

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 251
3045693

BETWEEN LI WANG
 Applicant

AND W & H DEVELOPMENTS
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Royal Reed, Counsel for the Applicant
 Michelle Pollak, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 30 April 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Li Wang, claims that she has been unjustifiably dismissed by the Respondent, W & H Developments Limited (WHDL).

[2] WHDL denies that Ms Wang raised her personal grievance within the requisite 90 days period and does not consent to a personal grievance being raised outside the time period specified in the Employment Relations Act 2000 (the Act).

[3] Ms Wang claims that (i) the individual employment agreement provided to her by WHDL did not contain a plain language explanation of the services available for resolution of employment related problems, including a reference to the 90 day statutory time period; and (ii) she was so traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the statutory time period set out in s 114 of the Act.

[4] WHDL does not accept that Ms Wang's delay in raising her personal grievance was caused by exceptional circumstances.

[5] Accordingly this determination addresses the preliminary issue as to whether or not Ms Wang raised her personal grievances with WHDL within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievance before the Authority.

Note

[6] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

The issues

[7] The issues for determination are whether or not :

- Ms Wang's delay in raising her personal grievance within the 90 day statutory time period as set out in s 114 of the Act was occasioned by exceptional circumstances pursuant to s 115 of the Act.;
- If so, whether it is just to grant leave pursuant to section 114(4)(b) of the Act.

Background

[8] WHDL is a property development business. It has two directors, Ms Yinghui Wei and Mr Hunyu Han (Mr & Mrs Han). Ms Wei is the sole shareholder.

[9] Ms Wang arrived in New Zealand in October 2009 on a one month visitor visa and was supported financially by Mr and Mrs Han who also paid for Ms Wang to have English lessons in order that she could undertake some paid work in New Zealand.

[10] During November 2009 Ms Wang became pregnant by Mr & Mrs Han's son, Richie Han, whom she married in January 2010.

[11] She performed some casual work for WHDL from 4 December 2009 to 9 June 2010, and was issued with an individual employment agreement (the First Employment Agreement). It is claimed by the Respondent that the original of this First Employment Agreement was signed and sent to Immigration New Zealand (INZ) in Shanghai which has been unable to locate the original.

[12] The First Employment Agreement states at clause 18:

18 PERSONAL GRIEVANCE AND DISPUTE PROCEDURES

The procedure for settlement of personal grievances and disputes concerning the interpretation, application, or operation of this agreement shall be referred to in the Employment Relations Act 2000.

[13] The copy of the First Employment Agreement provided to the Authority is not signed by the parties but in Schedule 1 sets out that Ms Wang's job title was Management Officer and that her remuneration was \$33,449.00 per annum.

[14] During 2017 Ms Wang's salary was increased to approximately \$97,000.00 p.a. and an amended employment agreement was provided to her (the Second Employment Agreement). The Second Employment agreement has been signed by the parties with a statement that it was: "SIGNED by the parties on the day of 31 July 2014".

[15] The copy provided to the Authority has been stamped:

MBIE-INZ- Shanghai – Original Sighted
12/06/2015

[16] The Second Employment Agreement contains the identical clause 18 to that contained within the First Employment Agreement.

[17] During 2016 Ms Wang and Richie Han began to experience some marital difficulties which affected the working relationships between Ms Wang and Mr and Mrs Han. The marital difficulties eventuated in a marital separation in February 2018.

[18] Ms Wang took unpaid leave on 22 December 2017 and was in China from 28 December 2017 until 3 February 2018. During that period Ms Wang did not carry out any work related duties for WHD.

[19] Mr and Mrs Han spoke with Ms Wang on 11, 16 and 17 December 2017 about family related matters concerning the children of Richie Han and Ms Wang; however it is claimed by WHDL that Ms Wang did not provide an explanation in relation to her non-attendance to work or attention to related matters.

[20] Ms Wang claims that her employment was terminated by WHDL on 22 December 2017 after she had separated from Richie Wang and following her salary ceasing to be paid on 17 December 2017.

[21] Prestige Law, acting on behalf of Ms Wang, sent a letter dated 11 May 2018 to McVeagh Fleming who were acting on behalf of the Han family. In that letter Prestige Law state at paragraph 4(a)(ii): “We are instructed that Mr Han has stopped Ms Wang’s wages and terminated her employment with the family business. ...”

[22] A further letter was sent by Prestige Law to Neilson Lawyers, then acting on behalf of the Han family on 16 August 2018. The letter was primarily concerned with domestic arrangements concerning child support and payment of school fees resulting from the marital breakdown between Ms Wang and Richie Han, however it stated at paragraph c:

We understand that our client was employed by your clients’ company, W&H Developments Limited (“**the Company**”), but our client’s salary payments were stopped by the Company after our client and Richie ran into difficulties with their marriage. Our client has considered bringing a claim against the Company. Our client’s instructions were that she was instrumental and responsible for much of the Company’s ongoing work, which had allowed her to earn a healthy incremental remuneration package from her long-standing employment. Given that our client was dismissed without due process, please confirm whether your clients will be reinstating our client’s position in the company, or alternatively proposing appropriate compensation for unjustified dismissal.’

[23] Prestige Law sent a further letter dated 26 September 2018 addressed to WHDL which stated:

2. Our client has been unjustifiably dismissed from her full-time employment as Manager at W&H Developments Limited (the “Company”). We are instructed to raise this personal grievance with you under the Employment Relations Act 2000.
- 4 On 22 December 2017 our client was dismissed via a text message from Director Ms Alice Wei. The message discussed many personal matters and stated that even if our client did not divorce your son, she would not be welcome as an employee of the company any longer. ...
5. Ms Wang was dismissed immediately without any period of notice being given ...

7. Ms Wang was not provided a copy of her employment agreement, meaning she had no way to consult the terms of the agreement regarding dispute resolution or time within which to raise a personal grievance.

9. Our client wishes to resolve this matter amicably, and purposes that this matter is referred to Employment Mediation Services to arrange mediation regarding the employment is specifically. ...

Was Ms Wang's delay in raising her personal grievance within the 90 day statutory time period occasioned by exceptional circumstances?

The Act addresses raising a personal grievance at s114 of the Act which provides at subsections (3) and (4):

(1) 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 with 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;

(2) (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

- a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
- b) Considers it just to do so

[24] Ms Wang understood that her employment with WHDL had been terminated on 22 December 2017. However she had taken no steps to raise a personal grievance with WHDL until the letter dated 26 September 2018 which was significantly outside the 90 day statutory time limit for doing so.

[25] In this case, WHDL does not consent to Ms Wang raising her personal grievance after the expiration of the statutory 90 day time limit. Accordingly Ms Wang has applied to the Authority to raise her personal grievance after the expiry of the time limit pursuant to s 114(4).

(a) Exceptional Circumstances pursuant to s 114 (4) (a) and s 115 of the Act

[26] Ms Wang claims that her delay in raising a personal grievance was occasioned by exceptional circumstances and seeks leave from the Authority to raise her personal grievance outside the statutory time limit pursuant to s 114 (4) of the Act.

[27] Ms Wang claims that the exceptional circumstances on which she relies are those set out in s 115(c) of the Act as being:

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 ...

[28] The form and content of an individual employment agreement are set out in s 65 of the Act which states in s65(2)(vi) that the individual employment agreement must contain:

A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised ...

[29] Clause 18 as set out in both the First and Second Employment Agreements does not contain a reference to the period of 90 days in which a personal grievance must be raised.

[30] Ms Wang understood that her employment with WHDL had been terminated on 22 December 2017. There had been no explanation in either the First or Second Employment Agreements that she needed to raise a personal grievance within 90 days of it having come to her attention that the employment had ended.

[31] Ms Wang also claims that pursuant to s 115(a) of the Act that she was so traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the statutory time period set out in s 114 of the Act.

[32] Prior to the termination of her employment and in the period thereafter I accept that Ms Wang was dealing with the emotional upset resulting from the breakdown of her marriage and the child care arrangements that she was unable to focus upon the personal grievance.

[33] On that basis I find that exceptional circumstances as set out in s 115(c) and s 115(a) of the Act are established..

(1) *'Just To Do So' pursuant to s 114(b) of the Act*

[34] It is not sufficient for the exceptional grounds for raising a personal grievance outside time to be satisfied, the Authority has also to consider whether or not it is just to grant leave to the Applicant to raise the personal grievance outside the statutory 90 day time period.

[35] I have found the failure to raise her personal grievance within the statutory 90 days' time limit attributable to exceptional circumstances. However it is clear from the letter sent by Prestige Law to McVeagh Fleming dated 11 May 2018 that Ms Wang was receiving legal advice from that date, if not from any earlier point, and although the letter was mainly concerned with the marriage separation issues, it had pointed out in paragraph c) that Mr Han had ceased paying Ms Wang's wages and terminated her employment.

[36] I find that by 11 May 2018 Ms Wang was not only aware of: "the action alleged to amount to a personal grievance" but had instructed a legal firm to represent her and was receiving legal advice.¹

[37] I find at that date therefore that Ms Wang, with the benefit of legal advice, was able to properly consider raising the personal grievance. However no personal grievance had been raised at that date.

[38] On 16 August 2018 Prestige sent a further letter to the lawyers acting on behalf of WHDL in which it was stated that Ms Wang had considered bringing a claim against it in respect of the termination of her employment: "without due process".

[39] Despite that stated consideration, it is not until over a month later that Prestige Law, acting on behalf of Ms Wang, states in the letter dated 26 September 2018 that Ms Wang was unjustifiably dismissed from WHDL and that it is instructed to raise a personal grievance.

[40] There is no doubt that by May 2018 Ms Wang was aware that her employment had been terminated by WHDL. At that point she had instructed Prestige Law, a firm with some experience in employment law matters.

[41] Whilst I accept that exceptional circumstances resulting from the failure to provide a plain language explanation of the services available for resolving her employment relationship problem and the marriage breakdown may explain the initial delay in raising a

¹ S 114(1) of the Employment Relations Act 2000

personal grievance, I find that by May 2018 Ms Wang had access to legal advice capable of remedying her ignorance of her rights and assisting her to raise a personal grievance.

[42] However she took no steps to further raising her personal grievance in the months after that and even the letter dated 16 August 2018 stated only that Ms Wang was considering making a claim against WHDL in respect of the termination of her employment.

[43] Inexplicably it is not until over a month later that Prestige Law state that it is instructed to raise a personal grievance on behalf of Ms Wang.

[44] In these circumstances I find unacceptable delay in Ms Wang raising a personal grievance and I do not consider it just to grant leave to Ms Wang to raise her personal grievance after the expiry of the 90 day statutory period.

[45] I determine that Ms Wang did not raise a personal grievance within the statutory 90 day time limit for doing so and leave is not granted for her to do so outside that time limit.

Costs

[46] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[47] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority