IN THE COURT OF APPEAL OF NEW ZEALAND

CA500/2010
[2010] NZCA 563

BETWEEN	LYNETTE MELVILLE Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Hearing: 16 November 2010

Court: O'Regan P, Hammond and Arnold JJ

Counsel: G P Lloyd for Applicant
T P Cleary for Respondent

Judgment: 26 November 2010 at 4 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The respondent will have costs as on a standard application for leave to appeal, Band A, and usual disbursements.

REASONS OF THE COURT

(Given by Hammond J)

Introduction

[1] This is an application for leave to appeal on what is said to be a question of law, namely a finding by Judge Travis in the Employment Court that Ms Melville

was time-barred from raising a personal grievance against her employer, Air New Zealand Ltd, because she had not shown that her failure to raise a personal grievance within the specific time was a result of exceptional circumstances for the purposes of s 114(4)(a) of the Employment Relations Act 2000 (the Act).[1]

[2] On 19 August 2008 Ms Melville was involved in an altercation with another employee. On 24 March 2009 she was dismissed for serious misconduct. Ms Melville had been suspended for the intervening seven month period before being dismissed. What happened during that altercation, and specifically what the applicant's role in it, has not yet fallen for determination by the Employment Relations Authority (the Authority). The proceeding has not thus far progressed beyond the procedural issue which is now raised before this Court.

[3] Section 114(1) of the Act requires that personal grievances must be raised with the employer, unless the employer otherwise consents, within 90 days of the triggering event. Here that was the dismissal on 24 March 2009. That period expired on 21 June 2009. Ms Melville did not file and serve a statement of problem until 27 July 2009. Employees may apply to the Authority for leave to raise a personal grievance after that period,[2] but the Authority may only grant leave if it is satisfied that the delay was caused by exceptional circumstances and that it is just to do so.[3]

[4] Section 115 of the Act sets out examples of what may constitute exceptional circumstances for the purposes of s 114(4)(a). The list is non-exhaustive.[4]

[5] Here the applicant relies solely on s 115(b), which provides:

> For the purposes of s 114(4)(a), exceptional circumstances include–
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> ...
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> (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee,

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1 *Melville v Air New Zealand Ltd* [2010] NZEmpC 87.
2 Section 114(3).
3 Section 114(4).
4 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7 at [26].

> and the agent unreasonably failed to ensure that the grievance was raised within the required time; ...

Some further facts

[6] To understand Ms Melville's position, and what Judge Travis decided, some further facts are necessary.[5]

[7] On 19 March 2009, Philip Townsend, who is an organiser employed by the New Zealand Amalgamated Engineering, Printing and Manufacturing Union Inc (the Union) wrote to Air New Zealand on behalf of the applicant. That letter described the altercation and put Ms Melville's case that her co-worker was primarily to blame. It recapitulated Air New Zealand's view that Ms Melville's conduct amounted to serious misconduct and that it no longer had trust and confidence in her as an employee. The letter then noted that "serious misconduct" did not necessarily equate to "conduct justifying dismissal" for the purposes of the Act; that Air New Zealand had evinced an intention to dismiss Ms Melville during the period of her suspension and that her fate was already sealed; and expressed the view that Air New Zealand's conduct did not meet the standard of a fair and reasonable employer. It then stated Ms Melville's position that her conduct did not justify dismissal. The letter concluded that the suspension was unjustifiable and that it would be unjustifiable to dismiss Ms Melville.

[8] There was then a meeting on 24 March 2009 between Ms Melville and Air New Zealand. Mr Townsend attended. Ms Melville was dismissed at that meeting. Mr Townsend deposed that his and Ms Melville's immediate response was to say "See you in Court", a point Mr Townsend says he reiterated before leaving the meeting.

[9] The next day Mr Townsend went on leave for a month. Regrettably, in his rush to leave he did not send Air New Zealand the Union's standard letter confirming the existence of a grievance. He handed the file over to the Union solicitor, X.

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5 These are taken from [4]–[12] of the judgment under appeal.

[10] On 26 April 2009 Ms Melville emailed Mr Townsend to check progress on her file. She had been aware he had been on leave. That email read:

> [W]hen you get back into the office can you see where my case [is] at, as it hit a real stand still. I went to see [X] and that went well, we went half through my file, then had an appointment to see [her] 3 days later. I got there and they had forgotten to phone me and cancel as they were unable to see me.
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> [A staff person] was to email me a proof to read which never arrived. I left it a couple of weeks and phoned she thanked me for reminding her and said [I] would have it by [F]riday, still not arrived called following [W] and told same again, still not arrived. I know that Air New Zealand has caused the union heaps of headaches with others while you were away. I am just worried there is some "time limit" on us responding and [I] will miss out.

[11] Ms Melville deposed that she followed up with the Union on the progress of her file on a number of occasions, through text message and telephone. She was reassured that everything was in hand. Mr Townsend confirmed this in his affidavit. He had assumed that a grievance had in fact been raised.

[12] X gave evidence that she worked on the file in Mr Townsend's absence and had commenced writing a statement of problem. There was a period where, owing to illness, she was unable to attend work. When she returned and resumed work on the statement of problem she became aware that there was no submission of grievance letter on the file, because none existed. She had assumed that the personal grievance had been raised and by the time she became aware that it had not the 90 day period had expired.

[13] For Ms Melville's part, under cross-examination she:[6]

> ... acknowledged that she was aware that in the collective agreement that bound her there were clauses about how to resolve disputes. She confirmed that she had instructed Mr Townsend to write the 19 March letter and that she was concerned that the manager had decided that she was going to be dismissed. She confirmed that after she was dismissed she did not instruct Mr Townsend to telephone or write to the defendant about taking the dismissal matter further but said something like "where do we go from here" and that she wanted to take the matter to Court. She was keen to pursue an unjustified dismissal grievance and continued to check with the union on progress. She was focussed on getting the union to make sure that her case was being progressed. She was aware of the time limit but did not know

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6 Judgment at [11].

> what it was and was concerned she might miss out if something was not done. She had read the 90-day reference in the collective agreement but thought the union would have her best interests at heart. She did not know how to move the matter forward and did not expressly request the union to raise her grievance with the defendant. She left it in the hands of the union to progress the matter. Mrs Melville confirmed that she had told Mr Townsend that she wanted her job back.

[14] X gave evidence that at no stage had Ms Melville instructed her to raise a personal grievance, relating to her dismissal.

The Judge's decision

[15] The Judge first had to determine what exactly had been "raised" by Ms Melville. The Authority had found that the 19 March letter raised a disadvantage grievance and Judge Travis accepted that. But she had – on the facts – not raised a grievance as to her dismissal. In short, she *had* raised a grievance relating to the investigation of her case; but not as to dismissal, which was a quite different thing.

[16] The Judge then had to decide whether leave should be granted to Ms Melville to raise the grievance after the expiration of the 90 day period. On that point, the Judge accepted that the Union had:[7]

> unreasonably failed to ensure that the grievance was raised within the required time. The file ought to have been checked to see whether the standard letter raising the grievance had been sent. The evidence was that the union, regardless of what was said at the time of the events giving rise to the grievance, always, as a matter of proper caution, issues written advice raising the grievance. That procedure was not followed in this case. Again the union relied on an assumption that such a letter had been sent and this was unreasonable.

[17] However, the Judge held that to fit within the first element of s 115(b), namely that the employee had made "reasonable arrangements" with his or her agent, the applicant "had to have given instructions to Mr Townsend ... to have the [dismissal] grievance raised".[8] The Judge held that the applicant had not, rather what she did:

> [33] ... was to make it clear to Mr Townsend that she wanted the union to pursue a grievance of unjustified dismissal on her behalf ... She did not

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7 At [32].
8 At [33].

> expressly request the union to raise the grievance. This was no doubt based on her assumption that it had already been raised on 24 March. This is consistent with the union's concentration on the filing of the statement of problem, on the mistaken assumption that a grievance had been raised in writing.
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> ...
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> [37] The plaintiff's failure was not to have made reasonable arrangements to ensure that her grievance was raised in time, as opposed to her more general and broad instructions for the union to take the necessary steps to pursue her grievance. Her failure to do so was similar to the situation in [*McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) NZELR 402 (NZEmpC)] where the provision in the employment agreement had alerted the employee to the existence of a time limit and his communications with his solicitors had not made arrangements that were reasonable to raise his grievance.

The appeal point

[18] Ms Melville seeks to appeal against that finding. The question of law the applicant proposes is:

> Whether or not the Employment Court has erred in law by misstating the relevant legal test.

[19] In broad terms, Air New Zealand's contention is that to make "reasonable arrangements" the employee must give express instructions to his or her agent. For Ms Melville's part, the submission is that something less is required.

Jurisdiction for the appeal

[20] The application for leave is made pursuant to s 214 of the Act. This Court may grant leave if:[9]

> in the opinion of [the Court], the question of law involved in [the] appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[21] The leading authority on what s 214(3) requires is *New Zealand Employers Federation Inc v National Union of Public Employees*.[10] There the Court considered

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9 Section 214(3).

10 *New Zealand Employers Federation Inc v National Union of Public Employees* [2001] ERNZ 212 (CA).

the jurisdiction was analogous to that created by s 144 of the Summary Proceedings Act 1957. The Court explained that the requirements are stringent. Neither the question of what constitutes a question of law or whether a question is of sufficient importance is to be "diluted".[11] Those principles were followed recently in *Andrew Yong t/a Yong & Co Chartered Accountants v Yunpei (Sophia) Chin*.[12]

Discussion

[22] As Judge Travis rightly said, there are two elements in s 115(b).

[23] The Judge dealt with the second element first because it is straightforward. The Judge accepted a submission for Ms Melville that the Union unreasonably failed to ensure that the grievance was raised within the required time. As the Judge rightly said:[13]

> The file ought to have been checked to see whether the standard letter raising the grievance had been sent. The evidence was that the union, regardless of what was said at the time of the events giving rise to the grievance, always, as a matter of proper caution, issues written advice raising the grievance. That procedure was not followed in this case. Again the union relied on an assumption that such a letter had been sent and this was unreasonable.

[24] The difficulty in the application lies in the first limb, namely whether Ms Melville had made "reasonable arrangements to have the [dismissal] grievance raised on her behalf". The Judge held, as he said on the basis of Mr Cleary's cross-examination, that Ms Melville did not expressly request the Union to raise a grievance over her dismissal. As the Judge noted:[14]

> This was no doubt based on her assumption that it had already been raised on 24 March.

[25] It may be as well to set out the passage in cross-examination to which the Judge referred:

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11 At [27].
12 *Andrew Yong t/a Yong & Co Chartered Accountants v Yunpei (Sophia) Chin* [2008] NZCA 181 at [10].
13 At [32].
14 At [33].

Q. What did you ask him to do on your behalf, or the union on your behalf. What were you wanting to achieve.

A. To be absolutely honest, I don't remember a lot about that day, as I said I was in shock. I walked out of the building and got a big wave and a goodbye from Nic, so I couldn't say, I couldn't say under oath word for word what I said but I said to Phil.

Q. Just in substance what were you wanting him to –

A. Where do we go from here, and he said, I said what are my options, and that's when it was put to me well you can taken them to Court for unfair dismissal. Is that something you want to do, is that where we're going to go from here, and then he said he'd give me a call in a couple of days. To get my head around it.

Q. Is that what you wanted to achieve that you –

A. Ultimately I wanted my job back and I wanted an apology from them.

Q. And you told that to Mr Townsend.

A. Yeah. I said to them many times during it all, that, you know, and when we were at our last mediation thing I said to the mediator.

Q. No, no I can't – sorry – this is going into what was said at mediation.

A. Okay. So all I wanted was an apology.

Q. Yes, and you wanted your job back.

A. Yes.

Q. And that's what you told Mr Townsend to achieve for you.

A. Yes.

Q. And that was the reason you'd been following up to find out how it was getting on.

A. Well yes, yeah.

[26] The Judge concluded:[15]

> The plaintiff's failure was not to have made reasonable arrangements to ensure that her grievance *was raised in time*, as opposed to her more general and broad instructions for the union to take the necessary steps to pursue a grievance. Her failure to do so was similar to the situation in *McMillan* where provision in the employment agreement had alerted the employee to the existence of a time limit and his communications with his solicitors had

[15] At [37].

> not made arrangements that were reasonable to raise his grievance.[16] (Emphasis added.)

[27] If the Judge is to be taken as saying at [37][17] that there must always be an express instruction by the claimant to the agent to bring a timeous claim, then we could not accept that, as a matter of law. That would amount to a quite unwarranted narrowing down of the statutory provision in s 115(b). In the words of the provision, the employee has to make "reasonable arrangements" to have the particular grievance raised on her behalf.

[28] But if the Judge is to be taken, on a fair reading of his judgment, to be making a finding of fact that reasonable arrangements had not been made in this particular instance on the dismissal point, then that is not something which is reviewable on appeal by this Court.[18]

[29] In our view, the latter reading of the judgment is the appropriate one. And the Judge's conclusion was open to him on the facts. The possibility of "going to court" was raised, but the cross-examination showed there was not such a degree of definiteness about it that it could be said that "reasonable arrangements" to raise that grievance had been made. The discussion with the Union agent was contingent; a final decision had not been made and instructions given on a dismissal grievance.

[30] What therefore at first blush might appear to be a harsh result has to be understood in context. The Union representative should have got it straight what was to be pursued, and on what basis. Ms Melville appears to have been understandably confused. She was not well served. She will still have the possibility of remedies for what was properly raised available to her; but not for the dismissal.

Conclusion

[31] The application for leave to appeal is dismissed.

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[16] The reference to *McMillan* is to *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) NZELR 402 (NZEmpC).

[17] Reproduced above at [17] and again at [26].

[32] The respondent will have costs as on a standard application for leave to appeal, Band A, and usual disbursements.

Solicitors:
EPMU, Wellington for Appellant

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[18] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.