ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION REFERRED TO IN THIS DETERMINATION

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 609
3056712

	BETWEEN	EKD Applicant
	AND	QDA Respondent

Member of Authority:	Helen Doyle
Representatives:	Applicant in person DG advocate for the Respondent
Investigation Meeting:	28 August 2019
Submissions:	On the day from the Applicant On the day from the Respondent
Date of Determination:	23 October 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A EKD raised a personal grievance of unjustified dismissal in his email to QDA of 16 July 2018 within the statutory timeframe in s 114(1) of the Employment Relations Act 2000.

B EKD and QDA are directed to attend mediation.

C There are no issues of costs.

Prohibition from publication

[1] The applicant has applied for non-publication of his name and any identifying details. He is concerned that having his name published may negatively impact on his ability to obtain future employment.

[2] That on its own would not be sufficient to prohibit from publication the identity of a party. I am satisfied that there are additional reasons that would support non-publication which are known to the respondent and are not required to be set out in this determination. The respondent has no objection to non-publication of the applicant's name and details that may identify him in the circumstances. One of the circumstances that may identify the applicant is the identity of the respondent. By agreement the name of the respondent is also prohibited from publication.

[3] The respondent was represented by its human resources advisor.

[4] I prohibit from publication the name of the applicant and respondent and any details that may identify the applicant under clause 10(1) of the second schedule to the Employment Relations Act 2000 (the Act).

[5] The Authority heard evidence from EKD and from DG the human resources adviser for QDA.

Employment Relationship Problem

[6] EKD says that he was unjustifiably dismissed from his employment with QDA where he had been employed from 2 October 2017 until his dismissal on 10 July 2018.

[7] QDA say that EKD did not raise his grievance within the statutory timeframe and it does not consent to a personal grievance being raised out of time. Further, QDA says there are no exceptional circumstances that would provide a basis for granting an extension to submission of a grievance out of time.

[8] This determination resolves the issue whether a personal grievance of alleged unjustified dismissal was raised within the statutory timeframe in s 114(1) of the Act, in a manner that satisfied the requirements of s 114(2) of the Act. If not, then is there any basis for granting an extension to submit the grievance outside of the statutory timeframe?

Authority telephone conference

[9] It was agreed with the Authority at a telephone conference with EKD and DG that whether or not the grievance was raised within the statutory timeframe would be determined as a preliminary matter.

[10] A direction was made that if the applicant wished to make an application to raise a grievance outside of time, on the basis that the delay was occasioned by exceptional circumstances, then he should do so by 9 July 2019. QDA would then have a further two weeks to respond to any application by 23 July 2019.

[11] The Authority did not receive the application for leave to raise the personal grievance out of time on the basis of exceptional circumstances until 27 August 2019 which was the day before the investigation meeting.

When does the 90 day period begin from?

[12] A disciplinary meeting was held on 10 July 2018. At the end of the meeting EKD was advised that he was dismissed with two weeks' pay in lieu of notice. The fact of dismissal on that date is consistent with a letter provided to EKD confirming dismissal. The letter was sent as an email attachment on 13 July 2018 from the branch manager to EKD and then a signed copy of the letter was couriered to EKD on 16 July 2018.

[13] EKD says that he only became aware that he had been dismissed when he received the signed letter dated 16 July 2018 confirming this. Although the letter was an attachment to the email to EKD on 13 July 2018 he says that he did not read it until 16 July 2018.

[14] Section 114(1) of the Act provides that the 90 days begins 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.

[15] It seems less likely that EKD was not aware that he was dismissed at the end of the meeting on 10 July 2018. I cannot however rule out a measure of confusion existing at the end of that meeting for EKD. I find that the dismissal would have clearly come to EKD's notice at the latest on 13 July 2018. Even if he could not open the attached unsigned letter

confirming dismissal the email itself would have alerted EKD to the fact that his employment had been terminated as below:

> As discussed this afternoon please find attached a copy of your confirmation of termination letter. I will courier you a signed copy on Monday. Once again we would like to wish you all the best.

[16] I am satisfied the difference in the date of the dismissal letter of 16 July 2018 and the date of the earlier email is explained by the fact the couriered letter was signed and the attached letter was not.

[17] The 90 day statutory period in s 114(1) of the Act begins from 13 July 2018. QDA says that it was not aware of a personal grievance until it received the statement of problem lodged in this matter a day or so after 20 March 2019. That was outside of the 90 day timeframe.

How does EKD say he raised a personal grievance within the statutory period?

[18] Section 114(2) of the Act provides:

> 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.

[19] EKD relies on two emails that he says he raises his grievance of unjustified dismissal dated 13 and 16 July 2018.

[20] He also relies on two attendances at the premises of QDA in late October/early November 2018 and mid-February 2019. He referred to these visits as "informal" but also "work related." He said that on both occasions when he attended at the premises he said that it was "not over" to his previous supervisor. I find it more probable than not that both of these attendances were outside the 90 day period that I find expired on 13 October 2018.

13 July 2018 email

[21] I will consider the first of the emails on 13 July 2018. The second email suggests a possibility that the first was not successfully delivered although the Authority did not hear evidence about that from the branch manager. The emails were both provided by EKD after

the telephone conference with the Authority and were not provided by QDA. The content of the emails is very similar.

[22] The 13 July 2018 email was sent to the branch manager by EKD. It provided as follows:

> Hi A on advice it seems articles of hand issued letter dated 3rd July 2018 has some questionable note.
> Final warning not preceded by previous warning.
> Safety policy was cited with no harm to person and minimal property damage.
> No structural damage to vehicle.
> Time of reporting actual and stated requirement is to minimal to have consequence.

[23] The 16 July 2018 was sent to the branch manager but additionally copied to DG. It provided as follows:

> Hi A as mentioned by phone voicemail on Fri 13 and now as it seems my Email did not deliver. My protest that has been encouraged for me to give being…No health and safety concern should exist as no person was close and/or could not have possibly involved in any physical or dangerous way…There also being no structural nor any significant damage done. The matter of not reporting immediately would be contested in a legal sense as all NZ Law has an element of what would reasonably be termed in good faith and reasonable time. The written report was not verbally requested by anyone and was on my supervisors desk at the start of clock in time.the following day.

[24] At the time of the emails EKD said he considered whether he could keep quiet and simply move on.

Analysis and conclusions as to whether the grievance of unjustified dismissal was raised within 90 days

[25] In determining whether a grievance was raised within the statutory period I have focussed predominantly on the 16 July 2018 email. One matter in the 13 July 2018 email but not in the 16 July email is the reference to the letter of 3 July 2018 and the fact that the final warning was not preceded by a previous warning. The 3 July 2018 letter was the letter containing the allegations to be discussed at the disciplinary meeting on 10 July 2018. The letter of dismissal does refer to consideration of a prior final written warning in reaching a disciplinary outcome.

[26] The evidence supported that the two visits to the premises of QDA were outside of the 90 day timeframe. Even if the first was not, EKD's evidence about what was said during

those two visits did not meet the test set out in the Employment Court judgment in *Creedy v Commissioner of Police*[1] which I will refer to below. Parts of the *Creedy* judgment were appealed further but the issue about when a grievance was raised is not affected.

[27] The main aspect of the test in *Creedy* is that there has to be reasonable steps taken by an employee to make the employer aware that a personal grievance is alleged that the employee wants the employer to address. The grievance should be specified sufficiently so that an employer is able to address a grievance as contemplated by the Act. There is no requirement this be in writing or with the use of a particular formula of works. Detail that may be found in a statement of problem is not required**.**

What were the concerns in the 16 July 2018 email?

[28] The two allegations found established by QDA were that EKD failed to operate his vehicle in a safe manner in breach of the safe driving policy and employment agreement, and that he failed to immediately report a vehicle incident in breach of the safe driving policy and employment agreement. The disciplinary outcome was dismissal with 2 week's pay in lieu of notice.

[29] EKD wrote in his 16 July 2018 email that no health and safety concern should exist as no person was close and/or could not have been involved in any physical or dangerous way and there was no structural or significant damage. From what is said it is clear there is disagreement with the finding that a health and safety breach was established.

[30] The second part of the email is about the breach found established from the second allegation. There is reference to the matter of not reporting immediately being contested in a legal sense as all "NZ law has an element of what would reasonably be termed in good faith and reasonable time." Somewhat clearer is the next part of the email that the written report was not verbally requested and was on the supervisor's desk at the start of clock-in time the following day. What can be taken is that EKD says the written report was provided within a reasonable time which is contrary to the findings reached by QDA.

[31] The email of 16 July 2018 raised concerns by EKD about the substantive reasons for dismissal.

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[1] *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 at [35]

Was the email of 16 July 2018 a reasonable step to make QDA aware that EKD alleged a personal grievance that he wanted his employer to address?

[32] DG said in his evidence that when he received the email it re-confirmed that EKD disagreed with the decision to dismiss which was consistent with his "non-agreement" to the disciplinary outcome conveyed at the 10 July 2018 meeting. DG did not regard it as a raising of a grievance and considered that it did not appear that the matter required a response. He noted that there was no request for mediation, for example.

[33] A very recent judgment of the Employment Court provides some useful guidance about what constitutes raising a grievance.[2] In that case it was found that the employer knew that the employee disagreed with the process it had followed and in particular a failure to offer redeployment. It was considered the employee had provided sufficient information about the complaint for the employer to respond to it.[3] It was noted the employee agreed that he had not intended his [January] emails to be part of his submission of a personal grievance but that a person may be submitting a personal grievance even if they had not understood that they were doing so.[4]

[34] EKD did not use the words personal grievance in his email or state he was intending to take some action.

[35] The timing of and the references in the 16 July email sent by EKD made it clear that his concerns were about the substantive justification of the dismissal. QDA would have known what was being referred to by EKD related to the dismissal and his views about substance. I find there was sufficient information and detail about why EKD had an issue with the dismissal and its substantive justification to enable a response.

[36] The only matter I hesitate about is whether, in alleging a personal grievance of unjustified dismissal in his email, EKD satisfied the requirement in s 114(2) that he wanted the employer to address the personal grievance.

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[2] *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132
[3] Above n 2 at [43]
[4] *Clark v Nelson Marlborough Institute of Technology*(2008) 5 NZELR 628

[37] The Employment Court in *Idea Services Limited (in Statutory Management) v Valerie Barker*[5] stated that the "informal, non-technical, nature of the personal grievance procedures relating to raising a grievance tell against an interpretation that requires an employee to specify the precise nature of the remedy or remedies they seek." The focus it was held in *Barker* was "…squarely on the alleged grievance, and the extent to which the employee had drawn (or reasonably attempted to draw) that grievance to the employer's attention."[6] I am not satisfied that EKD had to refer to mediation for the same reason articulated in *Barker* about remedies and the focus being on the alleged grievance. It would though have undoubtedly been useful to have done so.

[38] I find that from the detail provided in the email of 16 July 2018 there was enough information to know that EKD had issues and concerns with the substantive reasons for his dismissal and the nature of those concerns. There was enough detail for QDA to respond to the email. I weigh that the email was sent not only to the branch manager but was also copied to DG as human resources advisor within a few days of the dismissal. In particular I find that the action of copying in the human resources advisor satisfied that not only was a personal grievance alleged by EKD in the 16 July email, but that he wanted the employer to address his concerns.

[39] QDA did not respond to EKD. At a later date EKD lodged a statement of problem containing many of the same issues as were contained in the email. QDA did not accept a personal grievance had been raised.

[40] I find that the email of 16 July 2018 raised a grievance of unjustified dismissal within the 90 days in s 114(1) of the Act and meets the test in s 114(2) for the raising of a personal grievance.

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[5] *Idea Services Limited (in Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 545 at [40]
[6] *Creedy v Commissioner of Police* above n 2 at [39]

Next Step

[41] I direct the parties to attend mediation.

Costs

[42] EKD was self-represented and there are no issues arising therefore about costs.

Helen Doyle
Member of the Employment Relations Authority