

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 341/10
5284365

BETWEEN IQBAL AHMED
 Applicant

AND SPOTLESS SERVICES (NZ)
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: N Falthaus counsel for applicant
 R Harrison, counsel for respondent

Investigation Meeting: 19 May 2010

Additional information
received: 14 June 2010

Submissions received 22 June and 16 and 21 July 2010

Determination: 30 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Iqbal Ahmed says his former employer, Spotless Services (NZ) Limited (Spotless) dismissed him unjustifiably following an allegation of sexual harassment which he denied.

[2] Spotless says the dismissal was justified, and in any event that the grievance was not submitted within the 90-day period set out in s 114(1) of the Employment Relations Act 2000. It does not consent to the raising of the grievance.

[3] This determination addresses whether the grievance was submitted within the 90-day period. At the end of the investigation meeting an application was made in the

alternative for leave to raise the grievance out of time, and the parties subsequently filed affidavits and submissions. The application for leave is also addressed in this determination.

Background

[4] Spotless employed Mr Ahmed as an orderly at North Shore Hospital. An incident on 30 October 2008 led to another employee alleging that Mr Ahmed made inappropriate physical contact with her in the nature of a sexual assault. Mr Ahmed was charged with an offence in relation to the incident, and made his first appearance in the District Court on 3 November 2008.

[5] At the same time Spotless commenced an investigation and disciplinary process. The relevant meeting for present purposes occurred on 10 November 2008. It was attended by Mr Ahmed, Mrs Ahmed and Mr Ahmed's representative Ken Nicolson. Also attending were Brigid Bradley, Spotless' northern divisional manager – healthcare, and Gemma Muirhead, a human resources advisor at Spotless.

[6] It was common ground that, during an early part of the meeting involving a discussion of the differing accounts of the 30 October incident, Mr Nicolson threatened to raise a personal grievance if Mr Ahmed was dismissed because Mr Ahmed was 'an innocent man'. The threat was recorded in handwritten notes of the meeting which Ms Muirhead prepared.

[7] There has not been any attempt to argue that the comment amounted to a raising of the grievance. The principal question for the Authority concerns whether, at the end of the meeting and after the decision to dismiss had been advised, Mr Nicolson said words to the effect that 'I am raising a personal grievance' and whether he went on to indicate lost wages and compensation would be sought. Both Ms Bradley and Ms Muirhead denied such words were used and Ms Muirhead's notes did not record them. There were no other notes.

[8] It was common ground, however, that among Mr Nicolson's final words were: 'I will be seeing you in the Authority'. Those words were not recorded in Ms Muirhead's notes either, although Ms Muirhead said that was because the words were

used as she was walking out the door after the end of the meeting. To her, the meeting was over and there was no need to record them. She denied that Mr Nicolson said any more. Ms Bradley had already left the room, and did not hear Mr Nicolson at all.

[9] In emailed exchanges between 18 and 20 November 2008 Mr Nicolson advised Ms Bradley that he would receive the letter of dismissal on his client's behalf. He duly received a copy of the letter. There was no mention of a personal grievance in those exchanges.

[10] On 3 February 2009 Mr Nicolson telephoned Ms Bradley to enquire about where she was working, because he had heard there had been a change. He also asked whether he should send a personal grievance letter to Ms Bradley or Ms Muirhead. Ms Bradley advised that the letter should be sent to Ms Muirhead. According to Ms Bradley there was no other discussion about a personal grievance and the call was brief. Ms Bradley said she understood from the call that Mr Ahmed was still considering a personal grievance, and that any notification of a grievance would be forwarded to Ms Muirhead.

[11] No personal grievance letter was sent to Ms Bradley or Ms Muirhead. The next approach on behalf of Mr Ahmed came in an email message dated 15 April 2009, from Mr Nicolson to Ms Bradley. The message read:

“As you are aware a personal grievance for Ahmed was raised with you for unjustified dismissal on the day of his dismissal at our second meeting on the 10th November 2008. Later I discussed the issue with you by phone ... on 3 February 2009 ... We discussed this matter and you confirmed that you were the point of contact for Spotless on this matter of his personal grievance and I explained that Ahmed was also involved in a criminal matter over this incident that was taking priority over his personal grievance at this time. Never the less the grievance is still a live issue for him as he does seek reinstatement once his name is cleared plus lost wages and \$20,000 for hurt and humiliation.”

[12] There was an associated request for copies of the minutes of the disciplinary meetings. Ms Bradley referred the messages to Ms Muirhead. Ms Muirhead responded on or about 16 April in an undated letter to Mr Nicolson advising that Spotless did not accept a personal grievance had been raised within the required 90-day period.

[13] Mr Nicolson replied to Ms Muirhead in an email message dated 17 April 2009. He repeated that he had submitted a grievance on the day of the dismissal meeting, and said Ms Bradley had confirmed in February that she knew a grievance was being raised.

[14] In a further message dated 22 April, sent on receipt of Ms Muirhead's meeting notes, Mr Nicolson said: "there is no reference to the PG at all even though I specifically told you I was raising a grievance now that he was dismissed." There followed a further exchange about the content of the conversation between Mr Nicolson and Ms Bradley on 3 February, in which Spotless maintained its denial that a grievance had been raised.

[15] After a jury trial in October 2009 Mr Ahmed was found not guilty of the charge against him. His grievance was filed in the Authority shortly afterwards.

Whether grievance raised within 90 days

[16] I turn first to the principal question of fact, namely whether Mr Nicolson said at the 10 November meeting words to the effect that 'I am raising a personal grievance' and went on to indicate that wages and compensation would be sought.

[17] In addition to his direct evidence that he made these statements, Mr Nicolson relied on his conversation with Ms Bradley in February 2009, and a number of documents. One document referred to in submissions was a letter to WINZ dated 2 December 2008 and filed for the first time as an attachment to the submissions. The document was not part of the evidence and it was not appropriate to incorporate and discuss it in submissions as was done. I give it no weight but in any event I do not accept that anything in it supports Mr Nicolson's account of the exchanges at the end of the 10 November meeting. The remaining documents were the emailed messages I have described.

[18] I do not accept that Mr Nicolson's conversation with Ms Bradley in February 2009 was any more than a discussion about where to send a grievance letter. Such a conversation did not itself amount to the raising of a grievance. Nor does it support allegations that a grievance had already been raised orally and that Ms Bradley understood that. Except to the extent that the conversation concerned where a

grievance letter should be sent I do not accept the submission that ‘it was common ground that a personal grievance was discussed’. There was no such common ground. I do not accept the submission that Spotless was ‘aware of the grievance’ or that in February Spotless was ‘again put on notice of it before the expiry of the 90 days’.

[19] I do not accept that Ms Bradley told Mr Nicolson she was ‘the point of contact’ for the grievance. She denied doing so. Changes in her employment circumstances mean it is unlikely that she would be ‘the point of contact’ and unlikely that she would advise Mr Nicolson that she was the point of contact. Moreover it was part of Ms Muirhead’s job to handle personal grievances once they were raised, making it even less likely that Ms Bradley would make the statement alleged. If Mr Nicolson believed Ms Bradley was ‘the point of contact’ and attempted to contact her about the matter subsequently, it is because he overlooked her advice and not because she made the statement attributed to her.

[20] I do not accept that the opening sentence of the 15 April email message from Mr Nicolson to Ms Bradley confirms that a grievance was raised on 10 November 2008, that the sentence is an accurate summary of what was said on 10 November or that Ms Bradley was aware before April that a grievance was being raised. The message was written five months after the event, and is self-serving. Further I prefer Ms Bradley’s account of the conversation in February 2009 and do not accept that the second and third sentences in the April email are an accurate record of the conversation. Again, they were written several weeks after the event and are self-serving.

[21] For these reasons I do not accept that this material supports Mr Nicolson’s account of what he said at the end of the meeting on 10 November.

[22] Regarding the account itself, the lack of any mention of the disputed statement in Ms Muirhead’s notes is relevant but not necessarily determinative. Indeed efforts were made to impugn the notes, and no-one suggested that they were a word for word record. However even bearing in mind the incomplete nature of the notes, I consider it more likely than not that the lack of mention of the disputed statement is explained by the fact that the statement was not made. Ms Muirhead’s recollection of the end

of the meeting was clear, and she both acknowledged hearing the statement ‘see you in the Authority’ and explained why it was not recorded. Mr Nicolson did not make a note at the time, and said he put his evidence together from his recollection and with reference to the emailed messages. I prefer Ms Muirhead’s recollection to Mr Nicolson’s.

[23] Further I do not overlook Mr and Mrs Ahmed’s written statements that Mr Nicolson said at the meeting that a personal grievance was being raised and that wages and compensation were being sought. In general counsel should be careful to ensure that written statements of evidence are the voice of the witness and the information they contain is limited to the recollections of the witness. It is not for counsel to re-tell the tale. Here, having observed Mr Ahmed and his responses during the investigation meeting, I do not accept that he had any independent knowledge or recollection of the statements Mr Nicolson says he made. Quite plainly both Mr and Mrs Ahmed were motivated by an understandable wish to ensure Mr Ahmed’s grievance could proceed.

[24] For these reasons I consider it likely that Mr Nicolson did no more at the end of the 10 November meeting than threaten to see Spotless in the Authority. If he thought at the time he had done enough to raise a grievance, he was wrong.

[25] In the light of this finding there is no need to address whether the words Mr Nicolson said he used were sufficient to raise the grievance.

[26] Mr Ahmed’s grievance was not raised within the necessary 90 days.

Whether leave to raise grievance should be granted

[27] I acknowledge that, given the reliance on the argument that a grievance was raised in time and during the November meeting, it is difficult for Mr Ahmed to say in the alternative that exceptional circumstances occasioned a failure to raise it.

[28] Nevertheless the application for leave to raise the grievance out of time proceeded on the basis of s 115(a) and (b) of the Act, which read as follows:

“... exceptional circumstances include –

(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 s 114(1); or

“(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;”

1. Whether Mr Ahmed was able to properly consider raising the grievance

[29] Mr Ahmed was upset and distressed by the criminal charges against him. His involvement in the criminal process required his attendance at a depositions hearing on 16 April 2009, a call over on 7 July 2009, and the jury trial on 30 September and 1 and 2 October 2009. He said he found the experience traumatic and that he went from one court hearing and one meeting to another, in a haze of confusion and not thinking clearly about anything. I accept that is the essence of how he felt.

[30] Mr Ahmed’s general practitioner filed a brief affidavit in which he commented broadly on the contents of medical notes concerning Mr Ahmed’s attendances on himself and other practitioners during 2009. He said the notes (which were not produced but should have been) recorded reports of major stress in the family and attendance at counselling sessions. He asserted that in his professional opinion these matters seriously impaired Mr Ahmed’s decision-making abilities.

[31] The following tests apply where s 115(a) is relied on:

“First, the consequences of the dismissal or other matter giving rise to a personal grievance must be severe. That is illustrated by the use of the phrase ‘has been so affected or traumatised...’. Although being affected might encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of “trauma” connotes very substantial injury. ...

Next, s 115(a) requires that these effects of the dismissal ... caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to ‘properly consider’ raising the grievance that is required... . Finally, that incapacity appears to be required to exist for the whole of the 90 day period...”¹

¹ **Telecom NZ Limited v Morgan** [2004] 2 ERNZ 9

[32] Here Mr Ahmed's general practitioner apparently formed the professional opinion he has set out on the basis of his perusal of the notes, but did not provide any more detailed report on the matter and did not explain how and why any impairment to Mr Ahmed's decision-making abilities was traumatic and such that he was unable to properly consider raising a grievance during the 90 days from 10 November 2008. The material is not sufficient to meet the requirements of s 115(a).

2. Ensuring grievance raised in time

[33] Section 115(b) has two elements. The first is whether Mr Ahmed made reasonable arrangements to have his agent raise his grievance on his behalf. The second is whether his agent failed unreasonably to ensure that occurred within the required time.

[34] Both Mr and Mrs Ahmed were questioned at the end of the investigation meeting about whether or when Mr Nicolson was instructed to raise a grievance on Mr Ahmed's behalf. Both began by saying that Mr Nicolson told Spotless at the end of the 10 November meeting that a personal grievance was being raised and loss of wages was sought. However as far as the giving of instructions is concerned the evidence was that the decision to dismiss was made in deliberations during an adjournment of some 15 minutes, and was advised on the resumption of the meeting. There was no suggestion that there was a further break before Mr Nicolson made the statements he said he made regarding the raising of a grievance.

[35] Accordingly Mr and Mrs Ahmed were asked when Mr Nicolson was instructed to raise the associated grievance, since that must have occurred on or after the advice of dismissal. Initially their answers repeated that Mr Nicolson said a grievance was being raised and compensation and lost wages were sought, which did not answer the question.

[36] For present purposes I am prepared to accept that the possibility of dismissal was discussed during the adjournment and before the decision to dismiss was conveyed. Mr Ahmed said Mr Nicolson told him that if he was dismissed he (Mr Nicolson) would bring a grievance. However when Mr Ahmed was asked specifically when he said to Mr Nicolson 'I want you to pursue a grievance', he said it was when

he had sold his house and needed money. When asked whether he gave that instruction after the November meeting, he said 'yes'.

[37] Evidence of this kind illustrates the difference between the giving of advice about the availability of procedures and the confirmation of instructions regarding how that advice is to be acted upon. While the former may have occurred here, evidence in support of the latter was sparse.

[38] Mr Ahmed deposed at paragraph 14 of his affidavit in support of a grant of leave filed after the investigation meeting that: "When they told me I was being dismissed, Mr Nicolson then told them, based on my instruction that he was now raising a grievance on my behalf against them. We had discussed this during the 15 minute break as we believed that they were going to dismiss me judging by their attitude and language."

[39] I find the articulate nature of this account at odds with Mr Ahmed's demeanour when giving evidence and with assertions that he has difficulty with English as he is not a native speaker of it. The account is also at odds with the gist of the response Mr Ahmed was able to give during the investigation meeting. Even taking into account Mr Ahmed's difficulties I consider it likely that Mr Nicolson gave information about what he would do if a dismissal was imposed and at most Mr Ahmed was advised of what would happen if he was dismissed. There was no affirmative evidence that on 10 November Mr Nicolson was instructed to go ahead and raise a personal grievance and I find the account quoted above to be self-serving in that respect.

[40] Further, counsel for Spotless submitted that between the time of the dismissal and the criminal trial Mr Ahmed did not follow up with Mr Nicolson to enquire about pursuing a grievance, the timing of that process, or how the claim was proceeding. It would be more accurate to say there was no evidence regarding those matters.

[41] Details of any instructions given after 10 November, and steps taken as a result (including dates), could and should have been included in Mr Ahmed's affidavit in support of the application for leave to proceed. Instead of including the information in the affidavit an attempt was made to include the details (although without giving dates or any more than generalised details) in submissions in reply.

Again, attempting to introduce evidence in this way is unacceptable. I give no weight to the information thus provided.

[42] No reliance has been placed on an argument that Mr Ahmed's agent failed unreasonably to take steps to ensure the grievance was raised in the required time, so that any grant of leave based on s 115(b) must rely on the arrangements Mr Ahmed took himself to have his agent do so.

[43] Since there was no evidence beyond the information I have set out, I am not satisfied Mr Ahmed made reasonable arrangements to have his agent raise his grievance on his behalf.

3. Conclusion regarding grant of leave to raise grievance

[44] For these reasons leave to raise the grievance out of time is declined.

Costs

[45] Costs are reserved.

[46] If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority