

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 59
5454183

BETWEEN DUYEN THI BICH NGUYEN
Applicant

A N D HUE KIM THI TA
First Respondent

LITTLE SAIGON NAILS AND
BEAUTICIANS LTD
Second Respondent

Member of Authority: David Appleton

Representatives: John Horan, Advocate for the Applicant
Peter Rea, Advocate for the Respondents

Investigation Meeting: Determined on the papers on consent

Submissions Received: 29 and 30 January 2015 and 16 April 2015 from the
Applicant
22 April 2015 from the Respondents

Date of Determination: 8 May 2015

DETERMINATION OF THE AUTHORITY

- A. The applicant did not raise a valid personal grievance for unjustified disadvantage with the respondents within the statutory 90 day period. However, leave is granted to the applicant to raise her personal grievance outside of the statutory 90 day time period for the reasons set out in this determination.**
- B. Costs are reserved.**

Employment relationship problem

[1] The applicant has applied for relief against the respondents in respect of several claims including failure to pay holiday pay, public holiday pay, and unjustified disadvantage.

[2] Two preliminary issues arise; namely whether a personal grievance was raised within the statutory timeframe of 90 days in respect of one of the alleged actions amounting to unjustified disadvantage and who the correct respondent is.

[3] This determination addresses the first of those preliminary issues. The second preliminary issue shall be investigated at the substantive investigation.

Brief account of the events leading to the alleged actions said to amount to an unjustified disadvantage

[4] Ms Nguyen was employed by the first or second respondent at a nail bar and beauticians known as *Kim's Nails* which operates at the Colombo Shopping Mall in Christchurch. It is alleged, inter alia, that on or around Thursday 29 May 2014 an individual purportedly acting at the behest of the respondents called Ms Simmons, allegedly appeared at the business premises of Kim's Nails at around 9am that day and *took over the staff and business operation.*

[5] It is alleged that Ms Simmons *verbally harassed both the employee/applicant and the other staff member, named Ms Ngoc Thao My Tran.* It is alleged that Ms Simmons *masqueraded as a Director of the business/company (she is an associate of the employer/respondent) she shouted and threatened both employees, made them turn off their mobile phones, would not let them make any calls, she also demolished some of the counters in which products were displayed and threw them all over the floor.*

[6] It is further alleged that the Police were informed of the situation and that they later took Ms Simmons away. It is alleged that the primary purpose of Ms Simmons *invasion of the business was to force the employees by any means to sign "Employment Agreements" prepared by the employer/respondent, such documents never ever previously offered until after a "Labour Mediation" meeting was unsuccessfully held.*

[7] Ms Nguyen claims a personal grievance for unjustified disadvantage in relation to the alleged actions of Ms Simmons against her.

[8] The respondent submits that the personal grievance in relation to the alleged actions of Ms Simmons was raised out of time and does not consent to the personal grievance being raised out of time.

The law

[9] Sections 114 and 115 of the Employment Relations Act 2000 (the Act) provides as follows:

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.

(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.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

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.

Discussion

[10] It appears that the personal grievance in relation to the alleged actions of Ms Simmons was not raised until Mr Horan wrote to the Authority on 15 January 2015. The 90 days period within which Ms Nguyen was required to raise her personal grievance in relation to the alleged actions by Ms Simmons expired on Tuesday 26 August 2014. There is no evidence that the grievance was raised within this time period.

[11] Therefore, in order for the Authority to be able to grant leave to Ms Nguyen to raise her personal grievance outside of the statutory 90 days period, the Authority must be satisfied of the following:

- (i) That the delay in raising the personal grievance was occasioned by exceptional circumstances; and
- (ii) That it is just to do so.

[12] Section 115 of the Act provides examples of the exceptional circumstances that may be relied upon, although the list is not exhaustive.

[13] Mr Horan was directed to explain to the Authority what the exceptional circumstances were that occasioned the delay in raising the personal grievance. He has written three letters to the Authority.

[14] Mr Horan's first letter was dated 29 January 2015, in which he states the following:

These actions are so serious that as the Advocate for the Applicant I request that the Respondent waive the 90 day period of discovery of this specific "personal grievance" if this request is not granted then I further request that the Employment Relations Authority allow the matter to be raised given that the 90 day period may have been exceeded.

The fact that the actions of the Respondent and her associate are directly related to the same overall employment regulations dispute does provide credibility to this allowance request and I thank the ERA for such consideration as per: (if the employer doesn't consent the employee may apply to the Employment Relations Authority to be allowed to raise a personal grievance after the 90 day period).

[15] By way of a letter dated 30 January 2015 Mr Horan applied for leave to raise the personal grievance out of time. In this letter he stated the following:

The extraordinary happenings of that morning can only be considered as "exceptional circumstances" under any definition of that term and as such could be considered by the ERA as per Employment Relations Act ss.114 and 115.

The fact that the individual named acted in concert with the Respondent and by verbal and physical harassment held the Applicant and her fellow employee in what could be considered a position of unnecessary and perhaps illegal confinement against their will. Such actions could have been considered then, now or at a future date as the basis for a police complaint.

The objective of the individual was to attempt to force the Applicant and her fellow employee to sign Employment Agreements that the Respondent had prepared, sign and dated on the 14th of May 2014.

Those agreements were incorrect as they contained inaccuracies as per employment regulations and the individual employees were advised not to sign the documents due to the incorrectness of the documents that advice was provided at a time between the 14th of May 2014 and the alleged events of Wednesday 28th of May 2014.

Because they (the employees) had not signed the documents resulted in the fracas that developed at the business on that morning stated.

All the above was directly related to all the employment issues that had been already ongoing since February 2014. The Respondent was attempting to retrospectively correct inadequacies of her responsibilities as per employment regulations and her role as an employer and in doing so sent an associate in an attempt to illegally force her employees to sign documents that would have disadvantaged them.

The event at the business of 28th of May 2014 was most distressing and traumatic to the Applicant and her fellow employee, the individual had no legal right to act as she did even as an emissary of Respondent. Her actions towards the Applicant and her fellow employee were totally inappropriate and eventually the individual had to leave the Mall after the Respondent had to come to the business and escort her away.

This extraordinary event has a number of witnesses, and a number of documents and other evidentiary proof of that morning.

The fact that it was not taken up as an 'personal grievance' at or close to the actual event was due to its direct relationship to the employment issues that were all integrated and the actions taken by the individual at the direction of the Respondent was part of all issues.

We submit the rationale outlined in this document as 'exceptional circumstances' that were so extraordinary that the application to allow this 'personal grievance' to be reviewed 'Out of Time'.

[16] It was my view that Mr Horan had not sufficiently explained in either of these letters what had occasioned the delay in raising the personal grievance and so I gave him one last chance to do so by way of a direction dated 10 April 2015. In his letter of 16 April 2015 Mr Horan explains that he regarded the personal grievance arising out of the alleged actions by Ms Simmons to be closely inter-related to Ms Nguyen's other personal grievances. He also states the following:

All the above happened as a result of the initial actions against the Respondent and the two instances were so directly related that I did not ever consider it necessary to file another 'personal grievance' until it became possible that the serious actions by 'Simmons' might not be allowed to be heard by a hearing of the Authority.

Another factor that was an issue was that the initial actions taken against the Respondent with ERA went back to February 2014 and it was not until May 2014 that a mediation hearing was held and soon after that hearing the 'Simmons' instance happened. We; (that is the Applicant and I) assumed that since the actions were taken to the ERA that the mediation breakdown would be followed by an automatic hearing. However that was not the case.

After waiting at least three months with no information from ERA I approached the office and was told we had to move the matter further forward and this was an additional factor that has mitigated in regard to the time factor.

In respect of the term 'exceptional circumstances' then this infers to the actions taken by the Respondent in directing Ms Simmons to obtain a signature onto an employment agreement that the Applicant did not wish to sign as it did not comply with employment regulations. Then; the 'extraordinary' actions taken by Ms Simmons in an attempt

to coerce Applicant to sign the document. All of which involved many others, including other staff, customers, mall management, the police, the Applicant's husband, myself and finally the Respondent having to escort Ms Simmons out of the Mall.

Ms Simmons had no legal standing, was not a director or shareholder or employee of the business all of which created the 'exceptional circumstances'.

[17] No substantive submissions have been received on behalf of the respondent, save that Mr Rae has stated the following:

In response to the personal grievance claim and John Horan's explanation on how the delay in raising was occasioned, have no comment except to respectfully restate and point out on behalf of the defendant that the issue was presented well over the permissible time by over 90 days and the authority is requested to recognise that and rule accordingly.

[18] Considering Mr Horan's correspondence, I infer that, at the time of the alleged incident, Mr Horan did not appreciate the requirements under the Act to raise a personal grievance in respect of the new and distinct alleged actions causing disadvantage and that, therefore, the delay was occasioned by this misapprehension. Ms Nguyen's original statement of problem was not lodged with the ERA until 17 October 2014 and the personal grievance relating to the alleged action of Ms Simmons was not raised until an amended statement of problem was lodged on or around 16 February 2015.

[19] However, in order to satisfy s.115(b) of the Act, I must be satisfied both that Ms Nguyen made reasonable arrangements to have the grievance raised on her behalf by Mr Horan and that Mr Horan unreasonably failed to ensure that the grievance was raised within the required time. No direct evidence has been provided of whether Ms Nguyen made reasonable arrangements to have the grievance raised on her behalf by Mr Horan. Whilst it is clear that Mr Horan was acting for Ms Nguyen at the time of the alleged action, it would be wrong to infer from this alone that she *made reasonable arrangements* to have her grievance raised on her behalf.

[20] There is, however, a second exceptional circumstance which is relevant to this matter; it is evident from correspondence to the respondent from the Labour Inspectorate dated 14 April 2014 that the respondent did not provide Ms Nguyen with a copy of an employment agreement when she started working for it in June 2012, and

this appears to have remained the case during the majority of her employment. It appears from the allegations concerning Ms Simmons that she was trying to get Ms Nguyen to sign an employment agreement on 29 May 2014. Therefore, I infer that no employment agreement was in place when the alleged actions occurred.

[21] Section 115(c) of the Act provides that an exceptional circumstance includes circumstances where the employee's employment agreement does not contain an explanation concerning the resolution of employment relationship problems that is required by s.54 or s.65 of the Act. In a case where no employment agreement is provided at all, that must amount to a failing to provide the required explanation concerning the resolution of employment relationship problems.

[22] Section 115(c) of the Act makes clear that failing to provide the required explanation concerning the resolution of employment relationship problems is an exceptional circumstance, and so I am satisfied that that failure is an exceptional circumstance which, on the balance of probability, occasioned or contributed to the delay in raising the personal grievance.

[23] I must also be satisfied that it is just to grant leave to the applicant to raise her personal grievance out of time. When I take into account the nature of the allegations made in relation to Ms Simmons, which, on their face, are serious and warrant investigation, I believe that, in all the circumstances of the case, it is just to grant leave.

[24] It should be noted that this conclusion does not in any way suggest that I accept that the allegations against Ms Simmons and the respondents occurred as alleged; they will need to be investigated during the substantive investigation of this matter.

Order

[25] I grant leave for Ms Nguyen to raise a personal grievance for unjustified disadvantage in relation to the alleged actions by Ms Simmons after the expiration of the 90 day period set out in s.114(1) of the Act.

Directions

[26] The Authority will shortly conduct a telephone conference call in which the substantive investigation into the complaints raised by Ms Nguyen will be timetabled.

Costs

[27] Costs are reserved until the conclusion of the substantive investigation into this matter.

David Appleton
Member of the Employment Relations Authority