

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 99  
5429991

BETWEEN ANNETTE DAWN WESTRUPP  
Applicant  
  
A N D ENVIROWASTE SERVICES  
LIMITED  
Respondent

Member of Authority: M B Loftus  
  
Representatives: Steven Zindel and Amy Gulbransen, Counsel for  
Applicant  
Jo Douglas, Counsel for Respondent  
  
Investigation Meeting: 18 June 2014 at Nelson  
  
Submissions Received: At the investigation  
  
Date of Determination: 3 July 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Ms Annette Westrupp, claims she was unjustifiably dismissed by the respondent, EnviroWaste Services Limited (Envirowaste), on 9 November 2012.

[2] Ms Westrupp accepts she failed to raise her grievance in the 90 days required by s.114(1) of the Employment Relations Act 2000 (the Act) but seeks leave to proceed in accordance with s.114(3) of the Act.

[3] Envirowaste asserts there are no grounds to grant the application.

[4] The parties agreed the question of whether the grievance can proceed be decided as a separate and preliminary matter.

## Background

[5] Ms Westrupp was employed by Envirowaste in an administrative role at its Nelson office. She had been there for some time.

[6] In September 2012 she was advised of a proposed restructuring which could potentially lead to her redundancy. Meetings followed though the parties disagree on whether they constituted adequate consultation.

[7] On 9 October 2012 Ms Westrupp received a letter advising Envirowaste had decided to disestablish her position and replace it with a broader one with additional responsibilities. The letter goes on to advise:

*Should redeployment not be possible and you are not successful in your application for the [new role] this will mean that your employment with Envirowaste is terminated and in accordance with the notice period provisions in your employment agreement your employment will cease on 9th November 2012.*

[8] Ms Westrupp applied for the new role but was unsuccessful. She was advised orally on either 7 or 8 November. Written confirmation followed on 12 November.

[9] Ms Westrupp attended a farewell morning tea on 9 November 2012 and departed Envirowaste's premises that morning. Notwithstanding the absence of written confirmation of termination at that time Ms Westrupp, via her counsel, accepts the date of cessation was 9 November 2012 and it is from then the 90 day period runs.

[10] Ms Westrupp spent some time considering whether to challenge her dismissal and, while doing so, approached a Nelson law firm, Pitt & Moore, on 11 December 2012.

[11] Having considered her options Ms Westrupp decided to challenge the dismissal. She called Pitt & Moore to arrange a further meeting on 22 January 2013. It occurred on 28 January.

[12] The solicitor handling the matter, Mr Nick Mason, prepared a letter notifying Envirowaste of the grievance. He sent the draft to Ms Westrupp on 31 January. She approved its despatch at 12.43 the following day (Friday, 1 February 2013). Mr Mason then signed the letter and placed it in his out tray for posting that evening.

[13] Unfortunately it did not go, though the reason is unknown. It remained at Pitt & Moore's premises until at least 7 February 2013. This was due to a three day closure occasioned by both Monday 4 and Wednesday 6 February being public holidays in Nelson.

[14] The letter was addressed to Mr Kevin Edgar, Envirowaste's South Island Collections Manager, at its Auckland head office. The envelope is date stamped 8 February 2013. The date it was received at Envirowaste's head office is unknown.

[15] Mr Edgar does not, however, work from the Auckland office and was, at the time, based in Dunedin. The letter was not opened but forwarded to Dunedin. It arrived on either 13 or 14 February 2013. The still unopened envelope was placed on Mr Edgar's desk and awaited him when he returned to the office on the morning of 15 February 2013 after a couple of days' absence.

[16] Envirowaste contends it was eight days late given the parties agreement 7 February 2013 was the day on which the 90 day period expired.

### **Determination**

[17] Section 114 of the Act discusses the raising of a personal grievance. Every employee who wishes to raise a personal grievance must do so within 90 days (s.114(1)). If the employee fails to raise the grievance in that time s/he may ask the employer to allow a continuation and in the event of a refusal seek leave from the Authority to do so (s.114(3)).

[18] On receiving such an application the Authority may grant leave if it:

- (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...*
- (S.114(4)).

[19] Included in the examples of what constitutes exceptional circumstances in s.115 is subsection (b). It reads:

- (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;*

[20] As already said Ms Westrupp accepts Envirowaste was not notified of her grievance within the 90 day period. Envirowaste did not consent to it being raised out of time and she now seeks leave to continue pursuant to s.114(3) on the grounds her original counsel unreasonably failed to ensure the grievance was raised in time.

[21] The initial onus is on the grievant to make reasonable arrangements for the raising of the grievance. Here there can be no doubt Ms Westrupp complied with this requirement. She clearly instructed Mr Mason to pursue the claim and did so with sufficient time for Mr Mason to do so within the 90 day limit. Had the letter departed Pitt & Moore's premises as intended on 1 February it would most likely have been in Envirowaste's hands before the 8<sup>th</sup>.

[22] So was, therefore, Pitt & Moore's failure to ensure it was delivered in a timely manner a failure as contemplated by s.115(b)? I conclude the answer is yes.

[23] The threshold as to what constitutes exceptional in this context is relatively low given the Supreme Court's ruling *exceptional circumstances* will arise from *unusual* occurrences as opposed to special or extraordinary ones. Unusual was defined as the exception to the rule (see *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] ERNZ 109 at [31]).

[24] During the meeting both Mr Zindel and Ms Douglas commented that today it was highly unusual (or words to that effect) for a solicitor not to email such a document. Had that occurred there is no doubt the letter would have been with Envirowaste prior to the expiry of the 90 days.

[25] When this was put to Mr Mason he agreed email was a common practice and one he also used though not always. He accepted he did not do so in this instance and could not explain why.

[26] Given Mr Zindel's and Ms Douglas' observations I conclude this omission was, in itself, sufficient to constitute an unusual occurrence in a modern law firm and satisfies the requirements of s.114(4)(a) of the Act.

[27] That, however, is not the end of the matter. It must also be just to grant leave to continue. Ms Douglas argues it is not. She does so on the grounds that:

- a. Ms Westrupp's case is weak and Envirowaste acted in good faith at all times;
- b. Ms Westrupp failed to accept alternate work with Envirowaste;
- c. Envirowaste will be put to cost which it is unlikely to recover if it is successful;
- d. Ms Westrupp met with Mr Askew, her manager at Envirowaste, after the cessation and could simply have told him of the grievance then;
- e. The delay has disadvantaged Envirowaste.

[28] For the following reasons these are not arguments I accept. The merits of the case are yet to be tested and Ms Westrupps at least appears arguable. The alternate work was not a real option as it was only casual in nature.

[29] The idea of simply telling Mr Askew also fails to convince. At the time they met Ms Westrupp was yet to decide whether or not to pursue the issue but in any event she is entitled to use an agent as she chose to do. Similarly the issue of delay and cost fails to sway me. Envirowaste knew of the grievance shortly after expiry of the 90 days and could have acted to secure the information it needed then. The issue of cost would have existed in the event the matter had been properly raised and the situation has not altered in this respect.

[30] Against this is the fact the delay was minor was minor. While it is not known exactly when Envirowaste received the letter in Auckland it could have been within 48 hours of expiry of the 90 day limit. Add to that the fact Ms Westrupp's case is arguable, I consider it just to grant her application.

### **Conclusion**

[31] Ms Westrupp is granted leave to pursue her grievance. I indicated during the investigation meeting that should the outcome favour Ms Westrupp the parties would be ordered to mediation to address the claim. That order is now made.

[32] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority