

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 131
5548887

BETWEEN CHRIS MOOAR
Applicant

AND PENNYLANE RECORDS
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Kevin Murray, Advocate for the Applicant
David Beck, Counsel for the Respondent

Date of Investigation Meeting: 8 September 2015

Oral Determination delivered: 8 September 2015

Written Determination issued: 9 September 2015

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

[1] This determination is a written record of an oral determination delivered on 8 September 2015.

Employment relationship problem

[2] Mr Mooar has made an application for the Authority to determine a personal grievance of unjustified disadvantage and a personal grievance of unjustified dismissal and a breach of good faith. He also says that Pennylane Records Limited (Pennylane) should pay a penalty for failing to comply with s.130(2) of the Employment Relations Act 2000 (the Act) because it failed to provide him with the time and wages records he requested.

[3] Mr Mooar was dismissed on 4 October 2014 on the grounds of redundancy. Based on that date the 90-day period after his dismissal expired on 2 January 2015.

[4] On 23 February 2015 Shayne Boyce wrote to David Howard, director of Pennylane, purporting to raise personal grievances of unjustified disadvantage and unjustified dismissal.

[5] Pennylane denies that the personal grievances were raised within 90 days of Mr Mooar's dismissal and does not consent to the grievances being raised outside of the 90-day period.

[6] Mr Mooar says that he raised his personal grievance within 90 days of it coming to his attention that Pennylane's Riccarton store was still trading early in the 2015 New Year and had not been sub-leased by another business as he expected it was to be. He says he was led to believe that was a catalyst for the redundancy.

[7] Mr Mooar's evidence discloses that the first date he discovered that the shop premises had not been sub-let was 27 November 2014, by way of text message from another employee. The 90-day period after that expired on 25 February 2015.

[8] If I decide that Mr Mooar's grievances were not raised within the 90-day period in the alternative he has applied under s.114(3) of the Act for the Authority to grant him leave to raise his personal grievance outside of the 90-day limit.

Procedural background

[9] On 4 May 2015 I held a teleconference after which I issued a timetable to deal with the 90-day issue on the papers, as agreed by the parties. However, once the parties submissions were received it was clear that there is a factual dispute about what Mr Mooar knew about the trading status of Pennylane over the remaining months of 2014 after he was dismissed.

[10] A further teleconference was held on 8 July 2015 and the date of 8 September 2015 was set to conduct an investigation meeting and to hear from Mr Mooar, Mr Ingwell and Mr Howard. Dates were set for the provision of statements of evidence.

[11] I received statements of evidence in advance from Mr Mooar, and Yvonne Munro, Pennylane's accounts administrator with whom Mr Mooar corresponded in the weeks following his dismissal and an affidavit from Mr Ingwell. Mr Howard and Garry Knight, a co-manager of the business, also attended the investigation meeting and gave oral evidence. All witnesses were questioned under oath or affirmation.

The issues

[12] I need to determine:

- (a) What is the relevant date from which the 90-day period runs; the date of redundancy or the date on which Mr Mooar discovered that Pennylane remained in business in Riccarton either on 27 November 2015 or after the 2015 New Year?
- (b) Was the grievance raised within 90 days of Mr Mooar discovering Pennylane Riccarton was still trading?
- (c) Did Mr Mooar not having been provided with an individual employment agreement amount to an exceptional circumstance that occasioned the delay in raising a personal grievance?
- (d) If so, is it just to allow the grievance to be raised beyond the 90-day period?

The evidence and the law

[13] 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 or came to the notice of the employee.

[14] Mr Mooar says that the date of his dismissal was not the relevant date from which the 90-day period ran. He says that he understood his manager's position was made redundant because the Riccarton business was going to close as soon as the premises were to be sub-let to another business. He understood the sub-letting was imminent.

[15] Pennylane says that sub-letting the premises was one possibility being explored but that the main thing it needed to do was save money and that Mr Mooar's management position was not necessary in the shop and saving his salary, which was

the highest staff expense in that store, was its best solution. Mr Howard says that it was always the Riccarton store that was going to be closing down, which it now has. That was at least in part because the Riccarton shop's rent was more than the rent of the other two stores combined.

[16] Pennylane also says that Mr Mooar was aware at least up until November 2014 that the Riccarton shop remained open and trading so that he did not just discover that in January 2015.

[17] If I decide that Mr Mooar's raising of his grievance 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 1 or more of the circumstances set out in section 115); and
(b) considers it just to do so.

[18] I need to determine whether the delay in raising the personal grievances was occasioned by exceptional circumstances before I consider whether it is just to grant leave to raise the grievances outside of the 90-day limit.

[19] Mr Mooar says that his situation falls within s.115(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....

[20] He says that if he failed to raise the grievances within 90-days that was occasioned by the fact he did not have a written employment agreement setting out the 90-day time limit for raising a grievance. That makes any failure to raise a grievance within 90 days an exceptional circumstance under s.114(4) of the Act.

[21] Pennylane says that even though Mr Mooar did not have a written employment agreement setting out a reference to the period of 90 days within which a personal grievance must be raised it is certain that he was aware of his right to bring personal grievance proceedings and that he needed to do so in a timely fashion.

[22] Pennylane submits that Mr Mooar simply chose not to seek timely advice and that his claim cannot establish an unjustified dismissal in any case because the decision to make the manager's position redundant was not based on the shop being sub-let.

[23] Mr Mooar says that unless Pennylane can show that it would be disadvantaged in some way by the delay it would be just to grant him leave to raise the grievances outside the 90-day period.

[24] If I do decide to grant leave to Mr Mooar to raise his grievances under s.115(5) I must direct the parties *to use mediation to seek to mutually resolve the grievance.*

Analysis and determination

What is the date from which the 90 days began to run?

[25] Mr Beck submits that the real reason for Mr Mooar disagreeing with his dismissal is that he sees himself as a more valuable staff member than Mr Ingwell, whose employment was retained. Therefore, Pennylane says it is not credible that the catalyst for Mr Mooar's raising of the grievances was his discovery that the shop continued to trade into the New Year.

[26] In support of that submission Mr Beck points out that in Mr Mooar's original affidavit he says:

I live in the St Albans suburb in Christchurch and had no need to drive past or go to the Riccarton suburb. I did not go near the store over the following three months and presumed it had stopped trading because that is what I was told by Garry and Dave would be happening at the time I lost my job.

[27] Mr Mooar's case at that time was based on the fact that a combination of him discovering the shop was still trading in the New Year and a friend telling him in mid-January 2015 that he may have a personal grievance case was what prompted him to seek advice and ultimately to raise his grievances.

[28] However, once evidence was produced by the witnesses for Pennylane that Mr Mooar did go into the store a number of times in the months after his dismissal Mr Mooar made a further statement admitting to having been in email correspondence with Ms Munro and having gone into the shop a number of times. Ms Munro remembers Mr Mooar being in the store up until Christmas. However, there is no objective evidence of Mr Mooar being in the shop after 7 November 2014.

[29] In the light of evidence given today by Mr Ingwell and Mr Knight and tested by my questioning I consider that Mr Mooar reasonably understood the decision to make his position redundant was based on a combination of the fact that the Riccarton shop was losing money and that the shop was likely to be sub-let in the near future and the business closed. The business was closed but that was not until sometime in July 2015.

[30] On 27 November 2014 Mr Mooar exchanged a number of texts with Luke Cox who was a part-time staff member in the Riccarton shop in which Mr Cox told Mr Mooar:

The people who were going to lease the shop all fell though (sic). Stephen has resigned. I'm the only one at the shop now. No one thought it would be open still.

[31] Mr Mooar responded:

Shit! I thought it was pretty much done n dusted with the store. So are you working full time? When did stephen (sic) resign?

[32] I consider that was the time at which it came to the notice of Mr Mooar that one of the reasons for his redundancy may not have been accurate. That was the date at which the action alleged to amount to a personal grievance came to his notice. That being the case Mr Mooar had 90 days from 27 November 2014 to raise his grievances. In addition, Mr Mooar noticed that the shop was still trading in January 2015.

[33] I consider that Ms Boyce's letter dated 23 February 2015 raised Mr Mooar's grievances within 90 days.

Was any delay occasioned by exceptional circumstances?

[34] However, even if I had not decided that the relevant date from which the 90-day period ran was 27 November 2014 it is likely that I would have granted leave to Mr Mooar to raise his grievance out of time because he did not have a written

employment agreement, which is one of the exceptional circumstances set out in s.115 of the Act.

[35] A written employment agreement is required under s.65(2)(vi) of the Act to contain:

a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised;

[36] Mr Mooar's evidence, which I accept, was that he had never had prior cause to consider a personal grievance action and that he was unaware such a claim may be open to him until mid-January 2015 when two friends advised him to take some advice on whether he could bring a claim or not. His evidence was that when he spoke to Ms Boyce on 30 January 2015 she advised him that he may have a case. He then instructed her to raise his grievances.

[37] The lack of an employment agreement brings Mr Mooar within the purview of s.115(c) and I am satisfied that any delay in raising a personal grievance was occasioned by his lack of knowledge of the 90-day period within which he was required to raise a personal grievance.

[38] The lack of a written employment agreement is not overcome by Mr Beck's submission that Mr Mooar was not young and naïve and was a journalist and could have sought legal advice about his redundancy at any time.

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

[39] Mr Beck submitted that Mr Mooar has no prospect of being successful in his claims because the redundancy decision was made on genuine grounds of financial hardship in the business and so it would not be just to grant leave to raise the grievances outside of 90 days.

[40] However, I would have found it just to grant leave on the basis that Mr Mooar's case is arguable. I could not put it higher than that having not heard all the evidence, particularly financial evidence, that would be provided for a substantive hearing. In addition, it cannot be right that if the employer fails in its statutory duty to provide information in writing to an employee about the personal grievance process and, in particular, the 90-day time limit, it can then rely on that employee's failure to

raise a grievance within 90 days to deprive that employee of access to the personal grievance process.

[41] Although Pennylane has closed the Riccarton shop Mr Knight's and Mr Howard's memories of the time around the redundancy are clear and the financial information relied on at the time appears to be readily accessible. There is no disadvantage to Pennylane in any delay in raising the grievances.

Conclusion

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

[43] 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.

Orders

- A. Chris Mooar's personal grievances were raised within 90-days of it coming to his notice that the decision to make his position redundant may not have been based on one of the reasons he understood it to be based on, making it unjustified in his view.**

- B. The parties are directed to mediation and must attempt in good faith to reach an agreed settlement of their differences.**

Christine Hickey
Member of the Employment Relations Authority