

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 327/07
5081338

BETWEEN

PETER CRUTCHLEY
Applicant

AND

CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Janet Scott

Representatives: Stephen Corlett for Applicant
Samantha Turner for Respondent

Investigation Meeting: 27 September 2007 in Hamilton

Submissions received: 24 September 2007 for Applicant
24 September 2007 for Respondent

Determination: 17 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant seeks to have personal grievances of unjustified disadvantage and unjustified dismissal resolved by the Authority. He has also brought a breach of contract claim against the respondent.

[2] First, however, the Authority must address two preliminary issues.

(i) The applicant seeks a declaration that he raised a personal grievance of unjustified dismissal in terms of s.114 (1) and (2) of the Act in relation to the termination of his employment with effect from 9 December 2005. In the alternative the applicant seeks leave to raise the grievance pursuant to s.114 (3) of the Act because exceptional circumstances exist under s.115 (b) of the Act.

(ii) The respondent draws to the Authority's attention the fact that Mr Crutchley previously filed a Statement of Problem claiming breaches of contract and unjustified disadvantage in his employment. That claim was filed on 22 July 2004 (AEA 678/04). On 13 January 2005 Mr Crutchley's lawyers asked for the hearing date in the matter to be vacated and notified that the application was withdrawn.

However, on 13 March 2007 Mr Crutchley re-filed the original complaints together with a claim of unjustified dismissal. The original claim was thus re-lodged two years and two months after it had been withdrawn and two years, eleven months and twenty-six days after the date Mr Crutchley first raised his grievance on 17 March 2004.

The respondent states that Mr Crutchley has not applied to reinstate the original claims and the respondent opposes it being put before the Authority.

Background

[3] Mr Crutchley was employed by the Ministry of Social Development (MSD) as a Work Broker for Work and Income in Hamilton from 11 February 2002 until 9 December 2005 when his employment was terminated by reason of medical incapacity.¹

[4] On 22 July 2004 the applicant filed proceedings in the Employment Relations Authority alleging a personal grievance (disadvantage) and breach of contract.

[5] The parties attended mediation in the matter on 12 August 2004. The issues between the parties were not resolved in mediation. Nevertheless, discussions between the parties continued and by early December 2004 a proposal to resolve all matters between the parties was arrived at. However, Mr Crutchley did not sign off on the proposed settlement agreement and on 23 December the respondent was advised that Mr Crutchley would be proceeding with his claims.

[6] However, on 13 January 2005 Mr Crutchley's representative wrote to the Authority withdrawing his disadvantage and breach of contract claims against the Ministry.

¹ Mr Crutchley's last day of attendance at work was in February 2004.

[7] After that there were numerous interactions between the Ministry and Mr Crutchley (who was by then on unpaid leave) up until the date of his dismissal for medical incapacity.

[8] It was Mr Crutchley's evidence that during his employment with MSD he sought legal advice on a number of employment relationship problems that arose. As a result, he incurred significant financial expense and it was his evidence that at the time his employment was terminated he had no financial resources to fund further legal services.

[9] However, it was also his evidence that after his employment was terminated, he again needed urgent legal advice and because of his inability to pay for legal services, he was directed to the Hamilton District Community Law Centre (HDCLC) for free legal advice. He and his wife met with Linda Moy of HDCLC on 27 January 2006.

[10] It was Mr Crutchley's evidence that his meeting with Ms Moy lasted for approximately 90 minutes. At that meeting, Mr Crutchley discussed with Ms Moy his concerns relating to his employment with MSD and he told her that he was dissatisfied with how he had been treated at his former employment and now wished to lodge a personal grievance for unjustified dismissal against the respondent. Ms Moy acknowledged those instructions and the meeting concluded on the basis that she would make all arrangements to raise a personal grievance on his behalf.

[11] When Mr Crutchley had not heard from Ms Moy by 8 February 2006, he emailed her inquiring as to whether or not she had been able to register his personal grievance with the respondent before the deadline for raising the grievance. It was Mr Crutchley's evidence that Ms Moy responded on 9 February advising she had sent a notice of personal grievance to WINZ that afternoon and he reviewed the letter that had been sent on his behalf. It was dated 9 February and addressed to Mr Williams (Regional Manager-Work and Income).

“Dear Mr Williams,

Re: Peter Crutchley – Personal Grievance

We are assisting Mr Crutchley in relation to the termination of his employment with Work and Income New Zealand. Notice of termination was given out client on 10 November 2005, his last day of employment being 9 December 2005. The reason for the termination of employment was given as “medical incapacity”.

Mr Crutchley sought assistance from us on 25 January 2006 and we have been instructed to notify you of his intention to lodge a personal grievance on the basis of an unjustified dismissal. You may already be aware of our client’s claim which originated in April 2004.

In essence our client’s claim is based on an unjustifiable action by the employer. That is, the termination for “medical incapacity”, being the unjustified action by the employer. The reason being, the medical incapacity being brought about by the employer’s breach of statutory duty to provide a safe and healthy workplace environment.

We will advise you in due course of the specifics of the client’s claim.

Hamilton District Community Law Centre Linda Wong Moy, Barrister & Solicitor”

[12] It was Mr Crutchley’s evidence that at all times he relied on HDCLC’s legal expertise and believed that HDCLC would protect his best interests.

[13] It was also Mr Crutchley’s evidence, and that of his wife Barbara, that Mrs Crutchley herself emailed Ms Moy on 8 March 2006 requesting confirmation that the grievance letter was sufficient for the raising of a personal grievance. In that email, Mrs Crutchley also asked whether or not any further action was needed at that stage. By a reply email dated 8 March, Ms Moy confirmed that the grievance sent to WINZ was sufficient for the purposes of his personal grievance.

[14] It was Mr Crutchley’s evidence that following Ms Moy’s email of 8 March 2006, he left the matter of his grievance with HDCLC to deal with on his behalf. He

said too that HDCLC had advised him that in due course it would provide him with an opinion as to his legal position.

[15] In fact that opinion was not provided for a further six months. It did not support Mr Crutchley's view of his case (that he had a strong case). At the same time, HDCLC advised it would not pursue the matter further for him without payment and he was referred to a number of practitioners who, it was advised, could assist him on a fee-paying basis.

[16] It was Mr Crutchley's evidence that he subsequently consulted a number of legal practitioners. The question for him was always how he would find the money to finance this.

[17] Ultimately, he received a grant of legal aid to pursue the matter.

[18] On 13 March 2007, a Statement of Problem was lodged with the Authority. That statement of problem encompassed the original disadvantage grievance and the breach of contract claims together with a new claim alleging Mr Crutchley had been unjustifiably dismissed with effect from 9 December 2005.

[19] In its Statement in Reply filed on 3 April 2007, the Ministry (among other things) advised that, in its view, Mr Crutchley was seeking to raise his personal grievance for unjustified dismissal outside of the 90-day period specified in s.114 (1) of the Employment Relations Act 2000. The Ministry also notified that it did not consent to the personal grievance being raised after the expiration of that period.

[20] In its Statement in Reply the respondent also notified its opposition to Mr Crutchley re-filing his original claims.

[21] It was Mr Crutchley's evidence that it was only on receipt of the Statement in Reply filed by the respondent on 3 April 2007 that he became aware that the Ministry was alleging he had not raised his personal grievance within the timeframe allowed under s.114 (1) of the Act.

Positions of the parties

[22] The substantive hearing in this matter is scheduled for December 2007 and so time is of the essence in determining these preliminary matters for the parties. For this reason I have summarised the parties' submissions on the questions to be decided.

They can be assured however that I have considered carefully the very full submissions provided.

Applicant

[23] It is submitted for the applicant that Ms Moy's 9 February letter to the respondent was served within the 90-day period and that the content, language and sentiment expressed in the grievance letter are sufficient to make the respondent aware of a grievance requiring redress by the respondent.

[24] In the alternative it is submitted that Mr Crutchley should be allowed to raise his grievance out of time because exceptional circumstances exist under s.115 (b) of the Act. It is submitted for Mr Crutchley that he made reasonable arrangements to have his grievance raised on his behalf. He met with Linda Moy of HDCLC well within the timeframe required under the Act, he instructed her to raise a personal grievance in relation to his dismissal and he made enquiries to ensure his grievance had been raised and that the grievance raised on his behalf was sufficient for the purposes of the Act. It is submitted exceptional circumstances exist where a legal representative in unequivocally instructed to raise a grievance and that legal representative fails to do so despite knowing of the instruction. (*Jones v George Weston Foods (NZ) Ltd* CA 31/05; *Rarere v Electrotech Controls Ltd* WA 108/06).

[25] It is also argued for the applicant that it would be just to allow the applicant to raise his grievance out of time because he has an arguable case and there will be no prejudice to the respondent because the respondent will, in any event, have to respond to the substance of the applicant's claims concerning an unsafe workplace as this allegation is already before the Authority for determination in the form of the applicant's contractual damages claim.

[26] On the matter his right to recommence his disadvantage claim it is submitted for the applicant that the Act permits any party to withdraw a matter before the Authority and there is no prohibition on recommencing a withdrawn proceeding. The grievance was raised with the respondent on 17 March 2004. The applicant therefore is entitled as of right (pursuant to s.114 (6) of the Act) to lodge his grievance (in this case to re-

lodge his grievance) with the Authority as long as it was lodged by 18 March 2007, which it was.²

[27] Accordingly, the applicant submits he is able to recommence his claim as the claim has not be previously determined by the Authority or resolved between the parties and it has been recommenced within the time frame required under s.114 (6) of the Act.

Respondent

[28] It is the respondent's position that the applicant did not raise a personal grievance of unjustified dismissal within the 90-day timeframe required under the Act. The respondent does not consent to the grievance being raised out of time.

[29] The respondent provided a careful analysis of applicable case law and submits in reliance on that analysis that it cannot be said that Ms Moy's 9 February 2005 letter to the Ministry raised a personal grievance on Mr Crutchley's behalf in accordance with the requirements of s.114 (1) & (2). It submits the 9 February letter merely provides notice of an intended or potential grievance and it did not sufficiently specify the grievance to enable the Ministry to address it. Neither did Mr Crutchley advise what steps he wanted the Ministry to take to resolve his claim.

[30] Further the Ministry does not accept that it had any obligation to advise Mr Crutchley that it did not regard Ms Moy's letter as sufficient to raise a grievance; the employment relationship between the parties had ended. In any event Ms Moy's letter stated she would advise the "*specifics*" of Mr Crutchley's claim "*in due course*" so the Ministry was not alerted to a need to respond.

[31] The respondent opposes Mr Crutchley application in the alternative that he be permitted to raise his grievance out of time. The respondent submits the circumstances claimed by Mr Crutchley (that he relied on his legal advisor) are not exceptional and even if they were they were not causative of the delay and it is not just to grant Mr Crutchley leave to raise his grievance out of time.

² Re-lodged on 13 March 2007

[32] On the matter of Mr Crutchley re-filing his original claim (disadvantage grievance) the respondent argued among other things that Mr Crutchley had the benefit of legal advice when he withdrew his claim; he did not advise at any stage that he was putting his original claim on hold and he took no steps in relation to the claim between January 2005 and March 2007. It is submitted the delay is inordinate and that it prejudices the Ministry's ability to defend it.

Discussion

[33] In arriving at my determination I have had regard to the evidence of the witnesses to these matters, to the statutory scheme and provisions of the Act, to the submissions of the parties and to relevant case law.

[34] Firstly some comments in general.

[35] The applicant's delay in bringing these proceedings for investigation and determination is excessive and the reason for the delay – that he was taking steps to find and secure the financial wherewithal to pursue his claims against the respondent – is unacceptable.

[36] I say unacceptable because it offends against the statutory scheme available for the resolution of employment relationship problems that envisages parties acting to achieve prompt and effective resolution of problems with an emphasis on resolution through mediation and if that is not successful resolution through the investigation and determination processes of the Authority.

[37] Mr Crutchley's actions have been the antithesis of the favoured scheme for the resolution of employment relationship problems.

[38] I note too the IEA governing the personal grievances and disputes (Cl. 12) specifically refers to and imports the good faith provisions of the Act into the resolution of employment relationship problems. It is fundamental good faith behaviour to keep one's employer informed of one's intentions in pursuing a personal grievance. It should also be pursued expeditiously.

[39] I note too, the respondent needs to be mindful of such provisions in its contracts because they extend good faith obligations between the parties beyond the termination of employment to apply to the resolution of disputes and personal grievances. In this case however there was no breach by the respondent in not advising the applicant that the 9 February letter was insufficient for the purposes of raising a grievance because that letter promised specifics of Mr Crutchley's grievance and it was reasonable for the respondent to wait for the information promised before responding.

[40] This said, I will now address the preliminary issues to be decided. I deal first with the respondent's objection to Mr Crutchley re-filing his disadvantage claim.

The re-lodging of the original claims

[41] The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities (s.157 (1)).

[42] The Authority must act as it thinks fit in equity and good conscience, *but may not do anything that is inconsistent with the Act*.....s.157 (3). (Emphasis mine)

[43] Section 114 (6) provides that 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 with the respondent in accordance with the Act.

[44] It is not in dispute that the disadvantage grievance was raised properly with the respondent in accordance with the provisions of s.114 (1) & (2) of the Act. Neither has the matter been previously resolved between the parties or determined by the Authority.

[45] For all the delay on Mr Crutchley's part the statute allows him, as of right, to lodge his personal grievance in the Authority for investigation and determination as long as it is lodged within three years, which the facts show to be the case.

[46] I am confirmed in my view by the requirement that I do nothing that is inconsistent with the Act. I also rely on the findings of the Employment Court in *Ngapuhi Fisheries Ltd v Taurua* [2002] 1 ERNZ 562. There the Court said:

“[41] ... so long as they are within the limitation period for doing so, the law [in the District Court] is that a discontinuance is not a bar to subsequent proceedings on the same cause of action, provided any costs allowed on the discontinuance have been paid. The practice of the Employment Tribunal should not be more restrictive than that of the District Court It would follow that a personal grievance discontinued before adjudication is able to be re-filed, subject of course to the Tribunal’s powers of control of matters before it including for abuse of process, an allegation neither made nor apparent in this case.”

[47] Mr Crutchley is entitled to have his personal grievance of disadvantage investigated and determined by the Authority. Mr Crutchley is also entitled to have his breach of contract claims investigated and determined.

The application for a declaration that the applicant raised his unjustified dismissal grievance within 90 days or that in the alternative he should be granted leave to raise his grievance out of time under the exceptional circumstances provisions of the Act.

[48] The following passage from *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 guides the Authority in determining whether or not the applicant has raised a grievance in accordance with the Act.

“It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance as, for example, unjustified disadvantage in employmentAs the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation

contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, the raising cannot be oral or that any particular formula of words needs to be used. What is important is the employer is made aware sufficiently of the grievance to be able to respond as the legislation scheme mandates”.

[49] Ms Moy’s 9 letter which it is purported raised the dismissal grievance on Mr Crutchley’s part was received by the respondent in circumstances where only recently settlement negotiations between the parties had been concluded without resolution, followed shortly thereafter by the withdrawal of Mr Crutchley’s disadvantage/contractual breach claims from the Authority.

[50] It was in this context that the respondent received a letter, which states an intention to lodge a personal grievance. Ms Moy’s evidence was Mr Crutchley had provided a lot of material in relation to his claims and that required time to assess. It became a matter of urgency to “flick off a letter” notifying the respondent that Mr Crutchley was going to raise a personal grievance and that the specifics would be advised later. She confirmed that the words “to lodge a grievance” referred to “giving notice of personal grievance”.

[51] The letter of 9 February conforms to the purpose advised by Ms Moy. It advises the respondent that it is the applicant’s intention to raise a personal grievance and that the specifics would be advised in due course. It also refers to matters related to the earlier dispute between the parties that had been withdrawn from the Authority.

[52] In this regard I note another statement of the Chief Judge in the *Creedy* case (cited above).

“The personal grievance procedures in the legislation are not aimed at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged grievances identified and addressed quickly, and initially at least, informally and directly between employer and employee”.

[53] I note too that this is what the applicant's representative did – she *'flicked off'* a letter to the respondent with the view to preserving Mr Crutchley's rights to litigate his grievance. It fell woefully short of meeting requirements of the Act in raising a personal grievance, which requires the grievance to be specified sufficiently to allow the respondent to address it as the legislative scheme intends.

[54] I note too, Mr Williams' evidence in the matter. He interpreted the letter for what it was. His thoughts were that the parties had previously and thoroughly canvassed the issues relating to Mr Crutchley's claims that the respondent had failed to provide a safe and healthy workplace. He decided, because the letter referred to the applicant's representative providing specifics in due course that the applicant must be intending to raise new issues and, in consultation with the Ministry's legal advisors, the letter was put aside pending receipt of those specifics.

[55] Mr Crutchley' unjustified dismissal grievance was not raised within 90 days in accordance with the provisions of s. 114(1) & (2) of the Act.

[56] The applicant asks in the alternative that I grant him leave to raise his grievance out of time because the delay in raising his grievance was occasioned by exceptional circumstances and it would be just to allow the grievance to be raised out of time.

[57] In allowing the applicant's claim in this regard I must be satisfied that:

- Exceptional circumstances exist; and
- That the exceptional circumstances occasioned the delay in raising the grievance; and
- That it would be just to allow the applicant to raise his grievance out of time.

[58] The applicant relies on s.115 (b) of the Act in claiming that exceptional circumstances exist.

[59] S.115 (b) describes as an exceptional circumstance the situation where the employee made reasonable arrangements to have the grievance raised on his behalf by

an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[60] The applicant described the steps he took to identify and meet with Ms Moy of HDCLC; the information he submitted to her relating to his claims; his specific instructions to her to raise a grievance his behalf; the following up by him of those instructions and his wife's communications with Ms Moy with a view to ascertaining that the 9 February was sufficient to raise his grievance.

[61] Mr Crutchley submits he made reasonable arrangements to have his grievance raised on his behalf by his then legal representative. I agree that is the case.

[62] It seems to be argued for Mr Crutchley that he relied on HDCLC's expertise to raise a grievance in accordance with the Act and if this is not the case then this amounts to an exceptional circumstance as the legal representative has unreasonably failed to ensure the grievance was raised in time.

[63] It is well settled that reliance on one's legal representative does not constitute an exceptional circumstance Commissioner of Police v Creedy CA 234/06.

[64] I note however, there are exceptional circumstances that exist in this case. They fit the s. 115 (b) criteria. I find it is an exceptional circumstance within the meaning of s.115 (b) of the Act that Ms Moy would give notice of an intention to raise a grievance and that specifics would be provided in due course when she did not go on to provide those specifics. In failing to do so Ms Moy unreasonably failed to ensure that Mr Crutchley's grievance was raised within the required time and that this failure occasioned the delay in raising the grievance.

[65] Lastly I must consider whether it would be just to allow Mr Crutchley to raise his grievance out of time. In considering this issue I have reflected on the merits of the case: the extent of the delay and the reasons for it and the prejudice the respondent in allowing the grievance to be raised out of time.

[66] I have already made the general point that the delay by Mr Crutchley in bringing his claims forward for resolution is unacceptable and contrary to the spirit, if not the letter, of the Act.

[67] Speaking specifically, it was some 26 months after his dismissal before the respondent was properly advised of Mr Crutchley's grievance. I have weighed this delay against the other factors to be considered and find that the evaluation tips in Mr Crutchley's favour, despite what I consider to be an excessive delay on his part in advancing his claims.

[68] It is not possible in the circumstances of the substantial claim before the Authority to make conclusive findings on the merits of Mr Crutchley's claim. However, he does have an arguable case as the dismissal is admitted and the onus rests with the respondent to justify it. (*Gibson v G F W Agri –Products Ltd* [1994] 2 ERNZ 309.

[69] I have also considered the respondent's claim it will be prejudiced in defending the applicant's claims some of which go back five years. The respondent speaks of colleagues and managers who have left the Ministry and who may not be contactable.

[70] I have genuine sympathy for the respondent faced with defending matters that have been the subject of such delay that applies in this case. However, the applicant's claims are all based on the claim that the respondent failed to provide a safe and healthy place of work. The respondent must address these claims under the other heads in which the applicant is permitted to proceed in the Authority.

[71] This being the case I find that in all the circumstances it would unfair not to permit him to raise his grievance out of time.

[72] I am therefore satisfied it would be just to grant leave to Mr Crutchley to raise his grievance out of time.

Penalty Action

[73] To the extent the applicant is seeking penalties for the respondent's alleged breach of good faith it needs to be noted the penalty claim is brought well out of time (s.135 (5)).

Determination

- **The applicant did not raise his grievance within 90 days in accordance with the provisions of the Act.**
- **The applicant is granted leave to raise his grievance out of time.**
- **The applicant is entitled to have his disadvantage grievance and breach of contract claims investigated and determined by the Authority.**

Mediation

[74] Having granted leave to Mr Crutchley to raise his grievance out of time I am bound under s. 115 (5) to direct the parties to use mediation to seek a mutual resolution of Mr Crutchley's grievances.

[75] I intend to set up an urgent telephone conference with the parties to discuss this.

Costs

[76] Costs are reserved and will be dealt with at the conclusion of the investigation into and the determination of Mr Crutchley's substantive claims.

