

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 295
3055452

BETWEEN JEROME DU PLOOY
Applicant

AND ASMUSS WATER SYSTEMS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Allan Halse, advocate for the Applicant
Tim Oldfield, counsel for the Respondent

Investigation Meeting: 10 May 2019 at Hamilton

Oral Determination: 10 May 2019

Confirmation of Oral
Determination: 21 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant (Mr Du Plooy) seeks leave under s 114(3) of the Employment Relations Act 2000 (the Act) to raise two personal grievances out of time. Mr Du Plooy maintains that he took reasonable steps to have the grievances raised by his advocate.

[2] The respondent (Asmuss) resists the application.

[3] The legal test requires me to satisfy myself that the delay in raising the personal grievance was occasioned by exceptional circumstances and that I consider it just to allow the grievance to proceed out of time.

[4] There are in fact two personal grievances, one for disadvantage and one alleged unjustified constructive dismissal. As to the disadvantage grievance, that grievance was not raised at the time of the events complained of nor within 90 days of those events which concluded in May 2014 and in any event, the disadvantage grievance was not pursued within three years: s 114 applied.

[5] Turning to the unjustified constructive dismissal allegation, that claim should have been raised by 23 October 2018 and was in fact raised on 8 November 2018.

[6] I am satisfied that Mr Du Plooy took appropriate steps to get his grievance raised. He signed an authorisation to have CultureSafe act on 2 August 2018. His evidence, which I accept, is that he spoke to Mr Halse on that date.

[7] He told Mr Halse he wanted Asmuss to be accountable to him for all the time he was employed there.

[8] He says he went to CultureSafe having read up about his rights and he says that when he met with Mr Halse, he asked Mr Halse to raise a personal grievance for him and that Mr Halse agreed.

[9] There was a subsequent exchange of messages where a draft personal grievance letter was supplied to Mr Du Plooy and then commented on by him in a return message.

[10] Mr Halse wrote to Mr Du Plooy on 1 October 2018 asking Mr Du Plooy to email the draft personal grievance letter which Mr Du Plooy was then working on, to Mr Halse just as soon as it was complete.

[11] It is clear that Mr Du Plooy responded to Mr Halse's above message very promptly because Dr Bishop from CultureSafe wrote to Mr Du Plooy the following day (2 October 2018) saying she had reviewed the personal grievance letter and was sending back a final draft for approval, and for some dates to be added.

[12] I am satisfied then on the evidence provided by Mr Du Plooy that he has taken appropriate steps to raise the constructive dismissal within time and that the delay in both raising the grievance and pursuing it in this Authority are a function of delay in CultureSafe's office, which Mr Du Plooy is not responsible for.

[13] I do not accept that proper steps have been taken to raise the disadvantage grievance, however. That grievance for disadvantage should have been raised proximate to the issues themselves apparently up to but not after May 2014, which is now some five years ago. That personal grievance may not proceed.

[14] I mention for the sake of completeness that of course, a constructive dismissal claim is not restricted to considering evidence about events within the 90 day period.

[15] Despite the views advanced through Asmuss that it would not be just to grant permission, I do not agree. I think Mr Du Plooy has a grievance for constructive dismissal which he wishes the employer to engage on. The fact the employer did not know he was distressed about his circumstances cannot override the justice of the case.

[16] The employer's lack of knowledge of the employee's unhappiness cannot act as an automatic protection to prosecuting the claim.

[17] There will be many cases where the employer is oblivious of the employee's unhappiness and that cannot be an automatic bar to the employee proceeding. It is a factor I have considered but I remain of the view it cannot be determinative.

[18] By virtue of s 114(5) of the Act, the parties are directed to mediation to endeavour to resolve the grievance.

[19] I also reserve costs in the hope that they may be able to be dealt with in the course of mediation.

[20] Leave is of course reserved to either party to revert to me in the event that the matter is unresolved after mediation.

James Crichton
Chief of the Employment Relations Authority