

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 24A/10
5140576

BETWEEN PAUL HOLMES
 Applicant

A N D META NZ LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Faye Birch, Representative for Applicant
 Peter Zwart, Representative for Respondent

Papers Received: 16 April 2010 from Applicant
 24 April 2010 from Respondent

Determination: 28 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination dated 4 February 2010, I found that Mr Holmes had not properly raised within time a personal grievance concerning the termination of his employment. However, prior to his dismissal, Mr Holmes had raised with his employer various other grievances which were eventually included in a statement of problem lodged with the Authority. These other matters having not been resolved in mediation, a telephone conference was convened on 29 March 2010 to arrange for their investigation.

[2] As a result of the telephone conference, arrangements are in place for an investigation meeting on 7 and 8 October 2010 to deal with Mr Holmes' problems that arose before the termination of his employment. During the telephone conference, however, Mr Holmes' representative indicated that there might be an application for leave to raise a late grievance concerning the dismissal. To ensure that any such application could be determined in good time prior to the scheduled

investigation meeting, a direction was made without objection requiring any application for leave to be lodged with the Authority no later than 4pm on Tuesday, 6 April 2010 and for it to be accompanied by affidavits in support.

[3] On 16 April 2010, the Authority received by email three documents which I take to be Mr Holmes' application with supporting evidence under s.114 of the Employment Relations Act 2000 for leave to raise an unjustified dismissal grievance out of time. There is a medical certificate dated 13 April 2010 saying that Ms Birch was unwell from 12 April 2010. There is also mention of bereavements affecting Ms Birch but no details. These points relate to the failure to lodge the application for leave by 6 April 2010. There is a statutory declaration from Ms Birch which (in summary) says that Mr Holmes instructed the company for which Ms Birch worked previously to raise a personal grievance about his dismissal but that was not done; and that she observed Mr Holmes to be very unwell over this period of time. There are also medical certificates about Mr Holmes' illness.

[4] If it considers it just to do so, and being satisfied that the delay in raising a grievance was occasioned by exceptional circumstances, the Authority may grant leave for a grievance to be raised out of time. Exceptional circumstances include where the employee has been so affected or traumatised by the matter that they were unable to properly consider raising the grievance within time and where the employee made reasonable arrangements to have the grievance raised by an agent who unreasonably failed to do so within time. I take the documents provided on Mr Holmes' behalf to invoke both these exceptional circumstances.

[5] Mr Holmes was summarily dismissed on 29 November 2008. Prior to that date, he had raised with his employer grievances about his employment having been disadvantageously affected by various unjustified actions on the employer's part. The statement of problem in respect of these grievances, several alleged breaches of statutory obligation, and the dismissal was lodged with the Authority in early August 2009. Mr Holmes' former employer was identified as the sole respondent at that time. An application was made soon after to join other parties as respondents. That aspect of the problem was investigated and determined by the beginning of October 2009 with the result that none of the additional parties were joined. In its statement in reply, the respondent then asserted that a grievance about the dismissal was out of

time. That aspect was investigated and a determination was released on 4 February 2010 upholding the respondent's view.

[6] The delay that must be explained first runs from 90 days after the dismissal (approximately the beginning of March 2009) to August 2009 during which time nothing was done to raise a grievance about the dismissal. When the statement of problem was lodged in August 2009, Mr Holmes seems to have assumed he could bring a dismissal grievance before the Authority without it having been raised first with his employer. By 4 February 2010, it was made clear to Mr Holmes that he could not. There was then a further delay from February 2010 to 16 April 2010 when the present application was lodged.

[7] The material placed in front of the Authority about Mr Holmes' state of health relates to November and December 2008. There is an email dated 2 January 2009 to Ms Birch about pursuing his grievance. I infer that Mr Holmes had recovered sufficiently by then and was able to properly consider raising his grievance. It follows that Mr Holmes could have raised a grievance within time and his state of health provides no explanation for the delay from March 2009 to August 2009 or thereafter. Mr Holmes cannot succeed under s.115(a) of the Act.

[8] As noted, the application also relies on s.115(b) of the Act. I will take the email of 2 January 2009 as the date on which Mr Holmes instructed his agent to raise a grievance about the dismissal even though it is not that explicit. Ms Birch has deposed that Mr Holmes instructed his current agent (KFM & Associates Limited) for whom Ms Birch now works in March 2009. At best from Mr Holmes' perspective, there is some explanation of the failure up to March 2009 but no explanation for the delay beyond then to August 2009 or from February 2010 to April 2010. It follows that Mr Holmes cannot succeed under s.115(b) of the Act.

[9] Mr Holmes' application for leave fails because much of the delay was not occasioned by any exceptional circumstance. It is not necessary to assess whether it would be just to grant leave so I do not need to consider whether Ms Birch's failure to make the application within the time stipulated during our last telephone conference affects the question of justice. I should simply observe that the date for any application was set by the Authority with the parties' agreement because I knew then that I was going to be absent from the beginning of May until mid-June and would not be able to deal with a later application until now. The respondent has expressed

concern on several occasions about delay affecting winding-up of its affairs and I wanted to avoid any possibility of having to adjourn the investigation dates to allow time for further preliminary issues.

Summary

[10] Leave to raise a grievance out of time is declined.

[11] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority