

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 204
3057493

BETWEEN

KELLY MCBRIDE
Applicant

A N D

ANZCO FOODS LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Greg Bennett, advocate for the Applicant
Fiona McMillan, counsel for the Respondent

Investigation Meeting: 24 September 2019 and 19 November 2019

Submissions and Further Information Received: 28 November 2019 and 17 March 2020 from the Applicant
13 December 2019 from the Respondent

Date of Determination: 20 May 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kelly McBride worked at ANZCO Foods Limited's Kokiri plant from 2001. In 2016 Mr McBride was charged with criminal offences and remanded on bail pending trial. As a result of his bail conditions and a protection order imposed against him, Mr McBride was unable to attend the Kokiri plant and was therefore unable to work.

[2] Initially, ANZCO allowed Mr McBride to take three months unpaid leave whilst he obtained legal advice and decided how he was going to deal with the charges.

[3] At the end of the three months, in January 2017, this leave was extended until February 2017. Mr McBride had pleaded not guilty to the charges and a trial was to be set, so the additional leave was so he could see if he could return to work, pending that trial.

[4] Mr McBride was unable to return to work and as a result his employment with ANZCO came to an end in March 2017. When discussing his employment coming to an end, ANZCO and Mr McBride also discussed the possibility of him returning to work at Kokiri after his trial. As a result, Mr McBride believed he would be able to return to his job at Kokiri if he was cleared of the criminal charges.

[5] On 2 November 2017, after a trial, a jury decided Mr McBride was not guilty and he was cleared of the criminal charges. Following this, Mr McBride contacted ANZCO about returning to work at Kokiri but ANZCO did not agree to him returning.

[6] In February 2018, Mr McBride raised a personal grievance for unjustified dismissal as ANZCO would not allow him to return to work.

[7] ANZCO responded to Mr McBride's personal grievance stating he had not been dismissed but he had resigned in February 2017. It also stated that, as a result, Mr McBride had not raised his personal grievance within the requisite period of 90 days from the event giving rise to the alleged grievance and it did not consent to the alleged grievance being raised outside of the 90 day period.

[8] In March 2019, Mr McBride lodged a statement of problem claiming he was unjustifiably dismissed by ANZCO.

[9] ANZCO responded to the statement of problem and in its statement in reply it said that I do not have jurisdiction to determine the personal grievance as it was not raised within the requisite 90 day period. ANZCO applied to have this issue resolved as a preliminary matter and Mr McBride, through his advocate, agreed to this.

[10] I subsequently investigated the preliminary issue and this determination deals with that issue.

Discussion

The 90 day time frame and my enquiry

[11] Section 114(1) of the Employment Relations Act (the Act) requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[12] In this case the action giving rise to Mr McBride's grievance is his alleged dismissal. Therefore I must determine if Mr McBride was dismissed and if he was, when this occurred and when it came to his attention. I can then calculate if his grievance, raised on 12 February 2018, was raised within 90 days of either the dismissal or it coming to his notice.

The parties' positions on when dismissal occurred

[13] Mr McBride's advocate advances three arguments in relation to Mr McBride's dismissal. He says:

- (a) Mr McBride was not dismissed (nor did he resign) in early 2017 and the dismissal occurred when ANZCO did not allow him to return to work in late 2017 after he had been cleared of the criminal charges.
- (b) If, contrary to this primary position, Mr McBride was dismissed in early 2017 he did not know he was dismissed. This is because Mr McBride believed he could return to his job if he was cleared of the criminal charges and he did not receive a written notice of dismissal from ANZCO. Therefore Mr McBride's dismissal only came to his notice in late 2017 when ANZCO did not allow him to return to work.
- (c) Alternatively if Mr McBride was dismissed in early 2017 and he knew this at the time then, because ANZCO agreed that he could return to work if he was cleared of the criminal charges, he was a person intending to work and he was therefore also dismissed in late 2017 when ANZCO did not allow him to return to work.

[14] In response, ANZCO, through its counsel, says:

- (a) Mr McBride resigned in February 2017 as he could not return to work due to his bail conditions and because he wanted to access a welfare payment through ANZCO and his union, which he was eligible to receive if he resigned.
- (b) There was no concluded agreement between ANZCO and Mr McBride about him returning to work after his trial; rather ANZCO simply advised Mr McBride that if he was cleared of the charges he could apply for a job with ANZCO but whether one would be offered to him depended on whether ANZCO had a suitable job available. For this reason Mr McBride was not a person intending to work and therefore not dismissed when ANZCO did not offer him a job in late 2017.

[15] So my investigation into whether Mr McBride was dismissed and, if so, when this was or when this came to his attention, breaks down into three parts:

- (a) Was Mr McBride dismissed in early 2017 or did he resign or did he remain employed pending the resolution of his criminal trial?
- (b) If Mr McBride was dismissed in early 2017 when did this dismissal come to his attention?
- (c) If Mr McBride's employment came to an end in early 2017 (either by dismissal or resignation) was he then a person intending to work who was subsequently dismissed in late 2017 when ANZCO failed to offer him a job?

The end of Mr McBride's employment in early 2017

[16] In May 2016, Mr McBride was charged with a criminal offence but his bail conditions at that time were such that he was able to continue working at the Kokiri plant. Subsequently around 20 October 2016, Mr McBride was charged with further offences including an alleged breach of bail conditions. As a result of this Mr McBride's bail conditions were varied and a

protection order was imposed against him, which meant he was no longer able to attend the Kokiri site.

[17] ANZCO responded to this by letting Mr McBride take three months leave without pay from 24 October 2016 so that he could make arrangements to deal with the criminal charges and work out what could be done with his bail conditions, pending any trial.

[18] In January 2017, as the three months was coming to an end, ANZCO contacted Mr McBride to work out what could be done about his work situation. This led to a group telephone call being held, where Mr McBride spoke with Scott Williams, the Kokiri Site Manager, Hayden Lister, the Production Manager based at Kokiri, Peter Sinot, an ANZCO employee and friend of Mr McBride and Warren Fitzgerald, the union secretary assisting Mr McBride.

[19] Understanding what was discussed in this group call sets the scene for how Mr McBride's employment was handled from January 2017 until Mr McBride's trial in October 2017.

[20] Mr McBride's evidence was that the call was in late February 2017 and just prior to it, Mr Williams had called him to discuss his ongoing employment. Mr McBride said in this first call, with just Mr Williams, he discussed when he might be able to come back to work at Kokiri and because he was unable to give Mr Williams a date, Mr Williams told him he had no choice but to terminate his employment. Mr McBride said that following this call the group call was held and the participants discussed Mr McBride getting his job back if he was cleared of the criminal charges.

[21] Mr Williams and Mr Lister's evidence about the group call focussed on the discussion around Mr McBride returning to work at Kokiri if he was cleared of the criminal charges, which, along with Mr McBride's evidence on this point, I will discuss further below. However, both said there was some discussion about Mr McBride keeping ANZCO informed about his ability to recommence work at Kokiri given the pending trial and the limitations imposed on him; in summary the position was Mr McBride was to see if he could return to

work shortly otherwise he would resign. In line with this conversation, Mr Williams was clear on the fact that he did not dismiss Mr McBride before or after the group call and Mr Lister said Mr McBride was going to resign if he was unable to return to work pending the outcome of the trial.

[22] The evidence I found particularly helpful in assessing what was discussed in the group call came from Mr Fitzgerald, who made notes in his diary during the call, which he then wrote up more fully about 25 minutes after the call. I have no reason to doubt Mr Fitzgerald's evidence and as the notes were contemporaneous I accept them as the best evidence of what was discussed. Mr Williams and Mr Lister's evidence whilst less detailed is also consistent with these notes.

[23] So, I conclude that the group call took place on 30 January 2017 and that two matters were discussed. First, whether Mr McBride could get his bail conditions and the protection order varied so he could return to work, whilst waiting for his criminal trial. And second, if Mr McBride was unable to return to work pending the trial, whether there would be a job for him at Kokiri if he successfully defended the charges.

[24] On the first matter, ANZCO extended the leave without pay granted to Mr McBride for a further two weeks until 17 February 2017. This was because Mr McBride had a hearing on the protection order on 14 February 2017 and a plea hearing on 17 February 2017; the outcome of both hearings would inform whether Mr McBride could return to work at Kokiri. Mr McBride was to advise ANZCO of the outcome. Mr Fitzgerald's notes record "if not good wont (sic) stuff company around, as trial could still be months away". And further down the notes refer to Mr McBride advising if he would be "coming back or reapplying at a later date and finishing work at Kokiri".

[25] This is confirmed by a further contemporaneous document. Late on 30 January 2017, Mr McBride sent an email to his lawyer enquiring about the possible variation of his bail conditions and the protection order. He concluded that email by stating:

I ask again are we able to ask for my bail conditions to be returned to the original, where I can go back to living at home and going to work. I need to know this as my work has had a meeting today and have informed me they want to know by Monday 20th February if I am returning or resigning.

[26] It follows from these conclusions that ANZCO did not dismiss Mr McBride in the 30 January 2017 call or prior to that. However it is also important to analyse what occurred after 30 January to ascertain whether Mr McBride was dismissed or resigned and if so, when this occurred.

[27] On 9 February 2017 Mr McBride called Mr Williams. Mr Williams says that in this call Mr McBride resigned because he wanted to receive a welfare payment from the ANZCO and Union administered superannuation fund, that he would be entitled to if he resigned. Mr Williams says that after this call he told Mr Fitzgerald what had happened and this is recorded in another note that Mr Fitzgerald made at that time.

[28] There are two contemporaneous forms and one letter that support Mr Williams' account of what occurred:

- (a) A form headed up CMP Kokiri Welfare Fund Application Form, which requests the payment of balance owing on resignation. This form is dated 9 February 2017 and was signed by Mr McBride's son on his behalf.
- (b) A form headed up MISS Scheme Benefit Calculation Request, which was signed by Mr McBride and dated 8 March 2017. This form records the calculation (of the payment due to Mr McBride) as being effective on 9 February 2017, for resignation.
- (c) A letter from ANZCO to Mr McBride dated 3 March 2017, confirming Mr McBride's resignation with his last day of work recorded as being 10 March 2017.

[29] Despite this evidence Mr McBride says he did not resign; he maintains that he was dismissed by Mr Williams in an earlier call. He also says he did not fill in the two forms,

although he accepts he signed the second one but did not record in that form that he was due any payment as he had resigned; he says this was done by someone else after he had signed the form. And he says he did not receive the letter confirming his resignation as it was not sent to his residential address.

[30] I accept what Mr McBride says about the resignation letter and what he says about the second form, but the fact that both forms and the letter were prepared and then used on the basis that Mr McBride had resigned on 9 February 2017, effective 10 March 2017 indicates this was ANZCO and the Union's understanding of the position at the time.

[31] Also, the evidence I heard in the investigation meeting made it clear that Mr McBride would not have been entitled to the welfare payment unless he resigned; if Mr McBride had been dismissed he would not have been eligible for the welfare payment that he received at the time.

[32] So, I conclude that Mr McBride resigned on 9 February 2017 effective 10 March 2017. I think Mr McBride's recollection of what occurred is influenced by his impression of the position he found himself in, that is, that he had to resign as he could not return to work pending the trial in late 2017 because of the restrictions imposed on him. It may be that if he did resign because he felt he had no choice that could give rise to a constructive dismissal claim, but this is not relevant for my determination of the preliminary issue.

[33] What is relevant is that Mr McBride, whether he had resigned or was dismissed, knew his employment had ended in March 2017. When I asked Mr McBride about why he was entitled to the welfare payment he said – "when I leave or fired I get my money... so I got my money". And in cross examination he confirmed that he knew his employment had come to an end.

[34] In short then, Mr McBride's employment came to an end on 10 March 2017. Mr McBride knew this at that time.

[35] Therefore Mr McBride's personal grievance should have been raised within 90 days of 10 March 2017 and it was not.

Was Mr McBride a person intending to work in late 2017?

[36] I must now also consider if a separate grievance arises in late 2017 when Mr McBride was not able to return to Kokiri after he was cleared of the criminal charges he faced.

[37] As discussed, the question here is whether Mr McBride was a person intending to work based on earlier discussions with ANZCO. A “person intending to work” is defined in s 5 of the Act as “a person who has been offered, and accepted, work as an employee”.

[38] To understand if there was an offer of work by ANZCO and acceptance of an offer by Mr McBride, the relevant conversation is the second part of 30 January 2017 call when the participants in the call discussed the possibility of Mr McBride returning to work after the trial.

[39] Mr Mc Bride describes the conversation in simple terms. He said that the question of him returning to work at Kokiri if he was cleared of the criminal charges was posed and no one on the call had a problem with him returning to work; Mr McBride’s recollection of the group call and his belief following it was there were no conditions on him returning to work at Kokiri so long as he was cleared of the criminal charges.

[40] Mr Sinot’s evidence dealt solely with Mr McBride’s possible return to work as discussed in the 30 January 2017 call. He said the group call was in late February or early March (which was wrong) and it was to discuss Mr McBride’s employment if he was cleared of the criminal charges. He said the call was approximately ten minutes and it was unanimously decided that Mr McBride’s employment would be retained if he was innocent. In questioning from me he put it as, in a nutshell if the charges were dismissed Mr McBride’s job would be there for him or a job would be there for him.

[41] Mr Williams said that Mr McBride was told if the trial went favourably for him he was welcome to apply for a job, but there would be no guarantees regarding any work and if there was work it would not be his old job as he could not work in the boning room. When cross examined on this point, Mr Williams said it was not a case of re-instating Mr McBride, there would have to be a suitable role available.

[42] Mr Lister said Mr McBride was told he could apply for a job at Kokiri if the trial went well for him. Mr McBride could fill out an application form and if a suitable position was available at that time ANZCO may offer him a job; this was normal procedure.

[43] Mr Fitzgerald said his recollection of the call was that there would be an offer of employment for Mr McBride if ANZCO was hiring but it would not be in the boning room. This reflects what was recorded in the notes that Mr Fitzgerald made on 30 January 2017:

The company said that there will be a job at ANZCO Kokiri, if Kelly wishes to reapply in the future / if hiring, probably won't be in the boning room.

[44] On balance I prefer the evidence of Messer's Williams, Lester and Fitzgerald. Mr McBride and Mr Sinot's evidence is simplistic, reflecting what I believe they wanted the situation to be; their evidence lacked detail nor did it make sense in the scheme of what was occurring with Mr McBride – so for example, how could ANZCO guarantee there would be a job for Mr McBride in the future even if he was cleared of the criminal charges.

[45] I conclude that there was no offer of work made to Mr McBride in the 30 January 2017 call and therefore no acceptance by Mr McBride of an offer to work as an employee. He was not a person intending to work pursuant to s 5 of the Act and therefore when ANZCO did not offer Mr McBride a new job at Kokiri in late 2017 ANZCO did not dismiss Mr McBride. There is no further dismissal on which the personal grievance can be based.

Conclusion

[46] Mr McBride resigned from his employment with ANZCO on 9 February 2017, effective on 10 March 2017. Further, Mr McBride was not a person intending to work, when he applied for a job at ANZCO at the end of 2017 and ANZCO did not dismiss him when it did not offer him a job. Therefore, the action giving rise to Mr McBride's personal grievance occurred on 10 March 2017 and he was aware of it at that time.

[47] Mr McBride did not raise his personal grievance within 90 days of 10 March 2017. Therefore, Mr McBride's personal grievance was raised outside of the statutory timeframe of 90 days set out at s 114 of the Act and I do not have jurisdiction to hear his claim.

Costs

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[49] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority