

[2] Mr Bali claims the personal grievance of unjustified dismissal was raised with Henderson Auto Parts within the 90 day period as required by s.114(1) of the Act.

[3] Henderson Auto Parts says Mr Bali did not raise his personal grievance of unjustified dismissal with it within 90 days of it allegedly occurring.

Relevant facts

[4] Mr Bali was employed by Henderson Auto Parts from June 2010.

[5] On Saturday, 13 July 2013, Mr Bali took two days off being Sunday, 14 July and Monday, 15 July. Mr Bali says that on 15 July his car broke down whilst he was in Kaitaia and he discovered that his cellphone and wallet were missing. Mr Bali returned to Auckland on Tuesday, 16 July and was contacted by his lawyer who had been dealing with his immigration issues. Mr Bali's lawyer told him he had been contacted by Immigration New Zealand (INZ) and informed that Henderson Auto Parts believed Mr Bali had abandoned his employment as he had not been to work for three consecutive days.

[6] Mr Bali claims the action taken by Henderson Auto Parts on Tuesday, 16 July amounted to a personal grievance of unjustified dismissal.

[7] On 22 July 2013, INZ sent a letter addressed to Mr Bali, to Mr Bali's lawyer stating:

We have received information from your employer, Mr Shahad Khan, that your position at Henderson Parts World has been officially terminated on 17 July 2013. ...

[8] In an affidavit sworn by Mr Shahad Khan, director of Henderson Auto Parts, the respondent disputes Mr Bali's version of events and states:

I advised Ms Anna Morton from Immigration New Zealand that the applicant has been drinking and arriving at work hung over and had failed to turn up at work for the past two days. I stated "we are considering terminating his employment and are in the process seeking advise [sic] form [sic] our legal advisers.

[9] Mr Khan goes on to depose that the last contact he had with Mr Bali was on 13 July 2013 as he was not answering his phone or acknowledging calls after that date.

Raising personal grievance

[10] On 15 October 2013 at 11:12am, Mr Bali sent an email to Henderson Auto Parts to its email address accounts@partsworld1.co.nz. The subject line of the email is “*personal grievances against unjust termination of employment*”. Mr Bali alleged unjust termination of his employment and sought remedies including payment of his holiday pay. Mr Khan says he did not receive this email.

[11] The email was subsequently hand delivered to the offices of Henderson Auto Parts on 17 October 2013 by a relative of Mr Bali. Mr Khan discovered Mr Bali’s email of 15 October 2013 on 17 October 2013. The email had not been sent to Mr Khan’s email address but to the email address of the accounts department.

[12] In the submissions filed on behalf of Henderson Auto Parts, Ms Ball states:

... it is evident that on 16 July 2013 the applicant became “aware of the circumstances to the extent necessary to form a reasonable belief that the employer’s actions were unjustifiable”.

[13] Ms Ball goes on to state that even if Mr Bali is now claiming that:

17 July 2013 is the date that the action alleged to amount to a personal grievance occurred, and 15 October 2013 is the date the personal grievance was raised, this is still a period of 90 days.

[14] Ms Ball says a personal grievance must be raised within the 90 day timeframe and therefore needed to have been raised by Mr Bali no later than the 89th day.

[15] Ms Ball concludes by saying that Mr Bali has failed to adhere to the strict statutory requirements of raising a personal grievance under the Act and is therefore out of time.

[16] Mr Lukas in his submissions for Mr Bali says that Mr Bali was made aware that he was going to be dismissed on 16 July 2013 and was formally dismissed on 17 July 2013. From 17 July 2013 until 15 October 2013, is a period of 90 days and as such Mr Lukas says the grievance was raised within the 90 day time period.

[17] Having taken into account the submissions made on behalf of both parties, it appears they agree that the dates for the Authority to consider are 17 July 2013 being the date of dismissal and 15 October 2013 being the date on which the dismissal was raised as a personal grievance with Henderson Auto Parts. Ms Ball says this is out of time and Mr Lukas says it is within time. I calculate the time elapsing between the

dismissal on 17 July and the raising of the dismissal on 15 October as 90 days. This means Mr Bali did raise his grievance within the 90 day period specified in s.114 of the Act.

[18] It seems to me that the grievance was raised within the 90 day period. However, If I am incorrect and the grievance was not raised within the 90 day period, I consider that through its actions, Henderson Auto Parts impliedly consented to Mr Bali raising his unjustified dismissal grievance outside the 90 day timeframe.

The legislation

[19] Section 114 of the Act states:

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*

Implied consent to raising grievance outside 90 day period.

[20] On 18 December 2014, Mr Bali filed his statement of problem in the Employment Relations Authority. On 12 January 2015, a statement in reply was filed on behalf of Henderson Auto Parts. The parties then attended an unsuccessful mediation. The Authority directed that both parties provide further information about the matter to it by 4 February 2015. Information requested was accordingly provided.

[21] On 23 April 2015, a telephone conference was convened with the parties by the Authority. At the telephone conference the parties agreed to a timetable for the filing of witness statements and the date of the Authority's investigation meeting. Mr Bali was to file his witness statements by 7 May 2015 and Henderson Auto Parts was to file its witness statements by 21 May 2015. The investigation meeting was scheduled for 3 June 2015. In accordance with the agreed timetable, the notice of investigation meeting was forwarded to the parties. Mr Bali filed his witness statement on 7 May 2015.

[22] Following the telephone conference, Henderson Auto Parts instructed Stephanie Ball of the office of Catherine Stewart, Barrister to act for it. On 12 May

2015, for the first time, Henderson Auto Parts through its counsel claimed that Mr Bali had not raised his personal grievance within the statutory 90 day time period and Henderson Auto Parts was not going to consent to him raising it out of time.

[23] Because of this development, the timetable agreed between the parties was abandoned and the investigation meeting scheduled for 3 June 2015 was vacated so that the Authority could determine this preliminary issue.

[24] Consent to raising a personal grievance out of time may be implied by conduct¹. The Employment Court in *Phillips v. Net Tel Communications* considered the predecessor to s.114 of the Act, namely s.33(2) of the Employment Contracts Act 1991. At para [37] Judge Travis referred to *Jacobson Creative Surfaces Ltd v. Findlater*² and stated:

Both counsel accepted, as do I, that the law is correctly set out in Jacobsen which held that even if an employer is ignorant of the time constraints imposed by s.33(2) affecting that grievance: "but purposely seeks to resolve the contended grievance through, say, a process of negotiation or mediation with the affected employee or his representative, then such an employer has plainly consented, I hold, to the submission of a stale grievance to him. In any given case it is a matter of fact and degree, I hold, as to whether what has materially occurred comprises a consent by a particular employer to the submitted stale grievance.(p54).

[25] It is clear from the facts referred to in the current matter that at least by 17 October 2013, Henderson Auto Parts was aware that Mr Bali had raised grievances. From that time, following the filing of a statement of problem, Henderson Auto Parts engaged with Mr Bali. It filed a statement in reply, entered into negotiations and attended a mediation. Henderson Auto Parts agreed to a timetable for the filing of witness statements and for an investigation meeting to take place on 3 June 2015.

[26] Just 3 weeks from the investigation meeting and very close to the time by which Henderson Auto Parts was to file its witness statements for the first time it raised a claim that Mr Bali had not raised his personal grievance within the 90 day period pursuant to s.114 of the Act.

¹ *Phillips v. Net Tel Communications* [2002] 2 ERNZ 340

² [1994] 1 ERNZ 35

[27] I consider the actions of Henderson Auto Parts in engaging in the process as described above as constituting implied consent by it to the raising of the grievance by Mr Bali out of time.

[28] Henderson Auto Parts impliedly consented to the raising by Mr Bali of his personal grievance of unjustified dismissal outside the 90 day period.

Costs

[29] Costs are reserved.

Future conduct

[30] The parties will be contacted shortly to arrange a telephone conference for the rescheduling of the substantive investigation meeting and the timetabling of the respondent's witness statements.

Anna Fitzgibbon
Member of the Employment Relations Authority