New Zealand Employment Relations Authority Decisions

Lorigan v Infinity Automotive Limited (Auckland) [2016] NZERA 495; [2016] NZERA Auckland 340 (5 October 2016)

Last Updated: 1 December 2016

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 340
5353422

BETWEEN PETER D'ARCY LORIGAN

Applicant

A N D INFINITY AUTOMOTIVE LIMITED

Respondent

Member of Authority: James Crichton

Representatives: David Fleming, Counsel for Applicant

Rob Towner, Counsel for Respondent

Investigation Meeting: 24 August 2016 at Auckland

Date of Determination: 5 October 2016

FOURTH DETERMINATION OF THE AUTHORITY

History

[1] It is not appropriate that I traverse the history in any detail but for context, it is useful to provide the briefest summary. There was an unreasonable delay in the Authority dealing with this file; I discovered the file when I was cleaning out the Auckland office of the late Rosemary Monaghan after her death. As the previous Chief of the Authority, the file had been on her list and evidently had been completely lost sight of.

[2] Having established that the parties wished to have the matter proceed, I undertook to deal with it myself and give it urgency. I have done so. The first determination I wrote consolidated two cross-claims into one action and declined to remove the matter to the Employment Court, thus rejecting Mr Lorigan's application.

[3] The second determination concerned the resolution by me of three preliminary issues which were identified by counsel. I concluded that there was no accord and satisfaction, as Infinity had claimed, I declined Mr Lorigan's application to raise unjustified disadvantage grievances as being out of time and I dismissed Mr Lorigan's claim against Sime Darby with which I was satisfied he had never had an employment relationship.

[4] My third determination refused to remove the whole matter to the Employment Court because there were no complex issues of law involved and in any event, one aspect of the relief sought by Mr Lorigan could only be initiated in the Authority and not in the Court.

This determination

[5] The issue in play in the current determination is an application by Mr Lorigan to raise a grievance out of time in terms of

s.114 of the Employment Relations Act

2000 (the Act). Mr Lorigan wishes to have his unjustified disadvantage grievance considered, and that application is necessary because in my second determination, as I have just noted, I held that the disadvantage grievances had not been raised within time and therefore could not proceed. I observe for the sake of completeness, and because it is relevant to the submissions of the parties, that Mr Lorigan has challenged my second determination in respect of that part of my decision.

[6] Infinity resists Mr Lorigan's application for leave to bring his disadvantage grievances outside of the 90 day period (the justiciable period), denying that there are in fact exceptional circumstances for the very long delay in bringing the matter to the attention of the employer, denying that Mr Lorigan had made *"reasonable arrangements"* to have those unjustified grievances raised by his then lawyer, Ms Emma Butcher, and that whether or not exceptional circumstances exist, the Authority ought to use its discretion to refuse leave because it would not do justice between the parties for leave to be granted.

[7] Interestingly, the submissions for Infinity also advance the proposition that as Mr Lorigan's challenge to my second determination proceeds on the footing that the disadvantage grievances have already been raised (before he says that he instructed his then lawyer to raise them which she allegedly failed to do), it is difficult to see

why he should need to claim, as he does in this proceeding, that Ms Butcher failed to do something which it seems he maintains he has already done.

The issues

[8] It will be useful if I consider the following issues: (a) The relevant law;

(b) Whether there are exceptional circumstances; and

(c) What the justice of the case requires.

The relevant law

[9] It is apparent on a proper construction of ss.114 and 115 of the Act that the circumstances listed in s.115 are no more than examples of the kinds of exceptional circumstance that might exist to preclude a person from fulfilling their statutory obligations. It follows that the question for the Authority must then be the broader question of whether exceptional circumstances exist rather than whether the factual matrix in the present case fits within one of the statutory circumstances referred to in s.115.

[10] That brings us back to what exceptional means in the context of the statutory provision and *Creedy v Commissioner of Police* [2008] NZSC 31 has resolved that question by identifying that exceptional means unusual. So the high water mark achieved by *Wilkins & Field Ltd v Fortune* [1998] NZCA 711; [1998] 2 ERNZ 70 had ebbed somewhat by the effect of the Supreme Court's decision in *Creedy*.

[11] However, Mr Lorigan's application proceeds exclusively in reliance on s.115(b) of the Act and for convenience I set out that provision in full:

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.

[12] It is important to note that this provision is conjunctive, that is to say, it is necessary to demonstrate not just that reasonable arrangements were made but also that there was an unreasonable failure by the agent.

[13] A number of well-known cases deal with the question whether proper arrangements were made. Simply engaging with a solicitor but not instructing that solicitor to raise a specific grievance is not enough: *McMillan*1; nor is it enough to be actively involved with the agent unless there is again, a specific instruction to raise a specific grievance: *Melville*2; and this is so even where there is an avowed and acknowledged intention to either *"go to Court"* or be represented by the agent in a hearing about the personal grievance: *Melville*; and certainly requires more than an avowed intention *"to take matters further"* and/or to challenge the dismissal and seek compensation: *Waitai*3.

[14] On the question of where the interests of justice lie, I have been helpfully referred by the applicant's counsel to cases involving the power to validate informal proceedings in terms of s.219 of the Act: *Ball v Healthcare of New Zealand Ltd* [2012] NZEmpC 91 dealt with the lodgement of personal grievance proceedings more than three years after the grievance was initially raised and so concerns analogous issues to the ones in play here. In *Ball*, the Employment Court held that relevant considerations included:

(i) The reason for the omission to bring the case within time; (ii) The length of the delay;

(iii) The prejudice to the other party;

(iv) The effect on the rights and liabilities of the parties; (v) Subsequent events; and

(vi) The merits.

[15] Again, it is emphasised in *Ball* that this is not a closed list. Moreover, that same list of considerations form the basis for the Court's consideration in two subsequent cases.

[16] Another decision, as it happens an earlier decision of mine (*Baynes v IAG New Zealand Ltd*4) which involved a 4½ year gap between the dismissal which allegedly grounded the grievance and the date of my determination, the Authority was invited to allow the raising of the grievance out of time. The gravamen of that decision really is that the prejudice to the employer was so great, given the passage of time, that it

would be unjust to allow the matter to proceed.

1 *McMillan v Waikanae Holdings (Gisborne) Ltd* [2005] NZEmpC 53; (2005) 2 NZELR 402 (EC)

2 *Melville v Air New Zealand Ltd* [2010] NZEmpC 87

3 *Chief Executive of the Department of Corrections v Waitai & Ors* [2010] NZELR 627 (EC)

4 *Baynes v IAG New Zealand Ltd* [2015] NZERA Auckland 304

Do exceptional circumstances exist?

[17] I have already made clear that the Supreme Court has determined that exceptional in this context means unusual so the question for the Authority is whether the circumstances are unusual. But while as counsel for Mr Lorigan correctly points out, the list of circumstances set out in s.115 of the Act is not a closed list, it is important to note that Mr Lorigan's application to the Authority proceeds exclusively on the basis of s.115(b) and on no other ground.

[18] It follows that that is the basis on which Infinity has dealt with the matter since that is the case it has to meet.

[19] I deal first with the issue of whether Mr Lorigan made proper arrangements to have the disadvantage grievance or grievances raised. I address first the point that the focus of Infinity's response has been wrongly directed at the number of the alleged disadvantage grievances (15 in total). It matters not at all whether there are 15 disadvantage grievances or one and it is somewhat specious for Mr Lorigan to now complain that the focus of the respondent is on the number of disadvantage grievances because it was his then counsel who pleaded those grievances in that way. Presumably, if that was not what Mr Lorigan wanted, he should have said so to his lawyer at the time.

[20] In any event, the question for this Authority now is whether proper arrangements were made by Mr Lorigan for one or more disadvantage grievances to proceed. Relying on the decided cases that I have already referred to, I am not persuaded that Mr Lorigan did make proper arrangements for his then counsel, Ms Emma Butcher, to raise disadvantage grievances.

[21] It is clear that it is not enough to simply engage with a lawyer and expect them to work out what to do: *McMillan*. The lawyer must be instructed and there is no evidence whatever before this Authority that Mr Lorigan ever instructed Ms Butcher to raise disadvantage grievances.

[22] Ms Butcher, a well-regarded and busy specialist employment lawyer, answered a summons from me to give evidence in this matter and in advance of so doing, to provide me with a copy of her file which I was to on-send to counsel so that we all had the ability to prepare appropriately for the giving and taking of her evidence.

[23] Put shortly, there is nothing on that file nor in the oral testimony that she willingly gave in my investigation meeting, which would suggest that she was instructed to raise disadvantage grievances.

[24] Ms Butcher told me that she did not believe Mr Lorigan had ever told her to raise disadvantage grievances. She also told me that like all prudent lawyers, she made file notes of all her attendances and we have those file notes on her file. There is nothing in any of them that resembles an instruction from Mr Lorigan to raise disadvantage grievances.

[25] Moreover, the terms of engagement letter dated 25 January 2010, which was sent by Ms Butcher's firm to Mr Lorigan, refers exclusively to an unjustified dismissal claim. There is no dispute that that was raised within time and is on foot.

[26] Moreover, Ms Butcher made it abundantly clear in her oral evidence to me (and this is confirmed by her file) that it was not until the date of that terms of engagement letter, 25 January 2010, that she commenced representing Mr Lorigan; prior to that, although there had been contact between them, she was offering no more than a sounding board and did not understand there was any expectation that she was acting until the date of the terms of engagement letter. Certainly, it was abundantly clear from her evidence that she gave Mr Lorigan no advice until that date.

[27] Nor am I attracted by Mr Lorigan's claim that while he acknowledged that he did not specifically say to Ms Butcher that

he wanted her to raise disadvantage grievances, he thought that she somehow knew that he wanted her to do that because she understood his case.

[28] Illustrative of that assertion is the chain of engagements between the two protagonists starting with Mr Lorigan's email to Ms Butcher dated November 30

2009. First, that email predates Ms Butcher commencing to act for Mr Lorigan and even on his evidence was only given to her to provide *"background"*. The email was sent fully two months before Ms Butcher began to act.

[29] Second, the email contains a reference to disadvantage but no reference whatever to a disadvantage grievance and certainly no statement that Ms Butcher was to raise a personal grievance for disadvantage on his behalf.

[30] Moreover, when Ms Butcher started to act for Mr Lorigan and prepared for him a letter to the employer, that letter, which Mr Lorigan appears to have been delighted with based on his response, does not raise any unjustified disadvantage grievance.

[31] Moreover, it is difficult to see how Ms Butcher could have dealt with the disadvantage claim in any event because by the time she acted for Mr Lorigan, the majority of the issues pleaded in the 19 December 2012 amended statement of problem would have been well out of time anyway. Indeed, if Infinity's submission on the point is to be accepted, all of the disadvantage grievances happened more than

90 days before Ms Butcher was instructed.

[32] I am satisfied then that Mr Lorigan made no proper effort to instruct Ms Butcher to raise disadvantage personal grievances and that is evident, not only from Ms Butcher's evidence and a perusal of Ms Butcher's file, but also from Mr Lorigan's evidence where he makes it abundantly plain that he did not instruct Ms Butcher to raise a personal grievance and seems rather to have expected her to come to an appropriate conclusion for herself. Moreover, the fact that even if there had been proper instructions as the law requires, those instructions would have already lacked timeliness seems to militate against any possible conclusion that Mr Lorigan has made reasonable arrangements to have the personal grievance raised.

[33] Furthermore, it is difficult to understand why Mr Lorigan would want to rely on Ms Butcher raising these matters, and to now complain that she did not raise them, when his challenge before the Employment Court proceeds on the footing that he himself raised these matters with the employer and he raised them within time.

[34] It is difficult to understand why Mr Lorigan would say (as he does in paragraph 12 of his brief of evidence) that Ms Butcher should have told him what to say when engaging with the respondent around the personal grievance if his position is that he has already raised the grievances by the time he engaged Ms Butcher as counsel. According to Mr Lorigan, the disadvantage grievances were all raised by him and raised by him during the employment so it is difficult to understand why he would now say that Ms Butcher should have raised them when he did not instruct her until after the employment ended.

[35] Mr Lorigan's evidence appears to be contending both that he himself raised the disadvantage grievances during the employment, and that Ms Butcher was told to raise them after the employment ended , notwithstanding that those grievances, by the time he instructed Ms Butcher, were out of time.

[36] Because I have not concluded that Mr Lorigan made any reasonable arrangements to have Ms Butcher raise the disadvantage grievances, there is no basis on which I need to inquire whether she made any reasonable steps to raise the grievances as I am satisfied she had no proper instructions so to do.

What does the justice of the case require?

[37] I confess to having real difficulty with the notion that the justice of the case requires the granting of leave to progress an alleged personal grievance some seven to eight years after the events complained of. Moreover, it seems to me that to grant such an application would be inconsistent with case law.

[38] Applying *Ball*, the first question is the reason for the omission in bringing the case within time, or in our circumstances in raising the grievance within time. On the material before me, I have yet to understand why there was that omission. If I deduct the portion of the delay that the Authority is entirely responsible for, there would still seem to be a three or four year delay between the events complained of and the proper documentation of the various claims in the amended statement of problem dated

19 December 2012.

[39] Conversely, if the claims were actually raised by Mr Lorigan himself in his engagement with the employer while the employment enured, then, as I have already noted earlier in this determination, it is difficult to see why the present application has been made because either the grievances were raised by Mr Lorigan (in which case there can be no issue about Ms Butcher's engagement) or they were supposed to be raised by Ms Butcher and were not (which raises the question

of why Mr Lorigan gave evidence to the effect that he raised the matters himself).

[40] The next consideration from *Ball* is the length of the delay and at three to four years it is well beyond the sort of inadvertent miscounting which happens from time to time and as I have already noted, is within the range where decided cases would suggest there had been too much time between the events complained of and the notification of the problem.

[41] The next consideration is the prejudice or hardship to the other party and here I am satisfied on the evidence of Mr Leathley that there would be significant prejudice to Infinity in allowing this matter to proceed now. Much if not all of Mr Lorigan's grievance is related to the activities of his then manager, Mr Gilmour, and Mr Leathley's evidence is that Infinity has had no contact with Mr Gilmour since

2010, some six years ago.

[42] Moreover, a number of the human resources people who worked on the file are no longer employed by Infinity which again poses real strain on the ability of Infinity to deal appropriately with Mr Lorigan's complaints.

[43] The final aspect that I desire to refer to very briefly is the merits of the case. I have not heard evidence in a fulsome way on the matters Mr Lorigan relies upon in relation to the disadvantage grievances and so it would be unwise of me to form a doctrinaire view about whether those matters had any particular merit or not. However, at an indicative or preliminary level, I am able to offer the observation that it seems to me, together with the passage of time and the associated unavailability of relevant witnesses from Infinity's perspective, there is also an apparent absence of documentary evidence to support the alleged grievances.

[44] As I have already observed, the whole point of the justiciable period in the legislation is to provide an opportunity for the employer to be seized of the complaint from the employee at the earliest possible date and with sufficient particularity to enable the matter to be resolved quickly and with the least cost to the parties. That central principle would be completely abrogated by granting the application Mr Lorigan promotes in the present proceeding.

[45] I must conclude that the overall interests of justice require me to dismiss the present application for leave to raise a personal grievance or grievances out of time.

Determination

[46] I have not been persuaded that it would be in the interests of justice for Mr Lorigan to be granted his application for leave to raise a personal grievance out of time and his application to that effect is accordingly dismissed. I have concluded there are no exceptional circumstances and that the justice of the case does not require the granting of leave.

Costs

[47] Costs are sought by Infinity. I direct that counsel are to engage with each other to see if costs can be settled by agreement and failing agreement leave is reserved for Infinity to apply to this Authority for costs to be fixed.

[48] Mr Lorigan will have 14 days from the date Infinity's submissions are served

on him to respond.

[49] I advance the view, without deciding the matter, that as the Authority must still investigate the dismissal grievance, which is still on foot, there is an argument for the view that costs could reasonably be dealt with at the end of that process.

James Crichton

Chief of the Employment Relations Authority