

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 128  
5568403

BETWEEN                      PHILLIP FRATER  
   Applicant  
  
A N D                              TRUCK STOPS (NZ) LIMITED  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Anjela Sharma, Counsel for Applicant  
   Elizabeth Coates, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        15 July 2016, from the Applicant and Respondent  
  
Date of Determination:        1 August 2016

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**DETERMINATION OF THE AUTHORITY**

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- A.     Mr Frater did not raise his personal grievance for unjustified action causing disadvantage within the requisite 90-day period. Accordingly, the Authority does not have jurisdiction to investigate the personal grievance for unjustified action causing disadvantage.**
- B.     Costs are reserved.**

**Employment relationship problem**

[1]     In his statement of problem dated 23 March 2016, the applicant, Mr Frater, identifies three claims for the Authority to investigate:

- (a)     A personal grievance for unjustified action causing disadvantage relating to two warnings, the first being a verbal warning issued on

29 July 2014 and the second being a written warning issued on 2 September 2014 (the unjustified disadvantage grievance);

- (b) A personal grievance for unjustified dismissal arising out of the respondent, Truck Stops (NZ) Limited (Truck Stops), terminating Mr Frater's employment on 6 March 2015 (the unjustified dismissal grievance);
- (c) A claim for a penalty to be imposed for the breach of the statutory obligation to act in good faith pursuant to s 4A of the Employment Relations Act 2000 (the Act).

[2] In its statement in reply, Truck Stops states:

- (a) Mr Frater has failed to raise the unjustified disadvantage grievance within 90 days of the verbal warning or the written warning which gives rise to his purported grievance;
- (b) The dismissal of Mr Frater was substantively justified and was the outcome of a fair and thorough process;
- (c) Truck Stops has complied with its statutory duty of good faith.

[3] In response to Truck Stops' allegation that the unjustified action grievance has not been raised within 90 days, Mr Frater states:

- (a) He did not become aware of the unjustified disadvantage grievance until he took advice from his lawyer, Ms Sharma, and he raised the unjustified disadvantage grievance within 90 days of this;
- (b) In the alternative, if the unjustified disadvantage grievance has been raised outside of the 90 day period then Truck Stops, by its actions, has consented to an extension of time for the unjustified disadvantage grievance being raised.

[4] In a case management telephone conference on 17 May 2016, the parties agreed that I would consider the question of whether the unjustified disadvantage grievance was raised outside of the statutory 90 day timeframe as a preliminary matter. The parties also agreed that I would make that determination on the papers

with affidavit evidence being filed by both parties in June 2016 and then written submissions lodged on 15 July 2016.

### **The issues**

- [5] The issues for determination by the Authority are:
- (a) On what date did the action which constitutes Mr Frater's unjustified disadvantage grievance occur, or on what date did he become aware of it, whichever is the later and is this more than 90 days prior to the unjustified disadvantage grievance being raised;
  - (b) If Mr Frater's unjustified disadvantage grievance was not raised within the 90 day timeframe, did Truck Stops consent to the unjustified disadvantage grievance being raised outside of the 90 day period?

### **Facts**

[6] Truck Stops employed Mr Frater from 31 July 2006 until the termination of his employment on 25 February 2015.

[7] When Mr Frater's employment came to an end, he was the Service Manager at the Nelson branch of Truck Stops.

[8] In July 2014, Truck Stops became aware of information that led it to believe that Mr Frater had failed to comply with its cash sales policy. Truck Stops carried out a disciplinary process with Mr Frater and issued a verbal warning to him on 29 July 2014.

[9] In August 2014, Truck Stops became aware of information which led it to believe that Mr Frater may have acted inappropriately in handling a "*rework matter*". Truck Stops subsequently carried out a disciplinary process with Mr Frater in relation to this matter and as a consequence issued a written warning on 2 September 2014.

[10] In February 2015, Truck Stops became aware of information which caused it to be concerned that Mr Frater had not followed the company's cash sales and rework policies. As a consequence of this information, Truck Stops carried out a disciplinary

process and it was concluded by a decision to dismiss Mr Frater with immediate effect on 25 February 2015.<sup>1</sup>

[11] Following his dismissal, Mr Frater took legal advice from Ms Sharma regarding the termination of his employment. Following receipt of that advice, Mr Frater instructed Ms Sharma to raise a personal grievance on his behalf for unjustified disadvantage and unjustified dismissal. These grievances were raised by Ms Sharma in a letter dated 18 May 2015 (the personal grievance letter).

[12] The personal grievance letter was a comprehensive and full letter comprising 10 pages. The personal grievance letter set out the background giving rise to Mr Frater's personal grievances and specified the basis on which the grievances were raised. In the personal grievance letter, Ms Sharma also made a request on behalf of Mr Frater pursuant to the Privacy Act 1993 for wage and time records, Mr Frater's personnel file, Mr Frater's annual performance appraisal, all notes in relation to the meetings between Mr Frater and Truck Stops and workplace policies relating to disciplinary procedures and process. The personal grievance letter then concluded with a section dealing with the remedies Mr Frater sought as a result of his grievances and within that there was a request for Truck Stops to attend mediation in order to resolve the personal grievances.

[13] Later, on 18 May 2015, Nikki Winnard of Truck Stops acknowledged receipt of the personal grievance letter. In her email, she simply stated:

This email is to acknowledge receipt of the document sent today at 12.23pm. We will endeavour to respond to your request for information in as timely a fashion as possible.

Kind regards,  
Nikki Winnard

[14] By July 2015, Truck Stops had not responded to the personal grievance letter, either by way of substantive response to the allegations or by provision of the documents requested.

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<sup>1</sup> In respect of the three sets of allegations pertaining to Mr Frater's conduct and performance as an employee, I simply record that these events occurred. For the purposes of this determination, I need not make any finding as to whether the disciplinary processes I have referred to were carried out in a fair manner or whether the outcomes of those processes were substantively justified. That is part of the determination that I will make if this matter proceeds following the resolution of this preliminary matter.

[15] On 3 July 2015, Ms Sharma emailed Truck Stops following up on her earlier correspondence noting that a response had not been received.

[16] On 10 August 2015, Truck Stops agreed to attend mediation. There was no correspondence put forward in the affidavit evidence that records the agreement to attend mediation and there is no additional evidence to describe the basis on which Truck Stops agreed to attend mediation. In his affidavit of 24 June 2016, Mr Frater references this agreement to attend mediation as follows:

On 10 August 2015, Truck Stops agreed to attend mediation, and in the absence of any objection, my understanding was that this was to address all matters raised in the 18 May letter.

[17] On 14 September 2015, Ms Sharma wrote to Truck Stops again recording:

We note that we have not received a response to our letter of 18 May. As noted below, under that correspondence my client made a request under the privacy legislation, which has not been actioned by Truck Stops:

*I am also instructed to request the following on behalf of my client and pursuant to the Privacy Act 1993:*

- (a) Wage and time records – 2006 to termination date;*
- (b) Mr Frater’s personnel file;*
- (c) All annual performance appraisals undertaken in the course of Mr Frater’s employment, to include KPI indicators and achievement levels;*
- (d) All notes in relation to all meetings between Mr Frater and his employer;*
- (e) Workplace policies relating to disciplinary procedures and process.*

As you know the parties have agreed to attend mediation on 29 September. Please provide the above information as a matter of urgency, and in no less than three working days from the date of this letter. Failing this my client will be left with no choice and to file proceedings with the Privacy Commissioner to address this matter. Truck Stops have a legal obligation to address this request in a timely manner, which it has failed to do.

[18] On 16 September 2015, Ms Winnard responded stating *“I apologise that you haven’t received the requested information in a timely manner. Please find attached the information requested”*.

[19] On 25 September 2015, Ms Sharma wrote a further letter to Truck Stops. In that letter, she complained on behalf of Mr Frater that not all of the requested documents had been received.

[20] Truck Stops did not respond to this correspondence.

[21] On 29 September 2015, Mr Frater and Truck Stops attended mediation. Mr Frater's personal grievances and claim for breach of the duty of good faith were not settled in that mediation and he subsequently lodged the statement of problem.<sup>2</sup>

**When did the action, which gives rise to Mr Frater's unjustified disadvantage grievance, arise or when did he become aware of it and was this more than 90 days prior to the unjustified disadvantage grievance being raised?**

[22] Mr Frater says it was only after his dismissal when he met with Ms Sharma that he became aware that he had grounds for a personal grievance arising from the verbal and written warnings. He says this is especially so in terms of how those warnings impacted on the decision to dismiss him from his employment.

[23] Section 114 of the Act states:

- (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 latter, unless the employer consents to the personal grievance being raised after the expiration of that period.

[24] The test as to whether the unjustified disadvantage grievance has been raised in the 90 day period is whether it was raised within 90 days of the action occurring or the action coming to the notice of the employee.

[25] It is clear in respect of both warnings the action of giving the warning occurred more than 90 days before the personal grievances were raised. So the question is therefore, does the fact that Mr Frater says that he was not aware that he had a personal grievance until he took legal advice mean that the action which gave rise to the grievance only came to his notice at that time?

[26] In *Silver Fern Farms Ltd v. North*<sup>3</sup>, the Employment Court made it clear that it is not necessary for the employee to have a belief in the existence of a personal grievance claim for the action to have been brought to his or her attention. The Court said that the 90 day period will begin when the employee becomes aware of

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<sup>2</sup> No evidence has been filed regarding the matters discussed at mediation, as this is confidential and without prejudice and should not be put before me. It is only the fact that the parties attended mediation that is relevant to this determination.

<sup>3</sup> [2010] NZEmpC 79

circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable. Knowledge of a grievance is not necessary. At paragraph [35], Chief Judge Colgan refers to an earlier judgment of the Employment Court in *Wyatt v Simpson Grierson*<sup>4</sup> and states:

... *Wyatt* says that not only must there be an awareness of the act or omission but the 90 day period does not begin to run until the employee considers (forms a "reasonable belief") that the employer's action was unjustifiable.

[27] Chief Judge Colgan then goes on to dismiss the respondent's further argument that actually a further step is required, not only an awareness or appreciation that the act or omission was unjustified but that it also amounted to a personal grievance. Chief Judge Colgan states at paragraph [43]:

I respectfully agree with the analysis and interpretation of section 114(1) in the *Wyatt* judgment. That was summarised at paragraph [29] as follows:

... If the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[28] At paragraph [44] Judge Colgan states:

I do not accept the defendant's submission that this further step of a requirement of belief in the existence of a personal grievance, in terms of the statute, is a correct interpretation of section 114(1).

[29] So the issue for me to determine is not the time at which Mr Frater became aware that he may have had a personal grievance for unjustified action causing disadvantage arising out of the two warnings that were issued but rather the point at which he considered (formed a "reasonable belief") that Truck Stops' action was unjustifiable. That is, at what point did he become satisfied that Truck Stops was unjustified in issuing the warnings to him?

[30] In this regard, in his affidavit, Mr Frater states<sup>5</sup>:

Prior to being asked to attend a disciplinary meeting in July 2014 I had no experience, and knowledge of the disciplinary process. I did not understand the verbal and written warnings to be matters that would affect the continuation of my employment with Truck Stops,

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<sup>4</sup> [2007] NZEmpC 478

<sup>5</sup> Paragraph 4 of the affidavit of Phillip John Frater sworn on 24 June 2016.

and this was never made clear to me. However, this is not to say that I was accepting of the outcomes that were dealt me, but more that I was confused and frustrated by what I thought was a nit picking approach that was disproportionate in the whole scheme of things considering the sound financial performance of the Nelson branch, that set it apart on a nationwide scale.

[31] Based on this evidence, it seems to me that Mr Frater did not accept the warnings, he was confused and frustrated by the process and he believed the process and the result were disproportionate when considering his input into the performance of the business. In short, I think this amounts to Mr Frater forming the opinion at the time that the warnings were issued that the actions of Truck Stops were unjustified.

[32] Whilst I have no reference to a specific date for this, given Mr Frater's evidence I am satisfied that the formation of this opinion must have been during the disciplinary processes and at the conclusion of those processes. This would have been more than 90 days before the unjustified disadvantage grievance was raised.

[33] I therefore conclude that Mr Frater did not raise the unjustified disadvantage grievance within the 90 day timeframe.

**Did Truck Stops consent to the unjustified disadvantage grievance being raised outside of the 90 day period?**

[34] Following from this decision, I must consider whether Truck Stops, by its actions, has consented to the personal grievance being raised after the 90 day period.

[35] In *New Zealand Fisheries Ltd v Napier City Council*<sup>6</sup> the Court of Appeal stated:

As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ...”

[36] In *Vulcan Steel Limited v Kirean Wonnocott*<sup>7</sup> Chief Judge Colgan stated that:

Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test. ....

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<sup>6</sup> [1990] 1 NZ ConvC 342 at p 190

<sup>7</sup> [2013] NZEmpC 15 at [45] – [46]

As case law establishes, whether there was implied consent is a matter of fact and degree. All relevant facts are for assessment individually and collectively. The facts of Mr Wonnocott's case are unique, if only because it involved multiple grievances, intense participation (even while his employment continued) of experienced employment lawyers on both sides; and a significant level of written recording of both parties' positions. As to the other element of "degree", the delay in raising the grievance was a day or two at most. Had Mr Wonnocott been months out of time in raising his grievance, it is likely that there would not have been consent, either express or implied.

[37] In *Anna Ale v Kids At Home Limited*<sup>8</sup> Judge Inglis stated:

It was also submitted that the defendant's apparently unconditional attendance at two mediations was reflective of implied consent. Ms Burke submitted that attendance at mediation must be viewed in context. I agree. While attendance at mediation may be taken as signifying consent to pursue a grievance out of time, much will depend on the circumstances. Mediation is effectively mandatory in this jurisdiction. This will often make it difficult for the Court to conclude with any confidence that consent has been given simply by the act of attending mediation without expressly stating it is not to be construed as a waiver. Where, as here, there are a number of alleged grievances, some but not all of which are said to be within time, it will be difficult to conclude that attendance at mediation signifies consent. I do not accept that the defendant's attendance at mediation can reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the particular circumstances.

[38] The question of whether an employer has consented to the late raising of a personal grievance is one of fact and degree. Consent requires more than just a passive standing by, there needs to be an affirmative action. Merely participating in the grievance procedure is not enough for that affirmative action if participation is only attending mediation without any other engagement in the substance of the grievance raised and where there is more than the grievance or claim to be mediated.

[39] It is clear that there is no express acceptance by Truck Stops that the unjustified disadvantage grievance could be raised outside of the 90 day timeframe.

[40] Therefore, the issue for me to determine is whether there is some action by Truck Stops that means it impliedly consented to the unjustified disadvantage grievance being raised outside of the 90 day period.

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<sup>8</sup> [2015] NZEmpC 209 at [34]

[41] Truck Stops did not respond substantively to the personal grievance letter. It did nothing to set out any response to allegations giving rise to the unjustified disadvantage grievance nor did it raise the issue of the unjustified disadvantage grievance being raised out of time at all until it lodged its statement in reply.

[42] The only point that Truck Stops engaged with Ms Sharma on in respect of the personal grievance letter was the request for personal information pursuant to the Privacy Act.

[43] The only other action that Truck Stops took in response to the personal grievance letter was to agree to go to mediation. As stated earlier, there is no specific evidence before me as to the acceptance to go to mediation but it appears from Mr Frater's evidence that Truck Stops agreed to go to mediation without making any statement about the personal grievance at all.

[44] The question is then, is the failure to object to the unjustified disadvantage grievance being raised outside of the 90 day period coupled with an agreement to attend mediation an implied acceptance of the late raising of the personal grievance.

[45] I do not accept that the actions of Truck Stops of not objecting to the grievance being raised outside the 90 days and agreeing to attend mediation amount to an implied acceptance of a grievance being raised out of time.

[46] A mere failure to raise the issue of the unjustified disadvantage grievance being out of time in response to the personal grievance letter is, of itself, not enough. This is because Truck Stops did not engage in the substance of any of the grievances or the breach of good faith claim at that time.

[47] As to the other elements of "degree", Truck Stops did not have legal representation until the statement of problem was filed and then, when it did respond substantively, in its statement in reply it raised the 90 day issue. And, the unjustified disadvantage grievance was not raised only days outside the 90 day period but months.

[48] All that Truck Stops did was agree to attend mediation. I think something more than simply agreeing to go to mediation without raising the issue of the 90 day time period is required. I believe the case law indicates that Truck Stops would have needed to engage in a substantive discussion around the unjustified disadvantage

grievance, either by corresponding on it or by agreeing to mediate that specific issue. This would be an action that evidences an acceptance that the unjustified disadvantage grievance was validly raised or was open to be debated.

[49] On this basis I am satisfied Truck Stops did not consent to the unjustified disadvantage grievance being raised outside the 90 day period.

**Determination**

[50] I determine that I do not have jurisdiction to hear and determine Mr Frater's personal grievance for unjustified action causing disadvantage.

**Costs**

[51] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority