IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 8
5381987

	BETWEEN	ELIZABETH WRIGHT Applicant
	A N D	THREE MINERS VINEYARDS LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	John Cuttance, Advocate for the Applicant Julie Mitchell and Jeff Price, for the Respondent
Investigation meeting:	6 November 2012 at Alexandra
Submissions Received:	6 November and 27 November 2012 from the Applicant 19 November 2012 from the Respondent
Date of Determination:	11 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Elizabeth Wright, seeks leave to raise a personal grievance beyond the expiration of the 90 day period specified in the Employment Relations Act 2000.

[2] The respondent, Three Miners Vineyards Limited, opposes the application.

Background

[3] Ms Wright was engaged by Three Miners as a marketing and administrative assistant. She commenced on 18 July 2011. Three Miners had concerns about Ms Wright's performance and decided to dismiss. They advised her of the decision

on 14 October 2011. She was given the choice of working out a two week notice period or departing with a payment in lieu. She chose the latter.

[4] Ms Wright says she:

> *… was upset and traumatized by being dismissed, however she was of the mistaken belief that she had no right to bring any action against her employer as she wrongly assumed that the provisions relating to the 90 day trial period applied to her employment and that the employer had the right to terminate her employment.*

[5] Here it should be noted Three Miners claims Ms Wright was advised during her interview a 90 day trial period would apply. The letter of offer notes:

> *The employment regulations as per New Zealand Employment Law (i.e. Holidays, Sick leave, 90 trial period etc) apply to this position.*

[6] In her reply, forwarded the following day, Ms Wright advises acceptance. That said and while an employment agreement was drafted, it was never signed. It contains the following provision:

> *15.1 The parties agree the employee shall serve a trial period of 90 days under the provisions of the employment agreement 2000. During this period the employee may be dismissed with 2 days notice. Where the employee is dismissed for serious misconduct the period of notice shall be 1 hour. The employee has no right to bring a personal grievance in respect of the dismissal although the employee may take action under other provisions of the Employment Relations Agreement 2000.*
>
> *15.2 Not withstanding the provisions of section 15.1 above where the employee is not performing to the satisfaction of the employer, their performance shall be brought to their attention. If the explanation is unacceptable they may be dismissed as provided for in section 15.1 above.*

[7] Ms Wright goes on to say:

> *It was only some months later, on about 19 April 2012, that the Applicant learned that she may have been wrongly dismissed and that she could have grounds for a Personal Grievance. On learning of this she immediately took professional advice in respect of her situation.*
>
> *On the basis of the Applicants instructions her Advocate wrote to the Respondent requesting the Respondent to consent to the Applicant raising a Personal Grievance beyond the 90 day period from her dismissal.*

[8] Three Miners did not consent – they did not even reply.

Determination

[9] Section 114 of the Employment Relations Act 2000 (the Act) provides

> *(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 …*
> *(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.*

[10] Section 115 of the Act says:

> *For the purposes of section 114(4)(a), exceptional circumstances include—*
> *…*
> *(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 …*

[11] Ms Wright, in her statement of claim, advises she relies on the following grounds:

> *(i)* *The applicant was not aware, that is, it did not come to her notice that she had a personal grievance until she was given advice of this on or about 19 April 2012, as prior to that date she had believed that the provisions of 67A Employment Relations Act applied to her employment, as she was advised by her employer at the time she was dismissed. She was unaware that this information was incorrect;*
>
> *(ii)* *That because the Applicant was so affected or traumatized by her unjustified dismissal that she was unable to properly*

consider raising her personal grievance within the 90 day period;

(iii) That the Respondent failed to provide her with a written employment agreement prior to or at the commencement of her employment; and

(iv) That at the commencement of her employment the Respondent did not provide the Applicant with a written explanation concerning the resolution of the employment relationship problems as is required by section 65 of the Act.

[12] After exchanges during the investigation meeting this approach was amended. Mr Cuttance advised the argument about trauma was no longer being pursued and paragraph 11(ii) no longer applied. The argument is now that the deficiencies in documentation were such that they, in themselves, amount to an exceptional circumstance. In particular Ms Wright relies on:

(a) there was no employment agreement;

(b) the job description was not one that applied to the job for which she was appointed and that she never received an amendment;

(c) the agreement, such as it was intended to be, is deficient in that:

(i) the employer is misidentified; and

(ii) there is no job description.

[13] Taking the amended approach first. I can not agree with the claim there was no employment agreement and conclude the situation was more accurately portrayed in the original pleading where it is said the written agreement was not provided at the commencement of employment. I do so as Ms Wright accepted, when questioned, that she received an agreement and estimates that occurred in September. The version produced in evidence and which the parties believe to be a copy of the one provided in September contains the clause required by, in this instance, section 65 of the Act.

[14] The fact the agreement was both late and unsigned does not, in my view, assist Ms Wright. At the point in time the information was required (ie; her dismissal) it was in her possession and no disadvantage arises as a result of the alleged deficiencies.

[15] Similarly I am not persuaded the other alleged documentary deficiencies alter the situation. The evidence is that the deficiency in respect to the job description lies in the title – it accurately reflects the duties performed. That is, in my view, de minimis and certainly does not amount to an exceptional circumstance of the type which might have led to a failure to raise a grievance in time. The same can be said of the misidentification of the employer – Three Miners Limited as opposed to Three Miners Vineyards Limited. Ms Wright knew who was employing her and had access to the company's principals throughout.

[16] These conclusions also dispose of the points raised under (iii) and (iv) of the original pleading. That leaves the argument Ms Wright was unaware she had a potential personal grievance as she understood she was covered by a 90 day trial provision and considered it valid until she received professional advice which suggested otherwise.

[17] Again I conclude the situation was such it does not amount to an exceptional circumstance. I reach that conclusion for the following reasons:

a. First the argument was not pursued in closing (see 11 and 21 above);

b. Second the parties did discuss the fact a 90 day trial period would apply and notwithstanding deficiencies in the agreement which would undoubtedly render it invalid, that was the parties intent;

c. In any event there have been enough cases involving the validity of 90 day provisions to show their existence does not preclude the pursuit of a grievance. The fact one was alleged to exist does not therefore appear to constitute an exceptional circumstance which improperly turned a potential litigant from pursuing her rights and that appears to have been confirmed by Ms Wright's own evidence. She said she was au-fait with employment law and understood the inclusion of 90 day provisions to be compulsory. There is no evidence or claim that incorrect notion was induced by the respondent. It was Ms Wright's and, I conclude, a lack of knowledge of the law does not constitute an exceptional circumstance, especially when it is combined with a failure to attempt to clarify the issue.

Conclusion

[18] For the above reasons I conclude none of the grounds raised by Ms Wright constitute exceptional circumstances justifying the grant of her application she be allowed to raise a personal grievance beyond the 90 day period stipulated in the Act.

[19] It is normal that costs follow the event but Three Miners did not have formal representation at the investigation meeting and the officers present reside locally. That means recoverable costs are limited. In order to avoid additional effort or expense, and given that a costs award can be reviewed, I choose to dispose of the issue and order that costs lie where they fall.

M B Loftus
Member of the Employment Relations Authority