IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 164
3030452

	BETWEEN	PAUL MONGER Applicant
	A N D	MORTON & PERRY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Allister Davis, Counsel for applicant Mark Nutsford, Advocate for respondent
Determined:	By consideration of the papers alone
Submissions Received:	30 August 2018 from Applicant 4 October 2018 from Respondent
Date of Determination:	9 November 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

Employment Relationship Problem

[1] Mr Monger claims that he was unjustifiably dismissed from his employment with the respondent on 22 December 2017. The respondent raises a jurisdictional objection to the application in the Authority on the basis that Mr Monger failed to raise a personal grievance within the statutory 90 day period of being dismissed.

[2] This determination is therefore limited to the issue of whether or not a personal grievance was validly raised within the statutory 90 days of Mr Monger's dismissal and, if not, whether the Authority should grant leave for the grievance to be raised outside of the 90 day period pursuant to s 114(4) of the Employment Relations Act 2000 (the Act).

Background

[3] Mr Monger worked as a sales representative for the respondent. On 30 November 2017 the respondent indicated to Mr Monger that it was looking at a potential restructuring of the business and noted that the potential changes, if implemented, could affect his position. A period of consultation was commenced.

[4] Mr Monger met with the CEO of the company on 4 December 2017. Mr Monger was handed a document by the CEO at that meeting, a copy of which was shown to the Authority. This document appears to have been intended to be a private briefing note for the respondent company from an advisor as to how to conduct a redundancy dismissal, rather than a document that was intended to be shown to Mr Monger. The document included the process that should be followed and included the following:

> 4. **Third Meeting**
>
> a. (Ideas to consider) The company should explain to the employee that in the view of the company none of the ideas presented will work. The company should then request time to consider a final decision and a follow up meeting should be set for the following day.
>
> ...
>
> 5. **Fourth Meeting**
>
> a. (Ideas to consider) The company should give the employee their final decision and outline the terms of the redundancy. No further meetings are required.

[5] Mr Monger relies on the contents of this document to argue that the consultation process purportedly followed by the respondent was a sham.

[6] Despite this, Mr Monger corresponded with the respondent the following day and made a number of suggestions to avoid his redundancy, including suggesting a salary reduction of 20%.

[7] On 19 December 2017 the respondent advised Mr Monger that his position would be disestablished and his employment would end on 22 December 2017. This was confirmed in a letter dated 19 December from the CEO.

[8] According to the statement of problem Mr Davis raised a personal grievance on behalf of Mr Monger in a letter marked without prejudice dated 15 December 2017.

[9] Mr Davis also asserts that, if that is not accepted as validly raising a personal grievance in respect of the unjustified dismissal on behalf of Mr Monger, then leave should be granted by the Authority to allow Mr Monger to raise his personal grievance outside of the 90 day time limit on the basis that the delay in raising the personal grievance was occasioned by exceptional circumstances, and that it would be just to grant the leave. The exceptional circumstances relied on are that Mr Monger made reasonable arrangements to have his grievance raised on his behalf by Mr Davis and that Mr Davis unreasonably failed to ensure that the grievance was raised within the required time.

[10] Mr Nutsford, on behalf of the respondent, contends that no instructions were ever given by Mr Monger to Mr Davis to file a personal grievance against the respondent.

[11] In order to enable the Authority to investigate this preliminary issue, Mr Monger has waived the professional privilege rights he held in respect of his communications with Mr Davis about his employment with the respondent and about the negotiations that took place between Mr Monger and the respondent via their respective advisers both before and after the employment came to an end.

[12] In addition, both parties have agreed that the Authority could see correspondence passing between the parties which were marked "without prejudice" and which comprised their attempts to reach a resolution and/or agreement with respect to the terms of Mr Monger leaving the respondent company. However, actual proposed settlement amounts have been redacted from that correspondence, some of which was presented as Calderbank offers.

The legal framework

[13] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must raise it 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.

[14] 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 grievance after the expiration of that period. Section 114(4) provides:

> 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.

[15] Section 115 of the Act sets out some examples of what would constitute exceptional circumstances under s 114(4) but makes clear, by use of the term "include", that the examples given are not exclusive. The exceptional circumstance relied upon by Mr Monger is set out at s 115(b), which provides that exceptional circumstances include:

> 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.

The issues

[16] The issues to determine are, therefore:

(a) Did Mr Monger, or Mr Davis on his behalf, raise a valid personal grievance within 90 days of being dismissed?

(b) If he did not, was the delay in raising the personal grievance occasioned by exceptional circumstances?

(c) If so, is it just to grant leave for Mr Monger to raise his personal grievance outside of the 90 day time limit?

Did Mr Monger, or Mr Davis on his behalf, raise a valid personal grievance within 90 days of being dismissed?

[17] In his original statement of problem, Mr Monger asserted that a valid personal grievance had been raised by way of an email sent by Mr Davis dated 15 December 2017.

[18] The second half of this email had been redacted but the first half sets out the view of Mr Monger, as expressed by Mr Davis, that the consultation process "is nothing short of a sham" and that "no matter what ideas our client comes up with they will be rejected". The email also refers to Mr Monger having been presented with a record of settlement under s 149 of the Act dated 11 December 2017 and Mr Davis states that, "If the ongoing process has any bona fides then why should one prepare such a document".

[19] There is little doubt that this document is raising a grievance about the process of consultation that the respondent was undertaking in respect of Mr Monger's possible dismissal for redundancy. That could certainly found a claim for unjustified disadvantage in respect of the process that had been followed up to 15 December. However, of course, Mr Monger had not been dismissed at that point and so Mr Davis's email cannot raise a grievance in respect of a dismissal that has not yet occurred. It was only on 19 December 2017 that Mr Monger was advised that he was to be dismissed with effect from 22 December 2017.

[20] Mr Nutsford responded to Mr Davis's email of 15 December by way of a letter dated 19 December 2017. This letter was sent after the letter from the company advising Mr Monger that he was to be dismissed by way of redundancy. Mr Nutsford's letter set out that the parties had been trying to negotiate an exit package for Mr Monger outside of the redundancy process, explained that Mr Monger's proposals to avoid his redundancy had been carefully considered, then asserted that Mr Monger's suggestion for a figure to be paid to him was rejected.[1]

[21] It is clear from this letter from Mr Nutsford that the respondent wished to continue to try to negotiate an agreement and that an offer to settle was made. The reason given in the letter for making an offer was stated by Mr Nutsford as:

> My client wishes your client no ill and would like to see him receive at least something in acknowledgement of his service to date.

[22] It does not appear from this communication that the negotiations had been initiated because of any overt personal grievance about the dismissal having been raised.

[1] The Authority has not been made aware of what that figure was.

[23] Further emails were sent between Mr Davis and Mr Nutsford with offers and counter offers. On 8 January 2018, Mr Davis advised Mr Nutsford that a counter offer from the respondent had been rejected and that his instructions were to "issue proceedings". He asked Mr Nutsford whether he was authorised to accept service of the same.

[24] On 11 January 2018 Mr Davis wrote to Mr Nutsford making a counter offer, in which he included the following words:

> ...our client is [sic] indicated that he is prepared to settle this personal grievance on the financial basis suggested in your correspondence of a compensatory payment of [redacted] and a contribution towards our costs in the sum of [redacted] plus GST.

[25] A further counter offer was made on behalf of the respondent on 19 January in respect of which Mr Davis sought instructions. It appears that this may have been the last written communication between Mr Davis and Mr Nutsford.

[26] Examining the correspondence between Mr Davis and Mr Nutsford, it appears that the only express reference to a personal grievance after the dismissal was the one replicated above from Mr Davis' email of 11 January. That reference in itself does not raise a grievance, as it does not state what the grievance is.

[27] Mr Davis has not given any sworn evidence to the effect that he orally raised a personal grievance for unjustified dismissal on behalf of Mr Monger during his post dismissal conversations with Mr Nutsford. However, he does refer in his submissions to an exchange between Mr Davis and Mr Nutsford in which Mr Nutsford stated that the redundancy process undertaken by his client would "withstand the scrutiny of the ERA". Mr Davis submits that this confirms discussions between Mr Davis and Mr Nutsford in respect of the bringing of a personal grievance.

[28] That, with respect, is insufficient, as Mr Davis is inviting me to infer the existence and contents of a conversation about which he could, instead, give first hand evidence. Although Mr Davis would have had to have briefed the matter out to alternative counsel if he were to have given evidence, that was open to him to do. Mr Nutsford could then have given evidence in response. I cannot safely infer that a grievance was raised orally from the basis of Mr Nutsford comment.

[29] However, the fact that the parties were negotiating for so long, with many offers and counter offers, does strongly suggest that the respondent was fully aware that Mr Monger believed himself to have been dismissed unjustly due to a flawed process. Is that sufficient?

[30] Being mindful of the requirements for raising a personal grievance set out in *Creedy v Commissioner of Police*[2] that the grievance "should be specified sufficiently to enable the employer to address it"[3], there is no cogent evidence that Mr Davis specified Mr Monger's grievance for unjustified dismissal sufficiently after the dismissal took effect for the respondent to know what aspects of the dismissal process were being criticised.

[31] I must therefore conclude that Mr Monger did not raise a valid personal grievance about his dismissal within 90 days of having been dismissed. Therefore, the Authority must turn to Mr Monger's application under s 114(3) for leave to raise his personal grievance outside of the time limit.

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

[32] In relying on the exceptional circumstances set out in s 115(b), there are two further questions to examine:

(a) Did Mr Monger make reasonable arrangements to have the grievance raised on his behalf by Mr Davis?

(b) If so, did Mr Davis unreasonably fail to ensure that the grievance was raised within the required time?

[33] To establish the answers to these questions, it is necessary to review the correspondence passing between Mr Monger and Mr Davis from the date when Mr Monger was advised that he was to be dismissed.

[2] [2006] ERNZ 517
[3] At [36]

Did Mr Monger make reasonable arrangements to have the grievance raised on his behalf by Mr Davis?

[34] Mr Davis's submission is that Mr Monger instructed him to comply with the 90 day time limit, and this is confirmed by the emails passing between him and Mr Davis.

[35] The Authority saw some communications between Mr Monger and Mr Davis which were undated, but which appear to have been sent prior to 22 December to the effect that Mr Monger was asking Mr Davis whether there were any concerns about handing everything over to the company on "Friday"; presumably, the last day of his employment, Friday 22 December 2017. There was nothing in those emails to suggest that Mr Monger wished to raise a grievance. Apart from asking the question about handing over property, they suggest figures (which were redacted in the Authority's copies) to go back to the respondent with by way of a counter offer.

[36] However, Mr Davis does reply to Mr Monger on 21 December in response to his question about handing property back by saying:

> Hi Paul,
>
> Your ability to bring a PG would not be compromised by your handing over the material tomorrow.

[37] Another undated email from Mr Monger to Mr Davis stated:

> With regards to this matter, going to the Employment Court will be the best option. I also will let you know that there was a shortfall in my pay to what was shown to me.

[38] Mr Monger later responded by way of an email to Mr Davis dated 10 January in which he declined an offer from the respondent and instructed Mr Davis to put a counter offer. He made no reference in that email to Mr Davis raising a personal grievance.

[39] By way of an undated email, possibly sent on 19 January 2018, Mr Monger wrote to Mr Davis saying "Yes needs to go to the Employment Tribunal". By way of another email dated Friday, 26 January 2018 Mr Monger said, inter alia:

> I am not accepting their offer and I think going to employment court is the only option.

[40] On 29 January 2018, Mr Davis wrote to Mr Monger seeking instructions. In this email he stated to Mr Monger:

> The options available now are to file an application with the employment tribunal and serve that on the employer unless you are prepared to accept the lesser of [redacted].

[41] In his submissions in support of arguing that he was instructed to raise a grievance, Mr Davis refers to the email in which he stated to Mr Monger that Mr Monger's ability to bring PG would not be compromised by him handing over property to the respondent on 22 December. Mr Davis also refers to references to his instructions to issue proceedings, and to Mr Monger referring going to the "Employment Court" and to the "Employment Tribunal".

[42] In his submissions in reply, Mr Nutsford submits that there was no instruction given to Mr Davis by Mr Monger to raise a personal grievance. Mr Nutsford also states that, during the negotiations, there was no dispute in progress and that the negotiations were to try and agree a redundancy package, not resolve a dispute.

[43] Mr Nutsford submits that references to "Employment Court", "ERA" and "Employment Tribunal" by Mr Monger do not reference an intention to raise a personal grievance but are more like threats or retaliation in the event that his counter offers were not accepted.

[44] Mr Nutsford submits in addition that there was no follow up from Mr Monger between January 2018 and 17 June 2018 when Mr Monger asks Mr Davis for an update on progress. That was sent after the statement of problem had been lodged. Mr Nutsford asks the Authority to consider why he would wait nearly six months before following up on the matter if he had instructed Mr Davis to raise a personal grievance.

[45] In conclusion, Mr Nutsford asks the Authority to find that there were no exceptional circumstances as defined in s 115 of the Act that would allow the raising of a personal grievance out of time.

[46] I would agree with Mr Nutsford that there is no clear evidence of an express instruction being given by Mr Monger to Mr Davis to raise a personal grievance on his behalf in respect of his dismissal. On balance, I believe that Mr Nutsford's analysis of the communications between Mr Monger and Mr Davis during the

negotiations is more likely to be correct. That is, Mr Monger's references about going to the Employment Court, ERA, and Employment Tribunal appear to be ways of putting pressure on the respondent than being an instruction to raise a grievance. I also believe that Mr Davis' reference to "bring[ing] a PG" was a reference to lodging proceedings.

[47] In any event, there is a difference between raising a grievance with the employer on the one hand and issuing proceedings in the Authority on the other. As s 114 of the Act makes clear, the Authority cannot accept an application in relation to a personal grievance unless it is satisfied that a personal grievance has been raised with the employer within 90 days of the action giving rise to the grievance. Therefore, references to issuing of proceedings cannot be taken to be an instruction to raise a personal grievance.

[48] However, the test in s 115(b) is not that the employee must "give instructions", but that he "makes reasonable arrangements to have his grievance raised". That is a broader concept. Standing back and looking at the correspondence between Mr Monger and Mr Davis as a whole, it is clear that Mr Monger expected his dispute with his former employer to be resolved by Mr Davis, however that needed to be achieved. Mr Monger was giving instructions to Mr Davis in that context, and Mr Monger was clearly not stopping short at the prospect of issuing legal proceedings.

[49] The fact that Mr Monger variously refers to "the Employment Court", "ERA", and "Employment Tribunal" suggests that he is not familiar with the details of how to bring proceedings before the Authority. He was reasonably relying on Mr Davis for that knowledge. Given that it is necessary to raise a personal grievance before one can issue proceedings for unjustified dismissal, that must have been implicit in Mr Monger's instructions to Mr Davis. Against that context, I am satisfied that one can infer from the correspondence between Mr Davis and Mr Monger that Mr Monger did make reasonable arrangements for Mr Davis to raise a personal grievance on his behalf to enable him to pursue proceedings for unjustified dismissal, if necessary.

Did Mr Davis unreasonably fail to ensure that the grievance was raised within the required time?

[50] It is my belief, having considered all of the evidence put before me, that Mr Davis believed that he had already raised a personal grievance in relation to

unjustified dismissal by way of his email of 15 December 2017. I suspect that Mr Monger would have been of the same view, relying on Mr Davis's advice.

[51] Having instructed a solicitor to represent him in relation to his employment relationship problem, Mr Monger would reasonably have expected Mr Davis to have taken such procedural steps as were necessary to preserve his legal position. In order to do so, Mr Davis would have had to have ensured that he had raised a personal grievance in respect of the dismissal on or after 22 December 2017. This he has not done. With respect to Mr Davis, I conclude that that failure was unreasonable, given that Mr Davis is a qualified and practising lawyer.

[52] In conclusion, therefore, I am satisfied that s 115(b) has been satisfied in this respect. That is to say, the exceptional circumstance in this case is Mr Davis incorrectly believing that a personal grievance in respect of the dismissal had already been raised on 15 December and that the 15 December email was sufficient to encompass a future act of dismissal. Were it not for that belief, the personal grievance would have been raised by Mr Davis after the dismissal. Therefore, the delay in doing so was occasioned by Mr Davis' incorrect belief as to the sufficiency of the 15 December grievance.

[53] Furthermore, that erroneous belief held by Mr Davis (and, I infer, also by Mr Monger in reliance upon Mr Davis) was sustained until after the statement of problem was lodged. This explains the entire delay between the dismissal and the application for leave to raise the grievance out of time, which was made shortly after the error was revealed.

[54] Therefore, I am satisfied that the first limb of s 114(4)(a) is satisfied, in that the delay in raising a personal grievance was occasioned by that exceptional circumstance.

Is it just to grant leave for Mr Monger to raise his personal grievance outside of the 90 day time limit?

[55] However, the second limb of s 114(4) must also be satisfied. That is, it must be just to allow the employee to raise his personal grievance out of time.

[56] When I stand back and look at the nature of the communications between the parties prior to the letter of 19 December 2017 to Mr Monger from the respondent,

there is at least a question raised about the genuineness of the consultation process undertaken by the respondent. I refer to the contents of the document handed by the CEO to Mr Monger on 4 December 2017 which strongly suggests that any feedback given by Mr Monger would be ignored.

[57] This is not to say that I find at this stage that the consultation process was a sham as it is quite possible, of course, that the respondent had ignored that part of the advice document it had been given and had undertaken a genuine consultation process. That question will need proper investigation at a substantive investigation meeting. However, there is a legitimate question to be examined in respect of the consultation process undertaken. At this stage, there is not enough information to reach even a preliminary view with respect to whether the reasons for the redundancy were substantively justified.

[58] I believe that it would be unjust for Mr Monger to be deprived of his opportunity to have the matter examined by the Authority given that he was personally blameless as to the cause of the delay in raising his personal grievance after the dismissal. Although the grievance, which was only properly raised in the statement of problem, was raised 127 days late, that delay is not egregious given the reason. I do not believe that it will prejudice the respondent unduly to have to defend the claim.

Conclusion

[59] In light of the evidence I have seen, and taking into account the legislative scheme set out in ss 114 and 115 of the Act, I find that this is a case in which it is appropriate to grant leave to Mr Monger to raise his personal grievance in respect of his dismissal outside of the 90 day statutory time limit on the grounds that there were exceptional circumstances which occasioned the delay in raising the personal grievance (namely, his lawyer's failure to raise the personal grievance properly) and that it is just to grant that leave.

Direction to mediation

[60] Section 114(5) of the Act states that, in any case where the Authority grants leave under subsection (4), it must direct the employer and employee to use mediation to seek to mutually resolve the grievance. Although the parties undertook

negotiations both before and after the dismissal coming into effect, they have not, I understand, sought to use the services of the Mediation Services because of the jurisdictional dispute. However, the Authority having resolved that issue, and having given leave to Mr Monger to raise his personal grievance out of time, I now direct the parties to mediation to attempt to resolve this employment relationship problem between themselves in good faith.

Costs

[61] Costs are reserved. If the matter cannot be resolved at mediation, then a determination on costs will be given after the Authority has determined the substantive issue of whether or not Mr Monger was unjustifiably dismissed.

David Appleton
Member of the Employment Relations Authority