IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 199/10
5280339

	BETWEEN	SHANE HELLER Applicant
	AND	ATLAS QUARRIES LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Marcus Steele, for Applicant James Turner, for Respondent
Investigation Meeting:	26 April 2010 at Whangarei
Determination:	30 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination addresses whether Shane Heller should be granted leave to pursue a personal grievance against his former employer, Atlas Quarries Limited (AQL).

[2] Leave was sought on the grounds that:

(i) Mr Heller had made reasonable arrangements to have the grievance raised on his behalf by Marcus Steele (who Mr Heller had authorised as his representative), but Mr Steele had unreasonably failed to ensure the grievance was raised within the required time, and

(ii) Mr Heller's employment agreement had not contained the explanation concerning resolution of employment relationship problems required by the Employment Relations Act 2000 (the Act).

[3] Both grounds are within the examples of "*exceptional circumstances*" for granting such leave referred to in s115 of the Act.

[4] Mr Heller's application was also initially advanced on the basis that his personal grievance had been lodged within 90 days of his dismissal for redundancy on 24 November 2008.

[5] Mr Steele asserted he sent a letter raising the grievance to AQL's General Manager Gary Olsen in mid-February 2009. However AQL insisted the first it heard of any personal grievance from Mr Heller was in September 2009 through a telephone call and then a letter from Mr Steele. Mr Steele then accused Mr Olsen of discarding or misplacing the February letter.

[6] This position changed on 22 April 2010 when Mr Steele sent an email to the Authority advising that he had found the original personal grievance letter. He said it was "*misfiled and not ever sent*". He apologised to all parties involved and explained: "*I think I may have been drunk and thought I had sent it to [AQL]*."

Investigation

[7] For the purposes of the Authority investigation on whether the leave sought should be granted I had written statements and further oral evidence from Mr Heller, Mr Steele and Mr Olsen. I also had an affidavit from Greg Stewart, chief financial officer of Atlas Concrete Limited, a related company of AGL. The representatives gave oral closing submissions with AQL providing a written synopsis and case references.

Mr Heller's employment

[8] Mr Heller was employed as a driver and quarry worker for AQL in March 2006. Mr Olsen gave him a document setting out the terms and conditions and headed "*Contract of Employment*". It included the names of the parties, job description, place of work, hours and wages. A "*Termination and Disputes*" clause (11.1) read:

> *… [T]his Contract shall incorporate the Personal Grievance Dispute Procedures under the Employment Contracts Act 1991 sections 27 to 30. The employee has a 90 day period with which to make such a claim.*

[9] Mr Heller took the document away and Mr Olsen reminded him several times about signing and returning it. It was not until around a year later – on 28 March 2007 – that Mr Heller met with Mr Olsen and went through the agreement with him, initialling each page and signing the agreement.

[10] In October and November 2008 12 of AQL's 52 staff were dismissed for redundancy, including Mr Heller.

Representation

[11] In January 2009 Mr Steele visited Mr Heller for social reasons. The two men had been neighbours for many years and have some family connections.

[12] Mr Heller's evidence was that when asked what he was doing at the moment, he told Mr Steele of his redundancy. Mr Steele then asked to see Mr Heller's employment agreement and after looking at it, "*started jumping up and down*". Mr Steele says this took place while they were drinking beer and he told Mr Heller that he "*could send a letter or something*" for him.

[13] Shortly after that conversation Mr Steele had Mr Heller sign a document by which Mr Heller authorised Mr Steele as his representative under s236 of the Act. This document was headed "*Agreement*" and included the following paragraph:

> *This agreement is on a no win no fee basis. A fee will only be awarded to the representative after the achievement of a settlement to the dispute. This fee will be 20% of the full settlement amount.*

[14] Around four weeks later Mr Steele drafted a letter addressed to AQL and marked for Mr Olsen's attention. The copy of that letter in the evidence before the Authority bears the date 16 February 2009. It stated Mr Steele was instructed by Mr Heller to "*raise a Personal Grievance for wrongful dismissal. This relates to the employment that ceased with your company about two months ago*."

[15] It also stated that the company was "*required to attend a mediation hearing*" and if no response to these "*statutory requirements*" was received within 21 days, "*an investigation hearing will be initiated*". Remedies of reinstatement, lost wages, compensation and costs were sought.

[16] Mr Steele did not check the draft of this letter with Mr Heller and now says that while he was supposed to have posted the letter, he does not know if he did.

[17] He does not remember if he saw Mr Heller between 20 January and 16 February 2009, but believes he may have visited "*to drink beer but not do anything else*."

[18] He did nothing more on this matter until making a telephone call and sending a letter to Mr Olsen in September 2009.

The law

[19] The Supreme Court in *Creedy v Commissioner of Police* [2008] ERNZ 109 at [32] advised that the short limit of 90 days, and the potentially serious consequence for employees of not being able to bring a grievance, meant interpretation of s115 of the Act should not be unduly limited.

[20] However the Court also emphasised that Parliament imposed a 90 day limit to ensure employers were promptly notified of alleged grievances. Time should be extended only if exceptional circumstances were truly established and, in addition, overall justice of the case so required.

Were reasonable arrangements made?

[21] I find Mr Heller failed to make reasonable arrangements to have his personal grievance raised on his behalf by a representative.

[22] It may be inferred by his actions – or rather the fact that he did nothing – in the period between 24 November and 20 January, that he had no desire or intention to raise a grievance. It was only at Mr Steele's suggestion that Mr Heller considered whether something could be done about losing his job with AQL.

[23] The mere appointment of Mr Steele as his representative did not constitute reasonable arrangements by Mr Heller. There is no evidence that he provided instructions or details on what might constitute a personal grievance about how his employment at AQL came to an end. This is apparent from Mr Steele's letter – drafted but not sent – referring only to "*wrongful dismissal*". While that is said to relate to "*employment that ceased*", it does not identify any aspect of the redundancy process or decision as unjustified.

[24] Neither did Mr Heller follow up or check what steps Mr Steele might be taking to raise the personal grievance. This was not a situation where Mr Heller had engaged a lawyer or professional advocate who could be relied on to carry out the necessary work in a timely way. Rather, this was a situation involving a friend with no real expertise and where a possible course of action was discussed in a solely social context involving alcohol. "*Reasonable arrangements*" in those circumstances would require Mr Heller to have made some further inquiry of what Mr Steele had done or would do to raise the grievance within the required period.

[25] Having reached that conclusion, I need not determine whether Mr Steele unreasonably failed to ensure the grievance was raised within the required time. It is, however, a point Mr Steele concedes. In his oral evidence he accepted he had let Mr Heller down.

[26] It is regrettable that Mr Steele was able to make enough effort to have Mr Heller sign an agreement promising a 20% 'cut' of any settlement amount gained, but did not apply the same degree of diligence to the obligation of raising the grievance in a timely way after having himself authorised as Mr Heller's representative.

[27] Section 236 of the Act allows for employees to choose "*any other person*" to take action on their behalf but carries with it an understanding or expectation that someone taking on such a role will do so responsibly.

Was the employment agreement adequate?

[28] AQL's documentation explaining services to resolve employment relationship problems was irregular but, I find, did not fail to provide the essential information in those circumstances – that a personal grievance needed to be raised within 90 days.

[29] Mr Olsen acknowledged in his evidence that a reference in AQL's standard form employment agreement to the Employment Contracts Act 1991 was inadequate. That reference had since been updated to refer to the current legislation. However, I find the actual words used in the form of agreement signed by Mr Heller in March 2007 were not so inadequate as to fail to meet the substance of the requirement at s.6(2)(vi) of the Employment Relations Act 2000 for a "*plain language explanation*".

[30] The reference to raising a personal grievance within 90 days was in a separate sentence from the inaccurate reference to the Employment Contracts Act.

[31] The Authority is obliged to resolve these matters according to the substantial merits rather than technicalities. In the particular circumstances, Mr Heller's employment agreement clearly conveyed the substantive requirements of raising a personal grievance within 90 days. The technical inaccuracy of other provisions does not amount to an exceptional circumstance warranting leave to raise a grievance out of time.

Determination

[32] For the reasons given, I find the circumstances in which Mr Heller's grievance was not raised within 90 days are not exceptional and decline to grant leave for the grievance to be raised outside that period.

Costs

[33] Costs are reserved.

[34] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is required, AQL may lodge and serve a memorandum within 28 days of the date of this determination. Mr Heller will then have 14 days from the date of service to lodge and serve a memorandum in reply. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority