

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ronald Dams (Applicant)

AND Powerbeat International Limited (Respondent)

REPRESENTATIVES Ms Alice Collins, counsel for Applicant
Mr Brian Henry, counsel for Respondent on 24 May 2006
Mr Peter Witehira, advocate for Respondent on 9 November 2006

MEMBER OF AUTHORITY Alastair Dumbleton

INVESTIGATION MEETING 24 May, 1 and 9 November 2006

DATE OF DETERMINATION 22 November 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant Mr Ronald Dams was employed by the respondent Powerbeat International Limited (Powerbeat) as a Research and Development Electronics Engineer. He commenced work for the company on 26 July 2004. From that date up until 23 August 2004, in his conduct and performance Mr Dams gave Powerbeat no grounds for complaint or criticism. There has been no evidence to the contrary or any suggestion even.

[2] On Monday 23 August 2004 in the morning, Mr Dams rang the offices of his employer and spoke separately to two Powerbeat officers or employees, Mr Dave Corr and Mrs Elizabeth Witehira. He told them that his car had broken down over the weekend, on the Saturday, while he had been driving from Hamilton to Tauranga. Mr Dams advised that he would not be at work that day because he was arranging for the vehicle to be repaired. Either Mr Corr or Mrs Witehira, or both, on the same day they received it reported this advice to Mr Peter Witehira who is the Managing Director of Powerbeat.

[3] The next day, Tuesday 24 August, Mr Dams arrived at work at about 11am and asked for a meeting with Mr Witehira. The two sat down alone together in the board room and spoke for a relatively brief time, perhaps as little as 10 minutes. The conversation that took place during the meeting led Mr Dams to leave the Powerbeat offices straight afterwards and never return to his job.

[4] There was no further communication between Powerbeat and Mr Dams, whether by telephone call or in writing, at least until several months later when Powerbeat received a letter advising that Mr Dams was pursuing a personal grievance against the company for being unjustifiably dismissed by it. That letter had been written by Mr Dam's agent, a solicitor employed by a community law centre.

[5] The length of time from Mr Dams' departure until the company received the letter is a central issue in this case. There is no dispute that the letter expressly purported to raise a grievance, but there is an issue between the parties as to whether that grievance was raised within the period of 90 days stipulated in the Employment Relations Act 2000, at s.114.

[6] If, as Powerbeat contends, the grievance was not raised inside the 90 day period, a further issue arises for determination by the Authority as to whether there were *exceptional circumstances* within the meaning of the Act, providing grounds for the Authority to grant leave to Mr Dams to raise his grievance out of time. Mr Dams contends that if his letter was not received within 90 days, then that was not his fault. His evidence was that within about 6 weeks of his contended dismissal he gave instructions to a solicitor employed by the community law centre to raise a grievance on his behalf.

[7] If the Authority does become satisfied that it has jurisdiction to consider the merits of the grievance, then the first question is whether Mr Dams was dismissed at all. It is clear that the employment relationship he had with Powerbeat did terminate. Powerbeat however contends that this was by resignation or abandonment, rather than by any act of dismissal. If Mr Dams was dismissed, there is also a question as to whether that dismissal was justified, although, consistently with its position, Powerbeat has not contended the existence of justification.

[8] To remedy his contended grievance Mr Dams has sought compensation for humiliation, loss of dignity and injury to feelings, and he has sought lost wages for a period of 3 months.

[9] It has also been put in issue in this case whether Powerbeat had any genuine reason for making Mr Dams employment the subject of a three month fixed term expressly included in the written agreement Mr Dams signed at commencement. In this regard he seeks by way of remedy a finding or declaration by the Authority that there was no genuine reason for fixing the term of employment at 3 months or any other period.

[10] Over the course of the investigation meeting held on 24 May and 9 November 2006, the Authority was given or obtained all of the evidence in relation to the above issues, including the merits of any grievance claim. The Authority also received from both parties written submissions that comprehensively address all relevant factual and legal aspects of this case raised by them. It is now in a position to determine all of the issues, including the grievance claim. However, if it reaches a position of giving leave for a grievance to be raised outside of the 90 statutory period, the Authority is bound to direct the parties to mediation at that point. That requirement is imposed by s.114(5) of the Act.

[11] As I advised the parties, in the event of the Authority giving such a direction (as it has in the outcome of this determination) I would not go no further for the time being and give a determination on the grievance itself, at least until the parties had had the opportunity to mutually resolve the grievance in mediation.

90 day issue

[12] Turning then to the issue of when the grievance was raised. Mr Witehira has submitted that the 90 day period began on the last day worked for Powerbeat by Mr Dams, which was Friday 20 August 2004. The provisions of the Act at s.114(1) however are clear that time runs from when the action alleged to amount to the grievance occurred or came to the notice of the employee, whichever is the later. By my calculations, the 90 day period began on Tuesday 24 August 2004 when Mr Dams says he formed the belief that he had been dismissed by Powerbeat after his discussion with Mr Witehira that morning. The expiry of the 90 day period would therefore have been at the close of 21 November 2004.

[13] Evidence was given by Powerbeat that it did not receive any letter raising a grievance until 24 November 2004. The receipt of the letter on that day is supported by a note Mrs Witehira made in her diary with reference to it. That date was the third day after the expiry of the 90 day period.

[14] I accept the evidence of Mr Dams that he pursued his grievance to begin with by contacting the Hamilton District Community Law Centre on 5 October 2004. Two days later he met Ms Cynthia Martell-Stark, a barrister and solicitor employed by the Centre who gave him advice about pursuing his grievance. On that date there were several weeks still to run before the 90 day period was due to expire.

[15] The evidence of Ms Martell-Stark and Mr Dams is that the former drafted a letter on 19 October 2004 which was put in the post on the same day. After there had been no response to that letter for several weeks, Mr Dams got in touch again with Ms Martell-Stark who re-sent the letter on 19 November 2004, two days before expiry of the 90 day period.

[16] For Powerbeat, however, the evidence is that no letter was received by the company until 24 November 2004.

[17] From the evidence, I find it likely that a letter was sent to Powerbeat on 19 October 2004 raising Mr Dams' grievance. It was therefore sent well inside the 90 day period. A register kept by the Community Law Centre shows an orderly and systematic way of recording outwards correspondence against the name of the client (Mr Dams in this case), the solicitor giving advice (Ms Martell-Stark), and the addressee (Powerbeat). I accept that Powerbeat also has an established system for recording the receipt and distribution of inwards mail.

[18] Despite my finding that a letter was actually sent on 19 October 2004, I am not satisfied that it was received by Powerbeat so that the grievance could be said to have been communicated to the employer. It seems to me likely that for some unknown reason the letter went astray in the mail.

[19] I also accept that the letter re-sent on 19 November 2004 was not received until 24 November 2004, just over two days outside of the 90 day period. Why the letter took five days in the post is also not known, but the explanation may lie in the fact that Powerbeat has an RD postal address, its offices being in the countryside outside of Hamilton City.

[20] Therefore, in accordance with my findings, unless there are exceptional circumstances permitting the grant of leave to proceed outside of the 90 day period, Mr Dams will not be able to pursue his grievance claim any further.

Exceptional circumstances

[21] Leave to raise his grievance out of time was first sought by Mr Dams in a written memorandum dated 8 March 2006. A copy was sent to Powerbeat which therefore had over two weeks' notice that this supplementary application had been made.

[22] When considering whether there are exceptional circumstances in this case, the following factors are relevant. Mr Dams had until the close of 21 November 2004 to raise his grievance. He could not be barred from raising it if he had waited until the very end of the statutory period to do so. The delay in raising it was two and a bit days, which is a small period of time in relation to an overall 90 day period. The delay has evidently caused no prejudice to Powerbeat, which has been able to readily provide detailed evidence of the circumstances it claims surrounded the departure of Mr Dams from his employment. Also, without wishing give a determination before the parties have had mediation, I will go so far as to say that the grievance is not totally without merit and indeed is an arguable one.

[23] Perhaps the most significant factor in Mr Dams' favour for the granting of leave is that he made, I find, reasonable arrangements to have a grievance raised on his behalf. He went to a community law centre where he gave instructions to a solicitor to raise a grievance. He drafted a letter for Ms Martell-Stark and she then prepared the letter shown in the centre's records as having been sent on 19 October. Further, when Mr Dams heard nothing more about his grievance for a period of time, believing the letter had been sent, he made inquiries from Ms Martell-Stark who then sent the letter again, I find, on 19 November 2004.

[24] Turning to the statutory requirements in relation to exceptional circumstances, s.115 of the Act expressly provides a non-exhaustive list of situations that may constitute exceptional circumstances.

[25] Section 115(b) provides the ground that the employee has made reasonable arrangements to have a grievance raised on his behalf by an agent, but that the agent has unreasonably failed to ensure that the grievance is raised within the required time.

[26] The circumstances of this case, on my findings of fact, do not fit that particular ground, as I have found that Ms Martell-Stark did not fail to write the letter or have it posted in time. My finding has been that agencies outside of the Community Law Centre most likely have contributed to the failure of the letter not being delivered to Powerbeat. I consider however that those circumstances are exceptional in this particular case.

[27] I find that Mr Dams cannot reasonably be held to blame for whatever the true reason may be as to why his correspondence was not received by Powerbeat after it was put in the mail.

[28] To grant leave, the Authority must also be satisfied that it is just to do so in the circumstances. I have already mentioned my view that the grievance does not have the appearance of being hopeless or unarguable. It raises serious questions about the reasonableness of Mr Witehira's behaviour during the meeting on 24 August and as well there is a question about the degree to which Powerbeat communicated with Mr Dams after he did not return to work.

[29] For the above reasons, the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances. Mr Dams took reasonable and practicable measures of a kind that are normally taken by grievants and that usually achieve the outcome sought of raising a grievance. In the circumstances something quite out of the ordinary and for which Mr Dams was not to blame, must have occurred to foil his efforts to raise a grievance. Further, the Authority is satisfied that it is just to grant leave to Mr Dams to raise his grievance out of time.

[30] For completeness I add that if contrary to my finding there was a failure within s.115(b) which was properly attributable to Ms Martell-Stark, then such failure is expressly an exceptional circumstance under the Act. For the same reasons outlined above it would be just to grant leave for the late raising of the grievance.

[31] The result would therefore be the same as the one I have in fact reached in finding that Ms Martell-Stark was not to blame for any delay.

[32] In accordance with s.114(5) of the Act, I therefore direct Mr Dams and Powerbeat to mediation for the purpose of trying to mutually resolve the grievance. The issue over the fixed term of the employment agreement should also be mediated at the same time. The Mediation Service I expect will consider the priority that this matter can be given and will give it the degree of urgency warranted in the circumstances.

[33] If the outcome of mediation is that the grievance is resolved, Ms Collins need only advise the Authority of that and I will gratefully cease all further work on this case. If Ms Collins advises that the outcome is that the grievance remains unresolved, then I will proceed immediately to prepare and issue a determination on the substantive merits of the grievance. At the same time, as requested, I will give a ruling as to whether there was any genuine reason for the fixed term of the employment.

[34] In concluding this determination I record that Mr Dams did not receive any holiday pay for the time he worked for Powerbeat. The amount due was calculated and entered into the wage records but was not actually paid to him. He is entitled to receive that amount regardless of whatever final outcome may be arrived at in this case. Mr Witehira has acknowledged the entitlement and has undertaken to see that Mr Dams receives the holiday pay due.

[35] Costs are reserved pending the outcome of mediation and a final determination if one is required.

A Dumbleton
Member of Employment Relations Authority