

BETWEEN	BROUGHTON CHERRINGTON Applicant
AND	RIXON CONTRACTING LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Joy Walpole, Advocate for Applicant Max McGowan, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions received:	11 December 2015 from Applicant 21 December 2015 from Respondent
Determination:	7 January 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Cherrington, claims that he was unjustifiably dismissed by his employer, Rixon Contracting Limited (Rixon), on 8 December 2014, and that he was unjustifiably disadvantaged by being suspended and pressurised to resign from his employment.

[2] This determination addresses the preliminary issue as to whether or not Mr Cherrington raised his personal grievances within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

Issues

- The issue for determination is whether or not Mr Cherrington raised a personal grievance within the statutory 90 day time period.

Brief Background Facts

[3] Mr Cherrington commenced employment at Rixon as a Truck Driver/ Machine Operator/Labourer on 20 November 2012. He was provided with an individual employment agreement (the Employment Agreement) signed by the parties and dated 20 November 2012. The Employment Agreement stated at clause 29 that: “*A personal grievance must be raised within 90 days*”.

[4] Mr Cherrington subsequently undertook training to be a Site Traffic Management Supervisor.

[5] By letter dated 1 December 2014 Mr Cherrington was requested to attend a formal disciplinary meeting to be held on 3 December 2014 to discuss: “*your absence from work on the 29th November 2014 and being late to work on the 1st December 2014*”. The letter was signed by Mr Michael Rixon, sole Director and Shareholder of Rixon.

[6] Mr Cherrington stated that on or about 1 December 2014 he was informed by his brother that Mr Rixon had telephoned him and tried to persuade him to ask Mr Cherrington to resign.

[7] The scheduled formal disciplinary meeting took place on 3 December 2014. Mr Cherrington was subsequently informed by text message on 2 December 2014 that also to be discussed at the meeting on 3 December 2014, was an allegation that he had been: “*brandishing a knife on site with a traffic employee last week*”.

[8] Following the meeting, on 4 December 2014 Mr Cherrington was sent a further text message stating that Rixon would be seeking clarification as regards the knife brandishing incident in addition to other matters.

[9] At a further meeting held on 8 December 2014 a decision was taken by Rixon to terminate Mr Cherrington’s employment on the grounds of serious misconduct, and that decision was confirmed in a letter dated 9 December 2014.

Letter dated 20 January 2015

[10] On 20 January 2015 Mr Cherrington emailed a letter to Mr Rixon requesting copies of specified documents and stating:

Given these unfortunate & humiliating circumstances I reserve all rights to pursue any and all remedies for unjustified disadvantage and dismissal.

In summary, I reserve any and all rights to 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 & distress, and seeking damages accordingly.

Determination

Did Mr Cherrington raise his personal grievance within the 90 day statutory limitation period?

The Law

[11] Section (1) of the Act states:

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.

[12] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[13] Section 114(2) of the Act states:

For the purposes of subsection (1), 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.

[14] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral 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.

[15] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer².

20 January 2015 Letter

[16] The 20 January 2015 letter refers: "*I reserve all rights to pursue any and all remedies ...*" and: "*In summary, I reserve all and any rights to pursue a personal grievance claim ...*".

[17] 'Reserve' is defined in the Concise Oxford Dictionary³ as: "*Postpone use or enjoyment or treatment of, keep back for later occasion*". I find that the word "reserve" denotes a future intention.

[18] Mr Cherrington also states in the letter : "*In the event that a claim is lodged...*". Again I find this denotes a future purpose.

[19] In *Creedy v Commissioner of Police*⁴ the Employment Court observed⁵

The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.

[20] I find that the letter dated 20 January 2015 refers to a future event or action which might be taken by Mr Cherrington, and that this is the view which would be taken by an

¹ *Creedy v Commissioner of Police*[2006] ERNZ 517

² *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

³ Sixth Edition, edited by J.B.Sykes

⁴ [2006] ERNZ 517

⁵ *Ibid* at para [29]

objective observer. Accordingly I find that it does not raise a personal grievance in relation to any action taken by Rixon.

[21] I determine that Mr Cherrington did not raise his personal grievance within the 90 day statutory limitation period.

Costs

[22] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority