

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 56
3010931

BETWEEN ANTHONY WILLIAM HENRY
Applicant

A N D SILVER FERN FARMS
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Jenny Beck, Counsel for Applicant
Tim Cleary, Counsel for Respondent

Investigation Meeting: 14 March 2018 in Dunedin

Submissions Received: On the day from Applicant
On the day from Respondent
Further information provided by the parties between
21 March 2018 and 16 April 2018

Date of Determination: 30 April 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A Anthony Henry has not made out that the delay in raising his personal grievance of unjustified dismissal was occasioned by exceptional circumstances as required under s 114 (4) of the Employment Relations Act 2000.**
- B Mr Henry is unable to bring a personal grievance of unjustified dismissal to the Authority.**
- C Costs are reserved and failing agreement a timetable for an exchange of submissions is set.**

Employment relationship problem

[1] This determination resolves an application under s 114(3) of the Employment Relations Act 2000 (“the Act”) whether leave should be granted to Anthony Henry to raise his personal grievance of unjustified dismissal after the expiration of the period of 90 days. The application is opposed by Silver Fern Farms Limited (“Silver Fern”).

[2] The parties have attended mediation without prejudice to the position of Silver Fern that it does not consent to the personal grievance being raised outside the 90 day period.

[3] The Authority in investigating the preliminary issue heard evidence from Mr Henry. As a result of his evidence and with the agreement of counsel during the investigation meeting the Authority connected Jason Carruthers, Union Secretary for Finegard,¹ by telephone to the investigation meeting for questioning. The Authority also heard evidence from Kass Saimoni who is the Health Adviser at Silver Fern Finegard and Diane Andrews who is the Senior Departmental Supervisor.

[4] A further issue arose during the investigation meeting about telephone records. By agreement Mr Henry was given a period of time to obtain his records over the material time and supply those to the Authority and Mr Cleary. This has now happened. Counsel referred to matters arising from those records in further correspondence to the Authority.

Section 114(4) of the Act

[5] Section 114(4) provides as follows:

On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in s 115); and
- (b) considers it just to do so.

¹ New Zealand Meat Workers Union

The issues

[6] The Authority needs to consider in this matter the following issues:

- (i) Was the delay by Mr Henry in raising the personal grievance occasioned by exceptional circumstances?
- (ii) Was Mr Henry advised by Ms Saimoni, Ms Andrews or Mr Carruthers that he would get his job back at the start of the following season and that the termination was really a formality until the end of the current season?
- (iii) If the delay was occasioned by exceptional circumstances then is it just to grant leave?

Was the delay in raising the personal grievance occasioned by exceptional circumstances?

When did the action allege to amount to a personal grievance occur or come to the notice of Mr Henry?

[7] Silver Fern are an accredited provider with ACC. AON is retained to manage ACC work injury claims. Ms Saimoni explained in her evidence that as a health adviser she manages claims with AON for Silver Fern. Mr Henry hurt his wrist and was off work for a period and Ms Saimoni completed weekly rehabilitation monitoring sheets for Mr Henry whilst he received weekly compensation.

[8] Silver Fern says that Mr Henry did not keep in touch during the period he was injured. Mr Henry does not accept that to be the case. Silver Fern determined in late May 2016 that Mr Henry had abandoned his employment and wrote to him by letter dated 31 May 2016 as set out below.

Re: Abandonment of Employment

It appears that you have been unable to be contacted by your Department for a period of 3 or more days and you yourself have made no attempt to contact us here at Finegard.

Your employment has therefore been terminated by reason of abandonment.

Jason O'Connell

Plant Manager

[9] Mr Henry said that he did not receive the letter of termination because he was no longer residing at the address it was sent to.

[10] Mr Henry accepted that he knew on 14 June 2016 when he attended a meeting with Ms Saimoni and an AON case worker about his rehabilitation that his employment had been terminated from that date. That was because he questioned receiving a letter of termination and Ms Saimoni obtained the letter to show him at the meeting. She said that he was provided with a copy of the letter. Ms Saimoni explained that AON still covered Mr Henry's medical treatment and there was a need to talk to him about that in accordance with his rehabilitation plan notwithstanding that his employment had been terminated.

[11] The statutory time period of 90 days therefore for raising a grievance of unjustified dismissal ran from 14 June 2016. The 90 day period ended on 12 September 2016. Ms Beck raised a personal grievance on behalf of Mr Henry by letter dated 9 November 2016.

Are there exceptional circumstances?

[12] Exceptional circumstances are circumstances that are unusual and the exception to the rule – *Creedy v Commissioner of Police*².

[13] Ms Beck wrote in her letter dated 9 November 2016 raising Mr Henry's personal grievance that amongst other matters Mr Henry would have taken action earlier but he had been promised his job back by Ms Saimoni.³ The nature of the promise had been referred to earlier in the letter in para [8] where Ms Beck stated amongst other matters that "Caz had advised him that he could simply re-apply in the new season and that he would be successful in getting his job back."

[14] The statement of problem along the lines of the letter raising the grievance referred again to the advice from Ms Saimoni that Mr Henry should reapply in the new season and that he would "get his job back." It additionally referred to the delay

² *Creedy v Commissioner of Police* [2008] ERNZ 109 at [31] and [32] Supreme Court

³ Paragraph [10]

being because Mr Henry had been led to believe by his employer that the dismissal did not mean anything because he simply expected to get his job back.

[15] Mr Henry in his written evidence refers to speaking not only to Ms Saimoni but also to the Union who told him that he would get his job back at the start of the next season and “the termination was really a formality.”

[16] In his oral evidence Mr Henry said that not only had Ms Saimoni and Jason Carruthers from the Union told him he would get his job back but his supervisor Ms Andrews had told him as well that he had work in September and that she told him to get fully recovered in the meantime.

[17] The focus for the Authority therefore is whether there are exceptional circumstances because Mr Henry had been assured by the three individuals above that he would be employed the following season and therefore did not need to raise a personal grievance. I accept Mr Cleary’s submission that there has to be some reasonable basis assessed objectively for that belief.

[18] Ms Saimoni in her evidence did not accept that she told Mr Henry he would get his job back at the start of the new season and that termination was a formality. Her evidence was that she did not talk to Mr Henry after 14 June 2016. The weekly rehabilitation monitoring sheet for Mr Henry shows a final entry on 20 June 2016 following confirmation that his physio therapy was to continue. The note reflects and Ms Saimoni confirmed this in her evidence that she telephoned Mr Henry for follow up on this day but on both occasions there was no answer and a message was left for him and the case manager notified.

[19] Ms Andrews did not accept in her evidence that she spoke to Mr Henry after he was terminated. She said that she would not have told him that he would be re-employed in the new season. Ms Andrews did not accept that Mr Henry had called her to discuss employment for the new season. She said that she had not spoken with Mr Henry since he had left work towards the end of the 2015/16 season.

[20] Mr Carruthers was not called to give evidence but as earlier stated was able to be connected to the investigation meeting by telephone for questioning. It had become apparent to the Authority that was important for Mr Henry. The Authority is

conscious of its investigative role and helpfully Mr Cleary did not object to this practical manner of dealing with the matter.

[21] Mr Carruthers said that he recalled some discussion about retrieving Mr Henry's personal gear. He agreed that there were some text messages sent between them but he said they were about Mr Henry getting "his gear back". Mr Carruthers said that he told Mr Henry "that he would try and get him back in the new season." He said that he went to see Ms Andrews and she said that Mr Henry would not be in her department. He then said that he rung around and could not find a spot for Mr Henry and that he believed that he let Mr Henry know that he could not do anything.

[22] The telephone records showed text messages were sent on and after 31 August 2016 from Mr Henry to Mr Carruthers. The content of the text messages was not able to be retrieved. The records also show one telephone call to Silver Fern's main telephone line on 27 September 2017. Ms Beck says that this is important because it is consistent with Mr Henry's evidence that he spoke to Ms Andrews about two weeks after the start of the new season on 12 September 2016. Mr Cleary states it is unclear what the call was about and it would be speculative to conclude anything from the record other than a connection to the main number at Silver Fern for a short period.

[23] In assessing whose account is more reliable I have initially had regard to the fact that earlier communication as to why the grievance was not raised within 90 days focused solely on a promise made by Ms Saimoni that Mr Henry would get his job back in the new season.

[24] Ms Saimoni was a health adviser at Silver Fern. She confirmed in her evidence she was not involved in the decision to terminate Mr Henry's employment although had herself experienced some difficulty in getting in touch with Mr Henry over the material time. This is supported by entries she made into his weekly monitoring sheets. In terms of telephone calls after 20 June Ms Beck said records before July 2016 were not able to be retrieved so there is no assistance there. Having heard the evidence I find that it is less likely when assessed overall that Ms Saimoni given her position and her own interactions with Mr Henry would have then told him he would get his job back in the new season if he reapplied. I prefer her evidence as

more likely than not that she did not make such a statement to Mr Henry, that he would get his job back in the new season.

[25] That Ms Andrews gave a similar reassurance was mentioned for the first time by Mr Henry in oral evidence although in his written evidence he had said that he called Ms Andrews in September to make plans for his return to work at the start of the new season. Ms Andrews did not accept that she had any contact with Mr Henry to discuss employment for the new season and denied reassuring him that he would have work in the new season. Ms Andrews said in her evidence that she also had issues contacting Mr Henry. She said that she would have recalled if he had called her in September to discuss employment for the new season because Mr Henry was dismissed for abandonment and would not be re-offered work.

[26] I accept there is a record of a call to Silver Fern in late September. I am however unable to conclude with certainty that it was a call to Ms Andrews about work in the new season. I also find when viewed overall it is less likely given Ms Andrews concerns about Mr Henry that she would have reassured him that he would have work in the new season. I prefer Ms Andrews' evidence to that of Mr Henry.

[27] Mr Carruthers accepted that he had told Mr Henry that he would try and get him back in the new season. He said that he was not successful in his attempts and believed he let Mr Henry know. There was certainly a line of communication between them by way of text message as referred to above. I am not satisfied that there was a reassurance by Mr Carruthers that Mr Henry would get his job back. I am strengthened in that view because if that had been the case then I would have expected that to have been referred to when the grievance was raised or the problem lodged.

[28] For completeness it was not suggested that Mr Carruthers had been asked to raise a personal grievance and had failed to ensure the grievance was raised within time.

[29] In conclusion I accept that Mr Henry may have believed mistakenly and hoped that he would be re-employed in the new season. On that basis as Ms Beck submits he decided that he did not need to raise a personal grievance and to do so would make trouble unnecessarily. The evidence however I have found falls short of an assurance

made that Mr Henry would get his job back in the new season such as to form a reasonable ground for a belief on Mr Henry's part that he would be re-employed. The mistaken belief he had I find is not an exceptional circumstance so as to conclude it is unusual, out of the ordinary course or uncommon.

Conclusion

[30] In conclusion I am not satisfied on the balance of probabilities that the delay by Mr Henry in raising the personal grievance of unjustified dismissal was occasioned by exceptional circumstances for the reasons set out above. I do not need to determine whether it would be just for Mr Henry to raise his grievance out of time.

Costs

[31] I reserve the issue of costs

[32] Mr Cleary has until 14 May 2018 to lodge and serve submissions as to costs and Ms Beck has until 28 May 2018 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority