

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 236
5436570

BETWEEN CELROY MASCARENHAS
 Applicant

AND HELIPRO AVIATION
 TRAINING LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Ken Usmar Advocate for Applicant
 Mark Beech and Hester Sutherland-Stacey, Counsel for
 the Respondent

Investigation Meeting: 13 May 2014 at Tauranga

Submissions Received: At the investigation meeting 13 May 2014

Date of Determination: 16 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Mascarenhas filed a statement of problem on 1 October 2013 with various claims for unjustified disadvantage against Helipro Aviation Training Limited (Helipro). He relies on a letter purporting to raise personal grievances with the employer on 27 August 2013, and claiming a constructive dismissal. The respondent replied claiming that the personal grievance was out of time, since the matters raised related to issues between November-December 2012 and at the latest the end of April 2013. Helipro has not consented to the personal grievance being heard out of time.

[2] Also, Helipro through its solicitors provided on 18 September 2013 Mr Mascarenhas's representative with a letter of termination of employment dated 8 March 2013. It is claimed that Mr Mascarenhas was given the letter by Mr John Read, director, on 8 March, but Mr Mascarenhas denies that he was given the letter until he received it through his representative.

[3] There is an issue since the close of the investigation meeting about the admissibility of information. At the time of final submissions I ruled that information Mr Usmar was attempting to introduce in his final submissions was inadmissible. I gave my reasons at the time. The reasons have been recorded by the respondent correctly in a memorandum dated 19 May 2014. The respondent has objected to the additional information based on the Authority making a ruling at the investigation meeting that the documents were inadmissible during submissions and that to consider them now would be prejudicial as to the content without more evidence and could involve extra cost, and when the information was not relevant. There was no advance information prior to the Authority's investigation meeting about what was involved and any difficulties in obtaining any information and it was not introduced during the evidence, and in any case little weight could have been given to the documents at such a late stage without witnesses. Given that there had been ample notice of the investigation meeting it was not reasonable to have a delay. Such information could have been reasonably provided earlier. The applicant has personally submitted more documents since the investigation meeting without any reference to his representative. Mr Usmar remains on the record as representing Mr Mascarenhas and has asked the Authority to determine the matter on the basis of the evidence in the investigation meeting and the submissions (without making a determination on the admissibility of the information being required). I am relying on that.

[4] At the outset of my involvement in the matter I considered sending the parties to mediation as they had not been. I decided it was too early to send them to mediation given that the respondent opposed mediation, that there were three preliminary matters in regard to the grievances (1) purportedly being raised out of time, (2) the employer's decision not to consent to the grievances being heard out of time, and (3) the dispute over whether or not there had been a dismissal. Further consideration on mediation was reserved on the outcome.

The issues

[5] The primary matter for the Authority is to determine whether or not the claims for unjustified disadvantage and the claim for constructive dismissal based on a letter dated 27 August 2013 were raised in 90 days with Helipro. Mr Mascarenhas is relying on the events that occurred between November-December 2012 and April 2013. In submissions it is claimed that the matters did not come to Mr Mascarenhas's

notice until he decided to approach Mr Usmar for assistance sometime in August 2013 because he was frightened, fearful and intimidated, and being the first time that he was aware that he had rights to raise a personal grievance.

[6] The claim for constructive dismissal conflicts with his claim that he had not been dismissed. He says he used the wrong choice of words in raising his personal grievance at the time. This is an unusual situation where the applicant denies being dismissed and it is the respondent that asserts that there was a dismissal, but that there was a change in the employment relationship. However the claim is a signal that Mr Mascarenhas had some knowledge of the causes of action much earlier than 27 August.

[7] An underlying issue is that Mr Mascarenhas claims that he was never dismissed on 7-8 March 2013. There is clearly a credibility issue involved with the claim.

[8] The Act makes provision for raising a personal grievance. The provision reads as follows:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter, unless the employer consents to the personal grievance being raised after the expiration of that period.

The facts

[9] Mr Read is the business manager of Helipro Aviation Training Limited (Helipro) located in Tauranga. Helipro offers a variety of professional pilot programmes and instruction (for helicopter and fixed wing aircraft).

[10] Mr Mascarenhas was employed by Helipro for some time before the parties signed off an employment agreement dated 25 February 2013. Under the employment agreement Mr Mascarenhas' position was that of International Manager IB – Category Flight Instructor/Multi Engine Flight Instructor. The agreement made provision for the remuneration for the position and the recovery of any overpayments, debts owing to the employer or payments advanced to the employee. It also included the dispute

resolution procedures as required under the Employment Relations Act (the Act), including information in regard to the 90 day requirement to raise any personal grievance. Mr Mascarenhas accepted that he understood the conditions of employment and accepted them fully when he signed off the agreement.

[11] At the same time Mr Read sent a letter dated 25 February 2013 to Immigration New Zealand that supported Mr Mascarenhas in regard to his visa issues and referred to his continued employment with Helipro.

[12] During the latter time in Mr Mascarenhas's employment there were a number of workplace issues and a matter involving Mr Mascarenhas and his involvement in a flight to Nelson that required an internal investigation. Mr Mascarenhas was required to cease flying and he was deployed to narrower duties involving recruiting. An internal report was written, but not provided to Mr Mascarenhas until the Authority's investigation.

[13] Mr Read says that subsequently he had no choice, but to dismiss Mr Mascarenhas on 7 March 2013. The decision was formalised with the letter dated 8 March 2013 that he says he gave to Mr Mascarenhas on the same day. Mr Mascarenhas denies receiving the letter at the time. He relies on the prior correspondence from Mr Read to Immigration New Zealand and the completion of the employment agreement to support his claim that he remained employed. Mr Read says that after 8 March Mr Mascarenhas agreed to be paid for recruiting students that involved narrower duties and a payment regime by commission. Mr Read says he intended the arrangement to be as an independent contractor, but accepts nothing was formally put in writing. Mr Mascarenhas's final commission payment was made on 28 April 2013.

[14] Mr Mascarenhas's claims for personal grievance were raised with Helipro on 27 August 2013 and related to a number of matters that occurred between November-December 2012 and April 2013.

Determination

[15] This determination is focussed on determining whether or not the personal grievance was raised in time. Because of the way in which the investigation meeting unfolded with submissions being made on exceptional circumstances I have made a

determination on that because I am able to on the evidence in the investigation meeting and the submissions that covered exceptional circumstances.

[16] The raising of the personal grievance is outside the 90 days required under s.114 of the Employment Relations Act 2000 (the Act) based on the letter raising the grievances on 27 August 2013. The decision for this is based on the dates on which the actions alleged to amount to personal grievances occurred.

[17] However that is not the end of the matter. It was submitted that the matters allegedly amounting to grievances came to Mr Mascarenhas's notice much later (in August 2013) when Mr Mascarenhas asked his representative for help. One of the features of this particular case is that Mr Mascarenhas upon raising his personal grievance with his employer on 27 August failed to include the details and particulars in the letter, particularly of the dates of the events that he was relying on. Moreover he only generally alluded to a claim of a *campaign of ostracism and bullying in the workplace*, without giving Helipro the details that he was claiming. It seems these relate to the period in March 2013, and Mr Mascarenhas confirmed the dates in his evidence when he was cross examined. At all times there has been no recognition by Mr Mascarenhas and his representative that there was an out of time matter, until the Authority's intervention, and this has been despite the respondent making its position clear on refusing to give consent for the matter to be heard out of time.

[18] The cross examination of Mr Mascarenhas by Mr Beech in regard to the letter dated 27 August 2013 satisfies me that the events relied upon to claim personal grievances of unjustified disadvantage are the matters referred to in the letter and as such are each outside the 90 days. If Mr Mascarenhas is to be believed that he used the wrong choice of words in making a claim for "constructive dismissal" in the letter dated 27 August then I accept that he says he was wrong, but by this time he was represented by a professional employment advocate and that it is reasonable to conclude that he would have been fully informed of the causes of action available when the letter was written. It seems to be a mistake. There is no claim for any constructive dismissal and I am further supported in making this conclusion by the absence of any resignation.

[19] Mr Mascarenhas personally has not explained the reasons for the delay in raising his personal grievance in his evidence. He had no supporting evidence from any other independent witnesses. His evidence did not cover off the matter, until his

representative gave his submissions (and tabled a copy in writing) and referred to Mr Mascarenhas's unawareness of being dismissed at the time, unfamiliarity with the New Zealand law, and his belief that he would be allowed to return to flying. There are two points that arise from the matter of the delay. The first is that the length of time that elapsed from April 2013 until August 2013 that relates to the delay in raising the grievance (for any exceptional circumstances), and second the time elapsed relates to the time that Mr Mascarenhas says he did not know that the action alleged amounted to a personal grievance before he got assistance from a professional advocate. Dealing with the latter first, Mr Mascarenhas used and/or engaged with other agencies during the same time (CAA and the Police). Also, he had to convince his family that he wanted to stay and return to flying in New Zealand. Indeed at the Authority's investigation he tried to introduce new evidence by way of a Police report and/or statement during submissions, which I disallowed because no one had been called to support the evidence and to be questioned on it, and there had been no notice of the content of the statement's existence and any difficulties in obtaining it before the investigation meeting and during the Authority's timetable for documents and statements of evidence to be provided. Such information could have reasonably been provided for the Authority's investigation meeting and provided properly. Also as the document was not introduced properly and without being able to question any witness in regard to the document, little weight would be given to the information. I hold that Mr Mascarenhas would have known about the matters when they happened, which is supported by him acknowledging that he understood the terms of the employment agreement for the dispute resolution processes, and for him to get advice earlier.

[20] Next, the second point relates to his representative's submission that Mr Mascarenhas was frightened, confused and ignorant of the law, that he was an immigrant and he was waiting to get responses from Helipro, to explain the delay for any exceptional circumstances. I am not satisfied these explain the delay in the time that elapsed when all of these matters were in reality involved in the complaints and concerns and issues applying at the time that he had in his employment with the students and Helipro, and he engaged with other agencies and had to convince his family that he wanted to stay in New Zealand and return to flying. I accept that he may have felt there were difficulties in his life and employment, but he has not persuaded me that they were the cause for any delay.

[21] Also there is no claim associated with a dismissal. First because Mr Mascarenhas denies that he was dismissed. Second there is no relief sought in the statement of problem for a dismissal, particularly as he denies that he received the letter dated 8 March 2013 until it was provided by Helipro's lawyers on 18 September 2013. I hold that Mr Mascarenhas knew that there was an issue in his employment at least by 7-8 March by which time he was required to stop flying, that there was a change in the remuneration arrangements and his duties were narrowed, or when all his payments stopped, and later when he left Helipro's premises and requested holiday pay. There is proof of the existence of the 8 March 2013 letter, but there is a dispute between Messrs Mascarenhas and Read that Mr Read handed Mr Mascarenhas the letter. Suffice to say it is not necessary for me to make particular findings around this aspect of the matter in dispute because there is no claim for a dismissal. The statement of problem has never been amended to include such a claim. Furthermore, if there is any claim that somehow in his employment Mr Mascarenhas has been treated unfairly in any process there are no particularised claims about what processes were being complained about that are usually associated with a dismissal and/or any claim of unjustified action. The claims were too broad and too general. Such matters have clearly not been raised.

[22] In addition Mr Mascarenhas has concerns about Helipro's internal investigation report produced during the Authority's investigation. If the document was in any way used by the respondent in reaching a decision at the time then Mr Mascarenhas should have been given it much earlier. Indeed as such it would have an impact on the respondent's justification of a dismissal. However, that is a matter of substance and there is nothing about the document that suggests it is the basis upon which Mr Mascarenhas says the grievance came to his notice much later.

[23] In his statement of problem filed in the Authority Mr Mascarenhas accepts that there was at least some change in his relationship with Helipro after April 2013, because he is making a claim for lost wages from 30 March 2013 in regard to his wages ceasing, and he had stopped flying, and he was only required to recruit students. He asked to be paid out his holiday pay. The parties have an issue from 8 March about the real nature of the relationship because of the commission payment arrangement and narrower duties and the different views they have about their intentions. Also Mr Mascarenhas's last salary payment and payment of holiday pay and deductions was made by 31 March 2013. The deduction was permitted under the

terms of the employment agreement that Mr Mascarenhas acknowledged. A final commission payment was made by 28 April 2013. After that no other payments were made in regard to the relationship and/or any other arrangement and Mr Mascarenhas had left the premises. I hold that on the basis of the above Mr Mascarenhas knew of the actions at the time that related to him raising a personal grievance late.

[24] It follows that the raising of the personal grievance claim was outside the 90 days.

[25] In the alternative Mr Mascarenhas has put forward a claim for exceptional circumstances, albeit not formally on any notice, until final submissions at the Authority's investigation meeting. Both parties were ready and covered it off in their written and oral submissions to require a determination. There was no proper notice of the application being made and that matters relating to it were not addressed in the evidence from Mr Mascarenhas. An application to have the grievance heard out of time was always an alternative option open to Mr Mascarenhas, but should have had some formal notice and evidence, particularly as the matter was relied upon in submissions. Mr Mascarenhas has not established that the delay was occasioned by exceptional circumstances. This is because there was no particularised claim for exceptional circumstances in the statement of problem and indeed there has been no amended statement of problem to apply for exceptional circumstances following the Authority's directions conference. Therefore I can only consider the submissions made on the point at the Authority's investigation meeting. Despite all of this there is no evidence supporting any exceptional circumstances that apply under s 115 (a) - (d) of the Act other than what Mr Mascarenhas asserts he felt happened to him. The same applies for any reliance by him on the broader category of "exceptional circumstances" under s 114 of the Act. Mr Mascarenhas has not given any direct evidence and not provided any link between the events he has recalled and exceptional circumstances for causing the delay in raising the personal grievance on 27 August, including the assertion that he could not have obtained a representative earlier. I cannot accept the latter because he knew his rights as they were contained in the employment agreement.

[26] In addition any claim of fear and confusion, and being a migrant, and/or that he did not understand his rights to mean that he was ignorant of the law cannot be sustained. I cannot draw such a linkage between these matters and the delay. This is

because they did not prevent him making his own complaints, dealing with the CAA and dealing with the Police, dealing with Helipro and him trying to convince his parents of his wish to remain and get back to flying in New Zealand. He was able to take action elsewhere and with different agencies. Also ignorance of the law is not an exceptional circumstance, especially where Mr Mascarenhas has signed off an employment agreement and confirmed that he understood the terms of the agreement, which contained the 90 day requirement and dispute resolution requirements. For whatever reason he left the matter until August to get a representative. Mr Mascarenhas acknowledged that he knew of the provisions of the employment agreement and understood them. Moreover, I hold that Mr Mascarenhas had a very good understanding of the questions put to him by the Authority and in cross examination. He was able to clearly and assertively in a polite manner ask for any clarification when it was required and his answers were given in clear English. This is supported by his qualifications and role when he was employed by Helipro and his written documents. He is an intelligent person. He clearly understood the matters put to him during the Authority's investigation and could answer clearly, I hold.

[27] Furthermore, Helipro has faced inadequate notice on the justice of the matter to make submissions if there was a finding for a personal grievance to be heard out of time (if exceptional circumstances were the cause for the delay). The submissions reasonably attempted to cover the point and Mr Beech and Ms Sutherland-Stacey raised a valid point that a number of key witnesses would not be available as they were students and had returned to their countries of origin. This would in part raise one issue of prejudice to Helipro as regards to the availability of such witnesses associated with the claims. Equally there have been the matters raised by Mr Mascarenhas about the Police report and the internal investigation report that might apply to his case on the substantive matters and an assessment of the justice of the matter, but that comes too late as he delayed raising his grievances. Any extra costs would be a residual factor for consideration. I can glean from Mr Mascarenhas's evidence that there are a number of substantive issues that he genuinely believes are unjust. However without exceptional circumstances the matters cannot be taken into account.

Conclusion

[28] I hold that the personal grievances raised in the letter dated 27 August 2013 are (significantly) out of time. I hold that there are unexplained circumstances surrounding the letter dated 8 March 2013, and that there is an issue between the parties as to the real nature of the employment relationship, which would be the basis of a very different employment relationship problem. There is no claim of any unjustified dismissal because Mr Mascarenhas denies being dismissed, and he did not resign, and the only subsequent action can only relate to what the real nature of the relationship was after 8 March, because of any changes in the parties' arrangements. This includes that the actions alleged to amount to a personal grievance more likely than not came to the notice of Mr Mascarenhas by the end of April 2013, and not August 2013, by which time the employment relationship had well and truly come to an end.

[29] There has been a delay in raising the personal grievance by Mr Mascarenhas, and there are no exceptional circumstances for the delay in raising his personal grievance. Also despite any genuine belief by Mr Mascarenhas of the justice of the matters in the background that there may be real factors preventing any leave being given. I accept that Mr Usmar has genuinely raised a number of personal matters about Mr Mascarenhas and tried to enter these as exceptional circumstances to explain the delay, but they are not backed up by sufficient evidence to tip the balance that Mr Mascarenhas was aware of the causes of action for a personal grievance and/or that they came to his notice later, and that he was prevented from raising them earlier.

Order of the Authority

[30] The personal grievance claim is out of time.

[31] There are no exceptional circumstances and the delay has not been occasioned by exceptional circumstances.

[32] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority