

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 370
5390184

BETWEEN	MOSESE FATUKALA Applicant
A N D	GOODMAN FIELDER NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Piliki Talanoa, Advocate for Applicant Susan Walls, Advocate for Respondent
Investigation meeting:	On the papers
Submissions Received	from Applicant from Respondent
Date of Determination:	16 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Fatukala) was dismissed from his employment by the respondent (Goodman Fielder) on 21 February 2012. Together with another former employee of Goodman Fielder dismissed on the same day, Mr Fatukala instructed his advocate, Mr Talanoa, to file a claim in the Authority alleging unjustified dismissal.

[2] An informal claim was purportedly filed in the Authority on 12 April 2012 but there were defects on the face of the filing which caused the Authority's support staff to reject the filing and return it to Mr Talanoa.

[3] Amongst other things, the Authority rejected the purported filing on the footing that there ought to have been a separate application made for each applicant. That and other problems with the original filing was eventually remedied by an

application made on 27 July 2012, more than three months after the original aborted filing of the application.

[4] As a consequence of that additional delay, the application to challenge the dismissal was not placed before Goodman Fielder until well outside the statutory 90 day period.

[5] Goodman Fielder says that, in consequence, it ought not to be put to the trouble of responding to the matter because, pursuant to s.114 of the Employment Relations Act 2000 (the Act), the notification of the personal grievance is outside the statutory 90 day period provided in the Act.

[6] Conversely, Mr Talanoa submits that had the Authority accepted the original joint application, it would have been well within time and while that is true as far as it goes, the fact remains that the Authority, in accordance with its invariable practice, did not forward on the informal application to the respondent and waited for the application to be correctly filed before placing it before the respondent employer, Goodman Fielder.

Determination

[7] The only issue in the present case is whether this application can proceed notwithstanding that it has been notified to the employer outside of the 90 day period in which personal grievances are required to be raised with the employer. Goodman Fielder quite properly raises the point that, whatever the explanation, it was not aware that a grievance was raised until well outside the statutory 90 day period.

[8] Conversely, it is plain from the evidence before the Authority that Mr Fatukala instructed his advocate, Mr Talanoa, to raise a grievance within time and indeed, the evidence is plain that Mr Talanoa purported to do that on 12 April 2012. The fact that he was unsuccessful is the only reason that this matter is before the Authority now. While Mr Talanoa's submission to the Authority simply proceeds on the footing that the Authority should allow time to run not from the date that the proceedings were correctly filed, but from the date that the proceedings were incorrectly filed, the Authority thinks the implication of Mr Talanoa's submissions are that the error was his and not Mr Fatukala's. That being the position, were an application to be made under s.115 of the statute, it seems likely that grounds could be found in s.115(b) of the Act. That is the subsection which provides that exceptional circumstances include

the situation where the affected employee has made “*reasonable arrangements to have the grievance raised*” and “*the agent unreasonably failed to ensure that the grievance was raised within the required time*”.

[9] It may be that Mr Talanoa failed to turn his mind to the question of time running on the raising of the grievance but whatever the explanation for the delay, it seems to the Authority that the fault lies with Mr Talanoa rather than with the applicant, Mr Fatukala.

[10] On that basis, it seems to the Authority unjust to deny Mr Fatukala the opportunity of having his personal grievance investigated. If the Authority were to take a strict view of the submissions filed in support of Mr Fatukala’s application, the Authority might well conclude that there is no explicit request for the Authority to consider a question of exceptional circumstances under s.115 of the Act. But, in the Authority’s view, the better view of matters is that, rather than decline the application now and then subsequently have to deal with an application for the consideration of exceptional circumstances subsequently, to save both parties and the Authority time and expense, it is as well to indicate that the matter should proceed, that notwithstanding the circumstances, leave is granted for Mr Fatukala to have his claim of unjustified dismissal investigated by the Authority, the Authority having satisfied itself that but for the deficit in the performance of Mr Fatukala’s advocate in failing to ensure that the matter was filed within time, Goodman Fielder would have been apprised of the personal grievance within the 90 days and the matter would already have been disposed of, one way or the other by the Authority.

[11] For the avoidance of doubt then, the Authority directs that this is a case where exceptional circumstances under para.(b) of s.115 of the Act ought properly to allow the applicant, Mr Fatukala, to proceed with his claim of unjustified dismissal against Goodman Fielder.

[12] The next step will be for the Authority to determine a process for investigating the matter.

James Crichton
Member of the Employment Relations Authority