

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 265
5376360

BETWEEN LESLIE ASPLET
 Applicant

A N D BIRCHFIELD MINERALS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in Person
 David Carruthers, Counsel for Respondent

Investigation meeting: Determined on the papers by consent

Submissions Received 8 November 2012 from the Applicant
 9 and 29 November 2012 from the Respondent

Date of Determination: 4 December 2012

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE (NO 2)**

- A. The Applicant’s application for leave to raise a personal grievance for unjustified dismissal outside of the 90 day time limit is declined. His claim for arrears of wages and notice pay, and the respondent’s counterclaim, shall proceed.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Asplet seeks leave from the Authority to raise a personal grievance for unjustified dismissal out of time. The respondent opposes that application.

A brief account of events

[2] Mr Asplet was employed by the respondent between 2 March 2009 and 24 August 2009. The respondent terminated the employment because it believed that Mr Asplet had been unlawfully taking away and retaining items of equipment from the respondent, some of which were worth a significant amount of money. Mr Asplet strongly disputes this.

[3] Mr Asplet originally lodged a claim in the Disputes Tribunal seeking the payment of wages and notice pay. The respondent lodged a counterclaim in that forum for the value of items of equipment not recovered. The Disputes Tribunal was of the view that the relationship between the parties could have been an employment relationship and, accordingly, ordered Mr Asplet to lodge a claim in the Employment Relations Authority. Pursuant to my determination dated 4 July 2012 ([2012] NZERA Christchurch 135) I determined that the relationship between the parties had been an employment relationship.

[4] By way of a letter to the Authority dated 4 November 2012, Mr Asplet applied for leave to bring his personal grievance for unjustified dismissal out of time. This letter stated as follows:

Although I was dismissed by Mr Birchfield in 2009 and filed a claim with the Disputes Tribunal, it was not until 4 July 2012 that I was deemed by the ERA to be an employee. It is only from the time I was classified as an employee (not a contractor), that I believed I was entitled to make a claim of unjustified dismissal.

I mistakenly believed, at that point, that I would have to prove my innocence of the theft allegations against me before I could proceed with a claim for unjustified dismissal.

In my statement to the ERA which I sent on 25 September 2012 I stated "I believe that I should be compensated fairly for all the stress and financial losses I have incurred". (p.11) As this statement was made to the ERA within the statutory 90 day filing period, albeit not in the prescribed manner, I am asking the ERA to consider my request to allow me to make said claim of unjustified dismissal against Birchfield Minerals Limited.

[5] It is the respondent's position that Mr Asplet is relying upon ignorance of the law to persuade the Authority to allow his personal grievance out of time and that such a reason is not sufficient or acceptable grounds upon which to exercise the Authority's discretion.

The law

[6] Section 114 of the Act deals with the issue of raising a personal grievance. Section 114 provides as follows:

- (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 employee 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 a personal grievance after the expiration of that period.*
- (4) *On an application under subsection (3), the Authority, after giving the employee 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.*

[7] Section 115 of the Act, which provides examples of the *exceptional circumstances* referred to under s.114 provides as follows:

For the purposes of section 114(4)(a), exceptional circumstances include –

- (a) *where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
- (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; or*

- (c) *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; or*
- (d) *where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

[8] Mr Asplet's argument that he did not believe he had a right to claim unjustified dismissal at the time he was dismissed, as he had been classified as a contractor, is a reasonable position for Mr Asplet to take. Mr Asplet was employed pursuant to a contract in which Mr Asplet was described as a *contractor* and it was only when the Disputes Tribunal referred him to the Employment Relations Authority that it would have been reasonable for Mr Asplet to have considered that he may have employment rights. Furthermore, it was, in my view, reasonable for him not to have raised his personal grievance before the Authority determined that he was an employee of the respondent.

[9] However, the 90 day period ran from the date that Mr Asplet received the determination and, assuming that would have been Friday 6 July, the 90 day period within which the personal grievance should have been raised expired on Wednesday 3 October 2012. Mr Asplet's application to raise the personal grievance was received on 8 November 2012 by the Authority (although the possibility of him raising it was voiced by Mr Asplet during a telephone conference held on 31 October 2012, Mr Asplet had not decided at that point whether he would do so as he wished to take advice from his then counsel).

[10] Mr Asplet explains in his letter of 4 November 2012 that *it is only from the time I was classified as an employee (not a contractor) that I believed I was entitled to make a claim of unjustified dismissal. I mistakenly believed, at that point, that I would have to prove my innocence of the theft allegations against me before I could proceed with a claim of unjustified dismissal.*

[11] It is not clear whether Mr Asplet is speaking of criminal allegations when he refers to *theft allegations*, or whether he is referring to the counterclaim made against him. I assume that he means the latter, given that the criminal allegations against him were dropped some time ago. Nevertheless, in either case, Mr Asplet displays that he had a misunderstanding of the legal position. His letter makes clear that he knew

about the right to bring a claim of unjustified dismissal from the time he received the Authority's determination, which held that he had been an employee of the respondent. It is not clear why he would have believed that he had to prove his innocence of the theft allegation before putting in a claim for unjustified dismissal. However, whatever the reason, I accept the submissions of counsel for the respondent that ignorance or misunderstanding of the law does not constitute an *exceptional circumstance* as provided for in s.114 of the Act. I accept Mr Carruthers' submissions that the case law is unequivocal in this regard and that ignorance or mistaken belief of the law is not an *exceptional circumstance* and cannot be considered an *exceptional circumstance* in terms of s.114 of the Act.

[12] Therefore, I cannot grant leave for Mr Asplet to raise his personal grievance out of time on this ground.

[13] Having regard to the example of an *exceptional circumstance* given at s.115(c) of the Act, it is the case that Birchfield Minerals Limited's contract did not contain a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in s.114 within which a personal grievance must be raised (s.65 of the Act). However, I do not believe it would be just to allow Mr Asplet to raise his personal grievance out of time on this basis, as it is clear that both parties believed that the relationship between them was one of principal and contractor rather than employer and employee. Clearly, an agreement with what was intended to be a contractor would not contain a s.65(2)(vi) statement. Therefore, although strictly speaking, in a technical sense this *exceptional circumstance* has been satisfied, I do not believe that the second limb of the test set out in s.114(4) would be satisfied.

[14] Finally, it is necessary for the Authority to consider the other ground on which Mr Asplet relies, namely that he made a statement on 25 September 2012 to the Authority that he believed he *should be compensated fairly for all the stress and financial losses [he has] incurred*, and that this amounted to the raising of a personal grievance.

[15] This statement was emailed to the Authority and to Mr Birchfield on 25 September (and I note from the Authority's file that Ms Allan, an Authority Support Officer, specifically asked Mr Birchfield to comment on the contents of the statement and to raise any problems).

[16] The statement in question was ten pages long and consisted largely of a rebuttal of the counterclaims against Mr Asplet. However, it did contain a section that stated the following:

Given my previous work history I was extremely shocked and upset to be dismissed and accused of theft from Birchfield Minerals. Mr Birchfield told people he had sacked me for theft and word spread quickly amongst the small community where I lived and in the greater Greymouth area. Whilst some people commented to my face I was aware that the way people looked at me and treated me had changed. People I had known well would not speak to me and looked at me as if I were a stranger.

...

I feel my life has been negatively affected in a significant manner by the allegations made by Mr Birchfield that I am a thief and by him dismissing me from the job.

[17] This statement was emailed to the respondent within 90 days of the date of the determination from the Authority stating that the relationship between the parties was an employment relationship. Section 114(2) makes clear that 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 employee wants the employer to address. This level of detail required by an employee to satisfy s.114(2) was examined in the Employment Court case of *Creedy v. Commissioner of Police* [2006] ERNZ 517. At [36] the Court stated:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ...

As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that a raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[18] Mr Carruthers for the respondent points out that the statement of 25 September from Mr Asplet states, at its commencement, that it is made in regard to the counterclaim made by Birchfield Minerals Ltd. That, Mr Carruthers submits, explains the context in which the statement was made. Its purpose was not to raise a personal grievance. Secondly, Mr Carruthers points out that, during the telephone conference with the Authority on 31 October 2012, neither Mr Asplet nor his counsel stated that Mr Asplet had already raised a personal grievance. The whole tenor of that part of the conference call was that Mr Asplet would take advice over whether he should apply to raise a personal grievance out of time. He did not say that he had done so in his statement of 25 September 2012.

[19] Taking all these factors into account, it is my view that the statement from Mr Asplet to Birchfield Minerals dated 25 September 2012 does not make clear that Mr Asplet was raising a grievance in respect of the dismissal, as I do not believe that was what Mr Asplet's intention was in writing and sending the statement. He makes specific mention of the dismissal (and not just the allegations of theft) and the effect on him of the dismissal (as well the allegations of theft) but, in my view, the employer is not *made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates*.

[20] Therefore, I find that Mr Asplet did not raise a personal grievance with respect of the dismissal within 90 days of the date upon which he first became aware that he had been an employee.

[21] I therefore decline to give leave for Mr Asplet's personal grievance for unjustified dismissal to proceed to an investigation meeting.

Costs

[22] Costs are reserved and shall be considered at the conclusion of the substantive investigation.

David Appleton
Member of the Employment Relations Authority