

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 8
3074492

BETWEEN WENLI WEI
 Applicant

AND SUNLIGHT JMB FUTURE
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person
 David Fleming, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 6 December 2019 from the Applicant
evidence 20 December 2019 from the Respondent

Determination: 10 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Wenli Wei, claims that he was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, Sunlight JMB Future Limited, (Sunlight).

[2] Mr Wei further claims that he is owed monies in respect of arrears of wages and holiday pay.

[3] Sunlight denies that Mr Wei has raised a personal grievance for unjustifiable dismissal and/or unjustifiable disadvantage, but accepts that Mr Wei has raised a claim for arrears of wages.

Issues

[4] The issues requiring investigation are whether or not Mr Wei raised a wages arrears claim and/or a personal grievance with Sunlight within the 90 day statutory time frame.

Brief Background

[5] Sunlight is a retail food business.

[6] Mr Wei was employed on two occasions by Sunlight, the first period of employment was in 2017, and the second period of employment was in 2018, ending on 24 September 2018. He was paid in cash on each occasion.

[7] Following the conclusion of the employment there was an exchange of WeChat messages related to Mr Wei's final pay and tax status. Sunlight submits that during those exchanges there was no suggestion made by Mr Wei that his dismissal was unjustifiable or that he was not paid correctly.

[8] In August 2019 Sunlight was contacted by the Ministry of Business, Innovation and Employment in relation to a request for mediation made by Mr Wei, however mediation did not take place due to Mr Wei withdrawing the request for mediation assistance.

[9] Mr Wei filed a Statement of Problem with the Authority on 11 September 2019 claiming he was owed wages and holiday by Sunlight in the amounts of \$18,900.00 in respect of unpaid wages and \$10,920.00 in respect of unpaid holiday pay entitlement.

[10] The Statement of Problem also referred to: "unjustified dismissal, no compensation" but set out no further details regarding the unjustifiable dismissal.

Has Mr Wei raised a wages arrears claim within time?

[11] Mr Wei is seeking to recover wages in relation to two periods of employment with Sunlight, the first being in 2017 and the second period of employment in 2018.

[12] Pursuant to the Wages Protection Act 1983 employees must bring an action for recovery of wages no later than 6 years from the date on which the cause of action arose. It is noted that holiday pay is treated as part of wages as set out in s86 of the Holidays Act 2003.

[13] Mr Wei's periods of employment with Sunlight both fall within that 6 year period.

[14] I determine that Mr Wei raised his wages claim within time such that he may pursue it.

Did Mr Wei raise a personal grievance with Sunlight?

[15] Mr Wei claims that after he was unjustifiably dismissed he contacted Sunlight to: "try to get all the owing money back."

[16] Sunlight submits that Mr Wei has never raised a personal grievance with it.

[17] Section 114 of the Employment Relations Act 2000 (the Act) sets out the requirements for raising a personal grievance. Section 114 (2) states:

.... A grievance is raised with the employer as soon as the employer has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employer wants the employer to address.

[18] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[19] It is therefore necessary for Mr Wei to have adequately particularised the basis why he believed his dismissal was unjustifiable. Stating that he believed he had a personal grievance without such details is not sufficient to raise a personal grievance since without that information Sunlight cannot to be put on notice of the action it needed to take to address Mr Wei's claim.

[20] Sunlight submits that Mr Wei did not attempt to raise a personal grievance in relation to the ending of his employment either at the time his employment ended or within the 90 days following.

[21] The Statement of Problem filed on 11 September 2019 makes mention of 'unjustified dismissal' but provides no details of how it arose or why Mr Wei believed it was unjustifiable.

[22] The submissions filed by Mr Wei state: "after the unjustified dismissal" only and are predominantly concentrated on the wage arrears claim. There are no particulars to indicate the basis for his belief that there has been an unjustifiable dismissal.

¹ *Creedy v Commissioner of Police*[2006] ERNZ 517

[23] I determine that Mr Wei did not raise his personal grievance claim within the statutory time frame.

Should Mr Wei be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[24] Sunlight does not consent to Mr Wei raising his unjustifiable dismissal grievances outside the statutory 90 day timeframe.

[25] As set out in s 114(3) of the Act where an employer does not consent to a personal grievance being raised after the 90 day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(4) of the act which states.

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 circumstance (which may include any 1 or more of the circumstances set out in section 115); and
- (b) Considers it just to do so.

[26] Examining the three criteria which must be fulfilled I note firstly that Mr Wei has made no application to raise the personal grievance outside the 90 day statutory time frame.

[27] The second criterion is that the delay arose due to exceptional circumstances. Exceptional circumstances are set out in s 115 of the Act and include: “where the employee’s employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 of section 65 of the Act”².

[28] Sunlight has accepted in submissions that the employment agreement with Mr Wei was not recorded in a manner that would comply with s 64 of the Act. This would therefore constitute an exceptional circumstance.

[29] The existence of the exceptional circumstance is not sufficient alone to satisfy the requirements, the exceptional circumstance must have given rise to the delay in raising the personal grievance.

² Employment Relations Act 2000 s115(c)

[30] Sunlight submits that Mr Wei has not shown that the lack of a compliant employment agreement is the reason why no personal grievance has been raised in the 14 months since the last period of employment ended.

[31] It is further submitted that it cannot be reasonably inferred that that the lack of a compliant employment agreement was the reason given that no later than August 2019 Mr Wei knew enough about processes under Part 10 of the Act to seek mediation assistance and to file proceedings in the Authority.

[32] In considering this issue I observe that during the case management conference call held with the parties on 18 November 2019 I specifically drew Mr Wei's attention to s 114 and s 115 of the Act which was prior to his filing his submissions, however there is no reference to a delay having been caused by exceptional circumstances in the submissions made by Mr Wei on 6 December 2019.

[33] I find no evidence supporting the conclusion that there was an exceptional circumstance basis for the delay in Mr Wei raising the personal grievance outside of the 90 day statutory time frame.

[34] In considering the third criterion of whether or not it is just to allow Mr Wei to bring his personal grievance claim out of time I find that given the fact that a substantial period of time has passed since the events said to give rise to a grievance arose, and in that time Mr Wei has taken no steps to raise a grievance or apply for leave to raise one, it would not be in the interests of justice to allow him to do so now.

[35] In making this decision I note that this will not cause any injustice to arise in connection with Mr Wei's wage arrears claim.

[36] I determine that Mr Wei should not be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act.

Costs

[37] Costs are reserved and will be determined following the conclusion of the substantive matter which is set down for an Investigation Meeting on 16 June 2010.

Eleanor Robinson
Member of the Employment Relations Authority