness, our advocate based in Christchurch, who will contact you accordingly and may take on your case. Thank you for contacting our firm.*

[18] Georgina Burness who is based in Christchurch duly made contact with Ms Smith. She agreed to represent Ms Smith. On 2 May 2011, Ms Smith sent a further email to Ms Burness setting out further details about the redundancy and harassment from her manager. In that email, Ms Smith provided Ms Burness with Mr Usher's telephone number. Ms Smith said that, at that stage, she was hoping to get her job back; she expanded on this in her evidence to say that she believed other staff had been employed since her redundancy at that time. Ms Burness confirmed in her evidence that she knew that Ms Smith wanted to be reinstated and she advised Ms Smith that she would contact Mr Usher by telephone the following day.

### **3 May 2011**

[19] Ms Burness had a telephone conversation with Mr Usher on 3 May 2011. There were differences in the evidence of Ms Burness and Mr Usher as to what was discussed during the telephone call. I do not consider I am required to resolve all the differences. Mr Usher told Ms Burness regarding the alleged sexual harassment by the manager that Ms Smith had not wanted that matter taken any further.

[20] Mr Usher said that he wanted to make the background to the redundancy situation clear to Ms Burness. Mr Usher advised Ms Burness that the redundancy from Usher Group's perspective was for genuine commercial reasons.

[21] One significant area of dispute between Mr Usher and Ms Burness was whether there was mention by Ms Burness that her client wanted to be reinstated. I prefer Mr Usher's evidence in this regard that there was no discussion of reinstatement. There is no mention of this in the follow up email to Ms Smith from Ms Burness as to what was said during the telephone call and nothing of reinstatement mentioned in the 5 May 2011 letter to Mr Usher. Mr Usher denied making any reference about alternative hours and I concluded that there may have been some confusion about that by Ms Burness.

[22] Mr Usher said that after talking to Ms Burness on 3 May 2011 he believed it was important that she understand that the redundancy situation and harassment allegations were not linked and were quite separate. He said in his oral evidence that therefore after the telephone call he telephoned Ms Burness straight back and said that the two issues were not related.

**5 May 2011**

[23] Ms Burness followed up the telephone call with Mr Usher with a letter dated 5 May 2011 which is primarily relied on as raising the personal grievances. Ms Burness commences her letter by referring to the telephone call of 3 May 2011. She then inserts into her letter an email from Ms Smith that she received after advising her of the 3 May telephone conversation. Ms Burness then after referring to the type of text messages received on Ms Smith's telephone states:

*...A personal grievance is probably the only option in this case with the need for mediation with the Mediation Service as a way of resolving this issue for the company and Sharon.*

*If redundancy was discussed as a consultative process, then hours are supposed to be talked about in the meeting with possible options put on the table. Sharon was not offered any options in her recollection. Can you please have her employment agreement to aid resolution.*

Ms Burness inserted into the letter the 23 March 2011 email that Ms Smith sent to Ms Moncur at the time she provided details of the events leading to the redundancy to the firm. The email sets out the detail of the harassment and the time period for the redundancy but does not say clearly the redundancy was not genuine and that the process was flawed. After the email some text messages are set out without any reference to the particular time they may have been sent and then at the end of those messages Ms Burness writes:

*I am available next week to discuss the process of mediation. This is a serious breach of trust on behalf of the company and should have received the utmost care in the way it was handled initially.*

[24] Mr Usher said he did not receive the letter until 16 May 2011. The evidence supports that Ms Burness initially tried to email it but did not have Mr Usher's correct email address.

[25] On 19 May 2011, Ms Burness received a letter from a solicitor Brenda Thom from the firm Webb Farry in Dunedin. She advised that she was acting for Usher Group, was in receipt of Ms Burness' letter dated 5 May and had been instructed to prepare a response. She advised in her letter that she would anticipate having that to Ms Burness shortly.

[26] On 26 May 2011, Ms Thom provided to Ms Burness what she described as a copy of Ms Smith's employment agreement although whether it is or not was a matter

in dispute. Ms Smith said that shortly after 11 February 2011 she requested a copy of the employment agreement from her manager but it was never provided.

[27] On 30 May 2011, Ms Burness provided Ms Thom with witness statements in relation to the sexual harassment claim.

[28] On 17 June 2011, Ms Burness sent a letter to Ms Thom following up a response to the witness statements as well as to whether or not the parties were to attend mediation.

[29] On 24 June 2011, Ms Thom responded to Ms Burness' email dated 17 June and advised that she was in the process of obtaining instructions from her client and expected a response to be sent early the following week.

[30] On 30 June 2011 Ms Thom wrote a letter to Ms Burness and advised that there is nowhere in the letter of 5 May 2011 and subsequent correspondence where Ms Burness has raised a personal grievance. In her letter, Ms Thom noted that 90 days had expired since Ms Smith was made redundant and therefore Ms Smith would have to make an application for leave to raise her personal grievance out of time.

[31] On the same day, Ms Burness emailed back to Ms Thom and advised as follows:

*Hi Brenda,*

*We've been discussing mediation in this case and the personal grievance for false redundancy and improper motive was as part of this process.*

*My client raised her concerns with the employer initially regarding the bullying and sexual nature of the manager in dealing with her personally. The request for witness statements was also sent to the lawyer and the personal grievance was requested to be settled by mediation is in this email to your office. Talks of needing facts and figures were provided in the hope resolution of the employment problem could be completed amicably. So do we continue to mediation or is this the filing of the case?*

[32] Following that email, the statement of problem was then lodged with the Employment Relations Authority in October 2011.

## Conclusion

[33] Section 114 requires that:

- (1) *Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred ... unless the employer consents to the personal grievance being raised after the expiry of that period.*
- (2) *For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[34] The purpose of requiring a grievance to be raised is to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin. To enable an employer to address a complaint and any remedy, a minimum level of sufficiency of detail of the complaint is necessary – *Ruebe-Donaldson v. Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83.

[35] In *Creedy v. Commissioner of Police* [2006] 1 ERNZ 516, the Court considered the issue of raising a grievance and what that comprised. The Court held that the lawyers' communication in that case did not constitute the raising of the grievance and stated in para.[36]:

*It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of a grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation clearly states an employer must know what to address ... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[36] I find, with little difficulty, that the personal grievance of sexual harassment was raised by Ms Smith in her telephone call with Mr Usher in October 2010. Ms Smith told Mr Usher that she had been subject to behaviour of a sexual nature that was unwelcome or offensive to her from her manager, a representative of the

employer and that she could no longer work with him – s.108 of the Employment Relations Act 2000. She discussed threats he had made to her job. Mr Usher told Ms Smith to take leave for a week until he could deal with the matter on his return. Mr Farrow and Mr Usher focused on Ms Smith's response to Mr Usher when he did return from London and/or the failure by Ms Smith to supply further information. Whilst Ms Smith advised Mr Usher subsequently she did not wish to proceed further and that everything was fine that does not counter or negate the raising of the personal grievance of sexual harassment during the period of 90 days prior to the October 2010 telephone call. I find that the threshold for raising a personal grievance for sexual harassment was met during the telephone call without the requirement for further information. For completeness, as the complaint in this case was about a representative of the employer a personal grievance was raised immediately without the need for the circumstances described in s. 117 of the Employment Relations Act 2000 to occur. The personal grievance of sexual harassment was raised within 90 days.

[37] I turn now to the second personal grievance of unjustified dismissal with respect to the redundancy. I have considered both the 5 May 2011 letter and the earlier telephone call. I do not find objectively assessed that either of Ms Smith's emails that were inserted into the letter of 5 May 2011 were specific enough to raise a personal grievance that her redundancy was not genuine and/or the procedure was unfair so as to enable those matters to be addressed by her employer. Ms Burness in addition to the email content says only this about redundancy and that is that hours are supposed to be talked about and options put on the table and then she asks for the employment agreement. I have considered whether the telephone conversation of 3 May 2011 and the letter of 5 May 2011 together would have made Usher Group aware of a personal grievance raised about the redundancy. I do not find in this case that it does. There is also no mention of reinstatement and/or any remedy or outcome aside from mediation in the letter of 5 May 2011. I find that the first time a personal grievance about unjustified dismissal with respect to the redundancy was raised was on 30 June 2011 in Ms Burness' email. This was outside of the 90 day period from the date of termination of Ms Smith's employment.

[38] In conclusion I find that a grievance of sexual harassment was raised within 90 days and the grievance of unjustified dismissal was raised outside of the 90 days.

**Was the delay occasioned by exceptional circumstances and would it be just for the Authority to grant leave to raise a personal grievance outside of that period?**

[39] Section 114 (4) of the Employment Relations Act 2000 provides that the Authority may grant leave to raise a personal grievance outside of the 90 day period if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it consider it just to do so.

[40] Ms Smith is relying on s 115(b) of the Act that she made reasonable arrangements to have the personal grievance raised on her behalf by Ms Burness and that Ms Burness unreasonably failed to ensure it was raised within time. I accept Mr Farrow's submission that there is a high threshold for employees seeking to establish exceptional circumstances under s 115 and that an employee must have made reasonable arrangements to have the grievance raised – *Melville v Air New Zealand Ltd* [2010] NZEmpC87, (2011) 9 NZELC 93,700.

[41] Mr Farrow submits that Ms Smith never instructed Ms Burness to raise a personal grievance and that she delayed consulting a representative. Within two weeks of her termination Ms Smith consulted Employment Dispute Services to help her with her case. Ms Moncur from that organisation responded positively to Ms Smith that she thought she may have a case and from the email information provided by Ms Smith and no doubt with an earlier discussion. She was able to set out with some precision what her case was. I do not find that there was delay on the part of Ms Smith or that there were any difficulties with her instruction to the firm about the nature of her case.

[42] I now turn to whether Ms Smith made reasonable arrangements to have her personal grievance of dismissal raised. Ms Smith's file was given to Ms Burness who from 2 May 2011 was in regular email contact with Ms Smith. Ms Smith provided Ms Burness with Mr Usher's contact details and a further email including setting out details of her redundancy/sexual harassment on 2 May 2011. Ms Smith knew Ms Burness intended telephoning Mr Usher about her case the following day and she advised her she wanted her job back. Ms Burness told Ms Smith of the nature of her telephone discussion with Mr Usher on 3 May 2011 and provided her with a copy of the letter she had written to Mr Usher dated 5 May 2011. On 24 May Ms Burness advised Ms Smith about a reply from the respondent's lawyer and on 30 May 2011

advised Ms Smith by email – *have had a reply from the lawyer regarding your case and will let you know when the mediation is.*

[43] I accept Mr Farrow's submission that the words *raise my personal grievance(s)* was in all likelihood not used by Ms Smith. When the dealings Ms Smith had with Ms Burness overall are considered, she was entitled to conclude, as a lay person and not an expert in employment law, that had occurred and her case was progressing to the next stage of mediation. There was no sense by Ms Smith in this case of a lack of progress with her case within the 90 day period. I also take into account that Ms Smith did not have a copy of her employment agreement available to her when she initially contacted Employment Dispute Services early on in the 90 day timeframe. I find that Ms Smith made reasonable arrangements to have a grievance of unjustified dismissal raised on her behalf by Employment Dispute Services and was able to conclude that her legal rights would be protected by Ms Burness.

[44] Ms Burness said in her evidence that she had suffered from stress related problems following the February 2011 earthquake in Christchurch that impacted on her work. I understood her evidence as well to be that she was somewhat distracted in this case by the seriousness of the allegations of sexual harassment including the text messages. It is reasonable to expect Ms Burness would have understood Ms Smith's grievance and clearly put it to Usher Group. Ms Burness I find unreasonably failed to properly raise the personal grievance of unjustified dismissal in her letter of 5 May 2011 and within 90 days of the grievance occurring.

[45] I find that the delay in raising the dismissal personal grievance was occasioned by exceptional circumstances under s.115(b) of the Employment Relations Act 2000.

[46] I have then considered whether it is just to grant leave to raise the personal grievance out of time. Mr Farrow submits it is not just to grant leave. He submits that Ms Smith failed to instruct an Agent in a timely way. I have found that there was no delay in her doing that. He submits that Ms Smith failed to provide specific instruction to her agent to notify a personal grievance and detail remedies sought. I have dealt with the issue of instruction to raise a personal grievance earlier in my determination. Ms Smith did advise Ms Burness she wanted reinstatement.

[47] I consider it is just to grant Ms Smith leave to pursue the grievance of unjustified dismissal. The delays between 9 June and 30 June 2011 were not so

significant that I would find there to be prejudice to Usher Group. Usher Group had already instructed their solicitors. I have found that the failure to raise the grievance lay with Ms Burness and not Ms Smith and it would be unfair on that basis not to grant leave to Ms Smith.

[48] I am required to direct the parties to mediation under s.114 (5) of the Act to seek to mutually resolve the grievance in circumstances where I have granted leave. I direct the parties attend mediation on both the grievances.

### **Costs**

[49] I reserve the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority