

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 8
5309619

BETWEEN JOHN WILLIAM DUFFY
Applicant

A N D NGATAHI HORTICULTURE
PARTNERSHIP a joint venture
of WAKATU
INCORPORATION and
NGATI RARUA ATIWA IWI
TRUST and NGATAHI
PATYNEERSHIP PARTNERS
Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel and Heather McKinnon for Applicant
Martin Logan and Nick Mason for Respondent

Investigation Meeting: 15 October 2010 at Nelson

Submissions Received: 2 November 2010 from Applicant
28 October 2010 from Respondent

Date of Determination: 14 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Duffy says that he was unjustifiably dismissed, constructively or otherwise, from his employment with Ngatahi Horticulture Partnership (Ngatahi Partnership) in May 2009. Further, he says that such dismissal encompasses unjustified actions that disadvantaged him in that he had work withheld from him for three weeks in or about May 2009.

[2] Mr Duffy in his statement of problem applied for leave to raise his personal grievance out of time in the event that it was found that his personal grievance arose at or around the end of May 2009 and not from the time that he resigned by letter dated 21 October 2009.

[3] Following his resignation on 21 October 2009, Mr Duffy raised a personal grievance of constructive dismissal by letter dated 28 October 2009.

[4] Mr Duffy relies in terms of his application for leave on two exceptional circumstances in the main. One was that there was no employment agreement in place containing an explanation about the resolution of employment relationship problems as required by s.65 of the Employment Relations Act 2000. The second that the circumstances were unusual because he did not receive notification that his employment had come to an end but rather was led to believe there was the possibility of work in the future.

[5] Ngatahi Partnership is a partnership between Wakatu Incorporation and Ngati Rarua Atiawa Iwi Trust and is involved in the horticultural industry; apples, pears, hops and kiwifruit.

[6] Ngatahi Partnership says that Mr Duffy was employed on a succession of fixed term seasonal contracts the last of which expired in or around May 2009 and that in accordance with those contracts, Mr Duffy was advised in May 2009 that there was no work available for him at that time.

[7] Ngatahi Partnership says that Mr Duffy did not raise his personal grievance within 90 days of being advised that there was no work for him in May 2009 and it does not consent to the late raising of the personal grievance. Ngatahi Partnership also opposes Mr Duffy's application for leave to raise his personal grievances out of time and says that there was an employment agreement in place that contained an explanation about resolution of employment relationship problems.

The investigation meeting

[8] During a telephone conference with the Authority, Mr Zindel and Mr Rob Lane, who at that time was counsel for Ngatahi Partnership, agreed that the Authority would conduct an investigation meeting to determine the preliminary issues as to whether the personal grievances were raised within 90 days and if not, whether leave should be granted to raise the personal grievances out of time.

[9] The Authority heard evidence from Mr Duffy and his wife, Neske Duffy, and from the general manager of Ngatahi Partnership, Martyn King, and from the production manager, Luke Hawthorne. At the material times, Mr Hawthorne was the

manager to whom the supervisors at Ngatahi Partnership reported and he had the discussions with Mr Duffy about the work situation in or about May 2009.

Issues

[10] The issues for the Authority to determine are:

- Whether Mr Duffy's personal grievance claims were raised within 90 days from the date of dismissal and disadvantage action. This case will involve consideration as to when the 90 day period runs from as there is no dispute that the first time the personal grievances were raised was 28 October 2009.
- If the personal grievance claims were not raised within 90 days, whether leave should be given to raise the grievances after that period.

Whether the personal grievance claims were raised within 90 days from the date of dismissal and disadvantage action

[11] Section 114(1) of the Employment Relations Act 2000 requires:

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 on 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.

[12] Mr Duffy was employed as an orchard hand by Wakatu Incorporation in or about mid-1995. He did not have a written employment contract, but recalls he was made permanent in or about 1997. Mr Duffy was then made redundant from Wakatu Incorporation in or about 2005 and then worked with Ngatahi Partnership from mid-2005 mostly with kiwifruit before transferring to hops in 2007.

[13] Whilst initially it was said on Mr Duffy's behalf that he had never signed an employment agreement, Ngatahi Partnership provided an employment agreement that Mr Duffy accepted he had signed in 2006. Mr Duffy was firm, however, in his written and oral evidence that that was the only agreement he could recall signing and that he had not signed an employment agreement in 2008.

[14] Mr King gave evidence about the circumstances that led to his belief that Mr Duffy had signed a further seasonal employment agreement in 2008. He said that it had however been misplaced.

[15] After the investigation meeting had concluded, Mr Logan advised the Authority that Ngatahi Partnership had obtained a further employment agreement signed by Mr Duffy in September 2005. This was provided to the Authority. Mr Zindel did not object to this. Both the agreements that were provided were signed by Mr Duffy in 2005 and 2006 were headed *seasonal individual employment agreement*.

[16] During or shortly before May 2009, Ngatahi Partnership closed down for a period of two weeks. When Mr Duffy returned back to work in May 2009 he talked to Mr Hawthorne who advised him that there was no work available for him but suggested that he return in about a week's time. There was a dispute as to what was said at that time and during the other two visits Mr Duffy made to Ngatahi Partnership in May 2009. There is no dispute however that Mr Duffy was advised there was no work.

[17] I do not consider that I am required to resolve those disputes for the preliminary matter. I was satisfied at the last of the visits there was something said about Mr Duffy finding other work. The exact statement made was in dispute. Mr Hawthorne in his evidence said that on the last of these visits he advised Mr Duffy that it would be best if he looked for casual work in the meantime. He did not accept that he said, as Mr Duffy recalled in his evidence, *if you find other work you'll have to put up with it*.

[18] Mr Duffy received his final pay from Ngatahi Partnership on 27 May 2009 and he explained that, having been three weeks without work, he looked for other employment so that he could have an income.

[19] Mr Duffy obtained a part time job doing horticultural work elsewhere in or about June 2009. He said that he realised about this time that he was unemployed and referred in his evidence to seeing Thai and Tongan workers working for Ngatahi Partnership in the hops fields performing the type of work he had undertaken in his role.

[20] There was no further communication between Mr Duffy and Ngatahi Partnership until after he had attended at the local community law centre in or about early October 2009. Mr Duffy said that prior to attending at the community law centre, whilst he vaguely knew there was some remedy for the situation, he was primarily concerned with his financial survival.

[21] On 21 October 2009, Mr Duffy signed the following letter that was posted to Ngatahi Partnership:

To whom it may concern

I am writing to inform you that I am giving one week's notice of termination of my employment. This decision has been brought about by me not having any work since the end of May and has left me financially embarrassed. I have enjoyed my 14 years with the company but I need to find steady employment to meet my financial obligations.

*Yours faithfully,
John Duffy*

[22] Mr Duffy then wrote to Ngatahi Partnership on 28 October 2009, some five months after he had received his final pay from Ngatahi Partnership and advised that he intended to take a personal grievance against the company for constructive dismissal. In the letter, Mr Duffy advised that he had been working for the organisation for 14 years on a permanent full time basis and found out in May of 2009 when he returned from holiday that there was no work for him. He wrote that he kept coming back for three weeks but was told there was no work which meant he had to go and seek employment elsewhere. He explained in the letter that he had been working to pay the debt he accrued while unemployed and that he had sent his resignation in because he felt he had little option but to terminate his employment in the appropriate manner.

[23] Mr Zindel raises two arguments about whether the grievances were raised within 90 days. The first argument is that 90 days from the end of May 2009 would only run from when it was reasonable for Mr Duffy to conclude that he would not be given any further work from Ngatahi Partnership and that the relationship was therefore at an end. Mr Zindel in his submission suggests that August 2009 would be such a reasonable time and therefore the letter of 28 October 2009 was within the 90 day timeframe. Mr Zindel relies on the fact that Mr Duffy was never formally

advised that he was dismissed and there was a suggestion that further work may be available.

[24] The second argument that Mr Zindel raises is that the 90 day timeframe runs from the date of the letter of resignation of 21 October 2009.

[25] Mr Logan submits that the action alleged to amount to a personal grievance occurred and came to the notice of Mr Duffy by the end of May 2009. This was when Mr Duffy was told there was no further work and he therefore looked for employment elsewhere. Mr Duffy's final pay was received on 27 May 2009. Mr Logan submits that the action relied on by Mr Duffy in alleging his personal grievance is that he was not provided with work from May 2009 and that given Mr Duffy's view he was a permanent employee such an action could only amount to a permanent sending away or dismissal (Ngatahi Partnership does not accept that position). On that basis, Ngatahi Partnership submits that the personal grievance was therefore not raised within 90 days from the end of May 2009.

[26] I accept that the action that Mr Duffy alleges as a personal grievance is the failure by Ngatahi Partnership to provide him with work as a permanent employee. That occurred in late May 2009. Section 114(1) is clear that the 90 days runs from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[27] The evidence from Mr Duffy at the Authority's investigation meeting supports that he understood that he did not, or would not, have work at Ngatahi Partnership in or about June 2009. Consistent with this, after May 2009, Mr Duffy did not return to, or inquire further, about work at Ngatahi Partnership and obtained other employment in June 2009 and then in a different role from about August 2009. Whilst I accept that initially Mr Duffy may have been hopeful that there would be some work offered to him by Ngatahi Partnership and that the relationship may still be on foot he had, I find, by late June 2009 realised he was, as he put it, unemployed.

[28] I find that the appropriate time for the 90 days to run is from the end of June 2009. Even calculating 90 days from the end of June 2009 until 28 October 2009, the personal grievance was not raised within the 90 day timeframe and a personal grievance for unjustified disadvantage was not raised in the 28 October 2009 letter.

[29] In conclusion, therefore, if the action alleged to amount to a personal grievance is the actual dismissal of Mr Duffy in late May 2009, which came to his notice in late June 2009, then there was no grievance raised within the 90 day timeframe.

[30] I now turn to the second argument that the 90 day period ran from 21 October 2009 when Mr Duffy resigned. Mr Logan was not initially anticipating an argument of this nature and he was given additional time to make submissions on this matter and Mr Zindel a right of reply to those additional submissions.

[31] Mr Zindel submits that Mr Duffy was entitled to consider that his employment was still ongoing in the absence of a clear dismissal and to view the failure of Ngatahi Partnership to contact him and offer him work as a repudiation that entitled him to cancel. In those circumstances, he submits, 90 days ran from the date of Mr Duffy's resignation letter, 21 October 2009.

[32] It was common ground in the submissions that the 90 day period in a constructive dismissal runs from the date of the termination of employment and not the date of the repudiatory conduct. The Full Court of the Employment Court in *Para Franchising Ltd v. Whyte* [2002] 2 ERNZ 120 agreed with the analysis of the then Judge Colgan in *Charlton v. Colonial Homes Ltd* [2001] ERNZ 756 to that effect.

[33] I accept Mr Logan's submission that the Authority must, as the Employment Court did in *Para Franchising* and in *Meyer v. Ports of Auckland Ltd* (unreported) 41/04 28 July 2004, identify the nature of Mr Duffy's personal grievances in order to conclude when the 90 day runs from. In *Para Franchising* and *Meyer*, there was no difficulty identifying the nature of the grievance alleged to be a constructive dismissal.

[34] At the heart of this matter is whether there was an actual dismissal of Mr Duffy when he was not offered any further work from May 2009, in circumstances where he maintained he was a permanent employee, or whether, as Mr Zindel submits, because there was a mistaken belief that Mr Duffy was a casual and did not need to be dismissed, it was open to Mr Duffy to keep the relationship on foot until he elected to cancel the agreement by providing notice of resignation.

[35] In order to identify the nature of the grievance, I turn first to how Mr Duffy described his problem when he lodged his statement of problem with the Authority. Mr Duffy said his problem was his unjustified dismissal, constructively or otherwise, by having work withheld from him since May 2009.

[36] Mr Duffy's expanded on the alleged grievance in his statement of problem to say that he was a permanent employee and therefore entitled to be provided with work. Mr Duffy did not do any further work for Ngatahi Partnership after May 2009.

[37] I find that the action alleged to be a personal grievance was the advice to Mr Duffy in May 2009 that there was no work available for him at Ngatahi Partnership. In effect given that Mr Duffy considered himself a permanent employee, this amounted to a sending away or dismissal. Whilst there was a period of time during which Mr Duffy considered the relationship could still be on foot and that Ngatahi Partnership may provide him with further work I have found that by the end of June 2009 he realised he was unemployed.

[38] Mr Zindel allude to the difficulties with respect to a significant delay in cancelling said that this was a case where Mr Duffy could not be said to have affirmed the contract because Mr Duffy and Ngatahi Partnership were really two ships passing in the night. He referred in his submissions to an English case of *Howard v. Pickford Tool Co* [1951] 1KB 417, 421 where Asquith LJ stated:

An unaccepted repudiation is a thing writ in water and of no value to anybody: it affords no legal rights of any sort or kind.

[39] Mr Zindel goes on to submit that the conduct by Ngatahi Partnership in failing to provide any work was conduct that entitled Mr Duffy to cancel but until he did the employer's conduct was simply *floating and did not have any legal significance*.

[40] I do not accept that submission that the actions of Ngatahi Partnership in May 2009 were without any legal significance and the conduct could be regarded as floating. In circumstances where Mr Duffy maintained his employment was permanent and not seasonal, then Ngatahi Partnership actions in not providing Mr Duffy with ongoing work and paying his final pay did have legal significance. The evidence supports a realisation by Mr Duffy in June 2009 that he had indeed been sent away from Ngatahi Partnership and was unemployed. In Mr Duffy's letter raising his

personal grievance he refers to after being told [in May 2009] there was no work with Ngatahi Partnership having to go and seek employment elsewhere.

[41] I accept Mr Logan's submission that there was no requirement for Mr Duffy to take a further step of resigning. The action that Mr Duffy relied on was that it occurred in May 2009 and the 90 days ran from that time or when that action came to Mr Duffy's notice.

[42] I accept Mr Logan's submission that this matter, where Mr Duffy did not perform any further work for Ngatahi Partnership from May 2009 and resigned in October 2009, having obtained and worked for other employer's in the meantime, did not have the usual hallmarks of a constructive dismissal.

[43] Whilst an interesting and clever argument that the 90 day period runs from 21 October 2009 I conclude that the actions alleged in the personal grievance claim for a dismissal and disadvantage occurred in late May 2009 and came to the attention of Mr Duffy by the end of June 2009 and it is from that time that the 90 day period runs.

[44] The personal grievances therefore were not raised within 90 days from the end of June 2009 as required by s.114 of the Employment Relations Act 2000.

Exceptional circumstances

[45] Mr Duffy applied for leave if the Authority found that his grievances were not raised within 90 days under s.114(3) of the Employment Relations Act 2000 that provides an employee may apply to the Authority for leave to raise a personal grievance after the expiration of the 90 day period.

[46] The Authority, in considering such an application, must be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances. These circumstances may include one or more of the circumstances set out in s.115 of the Employment Relations Act 2000. The Authority must also consider it just to grant leave.

[47] Mr Zindel, in terms of the definition of exceptional circumstances, referred to the Supreme Court's judgment in *Creedy v. Commissioner of Police* [2008] NZSC. In its judgment, the Supreme Court considered the Court of Appeal's judgment in

Wilkins & Field Ltd v. Fortune [1998] 2 ERNZ 70. The Supreme Court preferred a definition of exceptional circumstances as circumstances which are unusual, outside the common run and perhaps something more than special and less than extraordinary.

[48] Mr Zindel relied on several circumstances that he considered exceptional. One such circumstance was Mr Duffy's age of 68 and the fact that he resides in a rural area. I am not inclined to find that these circumstances were outside of the common run or unusual. There was also reference in the evidence to Mr Duffy having had two strokes in the past however there was no evidence about the impact they may have had over the relevant period of time after June 2009. I do not find any exceptional circumstances arising on medical grounds.

[49] More emphasis was placed by Mr Zindel on the fact that Mr Duffy was not provided with a copy of his 2006 employment agreement, the 2008 agreement could not be found and therefore at the material time the information contained about resolution of employment relationship problem was not available to him.

[50] The employment agreements signed in 2006 and 2005 contained a section relating to resolution of employment relationship problems. Mr Duffy did not ask for a copy of the employment agreements.

[51] The 2008 agreement could not be found. If there was no new agreement signed then I accept Mr Logan's submission that the 2006 employment agreement must have simply then continued in force. The 2006 employment agreement contained a provision relating to resolution of employment relationship problems including the 90 day time limit for a personal grievance. I do not find that the fact Mr Duffy did not have a copy of the agreement to be an exceptional circumstance.

[52] The other exceptional circumstance that Mr Zindel relies on is the absence of a clear dismissal and simply reliance by Ngatahi Partnership on the seasonal contract to end Mr Duffy's employment.

[53] Grievances that include issues about the nature of the employment, casual, seasonal, fixed term or permanent are not uncommon or unusual. I am not satisfied that that can be an exceptional circumstance.

[54] In this case I am not satisfied that there are exceptional circumstances for leave as required under s. 114 (4) of the Employment Relations Act 2000.

[55] The application for leave is therefore dismissed.

Costs

[56] I reserve the issue of costs. I note that Mr Duffy was legally aided for the purposes of this matter and it may be that an agreement is able to be reached about costs. If agreement is not able to be reached then Mr Logan has until 18 February 2011 to lodge and serve submission as to costs and Mr Zindel has until 11 March 2011.

Helen Doyle
Member of the Employment Relations Authority