

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 17
5470784**

BETWEEN

BONNIE TAYLOR
Applicant

AND

RECECCA KATE LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Emma Miles, Counsel for Applicant
Investigation Meeting: On the papers
Submissions received: 22 January 2015 from Applicant
None from Respondent
Determination: 23 January 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] This determination addresses the preliminary issue as to whether or not the Applicant, Ms Bonnie Taylor, raised her personal grievances with her employer, Rebecca Kate Limited (RKL) within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue his grievances before the Authority.

[2] Alternatively, in the event that it is determined that Ms Taylor failed to raise her personal grievance within the 90 day statutory limitation period, she applies pursuant to s 114(3) of the Act for leave to raise a grievance outside the statutory 90 day time period on the basis that “*exceptional circumstances*” pursuant to s 114(4) and s 115 of the Act had occasioned the delay.

Issues

[3] The issues for determination are:

- whether or not Ms Taylor raised a personal grievance within the statutory 90 day time period, or
- if it is determined that she did not raise a personal grievance within the statutory 90 day time period, whether or not she should be granted leave to raise the personal grievance outside of the 90 day statutory limitation period pursuant to s 114(4) and s 115 of the Act

Note

[4] The preliminary matter was scheduled to be heard “on the papers” with submissions being filed by the parties on 9 and 23 December 2014 respectively. Due to sickness absence on the part of Counsel for the Applicant, submissions were rescheduled to be filed by both parties on 22 January 2015.

[5] On 19 January 2015 the Authority received an email from Mr Kinder on behalf of RKL, advising the Authority that his instructions to act had been withdrawn and that RKL was being placed into liquidation, however there was no confirmatory legal documentation of a liquidation process attached to the email. The Authority cannot proceed to investigate a claim by an applicant once the respondent has been liquidated without the approval of the court or the Liquidator.

[6] Accordingly the Authority made the necessary enquiries to check the legal status of RKL prior to proceeding with the scheduled Investigation Meeting, but found no confirmation that RKL had been liquidated, and no such confirmation has been provided by RKL.

[7] The parties were advised by a Member’s Minute dated 20 January 2015 that I intended to determine the preliminary matter in accordance with the rescheduled timetable, and that submissions should be filed on 22 January 2015 as previously advised.

[8] The Member’s Minute was couriered to the Registered Office of RKL, and also served at the home address of Ms Rebecca Denholm, sole director and shareholder. It was signed as received at both addresses.

[9] No submissions were received from RKL and as I was satisfied that no good cause had been shown for RKL’s failure to make submissions on the preliminary matter, I consequently proceed to determine the preliminary matter ‘on the papers’ pursuant to clause 12 of Schedule 2 of the Act.

Brief Background Facts

[10] Ms Taylor had been an existing employee at Pause Café with duties consisting of coffee making and waitressing when RKL acquired the business on or about June 2013. RKL changed the name to The Daily Dose (the Café), with Ms Taylor continuing in employment following the acquisition. The business was managed by Ms Denholm, Director and Café Manager.

[11] Following incidents involving customers at the Café and an informal meeting on Monday 10 March 2014 to discuss the matter, Ms Taylor said she had left the Café after Ms Denholm told her to go home and to think overnight about whether or not she wished to continue working at the Café.

[12] Later that evening, Ms Taylor had received a text message from Ms Denholm stating: *“think about it for the week and come back on Friday”*.

[13] Ms Taylor did not respond to the text message.

[14] The following day, 11 March 2014, Ms Taylor received a further text from Ms Denholm which stated: *“I take your silence to mean you no longer want to work here, I will pay you your final pay”*.

[15] Ms Taylor was paid an amount she believed to have been her final payment which included holiday pay entitlement on 14 March 2014.

[16] In a letter dated 4 June 2014, legal advisors acting on behalf of Ms Taylor wrote to RKL raising a personal grievance on her behalf. This letter was sent to the home address of Ms Denholm.

[17] By letter dated 24 June 2014 legal advisors acting on behalf of RKL responded to the letter enclosing requested documentation and asserting that Ms Taylor’s personal grievance had been:

- i. raised outside the statutory 90 day time limit;
- ii. incorrectly addressed to RKL’s registered office; and
- iii. RKL disputed that Ms Taylor had been dismissed.

[18] On 29 July 2014 Ms Taylor filed a Statement of Problem with the Authority.

Determination

Did Ms Taylor raise her personal grievance within the 90 day statutory limitation period?

The Law

[19] Section (1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), 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 or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[20] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[21] In *Wyatt v Simpson Grierson (A Partnership)*¹ the Employment Court stated:²

... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[22] I find that the language of s 114(1) as applied by the Employment Court in *Wyatt v Simpson Grierson (A Partnership)*³ makes it clear that it is necessary that there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised.

¹ [2007] ERNZ 489

² Ibid at para [29]

³ [2007] ERNZ 489

[23] I consider that the text message from Ms Denholm to Ms Taylor sent on 11 March 2014 was sufficient to enable Ms Taylor to form a reasonable belief that RKL was intending to terminate her employment.

[24] From that date Ms Taylor had 90 days in which to submit a personal grievance to RKL within the statutory 90 day time period i.e. by 8 June 2014.

[25] On 4 June 2014 Ms Miles, acting on behalf of Ms Taylor sent a letter raising a personal grievance. This letter was sent to Ms Denholm's home address rather than to the registered office of RKL.

[26] The letter from RKL's legal advisors advised that Ms Denholm received the letter on 10 June 2014.

[27] I accept that New Zealand Post Limited has the stated intention, as set out on its website, of delivering standard post letters within: "*up to 3 working days*".

[28] The date of posting of the letter was Wednesday 4 June 2014. There is no reason to doubt that the letter was not properly posted and that in the normal course of events it would have been received by the recipient within 3 working days at the latest i.e. on Monday 9 June 2014. In *Stott v Ministry of Agriculture*⁴ Travis J stated⁵

... once it was proven that the letter was properly posted the appellant and its solicitors were entitled to assume that it had been received by the respondent in the ordinary course of post ...

[29] The letter may have been delivered prior to this date, but in the face of the claim by Ms Denholm as stated in the letter from her legal advisers dated 24 June 2014 that she did not receive it until 10 June 2014, I consider that Monday 9 June 2014 is the date that applies to receipt of the letter.

[30] Accordingly I find that the raising of the personal grievance occurred outside the statutory 90 day time period.

Should Ms Taylor be granted leave to raise the personal grievance outside of the 90 day statutory limitation period pursuant to s 114(4) and s 115 of the Act

[31] RKL has not consented to Ms Taylor raising her personal grievance outside the 90 day statutory time period.

⁴ [1999] 1 ERNZ 448

⁵ Ibid at Pg 245

[32] An employee who has failed to raise a personal grievance within the 90 day statutory time limit and the employer has refused to grant leave for it to be raised out of time, may apply to the Authority to raise a personal grievance out of time as set out in s 114 (3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it :

- i. *is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances*
- ii. *considers it just to do so*

[33] Further provisions regarding exceptional circumstances are stated in s 115 of the Act to include:

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include-

- (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 or section 65, as the case may be ..*

Exceptional Circumstances

[34] Ms Taylor had been supplied with an individual employment agreement (the Employment Agreement) during the course of her employment which stated at clause 4.1:

The procedure for settlement of personal grievances and disputes concerning the interpretation, application, or operation of this agreement will be the procedure referred to in the Employment Relations Act 2000 and is outlined in the Employment Relations Act Schedule attached to this agreement.

[35] Ms Miles submitted that Ms Taylor had not noticed that the schedule referred to in clause 40.1 of the Employment Agreement had not been attached until she took the Employment Agreement to the office of Ms Miles on 2 June 2014.

[36] The letter from RKL's legal advisers dated 24 June 2014 attached a copy of the Employment Agreement which had been requested by Ms Miles, but this did not have the schedule referred to in clause 40.1 of the Employment Agreement attached.

[37] I find on this basis that there is no evidence that Ms Taylor had been provided with an explanation concerning the resolution of employment relationship problems as required under s 65 of the Act.

[38] Accordingly I determine that the 'exceptional limb' part in s 114(4) of the Act has been met pursuant to s 115 (c) of the Act, and I therefore proceed to consider whether it is just in all the circumstances to grant Ms Taylor leave to raise the grievance out of time.

Just to grant leave

[39] When considering this issue there are a number of relevant considerations. The first consideration concerns the length of the delay in filing proceedings and the reason for the delay.

[40] Ms Taylor raised a personal grievance with RKL in the letter dated 4 June 2014. I have found that this was outside the 90 day statutory time limit, however the delay was minimal being one day.

[41] In addition I note that Ms Taylor was, due to the omission of the Employment Relations Act Schedule which should have been attached to the Employment Agreement, ignorant of the 90 day statutory time limit.

[42] Whilst she had obtained legal advice, I observe that she had been ill following the termination of her employment, and had only been granted medical clearance just prior to 2 June 2014, and therefore had been unable to seek legal assistance prior to that date.

[43] Following the obtaining of legal advice, the personal grievance letter had been drafted and posted in a timely manner. Accordingly I do not find the one day delay to be prohibitive to the question of whether it is just to grant leave.

[44] It is also relevant to consider the relevant merits of Ms Taylor's case. The merits have yet to be tested; however the facts are that Ms Taylor was sent home from work and thereafter given sufficient information for her to realise that her employment had been terminated. There had been no disciplinary process undertaken prior to the decision having been made.

[45] It is for RKL to justify the actions taken which resulted in the termination of Ms Taylor's employment. If it is unable to do so, Ms Taylor may have grounds to support an unjustifiable dismissal personal grievance.

[46] Finally, in *Gibson v GFW Agri-Products Ltd*⁶ the Court suggested that unless the employer can show that it would be substantially disadvantaged by the granting of leave, it will normally be just to grant leave. RKL has not shown this to be the case.

[47] Taking all these considerations into account I determine that it is just to grant Ms Taylor leave to raise the personal grievance out of time

[48] The date of the investigation meeting to consider the substantive matter has been set down for, and will proceed on, 14 April 2014.

Costs

[49] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority

⁶ [1994] 2 ERNZ 309