

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 227
EMPC 218/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SUSAN WILLS Plaintiff
AND	FARMLANDS CO-OPERATIVE SOCIETY LIMITED Defendant

Hearing: 18 November 2020
(Heard at Nelson)

Appearances: A Sharma, counsel for plaintiff
S Townsend, counsel for defendant

Judgment: 14 December 2020

JUDGMENT OF JUDGE K G SMITH

[1] Susan Maree Wills was employed by Farmlands Co-Operative Society Ltd until she resigned with effect from 17 November 2017. Ms Wills began a new job, as a galley hand on a fishing vessel, in December 2017.

[2] Believing that she might have a personal grievance against Farmlands for constructive dismissal Ms Wills sought advice from Pitt & Moore Lawyers on 25 January 2018. She met Nick Mason, a lawyer employed by the firm who specialised in employment law. They had never met previously and Pitt & Moore had not acted for her before.

[3] The meeting lasted for about an hour. During it Ms Wills explained why, despite resigning, she considered Farmlands had dismissed her. By the time the meeting concluded Mr Mason had given Ms Wills advice on a possible personal grievance and considered that he had sufficient information to raise one on her behalf.

[4] Later that day Mr Mason sent Ms Wills an email that did two things. First, it supplied a letter of engagement and standard terms and conditions for Pitt & Moore's services. She was asked to sign the acceptance page of that letter and return it to him. Second, the email informed Ms Wills of the 90-day period to be able to raise a personal grievance, which Mr Mason calculated as elapsing on 15 February 2018.¹

[5] Despite subsequent correspondence, to be discussed shortly, Mr Mason did not raise a personal grievance with Farmlands on Ms Wills' behalf. She did not know that until he told her at a meeting on 17 July 2018. Ms Wills then instructed other counsel and applied to the Employment Relations Authority for leave to raise the personal grievance after the expiration of the 90-day period.²

[6] The Authority declined the application.³ In reaching this conclusion it held that Ms Wills had not instructed Mr Mason to raise a personal grievance on her behalf.⁴

[7] Ms Wills challenged that determination. Her case was that an instruction was given to Mr Mason at the meeting in January 2018 and she was let down by him.

[8] Farmlands takes a contrary view.

Legal test

[9] Under s 114(1) of the Employment Relations Act 2000 (the Act) a personal grievance must be raised within 90 days. Time begins to run on the date on which the action alleged to amount to a personal grievance occurred or came to the employee's notice, whichever is the later event. The section contemplates two situations where a personal grievance may be raised beyond the 90-day limitation. One of them is where

¹ Employment Relations Act 2000, s 114(1).

² Employment Relations Act, s 114(3).

³ *Wills v Farmlands Co-Operative Society Ltd* [2019] NZERA 352 (Member van Keulen).

⁴ At [27].

the employer consents. The other is where the Authority grants leave because it is satisfied that the delay was occasioned by exceptional circumstances and that it is just to do so.⁵

[10] The Act does not contain an exhaustive definition of exceptional circumstances for the Authority to apply when leave is sought, but s 115 does provide a definition of some of them.⁶ Relevant to this challenge is s 115(b) that reads:

- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; ...

[11] Relying on s 115(b), Ms Wills considers that exceptional circumstances existed because she made reasonable arrangements with Mr Mason to have the grievance raised on her behalf and he unreasonably failed to ensure that it was. She bears the onus of demonstrating that she has satisfied both limbs of the section.

The issues

[12] The issues to be considered are:

- (a) Did Ms Wills make reasonable arrangements to have the grievance raised on her behalf by Mr Mason as her agent?
- (b) If the answer to (a) is yes, did Mr Mason unreasonably fail to ensure the grievance was raised within time?
- (c) If the answers to (a) and (b) are yes, would it be just to grant leave to extend time to raise a grievance?

⁵ Employment Relations Act, s 114(4).

⁶ In *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109, the Supreme Court considered the meaning of “exceptional circumstances” in ss 114 and 115 of the Act. The Court preferred, as a meaning for those words, “unusual” (or as being the “exception to the rule”) and, in so doing, partially overturned the two formulations given by the Court of Appeal in *Wilkins & Field v Fortune* [1998] 2 ERNZ 70 (CA). “Unusual” was preferred by the Supreme Court because it accorded with common English usage and was easier to apply than any alternative.

[13] Ms Wills case was that, having given an instruction to an experienced lawyer, she was entitled to rely on him carrying it out. She said she gave Mr Mason an instruction during their meeting by telling him: “let’s get the ball rolling”. According to Ms Wills, Mr Mason informed her that he could not act until she signed a letter of engagement that would be emailed to her later that day.⁷ From that exchange an inference was invited to be drawn that any delay in taking action would be brief, while the documents were prepared and signed.

[14] As already described, Mr Mason sent Ms Wills an email on 25 January and she responded two days later. Her response included an important question:

Also if I take a case will your fees be added to any settlement that I hopefully will receive.

[15] The next event in this chronology was on 30 January 2018 when Ms Wills spoke to Pitt & Moore’s receptionist and told her that she had agreed to the letter of engagement. The receptionist sent an email to Mr Mason about this conversation and informed him that confirmation was to follow.

[16] Ms Wills provided that confirmation on Friday 2 February 2018, when she sent Mr Mason an email mentioning her conversation with the receptionist a few days before and sending back the signed acceptance page. His response was a short email reading: “Thank you Sue – that’s perfect”. Nothing happened after that and the time to raise a personal grievance as of right came and went without Mr Mason taking any action.

[17] Pitt & Moore billed for Mr Mason’s services and Ms Wills returned to her job at sea. She attempted to communicate with Mr Mason over the following months, beginning by sending him an email on 16 March 2018. This email informed him that she would be at sea until mid-April 2018 and a return email address was provided. She sent a follow-up email on 24 April 2018, asking him to explain what had happened with her case “re Farmlands Richmond for constructive dismissal”.

⁷ See [4] above.

[18] Those emails were not replied to and they seem not to have prompted Mr Mason, or Pitt & Moore, to be curious about why they were sent. Ms Wills did not discover the true state of affairs until after she sent Mr Mason an email on 10 July 2018 in response to which he invited her to a meeting the following week. At the meeting he explained that a personal grievance had not been raised on her behalf and recommended she obtain alternative advice.

[19] In Ms Sharma's submissions she argued that, in combination, giving instructions at the January meeting, returning the acceptance page and the subsequent emails showed the test in s 115(b) was met. She emphasised the client care and service section of Pitt & Moore's terms and conditions, where the firm agreed to protect and promote Ms Wills' interests. Although not expressed precisely in these terms, Ms Sharma's submissions for Ms Wills emphasised the fiduciary relationship created during the January meeting leading to a fiduciary duty imposed on Mr Mason to protect Ms Wills' interests. That duty was reflected in Pitt & Moore's standard terms and conditions and Ms Sharma's point was that it had not been discharged.

[20] Ms Sharma drew support for her submissions from *Hokotehi Moriori Trust v Prater* and *Hutchison v Nelson City Council*;⁸ namely, that Mr Mason was obliged to follow up his email advice to Ms Wills, that she had until mid-February 2018 to raise her grievance, and to "put the process of raising the grievance in place".

[21] Mr Mason sending his firm's letter of engagement was characterised as completing necessary steps to enable the instructions given at the January meeting to be carried out. Ms Wills' subsequent emails were said to show a consistent pattern or theme; that is, having given instructions to act she was following up with understandable inquiries about progress.

[22] Despite those careful submissions, Ms Wills has not satisfied the first limb of s 115(b). While Ms Wills believes she gave an instruction to Mr Mason I am not satisfied that was what happened for several reasons. First, Ms Wills' evidence was inconsistent with Mr Mason's recollection that he was waiting for instructions from

⁸ *Hokotehi Moriori Trust v Prater* [2019] NZEmpC 67; *Hutchison v Nelson City Council* [2013] NZEmpC 184.

her. That is what he recorded in his handwritten file notes of the January meeting and there was no suggestion that they were inaccurate or incomplete. Second, Mr Mason thought Ms Wills was reflecting on his advice about some difficulties to be faced in bringing a personal grievance for an alleged constructive dismissal. Those problems were that she would bear the onus of proof and that the available remedies might be limited because she had a replacement job.⁹ She accepted those were matters that needed to be taken into account.

[23] Third, despite Ms Sharma's submissions about Pitt & Moore being retained to progress the personal grievance there was nothing in the letter of engagement or terms and conditions to support that conclusion. Both were generic documents, confined to recording that the firm had been retained to act but without otherwise describing what it was being asked to do.

[24] Finally, Ms Wills' email sent in late January, after receiving the letter of engagement, was conditional, indicating she was still deciding what to do rather than simply taking a necessary administrative step to carry out a decision that had already been made. Asking about Mr Mason's fees if he was to act is quite different from confirming an instruction already given.

[25] I consider it is more likely than not that after the January meeting Ms Wills was taking time to decide whether she should assume the costs and risks of litigation in light of the advice given to her. It follows that I do not accept that Mr Mason was given an instruction during the meeting that he subsequently failed to carry out. There may be a separate issue about whether his fiduciary duty to her was satisfied but that subject is beyond this judgment.

[26] The cases of *Hokotehi Moriori Trust*, and *Hutchison*, do not assist Ms Wills' argument. In *Hokotehi Moriori Trust* several factors were taken into account in assessing whether exceptional circumstances had been established. The case can be distinguished from the present one because the exceptional circumstances accepted by the Court did not turn on the failure of an agent. The delay in that case was described

⁹ See *NZ Amalgamated Engineering etc IUOW v Ritchies Transport Holdings Ltd* [1991] 2 ERNZ 267 (LC).

as multi-factorial, only one part of which was the applicant being let down by lawyers who effectively abandoned him.¹⁰ The other factors, including health-related problems, carried more weight.

[27] Likewise, *Hutchison* does not assist. In that case the Court made a finding that the plaintiff had given clear instructions to the lawyer that had not been carried out on time.¹¹

[28] Ms Townsend, counsel for Farmlands, referred to two examples which better illustrated how s 115(b) might be applied. The first case was *Davies v Dove Hawkes Bay Inc* where a barrister was instructed to act but was dilatory.¹² Having already instructed the barrister but getting an inadequate response, Mr Davies contacted her again the day before the 90-day period expired and, at short notice, they met to work through a draft letter raising the personal grievance. For reasons that were not subsequently explained that letter did not arrive at his former employer until after the 90-day period had elapsed. Not surprisingly, the Court was satisfied Mr Davies had done enough. He had engaged a qualified and experienced agent to protect his interests and had done all that he could do to make sure that his case was presented to his former employer.¹³

[29] The second case was *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* where the former employee made an assumption about what would happen after seeking advice from a solicitor and took no further steps.¹⁴ Not surprisingly, the test was not satisfied.

[30] Referring to those cases illustrates the difficulty confronting Ms Wills. She was unable to show that she did anything more than obtain advice from Mr Mason about a potential claim.

¹⁰ *Hokotehi Moriori Trust*, above n 8, at [18].

¹¹ *Hutchison*, above n 8, at [27].

¹² *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83, [2013] ERNZ 191.

¹³ At [11].

¹⁴ *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) 2 NZELR 402 (EmpC).

[31] In this assessment the fact that Ms Wills sent emails after the meeting in January 2018 has not been overlooked. While Ms Sharma urged that correspondence to be seen as evidence supporting Ms Wills' claim that she had taken action to initiate a personal grievance, the situation is not so clear cut. Just as easily, the correspondence could be interpreted as nothing more than completing the terms of engagement that should have been sorted out before the meeting or, alternatively, as a preparatory step in case further instructions were received.

[32] The emails sent in March and April 2018 could not, in any event, be relevant to the test in s 115(b) because they were sent after the 90-day time limit had expired. It is possible that, had there been a response to them, Ms Wills may have been in a position to seek leave sooner than she did but the outcome would have been the same.

[33] That analysis is sufficient to address the application and the remainder of the test can be dealt with succinctly for completeness. Given the conclusion I have reached, Ms Wills cannot establish the second limb of s 115(b); Mr Mason did not fail to act.

[34] Even if Ms Wills had overcome the first limb of the test under s 114(4)(a) it would have been difficult for her to establish that the interests of justice warrant granting leave under s 114(4)(b). Her application was silent about the circumstances that she considered gave rise to a personal grievance, making any attempt to consider them as part of this evaluation impossible.¹⁵

[35] More importantly, Farmlands was not on notice of the existence of a potential personal grievance until 31 July 2018 when Ms Sharma wrote to it asking the company to consent to an extension of time, which was promptly refused. Ms Sharma's letter did not describe the basis for the alleged grievance. It was not until a statement of problem was lodged in the Authority, in August 2018, that the reasons for the claim were disclosed to Farmlands. By then about six months had gone by since the 90-day time limit had been reached and some of the pleaded allegations were about events

¹⁵ See *McMillan*, above n 14, at [5]; and the summary of the broad principles of s 114(1)(b) in *Goel v Director-General for Primary Industries* [2015] NZEmpC 54, [2015] ERNZ 652 at [45]–[63] per Chief Judge Colgan.

that were well over two years old. That passage of time, without Farmlands being on notice of the claim it might have to respond to, would have counted against granting leave.

Conclusion

[36] The application is unsuccessful and is dismissed.

[37] Costs are reserved. Any application for costs is to be made within 20 working days. Submissions in response are to be filed within a further 20 working days with a reply within another five working days.

K G Smith
Judge

Judgment signed at 4.30 pm on 14 December 2020