

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 352  
3037331

BETWEEN            SUSAN WILLS  
Applicant

A N D                FARMLANDS CO-OPERATIVE  
SOCIETY LIMITED  
Respondent

Member of Authority:        Peter van Keulen

Representatives:            Anjela Sharma, counsel for Applicant  
Sarah Townsend, counsel for Respondent

Investigation Meeting:        13 March 2019

Submissions Received:        13 March 2019 and 27 March 2019 from the Applicant  
13 March 2019 and 29 March 2019 from the Respondent

Date of Determination:        12 June 2019

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Farmlands Co-Operative Society Limited employed Sue Wills from March 2008. Ms Wills resigned in October 2017 and her last day of work was 17 November 2017.

[2] In January 2018 Ms Wills obtained legal advice about the possibility of bringing a claim against Farmlands arising out of events during her employment, including events leading up to and culminating in her resignation.

[3] Ms Wills says that as a result of obtaining that advice she wished to proceed with raising a personal grievance against Farmlands for unjustified dismissal.

[4] Section 114(1) of the Employment Relations Act 2000 (the Act) requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[5] Unfortunately, for Ms Wills, a personal grievance was not raised on her behalf until she lodged a statement of problem with the Authority on 27 August 2018. And this was clearly outside of the 90 days prescribed under s 114 of the Act.

[6] Farmlands did not consent to Ms Wills' personal grievance being raised after the expiration of the 90 day period. So, Ms Wills has applied under s 114(3) of the Act for leave to raise her personal grievance after the expiry of the 90 day period.

[7] In order to succeed with her application for leave Ms Wills needs to satisfy me that the delay in raising her personal grievance was occasioned by exceptional circumstances and it is just for me to grant leave as requested.<sup>1</sup> Exceptional circumstances, for the purposes of an application under s 114, include where an employee has made reasonable arrangements to have her personal grievance raised by an agent on her behalf and that agent has unreasonably failed to ensure the personal grievance was raised within the 90 day period.<sup>2</sup>

[8] Ms Wills says that when she obtained legal advice in January 2018 she instructed her lawyer to raise a personal grievance on her behalf and he failed to ensure that was done within the requisite timeframe, hence exceptional circumstances exist and leave should be granted.

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<sup>1</sup> Section 114(4) of the Employment Relations Act 2000.

<sup>2</sup> Section 115(b) of the Employment Relations Act 2000.

[9] Farmlands says that Ms Wills did not make reasonable arrangements to have her personal grievance raised on her behalf - it says this because Ms Wills' lawyer says Ms Wills did not instruct him to raise her personal grievance. The lawyer says he gave Ms Wills advice on her personal grievance, the process for pursuing that against Farmlands and the potential outcome. Ms Wills was considering whether she wished to take this action and was going to advise him after the meeting to raise her personal grievance if she did want to continue. He says Ms Wills never came back to him with instructions so he never raised her personal grievance.

[10] In order to resolve this preliminary issue for this employment relationship problem I need to determine what events occurred around Ms Wills obtaining legal advice and whether, based on my assessment of what occurred, she had made reasonable arrangements for her lawyer to raise her personal grievance on her behalf. If she did, I must then consider if the lawyer unreasonably failed to ensure the personal grievance was raised within the 90 day period. And, if the lawyer did unreasonably fail, then I must consider whether it is just for Ms Wills to be given leave to raise her personal grievance outside the 90 day period.

### **Analysis**

[11] In the course of my investigation into this preliminary issue, I heard evidence from Ms Wills and Nick Mason, an employment lawyer who Ms Wills consulted over her employment issues with Farmlands. Based on their evidence and various contemporaneous documents I have determined what occurred when Ms Wills obtained advice from Mr Mason and what occurred subsequently, particularly in terms of whether Ms Wills arranged for Mr Mason to raise her personal grievance for her.

[12] On 25 January 2018 Ms Wills attended at Pitt & Moore a law firm in Nelson, where Mr Mason then worked<sup>3</sup>, to meet him to discuss her employment concerns. During the meeting, Ms Wills explained the circumstances of her employment with Farmlands, including the events that caused her concern and led to her resignation. Mr Mason gave Ms Wills some initial advice on whether she had grounds for raising a personal grievance, the process for

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<sup>3</sup> Mr Mason was an employed solicitor at that time; he is now a partner in the firm.

raising and pursuing any personal grievance and the possible outcomes, including remedies that might be available.<sup>4</sup>

[13] In her written evidence, Ms Wills stated that after discussing her personal grievance and being advised there was sufficient information to raise a personal grievance, she instructed Mr Mason to proceed. However, she also stated that she understood she had to complete the formalities of engaging Mr Wills to act on that basis. When questioned during my investigation, Ms Wills explained that the “formalities of engaging” Mr Mason were signing and returning an engagement letter. And, she said she could not remember the specific words she used to instruct Mr Mason but she was sure she said she wanted to move forward and said let’s get the ball rolling.

[14] Mr Mason’s evidence was contrary to this. He said Ms Wills did not instruct him to proceed to raise a personal grievance in the meeting. He did not recall Ms Wills saying she wanted to move forward or that he should get the ball rolling. Rather, he said, Ms Wills was concerned about whether she should proceed to raise her personal grievance because of the prospect of what she might receive if successful against how much it might cost – there being a concern on his part about the extent of any remedies available. So Ms Wills was going to think about his advice and what was involved in pursuing her personal grievance claim and let him know subsequently if she wanted him to raise her personal grievance.

[15] Reflecting on the evidence, I accept Mr Mason’s account of what occurred in the meeting – that Ms Wills did not tell him to raise her personal grievance for her but rather that she left the meeting on the understanding she would consider the advice and then tell Mr Mason if she wished to progress her personal grievance. There are two key reasons for this:

- (a) Ms Wills accepted in cross examination that after she left the meeting with Mr Mason and when she subsequently received an email from him with the engagement letter, she was still thinking about whether to proceed with her personal grievance or not.

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<sup>4</sup> Noting that I did not hear any evidence about the substance of that advice to protect any privilege that might attach to it.

(b) Mr Mason's handwritten file note of the meeting with Ms Wills records at the end "will let me know if wants to raise PG".

[16] So, the next consideration is whether Ms Wills subsequently arranged for Mr Mason to raise her personal grievance.

[17] On the same day that he met Ms Wills, Mr Mason sent an email to Ms Wills with an engagement letter. The email stated:

Hello Sue,

It was nice meeting you today.

As mentioned we have to send all new clients a letter of engagement. Please find ours attached, together with accompanying documentation. If everything is in order, I would be grateful if you could sign the acceptance page and email back to me.

Further to our meeting I calculate the 90<sup>th</sup> day as 15 February 2018, so there are a couple of weeks left to raise a personal grievance.

If you have any questions please don't hesitate to contact me.

Kind regards

Nick

[18] Ms Wills responded on the 27 January 2018 by email stating:

Hi Nick,

Hope this isn't dumb question but where is the page with acceptance letter? I have read through both and don't see it. Also if I take a case will your fees be added to any settlement that I hopefully will receive.

Have a nice long weekend

Sue

[19] Ms Wills subsequently found the acceptance page, signed it and returned it to Pitt & Moore. Ms Wills then sent Mr Mason an email on 2 February 2018 stating:

Hi Nick,

I rang your office on Tuesday you were not available but verbally told your receptionist that I accepted conditions set out in letter of acceptance. If you are unable to print above letter I will send hard copy ...

Sue

[20] Mr Mason then responded by email stating "Thank you Sue - that's perfect."

[21] Ms Wills did not take any other steps to arrange for Mr Mason to raise her personal grievance. Ms Wills said that signing the engagement letter was giving Mr Mason the “go ahead for the case”.

[22] Mr Mason said that signing the engagement letter was authorisation to act, as all new clients were required to do. However, it was not, in his view an instruction to raise the personal grievance, rather it was simply a step that needed to be done irrespective of whether he was subsequently told to raise Ms Wills’ personal grievance – it was a pro forma step or requirement that sat outside an instruction to act in a specific way or manner. As he did not hear anything further from Ms Wills he took no further steps in terms of her personal grievance.

[23] In assessing this evidence I accept that Ms Wills may have believed that signing the acceptance page of the engagement letter was authorising Mr Mason to act on her behalf. But it is clear from the correspondence and the evidence that signing the acceptance page of the engagement letter was not an action that amounted to an instruction to Mr Mason to raise her personal grievance for her.

[24] I come to this conclusion because Mr Mason’s evidence explains this and the contemporaneous documents support this:

- (a) The engagement letter is a general letter of engagement and does not refer to any specific instructions to act in any particular way or undertake any particular work - so signing the acceptance page does not present an instruction to act in a specific manner.
- (b) The email from Mr Mason providing the engagement letter deals with the letter and Ms Wills’ need to sign it separately from any instruction to raise her personal grievance. It simply requires her to sign and return it as a new client. The email then deals with the personal grievance separately by referring to the 90 day time frame and when that would expire, suggesting Ms Wills still had time to confirm what she wished to do.

(c) Ms Wills' email response to Mr Mason deals with the engagement letter by asking about the acceptance page and then deals with pursuing a claim separately, which I understand to be a reference to pursuing a personal grievance claim – the email states “*Also if I take a case.*”. Taken as a whole the email appears to say, I will sign the engagement letter, but where is the signature page and I still have not decided if I will pursue a personal grievance and I have a question about that.

(d) Ms Wills' subsequent signing and returning of the acceptance page of the engagement letter does not include any additional and separate instruction to Mr Mason to proceed to raise a personal grievance on her behalf.

[25] In *Lynette Melville v Air New Zealand Limited*<sup>5</sup> the Court of Appeal made it clear that my assessment of exceptional circumstances under s 115(b) of the Act, is a factual enquiry to assess if “reasonable arrangements” were made to have a personal grievance raised, but reasonable arrangements does not mean there must always be an express instruction.

[26] So, it is not enough for me to say there was not a specific instruction for Mr Mason to raise Ms Will's personal grievance. The question is whether signing the acceptance page of the engagement letter and returning it amounts to reasonable arrangement to a personal grievance raised. The answer to this question is no, it does not. It was not clear that by signing the acceptance page of the engagement letter and returning it with the comments made in the various emails that Ms Wills wanted to proceed with her personal grievance.

[27] In conclusion, I am not satisfied that exceptional circumstances exist and therefore I will not grant leave for Ms Wills to raise her personal grievance outside of the 90 day period.

### **Costs**

[28] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

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<sup>5</sup> [2010] NZCA 563.

[29] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority