

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 52
5535302

BETWEEN RICHARD BATE
 Applicant

AND AFFCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Simon Mitchell, Counsel for the Applicant
 Christine Pidduck, Counsel for Respondent

Investigation Meeting: 30 March 2016

Submissions Received: 13 August and 4 September 2015, from the Applicant
 2 November 2015, from the Respondent

Determination: 2 May 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns a preliminary issue as to whether the applicant, Richard Bate, raised a personal grievance within the statutory timeframe set out at s.114(1) of the Employment Relations Act.

The Authority's investigation

[2] During the course of exchanging documents in preparation for an investigation meeting, the parties' representatives requested that the Authority decide the preliminary issue on the papers. I agreed to determine the matter following the provision of submissions. However, having reviewed the material provided I considered further information was required from each of the parties. An investigation meeting was rescheduled and set down for 30 March 2016.

[3] Counsel for the parties were each present at the investigation meeting. Immediately prior to the start of the investigation meeting counsel advised that Mr Bate was unable to attend the meeting, but was contactable by phone. There were difficulties with intermittent telephone reception whilst interviewing Mr Bate, as a consequence his interview was brief. AFFCO's ACC Partnership Programme Manager Ms Jennifer Sauer provided evidence on behalf of AFFCO.

Background information

[4] Mr Bate was employed by AFFCO New Zealand Limited (AFFCO) at its processing plant in Wairoa as a seasonal meat processor.

[5] As an accredited employer under the ACC Partnership Programme AFFCO assumes responsibility for the management of workplace personal injury claims made by its employees. In turn AFFCO contracts with Work Aon, an organisation that provides services to assist the management of work related injury claims.

[6] On 20 September 2012 Mr Bate sustained a back sprain injury whilst working. He received full clearance to return to work on 7 February 2013. On 9 April 2013 there was a subsequent workplace incident which aggravated Mr Bate's injury and he was away from work from 18 April 2013 onwards.

[7] It is apparent that AFFCO had concerns about the origins of Mr Bate's incapacity following both incidents and it declined ACC coverage corresponding to the second incident. It appears Mr Bate sought an independent review of that decision and further medical information was sought. In the interim period AFFCO paid Mr Bate 80% of his wages¹ until the season finished on 3 August 2013.

[8] Mr Bate obtained assistance from an injury claims advocacy service² who requested Work Aon provide a copy of Mr Bate's file. Work Aon supplied Mr Bate's file but some documents were withheld on grounds of legal professional privilege.³ In November 2013 Mr Bate's union instructed a Barrister to pursue information held by Work Aon.

[9] Mr Bate obtained medical clearance to return to work on 2 December 2013. He did not do so although it is unclear what impeded that event. Ms Sauer advised

¹ pursuant to a term contained in the core collective agreement

² Workplace Injury Advocacy Service, provided by the Combined Trade Unions

³ on 19 September 2013

meetings were held with Mr Bate to discuss the matter. Mr Bate was assisted by his union throughout all interactions with AFFCO regarding his injury, treatment and rehabilitation.

[10] On 18 December 2013 Work Aon informed Mr Bate that he was entitled to weekly compensation associated with the second injury.

[11] ACC compensation for the period 28 April 2013 to 1 December 2013 was paid on 24 January 2013.

[12] In the course of a disagreement about when Mr Bate would return to work, Mr Bate signed an 'Exit Advice Form' on 20 January 2014 which informed AFFCO of his resignation. His employment finished on 3 February 2014.

[13] On 17 July 2014 Work Aon released information it had previously withheld, including the following correspondence.⁴ The first was drafted on 26 April 2013 by AFFCO's Health and Safety Coordinator Mr Shaskey and sent to Work Aon. It states:

Given that we have got the Review for Mr Bate on the 14th of May and that he is back on claim for the same injury. Can we be ready to start the VI stuff straight away (if we lose of course).⁵ He clearly is at significant risk by working here – truck driving would be much better [for] him.

[14] The second email reflects an exchange between Ms Sauer and Work Aon (the initiating email the exchange was not provided). The following statement was made by Ms Sauer:

Yes I rang site and got some feed back basically they do not want him back...

[15] A third email drafted on 10 January 2014 by Mr Trevor Shaskey appears to dispute a portion of Mr Bate's entitlement to ACC compensation.

⁴ This event appears to have occurred after the Office of the Privacy Commissioner advised Work Aon of its preliminary view that most of the most information held by it was not legally privileged.

⁵ 'VI' refers to a vocational independence. It is an occupational assessment (for the purpose of identifying the types of work suitable for the claimant) and is used alongside a medical assessment (which provides an opinion as to whether the claimant has the capacity to undertake any of the types of work identified in the occupational assessment).

[16] On 7 August 2014 Mr Bate's representative sent a letter advising that Mr Bate considered he had a personal grievance based on a constructive dismissal. Amongst other things the letter stated Mr Bate "*has now received information sent out that AFFCO has sought that he no longer work for the company, and that there was a strategy to remove him from the workplace.*" Additional detail concerning Mr Bate's personal grievance was sent to AFFCO on 9 December 2014.

[17] AFFCO opposes Mr Bate's claims. It says Mr Bate's grievance has been raised out of time and it does not consent to it being raised after the expiration of the statutory limitation period. Alternatively AFFCO says the claims revolve around its management of his work related injuries. It submits that the Employment Relations Authority has no jurisdiction to grant remedies in relation to those matters.

Issues

[18] The Authority is required to determine:

- (a) did Mr Bate raise a valid personal grievance within the timeframes allowed by s.114(1) of the Employment Relations Act (the Act);
- (b) if he did not raise the grievance within 90 days are there exceptional circumstances.
- (c) whether Mr Bate's claim is barred from the Employment Relations Authority's jurisdiction;

Was the personal grievance raised within the statutory timeframe?

[19] Section 114(1) of the Act sets out the timeframe in which an employee must raise a personal grievance.⁶ It provides two possible periods of time: the first is within 90 days on which the action that it is alleged to amount to a personal grievance occurred; the second is within 90 days of when that action came to the notice of the employee.⁷

⁶ Subject to subsections (3) and (4) and unless an employer consents to the personal grievance being raised after the expiration of the timeframe stipulated at s.114(1).

⁷ s.114(1) paraphrased

[20] There is no dispute that Mr Bate did not raise a personal grievance of constructive dismissal at the time he tendered his resignation or when his employment finished.

[21] It is contended that it is the second of the available timeframes set out at s.114(1) that is applicable to this matter. In *Wyatt v. Simpson Grierson*⁸, as an example of a personal grievance raised “*when it came to the notice of the employee*”, Judge Couch observed that to properly apply s.114(1) it is necessary to deal with the extent of knowledge an employee must have before the 90 day period starts to run.

[22] The argument on behalf of Mr Bate is that he was constructively dismissed when he resigned on or about 3 February 2014. It is submitted that at the time Mr Shaskey (on behalf of AFFCO) was ostensibly placing pressure on Mr Bate to return to work but was concurrently communicating to Work Aon that AFFCO did not want Mr Bate to return to work.⁹ The emails of 26 April 2013, 13 August 2013 and 10 January 2014 are proffered as evidence of a strategy to remove Mr Bate from his position. I pause to note that the first two emails were written between 5 and 9 months prior to Mr Bate’s resignation when he had not received medical clearance to return to work. While it is not appropriate to make factual findings on the substance of Mr Bate’s claim in this determination, the content of the material and the dates in which the emails were drafted raises the likelihood that the issues under discussion relate to ACC matters outside the Authority’s jurisdiction.

[23] It is submitted that it is only when Mr Bate received copies of the documents on 17 July 2014 that AFFCO’s actions, alleged to amount to personal grievance, came to his notice and it is at this point in time that the timeframe within which Mr Bate could raise a grievance began.

[24] I consider the submission is at odds both with Mr Bate’s claim and his evidence to the Authority that at the time of his resignation he “*had had enough of this guy’s harassment by text messages*”, and in particular that Mr Shaskey was “*pressuring me to come back to work and told me if I did not come back on a certain date [he was unable to recall exactly when] then I would be terminated*”.

⁸ [2007] ERNZ 489

⁹ Information contained in the letter dated 9 December 2014 detailing Mr Bate’s personal grievance

[25] Section 114(1) does not require an applicant, when raising a personal grievance, to establish a legal cause of action, rather the focus is on the actions that allegedly amount to a personal grievance.¹⁰ As a matter of law however, a constructive dismissal arises in a factual context where the employee's resignation is forced by some action taken by the employer. It logically follows that Mr Bate must have had sufficient knowledge of AFFCO's actions for him to form a belief that those actions were unjustifiable and of such a nature that he had no option but to resign.

[26] Mr Bate's own evidence confirmed that he regarded the actions of Mr Shaskey towards him as so unreasonable that he could not return to work.

[27] That evidence undermines the submission that it was not until he received Work Aon's documents that AFFCO's actions (alleged to amount to personal grievance) came to his notice.

[28] Work Aon's documents may have led Mr Bate to consider he now had evidence to support his view that AFFCO had treated him unjustifiably and that he now had evidence to support his position.

[29] The law however does not require an employee to have supporting evidence before he or she raises a personal grievance. In *Wyatt v Simpson Grierson* Judge Couch held when raising a personal grievance:

*if the employee has sufficient information to form a belief on reasonable grounds that the employer had acted in an unjustifiable manner, that will suffice.*¹¹

[30] I note also that the letters of 7 August and 9 December 2014 written on Mr Bate's behalf respectively each assert that Mr Bate considered that he had been subjected to unreasonable treatment from AFFCO at the time of his resignation.

[31] The substance of Mr Bate's claim together with his evidence to the Authority and the allegations set out in correspondence detailing his personal grievance overwhelmingly satisfy me that Mr Bate was abundantly aware of his employer's actions and regarded these as unjustifiable on 30 January 2014 at the very latest. Those actions prompted his resignation. This must then be the date on which the

¹⁰ *Silver Fern Farms v North* [2010] NZEmpC 79 at [23]

¹¹ *Ibid* at n.8, para [28]

timeframe to raise his personal grievance began. That timeframe ended on 29 April 2014.

[32] There is no dispute that his personal grievance was not raised until 7 August 2014 and therefore his constructive dismissal personal grievance was not raised within the 90 day statutory limitation period.

Are there exceptional circumstances to warrant leave to raise a personal grievance?

[33] Mr Bate's statement of problem was lodged at the Authority with an attached memorandum which advised that the "*Applicant has not sought leave to file out of time due to his submission that time runs from the receipt of the ACC file.*"

[34] I understood from that communication that Mr Bate was not seeking to apply for leave to raise the personal grievance after the expiration of the 90 day period pursuant to s.114(3).

[35] Nevertheless in submissions it was suggested that exceptional circumstances exist in this matter which the Authority should assess. It is submitted that Work Aon wrongfully withheld information Mr Bate was entitled to and that the material was released well after ninety days from the date of resignation. It is asserted that if the information had been released at the time it was first sought then Mr Bate would have been in a position to raise the grievance within the 90 day period.

[36] Mr Bate did not apply for leave to raise the grievance pursuant to s 114(3). In any event I am unwilling to accept that the delay in the provision of documents by Work Aon prevented Mr Bate from raising his grievance within 90 days of their release when I have already found the actions alleged to amount to a personal grievance came to Mr Bate's notice on 30 January 2014. Nor do I consider Work Aon's omission can be fairly characterised as an exceptional circumstance which occasioned the delay.

Is Mr Bate's claim barred from the Authority's jurisdiction?

[37] Given I have found that Mr Bate's personal grievance was not raised with the statutory timeframe, the question of whether Mr Bate's claim is barred from the Authority's jurisdiction does not need to be determined.

Determination

[38] For the reasons set out above, I find that Mr Bates did not raise a personal grievance within the 90 days required by s 114(1) of the Act. His application to have the employment relationship problem resolved by the Authority is declined.

Costs

[39] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority