

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Ray Laking (Applicant)
AND Maverick Services Limited (Respondent)
REPRESENTATIVES Andrew Gallie, Counsel for Applicant
No appearance for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 5 July 2006
MEETING Napier

DATE OF 6 July 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Facts

1. The facts below have been gleaned from the uncontroverted evidence of Mr Laking and his solicitor, Mr Andrew Gallie. The respondent (Maverick) elected not to be represented at this part of the investigation process. Having questioned Mr Laking and Mr Gallie directly I accept their evidence, as I accept their statements were likely to be accurate.
2. On 5 August 2004, Mr Laking was dismissed by the respondent (Maverick) with immediate effect, for failing to follow instructions, insubordination and lack of productivity. He claims that his dismissal was unjustified - because there were no discussions held with him prior to the issuing of a number of warnings and that two weeks before he was dismissed, further training had been recommended but had not been implemented.

3. Mr Laking had an appointment with a solicitor, Mr Gallie, on 9 August 2004. He instructed Mr Gallie to take the matter further and raise a personal grievance on his behalf during the course of that appointment.
4. Mr Gallie set about gaining further information from Maverick and Mr Laking's union. He did not, however, diary in, as was his normal practice, a bring up date for ensuring that the 90 day timeframe was adhered to.
5. Other than seeking information from Maverick and the union, Mr Gallie failed to take any direct steps on Mr Laking's behalf to raise the grievance, despite a number of phone conversations between the two during the next few weeks. When Mr Gallie did remember to raise the grievance, it was not in fact raised until the 91st day and thus was outside the 90 day period required in the Act.
6. Maverick declined to consent to the personal grievance being raised after the 90 day period. Mr Laking has therefore applied under s.114 (3) to the Authority for leave to raise the personal grievance after the expiry of the 90 day period.

Determination

2. In order for the application to be successful, I must be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances, and consider it just to do so. Furthermore, in any case where leave is granted I must direct the employer and employee to use mediation to seek to mutually resolve the grievance. Section 115 sets out that exceptional circumstances include where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.
3. Given that I have accepted Mr Laking's evidence, it is clear that he made reasonable arrangements to have the grievance raised on his behalf by Mr Gallie. Having also accepted Mr Gallie's evidence, it is clear that Mr Gallie unreasonably failed to ensure that the grievance was raised within 90 days. It therefore follows that the test of exceptional circumstances has been made out.

4. I turn now to consider the justice of the case. Mr Laking's case does not appear to be without prospect of success, given the issues he and Mr Gallie have raised in relation to the warning procedures and the issue of further training. Furthermore, it appears apparent by the failure of Maverick to be represented at the investigation meeting on this application that it would suffer no prejudice should leave be granted to Mr Laking to pursue his personal grievance. I therefore consider it just for him to be able to do so.

5. I therefore grant the applicant, Mr Ray Laking, leave to raise his personal grievance after the expiration of the 90 day period against Maverick Services Limited. I also direct, pursuant to s.114 (5), Maverick Services Limited and Mr Ray Laking to use mediation, within 42 days of the date of this determination, to mutually resolve this personal grievance.

G J Wood
Member of Employment Relations Authority