

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 366/09
5143186

BETWEEN MATAMIO TAM YAN
 Applicant

AND OCEANIA GROUP (NZ)
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: David Flaws, for Applicant
 Rebecca Kroon, for Respondent

Investigation meeting: On the papers

Submissions and further 30 June, 13 and 24 August 2009
information received

Determination: 14 October 2009

DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Mrs Tam Yan seeks to raise her personal grievance out of time on the sole ground that exceptional circumstances exist under section 115(b) of the Employment Relations Act 2000. There is no dispute that her personal grievance was submitted to Oceania Group two days after the expiry of the 90-day statutory time limit.

[2] Oceania Group does not consent to the late submission of Mrs Tam Yan's grievance and opposes this application. It says the delay in raising Mrs Tam Yan's personal grievance was not occasioned by exceptional circumstances and that it would not be just to grant leave.

[3] By agreement this matter is determined on the papers. The parties have filed affidavit evidence and submissions in support of their respective positions which I have read and fully considered.

Leave to raise a personal grievance out of time

[4] The first issue to consider is whether Mrs Tam Yan made reasonable arrangements with her agent to raise a personal grievance on her behalf ie, is the first leg of section 115(b) satisfied?

[5] Mrs Tam Yan averred that shortly after her dismissal in August 2008 she asked her son to assist her in challenging her dismissal. Mr Tam Yan is professionally qualified and resides in Sydney. Mr Tam Yan immediately undertook to research the issue and sent material and his analysis of that material to Mrs Tam Yan electronically. In electronic correspondence to Mrs Tam Yan, Mr Tam Yan emphasised the importance of the statutory 90-day time limit and undertook to draft the letter to Oceania Group raising the personal grievance.

[6] At the end of October Mr Tam Yan fell ill which delayed his efforts to finish the personal grievance raising letter. Notwithstanding, he reassured his mother that the personal grievance would be raised with Oceania Group before 15 November, the last day of the 90-day period.

[7] Mr Tam Yan completed the grievance documents on 12 November and couriered the finished documents to his mother for review on 13 November. She received those documents on the morning of 17 November and lodged them with the Authority that day. That same day Mr Tam Yan telephoned the relevant manager at Oceania Group and emailed a copy of the grievance documents to the regional manager and site manager.

[8] I am satisfied that Mrs Tam Yan made reasonable arrangements with Mr Tam Yan for him to raise her grievance on her behalf. It was not unreasonable for Mrs Tam Yan to rely on her professionally qualified son to raise her grievance on her behalf. The evidence shows she discussed the 90-day time limited with him,

reminded him of it and understood and emphasised to him the consequences of failing to adhere to it.

[9] The next question concerns whether Mr Tam Yan unreasonably failed to ensure Mrs Tam Yan's grievance was raised with the required time ie, the second leg of section 115(b). I am satisfied Mr Tam Yan was acting as Mrs Tam Yan's agent and that he was responsible for raising her grievance within the required time. I am also satisfied that he unreasonably failed to raise her grievance within that time; Mrs Tam Yan's intention to challenge her dismissal remained unchanged and she communicated that clearly to Mr Tam Yan. There was no reasonable explanation as to why Mr Tam Yan failed to raise the grievance in time.

Is it just to grant leave?

[10] Section 114 (4)(b) provides that the Authority must also consider whether it is just to grant leave. I find it is just to do so for the following reasons; the delay in submitting the grievance was minimal and there is no evidence the delay has occasioned prejudice to Oceania Group either in terms of its defence or the preservation of evidence. I have also considered relevant to the question of whether it is just to grant leave Mrs Tam Yan's long service with the hospital from which she was dismissed and the serious nature of the allegations which resulted in her dismissal.

Determination

[11] Mrs Tam Yan's application for leave to raise her personal grievance out of time is granted.

[12] The parties are directed to attend mediation within six weeks of the date of this determination. If matters between the parties are not resolved in that process and Mrs Tam Yan wishes to pursue her grievance in the Authority then she should request a teleconference be convened to timetable an investigation meeting.

Costs

[13] Costs are reserved. If the parties cannot resolve this issue themselves then Mr Flaws should apply for a timetable to be set within 28 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority