

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 5  
5378047

BETWEEN            WILLIAM SIMPSON  
                                 Applicant

AND                    FOSTERING KIDS (NEW  
                                 ZEALAND FAMILY AND  
                                 FOSTER CARE FEDERATION)  
                                 Respondent

Member of Authority:    Trish MacKinnon

Representatives:        Vivienne d'Or, for Applicant  
                                 Barbara Buckett, for Respondent

Investigation Meeting:    Determined on the papers

Submissions received:    1 October 2012 from Applicant  
                                 9 October 2012 from Respondent

Determination:            15 January 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Preliminary Issue**

[1] Mr Simpson raised personal grievances for unjustified disadvantage and unjustified dismissal. Through his representative he says both grievances were raised within 90 days. He seeks leave, on the basis of exceptional circumstances, if the second grievance was not raised in time.

[2] Fostering Kids accepts the first grievance was raised within the statutory 90 day period but says the second was not. It does not consent to Mr Simpson raising the unjustified dismissal grievance outside that period.

[3] The parties agreed the Authority should determine on the papers the issue of whether Mr Simpson's personal grievance for unjustified dismissal was raised in time, after consideration of their submissions. Mr Simpson asks the Authority to determine the delay was occasioned by exceptional circumstances and to find it just that leave be given to raise the grievance after the expiry of 90 days.

[4] I advised the parties orally of my decision on the preliminary issue in a telephone conference on 14 December 2012, and informed them that my written determination would follow later.

### **Background**

[5] Fostering Kids dismissed Mr Simpson on 9 December 2011. His representative, Ms d'Or, emailed a letter to Fostering Kids' Chief Executive and its representative, Ms Buckett, on 24 February 2012. The purpose, as stated in the letter, was to raise Mr Simpson's personal grievance for unjustifiable dismissal. The relevant content of the letter was as follows:

1. *We have been instructed to act for our client, Mr Bill Simpson who was summarily dismissed from the employ of Fostering Kids.*
2. *Mr Simpson wishes to raise and pursue a Personal Grievance against his former employer on the claimed grounds of Unjustifiable Dismissal.*
3. *This letter is merely to raise the Personal Grievance within the prescribed time frame permitted by the Act on Mr Simpson's behalf with Fostering Kids.*
4. *A detailed letter will follow.*

[6] The relevant text of the accompanying email of 24 February 2012 is reproduced below:

1. *Mr Simpson has made a decision to raise a PG on the claimed grounds of Unjustifiable Dismissal.*

2. *He wishes to file a Statement of Problem with the Employment Relations Authority.*
3. *Accordingly I would be grateful if I could have a copy of the tape of the investigative meeting from which a decision was made to summarily dismiss Mr Simpson.*
4. *You are welcome to direct all correspondence to me on Mr Simpson's behalf.*

### **The Positions of the Parties**

[7] Ms d'Or says she subsequently wrote a letter dated 5 March 2012 and mailed that day which fully stated the basis of Mr Foster's personal grievance for unjustified dismissal. She provided the Authority with a copy of the letter and an explanation of her normal practice when mailing letters.

[8] Ms Buckett says she received the email and attached letter of 24 February 2012 and responded on 6 March 2012, pointing out that neither document contained sufficient information to raise a personal grievance. She informed Ms d'Or that *any reliance on the letter or email to satisfy the legal requirements to the personal grievance will be challenged* noting that there was *insufficient detail for the employer to respond*. Ms Buckett says she did not receive the letter dated 5 March 2012.

[9] Ms d'Or says she did not respond to Ms Buckett's email of 6 March 2012 because she assumed it had crossed with her letter of 5 March 2012. She was content that letter more than satisfied the requirements of the Act for raising a personal grievance. When she did not receive a response to the letter she eventually filed Mr Simpson's Statement of Problem in the Authority on 17 April 2012 without any further attempt to contact Ms Buckett.

[10] Ms d'Or's submissions were headed ***Submissions Regarding Exceptional Circumstances*** and focussed entirely on those circumstances which she claimed to be exceptional. These were her illness at the time, and the non-receipt of the letter of 5 March 2012 by Ms Buckett. The submissions did not pursue the claim made in Mr Simpson's Statement of Problem that the 24 February 2012 email and letter satisfied the statutory requirements for raising Mr Simpson's personal grievance for unjustified

dismissal. Ms d'Or described those documents as *brief and required more detailed information to be provided which was promised in the email letter to Ms Buckett.*

[11] Ms d'Or says she has suffered for several years from a recurrent chronic and debilitating illness which causes her stress. The condition kept her off work for a period of 5 weeks from 20 February 2012 and was the reason for the brevity of her emailed letter of 24 February 2012 to Ms Buckett and the Chief Executive of Fostering Kids. If it had not been for her illness she says she would have telephoned Ms Buckett after receiving her email of 6 March 2012, and the matter of the missing letter would have come to light sooner.

[12] Ms Buckett's submissions, in summary, were that the documents of 24 February 2012 were not sufficient to raise a personal grievance and a more detailed communication was required. There was no evidence that the letter of 5 March 2012 was ever sent. No communication was received from Mr Simpson's representative after 24 February 2012 until the Statement of Problem was filed in April 2012, well after the expiry of the 90 day period for raising a grievance. There were no exceptional circumstances. The Chief Executive who had dismissed Mr Simpson no longer worked for Fostering Kids and the organisation would be prejudiced if the Authority were to allow the late raising of the applicant's personal grievance.

[13] Ms Buckett has also brought to the Authority's attention that in 2011, while he was employed by Fostering Kids, Mr Simpson was listed on the New Zealand Law Society website register as a barrister and solicitor whose areas of practice included employment law.

### **Raising a Personal Grievance**

[14] Section 114 of the Employment Relations Act requires an employee to raise a personal grievance with his or her employer within 90 days of the matter forming the basis of the complaint arising or being brought to the employee's attention (whichever occurs later) unless the employer consents to the grievance being raised after the expiry of that period.

[15] The grievance is raised with the employer *as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[16] Inglis J noted in *Idea Services Limited (In Statutory Management) v Valerie Barker*<sup>1</sup> that the Court had *repeatedly emphasised the requirements for raising a personal grievance*, citing the following passage from *Creedy*<sup>2</sup> where the Chief Judge held that:

*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 or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

*It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

[17] In *Creedy* the Court found a letter sent by Mr Creedy's barrister did not meet the requirements of s114 for raising a personal grievance. The letter had stated that *by this letter [Mr Creedy] serves notice that he commences a personal grievance with you*. It had also indicated one or more of Mr Creedy's conditions of employment had been affected to his disadvantage by the unjustified way his employer had applied the disciplinary process to him.

### ***Exceptional circumstances***

[18] Where a grievance is not raised with the 90 day period and the employer does not consent to the employee raising the matter after the expiry of that period, the employee may apply to the Authority for leave to raise the grievance outside the

---

<sup>1</sup> [2012] NZEmpC112, ARC 6/12

<sup>2</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at paragraphs 36 & 37

statutory time frame. The Authority may, after giving the employer an opportunity to be heard, grant leave if it is satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so.

[19] The Act provides examples of exceptional circumstances at section 115:

*For the purposes of section 114(4)(a), exceptional circumstances include-*

*(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*

*(b) where the employee 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, as the case may be; or*

*(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

As noted by Travis J in *Paul McMillan v Waikanae Holdings (Gisborne) Ltd (trading as McCannics)* the examples of exceptional circumstances in s115 are not intended to be exhaustive and may include more than one of the circumstances.<sup>3</sup>

### **Determination**

*Were the letter and email of 24 February 2012 sufficient to raise Mr Simpson's personal grievance?*

[20] Ms d'Or's submissions tacitly acknowledged the email of 24 February 2012 and its attached letter were insufficient to raise Mr Simpson's personal grievance for unjustifiable dismissal. Those documents merely notified the organisation and its legal representative that Mr Simpson wished to raise and pursue a personal grievance for unjustifiable dismissal.

[21] They provided no detail of his grievance to which the employer could meaningfully respond. I find that neither Ms d'Or's email nor the letter attached to

---

<sup>3</sup> (2005) 7 NZELC 97,859 (EmpC)

that email satisfied the requirements of s114 of the Act for raising a personal grievance.

*Were there exceptional circumstances and would it be just to grant leave to raise Mr Simpson's personal grievance after the expiration of 90 days?*

[22] Ms d'Or relies on her illness and the non-receipt by Ms Buckett of her letter of 5 March 2012 as together constituting exceptional circumstances. She attributes the brevity of her 24 February 2012 letter to her illness. Ms d'Or also says she completed the 5 March 2012 letter to Ms Buckett during the 5 week period of her illness. That letter would have satisfied the statutory requirements for raising a personal grievance had it been sent on 5 March 2012 as it was within time and contained full details of Mr Simpson's grievance.

[23] I find it difficult to reconcile Ms d'Or's claim that her illness constituted exceptional circumstances when, by her own account, she completed and mailed the letter within the 90 day period. Ms d'Or noted in her submissions that *(i)n hindsight a phone call to Ms Buckett on the 6<sup>th</sup> (March) would have exposed the missing letter of the 5<sup>th</sup> at that time, and not several months later*. If she was sufficiently well to write and mail the letter, it is reasonable to assume she was also well enough to respond to Ms Buckett's email either by return email or by telephone. I do not find Ms d'Or's illness constitutes exceptional circumstances.

[24] There is an unresolved issue over whether the letter of 5 March 2012 was actually sent to Ms Buckett. The letter was not included in the documents attached to the Statement of Problem filed by Ms d'Or on 17 April 2012, although the emailed letter of 24 February 2012 was included. The following information was included in the Statement of Problem:

*ooo) A second personal grievance (PG) relating to [Mr Simpson's] dismissal was raised with the employer on 24 February 2012. [4.20]*

*ppp) Ms Buckett in reply says she refuses to accept this PG saying there was insufficient detail for her to respond to, however the Applicant believes that the initial PG raised on 4<sup>th</sup> November 2011 was never properly addressed by the Respondent and that the PG raised on the Applicant's behalf meets the criteria under*

*the Employment Relations Act 2000, its brevity due to an acute flair up of an on-going chronic condition of the Applicant's counsel.*  
**[4.21]**

[25] The document referred to as 4.20 is Ms d'Or's email and attached letter to Ms Buckett dated 24 February 2012. The document referred to as 4.21 is Ms Buckett's emailed letter of 6 March 2012 pointing out that the 24 February 2012 documents did not satisfy the requirements for raising a personal grievance.

[26] It is perplexing that Ms d'Or did not refer in the Statement of Problem to the 5 March 2012 letter to Ms Buckett, instead relying on the brief 24 February 2012 letter to have raised Mr Simpson's grievance. She had already been put on notice of the respondent's view that the earlier letter did not satisfy the statutory requirements for raising a personal grievance. There could have been no such qualms regarding the 5 March letter which provided full details of the personal grievance.

[27] I find it more likely that Ms d'Or mistakenly assumed her email and attached letter of 24 February 2012 satisfied the statutory requirements for raising a personal grievance. The letter itself suggests that was Ms d'Or's understanding, as she noted its purpose was *merely to raise the Personal Grievance within the prescribed time frame permitted by the Act*. When, or whether, she mailed the 5 March 2012 letter remains a mystery, but one that does not constitute an exceptional circumstance.

[28] That leads me to consider whether Mr Simpson's situation comes within s115(b) of the Act, that he *made reasonable arrangements to have the grievance raised on his... behalf by an agent..., and the agent unreasonably failed to ensure that the grievance was raised within the required time*.

[29] Ms d'Or made no submissions on this and provided no information about when she received instructions from Mr Simpson to raise his personal grievance for unjustifiable dismissal. However, she had clearly received those instructions by 24 February 2012, which was 78 days after Mr Simpson's dismissal and within the 90 day period for raising a grievance.

[30] Ms d'Or provided no information that would suggest Mr Simpson instructed her to respond to Ms Buckett's email of 6 March 2012 which had put her on notice of the inadequacy of the 24 February 2012 letter for raising a personal grievance. As there is no evidence Mr Simpson instructed Ms d'Or to provide the required further information about his grievance within the 90 day period, I am unable to conclude that Ms d'Or unreasonably failed to raise a personal grievance on his behalf for which he had made reasonable arrangements. I take into account that Mr Simpson, as a lawyer who had previously claimed employment law expertise, could be expected to pay more particular attention to the manner in which his grievance was raised and progressed than an applicant who lacked that specialised knowledge.

### **Summary of Findings**

[31] Mr Simpson's personal grievance for unjustifiable dismissal was not raised within 90 days of his dismissal and there were no exceptional circumstances that caused the delay. In the absence of exceptional circumstances I do not need to consider the justice of allowing Mr Simpson to raise his grievance outside the statutory period. Mr Simpson's application for leave fails.

### **Costs**

[32] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority