

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 33
5347347**

BETWEEN ABBEY WATERMAN
 Applicant

AND WEB PARTNERS LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Mark Nutsford, Advocate for Applicant
 Jenny Vickers, Counsel for Respondent

Investigation Meeting: 22 December 2011 at Auckland

Submissions received: 13 January 2012 from Applicant
 13 January 2012 from Respondent

Determination: 23 January 2012

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUES

Employment Relationship Problem

[1] The Applicant, Ms Abbey Waterman, claims that she was unjustifiably dismissed by the Respondent, Web Partners Limited (“WPL”) on 10 November 2010.

[2] Ms Waterman filed a Statement of Problem raising a personal grievance in the Authority on 14 June 2011, which was received outside the 90 day time period for raising a personal grievance with an employer, as set out in s114(1) of the Employment Relations Act 2000 (“the Act”).

[3] Ms Waterman applied for leave to raise the claim outside the 90 day time period, pursuant to s114(4)(a) and s115(c) of the Act, on the basis that “*exceptional circumstances*” had occasioned the delay. Specifically Ms Waterman says that she had no written employment agreement containing the “*explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65*”.

[4] WPL denies it unjustifiably dismissed Ms Waterman on the basis that Ms Waterman was not an employee but a shareholder during the period she performed services for WPL.

[5] In the event that Ms Waterman is an employee, WPL opposes the raising of Ms Waterman's personal grievance outside the time period specified in the Act on the grounds that it does not accept that Ms Waterman's delay in raising the personal grievance was caused by a lack of knowledge of the relevant time frames for so doing.

Issues

[6] The preliminary issues for determination are:

- Whether Ms Waterman was an employee while she was performing services for WPL
- Whether Ms Waterman was unaware of the legal time frame for an employee to raise a personal grievance in terms of sections 114 and 115 (c) of the Act
- If so, whether it is just to grant Ms Waterman leave pursuant to section 114(4) of the Act;

Background Facts

[7] WPL is a company which designs, builds and markets websites. Ms Waterman explained that she had met Mr Grant Everiss, director and shareholder of WPL, when they had worked together at a previous company, Irongate NZ Limited ("Irongate"), where she had been a Web Designer/Developer.

[8] Ms Waterman stated that Irongate had provided her with an employment agreement when she worked at Irongate, although she no longer retained a copy of it.

[9] Mr Everiss explained that he had left his position at Irongate with the intention of setting up and operating a small business with no employees and just a few clients, which would focus on Search Engine Optimisation.

[10] Ms Waterman said that she had been approached by Mr Everiss in 2007 to become involved in the business he was in the process of setting up. Mr Everiss said that his recollection was that Ms Waterman had approached him and had been happy to become

involved with himself and Mr Ashmore in setting up and being involved in the operation of the proposed business.

[11] Mr Everiss stated that he had had discussions with Ms Waterman and Mr Brett Ashmore, who was well known to both Mr Everiss and Ms Waterman, and there had been a suggestion that they set up a bigger business than that originally envisaged by Mr Everiss. As a result of their discussions, it had been agreed to set up a business together, WPL, in which Mr Ashmore would be responsible for design, Mr Everiss for sales and search engine work, and Ms Waterman for the production and operations aspects of the business.

[12] Mr Everiss and Mr Ashmore stated that Ms Waterman had not been approached and invited into WPL as an employee, but on the same basis as they had entered into the relationship i.e. as shareholders only.

[13] Mr Everiss and Mr Ashmore said that it had been agreed between the three of them that they would become shareholders in WPL, and Mr Everiss said he had a copy of a shareholder agreement which had been drafted by a lawyer for a previous business he had been involved in, and that this had been amended to reflect the duties which he, Ms Waterman and Mr Ashmore had agreed they would undertake in WPL. Mr Everiss stated that he had emailed that Shareholders Agreement to Mr Ashmore and Ms Waterman.

[14] The unsigned Shareholders Agreement produced in evidence by Mr Everiss set out the parties as being “*Grant Everiss, Abbey Waterman and Brett Ashmore*” and stated in clause 3 that the management of the company would be divided between Mr Everiss and Ms Waterman:

3.1.1 Grant Everiss will run the sales and technical aspects of webpartners.....

3.1.2 Abbey Waterman will run the design and production elements of Webpartners...

[15] At subclause 14.6 the Shareholders Agreement stated:

14.6 Shareholding and Shares Held On Trust

The current shareholdings are Grant Everiss 50%, however 30% are held for abbey waterman to call upon at any time she feels fit, and 20% is held for Brett.

[16] Mr Everiss explained during discussions between him, Mr Ashmore and Ms Waterman the split of the shareholding had been agreed on the basis that he was the only

person to inject capital and therefore incurred the greatest risk, Ms Waterman's share was on the basis that she would be involved in WPL on a full-time basis, and Mr Ashmore's share was on the basis that his involvement would be less due to the fact that he owned and also ran his own business.

[17] Mr Ashmore confirmed that his recollection of what had occurred agreed with that of Mr Everiss, and that he had been satisfied with the proposed share allocation, especially since he had acknowledged that Ms Waterman would be carrying out more of the day-to-day running of the business than he would, and because his own business shared the WPL office space.

[18] Mr Ashmore stated that he, Mr Everiss and Ms Waterman had all had difficult experiences of the master-servant nature of an employment relationship, and they were all keen to enter into a business arrangement which gave them an opportunity to work effectively in partnership as equals within a limited liability company.

[19] Mr Everiss stated that a copy of the computer screen view of the properties of the Shareholders Agreement indicated that amendments had been made to the document on a computer called "Sue Waterman"

[20] Ms Waterman said that she recalled a discussion about shares, but denied that she had seen the Shareholders Agreement prior to the Authority investigation, and that she had not signed it. Ms Waterman said that there had however been an informal offer from Mr Everiss that she was entitled to 30% of the total shareholding.

[21] Mr Ashmore explained that he had ceased his involvement in WPL in 2008 as it had been made clear to him by Ms Waterman, whom he said controlled and directed his work, that he was not performing satisfactorily. Mr Ashmore said that he had accepted this, and that he had understood that his entitlement to shares and dividends would end on his departure from WPL, and that as he had owed money to WPL, there had been a "*financial wash-up*" at that time.

[22] An unsigned Shareholders Agreement produced in evidence by Mr Ashmore which he said had been amended on or about the time his departure from WPL was imminent, set out the parties as being "*Grant Everiss, and Abbey Waterman*". The clause setting out the duties of Mr Everiss and Ms Waterman had not been amended, however clause 14.6 had been amended to read:

14.6 Shareholding and Shares Held On Trust

The current shareholdings are Grant Everiss 100%, however 30% are held for Abbey Waterman to call upon at any time she feels fit

[23] Ms Waterman stated that she had not previously seen this Shareholders Agreement before the Authority investigation.

[24] The Shareholders Agreement, although not signed, contains provisions commonly to be found in such documents.

[25] Mr Everiss said that he, Mr Ashmore and Ms Waterman had not been paid a salary, but at the end of each month they would assess the financial state of the business and decide how much money they could take out of the business for their personal use.

[26] Ms Waterman said that she had been paid monies on a “*piecemeal basis*” during the time she was working at WPL and that she had been paid a salary similar to that she had been receiving at Irongate.

[27] Mr Everiss stated that at the end of each month he and Ms Waterman would examine the accounts and financial position of WPL and decide how much money was available for withdrawal for their personal use. The allocation of these monies could vary depending on their own financial position at that time, and that some months he would receive a greater proportion than Ms Waterman, or vice versa.

[28] Mr Everiss explained that he and Ms Waterman had paid PAYE contributions to the IRD as a method of off-setting their provisional tax liability at the end of the accounting period. Mr Gary Nuttall, a forensic management accounting advisor who had carried out an investigation and review of WPL’s financial procedures, explained that in his experience this method of addressing the taxation liability issue was a common practice, particularly in small businesses.

[29] Mr Nuttall explained that Ms Waterman had posted claims for expenditure on a monthly basis and had withdrawn funds, dependent on cash flow, filing a monthly claim form. Mr Nuttall said that the claims were unsupported by receipts or invoices, which in his experience was not uncommon in respect of directors or shareholders, but which was not a common practice where employees were concerned.

[30] Ms Waterman explained that her working hours had been 8.30 a.m. to 5.00 p.m. Monday to Friday and that she had taken approximately 2 weeks annual leave a year which had been arranged with Mr Everiss. Mr Everiss stated that Ms Waterman had worked “*horrendous hours*” and that she had controlled her own working hours. As regards annual leave Mr Everiss said that Ms Waterman had decided when she would take the leave without reference to him.

[31] Ms Waterman said that during her involvement with WPL she had acted at all times under the control of Mr Everiss. Mr Everiss disputed this and stated that Ms Waterman had had full autonomy on any operational or production matters, although in all other areas they would discuss the issues and as the only Director, he would have the deciding vote.

[32] Mr Everiss also stated that Ms Waterman was responsible for all general management matters including management of the financial aspect of the business, supervising administration employees and running the bank accounts; and the recruitment of employees including the associated documentation relating to their employment. This had included the issuing of employment agreements.

[33] Mr Ashmore stated that he, Mr Everiss and Ms Waterman each had a key set of skills and confirmed that Ms Waterman had been responsible for all operational matters, as such he had been happy to accept her direction over the design work which he had produced.

[34] Mr Ashmore explained that he had left WPL as a result of coming under pressure from Ms Waterman for failing to deliver designs to schedule, describing Ms Waterman as: “*the driving force in running the production and in my departure*”.

[35] Produced in evidence had been an individual employment agreement (“IEA”) in the name of Alicia Morley. The IEA had been signed by Ms Waterman on behalf of WPL and dated 30 July 2010. The second schedule of the IEA is headed “*Resolving an employee’s employment relationship problem*” and contains the following statement:

Personal Grievance

The employee must bring any grievance to the employer’s attention within 90 days of that grievance occurring. The employee must also state what relief they want.

[36] Ms Waterman explained that she had obtained the draft IEA from Mr Everiss and that she had sat down with Ms Morley, and with other members of staff who had been issued with an IEA, and would go through it and discuss it with them. Mr Everiss explained that he had

based the employment agreement on the template used at Irongate and had forwarded this to Ms Waterman who had adapted the template for each employee and had issued them.

[37] Ms Waterman said that she had not been issued with an employment agreement, nor had she asked Mr Everiss for one. Mr Everiss said that there had been no need for either himself, Mr Ashmore or Ms Waterman to have an employment agreement since they were not employees and that no employment agreements had been issued to either himself or Ms Waterman at the time WPL was formed, during the period when other employees were being issued with employment agreements, or at any time thereafter.

[38] Ms Waterman said that between June and October 2010 she and Mr Everiss had started having general discussions about different aspects of the business operation, including debt collection, and obtaining support for WPL from third parties.

[39] During September 2010 Ms Waterman said that there had been concern raised via an email received that an employee was allegedly contacting some of her previous employer's customers and offering to do work for them whilst employed at WPL.

[40] Ms Waterman stated that Mr Everiss had asked her to handle the matter and on 27 August 2010 Ms Waterman had written to the employee by email asking her to attend a meeting to discuss the situation. In the email Ms Waterman stated:

Please be aware that as a result of this meeting disciplinary action might be a possibility. You are able to have a support person with you at the meeting

[41] Ms Waterman stated that she had issued the employee with a warning as the outcome of the meeting.

[42] Ms Waterman said that on 6 October 2010, at a meeting with Mr Everiss, he had told her that "*he must decide by 5 pm Friday on one of the options he has put forward otherwise he will take over the company*".

[43] On 9 October 2010 Ms Waterman said that she had received an email from Mr Everiss offering 3 solutions in respect of the future of WPL on the basis that he was no longer interested in working with her. These 3 options were that:

- Ms Waterman pay Mr Everiss out for his share of the business;

- Ms Waterman leave and be paid her share estimated to be worth approximately \$120,000.00; or
- Both Ms Waterman and Mr Everiss remaining in the business with Mr Everiss having operational management of WPL and Ms Waterman having responsibility for web design and production.

[44] Ms Waterman said that on 20 October 2010 a meeting had been arranged with Relate Coaching to discuss a resolution of the situation on the basis of the three solutions which had been proffered.

[45] Following the meeting on 7 November 2010 Ms Waterman said that she had received an email telling her not to attend for work but to be available for a meeting with a lawyer on 9 November 2010.

[46] Ms Waterman stated that despite this letter she had attended for work on 8 November 2010 and that Mr Everiss had ordered her to leave the premises. However she had ignored him and remained at work that day. On 10 November 2010 Ms Waterman said that she had received an email from Mr Everiss which stated that she had been: "*immediately dismissed as an employee of Webpartners*".

[47] Ms Waterman, following her departure from WPL, had applied to the District Court for judgments concerning her claim for a half share of business assets in the sum of \$120,000.00 based on her stated ownership entitlement to 50% of the shares. In addition Ms Waterman claimed income, lost wages, annual leave and holiday pay.

[48] Ms Waterman said she had been advised by the Ministry of Justice in an email dated 3 March 2011 that her claim for wages and holiday pay would sit within the jurisdiction of the Authority rather than that of the District Court.

[49] Ms Waterman stated that it was not until this point that she had realised that she could claim a personal grievance against WPL, and she had filed a Statement of Problem in the Authority.

Determination

Was Ms Waterman an employee when working for WPL?

[50] Ms Waterman gave evidence to the effect that she was an employee when working for WPL and was therefore able to bring a personal grievance under s 103 (1)(b) of the Employment Relations Act 2000 (“the Act”).

[51] I observe that directors, co-owners, or shareholders may be employees of a business. Although Ms Waterman denied that she had seen the Shareholders Agreement, Ms Waterman stated during the Investigation Meeting her understanding was that she had been entitled to a 30% share of WPL and she had entered a claim in the District Court based on that understanding. Ms Waterman has claimed that irrespective of her standing as a shareholder in WPL, she was an employee of WPL

[52] In deciding whether Ms Waterman was employed by WPL as an employee, I apply s.6 of the Act which provides:

“s.6 Meaning of employee:

1. In deciding ... whether a person is employed by another person under a contract of service, the Authority-... must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2)... or the Authority-

(a) must consider all relevant matters, including any matters that indicate the intention of the parties

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[53] In *Bryson v Three Foot Six Limited (No2)*¹ the Supreme Court stated the following:

“‘All relevant’ matters certainly includes the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship They will also include any divergences

¹ [2005] 1 ERNZ 372

from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or the Authority should consider the way in which parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters’ equally clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship in common law. It is not until the Court or the Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice that it will usually be possible to examine the relationship in the light of the control, integration and fundamental test”.

Contractual basis

[54] Ms Waterman stated that she had never seen the Shareholders Agreement prior to the Investigation Meeting, and the copies produced in evidence are unsigned.

[55] A copy of the computer screen view of the properties on the computer identified as “Sue Waterman”, a computer which Ms Waterman explained had previously belonged to her mother but which during her time at WPL belonged to her and which she had used. Although Ms Waterman stated that any person at WPL could have used that computer, I find it a reasonable conclusion that Ms Waterman had been aware of the Shareholders Agreement and had been aware of the amendments indicated by the computer screen view.

[56] Additionally, the evidence of Mr Ashmore supported that of Mr Everiss that all three of the parties indicated on that first Shareholders Agreement document were aware of it, and I consider it more likely than not that Ms Waterman was also aware of the terms of the second version produced to accommodate the circumstances following Mr Ashmore’s departure from WPL in light of her acknowledgement of an entitlement to 30% of the shares.

[57] A contract does not need to be signed to be valid. A recent judgment in the English Supreme Court² decided that where the parties agree the terms of a contract and then carry out work in accordance with the agreed terms, it can be inferred that the parties have an intention to create a legally binding contract.

² RTS Flexible Systems v Muller [2010]

[58] I find that there was a common intention at the outset, which was confirmed subsequently upon the departure of Mr Ashmore, that Mr Everiss, Ms Waterman and Mr Ashmore would participate in WPL on a shareholder basis with the duties of operating WPL divided between them as set out in clause 3 of the Shareholder Agreements.

[59] I find that Ms Waterman had carried out work in accordance with the duties as set out in clause 3 of the Shareholder Agreements.

[60] This conclusion is supported by the evidence of Mr Ashmore who had described the relationship as a “*partnership*” and Ms Waterman as “*an independent professional businessperson on an equal footing with us*”.

[61] Ms Waterman had been supplied with an employment agreement during her period of employment at Irongate but despite not being not provided with an employment agreement at WPL, she had not requested one from Mr Everiss.

[62] Although Ms Waterman disputed that she had access to a template document and adapted this for issuing employment agreements to other employees, it would have been possible for her to have copied the employment agreement she had issued to Ms Morley, or indeed to have requested the template from Mr Everiss and adapted it for her own personal use.

[63] Ms Waterman and Mr Everiss, on the evidence as presented, until the latter part of 2010, enjoyed a good collegial relationship. On this basis I consider that there was no reason for Ms Waterman not to request an employment agreement, or indeed not to have drafted one for herself, had she considered herself to have been an employee.

[64] I conclude that the reason for Ms Waterman not having requested an employment agreement was because she considered her position with WPL to be other than that of employment.

Control and Integration

[65] Ms Waterman stated that she had been under the control of Mr Everiss when working at WPL. Mr Everiss had disputed this, stating that Ms Waterman had full autonomy over those aspects of the business for which she had assumed control, these being production and operational management.

[66] Mr Ashmore gave evidence in support of that of Mr Everiss to the effect that Ms Waterman controlled the production aspects of WPL and operational matters including recruitment and accounting management.

[67] It was Ms Waterman who had been instrumental in the departure of Mr Ashmore from WPL and it was Ms Waterman who had issued employment agreements and had signed the employment agreement issued to Ms Morley on behalf of WPL.

[68] Mr Nuttall, who acknowledged that he had no formal qualifications as a qualified accountant, explained that he taught administration structure to small businesses. Mr Nuttall said his evidence had been based on an audit of the financial business affairs of WPL. The evidence of Mr Nuttall, whom I found to be a credible witness, was that it had been Ms Waterman who had supervised the accounting management processes of WPL, had full access management to company bank accounts, and was a signatory at WPL

[69] I find that the evidence indicates that Ms Waterman operated autonomously within those aspects of the business under her control until the latter part of her involvement with WPL.

[70] I also find that Ms Waterman was integrated fully into the operation of WPL and performed work which could be carried out by either an employee or a shareholder, or by someone falling within both of these capacities, and as such, do not consider this issue to be determinative of the relationship.

The Fundamental Test

[71] Ms Waterman said that her relationship with WPL was that of an employee and as such, she was paid a salary

[72] The IRD records submitted by Ms Waterman itemising monthly payments from WPL during the period from October 2007 until September 2010 show fluctuating amounts from \$4,008.00 in February 2008 to \$1,087.00 in March 2008, from \$1,911.00 in July 2009 to \$3,275.00 in September 2009, and from \$3,616.00 in March 2010 to \$5,481.11 in April 2010.

[73] I find these fluctuating amounts to be supportive of the nature of reimbursement being more consistent with a pattern of shareholder drawings in accordance with clause 14.7 in the unsigned Shareholders Agreement than of employee salary payments.

[74] Having carefully considered the evidence of both Mr Everiss and Ms Waterman, I find it more credible that Ms Waterman had control over her working hours and determined when and if she would take annual leave.

Taxation Position

[75] Chief Judge Colgan observed in *Singh v Eric James & Associates Limited*³ that: “Taxation arrangements, both generally and in particular are a relevant consideration..” Ms Waterman had had PAYE deducted from the payments she received. However these payments fluctuated and I do not find the payment of PAYE in these circumstances, and in light of the evidence presented on the subject by Mr Nuttall, to be determinative of an employee/employer relationship.

Statement of the parties

[76] Mr Everiss in an email dated 10 November 2010 and sent to Ms Waterman stated:

.... You are not a director nor a shareholder and you acted recklessly.

....

Due to your actions and the current breakdown it is in the best interests for the company that you are immediately dismissed as an employee of Webpartners.

[77] Mr Everiss further referred in an emailed letter dated 11 November 2010 to Fry, Wilson Todd & Co, the firm of Barrister and Solicitors engaged by Ms Waterman, to Ms Waterman being employed by WPL.

[78] Pursuant to s6(3)(b) of the Act, it is not for the Authority to treat any statement by the parties describing their relationship as determinative

[79] I note that these expressions were used following the breakdown of the relationship between the parties and at a time when Mr Everiss explained that he had been under pressure and was stressed.

[80] I find it relevant when considering Mr Everiss’s use of these terms, which imply an employment relationship between WPL and with Ms Waterman, to consider these in light of the terms used with reference to the three options outlined in Mr Everiss’s email to Ms Waterman on 9 October 2010.

³ [2010] NZEMPC 1

[81] The first two of these options outline a position entirely consistent with the position pertaining to a breakdown in the relationship between two business partners and shareholders rather than the relationship between an employer and employee.

[82] Further the approach adopted by Fry, Wilson Todd & Co upon instruction from Ms Waterman as outlined in the letter dated 11 November 2010 which states:

Notwithstanding the details disclosed on the Companies Office website, Abbey tells us that she has an arrangement with you in terms of which you are both in fact equal owners of the company shares and that the company, when originally set up by you was done so on the basis of the company shares...

[83] In conclusion, having considered all the circumstances I find that there is sufficient evidence to indicate that Ms Waterman was in business on her own account.

[84] I determine that Ms Waterman was not an employee during the period of her providing services to WPL.

Was Ms Waterman aware of the legal time frame for raising a personal grievance?

[85] For the sake of completeness only I shall examine this matter as if Ms Waterman had been an employee and proceed to address the issue of whether Ms Waterman was aware of the legal time frame for raising a personal grievance.

The Legislation

[86] Section 114 Employment Relations Act 2000 provides:

(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) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

a. Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

b. Considers it just to do so

[87] Ms Waterman claims that she did not become aware of the personal grievance matter claims until so advised by the District Court in the email dated 3 March 2011, and that she had not been aware of the 90 day limitation period until she attended mediation.

[88] Ms Waterman had not been issued with an employment agreement during her time at WPL. Ms Waterman had however been in receipt of an employment agreement at Irongate, and this was the template document Mr Everiss said had been utilised as the basis for the employment agreements at WPL.

[89] The IEA issued to Ms Morley is a comprehensive document. Clause 20 of the IEA states that: “*Any personal grievanceshall be dealt with according to the procedures set out in the Employment Relations Act 2000*”, and further informs the employee that: “*he/she is entitled to contact the Department of Labour information or mediation services for assistance.*” .

[90] The Second Schedule of the IEA at page 14 contains a comprehensive explanation of the steps to be taken in raising a personal grievance with an employer, including the requirement that a personal grievance should be raised within 90 days.

[91] At the Investigation Meeting Ms Waterman stated that she had read the IEA and in particular said that she had read page 14. Ms Waterman said that she had sat down and talked to the employees about the employment agreements.

[92] In the email dated 27 August 2010 which Ms Waterman had written to an employee whom she was inviting to a meeting which could entail disciplinary action being taken, Ms Waterman had advised the employee of her right to have a support person present.

[93] Despite not having been issued with an employment agreement, I consider that in addition to the fact that she had been issued with an employment agreement at Irongate, Ms Waterman was aware of the content of Ms Morley's IEA, and would have been aware having read page 14, the Second Schedule, of the requirement to bring a personal grievance within 90 days. Moreover I find that the advice concerning the support person referred to in the preceding paragraph indicates that Ms Waterman had knowledge of the procedures to be followed in matters of a disciplinary nature.

[94] I find that Ms Waterman had every opportunity to be aware of the legal time frame for raising a personal grievance having read page 14 of Ms Morley's IEA and having been prepared to have answered questions which could have been raised by Ms Morley concerning the IEA.

[95] I further find it significant in respect of consideration of this matter that immediately following her departure from WPL on 10 November 2010 Ms Waterman sought and obtained legal advice. On 11 November 2010 Fry, Wilson Todd & Co had written to Mr Everiss requesting clarification of Ms Waterman's position as regards her entitlement to shares in WPL.

[96] By email response dated 18 November 2010 Mr Everiss had written:

There was never an agreement that the company would be shared between Abbey and me on a 50/50 basis. There was however an informal offer from Web Partners Limited that Abbey would be entitled to a 30% share of the company so long as she remained employed by the company. As her employment has now terminated, any value of the shareholding that Abbey was offered would be based on 30% of the company's value as at the date of termination.

[97] Fry, Wilson Todd & Co had forwarded this email to Ms Waterman requesting that she telephone to discuss it on 24 November 2010.

[98] I consider that by virtue of Mr Everiss having referred to Ms Waterman being an employee in this email and with the opportunity to discuss the email with the legal practice she had engaged, Ms Waterman had full opportunity to understand the law and the time periods for filing a personal grievance claim.

[99] I determine that there are no grounds for granting leave to raise a personal grievance pursuant to section 114(4) of the Act.

[100] In these circumstances I am unable to assist Ms Waterman further.

Costs

[101] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority