

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 57
5340135

BETWEEN

MATTHEW BURLTON
Applicant

A N D

OCEANIA CARE COMPANY
(No 1) LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Tim Oldfield, Counsel for Applicant
Kate Hoyle, Advocate for Respondent

Investigation Meeting: On the papers

Date of Determination: 28 April 2011

FIRST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By letter dated 17 February 2011, the applicant (Mr Burlton) through his union, the Service & Food Workers' Union (the Union) sought to file a Statement of Problem in the Authority at Christchurch, alleging unjustified dismissal.

[2] The Statement of Problem was not processed by the Authority's support staff before the second major Christchurch earthquake and in consequence a copy of the Statement of Problem was not served on the respondent (Oceania).

[3] Mr Burlton was, by common consent, dismissed from the service of Oceania on 21 December 2010. Oceania says it did not receive notification of the raising of the personal grievance until 5 April 2011, well outside the 90 day period required by statute for the raising of the grievance.,

[4] However, the Union maintains that a personal grievance was raised by its organiser at the final disciplinary meeting, a claim Oceania denies. More importantly, it is self-evident that, but for the intervention of the second Christchurch earthquake,

Oceania would have been seised of the Burlton grievance within time. This is because, in the normal course of events, the Authority's invariable process is to serve a copy of the statement of problem on the respondent employer just as soon as the initial application has been processed.

[5] We know the statement of problem was lodged for filing around 17 February 2011 because that is the date of the Union's letter attaching the application. The letter is signed by counsel for the Union, Mr Oldfield. He told me (and I accept) that that letter was sent from the Union's office promptly on that date or immediately thereafter. If we assume that the letter was received in the Authority's Christchurch office say two days after it was posted by the Union in Auckland, then it would have been received in the Authority's mail for 19 February 2011, the Saturday immediately prior to the second Christchurch earthquake.

[6] The application was not filed in the Authority's system before the Christchurch earthquake. Nor was a copy forwarded to Oceania (the inevitable consequence of the application having been filed). Because these events failed to happen, Mr Burlton's personal grievance was not notified to Oceania before the 90 day period expired on 18 March 2011. Oceania says (and I accept) that it first became aware of the grievance in early April when, after a follow up by the Union, it became clear that the Authority had not processed the application.

Issue

[7] The only issue for determination here is whether the law around *exceptional circumstances* ought to operate to allow this grievance to be proceeded with outside the time allowed by the statute.

[8] I do not deal with the issue of whether or not the Union's organiser raised the grievance at the disciplinary meeting or not. I have heard no evidence on the point and it would not be appropriate to make any comment on the point other than to note there is dispute between the parties as to what actually happened.

[9] The argument about exceptional circumstances is different; in its simplest terms, unless the Authority allows for *exceptional circumstances* to exist, Mr Burlton's grievance cannot proceed, because of the apparent failure of the Authority itself to deal with his application as a consequence of the intervention of the second Christchurch earthquake.

Are there exceptional circumstances?

[10] The statutory provisions are contained in s.114(3) –(5) and s.115. Broadly, the provisions allow an applicant to apply to the Authority for leave to proceed *out of time* and the Authority may grant leave, after hearing the employer, if it is satisfied that there are *exceptional circumstances* and that it is just to do so. Section 115 contains a non-exclusive list of four categories of example of what *exceptional circumstances* might be.

[11] The first of those examples is the situation where the employee is so traumatised as to be unable to deal with the grievance in a business-like manner. The second is where the employee has made reasonable arrangements for the matter to be dealt with but his *agent* has *unreasonably* failed to ensure the grievance was raised in time. The third example is where the employment agreement does not contain information on the resolution of employment relationship problems and finally when the employer has failed to provide an explanation of the reasons for dismissal when asked.

[12] The first issue for determination is whether there was an application from the applicant. I am satisfied there was an informal application made during the initial telephone conference between the Authority and the parties, although I confess the application was rather a solicited one based on my observations about the unfairness of the situation. As the parties' representatives would be quick to attest, I indicated my provisional conclusion in that initial telephone conference and set out the process I wished to adopt by first dealing with this *90 day issue*. An opportunity for informal submissions by the employer was provided at the same telephone conference.

[13] Next, the Authority must consider if there are exceptional circumstances. The first issue to deal with is Oceania's claim that none of the examples in s.115 fit the bill. I agree. The only one potentially on point is the second, but the statute clearly envisages that the employee's *agent* is the defaulting party, not the Authority itself.

[14] The point I made during the telephone conference was that it is plain from the wording of s.114(4)(a) and from s.115 itself that the list in s.115 is a set of examples and not an all-encompassing list. In s.114, the Act provides that exceptional circumstances ... *may include any 1 or more of the circumstances set out in s.115*; in s.115, the wording is that exceptional circumstances *include* the four following

circumstances. It is apparent then, that exceptional circumstances could be evidenced by something other than is identified in s.115.

[15] I have no hesitation then in concluding that the factual matrix here, unique or unusual as it may be, does constitute *exceptional circumstances*. As I identified earlier, this was a situation where, but for the failure of the Authority to process an application in the usual way, the grievant would have raised his grievance well within time and the present issue would simply not have arisen.

[16] Finally, I must determine whether or not it is just to allow the grievance to proceed. Oceania made a strong submission that, notwithstanding any finding I might make about the existence of exceptional circumstances, it was unjust to allow the grievance to be brought on at this time.

[17] I do not agree. I think Mr Burlton is entitled to be heard on his grievance and to have the opportunity to seek its resolution through the usual channels. He felt aggrieved about his treatment, whether justifiably or not. He placed the matter in the hands of his union whose action in filing the matter would have perfected the raising of the grievance had the earthquake not intervened. Mr Burlton, the Union and Oceania are all blameless in this situation, but I hold it would be unfair and unjust to allow Oceania to shelter behind the letter of the law when the Authority has a discretion it can properly exercise in Mr Burlton's favour.

Determination

[18] For reasons I have already enunciated, I grant Mr Burlton the opportunity to raise his grievance out of time having concluded the facts fall within the definition of exceptional circumstances and having further concluded that it is just to grant leave.

[19] Pursuant to s.114(5) of the Act, the parties are directed to mediation to attempt to resolve the grievance.

Costs

[20] Costs are reserved.

James Crichton
Member of the Employment Relations Authority