IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 48
5301768

	BETWEEN	ROBERT ABERDEEN Applicant
	A N D	AIR NEW ZEALAND LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Ben Nevell, Counsel for Applicant Kevin Thompson, Counsel for Respondent
Investigation Meeting:	28 March 2011 at Dunedin
Date of Determination:	8 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Aberdeen, seeks leave to bring his personal grievance alleging unjustified dismissal outside of the statutory 90 day time limit provided for in the Employment Relations Act 2000 (the Act). Air New Zealand resists that application.

[2] Mr Aberdeen says that he made proper arrangements for the raising of his grievance by instructing his union, the Engineering, Printing and Manufacturing Union Inc (the Union) to raise his grievance and that the Union *unreasonably failed to ensure that the grievance was raised within the required time*. Mr Aberdeen also contends that it would be just for the Authority to grant him the right to raise his grievance out of time. It is a truism that the elements of Mr Aberdeen's claim cast the burden of proof on him.

[3] Mr Aberdeen was employed, at the time of his dismissal, as a customer service agent in the Dunedin Airport Koru Lounge. On 26 May 2009, Air New Zealand's Dunedin Airport manager received an email report from another staff member which was subsequently confirmed by other reports alleging inappropriate activity by Mr Aberdeen.

[4] An employment investigation was commenced and there were a number of meetings between the parties. Those meeting culminated in a decision to dismiss Mr Aberdeen for serious misconduct, that decision being communicated to him at a meeting with Air New Zealand on 6 July 2009.

[5] Mr Aberdeen was, at all relevant times, a member of the Union. He had been represented by the Union's delegate, Mr Glover, at the various meetings with Air New Zealand. However, it is proper of me to observe that it was Air New Zealand rather than Mr Aberdeen who insisted on Mr Aberdeen having a support person during the course of those disciplinary meetings.

[6] In any event, Mr Aberdeen's evidence was that, immediately after the dismissal, and at the suggestion of Mr Glover, he contacted Ms Juanita Willems, an organiser with the Union at Dunedin. Mr Aberdeen maintained that Mr Glover had suggested that he take a personal grievance against Air New Zealand; Mr Glover's evidence on the other hand is that he simply referred Mr Aberdeen to Ms Willems for appropriate advice and guidance. The difference between the two men's recollection of events is not material. The short point is that Mr Aberdeen engaged with Ms Willems and he stoutly maintained that he had instructed Ms Willems to raise a personal grievance with Air New Zealand on his behalf.

[7] Ms Willems' evidence is that no such instruction was ever received and there is nothing in the documentary evidence before the Authority which would give support to Mr Aberdeen's claim.

[8] Mr Aberdeen maintained throughout the investigation meeting that during the various extensive contacts that he had with the Union, he was never advised *that the EPMU would not take my case or that they had not yet lodged a personal grievance as I had instructed them to do ….*

[9] Ms Willems gave evidence to the Authority, having been requested to attend the investigation meeting by the Authority itself. I was impressed by her demeanour

and the straightforward way in which she answered my questions and the questions of counsel. Where there are differences between her recollection of events and the recollections of Mr Aberdeen, I have to say that I prefer her evidence to his.

[10] Contrary to Mr Aberdeen's evidence, Ms Willems maintained throughout her evidence, both in responding to me and under cross-examination, that the Union had never raised a personal grievance on Mr Aberdeen's behalf, had never received an instruction from Mr Aberdeen in that regard, and it only ever considered the question of whether the Union would *take Mr Aberdeen's case*, that is whether it would represent Mr Aberdeen in personal grievance proceedings against Air New Zealand.

[11] As to that last point particularly, Ms Willems told me that she formed the view after mature reflection on the evidence available to the Union that Mr Aberdeen had in fact been justifiably dismissed and that being her provisional conclusion, and a provisional conclusion formed at a relatively early stage, it seemed highly unlikely that the Union would commit its scarce resources to representing Mr Aberdeen should he pursue a grievance with the former employer.

[12] What is more, Ms Willems was adamant that Mr Aberdeen had been told explicitly in a conference call involving one of the Union's lawyers on 4 September 2009 that the Union would not represent Mr Aberdeen in proceedings against the airline. That explicit advice had been to some extent foreshadowed by earlier discussion between the parties; I note for instance that in an email Ms Willems sent to Mr Aberdeen on 31 August 2009, she said:

> *In regards to the PG as I explained earlier these things can take months so you need to be very careful about relying on any outcome in the immediate future …*

[13] Ms Willems, having given evidence that Mr Aberdeen was told on 4 September 2009 that the Union was not going to take his case, followed the matter up assiduously with the legal section of the Union at its head office in Wellington with a view to getting that oral advice about the matter confirmed in writing. In the event, a letter drafted by Jills Angus Burney, the Union's solicitor who had been involved in the 4 September 2009 telephone conference with Mr Aberdeen, set out once and for all the Union's final position in the matter, confirming that the Union would not expend its funds in Mr Aberdeen's personal grievance. That letter is dated 5 October 2009 and I am satisfied on the evidence before the Authority that it was not

received by Mr Aberdeen until 9 October 2009. That latter date is in fact the last day that was available to him to raise his personal grievance and the letter from Ms Angus Burney makes that clear. Accordingly, it was available to Mr Aberdeen to have immediately contacted his former employer and raised his grievance, but it is clear that he did not take that step.

[14] It is also clear that the passage of time from 4 September 2009 to 5 October 2009 is too long for written confirmation of an earlier decision to issue. The Union ought to have better in confirming its earlier communicated decision in a more formal way. However, I am not satisfied that Mr Aberdeen was prejudiced by that delay because he knew, or ought to have known, I find, that the Union was not going to take his case at the latest on 4 September 2009.

[15] I discussed with Ms Willems when she was giving her evidence the prospect that the Union could have raised the grievance on Mr Aberdeen's behalf without committing its resources to actually arguing his case, but at least doing enough to protect his position. She accepted that that possibility existed but did not understand that that was the approach typically taken by the Union, certainly in her own reasonably extensive experience. Clearly from her evidence, it was apparent that the Union had never turned its mind to the issue of the raising of the grievance proper and was totally focused on whether the Union would support Mr Aberdeen or not in arguing his grievance before the appropriate institution. No doubt if Mr Aberdeen had been explicit about his requirements, that distinction between raising the grievance and arguing it, would have been more apparent and could have been addressed.

[16] Despite my conclusion that Mr Aberdeen was told by the Union on 4 September 2009 that he was not going to be represented by the Union in personal grievance proceedings, there are contra indications in the evidence which Mr Nevell cleverly exploited. In particular, Mr Nevell pressed Ms Willems to explain why her handwritten notes of the 4 September 2009 telephone conference did not refer to the most critical piece of information, namely the intelligence that the Union was not going to act for Mr Aberdeen. Ms Willems accepted that was the position and simply indicated that the notes were not a verbatim record of the meeting but simply an aide-mémoire prepared at the time by a person who was an active participant in the discussion.

[17] Of particular importance in respect of Ms Willems's response to Mr Nevell's line of questioning was her recollection that, at the end of the telephone conference on 4 September 2009, during which Ms Angus Burney had told Mr Aberdeen that the Union would not support him, Mr Aberdeen became aggressive and unpleasant and threatened her personally, indicating that he would sue her and that he would make a documentary about what Air New Zealand had done and also about what the Union had done relative to his employment and subsequent potential personal grievance. Ms Willems says that she was so distressed and anxious by Mr Aberdeen's behaviour that she sought support from colleagues immediately after this altercation (after Mr Aberdeen had left), and that she contemplated involving the Police if Mr Aberdeen were to behave in that way again.

[18] Mr Aberdeen was clearly transfixed by that evidence when it was given and when he had the opportunity to respond to it, he denied absolutely that any of what Ms Willems had said was true. He denied having been told first that the Union was not going to take his case and claims to have left the EPMU building in a state of elation after the telephone conference, having satisfied himself that his claim was being progressed. He denied without reservation Ms Willems' contention that he had threatened her, threatened to make a documentary about Air New Zealand or to make a documentary about the EPMU critical of those third parties. He denied threatening to sue Ms Willems personally.

[19] These are extraordinary claims for Ms Willems to make up. She struck me as a sensible, level-headed woman who was an experienced union official and who I thought gave measured and reflective testimony. Mr Aberdeen, on the other hand, struck me as flustered and forgetful in his evidence and I confess I concluded that his recollection of these events at no doubt a stressful time of his life were simply not as accurate as Ms Willems had been.

[20] I was also struck by the submission of Mr Thompson who pointed out that Ms Willems' evidence was absolutely consistent within itself and that it would have been in her interests, given her obvious anxiety about Mr Aberdeen's behaviour, to have facilitated his progressing of his personal grievance claim by confessing that the Union had made a mess of things. In fact, as Mr Thompson pointed up, Ms Willems resolutely maintained that the Union had never been asked to raise a grievance on Mr Aberdeen's behalf, had only ever considered the question of whether it would

support him in that grievance, and that when it told him definitively, for the first time on 4 September 2009, that it was not going to support him, he became objectionable and threatening. I conclude that this is more likely than not to be what occurred on 4 September 2009.

[21] However, there are still imponderables in that conclusion. One of them, and an important one, is that if Mr Aberdeen had been told on 4 September 2009 that the Union was not going to take his case, then why did he not take steps to find another advocate at that time? The answer, I think, is found in Mr Aberdeen's own counsel's letter raising the personal grievance some months later. In that letter, in the first paragraph on the second page, Mr Nevell refers to Mr Aberdeen spending a period of time in hospital with a serious cardiac condition *partly as a result of the stress of his dismissal and partly because the EPMU had failed to secure his position.* It seems to me likely that, having been told that he was not going to be supported by his Union, Mr Aberdeen's health declined sufficiently to require his admission to hospital which we know from the medical records happened on 30 September 2009 at Dunedin Hospital.

[22] A factor contributing to my conclusion that the 4 September 2009 message was adequately conveyed to Mr Aberdeen (despite his subsequent protests in the investigation meeting), is the fact that after the 4 September 2009 meeting, there is no email traffic between Mr Aberdeen and the Union. Prior to that, there is a succession of exchanges between Mr Aberdeen and Ms Willems, not all of it straightforward and clear or even particularly on point, but certainly that whole exchange dries up after 4 September 2009. It is difficult to explain why this should be if Mr Aberdeen had not received the message that the Union was not interested any more. Surely he would have continued to pester Ms Willems about the matter if it was still a live issue.

[23] In any event, it is absolutely apparent that by its letter of 5 October 2009, the Union put matters beyond doubt by making it clear that it would not take Mr Aberdeen's case. Even in this letter, though, there is still an element of equivocation; Mr Nevell, in his cross-examination, cleverly made much of the fact that the letter does not refer anywhere to being a confirmation of the earlier decision conveyed to Mr Aberdeen allegedly on 4 September 2009. He sees that as redolent of misfeasance and points to that as evidence for his submission that it was not until the eleventh hour letter that the Union notified Mr Aberdeen that he was not to be

supported in his personal grievance. While I agree with Mr Nevell that the letter ought to have made that point explicitly, and indeed it is almost inexplicable that it does not, it seems to me that the factors to which I have already referred militate against a conclusion that the letter was the first occasion on which Mr Aberdeen became aware that his grievance was not yet on foot.

[24] Even if I am mistaken as to that conclusion, it is still clear that Mr Aberdeen took no steps whatever to raise his grievance with his employer, having received the Union's letter, for fully five months. As I have already noted in this determination, he could have rung his employer directly on the day he received the Union's letter and raised his personal grievance personally. He could even have taken steps to reduce it to writing and send it by facsimile, either to Air New Zealand at Dunedin or indeed to Air New Zealand's human resources people based in Christchurch. He acknowledged being aware of the relevant provisions in his collective employment agreement which refer to his obligation to draw a grievance to the attention of his manager as soon as practicable and in any event within 90 days of the events complained of.

[25] It is not necessary or helpful to dwell on the sequence of events after the Union's notification to Mr Aberdeen that it was not going to argue his personal grievance for him. It is clear from Mr Aberdeen's evidence that he took a variety of different steps to in effect find another advocate to bring his case for him, but he seems to have fundamentally overlooked his own obligation to raise the grievance with the employer. He knew on the last day of the 90 day period, as I keep emphasising, that the grievance had not been raised, but instead of taking steps himself, he devoted the next five months or less to finding an alternative advocate. That alternative advocate, Mr Nevell, raised the grievance by letter dated 2 March 2010.

Issues

[26] It is common ground that the grievance was not raised within the primary 90 day period required by the Act. It follows that the only issue for determination in the present case is whether Mr Aberdeen can legitimately be allowed to proceed to raise his grievance out of time. It follows that the questions for the Authority to decide are as follows:

(a) Did Mr Aberdeen make reasonable arrangements to have his grievance raised by the Union?

(b) Did the Union unreasonably fail to raise that grievance?

(c) Was the delay occasioned by the exceptional circumstances?

(d) Is it just for Mr Aberdeen to be granted leave?

Did Mr Aberdeen make reasonable arrangements to have his grievance raised by the Union?

[27] As Mr Thompson suggests in his helpful and erudite submissions, it is perhaps appropriate to start the inquiry by considering the meaning of the phrase *exceptional circumstances* in the context of the present proceeding. Of course, the leading case on the meaning of the phrase is the Supreme Court decision in *Creedy v. Commissioner of Police* [2008] NZSC 31 when the Court distinguished the earlier Court of Appeal decision in *Wilkins & Field* where that Court effectively gave the phrase *exceptional circumstances* two different but related meanings. The Supreme Court in *Creedy* preferred the first meaning used by the Court of Appeal in *Wilkins* as having its ordinary meaning of out of the ordinary, unusual or uncommon.

[28] The difficulty for Mr Aberdeen in respect of the first question that the Authority must determine then is that there is no evidence whatever that he made any arrangements to raise the grievance. The arrangements that he made were to have the Union take a case for him in respect of his personal grievance, but I am satisfied on the evidence (as I have already made clear), that Mr Aberdeen never instructed the Union to raise the grievance. The instructions (if any) were to take the case on for him, not to initiate the grievance by raising it in the manner required both by his own employment agreement and by the Act. I conclude that by preferring the evidence of Ms Willems for the Union who said she had never been instructed to raise the grievance, the email traffic between Mr Aberdeen and Ms Willems in which there is no indication whatever that the Union was supposed to be raising the grievance and the evidence of Mr Glover, the Union delegate, who also gave clear evidence that Mr Aberdeen had not asked him to raise a grievance either.

[29] Mr Thompson quite properly draws my attention to the decision of His Honour Judge Travis in *Melville v. Air New Zealand Ltd* [2010] NZEMPC 87 in which the learned Judge said, in effect, that the evidence before him disclosed that

what Ms Melville had done was instruct her agent that she wanted it to pursue the grievance on her behalf but *she did not expressly request the Union to raise the grievance.*

[30] That decision is exactly on point. Here, the communications between Mr Aberdeen and the Union focus, insofar as they have clarity at all, on the Union *taking his case* and there is no reference anywhere in the communications to the Union raising the grievance. That, supported by Ms Willems' unequivocal testimony and the supporting evidence of Mr Glover, seems to me to deal with that first issue.

Did the Union unreasonably fail to raise the grievance?

[31] In Mr Thompson's submissions on this point he draws my attention to the changes in the governing employment statute noting that from the Employment Contracts Act 1991 onwards, the governing statutes have required not just a failure simplicita but an **unreasonable** failure.

[32] The factual position can be simply summarised. The Union received Mr Aberdeen's request that it take up the case on his behalf and it gave that request earnest consideration. It is, I think, fair to observe that it took too long to confirm its written decision on the matter but, that aside, the Union is entitled to consider whether it is appropriate to expend members' funds on the defence of a particular claim by an individual member.

[33] The process that the Union undertook in this regard was, I am satisfied, a standard process which the Union would typically use in any case of this sort. That the Union reached a conclusion that it did not wish to support Mr Aberdeen was, I fancy, strongly influenced by Ms Willems' conclusion, as an experienced union organiser, that Mr Aberdeen was not unjustifiably dismissed.

[34] Having considered the matter in accordance with its usual process, the Union concluded that it did not wish to expend members' funds in support of Mr Aberdeen and I am satisfied on the evidence before the Authority that it told him so on 4 September 2009 and repeated that advice in writing (as I say rather later than was desirable) in its letter of 5 October 2009.

[35] It seems to me to follow then that even if it could be somehow assumed that a request to a Union by a member to take his case subsumes within it an implication

that the Union will also raise the grievance within time (and that analysis flies in the face of the Employment Court decision in *Melville* as well as being contrary to good sense), the refusal of the Union to act in the present case cannot be seen as unreasonable.

[36] It is clear on the facts that the Union failed to act, but its failure was not an unreasonable failure. It made a reasoned decision, which it is entitled to do. That decision was contrary to the interests of Mr Aberdeen. But that is not unreasonable of itself. The Union is entitled to make judgments about the use of members' funds and to deploy those funds to best purpose. A considered application of the principles the Union uses in reaching conclusions of that sort cannot, in my judgment, be seen to be unreasonable.

Was the delay occasioned by the exceptional circumstances?

[37] Looking at the matter exclusively from the perspective of this question, and not considering whether Mr Aberdeen has taken steps to have the grievance raised, whether the Union has been unreasonable or not, the law requires that Mr Aberdeen satisfies the Authority on an application such as this that the delay was occasioned by the exceptional circumstances.

[38] This is not a case where the delay is a few days beyond the 90 days mandated by statute. This is a case where fully five months after the 90 day period expired, the employer was confronted with a purported raising of Mr Aberdeen's personal grievance.

[39] As I have already noted, Mr Aberdeen knew on 4 September 2009 that the Union would not act for him, or at least that is my conclusion on the evidence before the Authority. But even if I am mistaken as to that, Mr Aberdeen knew on the last day of the 90 day period that the Union would not act and yet he still took no steps to notify his employer in accordance with the provisions of his employment agreement, of which, he told me, he was aware.

[40] Not only did he not take steps that day, but he took no other steps to raise the grievance for fully five months thereafter. His evidence is that he pursued a variety of parties who might have assisted him with his grievance, but it was not until five months later that the grievance was actually raised.

[41] He says that he did not know any better. It does seem extraordinary, given the number of people he spoke to in that five month period, that nobody said to him that he must speedily put the grievance before the employer. But even if, for whatever reason, no such advice was ever proffered to him, it avails him not at all that he does not know what he is supposed to do. The law is clear that ignorance of the legal principles is not an exceptional circumstance: *McCullough v. AFFCO New Zealand Ltd* [1998] 2 ERNZ at 367. That case is an example of a number of decisions which I am satisfied settle the law that a mistaken belief as to the legal position is not an exceptional circumstance within the meaning of s.114 of the Act.

Is it just for Mr Aberdeen to be granted leave?

[42] The first issue for consideration here is the very length of time during which Mr Aberdeen neglected the obligation to raise the grievance after the 90 day period had expired. The longer the delay continued, the more the prejudice to the employer, Air New Zealand, and the more likely it was that it would be particularly difficult for Air New Zealand to either provide evidence about the matters complained of or take other appropriate steps to address or resolve the grievance raised.

[43] Mr Aberdeen's evidence is that he suffered ill health during the period from the end of the statutory 90 day period down to the eventual purported raising of the grievance on 2 March 2010. But that claim is not borne out by the medical evidence. On the face of it, he has had periods of ill health but the period in question does not seem to have been particularly one of those. Even if it were, it seems difficult to justify a five month delay in raising a perfectly straightforward personal grievance claim.

[44] I must also consider whether the grievance has any real chance of success were it to be allowed to proceed: *Melville*. I am satisfied that Mr Aberdeen has a very poor chance of being successful in his substantive claim. Air New Zealand seems to have conducted an extremely thorough investigation into the allegations made against Mr Aberdeen. Mr Aberdeen was represented throughout the process at Air New Zealand's insistence. There were a number of meetings. I think the decision made by the company was a measured and reflective one and one which, on the evidence before the Authority, was supported by Mr Aberdeen's own union. In those circumstances, it seems highly unlikely that a successful substantive personal grievance claim could succeed.

Determination

[45] For the foregoing reasons, I conclude that:

(a) Mr Aberdeen did not make reasonable arrangements to have his grievance raised;

(b) There was no unreasonable failure by the Union in raising Mr Aberdeen's grievance;

(c) The delay in the eventual raising of the purported grievance was not occasioned by exceptional circumstances; and

(d) It would not be just to grant leave to raise the grievance out of time.

[46] It follows from the foregoing conclusions that Mr Aberdeen's claim fails in its entirety.

Costs

[47] Costs are reserved. The Authority notes that Mr Aberdeen is legally aided and, that being the position, the parties' counsel are urged to discuss the matter between them and seek a resolution, having regard to the effect of s.40 of the Legal Services Act.

James Crichton
Member of the Employment Relations Authority