

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 112/09
5133076**

BETWEEN JIMMY WALES
 Applicant

AND TOURISM HOLDINGS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Ken Nicolson for Applicant
 Stephen Langton for Respondent

Investigation Meeting: 26 March 2009

Determination: 7 April 2009

DETERMINATION OF THE AUTHORITY

Application to raise grievance out of time

[1] The applicant Mr Jimmy Wales ("Mr Wales) was dismissed from his employment with Tourism Holdings Limited t/a Kiwi Experience Limited(sic) ("Tourism Holdings") on 3 February 2008. Mr Wales' representative wrote to Tourism Holdings by letter dated 12 May 2008 giving "formal notice of a personal grievance" on Mr Wales' behalf. Tourism Holdings did not give its consent for the contended personal grievance to be raised out of time and Mr Wales now makes the application to the Authority for leave.

The merits

[2] Section 114 of the *Employment Relations Act 2000* ("the Act") provides:-

114 Raising personal grievance

(1) 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.

(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.

[3] Section 115 of the Act provides:-

115 Further provision regarding exceptional circumstances under section 114

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

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(b) 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; or

(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; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[4] Mr Wales' representative Mr Nicolson gives this evidence to the Authority by affidavit sworn 14 November 2008:-

11. As counsel I take full responsibility for the matter being lapsed due to my overlooking of the 90 day timetable due to my own work demands but also due to the fact that I was getting relevant documentation in at various intervals which caused me to delay the formal submission of the grievance. Ultimately I was hoping to gather all the relevant material before I raised the grievance but circumstances including those beyond my control slowed that process down including my client's own disabled condition causing me to lose track of time as other more pressing cases and timetables intervened. All that aside my client came to me in February 2008, only days after his dismissal and had a right to expect me to carry the responsibility of raising of the grievance with his employer once had had raised it with me albeit that he probably submitted his grievance verbally to his employer when he requested information from his employer anyway.

[5] I am satisfied that Mr Wales instructed Mr Nicolson to pursue a personal grievance of unjustifiable dismissal on his behalf with Tourism Holdings. Mr Nicolson accepted that instruction because he gave notice of the same, albeit out of time, and now seeks to have his failure legitimised.

[6] Mr Nicolson's professional obligation was to ensure that personal grievance was raised in the manner the law requires but he failed to do so. I am satisfied his failure

was "unreasonable". Mr Nicolson does not resile from his failure. The statute recognises this is an exceptional circumstance which occasions delay and in these particular circumstances, an immaterial delay which does not cause prejudice to Tourism Holdings. I am satisfied it is just to grant leave in all the particular circumstances.

The determination

[7] I grant leave to Mr Jimmy Wales to proceed to raise his personal grievance for unjustifiable dismissal after the expiration of the 90 day period.

[8] I direct the parties to use mediation to seek to mutually resolve the personal grievance and to do so within 28 days of the date of this determination. In the event that mediation is not successful, Mr Nicolson is to promptly seek a telephone conference to have the matter set down for investigation meeting.

Costs

[9] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Nicolson is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Langton is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority