

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Bruce Lee (Applicant)

AND Color Spec Paints Limited (Respondent)

REPRESENTATIVES Barry Hayes, counsel for Bruce Lee
Stephen and Helen Kidd, advocates for Color Spec
Paints Limited

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 12 January 2007

DATE OF DETERMINATION 15 January 2007

**DETERMINATION OF THE AUTHORITY ON
PRELIMINARY MATTER**

[1] Mr Lee has raised personal grievances with his former employer, Color Spec Paints Limited ("Color Spec"). He says he was unjustifiably and constructively dismissed. He also says he has been disadvantaged by unjustifiable actions of the employer's, although none of the actions concerned were specified. Color Spec says the grievances were raised outside the 90 day period in s 114(1) of the Employment Relations Act 2000, and does not consent to the raising of the grievances outside that period.

[2] Mr Lee sought leave under s 114(3) and (4) to raise a grievance, on the ground that the delay was occasioned by exceptional circumstances and it is just that leave be granted. The circumstances relied on are set out in s 115(b) as follows:

"115

For the purposes of s 114(4)(a), exceptional circumstances include –

- (a) ...
- (b) where the employee has 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 ... "

[3] There was an allegation that Mr Lee did not have a written employment agreement, which may have been a reference to s 115(c). The present application has focussed on s 115(b) and was determined accordingly, but I record that a proposed agreement was provided to Mr Lee. He did not agree to it. That document did contain the required explanation.

[4] Further, the application for leave addressed only the constructive dismissal grievance. Hence this determination addresses the application for leave to raise that grievance, although I will comment later on the allegations of disadvantage.

Mr Lee approaches his representative

[5] In April 2005 Mr Lee had complained to the Occupational Safety and Health service of the Department of Labour about the effect on his health of fumes from the solvents contained in products he transported by van as part of his duties. He had also raised these issues

directly with Color Spec and was dissatisfied with the result. Mr Lee had a further concern about 'disintegrating industrial relations' since problems with the company contract had allegedly begun in 2002. These matters, and the associated stress, were mentioned in Mr Lee's letter of resignation dated 29 August 2005. The resignation was effective immediately.

[6] Mr Lee had also consulted a barrister, Aaron Crabb, in or about early August 2005. There was a wide-ranging discussion about Mr Lee's concerns which included discussion about whether Mr Lee would resign, as well as matters concerning the accident compensation corporation and aspects of the fact that Mr Lee proposed to go to work for a competitor. Mr Lee says he was told he would have a good case for a resignation followed by a claim for constructive dismissal, while Mr Crabb says the advice was that Mr Lee might have a claim but would need more evidentiary support. He also says he canvassed the likelihood of success of various possible causes of action. Thus there was a discussion about the prospect of legal action in association with Mr Lee's resignation.

[7] Mr Lee resigned a few weeks later, without further consultation with Mr Crabb.

[8] On or about 5 September 2005 Mr Lee attended Mr Crabb's offices, apparently without an appointment. Mr Crabb saw him anyway, and the resignation and its implications were discussed.

[9] Unfortunately Mr Crabb has filed two affidavits which contain inconsistent accounts of his instructions. In the first he said he did not recall any definite instructions to raise a grievance, while in the second he said his recollection was that he was instructed to raise a claim of constructive dismissal.

[10] For his part Mr Lee deposed that he:

"... went to see Mr Crabb and instructed him to raise a personal grievance with the respondent based on the constructive dismissal and to refer the dispute to the Employment Relations Service Mediation Service."

[11] Just after his resignation Mr Lee had written an undated letter or note for Mr Crabb regarding what to do next. The note included reference to mediation, and what remedies could be sought.

[12] It is clear from the letter and the general accounts of his approaches to Mr Crabb that Mr Lee did not give Mr Crabb as precise an instruction regarding a personal grievance as he says he did. In that respect Mr Crabb's first affidavit is probably the more accurate. It is very unfortunate that it did not expand in an appropriate way (for present purposes) on the nature of the discussions at that meeting, and that the second affidavit is not accurate. At the same time I accept that Mr Lee did convey to Mr Crabb that he wanted to proceed to litigation in respect of the employment relationship and its termination, and that he and Mr Crabb had discussed raising a grievance alleging unjustified constructive dismissal.

[13] The inconsistency in the affidavits, as well as a comment of Mr Hayes', gave Color Spec particular reason to question whether Mr Crabb's assumption of responsibility for the failure to raise the grievance in time was genuine. Mr Crabb's response was that it is embarrassing for a member of the legal profession to have to give evidence of that kind, and he was uncomfortable about doing so. Mr Crabb's demeanour at the investigation meeting bore that out and I accept his assumption of responsibility was genuine.

[14] Some of the present difficulty could have been avoided if Mr Crabb had followed good legal professional practice of taking proper meeting notes even if the meetings were impromptu, confirming advice to the client in writing, and confirming the client's instructions in writing.¹ He did not do any of those things. He went ahead on the understanding, without further discussion with Mr Lee, that Mr Lee did indeed wish him to raise a personal grievance on the ground of constructive dismissal.

¹ And legal professional privilege had been waived to the extent necessary for the purposes of a preliminary investigation such as this one.

[15] Mr Lee did not complain to Mr Crabb that he had acted without instructions, instead he contacted Mr Crabb several times during 2006 with requests for updates on progress.

[16] As for the reason for the late raising of the grievance Mr Crabb said he was aware of the 90-period within which grievances must be raised, but calculated the period from the date of expiry of a notional one month's notice period rather than the date of the resignation. Accordingly he raised the grievance by letter dated 12 December 2005, thinking it was in time when it was not.

Determination

[17] I turn first to whether Mr Lee had made reasonable arrangements to have the grievance raised on his behalf. The steps he took were:

- (a) consulting Mr Crabb before offering his resignation, and ascertaining that legal action was available to him in respect of his resignation in the event he went ahead with it; and
- (b) attending on Mr Crabb shortly after offering his resignation to further discuss the legal avenues available to him.

[18] The evidence about the discussions between Messrs Crabb and Lee was not very satisfactory, and Color Spec had reason to be concerned. It is, however, clear that Mr Lee was consulting Mr Crabb with more than a mere wish to ascertain what, if any, legal avenues were open to him. He wanted to exercise such legal rights as he may have. Mr Crabb understood that to the extent that, without speaking again to Mr Lee, he considered himself to have instructions, and raised the grievance in December.

[19] I therefore conclude that Mr Lee had made reasonable arrangements to have his grievance raised on his behalf.

[20] The next question is whether Mr Crabb failed unreasonably to ensure the grievance was raised within the required time. Mr Crabb's failure arose out of the incorrect basis on which he calculated the 90-day period. If his approach had been correct, the 12 December letter would have raised the grievance in time.

[21] It is difficult to call a failure to act in time as a result of that kind of error 'unreasonable' as the word 'unreasonable' is usually understood, even if the error is otherwise open to criticism. On the other hand, nor do I believe Parliament intended that a lawyer's error be sufficient to deprive a grievant of the ability to have a grievance addressed. In the sense that there was no good reason for Mr Crabb's failure to ensure the grievance was raised in time, I find there was an unreasonable failure to ensure that was done.

[22] The last consideration is whether it is just that leave be granted. That consideration is usually addressed by referring to the merits of a grievance, although without necessarily hearing and determining those merits.

[23] I have already referred to the reasons for the resignation as set out in the letter of resignation. In his 12 December letter, Mr Crabb said Mr Lee had "no choice but to resign due to health and safety reasons". The concern about health and safety was invoked again in the statement of problem, and it was said in addition that 'bad management practices' when Mr Lee worked at the Tauranga office were a cause of the decision to resign. 'Industrial relations' problems were also referred to.

[24] As already indicated, the health and safety concern centres on the effect on Mr Lee's health of fumes from the solvents contained in products he transported as part of his duties. The OSH inspector who investigated Mr Lee's complaint recommended no more than that there be a systematic formal identification of workplace hazards, and identified the existence of employment-related issues to the extent that mediation was suggested. In association with

that investigation the van which Mr Lee used to transport the products was inspected by the Commercial Vehicle Investigation Unit, which found the vehicle was suitable for the use to which it was put but questioned Mr Lee's handling practices. The accident compensation corporation also made an inspection. Finally, Color Spec itself says it addressed a number of problems brought to its attention, but does not believe there is any overall problem with the vans it operates provided the containers of product are intact. Nor does it accept that Mr Lee's health problems are solely due to the alleged leakage of solvents from containers in his van.

[25] The parties attended mediation on 12 August 2005. However Mr Lee said his health problems were continuing and he resigned soon afterwards.

[26] The 'bad management practices' in Tauranga were said to concern an initially inadequate staffing level, then that two new staff members were appointed but did not perform satisfactorily. Color Spec says Mr Lee was a sole charge salesperson in Tauranga for just over two years from late 1998. A second person was appointed in January 2001, and a third was appointed in March 2003. Mr Lee raised concerns about the way those people worked, which Color Spec investigated. As a way of resolving the problems it offered Mr Lee an opportunity to return to Auckland to work for it there. It says he did so in or about September 2004.

[27] The 'industrial relations' problems were attributed to a breakdown in negotiations for a new employment agreement in 2002. Otherwise the nature of the problems was not specified at all. Color Spec advised that there was a breakdown in negotiations for a new individual employment agreement in 2002. Mr Lee refused to sign an agreement that was offered to him, rather a group of employees, including Mr Lee, sought to negotiate their individual agreements as a group.

[28] Regarding whether it is just that the constructive dismissal grievance be heard, I consider that the alleged effect on Mr Lee's health of the arrangements under which products were transported should be given a full hearing even if Mr Lee's claim is ultimately unsuccessful.

[29] On that basis I consider it just that the unjustified constructive dismissal grievance be allowed to proceed and leave is granted accordingly.

[30] I would, however, say that the allegations about bad management practices and disintegrating industrial relations – non-specific as they are - are so remote in time and place from the resignation that they are unlikely to be given any weight. I suggest Mr Lee give serious consideration to withdrawing any reliance on them in support of the unjustified constructive dismissal grievance.

The allegations of disadvantage

[31] There has been no application for leave to proceed with any disadvantage grievance, and no such leave has been granted.

[32] Further, if these grievances are based on the allegations about 'bad management practices' or 'industrial relations problems' in Tauranga, for example, it was incumbent on Mr Lee (or his agent) to raise them within 90 days of their occurring or coming to his attention. Nothing in the material before me contains the slightest indication of why that was not done. In the absence of any grant of leave these matters will not be addressed as disadvantage grievances in their own right.

Costs

[33] Costs are reserved pending a final resolution of this matter.

R A Monaghan
Member of Employment Relations Authority