

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 451
3209939

BETWEEN	ANDREW FLEMING Applicant
AND	BAILEY TANKS LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	David Feist, advocate for the Applicant Geoff Bevan, counsel for the Respondent
Submissions received:	8 and 15 May 2023
Determination on the papers:	16 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In January 2023, a statement of problem was lodged in the Authority by Andrew Fleming. He applied to have disadvantage and dismissal personal grievances investigated and resolved.

[2] A reply was lodged by Bailey Tanks Ltd (BTL) in early February 2023. BTL acknowledged that Mr Fleming's employment with the company had ended with dismissal on 13 September 2022, but otherwise rejected the grievances.

[3] BTL claimed that in any event the grievances had not been raised within the 90-day period, which is a requirement of s 114 of the Employment Relations Act 2000 (the ER Act).

[4] Mr Fleming claimed they were raised in time.

[5] The 90-day period ran from the day after the dismissal. BTL claims the dismissal was on 13 September. Accordingly, 90 days would end on 12 December 2022.

[6] Mr Feist and Mr Bevan, the parties' representatives, have agreed that the 90-day issue can be determined by the Authority 'on the papers', before any direction to mediation is considered.

[7] The parties provided submissions and further information to assist the Authority in giving a determination.

[8] For Mr Fleming, the submissions rely partly on the contents of a short email message sent to BTL on 23 November 2022. Its author, Robert Morgan, advised that he had been instructed to raise a personal grievance for unjustified disadvantage, unjustified dismissal, and loss of income. He wrote that the details of the grievance were not then able to be outlined but would be given by letter as soon as possible.

[9] Mr Morgan also gave the date of dismissal as 30 August 2022. Accordingly, 90 days would end on 28 November.

[10] A text message from Mr Morgan to Mr Feist was also relied on. It was sent on 25 November 2022. Mr Morgan advised, 'have notified employer of a grievance' but gave no further details.

[11] For BTL, it is submitted that although these communications are within the 90 period, neither gives sufficient detail to constitute the raising of a grievance.

[12] The Authority agrees with the respondent.

[13] The email of 23 November could at best be described as a notice of intention to raise a grievance. Until that has been done as a fact, an employer will not know what the concerns are of the employee which it is being asked to address.

[14] The text message of 25 November was not a communication directed to the employer at all. It conveyed no grievance to BTL. At best it could be described as having potential to be a statement corroborating advice that a grievance was raised.

[15] Mr Feist acknowledged the ‘flawed’ means by which the substance of the personal grievance had been made known. He submitted that the deficiencies were cured by the lodging and service of the statement of problem, which had given the necessary particulars of the grievance.

[16] Timing is critical to raising a grievance meeting the requirements of s 114 of the ER Act. When served on BTL the statement of problem conveyed a grievance, but that action did not occur until well outside of 90 days after dismissal.

[17] As BTL has not consented to the grievance claims being raised after the expiration of the 90-day period, the flaw acknowledged for Mr Fleming is fatal. The claims have not been raised as required within 90 days.

[18] As the Employment Court observed in *Chief Executive of Manukau Institute of Technology v Zivaljevic*¹, the issues are whether the nature of the employee’s complaint was a personal grievance, and whether the employee’s communications conveyed the substance of the complaint to the employer.

[19] The Court held²;

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[20] There has been no application to extend time on the grounds of exceptional circumstances, and none has been identified.

Conclusion

[21] For the above reasons, the Authority determines that Mr Fleming’s grievance claims were not raised with BTL within the required 90-day period.

¹ [2019] NZEmpC 132 at para [37].

² At para [38].

[22] The Authority is not able to investigate the grievance claims further and determine the merits of them.

[23] A direction to mediation is not appropriate in the circumstances.

Alastair Dumbleton
Member of the Employment Relations Authority