

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 17/08
5103068

BETWEEN MICHAEL WILLIAMS
 Applicant

AND PPCS BELFAST
 Respondent

Member of Authority: James Crichton

Representatives: Wayne Kerr, Counsel for Applicant
 Gary Williams, Advocate for Respondent

Investigation Meeting: 18 February 2008 at Christchurch

Determination: 20 February 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by the applicant (Mr Williams) for leave to bring a personal grievance out of time. The application is opposed by the respondent employer (PPCS).

[2] Mr Williams was found to have committed serious misconduct during his employment at PPCS and was dismissed from his employment on 3 November 2006.

[3] During the course of the disciplinary process that preceded the decision to dismiss, Mr Williams was represented by an official of his Union.

[4] After the dismissal, Mr Williams instructed counsel and then through counsel engaged with PPCS in relation to the dismissal. There was an exchange of information but at no stage before the 90 day period elapsed was PPCS notified that Mr Williams wished to raise a grievance in respect to his dismissal.

[5] Approximately a month after the dismissal (on 5 December 2006), and unbeknown to his counsel, Mr Williams was imprisoned for unrelated offences.

[6] Mr Williams and his counsel did not speak to each other until the second week of February 2007 by which time, of course, the 90 day period had already elapsed. At this point, a personal grievance was raised in a letter dated 19 February 2007 from Mr Williams' counsel.

[7] Mr Williams' counsel apparently contemplated filing an out of time application in the Authority in March 2007 but no such application was in fact filed.

[8] There was then a further significant delay and the application was actually filed on 17 October 2007, nearly 12 months after the dismissal of Mr Williams. It is said, and I accept, that a significant reason for the delay from March through to October 2007 was the illness of counsel.

The Law

[9] Section 114 of the Employment Relations Act 2000 establishes the general proposition that employees wishing to raise grievances must do so within 90 days of the event complained of or that event coming to the employee's notice.

[10] There is a proviso to that general provision the effect of which is that a grievance may be raised after 90 days if the employer consents.

[11] Where the employer refuses its consent then there is a process which is relevant to the present application. If the Authority is satisfied that the delay in raising the grievance within time was occasioned by *exceptional circumstances* and the Authority considers it just to grant the application for leave, the Authority may grant leave.

[12] Section 115 of the Act identifies four circumstances where exceptional circumstances may be found to exist but the list is not exclusive. One of the grounds identified in s.115 might be relevant in the present case in that it refers to the failure of a representative to raise a grievance within time.

Discussion

[13] For reasons which I will identify shortly, I have formed the view that there are neither exceptional circumstances in the present case which would justify the granting of leave nor would it be just, in all the circumstances, to grant leave to Mr Williams to bring his grievance out of time.

[14] It is clear from the factual matrix that there was a breakdown in communication between Mr Williams and his counsel around the time Mr Williams became incarcerated. Mr Williams seeks to encourage the Authority in the view that that incarceration, and the elapse of time that it occasioned, constitutes exceptional circumstances and entitled him to bring his claim out of time. I do not accept that submission. In my view, Mr Williams had ample opportunity before he was incarcerated to raise a grievance particularly as he had an experienced Union official looking after him during the disciplinary process and leading up to the dismissal itself. Had Mr Williams instructed that official to raise a grievance on the basis of the dismissal there would have been no issue in the present proceedings. He did not do that. Further, while he was engaging with the employer in the month after the dismissal he did not take any steps either himself or through counsel to raise a personal grievance. Those failures seem to me to be most significant, particularly the failure to make use of an experienced Union official involved at the time of the matters complained of.

[15] Even when Mr Williams was incarcerated, it seems inconceivable that the Prison authorities would have precluded Mr Williams from interviewing counsel on this matter. All Mr Williams would have needed to do was to seek permission of the Prison authorities to have his counsel attend at the Prison. This would be a common event in the Prison system and I am not persuaded that the effect of incarceration would completely remove from Mr Williams his will to deal with this employment matter, if he were minded to.

[16] By the time that the notification of personal grievance is eventually notified to the employer but letter dated 19 February 2007, it is already out of time. But if that were not enough, there is then another delay until October 2007 when there is further contact with the employer via notification from the Employment Relations Authority that the matter had now been filed in the Authority.

[17] There can be no doubt that the delay between the notification of the grievance (out of time) in February and the subsequent follow up in October of the same year is an unreasonable delay albeit it was occasioned by the illness of counsel. However, I prefer to base my conclusions not on any delay after February but on the delay before February, that is during the notice period itself.

[18] I am satisfied that there are no exceptional circumstances in the present case, that Mr Williams had ample opportunity to raise a grievance during the 90 days, including while he was incarcerated, but that he did not take those steps. I am also satisfied that it would not be just to grant Mr Williams' application for leave to bring his grievance out of time.

Determination

[19] Based on the forgoing analysis, I find that Mr Williams has not made out his case for leave to be granted to enable him to bring his personal grievance out of time and it follows that Mr Williams' application is dismissed.

Costs

[20] The usual rule that costs follow the event may from time to time be abrogated. I think in the circumstances of the present case, it would not be appropriate for Mr Williams to suffer the impost of having to contribute to any costs which the employer PPCS may have incurred in this matter and accordingly I direct that in the particular circumstances of this case, costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority