IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 244
5419923

	BETWEEN	SHARON GUISE Applicant
	AND	ALLIED SECURITY LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	James Pullar, Counsel for Applicant Chris McDowall, on behalf of Respondent
Investigation Meeting:	On the papers
Submissions received:	8 November and 27 November 2013 from Applicant 25 November 2013 from Respondent
Determination:	28 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Sharon Guise, claims she was unjustifiably dismissed by the respondent, Allied Security Limited, on or about 18 December 2012.

[2] Allied's response is the grievance was not raised till May 2013 which is well beyond the 90 day period required by s.114(1) of the Employment Relations Act 2000. Allied does not consent to a grievance being raised out of time.

[3] Ms Guise states Allied's assertion is incorrect. She says she raised the grievance on 14 March 2013 and therefore complied with s.114(1). In the alternative, and should I conclude the grievance was not properly raised, Ms Guise has sought leave to raise it out of time pursuant to s.114(3) of the Act.

[4] The parties agree the question of whether or not the grievance was properly raised should be determined as a preliminary matter. They also asked it be determined on affidavit evidence and written submission. I agreed.

Background

[5] As already said Ms Guise claims she was unjustifiably dismissed, albeit constructively, on 18 December 2012.

[6] She sought legal representation to assist with a claim. Mr Pullar then prepared a letter dated 14 March 2013 and addressed to Chris McDowall, Allied's Operations Manager. It is a detailed letter which, amidst other things, advises Mr McDowell should *regard this as notice of the existence of a personal grievance for unjustified dismissal and/or disadvantage.*

[7] 14 March 2013 is 86 days after the purported cause of action and complies with the requirements of s.114(1). The letter was sent, via email, to an address provided by Ms Guise and said to be one she regularly used to correspond with Mr McDowall. The covering email also asked Mr McDowell give an address to which a physical copy could be sent.

[8] Mr McDowall claims he never received the email. He claims the first he knew of the alleged grievance was 20 May 2013 when he received a telephone call from a Mediation support officer at the Ministry of Business, Innovation and Employment ("MBIE") who was attempting to arrange mediation in respect of the claim. The telephone call was followed by an email from MBIE confirming Ms Guise's request for mediation assistance to which Mr McDowall replied *thanks, I have emailed James* [Pullar] *and requested he send all relevant documentation to our Human Resources Department, I have provided James the relevant contact and address info.*

Determination

[9] As already said Ms Guise is of the view her grievance was properly raised on 14 March 2013. In support she attaches a copy of the letter raising the grievance, the email to which it was appended and a computer log showing it was sent at 1.09pm on 14 March 2013. The email address to which it was sent is identical to one both MBIE and the Authority have successfully used to communicate with Mr McDowall.

[10] Mr McDowall says it was never received and there is no evidence proving the email was *accepted* by Allied's server.

[11] I have some difficulty with Allied's position. Mr McDowell has received other emails sent to the same address and while there may be no evidence showing this email was received by Allied's server, there is none to show it wasn't. It is Allied's server. It is therefore Allied who has access to the servers logs and the ability to establish what traffic the server handled around the time in question (early afternoon on 14 March). It has failed to do so.

[12] I conclude, given the records forwarded by Ms Guise, the email was sent. In the absence of a record, obtainable only by Allied, to show it was not received at least within Allied if not by Mr McDowall personally, I conclude it was.

[13] If I am wrong and that is not the case there is the fall-back position – Ms Guise's s.114(3) application. Allied chose not to address the application and there is no argument in opposition.

[14] A s.114(3) application may be granted where the Authority is satisfied the delay in raising a grievance was occasioned by exceptional circumstances (Section 114(4)). In this setting what constitutes an *exceptional circumstance* has the relatively low threshold of being *unusual* in that it was an exception to the rule (*Creedy v Commissioner of Police* [2008] NZSC 31; [2008] ERNZ 109 at (31)). The interpretation is to be liberal.

[15] Included within the definition of such circumstances is a situation where the employee has made reasonable arrangements to have the grievance raised on his or her behalf but his or her agent failed to ensure that occurred within the required time.

[16] There can be absolutely no doubt Ms Guise did everything in her power to ensure the grievance was raised. That said, I cannot conclude Mr Pullar then failed to act other than to perhaps follow up on the request he be advised of a physical address for Allied which he did not pursue. Ms Guise cannot be held responsible for that but, in any event, the evidence is Mr Pullar prepared and sent an appropriate letter within the required time. If it was not received the failure is in either the transmission system or Allied's server.

[17] Failure within the email transmission system is, I conclude, now sufficiently rare for it to be considered unusual and therefore constitute an exceptional circumstance. Similarly a failure within a server is not only unusual, it would in this case be a circumstance totally beyond Ms Guise's control and one for which Allied must take responsibility. Either way, and given the absence of a contrary argument, I would conclude it fair and just to grant the application.

Conclusion and orders

[18] For the above reasons I conclude Ms Guise advised Allied of her grievance within the 90 day period required by s.114(1) of the Act.

[19] If her letter was not received, I would grant her s.114(3) application.

[20] Either way, the result is the same - her personal grievance may proceed.

[21] In the first instance the parties are required to consider mediation and both have indicated a willingness to do so should I conclude Ms Guise may continue with her grievance. I have, so the parties are now ordered to mediation and attempt to resolve the grievance.

[22] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority