

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 46
3076192

BETWEEN PETER FINCH
 Applicant

AND MAC D FARMS LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ted Hipkiss, representative for the Applicant
 Vanessa White, representative for the Respondent

Investigation Meeting: On the papers

Submissions [and further Affidavit dated 25 November 2019 from the Applicant
Information] Received: Affidavit of Nicolas Ian McDonald for the Respondent
 dated 11 December 2019
 Applicant's Submissions dated 17 December 2019
 Respondent's Submissions dated 28 January 2020

Date of Determination: 31 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Peter Finch, claims that he was unjustifiably dismissed from his employment by the respondent, MAC D Farms Limited (MAC D Farms). He also claims that he is owed outstanding holiday pay.

[2] MAC D Farms denies that Mr Finch was unjustifiably dismissed and claims that Mr Finch failed to raise the personal grievance claim of unjustified dismissal within the

statutory limitation period of 90 days specified in s 114(1) of the Employment Relations Act 2000 (the Act).

[3] Mr Finch appears to accept that he did not raise a personal grievance with MAC D Farms as required by s 114(1) of the Act . However, he says that he was unaware of the 90 day provisions of s 114(1) of the Act. Mr Finch says this was because there was no provision in his employment agreement with MAC D Farms specifying that a personal grievance claim must be raised with his employer within 90 days. He also says that he understood MAC D Farms was aware that he was dissatisfied within the 90 day time frame.

[4] This determination addresses the preliminary issues of whether or not Mr Finch raised the unjustifiable dismissal personal grievance with MAC D Farms within 90 days of it occurring, in accordance with the requirements of s 114(1) of the Act, such that he is entitled to pursue his grievance before the Authority. In the event that Mr Finch did not raise his personal grievance claim within 90 days of it occurring, is Mr Finch able to claim that the lack of a provision in his employment agreement notifying him of the 90 day requirement is an exceptional circumstance under s 115(c) of the Act. Therefore, the Authority may now grant him leave to raise his personal grievance pursuant to s114(4) of the Act

Investigation meeting

[5] The parties agreed to the Authority determining the preliminary issues based on the papers currently before it including the statement of problem, the statement in reply, affidavits and submissions filed by the parties.

[6] As permitted under s174E of the Act, this determination does not set out all the evidence or submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

[7] Mr Nicholas Ian MacDonald, is a director and shareholder of MAC D Farms. Mr Finch was employed as a relief milker by MAC D Farms on 4 July 2016 and reported to Mr MacDonald.

[8] Mr Finch was employed pursuant to a fixed term employment agreement (employment agreement) dated 29 June 2016. The employment agreement is one prepared by Federated Farmers of New Zealand. The employment agreement specified that Mr Finch's employment was for a fixed term and would expire on 31 May 2017 being the end of the dairy season. On

9 May 2017, Mr Finch was offered the opportunity to continue his employment into the next season once his employment agreement expired on 31 May 2017. Mr Finch decided not to accept a further period of employment at MAC D Farms.

Termination of employment agreement

[9] Mr Finch's employment ended on 10 May 2017. There is a dispute between the parties as to how the employment agreement was terminated.

[10] Mr Finch says he was unjustifiably dismissed when his employment agreement was terminated by MAC D Farms on 10 May 2017. MAC D Farms says Mr Finch left its employment voluntarily on 10 May 2017, he was not dismissed.

Raising personal grievance claim

[11] Mr Finch accepts that he did not raise a personal grievance of unjustified dismissal with MAC D Farms until 8 July 2018. This was by way of text and was 14 months after his employment had ended. A formal personal grievance letter was sent by Mr Finch's representative to MAC D Farms on 19 March 2019, 22 months after Mr Finch claimed he had been unjustifiably dismissed.

[12] It is clear from the evidence and submissions before me that Mr Finch did not raise a personal grievance of unjustifiable dismissal with MAC D Farms within 90 days of the grievance allegedly occurring in May 2017. The first indication of a personal grievance appears to have been the text sent by him to Mr MacDonald on 8 July 2018.

Exceptional circumstances?

[13] It is clear from the documentation filed in the Authority that MAC D Farms do not consent to Mr Finch's personal grievance claim being raised after the expiration of the 90 day period. Mr MacDonald on behalf of MAC D Farms states in his affidavit that he does not accept that Mr Finch's delay in raising a personal grievance is due to "exceptional circumstances".

[14] Mr Finch appears to be seeking the Authority's leave to raise his personal grievance of unjustified dismissal outside the 90 day period because of exceptional circumstances. Mr Finch says that the explanation concerning the resolution of employment relationship problems and the warning that they must be raised within 90 days was not contained in his employment

agreement. The employment agreement provided to the Authority does not contain the explanation concerning the resolution of employment relationship problems as required by s 65 of the Act.

[15] Section 65 of the Act sets out the form and content requirements of an individual employment agreement. Section 65(2) sets out the mandatory requirements of an individual agreement including in s 65(2)(a)(vi) that there be:

a plain language explanation for the resolution of employment relationship problems, including a reference to the period of 90 days in s 114 within which a personal grievance must be raised...

[16] There is no such explanation contained in the employment agreement between the parties and filed in the Authority.

[17] Section 114(4) of the Act provides that the Authority may grant leave to an employee to raise a personal grievance after the expiration of the 90 day period in which to do so, and when the employer refuses to consent for the employee to do so, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in s 115); and
- (b) if it considers it just to do so.

[18] Section 115(c) provides that “exceptional circumstances” include a situation in which an employee’s employment agreement does not contain the explanation containing the resolution of employment problems that is required, in this case by s 65 of the Act.

[19] I am satisfied that Mr Finch’s delay in raising his personal grievance was occasioned by an exceptional circumstance as specified in s115(c) of the Act. Accordingly, the Authority grants Mr Finch leave to raise his personal grievance outside the expiration of the 90 day period.

Mediation

[20] As the Authority is granting Mr Finch leave to raise his personal grievance outside the expiration of the 90 day period, it is required by s 114(5) of the Act to direct the parties to use

mediation to seek to mutually resolve Mr Finch's personal grievance claim. I direct the parties accordingly.

Costs

[21] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority