



# Employment Court of New Zealand

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## Griffin v Petworkz Online Limited AC21A/08 [2008] NZEmpC 100 (24 October 2008)

Last Updated: 30 October 2008

### IN THE EMPLOYMENT COURT

AUCKLANDAC 21A/08ARC 73/07

IN THE MATTER OF a challenge to determination of Employment Relations Authority

BETWEEN JENNIFER MARY GRIFFIN  
Plaintiff

AND PETWORKZ ONLINE LIMITED  
Defendant

Hearing: 29 September 2008

(Heard at Hamilton)

Appearances: Simon Scott and Martyn Chambers, Counsel for Plaintiff  
Allan Fursdon, Advocate for Defendant

Judgment: 24 October 2008

### JUDGMENT OF JUDGE C M SHAW

[1] The plaintiff challenges an Authority determination refusing her leave to raise a personal grievance after the expiry of the statutory 90 day period.

[2] At the Employment Relations Authority investigation meeting the plaintiff argued that she had not received an employment agreement when she was employed by the defendant and therefore she had not received the explanation about the resolution of employment relationship problems required by the [Employment Relations Act 2000](#) ("the Act") including advice of the 90 day time limit on raising a personal grievance. A director of the defendant, Ms Morley said that she had been provided with such an agreement.

[3] The sole issue for the Authority was whether the plaintiff had in fact received the employment agreement. It found that given Ms Morley's understanding of her obligations as an employer it was more likely than not that she did provide a copy of the agreement and as that agreement met the requirements of [s65](#) of the Act leave was declined. The plaintiff has challenged that finding of fact.

[4] The challenge was heard de novo. Ms Griffin and Ms Morley for the employer gave evidence. While the evidence was centred on whether an employment agreement was given to Ms Griffin by Ms Morley the background to the employment relationship and how it ended were also canvassed.

[5] [Section 114](#) of the Act requires the raising of a personal grievance 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 the employee. An employee may only raise a personal grievance after the expiry of 90 days if the employer consents or the employee is granted leave. Such leave may be granted if a delay raising the personal grievance was occasioned by exceptional circumstances and it is just to do so.

[6] [Section 115](#) sets out exceptional circumstances for the purposes of [s114\(4\)\(a\)](#). This includes in [s115\(c\)](#):

*where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by [section 54](#) or [section 65](#), as the case may be; ...*

#### The facts

[7] Ms Morley has a degree in management studies in accounting and finance, is an associate chartered accountant and a member of the New Zealand Institute of Management. She had known Ms Griffin for several years having met her through their mutual interest in dog-breeding and showing. In early 2006, aware that Ms Griffin had personal and financial problems, Ms Morley invited her and her son to stay with her. In a letter in May 2006 Ms Morley formally offered Ms Griffin a job at her dog kennels. It was to be a part-time role of 22 hours at \$16 per hour. The letter said that on acceptance Ms Griffin would be provided with an "employment contract".

[8] Ms Griffin says that the first time she saw an employment agreement was when Ms Morley produced one for the Employment Relations Authority. On the other hand Ms Morley says she provided Ms Griffin with an employment contract when she commenced work in the same way she did for all her other staff although Ms Griffin's one was the only one that was unsigned. She did not follow-up the signing as she viewed Ms Griffin as a friend and did not press her for it. She was happy to rely on the unsigned contract. She said Ms Griffin did not take exception to its terms and left it in a desk when she departed her job.

[9] Ms Morley told the Court Ms Griffin was a casual employee. Ms Griffin said that the employment agreement produced at the Authority and the Court did not reflect the work that she was employed to do. Contrary to its terms she was not primarily employed to work weekends and was not a casual employee. If she had been given the agreement she said she would have taken it back as it was the wrong agreement in order to discuss the changes that would be needed.

[10] There is a dispute about the way in which the employment ended. Ms Morley says that Ms Griffin became ill and dysfunctional and left voluntarily. Ms Griffin says that she was ill but Ms Morley asked her to leave and go and stay in a motel. That dispute cannot be resolved in the context of this case but it is clear that Ms Griffin became too ill to work on 4 February 2007. When she returned from hospital she and Ms Morley had a conversation after which Ms Griffin moved out. The parties had ongoing disputes about money and the future of Ms Griffin's son. Ms Griffin took advice from a community law office about her son and was referred to a family lawyer. In turn that lawyer referred her to an employment lawyer to get advice about the loss of her job. A personal grievance was raised immediately although it was 96 days after the termination of her employment and therefore out of time.

#### Discussion

[11] The Court is required to decide whether Ms Griffin had been told by way of an employment agreement of the 90 day limit for bringing a personal grievance. In assessing which of the versions is the more reliable and to be preferred I take into account the following matters:

1. The contents of the disputed employment agreement. The document produced as evidence is signed only by Ms Morley and a witness. It is dated 15 May 2006. The material parts of it are:
  - Clause 1.1 says that it arises from a short-term need to provide assistance with care for the employer's dogs and to participate when required in the pet related business of the employer.
  - The duties under the agreement were to be undertaken as set out in schedule 1 and are stated to be non-exhaustive. Schedule 1 says:

...

*Your principle role will be to ensure the kennels are cleaned on the week-ends.*

...

- Annual leave was to be taken or paid based on 6 per cent of the wages during the term of the contract.
  - There was no entitlement to special leave because the employee was said to be on a short-term casual contract with variable hours of work.
2. Pay records produced by Ms Morley show that Ms Griffin worked Monday to Friday each week from 15 May 2006 to 4 February 2007 for 22 hours per week.
  3. Although Mrs Morley said Ms Griffin was employed as a casual employee, holiday pay was paid as it arose rather than periodically each pay period as provided for in [s28\(1\)\(a\)\(ii\)](#) of the [Holidays' Act 2003](#).
  4. In spite of her education and qualifications Ms Morley accepted that employment is not her specialty area and with the

benefit of hindsight she would have changed some of the content of the employment agreement she produced.

[12] I assess Ms Griffin's evidence to be more reliable in all the circumstances. Ms Morley's otherwise invariable practice about employment agreements was not followed in this case. Ms Morley's educational qualifications while impressive, do not explain uncontroverted evidence which throws doubt on the authenticity of the agreement that she produced. It was not signed nor otherwise acknowledged by Ms Griffin. The differences between the work performed by Ms Griffin as evidenced by Ms Morley's own pay records and the scope of work contemplated by the agreement raises real doubt that the agreement produced actually related to her employment at all. Ms Griffin's explanation that had she seen the agreement and known of the discrepancies she would have taken those up with Ms Morley before signing was cogent and in the circumstances believable.

[13] Finally, after seeing an employment lawyer she immediately raised a grievance. From this I infer that had she known that she should have raised a grievance within 90 days she would have done so.

[14] In the light of those factors I cannot find on the balance of probabilities that the agreement was provided to Ms Griffin and therefore she did not have notice of personal grievance procedures including the 90 day time limit in raising a grievance.

#### The law

[15] As discussed in *Bryson v Three Foot Six Ltd*<sup>[1]</sup> there are three matters to be decided:

1. Whether there are exceptional circumstances for the purpose of s114(4).
2. Whether the delay in raising the personal grievance was occasioned by the exceptional circumstances.
3. Whether it is just to allow the case to be brought outside the 90 day period.

[16] I find that there was an exceptional circumstance in this case. Ms Griffin did not have a properly concluded employment agreement and therefore had no notice of the matters required by [s65](#). For the purposes of this case she did not have a plain language explanation of the services available for the resolution of employment relationship problems including a reference to the period of 90 days within which a personal grievance must be raised as required by s114.

[17] I find that the reason for not bringing the grievance within 90 days was occasioned by that exceptional circumstance. As soon as Ms Griffin was alerted to her rights to bring a personal grievance she did so without any delay.

[18] The justice of the case requires this employment relationship problem to be resolved according to its substantive merits. This matter has already survived a strike-out application brought by the defendant on the grounds that the plaintiff had failed to comply with matters of disclosure within a time limit. Judge Travis dismissed that application stating that he was unaware of any instance in which the Court has dismissed proceedings in those circumstances.

#### Conclusion

[19] I find that the plaintiff has established that there is an exceptional circumstance which justifies the granting of leave to bring her personal grievance outside the 90 day period and the matter may now be set down for hearing.

[20] The plaintiff is entitled to an order for costs but this will be reserved pending the outcome of the substantive proceedings.

**C M SHAW  
JUDGE**

Judgment signed at 4.15pm on 24 October 2008

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[\[1\] \[2006\] NZEmpC 88; \[2006\] ERNZ 781](#)