IN THE EMPLOYMENT COURT
WELLINGTON

WC 17/06
WRC 8/06

IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for leave to file amended statement of claim
BETWEEN	JAMES DAVID BRYSON Plaintiff
AND	THREE FOOT SIX LIMITED Defendant

Hearing: 27 June 2006
(Heard at Wellington)

Appearances: M E Gould, Counsel for the Plaintiff
P M Muir, Counsel for the Defendant

Judgment: 1 September 2006

JUDGMENT OF JUDGE C M SHAW

---

[1] Mr Bryson's personal grievance was raised in the Employment Relations Authority in April 2002 but has been suspended while preliminary matters have been dealt with. The first of these was to determine if Mr Bryson was an employee of Three Foot Six Ltd. The defendant challenged his ability to bring a personal grievance alleging that the document which governed his employment, known as the crew deal memo, and the way in which his employment was carried out meant that he was self-employed.

[2] The crew deal memo was not a conventional employment agreement and did not contain any explanation concerning the resolution of employment relationship problems as required by s65(2)(a)(vi) of the Employment Relations Act 2000.

[3] Mr Bryson was subsequently found by the Supreme Court to have been an employee and was able to bring a personal grievance[1].

[4] The defendant then challenged Mr Bryson's right to raise a personal grievance on the grounds that he had not raised it within the 90-day time limit imposed by s114 of the Employment Relations Act 2000.

[5] On 10 February 2006 the Authority issued its determination[2] which contained two principal findings: Mr Bryson had not raised his personal grievance in time and there were no exceptional circumstances which occasioned the delay in raising the personal grievance.

[6] Mr Bryson had 28 days after the date of this determination in which to challenge it[3]. This expired on 10 March 2006. He instructed his solicitors accordingly. A non de novo challenge was filed in time however the election related only to the part of the determination that concerned the exceptional circumstances issue.

[7] Mr Bryson, having discovered that the challenge was limited in this way, instructed his solicitor to file an amended claim to include a challenge to the Authority's first finding that he had not brought his personal grievance in 90 days. By now, the time for challenge had expired.

[8] There are three matters to be decided:

1. The plaintiff's application for leave to bring the second challenge out of time. If this is successful then,
2. The challenge to the Authority's determination on whether a grievance had been raised within 90 days of termination.
3. The challenge to the Authority's determination on leave to bring a personal grievance out of time.

[9] Evidence and submissions on all matters were heard together in what amounted to a de novo challenge.

---

[1] *Bryson v Three Foot Six Ltd* (NO 2) [2005] 1 ERNZ 372 (SC); [2005] NZSC 34

[2] *Bryson v Three Foot Six Ltd* unreported, P R Stapp, 10 February 2006, WA 20/06

[3] Section 179, Employment Relations Act 2000

1. Application for leave to challenge out of time

[10] This application was filed on 1 May 2006 following a telephone conference on 26 April 2006 with the Court to establish whether, pursuant to s182(3)(b), what directions should be made in relation to the issues involved in the non de novo hearing, and the nature and extent of that hearing. At that conference Mr Gould for Mr Bryson advised the Court that Mr Bryson wished to pursue a challenge on the issue whether he had raised his personal grievance in time as well as the exceptional circumstances point. Consent was not forthcoming from Three Foot Six Ltd to bring the extra challenge out of time and therefore this application was required.

[11] Mr Bryson said only when he received a copy of the first statement of claim from his solicitor on 19 April 2006 did he realise that there had been a misunderstanding between him and his solicitor about the scope of the challenge. He spoke to his solicitor who said he would raise it at the phone conference with the Court. The application was filed shortly after that.

[12] Applying the usual principles for deciding applications for leave to file out of time, I find that the delay between Mr Bryson discovering that his challenge was limited and the application being filed was relatively short, taking into account the intervention of two weekends between 19 April and 1 May 2006.

[13] Second, because the Court has unusually had the benefit of hearing the full challenge, I find there has been no prejudice to the defendant as a result of that short delay. No evidence of prejudice was adduced and the defendant's witnesses were required in any event for the 90-day issue to be heard.

[14] For the same reason, I have been able to evaluate in full the merits of the substantive appeal on both the issues Mr Bryson wishes to challenge.

[15] In these circumstances, there is a strong degree of artificiality in assessing the merits of the claim for the purpose of this application separate from that of the appeal.

[16] Above all, the question of whether an application for leave such as this should be granted is a matter of the Court's discretion. Although relevant considerations have been established for the exercise of this discretion, these only apply as the circumstances of each case allow. In the present case, while the

extension of time has been strongly opposed, the challenge has been heard in its entirety and it would be futile and against the interests of justice to refuse it.

[17] The leave to challenge both of the findings in the Authority's determination is granted.

2. Was the grievance raised within 90 days?

[18] The first question is whether Mr Bryson raised his grievance within 90 days of the date on which the action occurred which is alleged to amount to a personal grievance or came to the notice of the employee.[4] His employment ended on 28 September 2001. The 90-day period ended on 27 December 2001. His personal grievance was lodged with the Employment Relations Authority on 9 April 2002.

[19] The defendant does not consent to the grievance being raised outside the 90 days.

The law

[20] Section 114(2) provides that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges the personal grievance that the employee wants the employer to address.

[21] In spite of some changes to s114 introduced by the Employment Relations Act 2000, the principles for determining the question of when a grievance is raised are the same as those which applied under the Employment Contracts Act 1991.

[22] These principles are:

- First to establish what steps the employee took to raise the personal grievance with the employer.
- Those steps need not necessarily be in writing.[5]
- The employee's submission to the employer must be able to be judged objectively to be sufficient to enable the employer to remedy the grievance or for it to be settled in discussion.[6]

---

[4] Section 114(1), Employment Relations Act 2000

[5] *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 at 420; *Creedy v Commisisoner of Police* unreported, Colgan CJ, 23 May 2006, AC 29/06 at para 36

[6] *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 60 at 70

The facts

[23] Mr Bryson had been employed as an on-set special effects technician in Three Foot Six Ltd's miniatures unit since April 2000 and had worked directly under Paul van Ommen in the art department. Mr van Ommen reported to the first assistant director of the miniature unit, Marty Walsh.

[24] Mr Bryson had some difficulties in his workplace well before the termination of his employment on 28 September 2001. Towards the end of 2000 there was deterioration in the relationship between him and Mr van Ommen. In February 2001, Mr Bryson informed Mr Walsh of his problems and asked him to rectify them. Mr Walsh did not want to interfere with the running of the department and took no steps. Mr Bryson did not pursue the matter further at that stage.

[25] In August 2001 the staff of the miniatures unit were told by Mr Walsh that there was to be downsizing of the unit. Mr Bryson knew shortly after that that he was to be made redundant and this occurred on 28 September 2001.

[26] Following Mr Bryson's termination, Mr van Ommen tried to locate certain props that were needed for a visit by the Prime Minister to the Lord of the Rings set. He rang Mr Bryson believing he knew where they were. During that call, Mr van Ommen said that he would refer the matter of the missing props to Richard Taylor, the head of Weta Workshops, a person who Mr Bryson regarded as a potential employer. Mr Bryson was upset by this apparent threat and phoned Mr Walsh.

[27] He and Mr Walsh spoke again the next day in a continuation of the first call. Mr Bryson says, that in the course of this second conversation, not only did he assert that he was unhappy to have lost his position and was seeking reinstatement but that Mr van Ommen's treatment of him had led directly to the decision not to keep him on after the downsizing.

[28] The discussions with Mr Walsh centred largely on Mr Bryson's unhappy relationship with Mr van Ommen. He had a number of issues going back through the employment relationship. Mr Bryson wanted to sort those issues out because he wanted to have a job with Three Foot Six Ltd in the future. Mr Walsh expressed surprise that he would ever want to work with Mr van Ommen again given the state of the relationship so Mr Bryson raised the possibility of him getting a job in another department such as in lighting or in grips.

[29] In Mr Walsh's view, this was not a discussion about returning or reinstating Mr Bryson to his previous position. It was an inquiry from him as to whether new roles had become available that he could apply for.

[30] In the course of that call the fact that Jon Woolf, another colleague of Mr Bryson's who had been made redundant, had taken some legal action was raised but I accept that Mr Bryson was not then aware of the phrase personal grievance or the nature of the action Mr Woolf was taking. At that stage, Mr Walsh confirmed that Mr Bryson did not talk about the termination of his role or any so-called grievance. That was never discussed.

[31] Mr Walsh asked Mr Bryson to make a list of the issues he had about his employment so they could discuss them with Mr van Ommen. Mr Bryson produced this in late January under cover of a letter which said:

> *Dear Marty,*
>
> *Further to our phone conversation last year, find enclosed a list of topics I wish to have clarified in discussion with Paul.*
>
> *My apologies for taking so long to get this to you. My daughter needed a break from her crèche, so I was looking after her at home through November, after which I was given to understand the MLA was on holiday, and has only recently resumed work.*
>
> …

[32] His list set out 16 topics or questions about his work and Mr van Ommen's opinion of his work.

[33] Mr van Ommen and Mr Walsh had two conference calls with Mr Bryson on 14 and 15 February. They discussed his issues but although Mr Bryson did not think the issues were resolved, the other two did. Mr Walsh made it plain that he did not want to speak to Mr Bryson if he was considering taking any legal action. He believed that at that stage the focus was not on Mr Bryson getting his job back but was an attempt to resolve the issues he had had with Mr van Ommen.

[34] At an unspecified date in January, Mr Bryson had made contact with a community law office. There is no evidence of the advice he was given then but in March, having spoken to Mr Woolf, who was represented by Mr Gould, Mr Bryson made contact with Mr Gould and on 9 April 2002 a personal grievance alleging an employment relationship problem was lodged with the Employment Relations Authority.

[35] Mr Bryson said that the first time he had heard of the 90-day time limit was when he consulted the solicitors in March 2002. At that stage he understood that he had met his obligation to raise his grievance within 90 days by speaking to Mr Walsh in November. On that basis he instructed the solicitors to proceed with his claim to the Employment Relations Authority. He said that if he had been aware of the term personal grievance he would have used that terminology with Mr Walsh.

Conclusion

[36] I find that neither in his discussions with Mr Walsh in February 2001, nor the phone conversations with Mr Walsh in November 2001 nor in his 23 January 2002 letter did Mr Bryson raise a personal grievance. The letter appears to summarise the issues discussed with Mr Walsh. I accept Mr Walsh's evidence that, although Mr Bryson raised the issues which were between him and Mr van Ommen in November, he did not ask for his job back although he did inquire about a new position.

[37] I am satisfied from viewing the evidence objectively that Mr Bryson did not raise a grievance within the 90-day time limit that was sufficiently apparent to enable his previous employer to remedy it.

3. Application for leave to bring a personal grievance out of time

[38] An application for leave to bring a personal grievance out of the 90-day time period is only to be granted if the Court is satisfied that the delay in bringing the grievance was occasioned by exceptional circumstances and that it would be just to do so. There are three matters to be decided under s114(4):

1. Whether there are exceptional circumstances.
2. Whether the delay in raising the personal grievance was occasioned by the exceptional circumstances.
3. Whether it is just to allow the case to be brought outside the 90-day period.

[39] Section 114(4) repeats the test in the Employment Contracts Act 1991 without change but in s115 has added a non-exhaustive list of situations which would give rise to exceptional circumstances. It is well settled that in enacting ss114 and 115 Parliament did not intend to relax the tests for extending the limitation period of 90 days. As then Judge Colgan pointed out in *Telecom NZ Ltd v Morgan*[7] Parliament sought to exemplify but not limit situations that would amount to

[7] [2004] 2 ERNZ 9 at 16

exceptional circumstances. Section 115 sets out four examples of exceptional circumstances. This case concerns s115(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; …*

[40] In this case, it is accepted that on the face of it s115(c) applies as an exceptional circumstance because Mr Bryson's employment agreement did not contain the explanation concerning the resolution of employment relationship problems that is required by s65.

[41] Section 65 stipulates what an individual employment agreement must include. The 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 s114 within which a personal grievance must be raised[8].

[42] The principal issue is whether Mr Bryson's delay in raising the personal grievance was occasioned by the lack of the explanation.

[43] The meaning of the word "occasioned" in this context was dealt with in *McClutchie v Landcorp Farming Ltd*[9] where Finnigan J said:

> *That word "occasioned" itself in my view leads the Court towards, and not away from, a liberal interpretation of the test. It is wider in meaning than "caused" and implies a slightly more liberal view of the causative link between the exceptional circumstances and the delay. The* Shorter Oxford Dictionary *defines the verb "to occasion" as:*
>
> > "1. trans. *To give occasion to (a person); to induce, also, to do this habitually; hence, to habituate, accustom. 2. To be the occasion or cause of (something); to cause, bring about, esp. in an incidental or subsidiary manner . . .*"

[44] For the defendant, Ms Muir submitted that the crew deal memo which governed Mr Bryson's employment was not intended to constitute an employment agreement but rather an independent contract and it would be unjust to infer that s115(c) should apply retrospectively.

[45] I do not accept that submission. However the defendant characterised the crew deal memo at the time that it was presented to Mr Bryson, his employment has been conclusively found to have been that of an employment relationship[10]. This

---

[8] Section 65(2)(a)(vi)

[9] [1993] 1 ERNZ 388 at 395

[10] *Supra, n1*

relationship commenced when he began working for Three Foot Six Ltd and continued until he was made redundant. The requirement for the explanation concerning the resolution of employment relationship problems was required by s65 from 2 October 2000 when the Employment Relations Act 2000 commenced. It is not a case of applying s115(c) retrospectively. The law applied to Three Foot Six Ltd from that date.

[46] Ms Muir next submitted that there is no evidence of a clear causal connection between the exceptional circumstances and Mr Bryson's failure to raise his grievance.

[47] It is the case for Three Foot Six Ltd that in November 2001 Mr Bryson was aware that Mr Woolf was bringing a claim and therefore it is unconvincing for him to claim he did not know the nature of the claim and he made no effort to get legal advice until January 2002 despite that knowledge. However, I find that Mr Bryson did not know about his right or ability to raise a personal grievance until he got legal assistance well after the expiry of the 90-day period.

[48] Ms Muir also submitted that, although there was a dispute resolution clause in the crew deal memo, Mr Bryson did not seek to invoke this which suggests that the issues which arose after his termination did not concern the termination and the 90-day provision would not have assisted Mr Bryson because he would not have referred to or relied on it in the relevant time period. Even when Mr Bryson did detail his concerns in January 2002, he did not raise any issues about the termination of his contract.

[49] I am satisfied from the evidence that Mr Bryson was not aware of his ability to take a personal grievance until he consulted with either the community law centre but probably more likely when he consulted with his lawyer in March 2002 some 6 months after his dismissal.

[50] The material time for consideration of when exceptional circumstances arise is in the 90-day period following dismissal. In this case that ended on 27 December 2001. Whatever Mr Bryson's state of mind was after Christmas of that year the evidence discloses no knowledge on his part that he had any right to bring a claim for a personal grievance up to that point. On the other hand, although he did not formally raise a personal grievance to the extent required by s114(2), he did have a

number of issues arising from his employment that he wanted to discuss with his former employer and he did want to continue working with Three Foot Six Ltd in some capacity.

[51] Because of the absence of the required explanation of his rights in his employment agreement, he cannot be presumed to have had knowledge of those rights to raise his employment issues in the correct manner and within the correct timeframe. I am therefore satisfied that the lack of the explanation of rights occasioned his delay in bringing the personal grievance.

[52] Finally the question is whether it is just to allow the case to be brought outside the 90-day period.

[53] Three Foot Six Ltd was in breach of its obligation to provide an explanation of employment relationship problem resolution given that it was actually employing Mr Bryson as an employee. In addition, apart from the lack of the explanation, the facts of Mr Bryson's case are particularly unusual. Given that it took four judicial hearings to determine his precise employment status, it is hardly surprising that he would have been uncertain as to his rights and obligations in raising a personal grievance.

[54] While there has been considerable delay since Mr Bryson was dismissed and there may have been inevitable changes in the entity that employed him, that delay has not been caused by Mr Bryson apart from the initial time it took to file a grievance. Having come so far in his attempt to bring a personal grievance, it would not be just for him to be cut off at the pass.

[55] I find that the exceptional circumstance in this case was the absence of a s65 explanation in his employment agreement, that this occasioned the delay and that it is just to grant leave for the grievance to be brought out of time.

C M Shaw
JUDGE

Judgment signed at 3pm on 1 September 2006.

Solicitors: Michael Gould, Gibson Sheat, DX RP 42008, Lower Hutt
Phillipa Muir, Simpson Grierson, DX CX 10092, Auckland