Employment Court of New Zealand

Melville v Air New Zealand Ltd [2010] NZEmpC 87 (8 July 2010)

Last Updated: 14 July 2010

IN THE EMPLOYMENT COURT AUCKLAND

[2010] NZEMPC 87

ARC 18/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN LYNETTE MELVILLE Plaintiff

AND AIR NEW ZEALAND LTD Defendant

Hearing: 17 June 2010

(Heard at Auckland)

Appearances: Greg Lloyd, counsel for the plaintiff

Tim Cleary, counsel for the defendant

Judgment: 8 July 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff, Mrs Lynette Melville, has challenged a determination of the Employment Relations Authority on a preliminary issue, whether she had raised a personal grievance concerning her dismissal by the defendant within the 90-day period required by s 114 of the Employment Relations Act 2000 (the Act).

[2] As an alternative, if the Court was to find that her grievance was not submitted in time, then she sought leave under s 114(3) of the Act to raise it after the expiration of that period. The grounds for the leave application were said to be that Mrs Melville took reasonable steps to ensure the grievance was raised within time; she was entitled to rely on her

representative to do so on her behalf; she would suffer a significant

detriment if unable to pursue the grievance and, if leave was granted, the defendant would not suffer any detriment that would outweigh her detriment.

[3] The parties filed a brief agreed chronology of events, which indicates that on 19 August 2008 there was an incident involving Mrs Melville and a co-worker. Following the incident Mrs Melville was suspended for some seven months in spite of repeated requests that she be returned to her employment.

[4] On 19 March 2009, Philip Townsend, an organiser employed by the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (the union) wrote to the defendant. The letter sets out the following. Mrs Melville was assaulted at work on 19 August 2008 by a colleague who resigned soon after. It examined the circumstances of the assault in detail laying the blame on the co-worker who allegedly grabbed the plaintiff from behind. The defendant had expressed the view that Mrs Melville had acted inappropriately and that this amounted to serious misconduct and, as a result, the defendant no longer had trust and confidence in her as an employee. Mr Townsend stated the defendant had equated “serious misconduct” with “conduct justifying dismissal”, which was not the legal test for justification set out in s 103A of the Act. The defendant’s conduct towards Mrs Melville did not, he claimed, meet the standard of the fair and reasonable employer. The defendant had consistently over the past seven months demonstrated an intention to dismiss the plaintiff and her fate was already sealed.

The defendant was asked to reconsider this position. Under the heading “Dismissal” it states:

Even if there is considered to be some degree of contributory fault on her part, and we think that would be small, this employment relationship is sustainable and Lynette’s actions do not justify dismissal.

[5] The letter concludes, under the heading “**The Personal Grievance**”, that the suspension was an unjustifiable action for which the plaintiff should be compensated and states:

It is never too late to revise ones views of a situation, and we invite you to do so and to conclude that it would be unjustifiable to dismiss Lynette from the employment.

[6] The plaintiff and Mr Townsend attended a final meeting on 24

March 2009 at which the plaintiff was dismissed for serious misconduct. Mr Townsend’s affidavit evidence was that his immediate response to the defendant’s managers was to say: “See you in Court”. As the plaintiff and Mr Townsend were leaving, the plaintiff’s immediate manager, Nic Csongor, called out, “Thank you, see you”. Mrs Melville and Mr Townsend responded “its not over yet” and Mr Townsend stated “we’ll be seeing you in Court”. The following day Mr Townsend was due to go on leave for a month and did not submit a standard letter to the defendant confirming the existence of a grievance because he was rushing to tidy up loose ends before leaving. Prior to leaving the union office he handed the file back to the union solicitor, Anne-Marie McInally, who had assisted Mr Townsend to prepare the letter of 19 March.

[7] Mrs Melville was aware that Mr Townsend was going on leave for a month and on 26 April 2009 she emailed him to check on the progress of the grievance. The relevant part of her email stated:

[W]hen you get back into the office can you see where my case [is] at, as it hit a real stand still. I went to see AnneMarie and that went well, we went half way through my file, then had an appointment to see [her] 3 days later. I got there and they had forgotten to phone me and cancel as they were unable to see me.

Roseanne(?) was to email me a proof to read which never arrived. I left it a couple of weeks and phoned she thanked me for reminding her and said [I] would have it by [F]riday, still not arrived called following [W]ednesday and told same again, still not arrived. I know that Air New Zealand has caused the union heaps of headaches with others while you were away. I am just worried that there is some “time limit” on us responding and [I] will miss out.

[H]ope you can help.

[8] Mrs Melville deposes that she continued to send text messages asking what was happening and that Mr Townsend’s responses were usually

by phone rather than text and the message he gave was “be patient”. Mrs Melville had several appointments with Ms McInally, two of which were cancelled and there was a period of time when Ms McInally was not available. Mrs Melville and her husband continued to contact the union by phone to find out what was happening and in those calls she stressed her concern that there was a time limit approaching, although she was not sure of the date when it would take effect. She kept getting reassurances that everything was under control. Mr Townsend confirmed in his affidavit that he did reassure Mrs Melville that everything was under control on the several occasions she spoke to him by telephone because he assumed everything had been done at the appropriate times.

[9] Ms McInally gave evidence that she had assisted Mr Townsend to prepare the 19 March letter and received the file from him on 24 March when he went overseas on leave. She began preparation of a statement of problem but the process was delayed by a series of urgent proceedings. Then, on 8 June 2009, her mother passed away and in the following weeks Ms McInally became unwell and was unable to attend work. When she returned to work she resumed preparation of the statement of problem and in the course of drafting it became aware that there was no submission of grievance letter on the file.

[10] Ms McInally deposed that the usual union practice was for the organiser to send a notification of personal grievance to the employer and there was a template for doing this, before passing the file onto the legal department for assistance. She had been proceeding on the assumption that this had been done and, by the time she discovered the omission, it was beyond the 90-day period. She confirmed that prior to that time she had received messages through her secretary and Mr Townsend that Mrs Melville was concerned about the time it was taking to advance her grievance. She deposes that she did not appreciate that Mrs Melville was endeavouring to alert the union to the 90-day issue, because her assumption was that this had already been attended to.

[11] In cross-examination by Mr Cleary, Mrs Melville acknowledged that she was aware that in the collective agreement that bound her there were clauses about how to resolve disputes. She confirmed that she had instructed Mr Townsend to write the 19 March letter and that she was concerned that the manager had decided that she was going to be dismissed. She confirmed that after she was dismissed she did not instruct Mr Townsend to telephone or write to the defendant about taking the dismissal matter further but said something like “where do we go from here” and that she wanted to take the matter to

Court. She was keen to pursue an unjustified dismissal grievance and continued to check with the union on progress. She was focussed on getting the union to make sure that her case was being progressed. She was aware of the time limit but did not know what it was and was concerned she might miss out if something was not done. She had read the 90-day reference in the collective agreement but thought the union would have her best interests at heart. She did not know how to move the matter forward and did not expressly request the union to raise her grievance with the defendant. She left it in the hands of the union to progress the matter. Mrs Melville confirmed that she had told Mr Townsend that she wanted her job back.

[12] Ms McInally was also cross-examined and confirmed that she was a practising barrister and solicitor and, as an employee of the union, she represented the members' interests. She confirmed that at no stage had Mrs Melville instructed her to raise a personal grievance with the defendant and that she was focussed on preparing the statement of problem.

Was the grievance raised in time?

[13] The first issue is whether the actions of Mrs Melville and Mr Townsend on 24 March 2009, constituted the raising of an unjustified dismissal personal grievance for the purpose of s 114 which provides:

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

later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[14] The leading case on the interpretation of s 114(2) of the Act is *Creedy v Commissioner of Police.*[1] Chief Judge Colgan observed that the wording of the section clearly referred to the raising of a grievance about an event that has occurred or is occurring. It does not allow for a known or even anticipated future event, let alone a speculative future event, such as a dismissal, to be raised prior to the event occurring. Mr Lloyd did not

attempt to argue the contrary position.

[15] On this basis the 19 March letter, even though it clearly anticipated the likelihood of a dismissal and indicated that it was going to be challenged, could not in itself amount to the raising of the grievance in terms of s 114(2).

[16] The Chief Judge concluded that the terms "raise" in the 2000 Act and "submit" in the Employment Contract Act 1991, were virtually synonymous. The key wording in s 114(2) is that a grievance is raised "as soon as the employee has made, or had taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address". This means that the grievance must be specified sufficiently to enable the employer to address it, presumably at the time. The Chief Judge stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified

sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[17] I accept Mr Cleary's submission that this aspect of the interpretation of s 114 was not disturbed by the Supreme Court in *Commissioner of Police v Creedy*[2], the leading case on the issue of leave to raise a grievance out of time.

[18] I accept Mr Lloyd's submission that each case must be assessed objectively, see *Winstone Wallboards Ltd v Samate.*[3] Although a grievance cannot be raised in anticipation, the various correspondence and communications can provide a context for assessing whether the communication in question constituted a raising of the grievance. Mr Lloyd submitted that the 19 March letter showed the plaintiff's belief that

dismissal was almost inevitable and would be regarded as unfair. The words used by the plaintiff and Mr Townsend on 24 March were, he submitted, a direct response to the dismissal and would have left a reasonable person in no doubt that the dismissal was being challenged on the grounds that had been set out in the 19 March letter. He submitted that this must be considered in the light of s 113(1) which provides that the only way in which a dismissal can be challenged is by raising a personal grievance and pursuing it through the Authority. He submitted the fact that Mr Townsend used the word "Court" instead of "Authority" should not be given any weight.

[19] Mr Lloyd submitted that s 114(2) requires that an employee must raise the personal grievance they want the employer to address and it would impose too great a burden on the employees to require them to provide extensive detail in what was raised at the time. It could be supplemented by other communications. The plaintiff was therefore entitled to assume that the 19 March letter provided a sufficient background which would allow the defendant to address the grievance raised on 24 March. Once the grievance was raised it must then be addressed but there is no set timeframe, other than the three year time limit in s 114(6) for commencing an action.

[20] Mr Lloyd also submitted that s 4(1A)(b) requires the parties to an employment relationship to be, among other things, responsive and communicative and this would require an employer who has been presented with the personal grievance, and who was uncertain of the specific details, to request these as part of the process of addressing the grievance. He submitted this was consistent with the objects of Part 9 of the Act which include in s 101:

(a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; and

(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship; and

(b) to continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers; and ...

[21] Mr Lloyd cited the *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*[4], which endorsed the proposition in *Liumaihetau v Altherm East Auckland Ltd*[5], that where there has been a series of communications, the totality of these may constitute a submission.

[22] Mr Lloyd submitted that, applying commonsense, an objective observer would say that the defendant knew the details of the grievance because of the 19 March letter and was left in no doubt that the plaintiff was challenging that dismissal because of the statements made on 24 March.

[23] Mr Cleary, while accepting that the question was whether the words said after the dismissal in the context of those which preceded them constituted the raising of that a dismissal grievance, posed the question what could the defendant have reasonably taken from the words used on 24

March? He submitted that those words could not have enabled the defendant to address what was being raised and were little more than throw away lines, reflecting the continuation of the frustration evident in the 19

March letter. He submitted that the words could easily have referred to the already contested suspension, investigation process and predetermination allegations for which a disadvantage grievance had already been raised in the 19 March letter.

[24] Mr Cleary submitted that the words did not even reach the level of the example quoted in *Creedy* (at para [36]) of advising the employer that the employee considers he or she has a particular type of grievance, which the Chief Judge said would not be sufficient.

[25] I accept Mr Cleary's submissions. The law is clear that what was said in the 19 March letter cannot amount to the raising of a grievance in anticipation of the events which later occurred. Whilst they provide a context, and raised a disadvantage grievance, the words used on 24 March were far more equivocal. They could easily relate to the determination by the Court or the Authority of the unjustifiable disadvantage grievance already raised. They do not on their face raise a new grievance based on the dismissal, sufficiently clearly to have enabled the defendant to address it.

[26] I note also in *Coy v Commissioner of Police*[6], the Court concluded that an oral statement by the employee that "I can tell you now I am going

ahead with a Personal Grievance because I think I have been personally treated very badly" did not raise a grievance and in that case even the employee did not contend that it had done so. When joined with a fuller statement much later, the combination was found to have raised a grievance.

[27] The defendant would not have been aware on 24 March, or in the ensuing 90-days, that the plaintiff was dissatisfied with the dismissal or its justification and that she was intending to pursue a grievance. There was no material upon which it could assume what remedies were to be sought and, in particular, whether the plaintiff was seeking to be reinstated. I therefore

find, as did the Authority, that the personal grievance alleging an unjustifiable dismissal was not raised within the 90-day period.

Leave to raise the grievance out of time

[28] The second issue is whether, as here, because the employer has not consented to a personal grievance being raised after the expiration of the 90- day period, leave should be granted to Mrs Melville to raise the personal grievance after the expiration of that period. The relevant parts of s 114 and s 115 are as follows:

...

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(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 1 or more

of the circumstances set out in section 115); and

(b) considers it just to do so.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

...

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(b) 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; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[29] The leading case on the issue of leave is *Creedy* in the Supreme Court. In the present case, as in *Creedy*, the plaintiff was relying solely on s 115(b) that she had made reasonable arrangements to have the grievance raised on her behalf by the union and it had unreasonably failed to ensure that it was raised within time. The Supreme Court confirmed that in order to obtain leave under s 114(4), two conditions must be satisfied; first the delay must have been occasioned by “exceptional circumstances”; and,

second the justice of the case must require an extension of time.[7]

[30] The Supreme Court observed that the statutory wording confirmed that the circumstances specified in s 115 are not an exhaustive exposition of what may constitute “exceptional circumstances”, for the purpose of s

114(4)(a). It then stated that the wording of s 115(b) “also makes it clear that para (b) will apply only where the employee has made reasonable arrangements to have the grievance raised and the agent has unreasonably failed to ensure that it was”.[8] The Supreme Court stated:

[28] Although, as we have already noted, the contents of s 115 are clearly not intended to be a comprehensive schedule of what will

constitute “exceptional circumstances”, they assist in determining when such circumstances exist and when they do not. More particularly, Parliament has specified in s 115(b) that reliance on an agent will result in “exceptional circumstances” if the requirements of that paragraph are met. It would tend to negate the purpose of that paragraph if other situations where an employee had mistakenly relied on an agent to ensure that a grievance was notified in time were readily treated as establishing “exceptional circumstances”.

[31] In the present case, Mr Lloyd accepted that "the plaintiff does not rely on anything other than s 115(b)", and the only issue was therefore whether the plaintiff made reasonable arrangements to have her grievance raised. Mr Lloyd outlined the efforts the plaintiff made to check on progress and raised the question, what more could she have reasonably done. The answer to that was that she could have said, have you raised a personal grievance within the 90-day time limit? The reason, I assume, that she did not do so was, as Mr Cleary submitted, because she and Mr Townsend thought a grievance had already been raised by what they had said on 24

March.

[32] Looking at the two elements in s 115(b) and the second element first, I accept Mr Lloyd's submission that the union unreasonably failed to ensure that the grievance was raised within the required time. The file ought to have been checked to see whether the standard letter raising the grievance had been sent. The evidence was that the union, regardless of what was said at the time of the events giving rise to the grievance, always, as a matter of proper caution, issues written advice raising the grievance. That procedure was not followed in this case. Again the union relied on an assumption that such a letter had been sent and this was unreasonable.

[33] Turning to the first element, I accept Mr Cleary's submission that to fit within the precise wording of s 115(b) the plaintiff had to have given instructions to Mr Townsend, her agent, to have the grievance raised. What the plaintiff did, as Mr Cleary's cross-examination elicited, was to make it clear to Mr Townsend that she wanted the union to pursue a grievance of unjustified dismissal on her behalf. This would include taking the matter to the Authority. She did not expressly request the union to raise the

grievance. This was no doubt based on her assumption that it had already been raised on 24 March. This is consistent with the union's concentration on the filing of the statement of problem, on the mistaken assumption that a grievance had already been raised in writing.

[34] The plaintiff's difficulties arise in meeting the first limb of para (b), whether she made reasonable arrangements to have the grievance raised on her behalf by the union. She was cognisant of the 90-day time limit of which she had notice in the collective agreement and this is referred to, albeit somewhat obliquely, in her reminder email to Mr Townsend.

[35] Mr Cleary cited my judgment in *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics).*[9] In that case I applied *Telecom NZ v Morgan*[10] which concluded that Parliament had not intended to alter, by relaxing, the test for extending the limitation period when it enacted ss 114 and 115 in 2000. It also appeared that Parliament had established a high

threshold for employees seeking to establish exceptional circumstances by the examples given under s 115. As to s 115(b) I concluded that the requirement was now for the employee to make reasonable arrangements to have the grievance raised on his or her behalf. If the employee had not made such reasonable arrangements to have the grievance raised, this would not constitute exceptional circumstances for the purposes of s 115(b). It is only when the employee has made reasonable arrangements and the agent in turn has unreasonably failed to ensure that the grievance was raised within time, that the provisions of s 115(b) apply.

[36] Although s 115 was not intended to be exhaustive, the circumstances of s 115(b) were the only exceptional circumstances relied on in McMillan's case and were the only ones relied on by Mrs Melville.

[37] The plaintiff's failure was not to have made reasonable arrangements to ensure that her grievance was raised in time, as opposed to her more

general and broad instructions for the union to take the necessary steps to pursue her grievance. Her failure to do so was similar to the situation in *McMillan* where the provision in the employment agreement had alerted the employee to the existence of a time limit and his communications with his solicitors had not made arrangements that were reasonable to raise his grievance.

[38] I conclude that the plaintiff cannot therefore bring herself within the express words of s 115(b).

Whether it is just to grant leave

[39] In *McMillan*, I had observed that s 114(4) allows for the granting of leave, subject to any conditions, if the Court is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and "considers it just to do so". I observed that in many cases it would be difficult, if not impossible, to determine whether it is just to do so, once exceptional circumstances are established, without delving to some degree into the merits of the case. In the *McMillan* case I also concluded that there was little merit in the grievance, which was unlikely to be upheld and in such circumstances concluded it would not be just to grant leave to pursue a claim against an employer that was unlikely to succeed.

[40] I accept Mr Lloyd's submission that the word "occasioned" in s

114(4) is wider than the words "caused" and therefore implies a slightly more liberal view of the causative link between the exceptional circumstances and the delay: see *McCluthchie v Landcorp Farming Limited.*[11]

[41] Mr Lloyd submitted there was no need to look at the strength of the case, citing *Gibson v GFW Agri-Products Ltd.*[12] Chief Judge Goddard, in obiter comments about the previous legislation, stated that it is almost

always just to allow an employee to submit a personal grievance because every time leave is refused a potential injustice is done. Mr Lloyd properly noted that the Court of Appeal in that case found that the Chief Judge went rather too far: see *GFW Agri-Products v Gibson.*[13] I agree with Mr Lloyd that any considerations in balancing justice must necessarily be based on the evidence put before the Court. I still adhere to the view that the merits do

need to be addressed to determine whether it is just to allow the grievance to be pursued out of time. That is not a determinative issue in the present case because I have found the plaintiff cannot bring herself within s 115(b), the only exceptional circumstance relied on. I therefore do not need to consider whether it would have been just to have allowed the grievance to be raised out of time. In view of the lack of material on which I could base even a preliminary view of the merits of the grievance, it may well have been difficult to have found in the plaintiff's favour on this second requirement.

Conclusion

[42] The application for leave to raise the grievance out of time is declined.

[43] Costs are reserved and may be the subject of submissions, the first of which is to be filed by way of a memorandum 30 days from the date of this judgment if agreement cannot be reached. Any memorandum in reply is to be filed and served within a further 14 days.

B S Travis

Judge

Judgment signed at 4.30pm on 8 July 2010

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[1] [2006] NZEmpC 43; [2006] ERNZ 517.

[2] [2008] NZSC 31; [2008] ERNZ 109.
[3] [1993] 1 ERNZ 503.

[4] [2008] ERNZ 139.

[5] [1994] NZEmpC 117; [1994] 1 ERNZ 958.

[6] CC 23/07, 19 November 2007.

[7] *Creedy* [25].

[8] *Creedy* [26].

[9] (2005) NZELR 402 at [25].

[10] [2004] NZEmpC 66; [2004] 2 ERNZ 9.

[11] [1993] 1 ERNZ 388 at p 395, per Finnigan J.

[12] [1994] NZEmpC 219; [1994] 2 ERNZ 309.

[13] [1995] NZCA 317; [1995] 2 ERNZ 323 (CA).
