

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 141
5352782

BETWEEN PAUL ALLBON
 Applicant

AND NICHOLSON RACING
 STABLES LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S Scott, Counsel for Applicant
 G Steele, Counsel for Respondent

Investigation: On the papers

Determination: 23 April 2012

DETERMINATION OF THE AUTHORITY

Application to have a personal grievance heard out of time

[1] Via a *Statement of Problem* received by the Authority on 9 August 2011, the applicant, Mr Paul Allbon, claims that he was unjustifiably dismissed from his employment with Nicholson Racing Stables Limited (NRS), effective from 25 February 2011. Mr Allbon raised a personal grievance via a letter dated 5 July 2011. It is acknowledged in the *Statement of Problem* that the grievance was raised outside the 90 days time limit required by s.114 of the Employment Relations Act 2000 (the Act). However, Mr Allbon says that the lapse in raising the personal grievance was occasioned by exceptional circumstances and he relies on s.115(c) of the Act; in that he was never provided with an employment agreement, hence he did not receive an explanation pertaining to the resolution of employment relationship problems.

[2] The respondent, NRS, says that Mr Allbon's employment was terminated on or about 4 November 2010, because the company could no longer afford to pay his

wages. Via the *Statement in Reply* received by the Authority on 30 August 2011, NRS informed that it did not oppose an application to raise a personal grievance out of time. However, there has been a change of representative, and NRS now opposes any application to raise a grievance out of time.

[3] The Authority convened a conference call with the parties on 8 December 2011 with the outcome being that the applicant has made an application for leave to raise the grievance outside the 90 days period. It has been agreed that the Authority will determine the application on the papers. A sworn affidavit and submissions in support of the application have been provided for Mr Allbon and this material has been responded to by NRS, albeit only minimal evidence has been provided.

Why was the grievance raised after the expiration of the 90 days period?

[4] Via his sworn affidavit, Mr Allbon attests that he was not provided with an employment agreement, or anything in writing confirming his employment. Mr Allbon says that it was not until he saw an advertisement in the local newspaper, promoting legal services for his solicitor (Mr Scott), and then went to consult him, that he became aware of the process of raising a personal grievance and the requirement to raise a personal grievance within the 90 days time limit.

The Law

[5] The germane provisions of s.114 of the Act provide that:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employer wants the employer to address.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

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

Was the delay in raising the personal grievance occasioned by exceptional circumstances?

[6] Mr Allbon accepts that he failed to raise his grievance within the 90 days required by s.114(1) of the Act and his application to raise the grievance “out of time” is made under the provisions of s.114(3) of the Act. Mr Allbon relies on the ground available under s.115(c) of the Act in that exceptional circumstances 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 or section 65, as the case may be; ...

[7] NRS does not dispute that it failed to provide Mr Allbon with an employment agreement that contained a “plain language explanation of the services available for the resolution of employment relationship problem” as required by s.65(2)(a)(vi) of the Act. A handwritten one page document purported to be an employment “contract” has been produced by NRS. But this does not meet even the basic requirements of s.65 of the Act.

[8] Given the affidavit evidence of Mr Allbon and the established fact that there was not a legal employment agreement in existence that meets the requirements of s.65(2)(a)(vi) of the Act, I am satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances.

Is it just to grant leave to raise the personal grievance?

[9] The submissions for NRS in opposition to allowing the application to raise the grievance out of time, go largely to the second criterion provided by s.114(4) of the Act; whereby in addition to being satisfied that exceptional circumstances exist, the Authority has to consider that it is just to grant leave.

[10] Several arguments have been advanced for NRS as to why it would not be just to grant leave. Firstly, NRS says that it “strongly disagrees” with Mr Allbon’s

affidavit; but it has not provided any affidavit evidence to rebut that of Mr Allbon. The rest of the submissions for NRS go largely to its view that there is a lack of merit pertaining to Mr Allbon's grievance. But there has been no evidence produced at all to establish, on the balance of probabilities, that the claims of Mr Allbon are unlikely to be upheld. It probably goes without saying that:

Any consideration in balancing justice must necessarily be based on evidence before the Court [Authority].¹

It has also been submitted that NRS as a business has ceased to trade, is in debt and has no money with which to "recompense" Mr Allbon. Unfortunately, no evidence has been produced to verify this submission. Nonetheless, Mr Allbon might wish to investigate further the financial position of the respondent before committing to further costs on his part.

Determination

[11] For the reasons set out above, I am satisfied that pursuant to s.115(4)(a) of the Act, the delay in Mr Allbon raising his personal grievance was occasioned by exceptional circumstances. On the evidence that is available to the Authority, I also find, pursuant to s114(4)(b) of the Act, that it is just to grant leave for Mr Allbon to raise his personal grievance after the expiry of the 90 days period.

Mediation

[12] Under the provisions of s.115(5) of the Act, where the Authority grants leave under subsection (4), a direction to mediation is required. The parties are directed to use mediation to attempt to mutually resolve Mr Allbon's grievance. It is expected that the applicant (most probably via Mr Scott) will contact the mediation service in Hamilton and make the usual arrangements for mediation to occur. However, before doing so it may be prudent to establish whether the respondent is solvent.

Costs: Costs are reserved pending the outcome of mediation and whether a substantive investigation meeting will be required.

K J Anderson

Member of the Employment Relations Authority

¹ *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175, 22 December 2011.