

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 759
3213679

	BETWEEN	NIRMAL WEHELLAGE Applicant
	AND	J & T CIVIL WORKS LIMITED t/a J & T EARTHMOVERS Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Manel Samarakoon, counsel for the Applicant Danny Gelb, advocate for the Respondent	
Investigation Meeting:	On the papers	
Submissions and/or further evidence	1 and 18 November 2023 from the Applicant 13 November 2023 from the Respondent	
Determination:	18 December 2023	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Nirmal Wehelling, claims that he was unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, J & T Civil Works trading as J & T Earthmovers (J & T).

[2] Mr Wehelling also seeks recovery of wages.

[3] J & T claim that Mr Wehelling is outside of the statutory time limit for raising a personal grievance and that it does not consent to his raising it outside this time limit. Further that Mr Wehelling is prohibited from raising a personal grievance due to a trial period clause in his employment agreement.

[4] J & T accepts that it owes Mr Wehelling monies in respect of one week's pay plus his statutory entitlement, but claims it has not been able to pay this due to Mr Wehelling not providing it with his banking details.

The Authority's investigation

[5] 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.

[6] In particular, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[8] The preliminary issues requiring investigation are whether or not:

- Mr Wehellige raised his personal grievance within the statutory 90 days time limit?

If not:

- Did J & T consent to his raising it outside of the statutory time limit?

If J & T did not consent:

- Do exceptional circumstances apply so that Mr Wehellige should be granted leave to raise it?

If so:

- Is there a valid trial period which prevents Mr Wehellige from raising it?

Background

[9] Mr Wehellige is a Sri Lankan national who was living and working in Qatar when he applied for a job with J & T. His wife and children were living in Sri Lanka.

[10] J & T had been seeking to recruit an excavator operator in New Zealand for some time, but had not been successful. It therefore engaged the services of an international recruiter to assist with finding them a suitable candidate overseas.

[11] During the recruitment process there was a video interview between Yingli Ji, the director of J & T, and Mr Wehellige. In addition to videos showing Mr Wehellige carrying out tasks, it was submitted that J & T were also provided with Mr Wehellige's CV which stated that he had been employed as an excavator operator for 22 years, and was licenced to drive truck and trailers.

[12] J & T proceeded to make Mr Wehellige a job offer, preparing an employment agreement which was signed by Mr Ji on 8 August 2022 and sent to Mr Wehellige by email (the First Employment Agreement).

[13] Mr Wehellige states that he signed the First Employment Agreement on 10 August 2022 and returned it to J & T.

[14] The First Employment Agreement provided for a trial period provision at clause 3.2 which stated:

The first 90 days of employment will be a trial period, starting from the first day of work, as stipulated by sections 67A and 67B of the Employment Relations Act 2000.

During the trial period the Employer may dismiss the Employee. Notice must be given within the trial period.

[15] J & T states that it did not receive a copy of the First Employment Agreement from Mr Wehellige prior to meeting him. The First Employment Agreement has not been provided to the Authority.

[16] Mr Wehellige reported to J & T on 29 September 2022 with the expectation of commencing work on the following day, 30 September 2022. This is the date Mr Wehellige submitted had been advised to him, and the date he reported in his visa application documents. Mr Wehellige stated that he signed the employment agreement a second time, dating it 29 September 2022 (the Second Employment Agreement).

[17] On 4 October 2022 Mr Wehellige was asked by the site manager of J & T to undergo a skill test when he was observed on camera by Mr Ji. Following the test, J & T invoked the trial period provision in the Second Employment Agreement, and dismissed Mr Wehellige on the basis that he did not have sufficient ability to perform the work.

[18] On 19 February 2023 Mr Wehellige lodged a Statement of Problem with the Authority raising a personal grievance claiming unjustifiable dismissal and disadvantage which was received by the Respondent on 1 March 2023.

Did Mr Wehellige raise his personal grievance within the 90 days statutory time limit?

[19] Mr Wehellige accepts that he filed a Statement of Problem outside of the statutory time limit and does not dispute that he raised his personal grievance outside of the 90 days statutory time.

[20] He submits that he should be allowed to raise it late on two grounds: one being that J & T consented to his raising it outside the statutory time period, the other being that exceptional circumstances apply.

Did J & T consent to Mr Wehellige raising his personal grievance outside of the statutory time limit?

Submissions of the Applicant

[21] It is submitted by Ms Samarakoon for Mr Wehellige that because in the Statement in Reply filed on 13 March 2023, J & T responded to the issues raised by Mr Wehellige, and stated that it was willing to attend mediation, this indicates that J & T consented to the personal grievance being raised out of time.

[22] Mr Wehellige cites *Jacobsen Creative Surfaces Ltd v Findlater* in support of this submission in which Palmer J stated that if an employer:

... purposively seeks to resolve the contended grievance, say, through a process of negotiation or mediation with the affected employee or his representative, then such an employer has plainly consented.¹

[23] It is submitted that although J & T indicated it did not consent to the late raising of the personal grievance in the Statement in Reply, it engaged in the process of answering the allegations and in the relevant section of the form indicated a willingness to attend mediation, stating: “The respondent is willing to attend mediation in an attempt to resolve the employment relationship problem.”

[24] It is submitted that this was a clear indication that the employer “purposively” intended to resolve the grievance and had thus consented to the grievance being raised out of time.

Submissions of the Respondent

[25] It is submitted by Mr Gelb for J & T that completion of Form 3, Statement in Reply, is a statutory requirement which requires the respondent to set out its view in relation to the problem or matter set out in Form 1, the Statement of Problem, i.e. to set out its defence to the issues raised in the Statement of Problem by Mr Wehellige.

[26] On that basis the legislative requirement to complete Form 3 by stating its view “in relation to the problem or matter specified in the application” cannot be seen as consent to Mr Wehellige raising his grievance outside the statutory time frame.

¹ *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 at [54]

[27] In regard to mediation, it is submitted that the parties coming to the Authority are expected to attend mediation. Since s 159 of the Act sets out that it is the Authority's duty to consider mediation, it is submitted that it is therefore virtually a requirement in Form 3 that a party indicates a willingness to attend mediation because failure to do so is almost certainly likely to result in the Authority directing the parties to attend mediation.

[28] On that basis, it is submitted that stating a willingness to attend mediation, and then attending mediation once a Statement of Problem has been received, is not to be taken as the respondent consenting to the late raising of the personal grievance. These are the required actions of the respondent in light of the legislative requirements.

[29] In support Mr Gelb cites *Vulcan Steel Ltd v Wonnocott* in which the Court stated:

Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, this is not a test.²

[30] Mr Gelb submits that in *Vulcan Steel* Mr Wonnocott was successful because Vulcan Steel did not advise him that it did not consent to the late raising of his personal grievance. It is submitted that is not the situation in this case where J & T stated three times in the statement in reply dated 13 March 2023 that Mr Wehellige was out of time to raise his personal grievance. This was repeated in the Amended Statement in Reply dated 8 August 2023.

[31] It is submitted that in *UQE v TBN* it was held that QBE could not be held to have consented to the late raising of the grievance out of time by following a process set out in the relevant collective agreement.³

[32] It is submitted that in this case J & T had a higher obligation to follow a process that was a legislative requirement.

[33] I consider that J & T in completing the section of Form 3 was acting in compliance with the instruction at section 2 of Form 3 which requires the respondent to state its account of the relevant facts: "State details fully, fairly and clearly"

[34] J & T set out its view of the relevant facts, but also stated clearly that Mr Wehellige was raising his personal grievance outside of the statutory time limit and that it did not consent to his doing so.

[35] I do not find that in completing Form 3 as statutorily required by the legislation J & T was consenting to the late raising of the personal grievance by Mr Wehellige.

² *Vulcan Steel Ltd v Wonnocott* [2013] NZEmpC 145 at [45]

³ *UQE v TBN* [2022] NZEmpC at [21]

[36] As set out in s 159(1)(b) of the Act, it is a mandatory requirement that the Authority must direct the parties to mediation unless it considers that mediation will not be of assistance based on one of the reasons set out in s 159(1)(b) (i) to (iii) of the Act.

[37] I find that a party indicating on Form 3 that it is willing to attend mediation is a pragmatic approach and is not indicative of consent, given the recognition of the likelihood that if mediation has not been attended prior to the matter coming before the Authority, mediation will be directed by the Authority.

[38] Balancing these considerations, I determine that J & T did not consent to Mr Wehellige raising his personal grievance outside of the statutory time limit.

Are there exceptional circumstances which apply such that Mr Wehellige should be granted leave to raise the personal grievance?

[39] It is submitted on behalf of Mr Wehellige that he sought employment in New Zealand in order to be able to reunite with his wife and children who were in Sri Lanka. He paid \$25,000.00 to the international recruiter, but despite having supplied a video for J & T showing his skills, he was dismissed summarily after his arrival in New Zealand. These circumstances resulted in Mr Wehellige being severely traumatised and this affected his ability to make any decisions at all.

[40] In *Gibson v GFW Agri-Products Ltd* the Court of Appeal stated that a grant of leave for exceptional circumstances involved two tests: first there must be exceptional circumstances, and second, these must have occasioned the delay – that is, there must be a causative link between the circumstances and the delay.⁴

(i) Were there exceptional circumstances?

[41] As a result of the abrupt loss of his job Mr Wehellige found himself unemployed so he had no income needing to rely on the generosity of friends to live, and depleting his savings. He also lacked the ability to support his family which was extremely distressing for him. As a result he has been struggling with severe mental health issues.

[42] It is submitted that Mr Wehellige did not obtain a medical certificate because he lacked the resources of knowledge of how to apply for one and did not realise one might be required.

⁴ *Gibson v GFW Agri-Products Ltd* [1994] 2 ERNZ 309 at 330

[43] Whilst the loss of employment is usually distressing, I accept that the loss of his job in his peculiar circumstances will have been especially stressful for Mr Wehelligence being in a foreign country with no means of support.

[44] However there must not only be exceptional circumstances, these must have prevented Mr Wehelligence from raising his grievance for the whole of the 90 days statutory period.

ii) *For the whole of the 90 days period?*

[45] An applicant seeking leave on the basis of exceptional circumstances must be able to establish that during the whole of the 90 days statutory time period he or she was unable to consider raising a personal grievance.

[46] If an applicant is shown to have been able to undertake actions during that period that indicate that he or she was able to process information and make rational decisions accordingly, that will mitigate against the proposition that exceptional circumstances affected the applicant's ability to raise a personal grievance during the whole of the 90 days statutory period.

[47] Mr Wehelligence was dismissed on 4 October 2022. As stated, I do not doubt that the experience was extremely upsetting for him.

[48] It has been submitted for Mr Wehelligence that he was:

severely traumatised and [this] affected his ability to make any decisions at all let alone decisions buried in processes which seemed to him to be complex to the point of mystical, alien, exploitive and deeply punitive. ...

[49] The Employment Agreement which Mr Wehelligence signed advised at paragraph 14.1 that a personal grievance must be filed within 90 days of the event giving rise to the grievance.

[50] The Amended Statement of Problem lodged on 21 July 2023 it states at paragraph (f): "The applicant says that he applied for many jobs from 4 October 2022 to 20 March 2023 and met with a few employers".

[51] It also states in an email dated 25 January 2023 attached to the submissions filed on Mr Wehelligence's behalf by Ms Samarakoon:

Nirmal got a AEWV under J T Civil Works in September 2022. Then few weeks later employer terminate the contract for some reason.

But now he found a job from another employer.

[52] It is therefore clear that Mr Wehelligence was able to consider make rational decisions about his need to seek alternative employment within a short period after his dismissal.

[53] I do not consider that an applicant who has been able to apply for alternative employment within a short time after his dismissal and successfully obtained another job by 25 January 2023 would have been so unable to properly consider raising a personal grievance in the same period of time or indeed within the 90 days period specified in s 114(1).

[54] I also do not accept that the process to raise a personal grievance is “mystical, alien, exploitive or deeply punitive”. It is set out in clear language at clause 14.1 of the Employment Agreement that in the event of an employment issue arising, the employee can seek assistance from the Ministry of Business, Innovation and Employment Mediation service, and failing a resolution at that stage with the Employment Relations Authority. There is no requirement for a particular phraseology to be used when presenting the issue to either the Mediation Service or the Authority. Indeed the legislative intent is to make the process accessible to all.

[55] I do not find in these circumstances that the evidence submitted supports the claim that Mr Wehellige was so traumatised by the events of 4 October 2022 that he had been unable to turn his mind to properly consider raising a personal grievance for the whole of the 90 days statutory period.

[56] I determine that the delay in Mr Wehellige raising his personal grievance within the 90 days statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances lasting at least the whole of the 90 days period.

Is it just to grant Mr Wehellige leave pursuant to section 114(4)(b)?

[57] On the basis that I have not found the delay in Mr Wehellige in making a personal grievance application to have been caused by exceptional circumstances pursuant to s 114 (4) and s 115(a) of the Act, I cannot determine whether it would have been just to grant him leave to proceed with his personal grievance.

[58] Mr Wehellige’s application for leave to raise a personal grievance with the J & T is declined.

Is there a valid 90 days trial period which prevents his raising it?

[59] Having found that Mr Wehellige did not raise his personal grievance within 90 days, and there are no exceptional circumstances that justify his being granted leave to raise it outside of that statutory period, this issue does not require determination.

Recommendation

[60] I recommend that Mr Wehelligence provide J & T with his banking details in a timely manner in order that it can pay the monies owed to him.

Costs

[61] Costs are reserved. I consider that this is a matter in which costs should lie where they fall.

[62] However should costs be sought, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant 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.

Eleanor Robinson
Member of the Employment Relations Authority