

BETWEEN BENJAMIN AUSTIN
Applicant
AND YOOBEE LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Applicant in person
Elizabeth Coats, Counsel for Respondent
Investigation Meeting: 11 June 2013
Submissions received: 1 July 2013 from Applicant
11 June 2013 from Respondent
Determination: 2 July 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Benjamin Austin, claims that he has been unjustifiably dismissed and unjustifiably disadvantaged by being suspended from employment with the Respondent, YOOBEE Limited (YOOBEE).

[2] YOOBEE denies that it unjustifiably dismissed or unjustifiably disadvantaged Mr Austin, claiming that he was justifiably dismissed and justifiably suspended from employment.

[3] In determination [2013] NZERA Auckland 37 I determined that Mr Austin had failed to raise a personal grievance in relation to his dismissal within the 90-day time limit as specified in s 114(1) of the Employment Relations Act 2000 (the Act).

[4] Mr Austin now applies to the Authority pursuant to s 114(3) of the Act for leave to raise a grievance outside the 90 day time period on the basis that “*exceptional circumstances*” pursuant to s115 and s 115(b) of the Act had occasioned the delay. Specifically Mr Austin claims that he made reasonable arrangements to have the dismissal personal grievance claim

raised on his behalf, however circumstances beyond his control led to his application being filed outside the statutory 90 day time limit set out in s 114 (1) of the Act.

[5] This determination addresses as a preliminary issue whether leave should be granted to Mr Austin to raise the personal grievance after the expiration of the statutory 90 day time limit set out in s 114 (1) of the Act.

Issues

[6] The issue for determination is whether there are exceptional circumstances in terms of sections 114 and 115 of the Act such that it is just to grant leave pursuant to section 114(4)(b) of the Act.

Brief Background Facts relating to this preliminary issue

[7] Following an allegations of misconduct and serious misconduct in relation to an incident which took place on 1 June 2012 involving Mr Austin, a disciplinary process was undertaken by YOOBEE. During this process Mr Austin had been represented by Mr Laurence Ponniah of Corban Revell Lawyers.

[8] Mr Austin was suspended by YOOBEE on 1 June 2012. On 25 June 2012 Mr Ponniah wrote to YOOBEE's solicitors stating that Mr Austin was raising a personal grievance in relation to his suspension.

[9] During a disciplinary meeting on 26 June 2012 Mr Austin was informed that YOOBEE considered the allegations against him to be substantiated, to constitute serious misconduct, and that summary dismissal was being considered as an outcome.

[10] Ms Coats confirmed the outcome of the investigation in a letter to Mr Ponniah that same day, 26 June 2012 stating:

Yoobee proposes to summarily dismiss Mr Austin for serious misconduct. ...

Yoobee invites Mr Austin to provide feedback regarding this proposed disciplinary response. Mr Austin is required to attend a meeting at Yoobee's offices in Onehunga at 3 pm on Thursday 28 June 2012. ...

Mr Austin may provide written feedback in advance of the meeting, if that is his preference.

[11] Mr Ponniah responded to Ms Coats by letter dated 26 May 2012, which she received on 27 June 2012, providing submissions in respect to the process and stating:

We are instructed to hereby give notice that our client considers that he has a personal grievance in respect of the way he has been treated, the disciplinary hearing process adopted, the findings of serious misconduct and in respect of the intention to summarily dismiss him. We are taking instructions from our client in respect of filing an application to the Employment Relations Authority for reinstatement and damages.

We certainly hope you will reconsider your decision to summarily dismiss our client.

... As it appears, it is your intention to merely communicate your decision on penalty. We anticipate you could do this in writing ...

[12] Ms Coats responded to this letter on 28 June 2012. In the letter Ms Coats stated:

The meeting scheduled for 3pm today has been cancelled at your request. The company will proceed to consider the submissions contained in your letter of 27 June and will confirm its decision in writing. ...

In the meantime we acknowledge having been notified of your client's personal grievance claims and his intention to file proceedings in the Employment Relations Authority.

[13] By letter dated 29 June 2012 YOOBEE advised Mr Austin of its decision to dismiss him with immediate effect.

[14] The parties subsequently made arrangements and attended mediation on 1 August 2012; however this did not resolve the issues between the parties.

[15] Mr Ponniah had carried out no further work on behalf of Mr Austin after the mediation on 1 August 2012

[16] On 5 November 2012 Mr Austin filed a Statement of Problem with the Employment Relations Authority in respect of a personal grievance for unjustifiable dismissal and unjustifiable disadvantage.

Determination

The Law

[17] An employee who has failed to raise a personal grievance within 90 day time limit and the employer has refused to grant leave for it to be raised out of time, may apply to the

Authority to raise a personal grievance out of time as set out in s 114 (3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it :

- i. *is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances*
- ii. *considers it just to do so*

[18] The meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune*¹ as being those which are “*unusual, outside the common run, perhaps something more than special and less than extraordinary*”².

[19] The Supreme Court in *Creedy v Commissioner of Police*³ addressed the definition of ‘exceptional circumstances’ stating:⁴

[31] In Wilkins & Field, the Court of Appeal treated ‘exceptional circumstances’ as those which are ‘unusual, outside the common run, perhaps something more than special and less than extraordinary’. This formulation appears to combine two different meanings, the first being that of being unusual (the ‘exception to the rule’) and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As Lord Bingham of Cornhill said in R v Kelly [1999] 2 All ER 13 (CA), when construing a reference to ‘exceptional circumstances’:

‘We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.’

¹ [1998] 2 ERNZ 70

² [1998] 2 ERNZ 70

³ [2008] 1 ERNZ 109

⁴ Ibid at para [31] and [32]

Secondly, it will be easier to apply. The very language of Wilkins & Field implies both uncertainty (“perhaps”) and lack of precision (‘Something more than special and less than extraordinary’). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[20] The exceptional grounds upon which Mr Austin seeks to rely on those set out in s 115(b) of the Act which states:

115 Further provision regarding exceptional circumstances under section 114

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

- (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*

[21] There are two limbs to the test in s 115 (b) of the Act. The first limb is concerned with whether the applicant had made reasonable arrangements to have the matter raised by an agent on their behalf, and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit.

First limb: The Employee made reasonable arrangements

[22] Mr Austin said that he had engaged Mr Ponniah, whom he understood to be an experienced professional specialising in employment law, to act on his behalf during the disciplinary process.

[23] On 26 June 2012 Mr Ponniah had written to YOOBEE on behalf of Mr Austin formally raising a personal grievance in respect of the findings of *inter alia* serious misconduct and the intention to summarily dismiss him. I have found that in respect of the unjustifiable dismissal claim the letter did not constitute the raising of a personal grievance within the 90 day time limit.

[24] In the letter of 26 June 2012 letter Mr Ponniah states: “*We are taking instructions from our client in respect of filing an application to the Employment Relations Authority for reinstatement and damages*”.

[25] Mr Austin stated that he had relied on Mr Ponniah to raise the personal grievance on his behalf, and understood that the necessary steps had been taken to raise the personal grievance in relation to the unjustifiable dismissal claim. Mr Austin said he had based this understanding on an email dated 4 July 2012 sent to him by Mr Ponniah which stated:

We refer to the above matter and to our several recent email communications. As you are aware, YOOBEE have made a decision to dismiss you summarily. In turn, you have given notice of personal grievance and a mediation has been scheduled for Friday, 27 July 2012.

You have 90 days from the date of the alleged personal grievance to give notice of personal grievance. You have done this. The next step is to file a claim with the Employment Relations Authority. Given that the matter is scheduled for a mediation before the Department of Labour, we suggest that you do not file your claim as yet, pending the outcome of the mediation.

[26] Mr Austin said he had understood from this email that all the necessary steps had been taken by Mr Ponniah to raise the personal grievance within the 90 day time limit.

[27] In *Davies v Dove Hawkes Bay Inc*⁵ the Chief Judge considered a claim brought by an Applicant pursuant to s 115(b) of the Act, and stated at paragraph [29]:

If a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant’s interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievant’s steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant’s inexperience with such matters, the agent’s corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.

[28] I find that Mr Austin, a person inexperienced in employment law matters, was entitled to rely upon Mr Ponniah’s representations in the email of 4 July 2012 that he had

⁵ [2013] NZEmpC 83

given notice to YOOBEE of a personal grievance and that there had been compliance with the 90 day time limit.

[29] In the circumstances of this case, I find that Mr Austin's reliance on Mr Ponniah's representations to have been reasonable.

Second limb: The agent unreasonably failed to ensure the grievance was raised within the required time

[30] Mr Ponniah said he had understood from the letter dated 26 June 2012 that YOOBEE had summarily dismissed Mr Austin, and that any further feedback was to be in respect of the penalty only

[31] I find that this belief is underpinned by the reference in the letter to YOOBEE from Mr Ponniah dated 27 June 2012 to taking instructions from Mr Austin regarding filing an application to the Authority for remedies including "*reinstatement*".

[32] I found by determination [2013] NZERA Auckland 37 that a personal grievance for unjustifiable dismissal cannot be founded upon a preliminary decision to dismiss which had at that time still to be finalised.

[33] Mr Ponniah took no steps after the decision to dismiss had been finalised on 29 June 2012 to raise a personal grievance in relation to Mr Austin's dismissal after that date, nor had he received any instructions from Mr Austin to do so. Notwithstanding he had advised Mr Austin on 4 July 2012 that the necessary steps to do so had been taken and that these had met the statutory 90 day time limit.

[34] Mr Austin stated that he had issued no further instructions in connection with the filing of a personal grievance for unjustifiable dismissal to Mr Ponniah after receiving the 4 July 2012 email as he had relied upon Mr Ponniah's representations in the email that no further action in that respect was required of him.

[35] I find that the onus was upon Mr Ponniah to meet the statutory requirements in relation to the raising of a personal grievance in respect of Mr Austin's dismissal on 29 June 2012 in accordance with Mr Austin's previously issued instructions and on-going reliance on his expertise and advice, and I find that he unreasonably failed to do so.

[36] I determine that both limbs of the test in s 115(b) of the Act have been met, and I therefore need to consider whether it is just in all the circumstances to grant Mr Austin leave to raise the grievance out of time.

Just to grant leave

[37] When considering this issue there are a number of relevant considerations. The first consideration concerns the length of the delay in filing proceedings and the reason for the delay.

[38] Mr Austin was dismissed on 29 June 2012; he filed a Statement of Problem in the Authority on 5 November 2012, some 38 days after the expiry of the 90 day time limit. Whilst this delay was not minimal, the reasons for the delay are explained by Mr Austin's belief, based on the erroneous advice from Mr Ponniah, that the unjustifiable dismissal personal grievance had been raised in accordance with the statutory 90 day time period.

[39] Viewed from that perspective, Mr Austin would have been entitled to 3 years in which to file his claim in the Authority pursuant to s 114 (6) of the Act, and the Statement of Problem had been filed at an early stage in that time period. I do not find the delay to be prohibitive to the question of whether it is just to grant leave.

[40] It is also relevant to consider the relevant merits of Mr Austin's case. The merits have yet to be tested; however the facts are that Mr Austin was dismissed following a disciplinary process by YOOBEE which included suspension.

[41] In relation to the dismissal decision Mr Austin claims that the disciplinary process undertaken by YOOBEE had been unfair and biased, in particular Mr Austin says that he was unable to have witnesses to provide evidence during the disciplinary process in breach of YOOBEE's defined process.

[42] YOOBEE claims that it conducted a thorough process and that the allegations against Mr Austin were sufficiently serious for dismissal to be a disciplinary action a fair and reasonable employer could take in all the circumstances.

[43] It is for YOOBEE to justify the actions taken throughout the disciplinary process, and to establish that the disciplinary process was thorough and conducted in a fair and reasonable manner without bias. If it is unable to do so, Mr Austin may have grounds to support an unjustifiable dismissal personal grievance. On this basis, I consider that the issues are sufficient to merit an investigation by the Authority.

[44] Finally, in *Gibson v GFW Agri-Products Ltd*⁶ the Court suggested that unless the employer can show that it would be substantially disadvantaged by the granting of leave, it will normally be just to grant leave.

[45] The Statement of Problem filed by Mr Austin raises four grievances, the first of unjustifiable disadvantage in relation to Mr Austin's suspension, the second of unjustifiable disadvantage in relation to the disciplinary process, the third of unjustifiable disadvantage in relation to YOOBEE's decision to uphold the allegation about Mr Austin made by another employee, and the fourth of unjustifiable dismissal.

[46] Mr Austin's claims in respect of unjustifiable disadvantage relate to the disciplinary process undertaken by YOOBEE. There is no issue that these claims were raised within the 90 day time period pursuant to s.114 (1) of the Act and they will therefore require investigation by the Authority.

[47] YOOBEE submits that not granting leave to raise the dismissal grievance on exceptional grounds will significantly reduce the potential scope of the Authority's inquiry, the evidence required for, and the duration of, the investigation meeting, and the potential remedies.

[48] I consider that the investigation will require the Authority to traverse the steps taken in the disciplinary process which led ultimately to the decision to dismiss Mr Austin. On this basis I am not persuaded that there will be significant disadvantage to YOOBEE or that the duration of the investigation meeting and the length thereof will be significantly impacted by granting Mr Austin leave to raise the dismissal grievance.

[49] In these circumstances I determine that it is just to grant Mr Austin leave to raise the personal grievance out of time

[50] The Authority will shortly contact Mr Austin and Ms Coats for a telephone conference to progress the matter.

Costs

[51] Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority

⁶ [1994] 2 ERNZ 309

