

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 81  
5330274

BETWEEN DANIEL ROY MAXWELL  
Applicant

AND WEATHERFORD NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: P R Stapp

Representatives: Kyle Macneil, for the Applicant  
Maree Kirk, Counsel for the Respondent

Investigation Meeting: 5 April 2011 at New Plymouth

Determination: 16 May 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant has applied for leave out of time to proceed with a personal grievance on the grounds of exceptional circumstances. The dismissal occurred on 31 December 2008. The personal grievance first came to the respondent's attention on 17 December 2010 when the statement of problem was filed by the applicant in the Employment Relations Authority. The respondent says that no personal grievance was raised earlier. Further, the respondent has not consented to the late raising of the personal grievance.

**The issues**

[2] Exceptional circumstances under s 115 (b) of the Act are relied upon by Mr Maxwell. No other exceptional circumstances are relied upon.

[3] The issues in this matter can be summarised as follows:

- (a) Did Mr Maxwell make reasonable arrangements to raise a personal grievance with his employer;
- (b) Did Mr Maxwell's agent unreasonably fail to ensure the personal grievance was raised;
- (c) Was the delay occasioned by exceptional circumstances;
- (d) If there are exceptional circumstances, is it just to grant leave out of time?
- (e) Both parties have claimed costs. The applicant is legally aided.

### **The facts**

[4] Mr Maxwell was employed by Weatherford New Zealand Limited (Weatherford). He worked for Weatherford for approximately seven months. He was dismissed on 31 December 2008. Mr Maxwell went to Work & Income which required a letter with details about his employment and how it had ended. He claimed that his case worker at Work & Income gave him a telephone number, "0800 SACKED" (EDS), and he talked to Alan Taylor from EDS to organise a letter for Work and Income to assist with the stand down period. Mr Taylor made an assessment about Mr Maxwell's employment relationship problem at that time. Mr Taylor produced a letter dated 6 January 2009 and confirmed that he sent this letter to Work & Income. The only action that letter alluded to was Mr Taylor's intention to initiate mediation with claims for a personal grievance. There was no other information in the letter of any instructions and or arrangements to raise a personal grievance with Weatherford. The letter was not copied or sent to Weatherford.

[5] A meeting was organised between Mr Maxwell and Mr Taylor at or about the end of January and/or start of February 2009. Mr Taylor did not remember having a meeting. Mr Maxwell is clear one occurred and thinks it was after he had received a copy of Mr Taylor's Work and Income letter (dated 6 January 2009) and that he received the letter through Work and Income. Initially he thought this was in January sometime. Alternatively this would probably have been in February because the letter (6 January 2009) was received by Work & Income on 10 February 2009 (there is no reason to believe that the file date, 10 February 2009, is not correct).

[6] Mr Maxwell says that after that he telephoned Mr Taylor regularly asking what was happening and if there were any mediation dates because he had not heard anything from Mr Taylor.

[7] Mr Maxwell claimed he continued to try and contact Mr Taylor by telephone and learned that Mr Taylor had left EDS and was working in Te Awamutu. Mr Maxwell says he became frustrated when he had had no information from Mr Taylor. Mr Maxwell says he by chance had a discussion with a representative from the Department of Labour and that person confirmed that no dates had been arranged for any mediation with the company.

[8] Mr Maxwell then went to the Community Law Centre. Mr Maxwell says he was told by the community lawyer that Mr Taylor had said he had raised a personal grievance. Mr Taylor denied that he had said anything of the sort and that the purported comments from the Community Law Centre need to be considered in context. Mr Taylor did accept that his usual practice would be to raise a personal grievance using an EDS template letter.

[9] A Community Law Centre letter dated 4 October 2009 stated that Mr Maxwell told the lawyer at the Community Law Centre that he had instructed Mr Taylor to raise a personal grievance in respect of the termination of employment at Weatherford. A subsequent scrutiny of Weatherford's personal file on Mr Maxwell found that no personal grievance had been raised.

### **Determination**

[10] Mr Maxwell's personal grievance had to be raised by 30 March 2009 to meet the requirements of the 90 day time in the Employment Relations Act 2000.

[11] Mr Maxwell accepted that the personal grievance was not raised within 90 days before 30 March 2009. Mr Taylor informed me that he did not raise a personal grievance and did not arrange any mediation for Mr Maxwell. I conclude this was because his intention was only to assist Mr Maxwell at the time with Work and Income. My reasons for this conclusion are:

- a. Mr Maxwell was given the telephone number for Mr Taylor at Work and Income.

- b. Mr Taylor wrote the letter for Work and Income.
- c. A copy of the letter was not sent to Weatherford.
- d. The letter was clearly sent to satisfy requirements that Work and Income needed.
- e. The letter had no information regarding any instructions on actually raising a personal grievance with Weatherford.
- f. Mr Taylor took no other action, as if the matter had ended once he sent the letter.
- g. Mr Taylor did not raise a personal grievance and did not arrange any mediation.

[12] Mr Maxwell has claimed exceptional circumstances exist to raise his personal grievance out of time under s.114 and s. 115(b) of the Act. He has relied upon engaging Mr Taylor and relying on Mr Taylor to keep in contact regularly by telephone and to have a number of meetings. Mr Maxwell says he approached the Community Law Centre because he became frustrated with Mr Taylor's lack of action. The Community Law Centre wrote him an opinion (letter dated 4 October 2009). Upon advice from the Centre he then obtained other legal representation.

[13] The documentary evidence is not consistent with Mr Maxwell's claim that he arranged for Mr Taylor to raise a personal grievance. Mr Maxwell was emphatic that he requested Mr Taylor to make arrangements to raise a personal grievance including giving "instructions" to Mr Taylor. However, I find, on the balance of probabilities that Mr Maxwell's evidence does not provide the degree of definitiveness around what he wanted. In particular, the following supports this conclusion:

- (a) Mr Maxwell never called evidence to support that he had made arrangements for Mr Taylor to raise a personal grievance until and/or about September/October 2009 when the letter of opinion from the Community Law Centre was provided.
- (b) The letter dated 6 January 2009 does not refer to any action required on raising a personal grievance. The same letter only implied that Mr Taylor would arrange mediation on a claim.

- (c) The purpose of the above letter was to reduce the stand down period applied by Work & Income.
- (d) Mr Maxwell did not state in his affidavit that he wanted Mr Taylor to raise a personal grievance.
- (e) Mr Maxwell never stated in his affidavit what he actually said to Mr Taylor to make any arrangements to raise a personal grievance and when he was given the opportunity to comment, add to and/or make any deletions or alterations to his affidavit at the beginning of his evidence, he did not do so on this very important point. This is despite the comment in his statement of problem filed in the Authority that he had instructed Mr Taylor to raise a personal grievance.
- (f) The Community Law Centre's opinion dated 4 October 2009 refers to what Mr Maxwell says he said to Mr Taylor earlier. For Mr Maxwell, this is the first time he had told anybody that he gave Mr Taylor instructions to raise a personal grievance. Mr Taylor denied that he said to the Community Law Centre that he had raised the personal grievance within days. Mr Taylor is at least consistent with his evidence.
- (g) The delay in time before Mr Maxwell went to the Community Law Centre for an opinion. Despite saying that he telephoned Mr Taylor on a number of unspecified occasions, he could not convince me that he was waiting for more than "*something to happen*". "*Something to happen*" is not sufficient to expect a personal grievance to be raised I hold. This is especially so where there was a written employment agreement setting out the dispute resolution procedure and requirements that included the 90 day requirement. Therefore I do not believe that Mr Maxwell has adequately explained the delay before he went to the Community Law Centre.
- (h) No evidence of any telephone calls when there is a conflict between Mr Maxwell and Mr Taylor over the number of calls made, meetings and what they discussed.

- (i) The time that had elapsed makes it improbable a grievance was to be raised and but for a chance meeting with a person from the Department of Labour, the matter would not have been rekindled.
- (j) Mr Taylor could not recall that Mr Maxwell asked him to raise a personal grievance. Mr Taylor had no file notes and he has nothing in writing.
- (k) Mr Taylor could not even recall meeting with Mr Maxwell, although I believe Mr Maxwell that they did both meet, as Mr Taylor was too vague and uncertain in his evidence to challenge Mr Maxwell's evidence that they did meet. There is too much confusion around when the meeting would have occurred, which raises doubts about recollections as to what was said. Mr Maxwell obtained a copy of Mr Taylor's letter to Work & Income. Indeed if Mr Maxwell received the letter after 10 February from Work and Income it is possible any meeting would have been after this, and would contradict any earlier meeting taking place. They are not clear about this. There is no other evidence.
- (l) Mr Taylor had no adequate explanation for omitting to raise a personal grievance given that he informed Work & Income of his stated intention to at least initiate mediation for a claim. There is no certainty from Mr Taylor that he had any intention of making arrangements to raise a personal grievance with Weatherford given his involvement was initiated because Mr Maxwell was at Work and Income at the time.

[14] I accept that Mr Maxwell says that he was relying on Mr Taylor, but it is not clear that Mr Taylor had a definitive arrangement with Mr Maxwell to make arrangements to raise a personal grievance with Weatherford or to just meet Work & Income's requirements for a letter to lessen the stand down period. This is supported by Mr Taylor's evidence that he did not raise a personal grievance and did not make any arrangements for the mediation.

[15] I make the point that the Court of Appeal has said that to require "instruction" being given to raise a personal grievance would be too narrow an approach, but there needs to be evidence of definitive arrangements: (Melville and Air New Zealand

[2010] NZCA 563). Mr Maxwell's and Mr Taylor's evidence was not definitive enough of any arrangement to raise a personal grievance, I hold.

[16] I therefore find that while Mr Maxwell arranged for a representative, he never made reasonable arrangements for that representative to raise a personal grievance with Weatherford. Despite what Mr Taylor says would be usual practice with templates to arrange a mediation and raise a personal grievance and that his omission was a professional error, this has to be considered in the context of: (1) the purpose of the letter to Work & Income at the time; (2) that Mr Taylor did not arrange mediation and did not raise a personal grievance; and the length of time that elapsed before Mr Maxwell approached the Community Law Centre for an opinion.

[17] It follows there are no exceptional circumstances under s.115(b) of the Act.

[18] Mr Maxwell's claim for leave out of time is dismissed.

[19] Mr Maxwell is in receipt of legal aid without paying a contribution. Therefore I am not able to make an award of costs for the respondent.

[20] However, the costs I would have awarded, if Mr Maxwell was not in receipt of legal aid, would have been \$750 based on the daily tariff used by the Authority. This is because Weatherford has incurred costs for a representative's attendance where it genuinely did not consent to the personal grievance being raised out of time given the personal grievance came to its notice when the statement of problem was filed many months outside the 90 days. In other words the respondent has been successful in opposing leave to proceed out of time and costs follow the event. The respondent's position on the matter required submissions and the investigation meeting lasted a short time. There was no reason advanced for the necessity to bring in out of town Counsel. The costs for that will have to be incurred by the respondent because it could have been done cheaper and costs saved by using local representation.

[21] Mr Maxwell would have had to pay Weatherford New Zealand Limited \$750 contribution for costs if he had not been on legal aid.