

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 1
5424334

BETWEEN SHAUNE DONALD
 Applicant

AND POLLARD CONTRACTING
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
 James Pullar, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 31 October and 3 December 2013 from Applicant
 8 and 21 November 2013 from Respondent

Determination: 13 January 2014

DETERMINATION OF THE AUTHORITY

- A. The Authority grants leave under s.114(4) of the Employment Relations Act 2000 for the applicant’s personal grievance for unjustified dismissal to be heard outside of the statutory 90 day period.**
- B. No valid personal grievance was raised for unjustified disadvantage arising from the applicant’s suspension, although his unpaid wages and holiday pay claims arising from his suspension can proceed.**
- C. The parties are directed to attend mediation in good faith prior to any further investigation of the matter.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Donald claims that he was unjustifiably dismissed, suspended without pay, made to take annual leave during his suspension and suffered an unlawful deduction from his final pay. It is not clear whether Mr Donald also claims that he was subject to an unjustified disadvantage in his employment by having been suspended. However, I deal with a possible personal grievance for unjustified disadvantage arising from the suspension in this determination.

[2] The respondent resists the application, denying that the respondent is liable for any wages arrears, that it has made any unlawful deductions from the applicant's final pay or that the applicant was unjustifiably dismissed. However, the purpose of this determination is to establish whether the applicant raised a personal grievance within the 90 day time limit specified by s.114 of the Employment Relations Act 2000 (the Act) and, if not, whether the Authority should grant leave to allow Mr Donald to raise his personal grievance outside of that 90 day period.

Brief account of the facts

[3] Mr Donald commenced employment with the respondent on 23 May 2011 and was dismissed by way of a letter dated 18 June 2013, written by the respondent's lawyers (Mr Pullar of SB Law), addressed to Mr Donald's lawyers at that time (Young Hunter). The copy of the letter from SB Law to Young Hunter dated 18 June 2013 has been stamped as having been received by Young Hunter on 19 June 2013. The letter stated that the respondent had lost all trust and confidence in Mr Donald and that they were terminating his employment summarily.

[4] Although there is evidence that communication continued after the dismissal between Mr Pullar and Mr Donald's counsel, it does not appear that any mention was made of either the alleged unjustified dismissal or the suspension until Mr Donald's self-completed application to the Employment Relations Authority on Form 1 was received by the Authority on Wednesday 11 September 2013.

[5] The respondent states that counsel for the respondent received the applicant's statement of problem on 19 September 2013 by way of a letter couriered to Mr Pullar by the Authority. The respondent argues that, first, the statement of problem was received more than 90 days after the date of termination of Mr Donald and, second, that Mr Donald had failed to sufficiently specify the particulars of the personal

grievances so that the respondent can address them. The respondent does not consent to the personal grievances being raised out of time.

[6] The Authority must address three issues in determining whether the Authority has the jurisdiction to consider Mr Donald's personal grievances in relation to the alleged unjustified dismissal and alleged unjustified disadvantage in his employment:

- (a) Can a personal grievance be validly raised by way of a statement of problem?
- (b) Whether the statement of problem sufficiently specifies the particulars of the personal grievances so that the respondent can address them;
- (c) If so, whether the personal grievances were received within 90 days of the date of the actions complained of; and
- (d) If the personal grievances were not received within 90 days of the date of the actions complained of, whether:
 - i. exceptional circumstances occasioned the delay in raising the personal grievances; and
 - ii. it is just to grant leave to allow the personal grievances to be raised out of time.

The law

[7] Section 113 of the Act provides as follows:

113 Personal grievance provisions only way to challenge dismissal

(1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance.

(2) Nothing in subsection (1) prevents an action under this Part to recover—
(a) wages relating to a period of notice or alleged period of notice; or
(b) wages or other money relating to the employment prior to the dismissal; or
(c) other money payable on dismissal.

[8] Section 114 of the Act deals with the raising of a personal grievance. It specifies as follows:

114 Raising personal grievance

(1) 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.

(2) 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.

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*
- (b) considers it just to do so.*

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[9] Section 115 of the Act provides a further provision regarding the exceptional circumstances under s.114. Specifically, s.115 provides:

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment*

relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[10] In the Employment Court judgment of *Creedy v. Commissioner of Police* [2006] ERNZ 517, the Court examined how specific the person raising a personal grievance needed to be in order to satisfy s.114(2) of the Act. At para.[36], the Employment Court stated the following:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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.

Can a personal grievance be validly raised by way of a statement of problem?

[11] The application to the Authority stated the following:

1. *The problem (or matter) that I wish the Authority to resolve is:*

Unpaid suspension days, unpaid sick leave, unlawful deductions from final pay, unpaid commissions. Unlawful, unjustified, wrongful and procedural dismissal. Failing to act in good faith.

2. *The facts that have given rise to the problem (or matter) are:*

I was unlawfully, wrongfully procedurally dismissed. Forced to take 1 weeks holiday pay while suspended. They didn't pay out all monies owing to me and deducted \$813 from me unlawfully. Forced to go through two disciplinary hearings which cost me \$2,300 in legal fees.

3. *I would like the problem (or matter) to be resolved in the following way:*

I would like to be reimbursed for lost wages, holiday pay, sick pay and money unlawfully deducted from my wages. Ruling

on the grounds of dismissals, and making me take a 1 weeks holiday pay while on suspension. I want compliance, compensation, reimbursement and cost for my lawyers for 2 disciplinary hearings.

[12] Added to this in handwriting was the following:

*3 days unpaid suspension
3 days sick leave
5 days holiday made to take while suspended*

*11 days pay owed
\$813 deducted from pay for lock*

[13] Mr Donald also attached a number of documents to the statement of problem including his employment agreement and a number of letters from the respondent to Mr Donald (or from the respondent's lawyers). Amongst the documents attached to the statement of problem was a letter from a Labour Inspector of the Ministry of Business, Innovation and Employment, addressed to the respondent company, which advised that Mr Donald was complaining that he had not received his full holiday pay entitlement and that he had had two days unlawfully deducted from his pay while suspended. The letter reminded Mr Pollard, the director of the respondent, of his statutory obligations in relation to s.5 of the Wages Protection Act 1983 and s.27(2) of the Holidays Act 2003. This correspondence involving the Labour Inspector did not raise a grievance in my view.

[14] Mr Pullar in his submissions questions whether the lodging of a statement of problem constitutes reasonable steps to make an employer aware of a personal grievance. He refers to commentary from *Employment Law*, (online loose-leaf edition published by Brookers). The passage referred to by Mr Pullar also cites the Employment Court case of *Premier Events Group Ltd v. Beattie (No 3)* [2012] NZEmpC 79, (2012) 10 NZELC 79-011 in which the Court held that an employee could raise a personal grievance by lodging a statement of problem in the Authority which outlined the grievance. His Honour Chief Judge Colgan in *Premier Events* stated at para.[11] the following:

I consider that Parliament's use of this phrase [has taken reasonable steps to make] confirms this Court's interpretation that a "circuitous route" for raising a personal grievance may be permissible depending on the facts of the case.

[15] Chief Judge Colgan continues in para.[12] to say that raising a grievance first with the employer, before the matter is lodged with the Authority, so that there is an

opportunity for negotiation and discussion, is an approach to be encouraged. He goes on, however, to say:

But there will remain ample opportunity for the employer to address the grievance and, perhaps, resolve that grievance through discussion and/or mediation between the parties even after the matter is officially before the Authority.

[16] Notwithstanding the doubt raised by the commentators of Brookers online *Employment Law*, the Authority is bound by the judgments of the Employment Court and, therefore, the Authority is bound to accept that the lodging of a statement of problem with the Authority, so long as it complies with the requirements of lodging a valid personal grievance, can constitute the raising of a personal grievance. It is my view, in particular, that this must be the case where the matter complained of is a dismissal where the good faith obligations owed between the parties have come to an end and where, therefore, the requirement of the parties to be active and constructive in establishing and maintaining a productive employment relationship no longer applies.

Did Mr Donald raise his personal grievance with sufficient specificity?

[17] Having established that Mr Donald could, theoretically, raise his personal grievances for the first time with his former employer by way of a statement of problem lodged with the Authority, I must now turn to consider whether he did so with sufficient specificity as required by *Creedy*.

[18] *Creedy* related to a personal grievance ostensibly raised by the employee's barrister based on alleged unjustified disadvantage. In such a case, where the employment relationship is ongoing, it is clearly essential for the employer to fully understand what it is the employee is complaining about so that it may be addressed and the employment relationship problem resolved.

The dismissal

[19] Scrutinising Mr Donald's statements in his application to the Authority, he clearly expresses the view that the dismissal was unjustified, that there was a procedural failure and he also questions the grounds of the dismissal (*ruling on the grounds of dismissal*).

[20] Once the employment relationship has ended, as in this case, there is no other resolution of the employment relationship problem possible that would address a grievance to the satisfaction of the grievant other than reinstatement or payment of compensation. Unlike in the case of a disadvantage grievance made during employment, where, for example, someone complaining of bullying can ask the employer to remove the bully from the complainant's reporting line, in the case of a dismissal, there are few options open to the respondent to enable it to address the grievance satisfactorily.

[21] Under these circumstances, therefore, I accept that, although Mr Donald has raised his grievance for unjustified dismissal in scant terms, he has raised that with sufficient specificity for the respondent to understand what Mr Donald is complaining about.

The suspension

[22] Mr Donald has stated in the statement of problem that he was subjected to *unpaid suspension days* and that he was *forced to take 1 week's holiday pay while suspended*. This does not seem to complain about the fact of being suspended, but rather the fact that he was not paid for some of the days he was suspended and that he was forced to take holiday during another part of his suspension. These appear to be claims under the Wages Protection Act 1983 and the Holidays Act 2003 respectively. There is no requirement to raise a grievance within 90 days under these Acts, so the Authority can accept these claims.

[23] However, I do not accept that Mr Donald has raised a grievance of unjustified disadvantage arising out of the alleged suspension, as he has not detailed any such disadvantage with any specificity.

Were the personal grievances raised within 90 days?

The personal grievance relating to the alleged unjustified dismissal

[24] I accept that the dismissal was not communicated to Mr Donald's agents (Young Hunter) until 19 June 2013, as that is the date stamp on the letter of dismissal, and so the personal grievance had to be raised with the respondent (or its agent, SB Law) within the period of 90 days, beginning with the date 19 June 2013. Therefore, the application had to have been received by the respondent (or its agent) no later than

Monday, 16 September 2013. Mr Pullar states, and I accept this, that it did not come to his attention until Thursday, 19 September 2013. Therefore, the grievance was clearly not raised with the employer within the statutory 90 day period.

[25] Having concluded that, it is necessary to consider whether, pursuant to s.114(4) of the Act, the Authority should grant leave for the grievance to be raised outside the 90 day period.

The personal grievance relating to unjustified disadvantage

[26] Mr Donald does not appear to have raised any unjustified disadvantage personal grievance arising from the suspension at all, neither within 90 days of the suspension, nor afterwards. In addition, he has not applied to raise a personal grievance for unjustified disadvantage outside of that 90 day time limit under s.114(3).

Should the Authority grant Mr Donald leave to raise his grievance outside the 90 day period?

[27] The statement of problem was received by the Authority on Wednesday, 11 September 2013. Ms Lin, a support officer working at the Christchurch office of the Authority, emailed Mr Pullar later that day to say that the Authority had received an application from Mr Donald and asking whether Mr Pullar was still authorised to accept service and act on behalf of the respondent in the matter. Mr Pullar emailed back the following day to say that he was still authorised to accept service on behalf of the respondent.

[28] The hard copy of the application was then sent to Mr Pullar under cover of a letter dated 12 September and picked up from the Authority's office at 3.14pm on that day by CourierPost. CourierPost's records state that the hard copy of the application was delivered to Mr Pullar's office at 12pm on Friday, 13 September 2013.

[29] These facts were conveyed to Mr Pullar by way of a notice of direction from the Authority on 31 October 2013 and Mr Pullar was invited to comment upon them. Mr Pullar lodged a memorandum of counsel which was received by the Authority on 8 November which attached an affidavit from the legal receptionist of SB Law, Ms Paterson.

[30] The affidavit deposed that Ms Paterson was responsible for processing SB Law's incoming mail and that the firm's mail is collected on the morning of every working day. She deposed that, on 19 September 2013, a courier package from the Authority was delivered to the PO box and picked up. She stamped the cover letter with that day's date and passed the document onto Mr Pullar. She deposed that she was certain of this as Mr Pullar had been asking her in the days prior whether anything had arrived from the Authority. She also stated that, after she had passed the document onto Mr Pullar, he indicated to her that she might need to remember the time at which the document was received for the purpose of providing evidence at a later date.

[31] Mr Pullar accepts that receipt by him constitutes receipt and knowledge on behalf of the respondent of the statement of problem. Mr Pullar submits that Ms Lin's email to him on 11 September 2013 did not specify that a personal grievance had been alleged and that, at that point, he and his client were only aware of a dispute regarding the deduction from Mr Donald's final pay and expected that the application referred to by Ms Lin related to that dispute only. I accept that submission by Mr Pullar.

[32] The Authority made inquiries of the customer services department of CourierPost and Ms Freeman from that department advised the Authority by way of an email dated 14 November 2013 that the delay in receipt of the package between delivery to the building in which Mr Pullar's office is situated on 13 September and receipt by him of the package on 19 September could have been due to the fact that the item was put into the incorrect mail box. The Authority does not normally send out copies of statements of problem on a "signature required" ticket, and so no card would have been left in the mailbox of SB Law advising them that they had an item to collect and sign for. Even if there had been, it is likely that that card would have been left in the wrong box, given that the actual package was.

[33] Mr Pullar invites the Authority to take account of the High Court Rules in relation to service of documents sent to a post office box address. Rule 6.6(1) of the High Court Rules reads:

When a document is served on a party or person in accordance with rule 6.1(1)(d)(i) or (ii), that document must,—
(a) if posted to a post office box address, be treated as served on the earlier of—
(i) the third working day after the day on which it was posted; or

- (ii) the day on which it was received; and*
- (b) if left at a document exchange, be treated as served on the earlier of—*
 - (i) the second working day after the day on which it was left; or*
 - (ii) the day on which it was received.*

[34] Mr Pullar points out that, three working days after the posting of the statement of problem (that is to say, Thursday, 12 September), is Tuesday, 17 September, 91 days after the applicant was dismissed. Mr Pullar therefore submits that, even though service occurred at 93 days, a timeframe that one could reasonably expect for the service of the statement of problem sent to a post office box number would still fall outside the 90 day timeframe in this instance. However, while helpful, Rule 6.6 of the High Court Rules are not determinative of this matter, and the Authority must apply s.114(4) and s.115 in deciding whether to grant leave to allow Mr Donald's unjustified dismissal grievance to be raised out of time.

[35] Addressing the requirements of the Act, Mr Donald does not argue that the examples under s.115(a), (b), (c) or (d) apply. Furthermore, nothing in the documents sent to the Authority by Mr Donald would support that any of those examples of exceptional circumstances apply in this case.

[36] However, s.114(4)(a) and s.115 make clear that the four examples of exceptional circumstances set out in s.115 are no more than examples and that the Authority may take into account exceptional circumstances other than those listed.

[37] It is my view that an exceptional circumstance does apply in this case. That is to say, there was an error committed by CourierPost in putting the package which had been entrusted to it into the wrong post office box. That is no one's fault other than the agent of CourierPost who made that error. However, if that error had not occurred, the package would have been deposited in the correct box on 13 September and the latest that one would reasonably expect SB Law to have picked up that document would have been Monday, 16 September, which was the 90th day by which the personal grievance could be raised.

[38] Mr Donald chose to entrust his personal grievance to the Authority for service upon the respondent. In my view, the Authority office posted the document as soon as it reasonably could and, having done so, had CourierPost not made an error in delivery, the document would have been delivered in time.

[39] No one could reasonably have anticipated that CourierPost would fail to deliver the document to the correct address and so I am satisfied that that error by CourierPost constitutes an exceptional circumstance.

[40] Finally, I must consider whether it would be just to allow Mr Donald to raise his personal grievance out of time. Under the circumstances where, but for the error of a third party, his personal grievance would have been raised within time, and further, where the grievance came to the attention of the respondent only three days later than the 90th day, I consider that it would be just to allow Mr Donald to raise his personal grievance outside of the 90 day period. I am satisfied that, when balancing the prejudice to Mr Donald of not allowing his personal grievance to be raised out of time against that of the respondent in allowing it to be raised out of time, the prejudice to Mr Donald is the greater.

Conclusion

[41] I conclude the following:

- a. Mr Donald has raised his personal grievance in relation to unjustified dismissal with enough specificity for it to be a valid grievance;
- b. Through no fault of his own, Mr Donald failed to raise his personal grievance with the respondent within 90 days of the dismissal;
- c. An exceptional circumstance (the error of CourierPost in misdelivering the package) constitutes an exceptional circumstance which occasioned the delay in raising the personal grievance;
- d. It is just to allow Mr Donald to raise his personal grievance outside of the 90 day time period;
- e. Mr Donald has never raised a personal grievance about an alleged unjustified disadvantage arising out of his suspension, and has not sought leave to do so now, although his monetary claim and his Holidays Act claim in relation to his suspension can be determined by the Authority.

[42] Therefore, Mr Donald is permitted to raise his personal grievance for unjustified dismissal by way of an application to the Employment Relations Authority.

Directions

[43] As the parties have not yet been to mediation in order to try to settle their differences, and in accordance with the Authority's statutory duty under s.114(5) of the Act, I hereby direct the parties to mediation to seek to mutually resolve the grievance and also to seek to resolve their other areas of dispute. The parties are to attend mediation in good faith.

Costs

[44] Costs are reserved.

David Appleton

Member of the Employment Relations Authority