

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 122
5365552**

BETWEEN

VINOD JAURA
Applicant

A N D

MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Samantha Turner, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 11 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Jaura) claims that the decision by the respondent (the Ministry or MSD) not to grant him leave without pay was “*unfair, unjust, improper and in violation of the principles of natural justice*” and that the termination of his employment by abandonment was “*illegal, improper, unjust and (should) be set aside and quashed*”.

[2] The Ministry refers to the fact that the decision it made which Mr Jaura objects to was in 2010. It follows that, without the leave of the Authority, Mr Jaura is not able to raise a personal grievance unless MSD consents, which it does not.

[3] The purpose of this determination is to deal exclusively with the question whether that leave should be granted to enable Mr Jaura to raise his personal grievance out of time.

[4] For the purposes of context, the factual background can be briefly stated. On 17 February 2010, Mr Jaura applied to MSD for leave without pay for a period from 18 March 2010 down to 31 December 2010. Mr Jaura told the Ministry that he wanted that time off to enable him to complete a period of full time study.

[5] The request was denied. There was an extensive correspondence between the parties. Amongst other things, Mr Jaura sought reconsideration of the decision.

[6] Despite the Ministry's decision to decline Mr Jaura's request for leave without pay, Mr Jaura did not present himself for duties on 17 March 2010, the date when his leave without pay would have started if it had been granted. Again there were extensive exchanges of correspondence between the parties and finally an ultimatum was issued by MSD in its letter of 12 July 2010 when Mr Jaura was told that if he did not return to duty by 20 July 2010, he would be at risk of being found to have abandoned his employment.

[7] Despite further correspondence between the parties, on 23 July 2010 MSD indicated to Mr Jaura by letter that he was deemed to have abandoned his employment.

[8] Notwithstanding that decision, the correspondence between the parties continued and in a letter dated 11 April 2011, Mr Jaura claims to have raised a personal grievance. MSD denies that the letter raises a personal grievance but in any event points out that if it does, it was sent some 400 days after the communication of the decision to which Mr Jaura objects.

[9] Moreover, if the Authority is also to read Mr Jaura's application as evidencing a personal grievance in respect of the termination of his employment by abandonment, then MSD's position is that the 11 April 2011 letter does not achieve that aim at all because the Ministry maintains that there is no clear enough reference in that voluminous correspondence to identify that there was an unjustified dismissal claim on foot.

Issues

[10] It will be convenient if the Authority considers first whether any of the steps that Mr Jaura has taken can properly be considered to be the raising of one or more personal grievances and secondly whether, pursuant to s.115 of the Employment

Relations Act 2000 (the Act), there are exceptional circumstances sufficient to justify the granting of the relief sought.

[11] It is axiomatic that, in the absence of the consent of the Ministry, Mr Jaura cannot proceed with his claim in the Authority unless and until the Authority is satisfied that exceptional circumstances exist for the raising of a personal grievance.

Was a grievance ever raised?

[12] The Authority is not satisfied that Mr Jaura has ever raised a personal grievance, either in relation to the failure to grant him the unpaid leave or in respect of the termination of his employment for abandonment. The Authority's view in that regard is based on an assessment of the voluminous correspondence from Mr Jaura to MSD.

[13] In order for a grievance to be properly raised in accordance with the law, the Authority considers the following aspects must be satisfied:

- (a) There must be a notification to the employer of the nature of the complaint;
- (b) There must be an intimation that the dispute resolution system provided by law was being engaged; and
- (c) There must be an indication of the steps the employee expects the employer to undertake in order to resolve the matter.

[14] While there will always be cases where the use of the term of art "personal grievance" is not found to be imperative for the raising of a grievance, it is the Authority's considered view that the use of that term does focus the mind of the employer recipient. In the present case, Mr Jaura has not used that terminology. Indeed, looking at his 11 April 2011 letter which he relies on, it seems to the Authority that the only part of the test just enunciated that the letter complies with is the requirement to identify that the legal procedure mandated by law had been engaged. This is because Mr Jaura refers specifically to mediation and to the Employment Relations Authority in his correspondence. But he does not refer to personal grievance and he does not identify precisely what it is that he seeks from the employer to put matters right. What is more, the 11 April 2011 letter can only be seen

as contributing to the discussion in respect of the prospect of a personal grievance relating to Mr Jaura's complaint about the Ministry's failure to grant him leave without pay.

[15] The short point is that, looked at objectively, the 11 April 2011 letter in the hands of the Ministry would not alert it to the fact that it was facing legal consequences in respect of a claimed personal grievance concerning the failure to grant special leave without pay, because of the lack of clarity in respect of the nature of the complaint (was it a personal grievance?), and the failure to identify what it was that the Ministry was supposed to do to remedy its alleged default.

[16] Moreover, that letter does not inform the discussion at all about the prospect of a personal grievance in respect of the termination of the employment for abandonment as the matter is not referred to in that letter.

[17] Nor is it clear to the Authority that any other item of correspondence from Mr Jaura to the Ministry fulfils the role of raising a personal grievance in respect to either of the matters now claimed to be on foot.

[18] Accordingly, the Authority is satisfied that at the relevant time, the notification of a personal grievance was not made by Mr Jaura in respect of either of his alleged personal grievances.

Are there exceptional circumstances?

[19] Mr Jaura's claim to the Authority appears to proceed on the footing that the Authority will find that a grievance was raised in time and that therefore no exceptional circumstances will need to be identified. Indeed, the submissions filed by Mr Jaura do not identify what exceptional circumstances might apply. Mr Jaura appears to believe (erroneously on the facts as the Authority sees them), that the final decision was communicated by an undated letter which he received on 13 January 2011. But the actual decision was taken the previous year and the correspondence that Mr Jaura is referring to relates to one of his numerous attempts to have the Ministry reconsider the matter. The fact that the Ministry reconsidered a decision it had already taken does not indicate that its original decision was not a proper one. And even if the Authority's reasoning in that regard is not accepted, the only decision in play here is the decision of the Ministry not to grant Mr Jaura leave without pay; the termination of the employment simply does not feature.

[20] The Authority has power to grant leave to raise a personal grievance outside of the statutory timeframe where it is satisfied that there are exceptional circumstances and where it considers it just to do so: s.114(4) of the Act.

[21] As the Authority has already noted, Mr Jaura makes no reference in his submissions to any exceptional circumstances and the Authority is not about to try to conclude what they might be. Presumably, if exceptional circumstances existed, they would be pleaded.

[22] Furthermore, the Authority is not persuaded that it would be just to grant leave. The Ministry quite properly refers to the passage of time since the events complained of happened. The delay is significant; over two years have passed since Mr Jaura abandoned his employment, for instance.

[23] It would be incredibly difficult for the Ministry to now try to defend a claim which, with the greatest respect to Mr Jaura, is confused and prolix.

[24] What is more, the justice of the case requires the Authority to at least consider whether there has been an injustice done. The evidence suggests there has not. Indeed, the evidence suggests that Mr Jaura took an entirely unreasonable stance in relation to his employment and continued to argue with his employer about its position, notwithstanding that for a period of some months he was effectively absent without leave.

Determination

[25] The Authority is not persuaded that Mr Jaura has any justiciable claim. His application is dismissed.

Costs

[26] Costs are reserved.

James Crichton
Member of the Employment Relations Authority

