

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 383
5395494

BETWEEN DANNY BACHU
Applicant

A N D TRUCK LEASING LIMITED
t/a AUTO SELECT FLEET
PARTNERS
Respondent

Member of Authority: Rachel Larmer

Representatives: Lee-Long Wong, Advocate for Applicant
Michelle Davies, Human Resources manager for
Respondent

Investigation Meeting: 15 September 2014 at Auckland

Date of Determination: 15 September 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Danny Bachu was employed on 12 May 2008 by Truck Leasing Limited t/a Auto Select Fleet Partners (Fleet Partners) as a vehicle salesperson. He was dismissed for poor performance on 27 November 2009.

[2] On 28 November 2012, Mr Bachu filed a Statement of Problem with the Authority which alleged “*racial harassment*”, “*bullying*”, “*unfairly discriminated against, singled out, disadvantaged, victimised*” and “*unfair dismissal*”.

[3] It was not clear what specific claims Mr Bachu wanted the Authority to investigate, what facts he relied on to support each claim, when each claim arose or what remedies were sought in respect of each claim.

[4] Mr Bachu did not progress his claim so the Authority recorded on 28 May 2013 that the file had been abandoned. On 31 July 2014 Mr Bachu emailed the Authority asking for his matter to be progressed. The file was then reactivated.

[5] On 4 August 2014 the Authority directed Mr Bachu to file an Amended Statement of Problem which made clear each and every one of the specific claims he wanted the Authority to investigate, the facts which related to each claim, the date each claim arose, and when and how he raised a personal grievance in respect of each personal grievance claim he wanted the Authority to investigate.

[6] On 14 August 2014, Mr Bachu filed an Amended Statement of Problem which identified that he wanted the Authority to investigate the following three personal grievance claims:

- (a) Unjustified dismissal grievance which occurred on 27 November 2009;
- (b) Sexual harassment grievance arising from incidents which occurred prior to 19 December 2008;
- (c) Racial harassment grievance arising from an incident which occurred on 15 March 2009.

[7] The information in the Amended Statement of Problem filed on 14 August 2014 suggested that Mr Bachu did not raise any of these personal grievances within 90 days of the incidents occurring as required by s.114(1) of the Employment Relations Act 2000 (the Act).

[8] On 15 August 2014, the Authority wrote to the parties identifying the potential jurisdiction issue and proposing to strike-out the matter for want of jurisdiction. Both parties were given an opportunity to file evidence in support of their view on the jurisdiction issues and a preliminary investigation meeting today was held on the jurisdiction issue only.

[9] The Amended Statement of Problem filed on 14 August 2014 suggested that Mr Bachu did not raise personal grievances for unjustified dismissal and/or sexual and/or racial harassment within 90 days of the incidents occurring as required by s.114 of the Employment Relations Act 2000 (the Act).

[10] At the investigation meeting today Mr Bachu's representative:

- a. Withdrew his racial and sexual harassment grievances;
- b. Conceded Mr Bachu's dismissal grievance had not been raised within 90 days of his dismissal;

[11] In terms of the steps Mr Bachu has taken to progress his dismissal grievance:

- a. During the meeting on 27 November 2009 at which he was dismissed he says he advised his employer that he "*would raise a personal grievance for his unjustified dismissal*".
- b. On 25 February 2010 Mr Bachu emailed Mr Nick Johnson, Chief Executive Officer that "*full details of grievance to follow.*"
- c. His then barrister Mr Lex Lankovsky wrote to Fleet Partners on 17 November 2010 saying "*consideration was being given to raising a personal grievance*".
- d. Fleet Partners responded on 24 November 2010 saying "*no details of the rationale behind the personal grievance*" had been provided and asked for "*information to clarify the reasons for Mr Bachu's claim.*"
- e. On 26 November 2010 Mr Lankovsky responded to Fleet Partners saying "*if further detailed information is required Mr Bachu will need formally to file a Statement of Problem with the Employment Relations Authority*".
- f. On 9 December 2010 Mr Lankovsky advised Fleet Partners that he had been instructed to raise the matter with the Authority and he asked for an address for service, which was provided that day. No further communication was received from either Mr Bachu or his representative.
- g. He filed his first Statement of Problem (which did not meet the requirements of the regulations) with the Authority on 28 November 2012. This was served on Fleet Partners on 30 November 2012.
- h. His Amended Statement of Problem was filed on 14 August 2014 and this was served by the Authority on Fleet Partners on 14 August 2014.

[12] Fleet Partners was therefore not fully or properly apprised of the details of Mr Bachu's dismissal grievance until 15 August, almost five years after his dismissal on 27 November 2009.

Issues

[13] The following issues require determination:

- (a) Was the delay in Mr Bachu raising his dismissal grievance due to "*exceptional circumstances*"?
- (b) If so, is it just to grant leave for Mr Bachu to raise his dismissal grievance almost five years out of time?
- (c) What if any costs should be awarded?

Was the delay in raising Ms Bachu's dismissal grievance caused by "exceptional circumstances"?

[14] There was a delay of almost five years between Mr Bachu's dismissal and him raising a dismissal grievance with Fleet Partners. Mr Bachu bears the onus of establishing "*exceptional circumstances*" caused this extensive delay in him raising his dismissal grievance.

[15] Mr Bachu relies on three factors which he claims are "*exceptional circumstances*" as per the requirement in s.114(4)(a) of the Act:

- a. He was stressed about his dismissal and upset over the events which occurred during his employment which he believes made his dismissal unjustified;
- b. He separated from his wife in mid-2009 (exact date unknown) which he found very stressful;
- c. From April 2012 he helped to care for his terminally ill landlord and the landlord's elderly mother.

[16] Section 115 of the Act sets out (non-exhaustive) examples of exceptional circumstances. These include where:

- a. an employee was so affected or traumatised by the matter giving rise to the grievance that they were “*unable to properly consider raising the grievance*” within the required period.¹
- b. The employee made “*reasonable arrangements*” to have the grievance raised by an agent and the agent unreasonably failed to ensure the grievance was raised within time.²

[17] I find that none of the “*exceptional circumstances*” identified in s.115 of the Act apply.

[18] Mr Bachu failed to provide the medical evidence that is expected to support a claim that he was so affected or traumatised by his dismissal that he was unable to properly consider raising his grievance within time. He filed a medical certificate dated 10 September 2014 which noted he had suffered severe anxiety, depression and insomnia both before and after his dismissal.

[19] I consider it unlikely that Mr Bachu was incapacitated to the required extent because he was able to instruct a lawyer to act for him in November 2010. Mr Bachu also engaged in Employment Court litigation³ in which he challenged an Authority determination⁴ relating to the employer he had worked for before becoming employed by Fleet Partners.

[20] Mr Bachu gave evidence at the Employment Court hearing on 08 March 2011 and he was represented by counsel at that hearing. Mr Bachu was also represented (so must therefore have instructed counsel to make submissions) in respect of the Employment Court’s costs judgment. His costs submissions were filed by his counsel on 06 April 2011.

[21] Mr Bachu also dissolved his marriage on 24 May 2012 so he must have been well enough to have participated in those proceedings which required specific documentation to be filed in support of dissolution.

[22] Mr Bachu had also instructed counsel at least by 17 November 2010 (when Mr Lankovsky advised Fleet Partners he was instructed to act for Mr Bachu “in respect of

¹ Section 115(a) of the Act.

² Section 115(b) of the Act.

³ [2011] NZEmpC 22.

⁴ 04 November 2009, D King, AA281/09.

a personal grievance” the nature of which was unspecified. Mr Lankovsky also wrote to Fleet Partners on 09 December 2010 saying “*my present instructions are to file the matter with the Employment Relations Authority.*” The “*matter*” to be filed was not specified and Mr Lankovsky did not file anything with the Authority.

[23] I consider that Mr Lankovsky’s involvement in November and December 2010 with the unspecified “*personal grievance*” involving Fleet Partners and was counsel in the Employment Court challenge and costs decision in April 2011 show that Mr Bachu was able to give instructions to a representative.

[24] There was no evidence produced or given by Mr Bachu about what instructions he had given to Mr Lankovsky or when. Mr Bachu was confused and could not recall anything about what he had instructed Mr Lankovsky to do and when in terms of raising a grievance. He did not explain why his first Statement of Problem was not filed with the Authority until 28 November 2012 almost two years after Mr Lankovsky indicated a “*matter*” would be filed.

[25] In the absence of evidence from Mr Bachu about what (if anything) he instructed Mr Lankovsky to do in respect of his dismissal grievance I am unable to find that Mr Bachu made “*reasonable arrangements*” with Mr Lankovsky (or indeed anyone else) to raise a dismissal grievance within 90 days of his dismissal.

[26] The limited evidence available to the Authority tends to suggest that Mr Lankovsky was not instructed until almost a year after Mr Bachu’s dismissal. I therefore find that s.115(b) does not apply.

[27] I consider the three factors relied on by Mr Bachu are not “*exceptional*”. It is common for people who have been dismissed to feel stressed about their dismissal. His separation occurred approximately six months after his dismissal so he had time before that happened to raise a dismissal grievance had he wished to do so.

[28] Likewise Mr Bachu did not start looking after his landlord and the landlord’s elderly mother until sixteen months after his dismissal so I do not consider this is a factor which prevented him from raising a dismissal grievance within time.

[29] I am not satisfied that any “*exceptional circumstances*” as required under s.114(4)(a) of the Act, caused Mr Bachu’s almost five year delay in raising his dismissal with Fleet Partners.

[30] I consider the fact that Mr Bachu was able to:

- a. instruct counsel in November 2010 to communicate with Fleet Services about his personal grievance(s);
- b. engage in litigation in the Employment Court in 2011;
- c. engage in dissolution proceedings in the Family Court;

fundamentally undermines his claim that he was so incapacitated from 27 November 2009 until his Amended Statement of Problem was served (by the Authority) on Fleet Services on 15 August 2014.

[31] Even if Mr Bachu had been able to establish that he had not raised his dismissal grievance within 90 days due to “*exceptional circumstances*” I consider this is not a case in which it would be “*just*”⁵ to exercise the Authority’s discretion under s.114(4) of the Act to grant leave to raise his dismissal grievance out of time.

[32] Almost five years have elapsed since Mr Bachu’s dismissal and the individuals involved in that situation are no longer employed by Fleet Partners. I consider this delay would have been likely to have caused Fleet Partners unacceptable prejudice, time and cost in terms of being able to defend Mr Bachu’s claims, should leave had been granted.

[33] I find that the Authority does not have jurisdiction to hear any of the claims Mr Bachu has identified in his Amended Statement of Problem. Accordingly, the Authority process is now at an end.

Costs

[34] Fleet Partners was not legally represented so it did not incur any legal costs. Costs may only be awarded in respect of legal costs which have actually been incurred. Accordingly, it is not appropriate to award any costs.

Rachel Larmer
Member of the Employment Relations Authority

⁵ Section 114(4)(b) of the Act.

