

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA**

[2023] NZERA 710  
3242999

BETWEEN	ALBY COE Applicant
AND	TARANAKI TRUCK DISMANTLERS LTD Respondent

Member of Authority:	Davinnia Tan
Representatives:	Danny Gelb, advocate for the Applicant Philip McCarthy, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	3 October 2023 from the Applicant 6 November 2023 from the Respondent
Determination:	27 November 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Alby Coe worked for Taranaki Truck Dismantlers Limited (TTDL) from 22 May 2022 as a mechanic.

[2] Mr Bruce Marsh is the sole director and shareholder of TTDL.

[3] On 10 March 2023 on or around 7:00 PM, Mr Coe and Mr Marsh had an argument which ended with Mr Marsh telling Mr Coe, “that’s it you’ve insulted me take your shit and fuck off you’re not the flavour of the month anymore” and “to lock up the yard” on his way out. Mr Coe then cleared his possessions and left the work

phone and keys to the yard on the smoko room table, and left the premises at around midnight. He received his last pay on 21 March 2023 but was not provided a pay slip.

[4] On 8 June 2023 at 4:48 PM, Mr Coe's representative raised a personal grievance with TTDL on his behalf via email for an unjustified dismissal and unjustified disadvantage detailing Mr Coe's version of events of 10 March 2023. A request was also made for various employment records.

[5] On 9 June 2023, Mr Coe's representative called Mr Marsh to confirm he had received the email and personal grievance letter. Mr Marsh confirmed that he had.

[6] On 2 August 2023, Mr Coe lodged a statement of problem with the Authority that alleged that he had been unjustifiably disadvantaged and dismissed from his employment by TTDL.

[7] TTDL considers that Mr Coe is outside the statutory 90-day time limit to raise a personal grievance and that Mr Coe needed to have done so by 7 June 2023. As such TTDL considers the Authority does not have jurisdiction to investigate Mr Coe's personal grievance claim.

[8] In its statement in reply, TTDL provided the Authority with a copy of its standard employment agreement template. This template employment agreement provided for the following:

*Disputes  
Resolving employment relationship problems*

... if it is a personal grievance, the employee has 90 days from the time the problem occurred, or became known by the employee, to raise the personal grievance with the employer.

[9] Neither party has been able to provide a signed copy of Mr Coe's individual employment agreement with TTDL.

**The Authority's investigation**

[10] The jurisdiction issues were discussed with the parties' representatives during a case management conference (CMC) that was held on 15 September 2023. As a result of discussions during the CMC it was agreed that the 90-day issue would be dealt with as a preliminary issue, prior to a substantive investigation.

[11] By agreement the preliminary jurisdiction issue was dealt with 'on the papers'.

[12] Mr Coe provided an affidavit that was affirmed on 22 September 2023. Mr Coe's representative provided written submissions dated 3 October 2023.

[13] On 3 November 2023, the Authority received TTDL's submissions. Counsel for TTDL provided affirmed affidavits all dated 31 October 2023 from Mr Marsh, Sheree Robbertsen (payroll administrator at TTDL), and Ann Jackson (office manager at TTDL).

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[15] The issues requiring investigation and determination are:

- (a) Whether the applicant raised any or all, of his personal grievance claims within the statutory 90-day time period;
- (b) If not, should leave should be granted under section 114(4) of the Employment Relations Act 2000 (the Act)?
- (c) Should either party contribute to the costs of representation of the other party?

### **Submissions**

#### *Mr Coe's submissions*

[16] Mr Coe's representative sought leave from the Authority under s 114 (3) to raise the personal grievance outside the statutory 90-day period due to exceptional circumstances under s 115(c) of the Act. In the alternative, it was submitted that Mr Coe did in fact raise his personal grievance within time based on the drafting of Mr Coe's employment agreement with TTDL which refers to the "time the problem occurred" as opposed to the use of "day" in s 114 of the Act.

[17] On the first submission, Mr Coe's representative stated prior to Mr Coe commencing employment he queried some terms of his employment agreement with Mr Marsh relating to his normal hours of work and returned the employment agreement with his annotated written queries, but Mr Marsh never responded to those queries and did not return a signed copy of the employment agreement to him. Mr Coe stated in his

affidavit that that he cannot remember if the employment agreement mentioned anything about lodging a personal grievance but understood that “with [his] employment termination happening on 10 March 2023...[he] had until 10 June 2023 to raise [his] personal grievance.” Therefore, it was submitted that Mr Coe was misinformed of the time limit to raise his personal grievance and that “with the respondent failing to retain a copy of the written terms of employment there is no way of verify if the dispute resolution clauses contained the correct information as required and as such the Authority can grant the out of time exception as detailed by s 115 (c) of the Act.”

[18] The alternative submission is that because the template employment agreement provided for by TTDL (as part of its statement of reply) sets out that the employee has “90 days from the *time* the problem occurred, or became known by the employee to raise the grievance with the employer”, Mr Coe did raise his personal grievance within time. This is because the incident which gave rise to the personal grievance on 10 March 2023 occurred at around 7:00 PM such that the 90-day time limit expired on 8 June 2023 at 7:00 PM. The personal grievance was raised on 8 June 2023 at 4:48 PM, and as such Mr Coe is within time.

#### *TTDL’s submissions*

[19] TTDL submitted that Mr Coe raised the alleged grievances 91 days after the date the incident in question occurred and is therefore outside the 90-day period.

[20] TTDL submitted that the words “beginning with” in s 114 of the Act indicate that the 90-day period is inclusive of the day on which the grievance occurred or came to the employee’s notice.<sup>1</sup> TTDL further submitted that days must be calculated in whole and not part days<sup>2</sup>, and that therefore the 90-day period starts on the day of 10 March 2023 despite the alleged events not happening until on or around 7:00 PM that day. By including 10 March 2023 as the first day, the 90<sup>th</sup> and last day for raising a grievance was 7 June 2023. Mr Coe raised his personal grievance on 8 June 2023 and is therefore out of time.

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<sup>1</sup> *North v Silverfern Farms Limited* ERA Wellington WA123/09.

<sup>2</sup> *Hughes v Herron’s Four Square Ltd t/a Twizel Four Square* ERA Christchurch CA 209/09.

[21] TTDL submitted that there were no exceptional circumstances at play here and even if there were, those circumstances did not occasion the delay as required by s 115 of the Act.

[22] In response to the submission that s 115(c) applies based on Mr Coe's evidence that he was misinformed or not advised about the mechanism of lodging a personal grievance, Mr Marsh stated in his affidavit that all employment agreements offered by TTDL include a provision that states a personal grievance needs to be raised within 90 days. Ms Robbertsen stated that "the employment agreement that has been attached to the Statement in Reply is similar to the employment agreements of other employees of Taranaki Truck Dismantlers (and the agreement Ann confirms she gave to Alby), which all contain the usual explanation about raising personal grievances." Ms Jackson also stated that "the template employment agreement always includes a plain language explanation of the 90-day period for raising a personal grievance." She further stated in paragraph 18 of her affidavit that "the employment agreement I handed to Alby was similar to the example that is attached to the Statement in Reply (the only differences were in the variable terms such as employee name, job description and pay rate)". In paragraph 19 of her affidavit, Ms Jackson also confirmed that the agreement provided to Mr Coe included the 'Dispute Resolution' clause and that it was a standard clause automatically generated by the Employment Agreement Builder.

[23] Counsel for TTDL submitted that it would be illogical that TTDL would provide Mr Coe an agreement which did not include its standard clause on raising a personal grievance. Counsel for submitted that even if Mr Coe returned the agreement and TTDL did not provide a returned copy (which it denies), these matters do not amount to 'exceptional circumstances' as contemplated under s 115 of the Act. Further, Mr Coe's evidence confirmed that he read the employment agreement and understood he had 90 days to raise a grievance, even though he mistakenly believed it to equate to three months. Counsel submitted that even if Mr Coe had not read the agreement or had a lack of knowledge of employment rights, this in itself did not constitute exceptional circumstances.<sup>3</sup> Citing *Melville v Air New Zealand Limited*<sup>4</sup> in support, Counsel submitted that the delay in these circumstances has proceeded on a misunderstanding of the statutory requirements (90 days rather than calendar months), rather than an omission to act. This is on the basis that Mr Coe chose to wait till 8 June 2023 to raise

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<sup>3</sup> *Muggeridge v Miden Construction Co Ltd* [1992] 1 ERNZ 232; *Walker v Heritage Hotel* ERA Auckland AA 168/03, 6 June 2003.

<sup>4</sup> *Melville v Air New Zealand Ltd* ERA Auckland AA 61/10, 12 February 2010.

his grievances and failed to expeditiously raise a grievance within the statutory timeframe.

[24] Counsel for TTDL further submitted that the 90-day period set out in s 114 is not subject to an equity or good conscience consideration.<sup>5</sup>

### **Has Mr Coe raised his personal grievance claims within 90 days?**

*S 114 statutory period of 90-days*

[25] Section 114 of the Employment Relations Act 2000 (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.  
(emphasis added)

[26] In *North v Silverfern Farms Ltd*<sup>6</sup> the Authority stated that the 90-day period for which a personal grievance must be raised is inclusive of the day the grievance came to the notice of the employee.<sup>7</sup> The Authority stated:

the ninety-day limit that the grievance must be raised is inclusive of the day that the grievance came to the notice of the employee by relying on the words “beginning with”

[27] Since that determination, the Legislation Act 2019 was passed. Section 54 of the Legislation Act 2019 prescribes the following interpretation of time periods:

#### **54 When periods start and end**

If legislation refers to a period described in the following way, the period must be calculated according to the following corresponding rule:

<b>Item</b>	<b>If the period is described as:</b>	<b>then the period:</b>
[...]		
3	being <b>within</b> a specified number of days of or <b>after</b> a specified day, act, or event	does not include that day or the day of the act or event
4	ending <b>by, on, at,</b> or <b>with</b> a specified day, act, or event	includes that day or the day of the act or event

<sup>5</sup> *Goodman Field Wattle Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

<sup>6</sup> *North v Silverfern Farms Limited* ERA Wellington WA123/09.

<sup>7</sup> *North v Silverfern Farms Limited* ERA Wellington WA123/09.

5	continuing to or <b>until</b> a specified day, act, or event	includes that day or the day of the act or event
6	ending <b>before</b> a specified day, act, or event	does not include that day or the day of the act or event
7	a number of days <b>between</b> 2 specified events	does not include the days on which the events happen

### Examples

[...]

Item 3: If the legislation states that public notice must be given within 10 days of adopting a constitution and the constitution is adopted on 1 August, the notice must be given by the close of 11 August.

[28] Although item 3 stipulates that if the period is described as “within” a specified number of days and would therefore not include the day of the act or event, item 4 in the table also stipulates that “with a specified day” includes the day of the act or event.

[29] The reference to “within” in s 114 is qualified by the words “beginning with the date on which the action alleged to amount to a personal grievance occurred”.

[30] Section 114 does not read “within the period of 90 days” without qualification otherwise the use of “beginning with” would be redundant.

[31] I find that the Authority’s interpretation of s 114 in *North v Silverfern Farms Ltd*<sup>8</sup> is consistent with the provisions of s 54 of the Legislation Act and continues to mean the 90-day period is inclusive of the day that the grievance came to the notice of the employee.

[32] For completeness, I also refer to the Authority’s interpretation of s 114 in *Hughes v Herron's Four Square Ltd*<sup>9</sup>. The Authority found that because s 114 refers to ‘days’ and not ‘time’, the 90-day period cannot be calculated based on the time duration.

### *TTDL employment agreement – ‘90 days from the time’*

[33] I now consider the alternative submission raised on behalf of Mr Coe that based on the terms of the employment agreement, his personal grievance was raised within time.

<sup>8</sup> *North v Silverfern Farms Limited* ERA Wellington WA123/09.

<sup>9</sup> *Hughes v Herron's Four Square Ltd t/a Twizel Four Square* ERA Christchurch CA 209/09.

[34] Unlike s 114, the ‘Dispute Resolution’ clause in TTDL’s template employment agreement refers to “90 days from the *time* the problem occurred” (emphasis added). Evidence submitted on behalf of TTDL also support that this clause would have been in the employment agreement provided to Mr Coe, as it was a standard clause in all their TTDL employment agreements, automatically generated, and not a variable provision subject to change. Notwithstanding that Mr Coe’s individual employment agreement could not be provided to the Authority as it could not be found, or was destroyed, there is no dispute that TTDL provided Mr Coe an employment agreement which more likely than not contained the aforementioned ‘Dispute Resolution’ clause.

[35] While the Act sets out the minimum employment obligations which govern an employment relationship, parties are free to agree to more favourable terms and conditions for an employee than what the Act provides for. By the deliberate insertion of the word ‘time’ in its ‘Dispute Resolution’ clause, the 90-day period under the employment agreement must therefore be calculated from the actual time the problem occurred. The outcome of this is that Mr Coe had until 7:00 PM on 8 June 2023 to raise his personal grievance based on his employment agreement with TTDL. As such, by raising his personal grievance on 8 June 2023 at 4:48 PM, Mr Coe’s personal grievance was raised within the time under his employment agreement with TTDL.

[36] In reaching this view, while this had the effect of a more favourable outcome for Mr Coe, I note that there has been no prejudice to TTDL (and none had been raised by TTDL) by Mr Coe raising his personal grievance within 24 hours of the last day possible under the employment agreement (a day later than what the statutory provisions of s 114 provide).

[37] I therefore find that Mr Coe has raised his personal grievance within 90-days under the terms of his employment with TTDL.

**Should leave should be granted under section 114(4) of the Employment Relations Act 2000 (the Act)?**

[38] As I have found that Mr Coe raised his personal grievance within 90-days under the terms of his employment with TTDL, I need not consider whether leave ought to be granted under s 114(4) of the Act.

[39] However I observe that as the personal grievance was raised on 8 June 2023 under advice, any failure to raise the personal grievance within 90-days would have been the failure of the representative, which should not be penalised on the applicant. I

further observe that such delay would have been very minimal, being a matter of hours and therefore no prejudice having occurred. Therefore I would have granted leave under s 114(4) of the Act, if leave was required.

### **Parties directed to mediation under s 159 of the Act**

[40] I note that to date parties have not attempted to resolve the dispute through mediation.

[41] While I am not required to direct parties to use mediation under s 114(5), I consider that the use of mediation is appropriate in these circumstances and under s 159 of the Act, direct the parties to use mediation.

### **Findings and next steps**

[42] I find that Mr Coe has raised his personal grievance of unjustified dismissal within the 90-day time period as set out in his employment agreement with TTDL.

[43] Parties are directed to use mediation to attempt to resolve the dispute, within 20 days from the date of this determination.

[44] If parties are unable to resolve the dispute through mediation, Mr Coe may contact the Authority so that a case management conference will be convened to discuss next steps with regards to the claim for unjustified dismissal.

### **Costs**

[45] The parties are encouraged to resolve any issue of costs between themselves during mediation otherwise costs are reserved until resolution of the substantive matter.

Davinnia Tan  
Member of the Employment Relations Authority