

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 20  
5528143

BETWEEN            KYLE JAMES BOS  
Applicant

A N D                NETHERLAND HOLDINGS  
LIMITED  
Respondent

Member of Authority:    Helen Doyle

Representatives:        Rupert Ward, Counsel for the Applicant  
Adam Gallagher, Counsel for the Respondent

Investigation Meeting:    5 February 2015 at Christchurch

Submissions:            On the day

Date of Determination:    17 February 2015

---

**DETERMINATION OF THE AUTHORITY**

---

- A.    Kyle Bos raised his personal grievance outside of the statutory timeframe of 90 days.**
- B.    The application for leave to raise the personal grievance after the expiration of 90 days is granted because it was occasioned by exceptional circumstances and it is just to grant leave.**
- C.    The parties are directed to mediation.**
- D.    Costs are reserved.**

**Employment relationship problem**

[1] The Authority is determining two preliminary issues in this case.

[2] The first is whether Kyle Bos raised a personal grievance about his dismissal within the 90 day period required by s 114 of the Employment Relations Act 2000 (the Act).

[3] The second, if a personal grievance was not raised within the 90 day period, is whether leave under s 114(3) of the Act to raise a personal grievance after the expiration of that period should be granted. Under s 114 (4) of the Act the Authority may grant leave if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it considers it just to do so.

[4] Three of the exceptional circumstances set out in s 115 of the Act are relied on by Mr Bos for the leave application. These are:

- The respondent did not provide a statement of reasons for the dismissal;
- That Mr Bos made reasonable arrangements to have the grievance raised on his behalf by a solicitor and the solicitor failed to ensure that the grievance was raised within the required time;
- Mr Bos was affected or traumatised.

[5] Mr Bos says that if the circumstances in s 115 of the Act, which are not intended to be exhaustive, are not satisfied then the Authority should consider the circumstances of his case generally and the facts and find that in any event they constitute an exceptional circumstance as required by the Act.

[6] Netherland Holdings Limited (Netherland) says that the grievance was raised outside of the 90 day period and it does not consent to Mr Bos raising a personal grievance outside of the 90 day period from the date of dismissal. Netherland say that there are no exceptional circumstances that justify the granting of leave to raise the personal grievance outside 90 days from the date of dismissal.

**The investigation process**

[7] The Authority held an investigation meeting to hear evidence and submissions on the preliminary issues.

[8] In anticipation of a dispute as to the date Mr Bos knew that his employment was terminated and therefore an issue as to when the 90 day period would run from, Mr Gallagher provided a statement of evidence from the Farm Manager of Netherland, Toni Medri.

[9] After Mr Bos was sworn and confirmed his written statement of evidence I questioned him about a telephone conversation with Ms Medri on 20 May 2014. Mr Bos said that during the conversation Ms Medri advised she was *firing him*. On that basis Mr Gallagher and Mr Ward agreed that I did not need to hear evidence from Ms Medri.

**The background facts**

[10] Mr Bos was employed by Netherland from 30 July 2012 as a Farm Assistant. The owner of the farm is Rael Wobben. Mr Bos was party to an individual employment agreement under which he was provided accommodation. He was 19 years of age at the material time.

[11] On 14 May 2014 there was a fire in the milking sheds. Mr Bos alerted Ms Medri to the fire by telephone and the fire was extinguished.

[12] On the same day Mr Bos was stood down on full pay while investigation into the fire was undertaken. He agreed to be stood down in the circumstances. His evidence was that he advised he had nothing to do with the starting of the fire.

[13] Mr Bos spoke to Netherland's insurance company on 16 May 2014 about the fire.

[14] On 20 May 2014 Mr Bos was advised in a telephone call from Ms Medri that he was dismissed from his employment.

[15] Mr Bos was given additional time to leave his accommodation. There seemed to be from reading both statements some dispute as to exactly how much time. Mr Bos told the Authority that he had been living with his father since he was stood

down on 14 May 2014 and that he commenced shifting out of the accommodation on 20 May 2014 after he received advice that his employment had been terminated. As his parents were overseas and unable to help him shift, it took him until 31 May 2014 to remove all his items from the property.

### **Letter confirming dismissal**

[16] Ms Medri in her written statement said that she recorded the decision to dismiss and the reasons for that in a letter and left it on the bench in Mr Bos' accommodation. There is a dispute as to whether Mr Bos ever received a copy of that letter. I find on the balance of probabilities that it is less likely Mr Bos received a copy of the letter. I shall explain why.

[17] The main reason for Mr Bos' dismissal taken from the letter of dismissal was an admission to the insurance company by he was smoking and set fire to the rubbish bin which in turn caused the fire. There was no request by his solicitor Katherine Wilmott for any information obtained by Netherland from the insurance company until after the letter of dismissal was provided to Ms Wilmott by Mr Gallagher on 25 July 2014. Other information had been requested earlier by Ms Wilmott.

[18] This also has to be assessed against the contents of a letter dated 27 August 2014 from Mr Ward to Netherland and copied to Mr Gallagher. This letter contains a statement that Mr Bos did not accept he had made the admission to the insurance company because he knew he was not smoking around the shed on that day and he did not set fire to the rubbish bin. Further it was stated that the only time that Mr Bos had spoken to the insurance company was with his grandmother present and that she would be able to confirm this. I find this supports there was no good reason why if Mr Bos had the letter confirming dismissal he would not have provided it to Ms Wilmott.

### **Instructing Ms Wilmott and actions undertaken**

[19] Mr Bos said that he had instructed Ms Wilmott on 19 June 2014 because he felt that he was unfairly dismissed and he wanted to follow up about the fire and know what was going on. The Authority did not hear evidence from Ms Wilmott.

[20] On 19 June 2014 Ms Wilmott wrote to Ms Medri advising that she was acting on behalf of Mr Bos in relation to his employment with Netherland. In her letter

Ms Wilmott expresses *an understanding* that he may have been dismissed and later in her letter to an *apparent dismissal*.

[21] A variety of information was requested by Ms Wilmott in her 19 June 2014 letter. Those was a request for a copy of the employment agreement between Mr Bos and Netherland was requested, copies of all correspondence, in particular any letters in relation to conduct and his apparent dismissal, copies of records of all discussions and meetings held with Mr Bos and details of his wages, including holiday pay. Ms Wilmott asked that this information be provided within five working days.

[22] On 1 July 2014 Mr Gallagher responded directly to Ms Wilmott by way of an emailed letter advising that his firm acted for Netherland and that the representatives of that company were currently overseas and the communication from Ms Wilmott was not received until 24 June 2014. Mr Gallagher advised that the representatives were due to return to New Zealand on or about 12 July 2014 and instructions would then be obtained and he would write again.

[23] On 16 July 2014 Ms Wilmott wrote again to Mr Gallagher referring to his emailed letter of 1 July 2014 and advised that his client was out of the country until 12 July 2014. She asked for the information requested in the letter of 19 June 2014 to be provided without delay.

[24] On Friday 25 July 2014 Mr Gallagher provided employment documents held on file for Mr Bos to Ms Wilmott by way of an attachment to an email. Included with the material provided at that stage to Ms Wilmott was the letter confirming *instant dismissal*. It was dated 20 May 2014 and expressed to be from Mr Wobben, although signed by Ms Medri. Mr Gallagher in his email advised that police and insurance reports relating to the fire had been requested and that once those were to hand the relevant parts would be provided.

[25] On 7 August 2014 Mr Bos said that he met with Ms Wilmott to discuss the information that had been received from Mr Gallagher. He said that for the first time he saw the letter of dismissal. He said he advised Ms Wilmott he would *like to make a personal grievance* and he wanted her to help him with that. He said that he felt he had been treated wrongly and was unfairly accused.

[26] It seems that Ms Wilmott then waited for a period to hear from Mr Gallagher for the police and insurance reports to be provided that Mr Gallagher had requested.

[27] On 20 August 2014 Ms Wilmott wrote to Mr Gallagher by email and advised that nothing further had been heard from him and that her client was considering raising a personal grievance against Netherland. She wrote amongst other matters that:

*However, we are unable to advise our client further until the Police and insurance matters have been finalised and we have received copies of the reports from you.*

*We believe these are exceptional circumstances under the Act when considering the time frames for raising personal grievances.*

*We will wait to hear from you when matters have been resolved.*

[28] On 21 August 2014 Ms Wilmott wrote again by way of email to Mr Gallagher and advised that:

*We have been instructed that our client is raising a personal grievance against your client in relation to his unfair dismissal.*

*We have instructed Rupert Ward, Barrister, to deal with the matter on behalf of our client. He will be in touch with you in due course.*

[29] On 27 August Mr Gallagher sent Ms Wilmott a letter by way of attachment to an email. In the letter he referred to Ms Wilmott's letter of 21 August 2014 raising a personal grievance. He noted that her client had 90 days from the date he was dismissed to raise his personal grievance and that the letter raising the grievance is outside the 90 day period. He advised that his client did not consent to her client raising the personal grievance out of time.

[30] On 27 August 2014 Mr Ward by way of emailed letter to Mr Gallagher advised that he had been instructed. He referred to Mr Gallagher's letter of 27 August 2014 that confirmed a personal grievance had been raised on behalf of Mr Bos and provided to Mr Gallagher a formal and detailed submission of a personal grievance which had also been couriered to Mr Wobben.

[31] Netherland was not prepared to attend mediation until determination of these preliminary issues.

**Was the personal grievance of unjustified dismissal raised within the period of 90 days in s 114 (1) of the Act?**

[32] Mr Bos understood that his employment had been terminated on 20 May 2014 and he suspected it was because of the fire. There may have been some confusion about the extended date to vacate his farm accommodation and the absence of a written letter of dismissal. I accept Mr Gallagher's submission that Mr Bos knew he had been dismissed on 20 May 2014 and further that he had at an early stage concluded that the dismissal was wrong and unfair.

[33] I find that the 90 day period for raising a personal grievance in this case runs from 20 May 2014. The 90 day period ended on 17 August 2014. The earliest it could be argued a personal grievance was raised after that time was on 21 August 2014.

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

[34] Section 114 (3) of the Act provides that the employee may apply to the Authority for leave to raise the personal grievance after the expiration of the 90 day period.

[35] Section 114 (4) provides that the Authority may grant leave accordingly, subject to such conditions as it thinks fit if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances which may include one or more of those in s 115 of the Act and further that the Authority considers it just to do so.

[36] As already set out Mr Bos relies on s 115 (a), (b) and (c) of the Act as set out above.

[37] As I indicated to counsel the strongest ground I find for an exceptional circumstance as defined in s 115 is that under s 115 (b) of the Act.

[38] Section 115 (b) provides:

*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.*

[39] Mr Gallagher correctly submits that to fall within this exceptional circumstance requires satisfying a two part test. Mr Bos must have made reasonable arrangements to have his grievance raised by Ms Wilmott and she must have unreasonably failed to ensure that the grievance was raised within the required time period.

**Reasonable arrangements to have the personal grievance raised?**

[40] Mr Bos sought legal advice well within the 90 day timeframe.

[41] Mr Gallagher suggests that he may have sought advice for the criminal aspects about the fire and to see what was happening rather than to pursue a personal grievance about his dismissal. There are two matters that support otherwise. The first is that the initial letter from Ms Wilmott of 19 June 2014 states that Mr Bos had contacted her in relation to his employment and the second is that there is no disclosure sought from Netherland in that initial letter of any information that could be said to be more related to any criminal matter. The request for information only changed to one for police and insurance reports when it became apparent after the supply of initial information that the basis for dismissal was because of an admission to the insurance company by Mr Bos. I should record for completeness that counsel advised the police have confirmed there will be no criminal charge pursued against Mr Bos.

[42] I have found Mr Bos in all likelihood saw for the first time the letter confirming dismissal when he met with Ms Wilmott on 7 August 2014. He advised that he wanted to raise a personal grievance. There was at that time ten further days left within the statutory timeframe in which to do so.

[43] Mr Gallagher submits that because the Authority has not heard from Ms Wilmott it cannot be satisfied that Mr Bos took reasonable steps to raise a personal grievance or that Ms Wilmott acted unreasonably. I agree that in many circumstances the Authority will have to hear from the agent to properly be able to determine whether there is an exceptional circumstance.

[44] In this case however the personal grievance was raised shortly after the expiration of the 90 day period. A reasonable conclusion can be drawn from the correspondence that there were delays on the part of Netherland in providing the requested information or advising that there was no such information and that in turn

appears to have led to the delay in raising the personal grievance. Mr Gallagher places emphasis on the wording in the email from Ms Wilmott dated 20 August in which she states *Our client is considering raising a personal grievance against our client*. He submits this could support that he had not instructed Ms Wilmott at that time to raise a personal grievance.

[45] I have considered that submission. In that same email of 20 August 2014 Ms Wilmott refers to a belief that there are exceptional circumstances under the Act when considering the timeframes for raising personal grievance because of the unsatisfied requests for information. That supports that she had turned her mind to that matter about the timeframe for raising personal grievances. Significantly Ms Wilmott then raised a personal grievance the next day on 21 August. In light of both those matters I do not find a clear conclusion available that Mr Bos had not given instructions earlier to have the personal grievance raised.

[46] The train of correspondence considered as a whole together is not inconsistent with Mr Bos' evidence that he instructed Ms Wilmott to raise a personal grievance on 7 August 2014.

[47] I am satisfied that Mr Bos made reasonable arrangements to have the grievance raised on his behalf by Ms Wilmott.

**Unreasonably failed to ensure the grievance was raised within the required time?**

[48] Mr Ward submits that Ms Wilmott, his instructing solicitor, could not be said to be acting unreasonably because she was waiting for further information.

[49] I agree that requesting further information was reasonable. The information from the insurance company was crucial. Mr Gallagher advised me that there still has no information from the insurance company to pass on. Ms Wilmott was not told that within the statutory timeframe to raise a personal grievance.

[50] What I find was not reasonable was the failure by Ms Wilmott to ensure that a personal grievance was raised on the facts already known within the 90 days. Mr Bos was entitled to rely on her in this respect to secure his position.

[51] I find that Ms Wilmott unreasonably failed to raise the personal grievance within the required time.

[52] The delay in raising Mr Bos' person grievance of unjustified dismissal was occasioned by exceptional circumstances. I now turn to whether it is just to grant leave.

### **Is it just to grant leave?**

[53] I have considered a number of matters in determining whether it would be just to grant leave.

[54] There was some delay to Ms Wilmott's requests for information and I find that it is a factor in favour of the justice of granting leave.

[55] The delays in raising a personal grievance were not significant and there is no evidence that Netherland would be prejudiced by the fact that the personal grievance of unjustified dismissal was raised out of time. The reason for the delay was attributable to the requests for information from the insurance company and police not being met within the timeframe. Those are factors I find in favour of the justice of granting leave. I note that Mr Gallagher submits that the letter of 21 August 2014 did not contain sufficient particulars or detail to raise a grievance. He did not state that in his response of 27 August 2014 to Ms Wilmott which acknowledged a grievance had been raised but that it was outside the expiration of the statutory timeframe. There can be no issue that Mr Ward's letter also dated 27 August 2014 gave full details of the grievance.

[56] I have also considered on the untested documents and evidence the merits of the case. This appeared to be a case of an instant dismissal over the telephone relying on an admission made to a third party. At the time of this determination there is no information from the insurance company. The merits of the case even with the lack of that information at this preliminary stage support it would be just to grant leave.

[57] I find standing back and considering all of these factors that it is just to grant leave.

### **Determination**

[58] I have granted Mr Bos' application for leave to raise his personal grievance under s 114 (3) of the Act.

[59] I now am required under s 114 (5) of the Act to direct the parties to mediation and accordingly I do so.

**Costs**

[60] I reserve the issue of costs.

Helen Doyle  
Member of the Employment Relations Authority