

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Huia Smith (applicant)
AND	Nga Kairauhii Trust (respondent)
REPRESENTATIVES	Trent Petherick for the applicant Elizabeth Brown for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS RECEIVED	2, 17 & 31 August 2006
DATE OF DETERMINATION	11 September 2006

DETERMINATION OF AUTHORITY: 90-day issue

Employment Relationship Problem

1. Ms Smith says the Trust failed or refused to honour her agreement with it to work a 3-year fixed term of employment. The applicant also says she was unjustifiably dismissed on 24 June 2004 when, Ms Smith says, the Trust locked her out – statement of problem received on 2 February 2006.
2. Ms Smith is legally aided.

3. The Trust says Ms Smith abandoned her employment with it in August 2004. It also says the Authority has no jurisdiction to consider Ms Smith's application as the personal grievance was raised out of time – statement in reply received on 10 March.
4. The parties have undertaken mediation.
5. During a second telephone conference convened on 3 July I directed that the claim the grievance was raised out of time be addressed first, by way of witness statements and submissions.

Parties' Positions

Respondent's Position

6. The Trust says Ms Smith's grievance was not raised within 90-days as required by the Act. It does not consent to the applicant raising her grievance out of time. The Trust also says that exceptional circumstances do not apply. Its view of the relevant facts is as follows.
7. The Trust says Ms Smith, after a period of volunteer duties with it, a registered charitable trust, commenced employment with it on 11 August 2003 when the Trust passed a motion to start paying her for the work she was doing, by way of a top up to her domestic purposes benefit, of \$100 per week for 10-hours work per week. That sum increased slightly shortly thereafter.
8. The Trust agrees it did not provide the applicant with a written employment agreement. The Trust accepts that Ms Smith asked it for an employment agreement. The respondent says that, in response, it asked her firstly to draft a list of her duties: the list did not eventuate.
9. In March 2004 the Trust submitted an application for funding from the Health Research Council of New Zealand. Ms Smith was identified in the application as an administration support employee. The funding application was not a new job offer or contract with Ms Smith. It was not a new role: the applicant would continue doing

the work she was already undertaking, without increase to either her hours of work or income. All that would change was the source of the funding money the Trust used to pay the applicant.

10. Between 27 June and 12 August 2004 the Trust's existing funding from Te Puni Kokiri (Ministry of Maori Development) was withheld. None of the Trust's employees or its creditors could be paid. The respondent says it was a difficult time but the employees continued to work under the assumption that funding would come through.
11. The Trust understands that around the same time Ms Smith laid three complaints with the Human Rights Commission against Te Puni Kokiri. Around the same time the respondent says the applicant stopped showing up for work.
12. The Trust says that the next development was the presentation to it by Ms Smith of a letter from the Employment Relations Service, Department of Labour, setting out a calculation for back payment of six weeks wages plus holiday pay, totalling \$973.59 nett. It says Ms Smith also advised the respondent at that time she was not returning to work for the Trust. A representative of the Trust spoke to the signatory of the letter who confirmed Ms Smith had approached the Employment Relations Service for advice.
13. On 16 August the Trust paid Ms Smith \$973.59.
14. Following the applicant's departure, a representative of the Trust visited her regularly and asked her to return to work for the respondent. Ms Smith refused.
15. Nothing further was heard from Ms Smith until a letter dated 9 September 2005 was received from her solicitor submitting a grievance. The 9 September letter came around 442 days, i.e. in excess of 14 months, after the date the applicant alleges she was dismissed (24 June 2004) and 398 days after the date her back pay was given to her (16 August 2004).
16. The Trust does not accept Ms Smith's contention that its failure to provide her with an employment agreement consistent with the provisions of s. 65 of the Act, in

particular a reference to the period of 90-days, within which a grievance must be raised, was the reason for her failing to raise a grievance within that time frame. This is because, on a balance of probabilities basis, having raised and settled a wages arrears claim with the respondent at the time of her alleged dismissal after seeking assistance from the Department of Labour's Mediation Service, it can be fairly concluded Ms Smith was aware of the 90-day requirement. She also had knowledge about her eligibility for legal aid in an employment matter and the process for filing complaints to the Human Rights Commission.

17. It would not be just in all the circumstances for the Authority to grant leave to the applicant to file her grievance out of time. This is because the Trust would be prejudiced by excessive delay, including the possibility that relevant documents have been lost, recollections are less certain and because the delay has prevented the Trust from dealing with the grievance in an informal, cost-effective manner.
18. The grievance advice of 9 September said a full factual background in support of the claim would be submitted later. The statement of claim does not provide a full factual background. Ms Smith has not adequately explained the delay in raising her grievance, either in her statement of claim or any subsequent communication. The reasons relied on by the applicant are not exceptional and her substantive claim is without merit.

Applicant's Position

19. It would be unconscionable to not allow Ms Smith's claim to be heard out of time when the fault for the delay lies with the employer's refusal to provide an employment agreement.
20. Ms Smith's wages arrears claim and her complaints to the Human Rights Commission are unrelated to her personal grievance and have been raised by the respondent as red herrings.
21. Ms Smith was not aware she could use legal aid for a personal grievance until she instructed counsel after the 90-day period.

22. There is no factual foundation for the Trust's allegation that Ms Smith very likely knew of the 90-day period.
23. As set out in the applicant's 9 September grievance advice, and in addition to the Trust's failure to provide a written employment agreement setting out the 90-day requirement, there were other reasons for the delay:
- The Health Research Project did not start until September 2004.
 - Ms Smith trusted that the respondent would reinstate her at that point.
 - Ms Smith could not afford to obtain legal advice at the time.
 - Once Ms Smith was alerted to the fact that she may be eligible for legal aid, it took her some time to save \$50.00 for the application to be made.
 - Ms Smith's application was delayed by an investigation into whether there had been a prior grievance and whether mediation barred a further investigation into this matter; and
 - There were delays in obtaining accounting records and minutes from the Trust.
24. Ms Smith elects not to respond to the contention that there is a lack of merit in respect of the substantive case except to disagree and reserves the right to make submissions at a more appropriate time.

Relevant Case Law

25. A very recent discussion of the matter for determination is set out in the Employment Court's decision, *Bryson v Three Foot Six Limited*, unreported, WC 17/06, Shaw J, 1 September 2006. It is useful to quote from it at length because the Court dealt with the same issue now being brought by Ms Smith:

3. *Application for leave to bring a personal grievance out of time*

[38] *An application for leave to bring a personal grievance out of the 90-day time period is only to be granted if the Court is satisfied that the delay in bringing the grievance was occasioned by exceptional circumstances and that it would be just to do so. There are three matters to be decided under s114 (4):*

- 1. Whether there are exceptional circumstances.*
- 2. Whether the delay in raising the personal grievance was occasioned by the exceptional circumstances.*
- 3. Whether it is just to allow the case to be brought outside the 90-day period.*

[39] *Section 114(4) repeats the test in the Employment Contracts Act 1991 without change but in s115 has added a non-exhaustive list of situations which would give rise to exceptional circumstances. It is well settled that in enacting ss114 and 115 Parliament did not intend to relax the tests for extending the limitation period of 90 days. As then Judge Colgan pointed out in *Telecom NZ Ltd v Morgan* ([2004] 2 ERNZ 9 at 16) Parliament sought to exemplify but not limit situations that would amount to exceptional circumstances. Section 115 sets out four examples of exceptional circumstances. This case concerns s115(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; ...

[40] *In this case, it is accepted that on the face of it s115(c) applies as an exceptional circumstance because Mr Bryson's employment agreement did not contain the explanation concerning the resolution of employment relationship problems that is required by s65.*

[41] *Section 65 stipulates what an individual employment agreement must include. The agreement must 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 in s114 within which a personal grievance must be raised (Section 65(2) (a) (vi)).*

[42] *The principal issue is whether Mr Bryson's delay in raising the personal grievance was occasioned by the lack of the explanation.*

[43] *The meaning of the word "occasioned" in this context was dealt with in McClutchie v Landcorp Farming Ltd ([1993] 1 ERNZ 388 at 395) where Finnigan J said:*

That word "occasioned" itself in my view leads the Court towards, and not away from, a liberal interpretation of the test. It is wider in meaning than "caused" and implies a slightly more liberal view of the causative link between the exceptional circumstances and the delay. The Shorter Oxford Dictionary defines the verb "to occasion" as:

"1. *trans.* To give occasion to (a person); to induce, also, to do this habitually; hence, to habituate, accustom. 2. To be the occasion or cause of (something); to cause, bring about, esp. in an incidental or subsidiary manner . . ."

...

[46] *Ms Muir next submitted that there is no evidence of a clear causal connection between the exceptional circumstances and Mr Bryson's failure to raise his grievance.*

[47] *It is the case for Three Foot Six Ltd that in November 2001 Mr Bryson was aware that Mr Woolf was bringing a claim and therefore it is unconvincing for him to claim he did not know the nature of the claim and he made no effort to get legal advice until January 2002 despite that knowledge. However, I find that Mr Bryson did not know about his right or ability to raise a personal grievance until he got legal assistance well after the expiry of the 90-day period.*

[48] *Ms Muir also submitted that, although there was a dispute resolution clause in the crew deal memo, Mr Bryson did not seek to invoke this which suggests that the issues which arose after his termination did not concern the termination and the 90-day provision would not have assisted Mr Bryson because he would not have referred to or relied on it in the relevant time period. Even when Mr Bryson did detail his concerns in January 2002, he did not raise any issues about the termination of his contract.*

[49] *I am satisfied from the evidence that Mr Bryson was not aware of his ability to take a personal grievance until he consulted with either the community law centre*

but probably more likely when he consulted with his lawyer in March 2002 some 6 months after his dismissal.

[50] *The material time for consideration of when exceptional circumstances arise is in the 90-day period following dismissal. In this case that ended on 27 December 2001. Whatever Mr Bryson's state of mind was after Christmas of that year the evidence discloses no knowledge on his part that he had any right to bring a claim for a personal grievance up to that point. On the other hand, although he did not formally raise a personal grievance to the extent required by s114(2), he did have a number of issues arising from his employment that he wanted to discuss with his former employer and he did want to continue working with Three Foot Six Ltd in some capacity.*

[51] *Because of the absence of the required explanation of his rights in his employment agreement, he cannot be presumed to have had knowledge of those rights to raise his employment issues in the correct manner and within the correct timeframe. I am therefore satisfied that the lack of the explanation of rights occasioned his delay in bringing the personal grievance.*

[52] *Finally the question is whether it is just to allow the case to be brought outside the 90-day period.*

[53] *Three Foot Six Ltd was in breach of its obligation to provide an explanation of employment relationship problem resolution given that it was actually employing Mr Bryson as an employee. In addition, apart from the lack of the explanation, the facts of Mr Bryson's case are particularly unusual. Given that it took four judicial hearings to determine his precise employment status, it is hardly surprising that he would have been uncertain as to his rights and obligations in raising a personal grievance.*

[54] *While there has been considerable delay since Mr Bryson was dismissed and there may have been inevitable changes in the entity that employed him, that delay has not been caused by Mr Bryson apart from the initial time it took to file a grievance. Having come so far in his attempt to bring a personal grievance, it would not be just for him to be cut off at the pass.*

[55] *I find that the exceptional circumstance in this case was the absence of a s65 explanation in his employment agreement, that this occasioned the delay and that it is just to grant leave for the grievance to be brought out of time.*

Discussion

Exceptional Circumstances?

26. It follows from *Bryson* (above) that the Trust was in breach of its obligation to provide to its employee, the applicant, an employment agreement setting out – amongst other things – a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90-days in which a personal grievance must be raised: s. 65 (2) (a) (vi) of the Act. Exceptional circumstances therefore arise: s. 115 (c) of the Act.

Was the Delay Occasioned by the Exceptional Circumstances?

27. The principal issue is whether Ms Smith's delay in raising the personal grievance was occasioned by the lack of that explanation (par 42, *Bryson*, above).

28. I do not accept it was. I reach this conclusion because, as Ms Smith makes clear in her witness statement (in particular par 34), it was around the time of her alleged dismissal that she approached – and obtained from – the Department of Labour's Mediation Service advice about, and statement and a statement in respect of, her claim for 6-week back and holiday pay. On a balance of probabilities basis, I find that – had Ms Smith genuinely believed that she had been dismissed – she would also have raised that concern with the Mediation Service, at the same time or shortly thereafter. This is because Ms Smith clearly knew that her employment problems could be raised, freely and effectively, with the Mediation Service. Her accessing of the Mediation Service so as to obtain back and holiday pay is evidence, I find, of her familiarity with her rights.

29. I am similarly satisfied that, had she raised her concern, she would have been informed by the Mediation Service that, amongst other things, she had 90-days within which to raise the matter with her employer. If she did not raise her concerns

with the Mediation Service, at the same time she successfully obtained its intervention in respect of outstanding wages and holiday pay, it is – I find – because she did not believe herself to have been dismissed. I am therefore satisfied that, in all probability Ms Smith elected to leave the Trust and seek employment elsewhere.

30. The credibility of Ms Smith's claim that she was entirely dependent on a non-existent employment agreement is further weakened by the admission at par. 16 of her statement that, "*Around August (2003) Mihi and I went to Napier to obtain pamphlets and advice for employment contracts to be prepared for the office and future staff.*" As she had been pressing for an employment agreement, I am satisfied those pamphlets would also have provided Ms Smith with some understanding as to her employment rights, including in respect of personal grievances.
31. My balance of probabilities conclusion is strengthened by the fact that a standard employment agreement for United Fruit Packers Limited, with whom Ms Smith says she started employment in March 2005, plainly advises of an employee's obligation to raise a grievance within 90-days (refer to attachment N to the respondent's witness, Ms Mihimai Otene's, affidavit in reply). If, as Ms Smith claims, she was ignorant of her rights because of the absence of an employment agreement with the respondent, it is reasonable to expect that – having read her new individual employment agreement – Ms Smith would then have moved sooner, not 6 months later, to pursue her personal grievance.
32. Ms Smith is not arguing that the action alleged to amount to a personal grievance came to her notice after the event: that is because her own statement plainly identifies 24 June 2004 as the date from which, "*I was not asked to stay ...*" (par 36). Her notice of personal grievance puts the relevant time as August 2004 (when, emphasis added, "*... our client sought recovery of wages owing **and still left the door open** for reinstatement ...*").
33. I am therefore satisfied there is no evidence of a clear causal connection between the exceptional circumstances and Ms Smith's failure to raise her grievance.

Is it Just to Allow the Case to be Brought?

34. In the alternate, would it be just to allow this grievance to be brought outside the 90-day period? I am satisfied it would not for the following reasons.
35. The applicant's account of the circumstances or events leading up to her termination are vague: she says,
35. *After awhile, Mihi failed to pick me up from my home address. Until this time, Mihi has picked me up everyday as the office cannot be accessed unless you have two keys to the building, of which I did not have any.*
36. *I was not asked to stay and not offered payment from the 24th of June 2004.*
37. *I felt all this occurred because of (alleged comments by Te Puni Kokiri representatives to her employer, which the Trust denies making, relating to Ms Smith's family's gang connections – see par. 8 of the applicant's statement, etc and par 6 of Ms Otene's statement).*
36. Ms Otene confirms she used to pick up the applicant every day to take her to work but stopped doing so because of Ms Smith's repeated advice she had other work and was not returning to the Trust. The grievance claim is also unlikely to succeed because, by way of her statement of problem, Ms Smith claims the Trust, 'locked her out' (par 2. b.). The two accounts do not sit comfortably together, particularly as Ms Smith does not deny the Trust's claim of Te Puni Kokiri withholding its funding in 2004, and that all employees were affected – not just her. The claims she was "*not asked to stay*" (above) and/or she was locked out are therefore highly unlikely to succeed.
37. The credibility of Ms Smith's account of relevant events is further compromised by the primary claim set out in her statement of claim, i.e. that she accepted the Trust's offer of a 3-year fixed term of employment that it then refused to honour (par 2.a., statement of problem). This allegation also does not sit comfortably with the lock-out/not asked to stay claims and is not supported by any documentary evidence. The Trust, however, can point to the document provided at "D" in Ms Otene's first affidavit: it is clearly a research proposal. It does not amount in any way to a fresh

or different offer of employment to Ms Smith. That claim is therefore also highly unlikely to be successful.

38. My view is also strengthened by Ms Smith's actions in seeking outstanding pay, including her holiday pay: this is circumstantial evidence I find of the applicant electing to leave her employment with the Trust, to seek work elsewhere.
39. An overall and informed appraisal of both Ms Smith's claims as to exceptional circumstances and to an allegation of unjustified dismissal – no matter how the latter is framed – lead me to the conclusion that the lack of an explanation of rights did not occasion the delay (or the full delay in any event) in the applicant bringing this personal grievance and, because of its substantive shortcomings, it is not just to allow the case to be brought outside of the 90-days.

Determination

40. I find against the applicant, Ms Huia Smith's, claim that – because there was no employment agreement setting out a s. 65 explanation – exceptional circumstances apply in this case and that this occasioned the delay in her filing a personal grievance.
41. I also find that it is not just to grant leave for the grievance to be brought out of time.
42. Costs are reserved.

Denis Asher

Member of Employment Relations Authority