



# Employment Court of New Zealand

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## Cherrington v Rixon Contracting Limited [2016] NZEmpC 61 (25 May 2016)

Last Updated: 13 June 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 61](#)

EMPC 25/2016

IN THE MATTER OF a challenge to a determination of  
the  
Employment Relations Authority

BETWEEN BROUGHTON CHERRINGTON  
Plaintiff

AND RIXON CONTRACTING LIMITED  
Defendant

Hearing: On the papers: Statement of agreed facts filed on 5 April  
2016;  
bundle of documents filed on 15 April 2016; counsel  
submissions filed on 7, 18 and 27 April 2016

Appearances: G Finnigan, counsel for plaintiff  
M Nutsford, advocate for defendant

Judgment: 25 May 2016

### JUDGMENT OF JUDGE M E PERKINS

[1] The plaintiff, Broughton Cherrington, has filed a challenge to the determination of the Employment Relations Authority (the Authority) dated

7 January 2016.<sup>1</sup> This determination was on a preliminary matter as to whether Mr

Cherrington had raised his personal grievances within 90 days of the grievances arising and in accordance with the requirements of [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). The determination held that the grievances were not raised within the 90-day period. Costs were reserved.

[2] In a subsequent determination dated 17 February 2016, Mr Cherrington was ordered to pay Rixon Contracting Limited (Rixon) a contribution towards legal costs

amounting to \$1,750.<sup>2</sup> No challenge has been filed to that determination.

<sup>1</sup> *Cherrington v Rixon Contracting Ltd* [2016] NZERA Auckland 6.

<sup>2</sup> *Cherrington v Rixon Contracting Ltd* [2016] NZERA Auckland 44.

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[3] In a consent memorandum for a directions conference set for 17 March 2016, it was agreed that the challenge could be dealt with on the papers. Counsel have filed an agreed statement of facts and written submissions to enable the Court to consider the matter and issue its judgment. The statement of agreed facts also refers to contemporary documents contained in a bundle of documents.

[4] The statement of agreed facts, referring where appropriate to the documents, reads:

1. The plaintiff was employed by the Defendant as a truck driver/machine operator at a rate of \$20 per hour on or about 20 November 2012 pursuant to a written [individual] employment agreement of the same date.
2. The Plaintiff subsequently undertook training to be a Site Traffic Management Supervisor. This training was completed in or about November 2014.
3. The Plaintiff was suspended by the Defendant on 1 December 2014 and his employment was terminated by the Defendant on 8 December 2014 following several meetings the Defendant had with the Plaintiff and his representative.
4. The dismissal was confirmed by the Defendant in a letter to the Plaintiff dated 9 December 2014. The period of 90 days from 9 December 2014 which the Plaintiff had to raise a personal grievance ended on Monday 9 March 2015.
5. The Plaintiff claims that the suspension and dismissal were unjustifiable.  
That is denied by the Defendant.
6. The Plaintiff signed and sent a letter to the Defendant on 20 January 2015 which detailed his concerns with his suspension and subsequent dismissal.
7. On 21 January 2015, Mr Rixon, on behalf of the Defendant, replied to the Plaintiff's letter responding to the Plaintiff's concerns and disagreeing that there were procedural or substantive issues with the suspension or termination.
8. On 5 March 2015 the Plaintiff emailed a second letter to the Defendant which referred to the 20 January 2015 letter, and advised that the Defendant's 21 January letter did not adequately address his concerns. The letter also suggested utilising the Ministry of Business, Innovation and Employment's mediation service.
9. By a letter dated [12] March 2015 the Defendant responded to the Plaintiff's letter of 5 March 2015. The letter denied that the Plaintiff's letter of 5 March 2015 constituted lodging a personal grievance and advised that the [Defendant] would not attend mediation.
10. The Plaintiff referred the grievance to the Employment Relations Authority by filing a statement of problem. The ERA advises that the statement of problem was lodged on 3 August 2015.
11. Subsequently, the Defendant filed a Statement in Reply. The ERA advises that the Statement in Reply was filed on 18 August 2015. The Statement in Reply attached documents 2-5 filed with this agreed statement of facts.
12. An amended Statement of Problem was lodged on 14 December 2015 and an amended statement in reply was filed on 22 December 2015.

[5] The contemporary documents relating to the termination of Mr Cherrington's employment and which give rise to the preliminary matter, the subject of the present challenge, are sequentially set out in the bundle of documents. These are as follows:

- (a) A letter dated 9 December 2014 from Rixon to Mr Cherrington giving notice of termination of employment together with the reasons for doing so.
- (b) A letter from Mr Cherrington to Rixon dated 20 January 2015 (wrongly dated 2014).
- (c) A letter from Rixon to Mr Cherrington dated 21 January 2015. (d) A letter from Mr Cherrington to Rixon dated 5 March 2015.
- (e) A letter from Rixon to Mr Cherrington dated 12 March 2015.

[6] While the correspondence refers to Mr Cherrington being suspended on pay as from 1 December 2014, it is the termination of employment rather than the suspension which has been raised by Mr Cherrington as his grievance against Rixon.

#### **Additional background**

[7] Mr Cherrington's performance of his duties appeared to become the subject of dissatisfaction on Rixon's part; and on 1 December 2014 Mr Cherrington was requested to attend a formal disciplinary meeting to be held on 3 December 2014. The subject of the meeting at that stage was to be Mr Cherrington's absence from

work on 29 November 2014 and lateness for work on 1 December 2014. Subsequently, on 3 December 2014, Mr Cherrington was advised by Rixon that a further allegation that he had been "brandishing a knife on site with a traffic employee" would also be discussed at the disciplinary meeting.

[8] The full circumstances of the meeting which took place on 3 December 2014 do not need to be the subject of this judgment and will need to be fully canvassed if this matter does proceed to a substantive hearing at a later date. On 8 December

2014 a further meeting was conducted, at which Rixon took a decision to terminate Mr Cherrington's employment on the grounds of serious misconduct. That decision was confirmed in the letter dated 9 December 2014, which has been produced in the bundle of

documents.

[9] The correspondence which followed the letter of termination of employment is particularly relevant to the issue of whether Mr Cherrington raised his personal grievance against the dismissal within the 90-day period prescribed in [s 114\(1\)](#) of the Act and included as a provision of his written employment agreement.

[10] The first correspondence to consider is Mr Cherrington's email to Rixon dated 20 January 2015. This email is headed "without prejudice" but it cannot be regarded as privileged as it does not contain any proposal to settle the employment relations dispute, which by that stage had arisen. In any event any privilege which may be perceived to attach to the letter has been waived.

[11] The primary purpose of the email dated 20 January 2015 was for Mr Cherrington to request Rixon to provide him with a copy of his employment file, and to notify Rixon that:

In summary, I reserve any and all rights [t]o pursue a personal grievance claim in response to your actions and justification for terminating my employment. In the event that a claim is lodged, I will be requesting a formal assessment of your culpability in relation to unjustified disadvantage, constructive dismissal, humiliation, stress and distress, and seeking damages accordingly.

[12] In addition to those matters, the email contained some statements from Mr Cherrington relating to the allegation of brandishing a knife and the clear deterioration in the employment relationship.

[13] The next letter in the sequence is the letter from Rixon to Mr Cherrington dated 21 January 2015. This letter contained Rixon's response to the request for further documents. Also in the letter Rixon reiterated some parts of the sequence in the disciplinary process and the reasons for the final termination of employment.

[14] The penultimate email in the sequence of correspondence is that from Mr Cherrington to Rixon dated 5 March 2015. It is not mentioned in the determination of the Authority although it was contained in the papers produced to the Authority, upon which the determination was to be based. The letter was written to Rixon within 90 days of the date of termination of Mr Cherrington's employment but not the suspension. It is an important letter in the overall sequence of events and is set out fully as follows:

Dear Mike

Further to my previous communication dated 20th January 2015, I do not feel that your response (letter dated 21st January) in any way adequately addresses the concerns I have raised.

As such I wish to formally notify you of my intention to pursue a personal grievance claim in relation to my termination.

To this end I suggest we utilise the mediation service offered by the Ministry of Innovation, Business and Employment under the [Employment Relations Act](#) (2000).

I would ask that you positively consider this request and confirm in open correspondence, within the next seven days, that you are indeed prepared to refer this claim to mediation.

If I do not hear from you in relation to this open offer within seven (7) days from the date of this letter, I will take it that you reject the offer to mediate. In such circumstances I reserve the right to produce this letter to any authority in relation to any further action that may be taken, and ask that this proposal for mediation be taken into account.

I hope to hear from you soon.

[15] Rixon did not immediately respond to the email of 5 March 2015. It clearly received the email from Mr Cherrington, because on 12 March 2015, by way of a

letter also sent by email to Mr Cherrington, Rixon responded to the email of 5 March as follows:

Dear Broughton

Subject: Your letter dated 5 March 2015

Broughton, I have received your letter and I need to advise you of the following:

1 That your stating that it was your 'intention' to pursue a personal grievance is not, according to the advice I have received, the same as advising that you were lodging a personal grievance and as such you are now outside of the 90 day period that you can lodge a personal grievance. So no, I do not agree with your request to attend a mediation hearing. In fact, we will vigorously defend any further attempts at your pursuing any further action against the company.

2 The decision we made to terminate your employment was one that was clearly open for me to take given the issues that we tabled in meetings and letters with you. I suggest you re-read these letters if you feel that you need clarity on the reasons that we terminated your employment.

3 If the Employment Relations Authority were to decide that there were exceptional circumstances that stopped you from raising the personal grievance within the 90 day period from when you became aware that you had been terminated then we will be required to defend our position in the ERA. We are happy to do that and, on the basis that we are successful, then we shall claim back the costs of defending our position from you along with the costs of putting you through your L2NP Traffic Control course.

Please accept this as my final word on this matter Broughton. We were friends before you became an employee of my company and you, in my view took advantage of my friendship. I do not intend to do anything more for you than I have already done.

## Raising of a personal grievance

[16] In order to assess whether the correspondence between Mr Cherrington and Rixon raised the personal grievance against his dismissal within the 90-day period it is necessary to consider the principles which apply. These have been well established now in previous decisions of this Court.

[17] The starting point for such a consideration is [s 114\(2\)](#) of the Act which states that:

...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[18] The matter has been the subject of a substantial discussion in *Creedy v Commissioner of Police*<sup>3</sup> and *Coy v Commissioner of Police*<sup>4</sup> which followed *Creedy*. The following paragraphs from *Coy* set out the principles which apply in assessing whether a grievance has in fact been raised and also deal with the limitation of the 90-day period which applies:

[12] When did the 90 days under [s 114](#) for the raising of personal grievances begin to run? This is covered by [s 114\(2\)](#) that provides that a grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This test has been the subject of definition in case law. Ironically, perhaps, one of the most recent cases to confirm when a grievance has been raised is another police case, *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] 1 ERNZ 517. This issue is not one affected by subsequent appeals in that case.

[13] In *Creedy* at paragraph [35], the Court confirmed previous interpretations to the effect that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This means that the grievance should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that the employee considers that he or she has a personal grievance or even simply by specifying the statutory type of personal grievance. For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. That is not to say that a grievance may not be raised orally or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates. The requirement is certainly not for the sort of detail that may subsequently be required when lodging a statement of problem in the Employment Relations Authority.

[19] The statutory provision came to be the subject of lengthy discussion in the subsequent case of [Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v](#)

[Edmonds](#).<sup>5</sup> The Court stated in *Edmonds* as follows:

<sup>3</sup> *Creedy v Commissioner of Police* [2006] NZEmpC 43; [2006] ERNZ 517 (EmpC) at [35]- [37].

<sup>4</sup> *Coy v Commissioner of Police* EmpC Christchurch, CC23/07, 19 November 2007.

<sup>5</sup> [Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds](#) [2008] ERNZ

139 (EmpC).

[58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every “i” to be dotted and “t” to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as “I have a personal grievance” or “I have been unjustifiably disadvantaged and want compensation and an apology” will usually be insufficient. ...

[20] These principles have all been more recently discussed in *Dunn v Waitemata District Health Board*<sup>6</sup> and *Vince Roberts Electrical Ltd v Carroll*.<sup>7</sup> As held in *Dunn*, having regard to the statutory provision and the principles which are set forth in the authorities dealing with the point, the Court needs to consider the entire context in which the correspondence was written.<sup>8</sup> This includes correspondence leading up to the alleged raising of a personal grievance and all the surrounding circumstances. This point was made in *Phillips v Net Tel Communications Ltd* where Judge Travis stated:<sup>9</sup>

[28] In determining whether a grievance has been submitted by an employee ... in a case where there has been a series of communications, each individual item can be examined to see whether, in itself, it constituted a submission, but the totality of the communications must also be examined. The issue is whether the communications, or any of them would, to an objective and disinterested observer, have presented to the employer for consideration or decision any grievance the employee may have had against his or her employer or former employer ...

## Conclusions

[21] In the present case I agree with the Authority's finding that the email of 20

January 2015 would not be sufficient on its own to constitute the raising of a grievance by Mr Cherrington. In that email, Mr Cherrington reserved his position. That was clearly in anticipation of receipt of the documents he was then requesting

from Rixon. Nevertheless, it was the commencement of a sequence of events and

<sup>6</sup> *Dunn v Waitemata District Health Board* [2014] NZEmpC 201, [2014] ERNZ 524.

<sup>7</sup> *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 112 at [28]- [31].

<sup>8</sup> *Dunn*, above n6, at [2].

<sup>9</sup> *Phillips v Net Tel Communications* [2002] NZEmpC 138; [2002] 2 ERNZ 340 (EmpC).

should not be considered in isolation from the subsequent correspondence and against the principles already set out. It helped to inform the subsequent letter in that some of the matters which were the subject of Mr Cherrington's grievance were set out in that letter perhaps in a preliminary way. In its reply of 21 January 2015, Rixon then took the matter a stage further by reiterating the grounds for termination. Mr Mike Rixon, the director of Rixon, clearly indicated in that letter that he was aware of the basis of Mr Cherrington's dissatisfaction with the termination decision.

[22] The statement in Mr Cherrington's email of 5 March 2015 that "[a]s such I wish to formally notify you of my intention to pursue a personal grievance claim in relation to my termination" was picked up by Mr Rixon as indicating that no grievance was being formally raised at the time. In the entire sequence, that cannot be the proper effect of that document. Mr Cherrington was clearly raising his grievance at that stage. He was proposing a method of resolving it by mediation. The intention of that letter is beyond doubt.

[23] In the response of 12 March 2015, which has been set out fully in this judgment at [15] Mr Rixon was by that time merely playing with words. He had clearly waited until after the 90-day period had expired before responding to Mr Cherrington. As stated in the letter Rixon was acting on legal advice, but that was in a manipulative way. That is clear from the fact that Mr Rixon advised that he was acting on advice in raising the 90-day rule, and later in the letter raising the prospect that Mr Cherrington might make an application to extend time by alluding to s 114(3), 114(4) and s 115 of the Act. Mr Rixon was obviously contemplating at that stage that in view of the fact that Rixon did not consent to the grievance being raised outside the 90-day period, Mr Cherrington would attempt to resolve the position in that way by applying for an extension on the grounds of exceptional circumstances. He attempted to head that off by warning Mr Cherrington of the financial consequences of doing so. What Mr Rixon may not have anticipated from his letter, however, was that it now indicates to the Court in the context of the present application that, following Mr Cherrington's email of 5 March 2015, Rixon knew sufficient of the complaint to address it and failed to do so in good faith.

[24] Standing back and considering all of the correspondence from the time of the dismissal letter, the question whether that correspondence, culminating in the email of 5 March 2015 from Mr Cherrington, was adequate to enable the employer to "know sufficiently of the complaint to be able to address it properly and informally and with a view to resolving it",<sup>10</sup> must clearly be answered in the affirmative.

## Disposition

[25] Mr Cherrington's grievance was raised in time and his challenge against the Authority's determination is successful. The issue of suspension was adverted to in the Authority's determination and in the statement of claim filed by Mr Cherrington but no separate disadvantage grievance is pleaded in respect of it. While the letter of

5 March 2015 was within 90 days of the dismissal, that would not have been so in respect of the suspension. In view of the way that the matter is pleaded at present, I do not perceive Mr Cherrington to be raising the suspension as a separate grievance. Nevertheless, if this matter proceeds to a consideration of the substantive issues, the suspension will be part of the overall background in the dispute as it relates to the termination of employment.

[26] As the Authority's determination is now set aside, the Authority's order for costs, while not subject to separate challenge, may later need to be revisited by the Court. Any discussion in that respect can be deferred until costs overall are being considered after the substantive merits of this matter have been determined.

[27] In view of the decision in *Abernethy v Dynea New Zealand (No 1)*,<sup>11</sup> the entire employment relationship problem between the parties is now before the Court for resolution. In view of the fact that this matter was originally placed before the Authority for a determination on a preliminary matter, the parties have not appropriately undertaken mediation in respect of the substantive employment relationship problem now existing between them. Accordingly, before any further

steps are taken to advance Mr Cherrington's personal grievance claim before the

<sup>10</sup> *Edmonds*, above n 5, at [58].

<sup>11</sup> *Abernethy v Dynea New Zealand (No 1)* [2007] NZEmpC 83; [2007] ERNZ 271 at [58]- [60].

Court, the parties are referred to mediation.<sup>12</sup> They are to participate in the mediation in accordance with the good faith provisions contained in the Act. The parties' representatives are to keep the Court informed of the date set for mediation and the outcome. Hopefully the matter will be resolved at mediation. However, if no agreement can be reached, a directions conference may be convened to advance matters.

[28] All issues as to costs are at this stage reserved.

M E Perkins

Judge

Judgment signed at 10 am on 25 May 2016

12 [Employment Relations Act 2000, s 188\(2\)\(a\)&\(b\)](#).

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