

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Zara Elizabeth Warren (Applicant)
AND Xpressions Fashion Clothing Limited (Respondent)
REPRESENTATIVES R van Panhuys for Applicant
S Webster for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 16 August 2005
MEETING Napier
DATE OF 30 August 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Facts

1. The respondent, Xpressions Fashion Clothing Limited (“Xpressions”), is a clothing warehouse and retail operation run by its two shareholders, Mr Graham Flynn and his wife Elaine. The applicant, Ms Warren, worked for Xpressions as a sales assistant at a fashion shop situated at 47 Dalton Street, Napier, between February and October 2004.
2. After being informed in writing on 7 September that Xpressions was giving “*serious consideration to a business proposal*”, Ms Warren was told a week later that the shop had been sold and that “*as the new owner will be operating the shop herself, we regret to have to inform you that we are giving you three weeks notice*”.
3. Xpressions’ management later suggested that Ms Warren be paid in lieu in notice. However, for whatever reason, this offer was either rejected or withdrawn. Accordingly Ms Warren worked up until her last day of employment, being 5 October.
4. Ms Warren had concerns about the way she came to lose her job, and the fact that she was not given any information in relation to the “business proposal”. As well as these

concerns about the termination of her employment Ms Warren also had concerns about non-payment of holiday pay and the failure to be given timesheets or an employment agreement, amongst other things. She sought advice from the firm of Langley Twigg, where she was assisted by a solicitor, Mr Michael Rutgers. Ms Warren instructed Mr Rutgers to raise a personal grievance with Xpressions.

5. Mr Rutgers did not get on to preparing and sending a letter raising the personal grievance to Xpressions until just before Christmas. He justifiably had concerns about how Xpressions could be contacted, given that the Dalton Street store was apparently no longer operated by Xpressions. He therefore conducted a company search through the Companies Office on the internet. That search showed the registered office and address for service of Xpressions as being its accountant's address. Mr Rutgers also noted that Xpressions' sole director was Mrs Flynn, with a given Napier address, and that the shareholders were Mr and Mrs Flynn, with a different given Napier address. Mr Rutgers also rang a telephone number associated with Xpressions and asked the person who answered the call how he could contact Xpressions in writing. He was told that he could write to 182 Emerson Street, Napier for that purpose. 182 Emerson Street is in fact the address of a shop called In Retrospect. The In Retrospect shop was run by Mrs Flynn's daughter, but at the time Mr and Mrs Flynn were helping out, particularly by providing Xpressions' stock to the store.
6. Mr Rutgers decided not to send a copy of the grievance letter to the accountant's office because he believed the 90 day period was about to expire (he believed it would expire, correctly, as I later determine, in early January 2005) and thus he did not want to send the letter to an address where it would not be picked up for several weeks, given the possibility that the accountant's offices would not be staffed for a long period over Christmas. He believed that it was appropriate to send a copy of the letter to the address of the two shareholders, because he wanted to be sure that as the two officers and shareholders of the company they both received the grievance letter. He also sent a copy of the letter to 182 Emerson Street. The letter sent to Mr and Mrs Flynn was returned to Langley Twigg unopened because of the fact that Mr and Mrs Flynn's address as set out in the Companies Office register was no longer current.

7. It was the Flynn's evidence that they did not receive the letter sent to In Retrospect's address until the same date that they received two follow up letters from Mr Rutgers dated 11 January. One of the two letters related to without prejudice proposals put on Ms Warren's behalf and is thus not relevant here. The other referred to the letter of 21 December, noted that the documents requested therein had not been provided and further requested a statement of the reasons for the dismissal of Ms Warren. That letter noted that Xpressions had to provide that statement within 14 days.
8. Xpressions did respond within that period. In fact a letter was sent to Langley Twigg on 18 January setting out Xpressions' views about the terms of Ms Warren's employment and its termination, including direct reference to the letter of 21 December. Xpressions later asked for a copy of the letter of 21 December. Mrs Flynn said the reason for this was because she believed that there might have been two letters on 21 December, just as there were on 11 January.
9. After a personal grievance for unjustifiable dismissal, plus claims for other matters relating to the failure to have an individual employment agreement and timesheets, alleged failure to pay sick leave and holiday pay were filed in the Authority, Xpressions provided, out of time, a statement in reply, which included the statement that it believed the 90 days had expired on 3 January 2005. This matter was discussed in a conference call held on 27 July. At that time Mr Rutgers, on behalf of Ms Warren, elected to pursue the personal grievance claim on the basis that it had been raised within the 90 days.
10. However, prior to the investigation meeting Mr Van Panhuys took over representation of Ms Warren, as Mr Rutgers had to give evidence about raising the grievance on Ms Warren's behalf. It was subsequently determined that a claim for exceptional circumstances would be made in the alternative. As a result I felt obliged, in equity and good conscience, to accept that application, particularly as Xpressions had filed its statement in reply out of time. Furthermore, given the responsibility of the Authority to direct mediation in a case where exceptional circumstances are made out I determined to first hear and determine the threshold issue on whether or not a grievance was raised within 90 days and, if not, then whether exceptional

circumstances existed and the justice of the case warranted an investigation by the Authority.

The Date of Expiry of the 90 Days

11. Mr Webster submitted that *GWF Agri-Products Ltd v. Gibson* [1995] 2 ERNZ 323 was authority for the proposition that payment in lieu of notice is equivocal as to when employment ends for the purpose of ascertaining the 90 day period. That is of course correct, but employment is ordinarily deemed to have ceased at the end of the notice period, see *Wilson & Horton Ltd v. Stiffe* [2001] ERNZ 296 (CA). In this case there was no payment in lieu of notice anyway and accordingly Ms Warren's employment did not end until 5 October, which is the date for the commencement of the 90 day period. It therefore follows that the relevant expiry date did occur in early January.

Reasonable Steps to Raise the Personal Grievance

12. Assuming Mr and Mrs Flynn did not receive the letters from Mr Rutgers on Ms Warren's behalf until after 11 January, then the only way the personal grievance could have been raised within time was if Ms Warren had taken reasonable steps to make Xpressions aware that she was alleging a personal grievance.
13. This issue would not have had to be decided if Mr Rutgers had simply sent another copy of the letter raising the grievance to the registered office of the company or its address for service. I accept, however, given the proximity of Christmas and the forthcoming expiry of the 90 day period, that it was reasonable for Mr Rutgers to send copies to other than that address, because the office could have been closed for a long period and Xpressions' officers thus would not have been made aware of the grievance until much later.
14. What must be assessed then is whether the steps Mr Rutgers took were reasonable in all the circumstances. The test is not whether all reasonable steps were taken, otherwise Mr Rutger's failure to write to Xpressions' address for service would have been fatal.
15. I find that the steps taken were in fact reasonable ones, especially as it was not Mr Rutgers' fault that the address of the directors had not been updated on the Companies

Register. That is the responsibility of Xpressions' officers or agents and Mr Rutgers was entitled to rely on the Register. Had the Flynns been at the address that was contained in the Company Register then the grievance would have been received by them as officers of Xpressions within the 90 days. Mr Rutgers therefore made reasonable steps to make representatives of Xpressions aware that a grievance was raised. Furthermore, Mr Rutgers rang a business premises associated with Xpressions, asked where a letter addressed to Xpressions should be sent and consequently sent it to that address. In total I find that these steps, while not sufficient, as is apparent, were in fact reasonable steps. I therefore conclude that the grievance was submitted within the 90 days because Ms Warren had taken reasonable steps to make representatives of Xpressions aware that she alleged a personal grievance that she wanted Xpressions to address within the 90 days.

Exceptional Circumstances

16. In the alternative, in the event that I may be wrong in determining that reasonable steps were taken, I determine that the delay in raising a personal grievance was occasioned by exceptional circumstances. The exceptional circumstances are those set out in s.115(b) of the Act, namely where the employee made reasonable arrangements to have the grievance raised on her behalf by an agent and that agent unreasonably failed to ensure that the grievance was raised within the required time. It is clear that Ms Warren instructed Mr Rutgers to raise a personal grievance on her behalf well within the 90 day period.
17. Despite those instructions it is apparent for the purposes of this part of the determination that Mr Rutgers must have subsequently failed to take reasonable steps to raise the grievance, otherwise my original conclusion would stand. The question for me to determine then is whether or not the failure to take reasonable steps meant that he unreasonably failed to ensure that the grievance was raised within the required time. The only reason Mr Rutgers would have failed to raise the grievance within the 90 days was because of the failure of the steps he took to properly notify Xpressions or its officers of the grievance, which must be seen (at least as argued here in the alternative) as unreasonable. In this particular case the failure flows from exactly the same actions. Therefore if the failure by Mr Rutgers was in not taking reasonable steps to

raise the grievance then it was also the failure (also clearly an unreasonable one) to ensure the grievance was raised within 90 days.

18. Having been satisfied that the delay was occasioned by exceptional circumstances, albeit in the alternative, I must also consider whether it is just to grant leave for Ms Warren to submit the grievance out of time. The following factors are relevant. Given the limited nature of the investigation to date I can make no assessment of the relative merits of both parties' cases on the dismissal itself. The reason for the delay was not one of Ms Warren's making. The delay was not significant as the grievance letter was received little more than a week out of time. Both Mr and Mrs Flynn gave evidence that Xpressions would not be prejudiced in its ability to defend Xpressions' position should the grievance be allowed to be heard. Furthermore, the employment relationship problem between Ms Warren and Xpressions extends to more than just a personal grievance and thus the Authority will still need to determine issues relating to the alleged under-payment of remuneration in a further investigation meeting.
19. In *Gibson v. GWF Agri-Products Ltd* [1994] 2 ERNZ 309 the Employment Court looked at a number of scenarios to determine whether it was just to grant leave to submit a grievance out of time. This case is closest to scenario 2 set out there, which involved an employer believing that it could justify the dismissal and also show that it followed a fair procedure, but wished to avoid the cost of defending the case, following a considerable delay. However, in this case the delay was not considerable. I further note that both here and in scenario 2 there was no prejudice to the employer as a result of the delay.
20. The Court held in *Agri-Products* that case 2 was one where the injustice of shutting the employee out of all prospect of remedies was still unacceptably high and far in excess of any injustice to the employer in being deprived of the protection of the limitation period. Here, given that Ms Warren had not delayed in raising her grievance by a considerable period it follows that it must be just for the Authority to grant leave for her application to be heard out of time.

21. Therefore I find that if Ms Warren had not taken reasonable steps to raise her grievance within the 90 day period then the delay was occasioned by exceptional circumstances and it is just to have the Authority hear her application out of time.

Conclusion

22. I have found that Ms Warren did take reasonable steps to make Xpressions aware that she alleged a grievance within 90 days and therefore the Authority should go on to investigate her personal grievance claim. In the alternative, I have determined that if the steps taken on her behalf were not reasonable then leave is granted to pursue her grievance out of time as I am satisfied that the delay was occasioned by exceptional circumstances and I consider it just to do so. Because I have granted leave I am required to direct Xpressions and Ms Warren to use mediation to mutually resolve the grievance. This mediation is to take place within 21 days of the date of this determination. I remind the parties that they must comply with this direction and attempt in good faith to reach an agreed settlement of their differences.

Costs

23. Costs are reserved.

G J Wood
Member of Employment Relations Authority