

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 88
5614425

BETWEEN TAMA MATETE
Applicant
AND INNOVATIVE LANDSCAPES
(2015) LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: No Win No Fee Ltd (formerly Equitable Employment
Solutions Limited) represented by Peter Cahill, for the
Applicant
Andrew Mitchell, Counsel for the Respondent
Investigation Meeting: 15 June 2016 at Christchurch
Submissions Received: At the investigation meeting
Date of Determination: 17 June 2016

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE**

Employment relationship problem

[1] Tama Matete claims he was unjustifiably disadvantaged and unjustifiably dismissed.

[2] At the investigation meeting, I decided that the unjustified disadvantage claim was not a separate claim from the unjustified dismissal claim. Mr Cahill agreed with that decision so I only need to determine the preliminary issue for the unjustified dismissal grievance. Mr Matete has also made a claim that Innovative Landscapes (2015) Limited (IL) breached its duty of good faith to him and failed to supply wage and time records when requested.

[3] Mr Matete was suspended on 12 November 2015 pending a disciplinary investigation and dismissed by letter dated 19 November 2015. Based on the date of dismissal, the 90-day period after his dismissal expired on 16 February 2016.

[4] On 4 December 2015 Mr Matete's representative, Peter Cahill, posted a letter to IL. The purpose of the letter was to raise personal grievances.

[5] The letter was mailed to 37A Prestons Road, Redwood, Christchurch. In fact, the address of IL is 237A Prestons Road, Redwood, Christchurch. The letter never arrived at IL's premises.

[6] Mr Matete's application to the Authority was lodged on 10 March 2016.

[7] IL alleges that Mr Matete failed to raise his personal grievance within 90 days of his dismissal. It does not consent to the grievances being raised outside of the 90-day period.

[8] Mr Matete says that he took all reasonable steps to raise his personal grievances within 90 days of him being dismissed.

[9] If I decide that Mr Matete's grievances were not raised within the 90-day period, in the alternative, Mr Cahill applied under s 114(3) of the Employment Relations Act 2000 (the Act) for the Authority to grant him leave to raise his personal grievances outside of the 90-day limit.

Procedural background

[10] The witness who originally received Mr Matete's instructions by telephone on 30 November 2015 is Jane Werohia-Praat. She works in Wellington so I arranged for her to appear at the investigation meeting by video conference.

[11] Mr Matete and Mr Cahill attended the investigation meeting in person. Ms Werohia-Praat appeared by video conference. Charles McNoe, the sole director and shareholder of IL, attended the investigation meeting. Mr Cahill, Mr Matete, Ms Werohia-Praat and Mr McNoe gave oral evidence and were questioned under oath or affirmation.

The issues

[12] I need to determine:

- (a) Was the grievance raised within 90 days of Mr Matete being dismissed?
- (b) If the grievance was not raised within the 90-day period, is it just to allow the grievance to be raised beyond the 90-day period?

[13] Under s 114(5) of the Act, if I decide to grant leave to Mr Matete to raise his grievance out of time I must direct the parties to use mediation to seek to mutually resolve the grievance.

Analysis and determination

When did the 90-day period expire?

[14] Section 114(1) of the Act provides that an employee must raise the grievance with his employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred. Mr Matete was dismissed on 19 November 2015 and so the 90-day period began to run that day. It expired on 16 February 2016.

Was the grievance raised within 90 days despite it being wrongly addressed?

[15] Mr Cahill says, and I accept, that on 4 December 2015 he posted a letter raising Mr Matete's grievance with IL. Mr Cahill says the letter was not returned to him although his return address was on the front, left, upper corner of the envelope. He says that Mr Matete told him that IL was unlikely to get back to him. Mr Cahill assumed the letter had been delivered.

[16] However, from early to mid-January 2016, he made three phone calls to IL's office to try and progress matters. He received no reply and was unable to leave a message. The first call was made on 6 January, while the business was closed for the Christmas/New Year holiday.

[17] Mr McNoe says that there is a mailbox at 237A Prestons Road where IL's mail is commonly delivered. He gave credible evidence that IL did not receive the 4 December letter from Mr Cahill.

[18] Mr McNoe says he first became aware that Mr Matete alleged he had been unjustifiably dismissed when he received the Statement of Problem at his home address. I accept his evidence. The Statement of Problem was delivered on 10 March

2016; the same day it was filed with the Authority. That was 23 days after the 90-day period expired.

[19] Despite accepting that he addressed the letter to the wrong address and despite Mr McNoe's evidence to the contrary, Mr Cahill submits that the grievance was raised within 90 days.

[20] Mr Cahill's view is difficult to support with logic. He has not said that IL did receive the 4 December letter or that Mr McNoe lied about not having received it. I accept it was not received.

[21] I find that Mr Matete's personal grievance of unjustified dismissal was not raised with IL within 90-days of his dismissal.

Was the delay in raising the grievance occasioned by exceptional circumstances?

[22] If I decide that Mr Matete's raising of his grievances was outside of the 90-day limit, I need to consider his application under s 114(4) of the Act:

(4) *On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

(a) *Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and*

(b) *Considers it just to do so.*

[23] That is a two-step test. I need to determine whether the delay in raising the grievance was occasioned by exceptional circumstances before I consider whether it is just to grant leave to raise the grievance outside the 90-day limit.

[24] Section 115 of the Act provides four examples of exceptional circumstances, but does not limit exceptional circumstances to these four categories. The only one of the four that may have applied to this case is:

(c) *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 the grievance was raised within the required time.*

[25] Mr Cahill did not rely on this. He and Mr Mitchell agreed that Mr Matete made reasonable arrangements to have the grievance raised within the required 90

days and that Mr Cahill, acting for EES who is Mr Matete's agent, took reasonable steps to raise the grievance.

[26] Mr Matete says that he is very unhappy that although he gave instructions to have his grievance raised within 90 days of his dismissal it may not have been. I have found that it was not.

[27] Mr Cahill made no submissions about why I should give leave to raise the grievance outside of the 90-day period. That was because he was so insistent that it had been raised within 90 days.

[28] Mr Cahill was well aware that if I found the grievance had not been raised within 90 days and I found there were no exceptional circumstances occasioning the delay Mr Matete would lose his opportunity to have his substantive personal grievance claim heard. However, Mr Cahill simply failed to consider or make submissions on the existence of any exceptional circumstances that could allow me to go to the next step of considering whether it is just to grant leave out of time. I do not consider that he did Mr Matete any favour in this regard.

[29] The Authority is an investigative body and has to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits and justice of the case, without regard to technicalities¹. Therefore, despite Mr Cahill's refusal to make any arguments on his client's behalf I can proceed to determine the application for leave anyway.

[30] I set out below some further findings of fact and my conclusion on whether there were exceptional circumstances.

[31] On 9 May 2016, Mr Cahill provided a very brief two-paragraph statement from Ms Werohia-Praat. Annexed to her statement was a two page document headed "*An employee client interview sheet*". It is dated 30 November 2015. Under the employer/company details, IL's address is noted as being 37A Prestons Road. On the second page, under the heading "*Case summary*", it is noted that Mr Matete wished to raise a personal grievance for unfair dismissal, unjustified disadvantage and a breach of good faith. Ms Werohia-Praat's interview states simply:

¹ Section 157 of the Act.

I am the Interviewer who took the case details for Mr Matete and sent the case to Peter Cahill (Advocate representative for Equitable Employment Solutions and Mr Matete).

Unfortunately, I made an administrative error and missed a number off the address. The number I noted was 37a Prestons Road, Marshland, CHCH 80151, however it is 237a Prestons Road, Marshland, CHCH.

I am available for phone video conference.

[32] In fact, at the investigation meeting Mr Cahill informed me, and Ms Werohia-Praat confirmed, that she had initially typed “37A Western Rd, Marshland” on the interview sheet and sent that interview sheet to Mr Cahill by email on 30 November 2015.

[33] Mr Cahill says that at his meeting with Mr Matete on 1 December 2015 he noticed that the road may have been wrongly named and asked Mr Matete if the address was “Prestons Road” not Western Road. Mr Matete confirmed it was Prestons Road and Mr Cahill handwrote that change on the interview sheet and later over-typed the version created by Ms Werohia-Praat.

[34] However, Mr Cahill did not check the correctness of the number of Prestons Road Ms Werohia-Praat had entered onto the interview sheet.

[35] At the investigation meeting, Ms Werohia-Praat elaborated on why she considered she had made an administrative error. She said that she usually does a Google search to check the validity of the employer’s address. She was not sure why she did not do so in this case. She may have been simply too busy. She says that when she trains people to be interviewers she always tells them they must check the addresses they are given.

[36] On 1 December 2015, Mr Matete granted EES the authority to act as his representative. EES undertook, among other things, to provide him a copy of all documents sent by it.

[37] The Supreme Court case *Commissioner of Police v Creedy*² is the leading case in defining what ‘exceptional circumstances’ means. The Court held that

² [2008] ERNZ 505

exceptional circumstances in s 115 of the Act were, as the Court of Appeal decided in *Wilkins & Field Ltd v Fortune*³:

circumstances which are unusual, outside the common run, perhaps something more than special and less than extraordinary.

[38] Mr Mitchell submitted that an administrative error, such as the incorrect street number being recorded and relied on, was not unusual but quite common and so could not reach the standard required to be exceptional circumstances.

[39] He also submitted that the *Creedy* case established that Mr Matete wrongly believing his grievance had been raised could not amount to the type of exceptional circumstance that needs to be proved.

[40] I agree with Mr Mitchell that administrative errors are not unusual or outside the common run. In addition, I agree that Mr Matete's mistaken belief is not an exceptional circumstance.

[41] However, I consider the combination of the following factors, some of which are not unusual in themselves, amount to exceptional circumstances:

- Ms Werohia-Praat recording the wrong street number and the wrong street name.
- Ms Werohia-Praat failing to check the employer's address contrary to her usual practice.
- Mr Cahill checking the street name, but not the street number. Or, if Mr Cahill did check the street number, failing to record the correct number which I am satisfied Mr Matete would have given had he been asked for it.
- Two of Mr Cahill's telephone calls to the IL during business hours not being answered or going to an answering service or voicemail despite office staff apparently being present in the office on those days.
- Mr Cahill failing to send Mr Matete a copy of the 4 December letter he sent to IL contrary to what EES undertook in the authorisation to act document. Mr Matete was overseas for at least part of December and

³ [1998] 2 ERNZ 70

January but Mr Cahill had his email address and mobile phone number. I am satisfied that if Mr Matete had seen a copy of the letter during December or January he would have seen the incorrect address and told Mr Cahill he had posted it to the wrong address.

- Mr Cahill's busy time with other business interests in January and February 2016, which meant he failed to file the application with the Authority until 10 March 2016 despite asking Mr Matete to pay the filing fee on 6 January 2016.

[42] I am satisfied that the combination of these exceptional circumstances occasioned the delay in raising the grievance.

Would it be just to grant leave to raise the grievance out of time?

[43] I need to consider whether IL would be disadvantaged in allowing Mr Matete's grievance to be raised after the 90-day period. The parties agreed that all, or at least the vast majority of relevant documentation, has been exchanged already. I am satisfied Mr McNoe was the decision maker and that he adequately remembers the relevant events. The grievance was only raised 23 days outside of the 90-day period.

[44] IL will not be unduly prejudiced if I grant leave for the grievance to be raised on 10 March 2016, the day Mr McNoe was first aware of the grievance.

[45] I also consider, as preliminary determination without having heard all the evidence, that there is some merit in Mr Matete's claim for unjustified dismissal, particularly when the procedural aspects are considered.

Conclusion

[46] I consider it just to grant leave for Mr Matete's unjustified dismissal grievance to be raised outside of the 90-day period. It was raised on 10 March 2016.

[47] The parties are directed under s 159 of the Act to attend mediation to attempt to resolve their differences in good faith.

[48] If mediation is unsuccessful, the matter will return to the Authority and the Authority Officer will arrange a teleconference to set a date for an investigation meeting.

[49] Costs are reserved. The parties should seek to resolve this issue in mediation too.

Orders

[50] **Tama Matete's personal grievance was not raised with Innovative Landscapes (2015) Limited within 90 days of the actions that he alleges give rise to the personal grievance.**

[51] **I grant leave to raise the grievance outside of 90-days on the basis that the delay in raising the grievance was occasioned by exceptional circumstances and it is just to allow the grievance to be raised outside of the 90-day period.**

[52] **I direct the parties to mediation. They must attend mediation in good faith to attempt to reach an agreed settlement of their differences.**

Christine Hickey
Member of the Employment Relations Authority