

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 416/10
5304771

BETWEEN CRAIG RUSSELL BROWN
 Applicant

AND TOTAL MARINE SERVICES
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Craig Brown, In Person
 Richard Harrison, Counsel for Respondent

Investigation Meeting: 24 August 2010 at Auckland

Determination: 20 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Via a *Statement of Problem* received by the Authority on 4th May 2010, Mr Brown claims that he was summarily dismissed and that the dismissal was unjustified. Total Marine Services Limited (“TMS”) says that Mr Brown’s employment ended as a consequence of frustration of the employment agreement, by reason of the events pertaining to Mr Brown being arrested on 4th July 2009 and being held in custody for a period, pending a trial. But in any event, TMS say that Mr Brown has raised his grievance outside of the 90-day period required by section 114 of the Employment Relations Act 2000 (“the Act”) and the company does not consent to the grievance being raised after the expiration of the period allowed. Mr Brown acknowledges that he did not raise a personal grievance until 6th April 2010¹ but says that he raised it

¹ This is the date of the letter in which the grievance is raised albeit it is uncertain when TMS received the letter. But in any event, TMS accept that 6th April 2010 is the effective date of the grievance being raised.

within 90 days of the loss of his employment coming to his notice. Further, Mr Brown has provided with the *Statement of Problem*, what is effectively, an application for leave to raise his grievance after the expiration of the 90-day period, pursuant to s 114(3) of the Act.

[2] As an outcome of a conference call held on 15th June 2010, the parties have agreed that the Authority should investigate and determine the 90-days issue before any anticipated investigation into the substance of the alleged personal grievance takes place.

Background Facts and Evidence

[3] The evidence of Mr Brent Shipman, a founding director and shareholder of TMS, (and real terms, the employer of Mr Brown) is that on the evening of 4th July 2009, he received a phone call informing him that his son, Aaron Shipman, had been admitted to hospital with life threatening stab wounds.² It subsequently transpired that Mr Brown was arrested by the police, and charged with the stabbing of Aaron Shipman; he was held in custody.

[4] The further evidence of Mr Shipman is that shortly after Mr Brown was arrested, he had contact with Mr Brown's sister, Ms Cheryl Hawken. She rang Mr Shipman, then subsequently came to the workplace and brought back Mr Brown's fuel card for the company truck. Mr Shipman attests that about a week later, Ms Hawken left at the company's office, a list of tools and other goods that Mr Brown wished to have returned to him. There was a third visit from Ms Hawken when she came to pick up a hydraulic steering pump belonging to Mr Brown. Mr Shipman says that: *I was all along acting in the belief that Craig would not be returning to work given what had happened and the fact that he was in jail.* Mr Shipman says that he had no information as to how long Mr Brown would remain in custody, but he assumed from his discussions with Ms Hawken (including conveying her distress about the stabbing of Aaron Shipman), and her visits to pick up Mr Brown's possessions, that the employment was at an end, hence Mr Brown's final pay was processed on 14th July 2009.

² Aaron Shipman is also an employee of TMS and at the time of the stabbing, worked with Mr Brown.

[5] Mr Brown made a bail application to the Court and was released from custody on 23rd December 2009. The conditions of bail included: non-association with the complainant (Aaron Shipman) or any of the Crown witnesses, including Mr Brent Shipman. Mr Brown says that upon being released from custody, he never made any contact with his employer because he was prevented from doing so by that condition of his bail, albeit Mr Brown was represented by a very experienced counsel. Leading up to the trial of Mr Brown, Mr Brent Shipman provided a witness statement to the police (Detective Tia Winikerei) on 1st September 2009. Included in this statement are two relevant passages that Mr Brown says made him aware that he was no longer employed by TMS. The first passage is: “Craig was employed by me from that time until July 2009 when this incident occurred.” The second passage is: “He only had about a month to go until he finished working for me, the night that Aaron was stabbed.” Mr Brown says that both of these passages indicated him that he was no longer employed by TMS, albeit he had not been personally informed that this was the case. I will return to this proposition later in this determination. An email dated 10th May 2010 from Detective Winikerei to Mr Shipman, records that the statement was “disclosed” to Mr Brown’s lawyer on 9th September 2009. But Mr Brown says that he was unaware of the relevant passages pertaining to the loss of his employment, until some time in February 2010, when consulting with his lawyer in preparation for his trial relating to the stabbing. Mr Brown says that he discussed the loss of his employment with his lawyer, who supposedly, informed Mr Brown that he; “... *could do nothing until after the trial.*”

[6] The trial for Mr Brown took place on or about 26th March 2010. The outcome being that he was acquitted. He subsequently (6th April 2010) raised a personal grievance.

The preliminary issues:

1. Did Mr Brown raise a personal grievance within 90 days of the loss of his employment coming to his notice?
2. If not, should the Authority grant leave for the grievance to be raised after the expiration of the 90-day period?

Did Mr Brown raise a personal grievance within 90 days of the loss of his employment coming to his notice?

[7] Under the provisions of s 114(1) of the Act:

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 employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[8] Mr Brown says that it did not come to his notice until some time in February 2010, while inspecting various documents in preparation for his trial, that he was no longer employed by TMS. While it is accepted that Mr Brown was incarcerated, and from 23rd December 2009 he was not permitted to contact Mr Shipman, there appears to be no good reason why he could not have instructed Ms Hawken and/or his barrister before then to make enquiries as to his employment status with TMS and raise a grievance. Indeed, his evidence is that he preferred to remain in custody for as long as he did before making an application for bail. The further evidence of Mr Brown is that he did not instruct his barrister to enquire as to whether he continued to have a job or not, as he presumed it would be “unlikely” that he still had a job. That would seem to have been a very realistic presumption on the part of Mr Brown, given that he had been accused of stabbing his employer’s son. It is simply not credible for Mr Brown to now claim that he believed his employment would have remained on foot given all of the circumstances. I have no doubts that Mr Brown would have known that he would no longer be employed by TMS and I do not accept that he only became aware of this in February 2010, more than six months after the stabbing incident

Should the Authority grant leave for the grievance to be raised after the expiration of the 90-day period?

[9] Given that Mr Brown has made an application for leave to raise a grievance after the expiration of the 90-day period, pursuant to s 114(4), and having heard from the employer, leave may be granted 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.

[10] Relevant to Mr Brown's position, s115 provides that 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)
- (c)
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Was Mr Brown so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising a grievance within the 90-day period?

[11] Mr Brown submits that his arrest and being placed in custody (from 6th July to 23rd December 2009) along with the allegation that he had stabbed Aaron Shipman, so affected and traumatised him that he was unable to properly consider raising a personal grievance within the required period. But there is a problem with this submission because there is no tangible evidence that Mr Brown ever gave any thought to raising a personal grievance until at least February 2010, when he was preparing for his trial. Furthermore, there is no evidence that Mr Brown was prevented from making contact with his employer, via a representative, before 23rd December 2009, when the conditions of his bail were set. I do not accept that Mr Brown was affected or traumatised as he claims. Indeed, as already stated, his evidence is that he preferred to remain in custody for as long as did before making an application for bail.

Did the employer fail to comply with the obligation under section 120(1) of the Act, to provide a statement of reasons for dismissal?

[12] The answer to this question must be no. This is simply because Mr Brown was not dismissed. Rather, he was in custody from 6th July to 23rd December 2009. Given all the circumstances, in particular the alleged stabbing of his son by Mr Brown and the actions of Ms Hawken, it was a reasonable assumption on the part of Mr Shipman that Mr Brown would not be returning to work at TMS. Indeed, as it transpired, Mr Brown was in custody for more than five months, thereby frustrating his employment agreement due to his inability to carry out his duties under the agreement. And in any event, as I have already found, Mr Brown never made any enquiry about his

employment status, let alone request a statement of the reasons for his alleged dismissal, within the 60 days required by s 120(1) of the Act.

[13] While I am satisfied that the delay in raising the grievance was not occasioned by exceptional circumstances, even if it were otherwise, pursuant to s 114(4)(b), I do not believe it would be just for leave to be granted to raise the personal grievance outside the 90-day period. This is because (apart from the issues surrounding the stabbing of Aaron Shipman)³, on 22nd February 2009, Mr Brown tendered his written resignation from his employment, giving six months' notice. Therefore, his employment was due to terminate on or about 22nd August 2009 in any event. And at that time, Mr Brown remained in custody. Mr Brown attempts to explain this away by saying that firstly, the resignation proffered was not to terminate his employment per se, but just as a mechanic, as he wished to retain his employment as a labourer only. Secondly, he says that the resignation was not accepted by Mr Shipman. When this was put to Mr Shipman, he did not accept either of those propositions and he explained the difficulties that he had experienced with Mr Brown in the workplace including; heavy drinking, suicidal tendencies and violent behaviour towards other employees. Mr Shipman says that Mr Brown was on parole following another conviction, and while he gave him a chance by employing him, he came to regret that and it was a relief when Mr Brown tendered his resignation.

Determination

[14] For the reasons set out above, I find that:

1. Mr Brown has failed to raise a personal grievance within the 90-day period required by s 114(1) of the Act and the employer does not consent for the grievance to be raised after the expiry of that period.
2. The failure to raise the personal grievance was not occasioned by exceptional circumstances.
3. The application to raise a grievance outside the 90-day limit is unsuccessful.

³ Which raises further issues about a serious breach of trust and confidence.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority