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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 249

December 2015

Out of Time but in with a Chance

A recent Employment Court determination has granted an employee who resigned, the opportunity to raise a personal grievance claim for constructive dismissal, in circumstances where the employee failed to raise the personal grievance claim within the requisite 90 day timeframe.

In ***Roy v. Board of Trustees of Tamaki College*** [2014] NZEmpC 153, the Employment Court was dealing with an application to strike out Mr Roy's constructive dismissal claim on the basis that it was alleged by Tamaki College that he had not raised the personal grievance claim within the requisite 90 day timeframe.

Mr Roy asserted that he did raise his personal grievance within the 90 day timeframe but as an alternative also applied under s.114(3) of the Act for leave to extend the time to raise a personal grievance claim.

In determining whether Mr Roy had submitted his personal grievance claim within the requisite 90 day timeframe the Employment Court had regard to the following facts:

1. The first documented indication of Mr Roy's intention to resign was in an email sent to the staff at Tamaki College on 27 September 2010, in which Mr Roy stated *"I have made a decision to resign from my position . . ."*.

2. On 29 September 2010 Mr Roy emailed the Principal *"in a friendly and conciliatory tone, saying things like "This will probably be the last correspondence that the two of us will enter into", "Let's celebrate these positive things that we had between us and not dwell upon any negatives", and the like. . . . The tone of the email is predominantly (even solely) one of sadness on the parting of ways on good terms but does not evidence an intention to treat the plaintiff's resignation as a constructive dismissal, let alone to raise a personal grievance."*

3. A record of settlement signed by Mr Roy on 5 October 2010 provides:

   "Chris will provide a written resignation from his employment at the school, effective as at Monday 11 October 2010".

4. On 24 November 2010 the Principal wrote to NZTC reporting Mr Roy's resignation *"on 11 October, 2010, following advice from the employer of an intention of disciplinary action over an aspect of his conduct".*

Taking this factual matrix into account, Mr Roy claimed that he raised a grievance on 28 December 2010 by an email to members of the Board however the Board rejected that it had ever received this email. In this regard the Court noted:

"[10] . . . However, as well as there being no corroboration of Mr Roy's claim that he sent an email raising his grievance on 28 December 2010, there is no evidence at all of the content of this communication. So even if it was accepted that an email was sent to the school by Mr Roy on 28 December 2010, the plaintiff has not established that this communication did raise a personal grievance as the law expects to be done."

In this regard the Employment Court concluded:

"[11] In these circumstances, it is clear that Mr Roy did not raise his personal grievance with his employer within the statutory period of 90 days of its occurrence or his becoming aware of its occurrence, both of which events occurred on 11 October 2010."

The Employment Court then went on to consider whether it was appropriate to grant Mr Roy leave to raise his personal grievance claim outside of the 90 day timeframe in accordance with s.114(3) of the Employment Relations Act and referred to the applicable tests in s.114(4) of the Act.

"[29] . . .The first is that the delay in raising his personal grievance was occasioned by an exceptional circumstance or by exceptional circumstances. Second, if that was so, the Court must consider whether it is just to allow the grievance to be raised now."

The Court referred to the following facts as being relevant to their consideration in this regard:

1. At a meeting on 27 September 2010 between Mr Roy and the Board he understood that if he did not resign he would be dismissed. Mr Roy stated that he was unclear about why he should resign or why he would be dismissed however he considered he had no option but to resign.

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Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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2. The Employment Court noted that while Mr Roy did not request the Board to provide him the reasons for the actions which he says amounted to his constructive dismissal (pursuant to s.120 of the Employment Relations Act), what he did subsequently was tantamount to doing so. In this regard the Court referred to the legislative requirement to provide a report to NZTC "*immediately following*" Mr Roy's resignation which set out the grounds for potential disciplinary action. On several occasions between 5 October and mid – December Mr Roy inquired of the school when he might expect to receive the report however there was a delay in almost 2 months before the Board complied with this legislative requirement.

In this regard the Employment Court held:

"[34] The significance of this lies in what I accept were Mr Roy's reasonable expectations of steps to be taken by the school before he determined to take action in response to what he considered was his unjustified constructive dismissal. First, Mr Roy was aware that this mandatory report would be made by the school to the NZTC. That was expressed in the parties' written settlement agreement that he signed on 5 October 2010. Mr Roy wished to know precisely, (and as confirmed in writing by the Board), what he was alleged to have done which warranted the ultimatum given to him by the Board on 27 September 2010 that he either resign or face dismissal.

[35] Employees are entitled to require employers to so commit themselves in writing pursuant to s 120 of the Act and are not only entitled, but are often well advised, to hold off formulating a personal grievance to be raised until that information is received. Statutory acknowledgement of that commonsense tactic is contained in s 115(d) of the Act. This specifies that an employer's failure to comply with its obligation under s 120(1) to provide a statement of reasons for dismissal is an exceptional circumstance. If this occasions delay in raising a personal grievance within the 90 day time limit, it may allow for leave to be granted under s 114 if the Authority or the Court considers it just to do so.

[36] Although Mr Roy's circumstances do not fall within s 115(d) because he did not formally request reasons under s 120, in the circumstances of this case they are akin to a s 115(d) situation. Whilst an employment law practitioner might have made a request under s 120, I think it would be unreasonable to hold Mr Roy, as a lay person who was at that time without any professional or industrial advice or assistance, to the same expectation.

[37] The Board did not send a copy of its s 139 Education Report to Mr Roy at the same time as it was made to the NZTC. Rather, the NZTC sent Mr Roy a copy which was received by him very shortly before the Christmas break in 2010 at a time when it was difficult, if not impossible, for him to obtain professional advice and assistance even if he had wished to do so. It is not surprising, in these circumstances, that Mr Roy turned his attention seriously to dealing with his former employment situation in January 2011."

"[41] In terms of timing it is significant that the defendant accepts in its written submissions to the Court that the 11 April 2011 letter from Mr Roy to the Board raised his personal grievance. At para 2 of those submissions under the heading "90 Day Issue" the defendant concedes: "An actual personal grievance claim did not get raised by the plaintiff until 11 April 2011 … In this email, Mr Roy makes reference to personal grievance issues due to constructive dismissal."

[42] It follows, then, that the period of delay between when Mr Roy might reasonably have been expected in all the circumstances to have raised his grievance (early January 2011 after he received a copy of the Board's managerial report to the NZTC) and his doing so, as the defendant acknowledges, on 11 April 2011, was approximately three months. Although not an insignificant delay, nor is it of such a degree that it should weigh heavily against a grant of leave to Mr Roy under s 114(3) of the Act.

[43] I accept that the foregoing are circumstances which are unusual, or exceptions to the rule and, therefore, "exceptional circumstances" in terms of s 114(4)(a)."

In concluding that the delay in raising a personal grievance "*was occasioned by exceptional circumstances"*, the Court then went on to determine whether *"it would be just"* to allow Mr Roy to raise his personal grievance outside of the 90 day timeframe. In respect to this test the Court held:

"[46] This test does not require Mr Roy to establish an irrefutable or even a strong case in support of his grievance. If it is clear that the case is so weak that it is very unlikely to succeed, that may be a material consideration in the weighing of the respective justices of granting or refusing leave. It will be significant, also, that there has yet been no independent assessment of the merits of Mr Roy's claims to unjustified dismissal. Finally, as other cases have pointed out, the statutory consequence of mandatory reporting of a teacher's resignation or dismissal in such circumstances, with the potential consequences of deregistration, will also be a factor in determining whether it is just to permit the grievance to be examined on its merits."

In relation to the merits of the case the Employment Court noted that the Board's "*strongest agreement*" related to the agreement entered into between the parties where Mr Roy agreed he could not bring proceedings against the Board in relation to his employment (including its termination) in return for resigning and receiving a modest lump sum payment. In this regard the Employment Court:

"[48] . . . It is probably best that I go no further than to say that the existence of the agreement in this case cannot be said to be so determinative of Mr Roy's claim that it would be more just not to allow it to be determined on its substantive merits."

For the reasons expressed above the Employment Court determined that Mr Roy "*has leave to proceed with his personal grievance despite it not having been raised by him within time"*.

This case illustrates that it may, in some circumstances, be too early for employers to '*breathe easy*' after a 90 day period has elapsed since an employee was dismissed and/or resigned and emphasises the importance of responding in an appropriate manner to any post dismissal/resignation communications from an employee in respect to the reasons for dismissal.

Christmas Shutdown

Our office will be unattended from midday on Friday 18 December 2015 until Monday 11 January 2016. If you require assistance during this period please feel free to contact us on the following numbers:

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