

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 95  
5318466

BETWEEN                      GURBRINDER AULAKH  
   Applicant  
  
AND                                YELLOW PAGES GROUP  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Alexis Lankovsky, counsel for Applicant  
   Richard Upton, counsel for Respondent  
  
Investigation Meeting:        7 March 2011  
  
Determination:                11 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**Application for leave to raise personal grievance**

[1]     By letter faxed to the respondent Yellow Pages Group Limited on 18 August 2010, the applicant Mr Gurbrinder Aulakh purported to raise a personal grievance. The letter referred to notice Mr Aulakh had given in April that he was resigning and described the resignation as amounting to “a constructive dismissal.”

[2]     Mr Aulakh was employed by Yellow Pages as a Sales Representative until 19 May 2010. A month earlier he had resigned, declaring in his resignation letter that he was doing so “under protest.” Mr Aulakh worked out a period of one month, although for three days in that time he was on sick leave.

[3]     In a statement of problem lodged on behalf of Mr Aulakh in November 2010 to commence an investigation into his grievance, it was acknowledged that he had not raised a grievance until 18 August 2010. It was also acknowledged that s114 of the

Employment Relations Act 2000 applied and required Mr Aulakh to seek leave from the Authority to raise the grievance.

[4] Under s 114(4)(a) and (b) of the Act, before granting leave the Authority must be satisfied:

- That the delay in raising the grievance was occasioned by exceptional circumstances; and
- That it is just to grant leave.

[5] “Exceptional circumstances” may include, but are not confined to, any of the four particular situations provided for by s 115 of the Act.

[6] Mr Aulakh was right to acknowledge that his grievance had not been raised until more than 90 days after the termination of his employment, an event he contends amounted to a constructive dismissal. Mr Aulakh’s employment had finished on 19 May when the period of one month’s notice he had given expired. The 90th day from 19 May is 16 August, and the 90th day from 20 May is 17 August. Either way, raising a grievance on 18 August was out of time, if only by one or two days. The fact that the time period had only been minimally exceeded may be taken into account, together with other matters, in considering the justice of an application for leave to raise the grievance out of time.

[7] The Authority heard evidence and submissions from Mr Aulakh and Yellow Pages directed at the application for leave.

### **Exceptional circumstances**

[8] Two situations have been relied upon, both of them expressly provided for in the non-exhaustive list of exceptional circumstances set out at s 115 of the Act.

[9] The first situation is under s 115(a). In this case it requires the Authority to be satisfied that Mr Aulakh had been so affected or traumatised by the matter giving rise to his grievance that he was unable to properly consider raising the grievance within the 90 day period.

[10] The second situation is under s 115(c). It requires the Authority to be satisfied that the delay in raising the personal grievance was caused or contributed to

by an omission from Mr Aulakh's employment agreement of any explanation concerning the resolution of employment relationship problems.

[11] With regard to the first situation, in the statement of problem it is claimed that Mr Aulakh "was traumatised by what had happened so that s 115(a) has some validity." The test under s 115(a) requires more than trauma. It requires the extent of that trauma to be such as to render the employee incapable of giving proper consideration to raising a grievance within the 90 day period. The Court held in *Telecom v Morgan* [2004] 2ERNZ 9 that the injury leading to trauma must be substantial, whether it is of a physical or psychological nature.

[12] Mr Aulakh provided a doctor's certificate stating that he was "medically unfit" for three working days in April 2010, shortly after he had submitted his letter of resignation and was working out the one month notice period. This evidence falls far short of showing that Mr Aulakh had been so incapacitated as to prevent him from even considering the raising of a grievance within the 90 day period. There is evidence from Mr Aulakh himself showing that he was functioning tolerably well physically and mentally. Apart from three days off "unfit" to work he continued working for most of the one month notice period. He said he had thought about getting legal advice in July but had not finally consulted a lawyer until August.

[13] To any extent that Mr Aulakh's wellness had been impaired by resigning from his job, I find that did not prevent him from considering whether there was some action he could take to challenge his resignation or to further air his protest about it. I find there are no exceptional circumstances raised by the state of Mr Aulakh's medical health after he resigned and within the 90 day period following his last day of employment on 19 May 2010.

[14] With regard to the second situation, one that is covered by s115(c) of the Act, there is no dispute that the employment agreement with Yellow Pages, which Mr Aulakh and his Manager, Ms Maree Eketone, signed on 14 April 2008, did not contain the explanation referred to in s 115(c). Under s 65 of the Act such explanation must be included in every individual employment agreement and it must include reference to the period of 90 days within which a personal grievance is required to be raised.

[15] The issue for the Authority is whether Mr Aulakh's failure to raise a grievance within 90 days was "occasioned by" the omission from the employment agreement of the explanation, which is required to include reference to the 90 day limitation period.

[16] In determining this issue I conclude the following is relevant. Prior to accepting employment with Yellow Pages, Mr Aulakh had been employed from August 2006 to April 2008 by Telecom NZ Limited, the parent company of Yellow Pages. In March 2007 he was advised that his employment would be transferred to Yellow Pages Group but that apart from the different name of the company employing him there would not be any other change to his employment contract.

[17] The Telecom employment agreement had contained a provision that complied with s 65. In particular it had expressly advised Mr Aulakh of the requirement to raise a personal grievance within 90 days. Mr Aulakh's signature on the relevant page of the employment agreement appears immediately below this provision. He agreed in his evidence that he had read it at the time of entry into the contract. I find it likely that at the time of his resignation from Yellow Pages, Mr Aulakh had retained some knowledge of the general legal requirement to raise a grievance within 90 days and in particular was aware that within the Telecom group of companies this was term or condition of employment with the parent company.

[18] Mr Aulakh protested his resignation and made it clear in his letter to Ms Eketone dated 19 April 2010 that he was considerably aggrieved about the circumstances leading to it. He sought the redress of having Yellow Pages address his concerns about the performance targets set for him. Ms Eketone considered Mr Aulakh's concerns had been addressed in meetings held with him before it had been decided to implement a performance improvement plan (PIP) for him.

[19] Yellow Pages had been responsive and communicative, as required of an employer acting in good faith, by seeking immediately to engage with Mr Aulakh about the contents of his letter of resignation. I accept from Ms Eketone that Mr Aulakh said he did not wish to talk about it but simply referred her to what he had said already in the letter. He remained employed and worked reasonably normally, at least from appearances, for a further month after his resignation. Despite expressing such strong discontent with the circumstances in which he was departing from Yellow Pages, Mr Aulakh did not threaten or seek to take some legal action, as might be expected of someone who has voiced such a strong complaint or objection.

[20] I consider it likely that Mr Aulakh, having resigned “under protest” simply did not know that there was anything he could do about a situation where he had elected to leave the employment. That is a different thing from not knowing how to go about raising a grievance and not knowing of the time limit for doing that.

[21] According to his evidence Mr Aulakh first took legal advice on 16 August, a date still inside the 90 day period, just. Had the letter from Mr Lankovsky been faxed on 16 August there should have been no issue about raising the grievance within time. (The particular exceptional circumstances at s 115(b), where an agent has unreasonably failed to ensure that a grievance is raised within time, have not been suggested as arising in this case.)

[22] I therefore consider that if Mr Aulakh had forgotten about the 90 day period which he had read of in his earlier employment agreement with Telecom, he was reminded of it or had an opportunity to receive advice about it from his solicitors. From that point, even at the last moment of the 90 day period, the failure to raise the grievance in time was not occasioned by any exceptional circumstances arising because of the omission from his employment agreement of the required explanation.

[23] I also consider that in combination with the above matters it is relevant that Mr Aulakh did not know until he consulted Mr Lankovsky on 16 August 2010 that a resignation could in some circumstances, by construction, become a dismissal. That I consider is the principal reason why Mr Aulakh did not raise a grievance within 90 days. He had not known there was a legal basis for invoking the grievance remedy until he took advice on 16 August, which was on the eve of the expiry of the 90 day time limit.

[24] For the above reasons, the Authority finds that the failure to raise the grievance within 90 days was not occasioned by the omission from the employment agreement of the explanation required under s 65 in an individual employment agreement. The causality between the deficiency in the employment agreement and the lack of action on the part of Mr Aulakh is not present in this case.

[25] Section 114(4)(a) has not been satisfied and on that basis the application for leave must be declined.

**Would it be just to grant leave?**

[26] In considering the second requirement under s 114, that the Authority must be satisfied it is just to grant leave, in Mr Aulakh's favour is the fact that the grievance was raised only marginally outside the 90 days, the time limit having expired by a matter of hours rather than days. It is also relevant that no prejudice was shown as being likely to be suffered by Yellow Pages if the application for leave is granted.

[27] A further significant matter that must be taken account of is the merits of the grievance itself. The Employment Court has recently considered that "the merits do need to be addressed to determine whether it is just to allow the grievance to be pursued out of time" - *Melville v. Air New Zealand Ltd* [2010] NZEMPC 87, at para.[41].

[28] The Authority has considered whether it is likely, if leave was granted, Mr Aulakh would be found to have a personal grievance resulting from his resignation or the circumstances leading to that.

[29] Mr Aulakh in his written brief of evidence did not address the merits of his grievance but gave some evidence about that orally during the investigation meeting. The termination of employment, contended by Mr Aulakh to be a dismissal, occurred on 19 May 2010 when he worked the last day of the one month notice period. He had given notice of resignation on 19 April.

[30] The Authority is satisfied from Ms Eketone's evidence that the employer did not simply receive the notice of resignation without making any inquiry of Mr Aulakh as to what might have led to it. Ms Eketone's inquiries as to what was behind his decision to leave were not responded to by Mr Aulakh except to refer to what he had written in his resignation letter. Ms Eketone, reasonably in my view, considered that his concerns he referred to in the letter had already been addressed with him. After resigning Mr Aulakh carried on his normal work for the one month notice period.

[31] The category of constructive dismissal contended for by Mr Aulakh has not been identified by him, perhaps because at this stage the Authority has not been asked to finally determine his grievance. I have assumed the claim is based on the kind of situation that was the subject of the Court of Appeal decision in *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW* [1994] 1ERNZ

168. In such cases it is alleged that an employer has breached its duty to an employee causing the employee to resign.

[32] In that category of constructive dismissal it must be shown that there has been a breach of duty and that the breach caused the resignation, but it must also be shown that the breach was of sufficient seriousness to make a substantial risk of resignation reasonably foreseeable by the employer.

[33] The evidence before the Authority does not disclose the presence of action taken by the employer capable of amounting to a constructive dismissal. Just before he resigned Mr Aulakh had been placed by Ms Eketone on a PIP. He was advised of the possibility that if his performance did not improve there could be disciplinary consequences. His objection seems to have been that it was unreasonable to place him on that plan because his failure to perform had resulted from Yellow Pages setting him unreasonable targets in his sales work.

[34] In my view, to succeed with a grievance claim in those circumstances, an employee may need to show that the employer had some improper motive in invoking a PIP, such as to put pressure on the employee to resign.

[35] I find no evidence to suggest that Yellow Pages motive in requiring the PIP was to coerce a resignation from Mr Aulakh. He had previously been on a PIP and as a result had demonstrated improvement in his employment. I consider that Yellow Pages had for a second time genuinely assessed Mr Aulakh to be in need of assistance from a PIP and it was therefore open to it as a reasonable employer to implement such a plan. In some cases it may even become a requirement for an employer to invoke one, where performance becomes an issue to the extent that there is a possibility of disciplinary action being taken if there is no improvement shown by the employee.

[36] The principles relating to disciplinary action for poor performance in this regard have been well set out in *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659. PIP's normally have built in protections for the employee, with opportunities provided for discussion about improvement over a period of time, as mentioned in *Trotter*.

[37] Mr Aulakh was free at any time to resign his employment if he wished but such a step by him in response to the PIP in the circumstances cannot be regarded as foreseeable to Yellow Pages, particularly as a PIP had previously been implemented

for Mr Aulakh, successfully on that occasion as it happened. If the use of a PIP a second time was for some reason a breach of the employer's duty to act fairly and reasonably that may have been a basis for a disadvantage grievance, but in my view it is an improbable claim that seeks to have a dismissal constructed from a resignation in these circumstances.

[38] For the above reasons I consider it is unlikely that Mr Aulakh would succeed with a personal grievance claim of unjustified constructive dismissal. On that basis I find it would not be just to grant leave for his grievance to be raised out of time.

### **Determination**

[39] For the reasons given above, I find that the application for leave made by Mr Aulakh does not meet either of the two required standards under s 114(4) and that therefore the application must be declined.

### **Costs**

[40] Costs are reserved, as requested by the parties.

[41] Mr Aulakh has apparently been legally aided and that situation is likely to affect the way the Authority must address the issue of costs. If Yellow Pages wishes to apply for costs it may do so in writing within 21 days of the date of this determination. Mr Aulakh may reply to any application within a further period of 14 days.