

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Vanessa Jay Williams (Applicant)  
**AND** Jason Burns (Respondent)  
**REPRESENTATIVES** Vanessa Williams in person  
No appearance for respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 14 December 2004  
**DATE OF DETERMINATION** 20 January 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant, Ms Williams filed her application with the Authority on 30 September 2004 alleging a personal grievance on the grounds of an unjustified dismissal. The alleged unjustified dismissal occurred as a consequence of a termination for redundancy.

[2] The respondent (Mr Burns) took no steps and has not at any stage addressed the issue raised by Ms Williams.

***Discussion***

[3] There are two preliminary issues which need to be addressed. The first of these is whether Mr Burns is properly the respondent in these proceedings. Mr Burns is identified as the respondent by Ms Williams because she alleges it was Mr Burns who employed her and thus the employment relationship was between those two parties.

[4] The evidence as to that is to say the least equivocal. Ms Williams told the Authority in her evidence that from time to time she was paid by a personal cheque drawn on Mr Burns's personal account. However, her individual employment contract (SIC) is expressed to be between her and a company incorporated as Vision Aluminium Nelson Limited. No such company has been registered with the Companies Office.

[5] When Ms Williams sought to file a proof of debt in respect to unpaid wages and other monies which she claimed were owed to her by her former employer, she filed her proof of debt in the name of an entity styled Vision Aluminium trading as CJB Enterprises.

[6] She lodged that proof of debt form with the solicitors then acting for the debtor and they responded to her with a letter captioned CJB Enterprises Limited trading as Vision Aluminium. A



search of the Companies Office in respect to that incorporation shows that that is in fact registered as a limited liability company with a registered office in Nelson and with the respondent listed as the sole director. For reasons which will become clear shortly, it is not necessary for me to make a determination as to whether Mr Burns is in fact properly proceeded against as the respondent in this matter. However, I note in passing that notwithstanding the fact that Ms Williams says that from time to time she was paid by personal cheque of Mr Burns, it seems more likely than not that Mr Burns was not at any time truly her employer.

[7] The other preliminary matter which needs to be addressed is the question of the raising of the personal grievance within the statutory time. Ms Williams' evidence was that she was dismissed from her employment by a telephone call she received at home on Sunday night in the first weekend in December 2003. This would mean that the dismissal took place on Sunday, 7 December 2003. It seems that there was no formal notification of the raising of a personal grievance until the proceedings brought by Ms Williams were lodged with the Authority on 30 September 2004. If that were the first occasion on which the matter was brought to the employer's attention or its representative then the raising of the grievance would have been eight months after the happening of the events complained of.

[8] Given that, on the face of Ms Williams' application, there was no evidence that the grievance had been raised prior to the lodging of her application to the Authority, I determined that an investigation meeting would take place to determine whether or not Ms Williams could proceed to a substantive hearing of her application having regard to the provisions of section 114 and section 115 of the Employment Relations Act 2000.

### *The investigation meeting*

[9] I determined to proceed to investigate the problem raised by Ms Williams notwithstanding there had been no communication whatever from the respondent Mr Burns. I am satisfied that the Authority took all reasonable steps to attempt to notify Mr Burns both of the statement of problem and of the date, time and place for the investigation meeting. In the material prepared for the investigation meeting, I made it abundantly clear to the parties that the only issue I was prepared to investigate at the investigation meeting on 14 December 2004 was the question whether the applicant's problem could be further proceeded with having regard to the effect of sections 114 and 115 on the raising of her personal grievance.

### *The facts*

[10] The applicant told me that she was employed in October 2003 in a clerical capacity. She told me she had originally contacted Mr Burns because he had advertised for an office manager and it was that role that she had originally aspired to. It was not however as an office manager that she was ultimately appointed although on the face of it her duties certainly seemed to encompass an office management role.

[11] Ms Williams said that from a very early stage she felt certain that *Things weren't right with the business*. She gave as examples Mr Burns sloppy accounting practices like a failure to complete cheque books and his response to her enquiry that *she did not need to know about that kind of stuff*.

[12] Ms Williams would prepare the cheques for payment and furnish them to Mr Burns for him to sign but she became aware very soon that Mr Burns was only paying people that he absolutely had to.

[13] There were cashflow problems and Ms Williams became anxious about the ability of the firm to pay wages. From time to time, it was only possible for a small number of the businesses staff to

be paid from the businesses account and it was on those occasions that Ms Williams says that she personally anyway was paid by Mr Burns from his personal account.

[14] Ms Williams then started to receive letters from the Inland Revenue Department indicating that PAYE was not being paid and she was subsequently distressed when the Inland Revenue Department held her personally accountable for the failure of the former employer to pay PAYE in respect to her wages.

[15] She had angry creditors ringing her demanding payment and she even had some creditors wanting her to tell them where Mr Burns lived so they could go round and confront him at home.

[16] Clearly this was a highly stressful time for Ms Williams and she needed to rely on her father for support during some of these more stressful events. Despite the stress, she continued to try to do her job to the best of her ability and frequently had to work late because she was unable to get anything done during the day by reason of having to deal with so many disgruntled customers and suppliers.

[17] Prior to the dismissal event, Ms Williams told me that she had been lulled into a false sense of security by Mr Burns saying that although the business was in difficulty it would be sold and that she would continue to have a job with the new owner. When she was dismissed on 7 December 2003 she was devastated and her evidence was that she thought at that point about immediately taking steps against her employer.

[18] However, critically, Ms Williams was unable to satisfy me that she had done anything to communicate to Mr Burns or any other representative of the employer that she had a personal grievance and/or that she intended to proceed with a grievance in respect to the way in which she had been treated.

[19] It is clear that she thought about the matter at the time that she was dismissed but it is not clear that she communicated those thoughts in any tangible way to the employer. Certainly there seems to have been some discussion with Mr Burns because she recalls Mr Burns threatening her if she were to contemplate bringing any proceedings against the firm. She recalls Mr Burns saying something to the effect that she would not get anything out of him and something to the effect that there was no point in her taking her dismissal any further as he was going to declare bankruptcy.

[20] A number of other factors clearly weighed with her at the time including a letter that she received from the employer's lawyer which indicated that her proof of debt was unlikely to be satisfied and the pressure generally from creditors and customers of the business all of which seemed to encourage her in the view at the time that the matter was hopeless and not worth taking further. She even remembers being confronted in the street with customers identifying her by name and then identifying where she used to work and asking where the joinery that they had ordered was.

[21] She got calls from the local newspaper on her personal phone and telephone calls from clients at her home asking about the business.

[22] All of this created a huge amount of stress for Ms Williams and I accept absolutely that this would have put her under immense personal strain. However, she started a new job on 6 January 2004 which is to say within a month of the notice of termination of employment and she has worked continuously since. She told me honestly that she did not want any legal proceedings to affect her job and that was one of the reasons that she took no steps.

[23] That raised the issue of why she finally decided to lodge her statement of problem and she told me that she had chosen to take that step because of a call from the Nelson police who she had

been assisting in their enquiries in relation to Mr Burns and the collapse of the business. The Nelson police allegedly told Ms Williams that Mr Burns had yet to declare bankruptcy; they encouraged her to lodge her statement of problem. She recalls that telephone discussion as having taken place in the middle of September 2004 and as I have already recorded, her statement of problem was lodged with the Authority on 30 September 2004.

### *The law*

[24] I found as a fact that Ms Williams did not raise with the employer her personal grievance within the statutory timeframe. It is self-evident that she did not do this in a formal way; I have also found that she has not done this informally in a verbal sense or by way of a course of conduct although it might perhaps be reasoned that she failed to do this only because she was deflected from that course of action by the truculent and unhelpful attitude of Mr Burns. I cannot however determine what might have happened had the circumstances been different and must consider the matter only on the facts as I discern them.

[25] That being the position, subsection (1) of section 114 of the Employment Relations Act 2000 gives an opportunity for the employer to consent to the grievance being raised out of time. Given that we have not heard from the respondent in this matter at all it is difficult to reach any other conclusion than the obvious one that no such consent has been given.

[26] Without the employer's consent, the only way that an employee in Ms Williams' position can proceed is where she is able to show the Authority that exceptional circumstances exist. It is clear law that the exceptional circumstances provision is to be construed strictly against the employee and there must be a causative link between those exceptional circumstances and the delay in raising the grievance.

[27] Notwithstanding the very considerable distress that I accept Ms Williams suffered as a consequence of the events around and subsequent to her dismissal, even if I were inclined to accept that the circumstances were exceptional in the sense contemplated by the first part of paragraph (a) of section 115, I am not persuaded that there is a causative nexus between those circumstances so described and the delay.

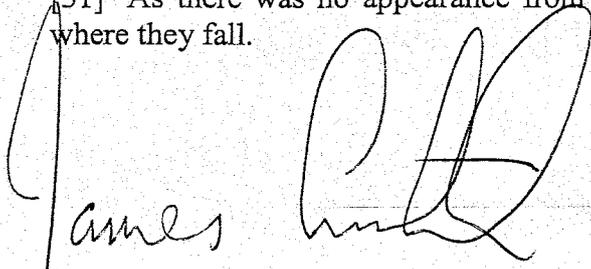
[28] I reach that conclusion for a number of reasons, viz (a) the primary stressors it seems to me for Ms Williams were the downstream consequences of the collapse of the business rather than the dismissal itself and therefore the test in *GFW Agri-Products Limited v Gibson* [1995] 2 ERNZ 323 at p 330 is not made out. (b) There was an extensive delay from the termination of employment down to the lodging of the statement of problem. (c) Ms Williams got new work quite quickly and must have started extracting herself emotionally from the detritus of the old employment. (d) Ms Williams seems to have affirmatively determined not to proceed with a grievance in case it affected her new employment. (e) Ms Williams seems to have been strongly influenced to raise her grievance out of time by the encouragement of the Nelson police who no doubt in the spirit of helpfulness suggested she proceed perhaps without considering the legal hurdles that Ms Williams would have to confront.

### *Decision*

[29] It follows then that I have reached the conclusion that Ms Williams does not meet the requisite legal test which would enable her to proceed to a substantive hearing of her personal grievance by reason of the fact that I do not think that she meets the exceptional circumstances test required by the law.

[30] That effectively brings this matter to a conclusion. One can only admire Ms Williams' fortitude in endeavouring to fulfil her employment and civic obligations in such difficult circumstances.

[31] As there was no appearance from the respondent there is no issue as to costs and they lie where they fall.



James Crichton  
Member of Employment Relations Authority

