

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 220/10
5312708

BETWEEN VICKI SWEET
 Applicant

A N D ALPINE GUIDES FOX
 GLACIER LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Carruthers, Counsel for applicant
 Peter Kiely, Counsel for respondent

Investigation Meeting: On the papers

Submissions Received: 12 October 2010 from Applicant
 16 November 2010 from Respondent

Date of Determination: 3 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Sweet) seeks leave to enable her to bring a personal grievance out of time pursuant to the power given to the Authority in that regard by s.114 of the Employment Relations Act 2000 (the Act).

[2] Ms Sweet's application is resisted by the respondent employer (Alpine Guides).

[3] A telephone conference was held between the Authority and counsel on 17 September 2010 at which it was decided that the threshold issue of whether the grievance might be raised out of time would be dealt with first, and only if leave was granted would the substantive personal grievance be heard. It was decided in that telephone conference that the threshold issue would be dealt with on the papers,

without a hearing, unless either party wished the matter to be heard orally. A timetable for that formal advice requesting an oral hearing was set and, neither party having requested a hearing, the Authority will now deal with the application for leave on the basis of the helpful submissions from counsel, together with supporting affidavit evidence.

[4] Ms Sweet was employed by Alpine Guides as its Accounts Administrator. In November 2009, Alpine Guides became aware that cash takings from its café were irregular and that money seemed to be missing. Alpine Guides conducted an investigation, meeting with affected staff and then referred the matter to Police. Subsequently, Ms Sweet was charged with theft.

[5] During the Police investigation into the alleged criminal offending, Ms Sweet absented herself from work without explanation. She was absent from the workplace from 19 November 2009 and by letter dated 23 November 2009, Alpine Guides wrote to her to indicate its assumption that Ms Sweet had abandoned her employment.

[6] The relevant provision in the operable employment agreement between the parties reads as follows:

29. *Abandonment of employment*

29.1 *Where the employee is absent from his place of work for a continuous period of two [2] working days without notifying the employer and without good cause the employee shall be deemed to have abandoned his/her employment and the employment will terminate at the end of the second working day, or such further period as the employer may in its discretion allow, upon the sending of a letter advising termination of employment to the employee's last known address.*

[7] Ms Sweet did not respond in any way to Alpine Guides until a letter dated 18 May 2010 purporting to raise a personal grievance.

[8] Alpine Guides declined to agree to the personal grievance being raised out of time and accordingly this application to the Authority became necessary.

Why was the grievance submitted late?

[9] Ms Sweet says, through counsel, that she did not believe that she could bring a personal grievance claim while the criminal charges were on foot and it was not until

those charges were withdrawn that she immediately sought to notify Alpine Guides of her alleged personal grievance.

[10] Ms Sweet also deposes that she felt she was in a hopeless position and felt that she had:

... no option but to plead guilty as everything seemed so stacked against me. I became very depressed about things and did not go back to work as I felt I could not do so given that the respondent had brought a theft as a servant charge against me.

What does the law require?

[11] Section 114(3) sets out the right of an employee to make an application to the Authority for leave to raise a personal grievance out of time. Subsection 4 of the same section confers power on the Authority to grant such an application subject to such conditions as it thinks fit if the delay in raising the personal grievance was occasioned by exceptional circumstances and if the Authority considered it just to do so.

[12] Section 115 of the Act provides some examples of what exceptional circumstances might be. It is clear from the drafting of the statute that s.115 is not intended to be an exhaustive list but despite that, cases where leave has been granted have tended to fall within one of the four categories referred to in s.115. In *Creedy v. Commissioner of Police* [2008] ERNZ 109, *exceptional circumstances* was defined as *unusual and the exception to the rule*.

[13] Furthermore, as Mr Kiely points out in his submissions, ignorance of the law is not an *exceptional circumstance*: *McCullough v. AFFCO New Zealand Ltd* [1998] 2 ERNZ 367.

[14] Indeed, Mr Kiely correctly identifies that there are a number of decided cases on this very point, all of which, I am satisfied, settle the law that a mistaken belief about the law or the effect of it is not an *exceptional circumstance* for the purposes of the Act.

[15] The Authority having been satisfied that that is the correct legal position, it is not strictly necessary to look at the terms of s.115. However, for the sake of completeness, it is worth noting that the evidence before the Authority in the instant matter would not support any of the grounds raised in s.115.

[16] This was a situation where Ms Sweet simply left the workplace without explanation or authority, presumably because of her anxiety about the criminal investigation. But that anxiety does not excuse or explain her behaviour and it certainly cannot be a ground for seeking to raise a personal grievance many months after the employment came to an end. If Ms Sweet was troubled about the way in which the employment ended, she ought to have raised the matter immediately. She would have been under no obligation to progress the issue immediately, but raising it at the time was the proper thing to do.

[17] There is no reason to think that Ms Sweet was somehow deprived of appropriate advice at the relevant time. Although her present counsel was not then acting for her, her affidavit discloses that she was legally represented in respect of the criminal matters that she was facing and thus would have had a trusted professional adviser available to her to discuss matters to do with her alleged personal grievance if she needed to talk the issues over with somebody.

[18] The Authority is satisfied, as I have already made clear, that there are no exceptional circumstances in the present case. Equally, the Authority is satisfied that this is not a case where it would be just to allow a grievance to be raised out of time. The situation here from the employer's standpoint was that it quite properly sought to conduct inquiries about apparent theft of takings and during the course of those inquiries, an employee under suspicion of criminal offending simply chose not to turn up to work. Her departure from the workplace pursuant to the operation of the abandonment of employment clause in her employment agreement seems, on the face of it, to have been perfectly proper. Ms Sweet simply did not turn up; she made no attempt to contact the employer and discuss her position at any time after leaving the workplace on 18 November 2009. Indeed, the employer was not contacted at all for some six months after the termination of the employment.

[19] On the face of it, even were the Authority to contemplate allowing Ms Sweet to bring her grievance out of time, it is difficult to see how she could be successful. While in no way relevant to the decision the Authority is required to make in the present case, I do advance the view that it appears the employer has implemented the abandonment of employment clause correctly and that, on the evidence before the Authority, the reason that that clause was able to be invoked at all was exclusively because of Ms Sweet's own behaviour.

Determination

[20] I am satisfied that the proper exercise of the Authority's discretion in this matter is to reject Ms Sweet's application to be allowed to bring her personal grievance out of time. I am satisfied that she has not advanced any ground that would fall within the legal requirement of *exceptional circumstances* and I am equally satisfied that it would be unjust, in any event, to grant the relief sought.

Costs

[21] Costs are reserved.

James Crichton
Member of the Employment Relations Authority