

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 252/08
5053725

BETWEEN Harold Butcher
Applicant

AND NEW ZEALAND POST LTD
Respondent

Member of Authority: Dzintra King

Representatives: David Feist, Advocate for Applicant
Naomi Jones, Counsel for Respondent

Hearing: 14 April 2008

Further Evidence Taken 24 April 2008

Submissions Received: 14 May 2008 from Applicant
16 May and 14 July 2008 from Respondent

Determination: 16 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The issues for determination are whether the applicant, Mr Harold Butcher, notified his grievances within the 90 day period; and, if he did not, whether he should be granted leave.

[2] Mr Butcher filed a constructive dismissal grievance in the Authority on 21 May 2007. This related to a resignation on 26 September 2006.

[3] At the hearing, Mr Butcher sought to include other grievances, which had not previously filed in the Authority. These included:

- An unjustified disadvantage grievance regarding an alleged unjustified demotion in May 2004
- An unjustified dismissal for redundancy in May 2004
- A wages arrears action relating to a failure to pay redundancy compensation in May 2004.

Employment History

[4] Mr Butcher started employment with NZ Post in 1972 and by 2004 was a Team Leader on Grade 5. His position was then disestablished and he was redeployed into a position as a Team Leader on Grade 4 on 6 May 2004. In accordance with the relevant provisions in New Zealand Post CEC 2002 to 2004 Mr Butcher's salary was protected for two years. He was given a lump sum payment.

[5] Mr Butcher says that if he had been made redundant he would have received an amount in the vicinity of \$40,000.

[6] Mr Butcher says that for the next year he was unfairly forced to carry out two jobs and was unfairly treated by his supervisor.

[7] In July 2005 he went on stress leave. He was called back early but promised more paid leave. He says he was then told it was unpaid leave and so was forced to return to work. He resigned on 26 September 2006.

Notification

[8] He says the disadvantage grievance regarding the demotion and loss of other entitlements relating to events between October 2003 and 6 May 2004 was notified either on:

- 26 October 2003
- 25 March 2004
- 29 April 2004

[9] He says the personal grievance for an unjustified dismissal for redundancy on the grounds of lack of consultation, not following the CEA procedures and/or improper motive, was submitted in the same documents.

[10] On 26 October he wrote an open letter to Ms Jo Ann Day (Leader, Auckland Mail Service Centre), Worksite Committee Members and EU representatives. This letter dealt with proposed changes in reporting lines for the P/A Team. In this he expresses his concern about the manner in which the disestablishment of his position was notified to him.

[11] On 25 March 2004 he wrote to Ms Day thanking her for the offer of a new position. He expressed concerns about the short period of time within which he has to make a decision and has questions regarding the pay rate. He also asked about redundancy and sought a calculation. On 31 March his employer responded to his queries, providing explanations in accordance with the CEC provision.

[12] On 29 April 2004 he wrote to Ms Suze Wilson, the General Manager of Human Resources, about a conversation he has had with her and John Allen. He said he has accepted the position despite not being happy about the lower salary. He queried matters relating to loss of leave and remuneration due to the loss of a shift. He said he was concerned that Ms Day was applying a literal reading of the CEA and seeks an agreed resolution. This communication shows a desire to negotiate compensation for the lost shift but makes no reference to a personal grievance nor can it be construed as such.

[13] Mr Butcher says the constructive dismissal grievance was notified in the following instances:

- 26 September 2005 letter to Ms Redden
- Email to Ms Redden on 15 November 2005
- Email to Mr Howells 29 September 2005
- Email to Mr Allen 30 November 2005

[14] The 26 September letter stated that his resignation would be effective as of 25 October. He referred to the debacle surrounding his domestic leave and said his employer has an arrogant disregard for the welfare of its employees.

[15] The 15 November email dealt with a mix up regarding leave. He said he would like to get the matter cleared up but “in the absence of any communication from yourself or the pay office, I can see no alternative other than sending an email to John Allen [the CEO] and Peter Fenton [the 2IC], informing them that I shall, reluctantly, be taking this matter to the Employment Tribunal.”

[16] This communication is to do with the pay issue and not with any personal grievance.

[17] The 29 September email to Mr Howells complained about the decision to rescind his domestic leave and stated that the ramifications of that should be understood.

[18] The 30 November email also dealt with the leave mix up. He also said the principal reason for his leaving NZ Post was Ms Redden’s management style. His concern in the email was with getting the three days’ leave payment sorted out.

The Law

[19] Section 114 Employment Relations Act 2000 provides that an employee is to raise the grievance within 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...”.

[20] Section 114 (2) provides that a grievance is raised as soon as the employee or a representative has taken reasonable steps to make the employer aware that the employee alleges a personal grievance the employee wants addressed.

[21] The phrase “came to the notice of” is synonymous with actual knowledge of the action which allegedly gives rise to the grievance: *Drayton v Foodstuffs (south*

island) Ltd [1995] 2 ERNZ 523. It is clear that Mr Butcher knew of the events in 2003 and 2004 and 2005.

[22] Mr Butcher's communications to NZ Post about these matters were not sufficiently clear to alert his employer that he was raising a personal grievance. Complaints per se do not constitute the raising of a personal grievance: *Runa and Rakaraku v Haulage Transport Ltd* (unreported, 13 February 2008, WA 18/08).

[23] These communications, neither singly nor jointly, constitute the submission of a personal grievance.

Are there exceptional circumstances?

[24] I had medical certificates supplied but was told at the Investigation Meeting that the doctor concerned had been contacted that morning and was too busy to come to the hearing. I subsequently spoke to Dr Lockwood. A representative of Mr Butcher's took part in the call.

[25] Dr Lockwood saw Mr Butcher between October 2005 and September 2006. Mr Butcher was clinically depressed with symptoms of anger, irritability, poor concentration and a feeling generally low. He had no enjoyment of life. Mr Butcher's mental state merited the prescribing of antidepressant medication but he would not agree to this so counselling was recommended. The counsellor was Grant Ryan.

[26] I was not able to locate Mr Ryan and interview him.

[27] In Dr Lockwood's opinion Mr Butcher was not in a fit state to make decisions. In March 2006 Mr Butcher had increased mood fluctuations and in June was more stressed and angry than usual. Dr Lockwood said the person he saw was very unwell.

[28] In *Telecom NZ Limited v Morgan* [2004] 2 ERNZ 9, the Court held that Parliament did not intend to relax the tests for extending the limitation period when it enacted ss114 and 115 ERA. If anything, it is arguable Parliament has made the "exceptional circumstances" test in s 115 more difficult to meet. The Court held that

“so affected or traumatised” connotes substantial injury. Furthermore, an inability to “properly consider” raising the grievance means the employee must suffer the inability for the entire 90-day period. The fact that an employee is able to “properly consider” raising the grievance at some point during the 90 day period means the test will not be satisfied. Mr Morgan’s notice period ended on 6 December. In January his health improved, and, in February, he obtained alternative employment. Although the Court did not doubt the psychological effects of the dismissal on Mr Morgan, he was not found to be “so affected or traumatised” by his dismissal that he was unable to properly consider raising the grievance for much, let alone all of the 90-day period.

[29] Mr Butcher was able to make decisions and deal with employment issues at the time of the termination his employment. While I have no doubt that Mr Butcher was unwell, the legal tests for exceptional circumstances have not been met.

[30] Mr Feist argued that the earlier complaints were also within the ambit of exceptional circumstances. There was no evidence that Mr Butcher had been suffering from ill health during the earlier periods. This argument fails.

[31] Mr Butcher did not raise any of the personal grievances within the 90 day period and there are no applicable exceptional circumstances.

Costs

[32] Costs were reserved. If the parties are unable to resolve the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent’s memorandum.

Dzintra King

Member of the Employment Relations Authority