

- [3] The solicitor for Mr Crawford responded on 17th March 2010 informing that:
- (a) Mr Crawford had never employed Ms Kiri hence it was not possible for her to claim unpaid wages or unjustified dismissal; and
 - (b) Even if it could be shown that Ms Kiri was employed by Mr Crawford (which is denied), there are no exceptional circumstances to allow the late “filing” of a personal grievance.

[4] A *Statement of Problem* was received by the Authority on 8th April 2010 claiming arrears of wages and holiday pay for Ms Kiri. It is also claimed that Ms Kiri was constructively dismissed. Pursuant to s 114(3) of the Employment Relations Act 2000 (“the Act”), an application was made for leave to raise a personal grievance out of time on the grounds that the delay in raising the grievance was occasioned by exceptional circumstances and that it would be unjust for the Authority not to grant the leave sought.

[5] In the *Statement of Reply* received by the Authority on 22nd April 2010, the respondents deny that Ms Kiri was ever employed by them; and they say that no grounds have been advanced as to why the personal grievance has been raised outside of the 90-day limit.

[6] A conference call with the parties was convened by the Authority on 17th June 2010. It was agreed that 90-day issue would be determined on the papers. The Authority has received submissions and affidavits for Ms Kiri, and submissions for Mr Crawford and Ms Brydon.

The Arguments for Ms Kiri

[7] It is submitted for Ms Kiri that exceptional circumstances exist pursuant to s 115(c) of the Act. That is: “*where the employee’s employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65 as the case may be.*” Of course the difficulty with this submission is that the respondents deny that Ms Kiri was ever employed hence it follows that there was no employment agreement or any apparent record of Ms Kiri being employed by the respondents.

[8] Ms Kiri has provided a sworn affidavit. She says that she was employed by the respondents at the Elgin Fish Shop and the London Street Fish Shop in Gisborne and that she worked at the shops during May, June and July 2005, having been invited to do so by the respondents. Ms Kiri also attests to discussions with Mr Crawford about wages owed to her and his acknowledgement that he owed her money. Some of the assertions of Ms Kiri are collaborated in an affidavit sworn by her daughter, Ms Recsina Jackson. She says that she also worked at the Elgin Fish Shop for a short period of time albeit she was pregnant and had to stop working. But via their lawyer, the respondents have told the Authority that the Elgin Fish Shop closed on 28th April 2005, and this is confirmed in statements from Mr John Crawford and Mr Cannon Crawford (the sons of Mr Whare Crawford). If this is so, then it is not possible for Ms Kiri and/or her daughter to have worked there during the time alluded to by them.

[9] There is also a sworn affidavit from Mr Casino Egypt Smith, a shearing contractor. He attests that Ms Kiri worked for him as a casual wool handler then she went to “the fish ‘n chip shop in 2005” and subsequently returned as a wool handler. Mr Smith says that he remembers Ms Kiri saying that she worked for Mr Crawford and “he owed her money.”

[10] I note that there is little evidence from Ms Kiri about any tangible efforts made by her to pursue the wages she alleges that she is owed, or to take advice about her overall circumstances relating to her purported employment with the respondents. Ms Kiri explains this failure to act by informing that she has worked for many years in shearing gangs and has never had an employment agreement; nor was she aware of the requirement to raise a personal grievance within 90 days.

[11] It is submitted for Ms Kiri that it is just to allow her to raise a personal grievance out of time. While accepting that the length of the delay in this case “may appear to be a difficulty to overcome” for Ms Kiri, the submissions add that this is only one factor and must not be considered as a barrier in itself. Counsel for Ms Kiri submits that there are two reasons for the long delay. Firstly, Ms Kiri was not told of her rights and/or obligations regarding bringing and personal grievance within 90 days. Presumably, the inference is that the respondents failed to inform Ms Kiri of such rights and obligations, but given that they deny that they ever employed Ms Kiri,

this argument comes against a substantial barrier. Then it is espoused that Mr Crawford “promised” that he would pay Ms Kiri the purported arrears of wages and because this “promise” went on for four years, Ms Kiri altered her position based on the purported promise. While it is possible to accept that this argument might have some merit in regard to the arrears of wages claim, it does not explain the delay in obtaining professional advice in regard to the constructive dismissal allegation that is the subject matter of this determination.

The arguments for the Respondents

[12] The primary argument for the respondents is that Ms Kiri was never employed by them hence it logically follows that she could not be owed wages, nor could there be a constructive dismissal. It is also submitted that there is no “causal link” between the exceptional circumstances advanced by Ms Kiri and the length of the delay – some four and a half years. Counsel for the respondents also points to Ms Kiri’s failure to obtain professional advice; at any time, and the lack of any explanation in regard to this failure. Finally, the respondents submit that in all the circumstances, it would be unjust for the Authority to allow Ms Kiri’s alleged grievance to be raised so far out of time.

[13] The respondents largely rely on the fundamental assertion that Ms Kiri was never employed by them and have not seen fit to provide any affidavit evidence. But a written statement has been provided by Ms Courtney Maureen Crawford, the daughter of Mr Whare Crawford. Ms Crawford states that she was present at the two shops every day and “there is no way” that Ms Kiri or any of her family ever worked at the shops. Ms Crawford refers to Ms Kiri being very noisy and that she “hung around for money and free food” and that Ms Kiri was “a heavy drug user” and always needed money “to feed her habit.” Ms Crawford alleges that Ms Kiri “is a liar and a thief” and she is strident in her condemnation of Ms Kiri’s character in other regards. There is also a written statement from Mr Skippy McKilliam who states that he spent “a lot of time” with the Crawford family and had seen Ms Kiri sitting at the back of “the shop” talking to Mr Crawford but not working.

[14] There are the written statements before the Authority from Mr John Crawford and Mr Cannon Crawford (referred to above). Mr John Crawford states that he

worked at the London Street Fish Shop from the last week in February 2005 through to 28th September 2005. Mr Cannon Crawford worked at the Elgin Fish Shop from the first week in November 2004 until it closed on 28th April 2005. Both of these men say that Ms Kiri never worked at the Elgin or the London Street Fish Shops. They also say that Ms Kiri came to the shops and asked Mr Whare Crawford for money which he gave her and then she would leave.

Analysis and Conclusions

[15] Given that Ms Kiri has made an application for leave to raise a grievance after the expiration of the 90-day period, pursuant to s 114(4) of the Act, and having heard from the employer, leave may be granted 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 section 115); and
- (b) considers it just to do so.

[16] Then relevant to Ms Kiri's claims, s115 provides that exceptional circumstances include:

- (a)
- (b)
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be;
- (d)

But as already mentioned, the respondents deny that Ms Kiri was ever an employee and so there is no employment agreement; written or implied, or any other tangible evidence of an employment relationship that can be ascertained from what is currently before the Authority.

[17] This of course raises a substantive issue in that Ms Kiri is required to establish that an employment relationship actually existed in order to entitle her to bring a problem under the jurisdiction of the Authority; let alone whether she is able to pursue a personal grievance out of time. This matter has been discussed via a further conference call with the parties prior to this determination being issued. Ms Bendall, for the applicant, and Mr Wolff, for the respondents, acknowledge that Ms Kiri is

required to establish the existence of an employment relationship before any of her other claims can be determined. Nonetheless, both counsel have indicated that it would be helpful for the Authority to issue a preliminary determination as to whether (or not), subject to an employment relationship being proven, there are exceptional circumstances pursuant to sections 114(4) and 115 of the Act, that would indicate that leave should be granted by the Authority for Ms Kiri to raise a grievance after the expiration of the 90-day period.

[18] Therefore with the consent of both parties and consistent with the problem resolution role of the Authority, and to assist counsel in regard to advising their respective clients, I have agreed to issue this preliminary determination on the condition that the matter of whether there was an employment relationship between the applicant and the respondents, remains to be determined, should this be necessary.

Should the Authority grant leave for the grievance to be raised after the expiration of the 90-day period?

[19] On the basis of the (untested) evidence available to the Authority, I find that there are no exceptional circumstances that would permit me to grant leave for Ms Kiri to raise her alleged personal grievance after the expiration of the 90-day period. I reach this conclusion on the basis that there is no evidence that Ms Kiri ever made any attempt to obtain professional advice in the four and a half years that elapsed, from the end of July 2005, when she alleges she ceased her employment, to 10th March 2010, when the grievance was raised. I do not accept that ignorance of her rights and obligations under the Employment Relations Act is any excuse for Ms Kiri to have left this matter unattended for the extraordinary time involved. And, I find that given all the circumstances associated with this very peculiar (and questionable) case, including the substantial time that has elapsed, it would not be just to grant the leave sought.

Determination

[20] I find that:

1. Ms Kiri failed to raise a personal grievance within the 90-day period required by s 114(1) of the Act.

2. The failure to raise the personal grievance was not occasioned by exceptional circumstances.
3. The application to raise a grievance outside the 90-day limit is unsuccessful.

Costs: The Authority is informed that both parties are in receipt of legal aid hence the matter of costs does not require any consideration unless the respondents indicate otherwise within 28 days from the date of this determination.

K J Anderson
Member of the Employment Relations Authority