

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 122
ARC 37/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN FRANK CHEN
Plaintiff

AND BANCLOGIX LIMITED
Defendant

Hearing: 22 and 23 September 2011
(Heard at Auckland)

Appearances: Dr Zhixiong (Leo) Liao, counsel for the plaintiff with Mr Raymond
Qiu, interpreter
Ms Joanne Douglas, counsel for the defendant

Judgment: 3 October 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The issue in this case is whether the plaintiff is able to pursue a personal grievance against the defendant, his former employer, for unjustified disadvantage and unjustified dismissal. The defendant's position is that both claims have been raised out of time and that there are no exceptional circumstances which would enable the Court to grant leave to raise the grievances after the expiration of the 90-day limitation period prescribed in s 114 of the Employment Relations Act 2000 (the Act).

[2] In a determination¹ dated 19 March 2010, the Employment Relations Authority (the Authority) held that the plaintiff's unjustified dismissal claim had not been raised within the 90-day statutory limitation period and that the delay in raising that grievance had not been occasioned by any exceptional circumstances in terms of s 114(4)(a) of the Act. The plaintiff's application was, therefore, declined and in a subsequent determination² dated 26 July 2010, the Authority Member made a costs order in favour of the defendant in the sum of \$3,000.

[3] For reasons which are not apparent from his determination, the Authority Member did not deal with the plaintiff's alleged unjustified disadvantage claim. That claim related to incidents that occurred on or about 12 August 2008, some three months prior to the plaintiff's dismissal. The plaintiff had different counsel during the Authority investigation and then he represented himself in relation to the subsequent costs determination. Before this Court, Ms Douglas, counsel for the defendant, indicated that the explanation for the apparent oversight may have been because the unjustified disadvantage claim had not been articulated sufficiently by Mr Chen during the Authority proceedings. However, as Dr Liao, counsel for the plaintiff, pointed out, both the disadvantage grievance and the unjustified dismissal grievance were acknowledged by the Authority in a mediation direction letter dated 2 November 2009, which was included in the agreed bundle of documents. I will need to deal with both alleged grievances.

[4] In a minute dated 15 March 2011, Judge Travis identified the issues as whether the disadvantage grievance and the unjustified dismissal grievance had been raised within the 90-day period or whether exceptional circumstances existed. Judge Travis noted that if Mr Chen was successful in either of those matters then another date would need to be fixed for a substantive hearing. His Honour went on to direct:

13. The full circumstances relating to the unjustifiable dismissal grievance and the disadvantage grievance will need to be canvassed at a hearing in order to ascertain the dates on which the 90 day period ran and the merits of Mr Chen's claims if they are out of time. This is because the Court can only grant leave, even if it is satisfied that the delay raising

¹ AA 128/10.

² AA 128A/10.

the personal grievance was occasioned by exceptional circumstances, if it considers it just to do so (s114(4)(b)). It will only be able to reach such a conclusion if the evidence is canvassed.

Background

[5] Mr Chen was employed by the defendant (BancLogix) as a development consultant under an individual employment agreement dated 1 August 2005. BancLogix was described to the Court as a software development and IT services company which was set up to service another company, KVB Kunlun New Zealand Limited (KVB). Both companies were wholly-owned subsidiaries of KVB Kunlun Holdings Limited based in the British Virgin Islands. The managing director of KVB and BancLogix was Mr Stefan Liu who resides in Hong Kong. Since 1 October 2007, Mr Liu's representative in New Zealand has been Mr Greg Boland. In March 2008, Mr Boland was appointed country manager for KVB. Mr Boland gave evidence on behalf of the defendant and explained that BancLogix is no longer trading as it has completed the work involved in establishing the new Internet system for KVB.

[6] Initially, Mr Chen reported to Mr Charles Cai, BancLogix's managing director. Mr Cai, however, resigned in May 2008 and from then on Mr Boland and Ms Christine Booker, the defendant's human resources manager, were tasked with providing oversight and direction to the three software developers still employed by BancLogix, namely Mr Chen, Mr Patrick Wei and Ms Kylie Zhou. They reported to Mr Liu who mainly worked out of the KVB office in Hong Kong. Mr Wei was described as the de facto team leader.

[7] On 12 August 2008, Mr Wei found that Mr Cai's e-mail account had been opened and this fact raised serious security concerns given that Mr Cai had left the company in May. Mr Wei immediately disabled the account and reported the incident to Mr Liu. The following day, Ms Booker, acting on Mr Wei's instructions and another IT engineer, Mr Brian Cao, approached Mr Chen for his IP address to enable them to ascertain who had accessed Mr Cai's account. Later that same day, Mr Boland and Ms Booker asked Mr Chen to leave his laptop belonging to the company in the office overnight but when they approached him a short time later they discovered that he was deleting some files. He was immediately told that he

must not delete any files. Overnight, Mr Wei and Mr Cao worked to disable Mr Chen's access to various security codes and his e-mail address was reset but he still had access to his work station the next day. It was the events of this day, particularly the commencement of the investigation against the plaintiff and the instruction to leave the laptop at work, which the plaintiff says were unjustified and which form the basis of his disadvantage claim.

[8] On 14 August 2008, Ms Booker e-mailed a series of questions to Mr Chen relating to the incident involving his alleged accessing of Mr Cai's account. Mr Chen replied later that same day but Ms Booker claimed that his answers were not directly on point. On Friday, 15 August 2008, Mr Chen did not attend work advising Ms Booker that he was unwell. He was off work again on the Monday and Tuesday. He later provided Ms Booker with a medical certificate covering the three days.

[9] On Tuesday, 19 August 2008, Mr Chen e-mailed his resignation to Mr Liu copied to Ms Booker. The translation of the e-mail reads:

2008-08-19

Dear Stefan,

I, Frank Chen, a normal staff member, I was rude sometimes with reckless attitude. I sincerely apologise for that with my deep regret.

Though I worked with my heart, my performance was not satisfactory. My technical skills are limited. I found stressed in handling technical work. I even feel harder in handling interpersonal disputes.

I feel tired both physically and psychologically, and I am unable to continue to work for BancLogix anymore.

I request to resign from the work in BancLogix.

Thank you.

Frank Chen

The disadvantage grievance

[10] Mr Liu replied to Mr Chen's resignation e-mail saying that he would still like Mr Chen to return to the office and explain his behaviour because what he did may have been illegal. Mr Chen attended the office on 20 August 2008 and met with

Mr Liu (who was in New Zealand at the time) and Ms Booker. Mr Chen told the Court that at that meeting he requested Mr Liu question what Mr Wei had done on BancLogix's servers, implying that Mr Wei may have been the one who had opened Mr Cai's account. The plaintiff said that he told Mr Liu directly that BancLogix's actions "were unjustifiable and unlawful". He also said that Mr Liu rejected his resignation.

[11] In her account of the same meeting, Ms Booker told the Court that Mr Chen had not said anything during the meeting about the defendant's actions being unjustifiable and unlawful. She said that at the end of the meeting, Mr Chen admitted that he still had online contact with Mr Cai and he admitted that he had deleted some e-books. Mr Liu requested Mr Chen provide him with a detailed report by Friday, 22 August 2008 about what had happened. Ms Booker said that later they conducted a computer forensic investigation and found that Mr Chen "had deleted a lot of risk reports, deal tickets, and other information, in addition to the e-books".

[12] After the meeting, Mr Chen said that he felt unwell and he was unable to write a further report. He was taken home. On 22 August 2008, Mr Chen was admitted to North Shore Hospital where he remained until 10 September 2008. In a letter dated 11 September 2008, the hospital advised BancLogix that Mr Chen had made a good recovery from his illness but it was recommended that he should have at least several weeks off work before returning on a gradual basis.

[13] On 12 September 2008, Mr Chen attended the office and submitted a leave application form covering the period 4 September – 10 October 2008 which was approved by Mr Boland on 16 September 2008. On 25 September 2008, Mr Chen again attended the office and a staff member reported to Mr Boland that he was trying to access the computers. Mr Boland spoke to Mr Chen and told him that he was not permitted to access the computers. At the same time, Mr Chen requested unpaid sick leave in advance from 10 October 2008 to 11 November 2008 but Mr Boland was not prepared to approve that application. Mr Boland told the Court that Mr Chen did not mention at that stage that he was planning to travel to China and that he had actually made bookings for his travel on 18 September 2008.

[14] On either 30 September 2008 or 1 October 2008 (there was a dispute as to the date) Ms Booker, who had been on leave, telephoned Mr Chen to find out why he had gone into the office on 25 September 2008. He told her that he wanted to find some e-mails to show that he was innocent. Ms Booker asked him whether he still wanted to resign and he told her that he didn't want to resign. In his account of that telephone conversation, Mr Chen told the Court that he "raised the defendant's unjustifiable actions again and pointed out the defendant's actions were unjustifiable and unlawful" and that "the existing and raised employment matters should be resolved before both parties would go to process further action". Ms Booker denied that Mr Chen had raised any such allegations regarding the defendant's actions. She said that Mr Chen was aware that they were still inquiring into the circumstances surrounding the opening of Mr Cai's account and she explained to him that, for that reason, he was not permitted to enter the company's premises or use the company's computers without management approval.

[15] The next development was the subject of considerable evidence before me. On Saturday, 4 October 2008, Mr Chen sent an e-mail to Mr Liu, copied to Ms Booker, which was unreadable. Mr Chen produced a copy of the e-mail which he says he sent. It was all in the Chinese language. Both Mr Liu and Ms Booker are fluent in Chinese but the e-mail they received contained very few Chinese characters. In his evidence, the plaintiff said that the defendant's printout of the e-mail "looks like Arabic words". The e-mail is significant because it is submitted on behalf of Mr Chen that, in addition to raising his personal grievance verbally during the meeting on 20 August 2008 and during his telephone conversation with Ms Booker on 30 September 2008 or 1 October 2008, Mr Chen confirmed the raising of his personal grievance in writing in that e-mail.

[16] Given its significance, I set out in full the defendant's English translation of the plaintiff's sent copy of the so-called unreadable e-mail:

4 Oct, 2008

In previous stage, I was really exhausted and needed to be hospitalised for treatment for 3 weeks. During my hospitalisation period, I had kept contact with the Human Resources Department either directly or indirectly for many times in order to handle the work-related matters. After discharge from hospital, I submitted the leave application for those days I had taken.

According to the advices given by the doctor, my family and other supporting people, it is better to have self-adjustment for few weeks. Please accept my apologies for the inconvenience caused.

In order to have a better health recovery and better preparation for the job, I came to the office last week and hoped to check some relevant emails. When I approached the IT Support officer to help accessing BancLogix PC, I came to realise that it also requires the approval from Human Resources Department and (or) you. Is it?

Is there any substantial change in the operation procedures or policies of BancLogix (KVB) IT? On October 1, during the telephone conversation with Human Resources Manager, I felt so many matters were caused by misunderstanding and loss of trust. Perhaps to find a third party, mediate, calm down for few weeks, and then have a better talk. Does it sound okay to you?

I found Simon Zhao who is a social worker. His contact:

(Contact details for Mr Zhao supplied)

Frank Chen

[17] The defendant produced a printed out copy of the e-mail it received on 4 October 2008, which looked nothing like the sent copy taken from the plaintiff's laptop. The Court interpreter confirmed that the e-mail received by the defendant contained only "a couple of phrases" in Chinese and they didn't make any sense.

[18] The unreadable e-mail had been received by BancLogix on Saturday, 4 October 2008. On the Monday morning Ms Booker e-mailed Mr Chen:

Dear Frank,

We can't read the contents of your email.

We will send a letter to your home today. Please check and receive it.

Christine

The word "receive" in this English translation would appear to be incorrect. In her evidence, Ms Booker indicated that she had asked Mr Chen to "resend" the e-mail.

[19] In all events, Mr Chen did not resend his e-mail. Unbeknown to anyone at BancLogix, he had departed for China on Sunday, 5 October 2008 and did not return to New Zealand until 10 November 2008. He told the Court that he had no computer access while he was in China.

The unjustified dismissal grievance

[20] The letter Ms Booker referred to in the second paragraph of her e-mail was a formal letter dated 6 October 2008 signed by Mr Boland. It requested that Mr Chen attend a disciplinary meeting on Thursday, 9 October 2008 to explain his actions in enabling Mr Cai's e-mail account on 12 August 2008 and his failure to provide the management team with the further report of the incident requested at the meeting on 20 August 2008. He was invited to bring a representative to the meeting. The meeting was to be with Mr Boland (on behalf of Mr Liu) and Ms Booker. On 7 and 8 October 2008, Ms Booker telephoned Mr Chen's home number to check that he would be able to attend the meeting but there was no response.

[21] Ms Booker said in evidence that as Mr Chen did not attend the scheduled disciplinary meeting on 9 October 2008 they felt they had no other choice but to terminate his employment. A letter dated 10 October 2008 on KVB letterhead, signed by Mr Liu as group managing director terminated his employment with BancLogix as from 13 October 2008.

[22] Mr Chen said that upon his return to New Zealand on 10 November 2008 he received Mr Boland's letter of 6 October 2008 convening the disciplinary meeting and Mr Liu's letter of 10 October 2008 terminating his employment. Ms Booker said that about the same time Mr Chen contacted the payroll clerk at BancLogix and requested his payslips to enable him to obtain the unemployment benefit from Work and Income New Zealand. Ms Booker received a similar request from Mr Zhao, the social worker who was assisting Mr Chen, and she provided the pay details on 12 November 2008. Ms Booker said that at no stage was there any indication by Mr Chen or Mr Zhao that Mr Chen intended to challenge the termination of his employment or raise a disadvantage grievance. Ms Booker said that after providing the pay details she heard nothing further from Mr Chen until BancLogix received a letter from Mr Ken Nicolson, a barrister, dated 7 April 2009 formally raising his personal grievance.

Discussion

[23] I turn first to the unjustified dismissal claim. In the Authority there was no dispute that the 90-day limitation period ran from when Mr Chen returned to New Zealand and received notice of his dismissal on 10 November 2008 until 9 February 2009. At the Authority investigation, it was not argued that Mr Chen had raised his unjustified dismissal grievance within the 90-day period. Instead, Mr Chen's case was presented on the basis that the delay in raising the grievance outside the 90-day period was occasioned by "exceptional circumstances" within the meaning of s 114(4)(a) of the Act. The exceptional circumstances relied upon were those set out in s 115(a) of the Act, namely:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); ...

[24] In this regard, however, there was medical evidence before the Authority and this Court confirming that, unbeknown to BancLogix at the time of employment, Mr Chen had a history of relapses of depression with psychotic features. He had been admitted to North Shore Hospital (the Taharoto Unit) in 2000 for a brief psychotic episode and he had had a relapse in 2004. There was also evidence indicating that one of the reasons he had travelled back to China was because he needed to provide evidence that he was in fact living with his wife in order to proceed with her immigration process. On 6 January 2009, Mr Chen commenced new employment at a New World supermarket.

[25] In its determination, the Authority concluded that given the treatment and medication Mr Chen had received, he had been capable of raising a personal grievance within the 90-day period up to 9 February 2009 and the delay in raising his grievance, therefore, had not been occasioned by an exceptional circumstance lasting for the duration of the 90-day statutory period.

[26] On the evidence before me, I agree with the Authority's conclusions in this regard but in this Court Mr Chen's case in relation to his alleged unjustified dismissal claim was presented on a different footing. Dr Liao submitted that

Mr Chen had, in fact, raised his unjustifiable dismissal grievance within the 90-day period provided for in s 114 of the Act because the plaintiff only received constructive notice of dismissal in January 2009 when he unsuccessfully attempted to attend work. Dr Liao argued that Mr Chen had not received notice of his dismissal on 10 November 2008 when he returned to New Zealand. In counsel's words:

The fact is that Mr Chen has never received anything in writing about his dismissal from his employer to NOW.

[27] Dr Liao's submission proceeded on the basis that the dismissal letter Mr Chen had received on 10 November 2008 was written on KVB letterhead and KVB was a separate legal entity from Mr Chen's employer, BancLogix. This somewhat ingenious submission ignores the reality, however, that the dismissal letter was signed by Mr Liu, group managing director of BancLogix and BancLogix is the company referred to throughout the letter. The final paragraph of the letter stated:

We gave you another chance to explain to us the above allegation on October 9, 2008, but you did not come to the meeting without notifying us at all. Management hereby terminates your employment with BancLogix without your presence, effective October 13, 2008.

[28] There was obviously a very close relationship between the two companies. Both were wholly-owned subsidiaries of the holding company based in the British Virgin Islands. KVB is referred to several times in Mr Chen's employment agreement and, indeed, the company had originally been named as a party in this proceeding. The Court was told that BancLogix was set up to establish the new software system for KVB and that it had no separate letterhead. It is also significant in this regard that the leave application forms which Mr Chen used when he applied for leave following his release from hospital were all printed on KVB letterhead. In these circumstances, Mr Chen could have been under no illusion: he was dismissed by his employer and discovered this fact on 10 November 2008 when he returned home from his visit to China.

[29] For completeness, I record that Mr Chen did not raise his unjustified dismissal grievance within the 90-day statutory limitation period and there were no

exceptional circumstances that would allow the Court to grant leave to raise the grievance outside the 90-day period.

[30] Turning to the disadvantage grievance, I reject Mr Chen's evidence that he raised this grievance at his meeting with Mr Liu and Ms Booker on 20 August 2008 and again in his telephone conversation with Ms Booker on either 30 September 2008 or 1 October 2008. I did not find Mr Chen's evidence in this regard at all convincing and it was inconsistent with his resignation e-mail sent immediately prior to the meeting on 20 August 2008 when he accepted that his work performance had not been good. It was also inconsistent with the conciliatory nature of his e-mail of 4 October 2008. On the other hand, Ms Booker impressed me as being a completely credible witness.

[31] Dr Liao's remaining submission was that the unreadable e-mail of 4 October 2008 in itself was sufficient to raise Mr Chen's disadvantage grievance. There was no independent expert evidence called to explain why Mr Chen's e-mail was received in an unreadable format. Ms Booker did, however, tell the Court that she sometimes received e-mails in Chinese from her parents which were unreadable and appeared to be in a similar format to the unreadable e-mail received from Mr Chen on 4 October 2008. On those occasions, she would request her parents to resend the e-mail.

[32] For his part, Mr Chen told the Court that the reason why his e-mail was unreadable was because Ms Booker's computer was not coded correctly. He said that it was a simple task for the receiver of an unreadable e-mail to match up the codes to make it readable. Given that explanation, coupled with Ms Booker's evidence regarding the e-mails received from her parents, I suspect the problem lay with the recipient or the recipient's computer. In the circumstances, I am prepared to accept that the e-mail Mr Chen sent to BancLogix on 4 October 2008 was that which appears at [16] above.

[33] Ms Douglas argued that the substance of the e-mail itself does not raise a personal grievance. Counsel submitted:

4.12. The content of the email indicates Mr Chen's attitude at the time. He had a conciliatory approach, and while he indicates he wants to meet with a third party, he doesn't say that he has a personal grievance. He says that there may be some misunderstandings. Again, the documentary evidence of Mr Chen's communications did not support his version of events.

[34] Both counsel referred the Court to different passages from the judgment of Chief Judge Colgan in *Creedy v Commissioner of Police*.³ For completeness, I set out the substance of the relevant passage in *Creedy* at [36] which was repeated by the Chief Judge in *Coy v Commissioner of Police*:⁴

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment As the Court determined in cases under the previous legislation, for an employer to be able to address the grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[35] Even allowing for some minor variations between the plaintiff's translation of the e-mail in question and the defendant's translation as recorded at [16] above, I agree with Ms Douglas that there is nothing in the body of the e-mail to alert BancLogix to the fact that a grievance has been raised which it needs to address. Indeed the overall tone of the email was apologetic, suggesting mediation to resolve differences and further discussion; it did not put the defendant on notice of a grievance which had to be resolved and did not provide details of that issue. I, therefore, reject the submission that the e-mail of 4 October 2008 was sufficient to raise Mr Chen's alleged disadvantage grievance.

[36] It was not submitted by Dr Liao that there were any exceptional circumstances which occasioned the delay in Mr Chen raising his disadvantage grievance outside the 90-day statutory limitation period. Ms Douglas, however,

³ [2006] ERNZ 517.

⁴ CC23/07, 19 November 2007 at [13].

made submissions on this aspect of the case commenting correctly, in reliance upon *Telecom New Zealand Ltd v Morgan*,⁵ that the statutory test in s 115(a) of the Act “for this limb of the exceptional circumstance test requires a high standard of proof to be met by an applicant”. The incapacity must exist for the whole of the 90-day period which, in relation to the disadvantage grievance, would run from 13 August 2008. The evidence before me fell well short of establishing this essential element in the present case.

Conclusions

[37] The plaintiff has failed in his challenge. His application to commence an action in this Court based on his alleged disadvantage grievance and/or unjustified dismissal grievance is dismissed.

[38] As I have indicated in [3] above, the Authority, for some reason which is not readily apparent from its determination, failed to consider the plaintiff’s alleged disadvantage grievance. Although the matter was not canvassed before me, I suspect that had the Authority properly dealt with that aspect of the claim, in all likelihood Mr Chen would have been advised not to proceed with the challenge. The Authority’s error may well be an important factor when exercising my discretion to award costs in this challenge. If the parties cannot reach agreement on costs, the defendant is to have 21 days from the date of this judgment to make submissions and the plaintiff is to have a like time in which to respond.

A D Ford

Judge

Judgment signed at 12.30 pm on 3 October 2011

⁵ [2004] 2 ERNZ 9 at [22].