

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 217
5307231

BETWEEN STUART HANDLEY
Applicant

AND AUCKLAND COUNCIL
(FORMERLY RODNEY
DISTRICT COUNCIL)
Respondent

Member of Authority: Rachel Larmer

Representatives: Penny Swarbrick, Counsel for Applicant
Gemma Mayes, Counsel for Respondent

Investigation Meeting: 28 April 2011

Submissions: 06 May 2011, Applicant's submissions
09 May 2011, Respondent's submissions
10 May 2011, Applicant's submissions in reply

Determination: 23 May 2011

DETERMINATION OF THE AUTHORITY

A Stuart Handley's application for leave under s114(4) of the Employment Relations Act 2000 ("the Act") to raise his personal grievance claim for unjustified dismissal outside the 90 day time limit is declined.

B Costs are reserved.

Employment Relationship Problem

[1] On 23 April 2010 Mr Stuart Handley was summarily dismissed for serious misconduct by his employer Rodney District Council, now Auckland Council (the Council).

[2] Mr Handley wanted to pursue a personal grievance claim for unjustified dismissal against his former employer. The Council's position was that Mr Handley had not raised his personal grievance within 90 days of his dismissal and it did not

consent to his personal grievance being raised after the expiration of the 90 day period.

[3] Mr Handley believed his representative, employment advocate Mr Thomas Skinner, had raised his personal grievance claim with the Council within 90 days of his dismissal.

[4] Whether Mr Skinner had raised a personal grievance on Mr Handley's behalf was the subject of a preliminary investigation into what I shall refer to as "the 90 day issue" by the Authority (Member Wilson). At the time of the 90 day issue investigation, no leave application had been filed.

[5] In a determination issued on 17 December 2010, the Authority concluded that Mr Skinner had not raised a personal grievance claim, so Mr Handley's dismissal grievance had not been raised within 90 days.

[6] That determination has been challenged.¹ The current legal position is that no personal grievance claim has yet been raised.

[7] On 7 February 2011 Mr Handley filed an application with the Authority under s114(3) of the Act for leave to raise his personal grievance after the expiration of the 90 day period.

[8] Mr Handley's leave application was made on the basis that the delay in raising his grievance was occasioned by exceptional circumstances, namely he had made reasonable arrangements with his agent, Mr Skinner, who unreasonably failed to ensure the grievance had been raised within time.

[9] Mr Handley also submitted it would be just to grant leave because he had a strong argument his dismissal was unjustified on the basis the decision was substantively and procedurally flawed. He submitted the Council had been alert to the fact he was unhappy about his dismissal from the time he was dismissed up to the time he filed this leave application, and he further said it would not suffer any prejudice if leave was granted.

[10] The Council said Mr Handley had not made reasonable arrangements to have his grievance raised within the 90 day period because he had failed to give sufficiently

¹ *Handley v Auckland Council* ARC 10/11

detailed instructions to Mr Skinner about the basis for his grievance or how he wanted it remedied. It said there was no unreasonable failure by Mr Skinner to raise Mr Handley's grievance because Mr Skinner had complied with Mr Handley's limited instructions, which it said were to take the matter to mediation.

[11] The Council also submitted it would not be just for the Authority to grant leave because:

- (a) Mr Handley's grievance was unlikely to succeed;
- (b) Even if he was successful, remedies would be reduced due to significant contribution;
- (c) It was prejudiced by Mr Handley's excessive delay in applying for leave 290 days after his dismissal.

Authority's process

[12] The Authority held its investigation meeting on the leave application on 28 April 2011. It heard from Mr Handley, Mr Skinner, Ms Cherie Morrison and Mr Lloyd Barton. Both parties filed written submissions.

[13] Ms Morrison is a solicitor at Swarbrick Beck Mackinnon (SBM). Ms Morrison explained the 20 day delay between SBM's receipt of instructions to file the leave application on 18 January 2011 and the actual filing of the leave application on 7 February 2011. Mr Barton was the Council's decision maker. He decided to discipline, and then dismiss, Mr Handley.

Chronology

Pre-dismissal	Mr Handley and Mr Skinner discussed the possibility or likelihood of his dismissal and Mr Handley told Mr Skinner that if dismissed he wanted to challenge his dismissal;
23 April 2010	Mr Handley was dismissed for serious misconduct. At the conclusion of the disciplinary meeting, Mr Skinner verbally indicated Mr Handley's dissatisfaction with the disciplinary process and outcome to the Council.
26 April 2010	Mr Skinner wrote to the Council and notified it of Mr Handley's intention to raise a personal grievance for unjustified dismissal. The letter did not set out the facts which had given rise to the grievance, the remedies Mr Handley

sought, or advice about how Mr Handley wanted the matter resolved.

- 13 May 2010 Mr Skinner faxed Mediation Services requesting a mediation date, but did not copy his request to the Council.
- 27 May 2010 Mediation Services acknowledged receipt of Mr Skinner's request, but did not copy that acknowledgment to the Council.
- 21 July 2010 Mr Handley's 90 day period for raising a dismissal grievance expired.
- 29 July 2010 The Council received an email from Mediation Services which advised of the mediation request and seeking suitable dates for mediation.
- 2 August 2010 The Council wrote to Mediation Services and said it did not agree to attend mediation because Mr Handley's personal grievance had not been raised within 90 days of his dismissal, and it did not consent to him raising it out of time.
- Mediation Services wrote to Mr Skinner and advised him of the Council's response.
- 17 August 2010 Mr Handley filed his Statement of Problem (116 days after his dismissal).
- 1 September 2010 The Council filed its Statement in Reply, which stated it did not consent to a personal grievance being raised out of time.
- 21 September 2010 The Authority held a telephone case management conference with Ms Mayes and Mr Skinner to timetable the 90 day issue. The timetable emailed by the Authority to the parties that day identified the applicant had an opportunity *to provide an addition (sic) submission regarding exceptional circumstances*. That was a reference to a leave application, which at that point had not been filed.
- 19 October 2010 Applicant's submissions on the 90 day issue received.
- 6 October 2010 Respondent's submissions on the 90 day issue received.
- 17 December 2010 The Authority issued its determination on the 90 day issue. It held the applicant had not properly raised his personal grievance with his employer within the 90 day period, as required by s114(1) of the Act.
- The Authority also specifically recorded no application for leave to raise a grievance out of time had been filed.

- Date unknown Mr Skinner discussed the Authority's determination with Mr Handley who said he wanted to challenge it. Mr Skinner recommended that Ms Swarbrick be instructed and Mr Handley agreed to that.
- Mr Skinner telephoned Ms Swarbrick to make an appointment but, because of work commitments and SBM's Christmas/New Year closedown, she was not available to meet until 18 January 2011.
- 18 January 2011 Mr Handley and Mr Skinner met Ms Swarbrick and SBM were instructed to:
- (a) challenge the Authority's determination on the 90 day issue; and
 - (b) apply for leave to raise a personal grievance out of time.
- 26 Jan 2011 An application for leave to file a Statement of Claim out of time (to challenge the Authority determination) is filed with the Employment Court.
- 7 Feb 2011 Mr Handley's application for leave to raise a personal grievance out of time is lodged with the Authority (290 days after his dismissal).

Relevant legislation

[14] Section 114(1) of the Act requires a personal grievance claim to be raised with the employer within 90 days of it arising, or the employee becoming aware of it (whichever is the later), unless the employer consents to extend time.

[15] Section 114(3) of the Act provides that where an employer does not consent to a personal grievance being raised after the expiration of the 90 day time limit *the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

[16] Section 114(4) sets out the basis on which the Authority may grant leave:

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.*

[17] The granting of leave is discretionary.

[18] Section 114(4) prescribes two conditions, both of which must be satisfied before leave may be granted. First, the delay in raising the grievance must have been occasioned by exceptional circumstances. Secondly, the justice of the case must require an extension of time.²

[19] Sections 114 and 115 of the Act establish a high threshold for employees seeking to establish exceptional circumstances.³ A mistaken belief by an employee that their agent had notified their employer of a personal grievance within the 90 day period does not constitute exceptional circumstances.⁴

[20] Section 115 of the Act sets out some (non exhaustive⁵) examples of what may constitute exceptional circumstances for the purposes of s114(4)(a). Mr Handley has relied solely on s115(b) of the Act.

[21] Section 115(b) provides that for the purposes of s114(4)(a), exceptional circumstances includes:

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.

[22] Reliance on an agent will amount to exceptional circumstances if the requirements of s115(b) are met.⁶ Section 115(b) will only apply where the employee has made reasonable arrangements to have the grievance raised and the agent unreasonably failed to ensure that it was raised within 90 days.

Relevant case law

[23] The Supreme Court in *Creedy* observed:

Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking

² *Creedy v Commissioner of Police* [2008] 3 NZLR 7 (SC)

³ *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ; cited in *McMillan v Waikanae Holdings (Gisborne) Ltd (t/a McCannics)* (2005) NZELR 402 and *Melville v Air New Zealand Limited* [2010] NZEMPC 87.

⁴ *Wilkins & Field Ltd v Fortune* [1998] 2 ERNZ 70 (CA)

⁵ *Creedy* ibid 2

⁶ *Creedy* ibid 2

*account of the position of an employer facing a late claim) so requires.*⁷

[24] A prerequisite to raising any personal grievance is that the action alleged to amount to a grievance has either occurred or, having occurred, has come to the attention of the employee, whichever is the later.

[25] This means that a dismissal must have occurred before a personal grievance for unjustified dismissal can be raised with the employer. It is not sufficient that dismissal has been anticipated, predicted, or threatened, at the time a grievance is raised but before dismissal has occurred. Notification of an intention to raise a grievance if dismissal occurs, does not comply with the requirements of s114(1) which requires the raising of a grievance to be about an event that has occurred or is occurring.⁸

[26] The Court of Appeal in *Melville v Air New Zealand Limited*⁹ held s115(b) of the Act did not require an express instruction to the agent to bring a timely claim. What is required is that the employee makes *reasonable arrangements* to have the particular grievance raised on their behalf.

[27] The Employment Court considered s115(b) of the Act and in particular the issue of whether the employee had made reasonable arrangements to have their grievance raised by an agent in the cases of *McMillan*¹⁰, *Melville*¹¹, and *Chief Executive of the Department of Corrections v Waitai & Ors*¹².

[28] Leave was declined in all three cases on the grounds each of the employees had not satisfied the requirements of s115(b) because they had failed to make reasonable arrangements to have their grievances raised within 90 days on their behalf.

[29] In *McMillan* the employee sought legal advice from his solicitor about whether he had a grievance and what steps he could take if he did. The employee called his lawyer a couple of times but could not get through to him and did not leave messages. The lawyer took no action on the file and after the 90 day period had

⁷ *Creedy* ibid 2

⁸ *Melville* ibid 3; *Creedy* ibid 2

⁹ [2010] NZCA 563

¹⁰ Ibid 2

¹¹ Ibid 2

¹² [2010] NZEMPC 164

already expired the file was passed to another solicitor at the same firm who then raised a grievance out of time.

[30] The Court held Mr McMillan had failed to make reasonable arrangements to have the grievance raised on his behalf because he had taken insufficient steps to establish whether he had a grievance and he had not given instructions to anyone to actually raise it within the time limit. The one or two attempts he made to contact his solicitor did not constitute reasonable arrangements because he had not given instructions for the grievance to be raised.

[31] The Court considered Mr McMillan's knowledge of the provision in his employment agreement alerting him to the 90 day time limit undermined his argument that the arrangements made were reasonable.

[32] *Melville* is another example of the Court concluding an employee had not made reasonable arrangements to have a grievance raised on her behalf.

[33] Ms Melville was represented during a lengthy disciplinary process by a union representative to whom she had made it clear she wanted the union to pursue an unjustified dismissal personal grievance on her behalf. Ms Melville and her union representative had verbally responded to her dismissal by telling the employer at the end of the dismissal meeting they would *see you in Court*.

[34] The union representative then referred Ms Melville's matter to the union solicitor, and each thought the other had raised a grievance. By the time they discovered their mistake, the 90 day period had expired.

[35] The Court found Ms Melville had:

- (a) Not expressly requested the union to raise a dismissal grievance on her behalf, which it considered was likely to be due to her belief a grievance had already been raised at her dismissal meeting;
- (b) Read the 90 day period clause in her employment agreement, but did not know exactly when the time period ran out;
- (c) Given broad and general instructions for the union to take the necessary steps to pursue her grievance.

[36] The Court considered Ms Melville's situation was similar to that of Mr McMillan's where, despite being aware of the 90 day period, he had not made arrangements which were reasonable to have had a grievance raised on his behalf.

[37] Ms Melville's evidence that she had followed up with the union a number of times about the progress of her matter and had been reassured everything was in hand, did not constitute reasonable arrangements to have her grievance raised. Ms Melville had not instructed her representative to telephone or write to her employer about taking her dismissal further, she had asked *where do we go from here* and had indicated her intention *to take the matter to Court*.

[38] It was clear that Ms Melville was keen to pursue her grievance because she checked with the union about the progress of her file to ensure her case was being progressed but her evidence was that she did not know how to move the matter forward. Ms Melville had told her union representative she wanted her job back and had then left it up to the union to progress her case.

[39] The Employment Court held the actions taken by Ms Melville did not meet the *reasonable arrangements* requirement in s115(b) of the Act. It held that in order to comply with s115(b) Ms Melville *had to have given instructions to [her representative] ... to have the [dismissal] grievance raised*, but had not done so.

[40] The Employment Court concluded that Ms Melville's:

*[...] failure was not to have made reasonable arrangements to ensure her grievance was raised in time, as opposed to her more general and broad instructions for the union to take the necessary steps to pursue a grievance. Her failure to do so was similar to the situation in McMillan where provision in the employment agreement had alerted the employee to the existence of a time limit and his communications with his solicitors had not made arrangements that were reasonable to raise his grievance.*¹³

[41] The Court of Appeal declined Ms Melville's application for leave to appeal.¹⁴

[42] The Court of Appeal in *Melville*¹⁵ in the course of hearing her application for leave to appeal the Employment Court's decision, set out the steps taken by Ms Melville. It said Ms Melville:

¹³ *Melville* ibid 2

¹⁴ Ibid 8

¹⁵ Ibid 8

- (a) and her representative responded to her dismissal at a meeting with her employer by saying *see you in Court*;
- (b) had followed up with the Union on the process of her file on a number of occasions and had been reassured everything was in hand;
- (c) about a month after her dismissal emailed her representative to check progress on her file, and referred to being worried there was a time limit that she did not want to miss;
- (d) saw the union's lawyer before sending the email above, but then had a second appointment cancelled;
- (e) was told she would get a letter to proof, but it was not sent;
- (f) followed up the missing letter and was told she would get it by Friday. The letter still did not arrive;
- (g) followed up the missing letter again.

[43] The Court of Appeal referred to the Employment Court's factual finding that Ms Melville had not made reasonable arrangements to have a grievance raised on her behalf and said that view was open to the Court on the facts and could not be appealed. The Court of Appeal noted:

*The possibility of "going to Court" was raised, but the cross-examination showed there was not such a degree of definiteness about it that it could be said that "reasonable arrangements" to raise that grievance had been made. The discussion with the union agent was contingent; a final decision had not been made and instructions given on a dismissal grievance.*¹⁶

[44] The Employment Court decision in *Waitai*¹⁷ also provides guidance on the meaning of *reasonable arrangements*.

[45] Mr Waitai was one of three employees dismissed at meetings which their union representative and the union solicitor were unable to attend. Grievances were not formally raised because the union's solicitor thought the union representative had already raised a grievance and the union representative thought the solicitor had done so.

¹⁶ Ibid 8

¹⁷ Ibid 12

[46] The union solicitor deposed the union representative had told him the three employees *wanted to proceed with the anticipated personal grievance claims and that their personal grievance claims should go to mediation as soon as possible.*

[47] Mr Waitai sent his union representative a letter prior to his dismissal which said he wanted the union to lodge a grievance about the delays in his disciplinary matter. The union did not raise a grievance because the union representative decided to wait until the final outcome of the employer's investigation before doing so.

[48] Mr Waitai provided an affidavit which stated:

I had made it clear to CANZ during the investigation that I felt I was being "railroaded" and that whatever the result of the investigation was, I wanted to take the matter further and after I was dismissed I told [union representative] that I wanted to challenge the dismissals and seek compensation. I understood that had been done. ...

[49] Mr Waitai's affidavit did not provide details of the steps he took and the communications he had with his union representative to ensure a grievance was raised on his behalf. The Court noted the union representative's evidence also lacked that detail.

[50] The Court held the onus was on Mr Waitai to *establish he had made reasonable arrangements for the grievance to be raised in time on his behalf. The evidence in respect of that is minimal and little weight can be placed upon it in the absence of his presence for cross examination.* The Court concluded that exceptional circumstances had not been made out.

[51] In terms of Mr Handley's leave application, once exceptional circumstances have been established, the Authority must then consider whether it is just to grant leave. The Employment Court expressly recognised in *McMillan*¹⁸ that in many cases it will be necessary to delve, at least to some degree, into the merits of the case.

[52] The Employment Court in *Stevenson v Hato Paora College*¹⁹ held that the overriding consideration is the justice of the case, which may include consideration of the following matters

- (a) Reason for delay;

¹⁸ Ibid 3

¹⁹ [2002] 2 ERNZ 103

- (b) Length of delay;
- (c) Prejudice or hardship to a party;
- (d) Effect on rights and liabilities of the parties;
- (e) Subsequent events;
- (f) The merits.

Issues

[53] The issues to determine include:

- (a) Was the delay in raising the personal grievance occasioned by exceptional circumstances?
 - (i) Did Mr Handley make reasonable arrangements to have his personal grievance claim raised by Mr Handley?
 - (j) If so, did Mr Skinner unreasonably fail to ensure the grievance was raised within 90 days?
- (b) If so, is it just to grant leave?

Are there exceptional circumstances?

[54] The requirement under s115(b) of the Act is for the employee to have made reasonable arrangements to have had the grievance raised on their behalf. If the employee has not made such reasonable arrangements, exceptional circumstances for the purposes of s115(b) of the Act will not exist.

[55] Mr Handley said he instructed Mr Skinner on 3 March 2010 to assist and represent him in any meetings his employer. Mr Handley said he and Mr Skinner both made representations to the Council which made it clear they did not agree with the way the Council was dealing with issues arising from Mr Handley's communications with a ratepayer.

[56] Mr Handley was dismissed at a meeting on 23 April 2010. Mr Skinner attended as his representative and after Mr Handley was dismissed he said words to the effect that the dismissal would be challenged.

[57] Mr Handley and Mr Skinner both provided written statements to the Authority.

[58] Mr Handley's statement recorded:

- (a) Prior to the 23 April 2010 meeting, Mr Handley discussed with Mr Skinner the possibility or likelihood he would be dismissed;
- (b) During this discussion they both agreed dismissal would be unfair;
- (c) He asked Mr Skinner what the process was to challenge any dismissal;
- (d) Mr Skinner told him he could claim a personal grievance for unjustified dismissal and then go to mediation to try to settle his claim, but that if it was not solved at mediation he could bring a claim to the Authority;
- (e) He told Mr Skinner if he was dismissed that was what he wanted to do;
- (f) This discussion was verbal and written instructions were not provided;
- (g) Before leaving the dismissal meeting, Mr Skinner indicated an intention to take the matter further.

[59] With the exception of item (g) above, the evidence in Mr Handley's statement related to discussions he had with Mr Skinner prior to his dismissal.

[60] Mr Handley's statement also said he was aware Mr Skinner had written to the Council on 26 April 2010, but it was silent about how he knew that and when he knew it. Although questioned about it, Mr Handley was unable to supply that information.

[61] Mr Handley's statement said:

I relied on Mr Skinner to take whatever steps were necessary to progress my claim of unjustified dismissal.

The next I was aware was Mr Skinner telling me around late May that he had filed the matter with mediation, and there had been no response from the Council to his letter of 26 April.

[...]

As far as I was concerned, a grievance had most certainly been raised. First, the Council managers can have been in no doubt when

we left the meeting on 23 April that I was unhappy and did not consider their decision to be fair. Second, they had received Mr Skinner's letter only a couple of days after my dismissal formally advising (I believed) of a personal grievance.

I believed with Mr Skinner's experience and expertise in this area, the relevant steps had been taken to ensure I could proceed with my claim.

[...]

I do not know what further steps I could have taken with Mr Skinner. I believed he had followed my instructions to proceed with the claim.

[62] Although Mr Handley's statement referred to a discussion he had with Mr Skinner prior to his dismissal, it did not address what (if any) discussions he had with Mr Skinner about pursuing a grievance after he had been dismissed. Despite being questioned about that, Mr Handley failed to give evidence about what arrangements he had actually made to have his grievance raised by Mr Skinner.

[63] I was surprised Mr Handley's statement did not set out what (if any) instructions he had given Mr Skinner about raising a grievance together with an explanation of how and when those instructions had been given. Apart from the reference to a pre dismissal discussion, Mr Handley also failed to identify what (if any) arrangements he had made to have Mr Skinner raise a grievance on his behalf. This information should have been provided because it was critical to his leave application.

[64] Mr Handley did not have a clear recollection of events so was unable to say with any certainty when his discussions with Mr Skinner had occurred, where they had occurred, or what had been discussed. I find Mr Handley was only able to go as far as saying Mr Skinner knew he wanted to challenge his dismissal and he had relied on Mr Skinner to take the necessary steps to do so.

[65] Mr Handley was asked what he told Mr Skinner to do, and he replied *Tom told me there was a case and I told him to pursue it*. It was unclear from this response whether this was the pre dismissal discussion he referred to in his statement or some other discussion. I consider, on the balance of probabilities, it was more likely to be the former, because Mr Handley was unable to recall any discussion(s) which occurred after his dismissal, but he was able to provide information about the pre dismissal discussion.

- [66] In terms of communications with Mr Skinner, Mr Handley told me he:
- (a) Met Mr Skinner in a café in Silverdale, which he thought was before his dismissal;
 - (b) Met Mr Skinner before the dismissal meeting;
 - (c) Did not recall seeing Mr Skinner's 26 April 2010 letter to the Council before it was sent and he was not sure when he did see it;
 - (d) Could see he had been invoiced for a meeting on 4 May 2010 but had no recollection of it;
 - (e) Would hear from Mr Skinner from time to time because he was good at keeping in touch. No evidence was given about what form these communications took or what was discussed or what, if any, information was exchanged;
 - (f) Attended Mr Skinner's house after he was dismissed.

[67] Mr Skinner said the meeting at his house was for the Authority's telephone case management conference on the 90 day issue. That was held on 20 September 2010, so it is not relevant because the 90 day period had already expired.

[68] Mr Handley said that although he could not specifically recall his conversations with Mr Skinner he was clear *they had agreed to put in a personal grievance case*. Mr Handley said he did not recall Mr Skinner explaining what a personal grievance was.

[69] Mr Handley was asked if he had told Mr Skinner what remedies he wanted and he replied *probably compensation*. When asked if he told Mr Skinner what amount of compensation to ask for and said no *I wouldn't have, I never told him an amount*. Mr Skinner said his usual practice was not to discuss remedies until the parties were at mediation.

[70] Mr Handley was then asked if he told Mr Skinner to claim \$20,000 for him (the amount claimed for hurt and humiliation in the Statement of Problem filed on 17 August 2010), and Mr Handley replied *it may or may not have been mentioned*.

[71] I find that Mr Handley did not give Mr Skinner clear instructions or advice about what he was seeking from the Council to resolve his grievance which was a fundamental part of properly raising a personal grievance.

[72] Mr Handley accepted he was aware of the employment problem resolution clause in his employment agreement and he acknowledged Schedule 2 recorded a personal grievance had to be raised within 90 days of it arising. It also referred to the need for an employee who wished to raise a grievance or problem to record *details of the problem or grievance; why the employee feels aggrieved; what solution the employee seeks to resolve the matter*. None of this information was provided to the Council.

[73] Mr Handley said he thought that Schedule 2 only applied whilst he was employed, so after his dismissal he relied on Mr Skinner to pursue his case. It was unclear whether Mr Skinner had a copy of Mr Handley's employment agreement.

[74] Mr Skinner's letter to the Council dated 26 April 2010 stated:

[...] Please be advised that we are of the view that he [Mr Handley] has grounds for a Personal Grievance on the grounds of an unjustified dismissal.

Accordingly, you should accept this letter as being formal notice that we will be filing a Personal Grievance claim on his behalf. [...]

[75] Mr Handley accepted he did not tell the Council what he wanted to achieve and he admitted he had not asked Mr Skinner to follow up the Council's lack of reply to the 26 April 2010 letter because he *left it in the hands of an experienced practitioner who knew the law*.

[76] It was put to Mr Handley in cross examination:

Q You did not give Mr Skinner instructions to proceed with a grievance you only discussed it before you were dismissed?

A Yes I did. Tom would have said do you want to go ahead. He would have asked me again after I was dismissed because he would not do it if he was not going to get paid. Tom was always in the loop. He knew I wished to proceed as far as I could go.

[77] I do not consider this provides clear evidence about the arrangements Mr Handley made for his grievance to be raised within time. I consider it is a

speculative answer based on what Mr Handley believed was likely to have occurred, rather than based on his recollection of what had actually occurred.

[78] In re-examination Mr Handley was asked if he met with Mr Skinner on the day of the dismissal. Mr Handley said he did when they were in the car park together. It was not clear from his response whether that was before or after his dismissal. Mr Handley was asked what he talked to Mr Skinner about and he replied *I would have talked about going on and I would have confirmed that.*

[79] I consider the only reliable evidence Mr Handley gave that could be viewed as amounting to instructions to Mr Skinner, was the pre dismissal discussion during which he told Mr Skinner if he was dismissed he wanted to challenge it.

[80] I find that discussion did not amount to reasonable arrangements by Mr Handley to have his grievance raised by Mr Skinner. It is analogous to the situation Ms Melville found herself in where she made it clear to her representative she wanted to challenge any dismissal but the Court held that did not constitute reasonable arrangements to ensure her grievance was raised in time. It is also analogous to Mr Waitai's situation where he asked the union to raise a personal grievance for him before he was dismissed.

[81] Mr Skinner's statement said that before he was dismissed, Mr Handley told him that if he was dismissed he wanted *to challenge any such decision by means of a personal grievance claim.* Mr Skinner stated he believed he had raised a personal grievance claim on the day of the dismissal by way of the comments he made at the dismissal meeting, although he acknowledged the Authority had concluded he had not done so.

[82] If, as Mr Skinner firmly believed, he had already raised Mr Handley's personal grievance at the conclusion of the dismissal meeting, there would have been no reason for him to have met Mr Handley after his dismissal to discuss whether he wanted to go down the personal grievance route. I find that supports my view that their discussion about a personal grievance must have occurred at their pre dismissal meeting.

[83] Mr Skinner's statement also said *I must take responsibility for the way in which this grievance was raised. Stuart clearly instructed me that he wished to challenge his dismissal.*

[84] Mr Skinner's statement did not give any detail about what he had been *clearly instructed* to do or about when and where those instructions had been given. Mr Skinner's statement also did not refer to him ever having been asked or instructed to raise a personal grievance on Mr Handley's behalf. These are surprising omissions, given the requirements of s115(b) of the Act.

[85] I consider, on the balance of probabilities, the reference Mr Skinner made in his statement to instructions was likely to be referring to the pre dismissal discussion when Mr Handley made it clear he wanted to challenge any dismissal.

[86] Mr Skinner was asked if at some point Mr Handley gave instructions about remedies. Mr Skinner said *he may have said he wanted his job back or money*. It was unknown when or where this discussion may have occurred. Mr Handley never mentioned in his evidence that he had told Mr Skinner he wanted his job back and he did not claim reinstatement in his Statement of Problem filed on 17 August 2010.

[87] I find that Mr Handley did not give Mr Skinner instructions about remedies and he was not clear about what he wanted from the Council in order to resolve his personal grievance claim.

[88] Mr Skinner gave viva voce evidence that there was a discussion in the car park on the day of Mr Handley's dismissal about a grievance but he was unclear whether that had occurred before or after the dismissal.

[89] I consider Mr Skinner's evidence about this discussion was confused because when asked to explain the detail of what was discussed in the car park conversation, Mr Skinner discussed Mr Handley's wish to challenge the Authority's determination on the 90 day issue. Because of his confusion Mr Skinner was twice specifically referred back to the car park discussion on the day of the dismissal, but despite that he continued to talk about the 90 day issue challenge.

[90] I find that Mr Skinner did not give reliable evidence about what (if any) arrangements Mr Handley had made with him to raise his grievance within time.

[91] When Mr Skinner was asked if he had given Mr Handley advice regarding the merits of his case, Mr Skinner said he did so on the day of the dismissal. When asked to clarify whether he did that before or after Mr Handley's dismissal, Mr Skinner said *he did it all the way through*.

[92] When asked to explain exactly what advice he had given Mr Handley after his dismissal, Mr Skinner said *I told him the allegations did not amount to serious misconduct and I told him what I needed to do*. When asked to explain what he said to Mr Handley about the process that had to be followed, Mr Skinner said:

I told him I would need to file in the Authority. I told him he'd need to make a submission to the Authority going over the whole issue and he would have to give evidence. We did not talk about what he [Mr Handley] wanted to achieve.

[93] Notably Mr Skinner's response did not refer to the need to raise a personal grievance with the Council, probably because he already believed he had done so verbally at the end of the dismissal meeting.

[94] In re-examination Ms Swarbrick referred Mr Skinner to the responses he had given to questions he had been asked about his discussions with Mr Handley in the car park, particularly about what Mr Handley wanted to achieve. Ms Swarbrick suggested Mr Skinner's previous responses had raised two possible scenarios, and she asked which (if any) was correct:

- (a) Mr Skinner never spoke to Mr Handley about what he wanted at all;
- (b) When Mr Skinner spoke to Mr Handley, he was not specific in terms of the money he was seeking, he was general.

[95] Mr Skinner's response to Ms Swarbrick's somewhat leading question was:

I do not recall if we discussed the issue of what Stuart wanted. We just discussed whether he wanted me to proceed and I did proceed to do it on Monday.

[96] I find that a discussion about wanting to proceed was not definite enough to constitute reasonable arrangements to have a grievance raised, particularly when there was no discussion about what Mr Handley was seeking to resolve his grievance.

Outcome

[97] The evidence I heard did not satisfy me Mr Handley made reasonable arrangements to have his dismissal grievance raised on his behalf by Mr Skinner. I consider he gave Mr Skinner broad and general instructions that he wanted to challenge his dismissal which did not constitute reasonable arrangements to have his grievance raised by Mr Skinner within 90 days.

[98] I accept Mr Handley told Mr Skinner before he was dismissed that if he was dismissed he wanted to challenge his dismissal. However, a grievance cannot be raised before it has arisen, so I find this pre dismissal discussion did not amount to a reasonable arrangement to raise a grievance within time. I consider that view is consistent with the Court's conclusion in *Melville*.²⁰

[99] Mr Handley was aware of the 90 day period recorded in Schedule 2 of his employment agreement, but he did not expressly require Mr Skinner to raise a grievance for him, probably because he mistakenly believed Mr Skinner had already done so at the dismissal meeting.

[100] In terms of what, if any, arrangements Mr Handley made after his dismissal, I find the evidence on that was unclear and therefore unsatisfactory. The evidence presented to me did not discharge Mr Handley's onus of establishing he made reasonable arrangements to have a grievance raised on his behalf by Mr Skinner. I am not satisfied Mr Handley's communications with Mr Skinner made arrangements that were reasonable to have a grievance raised for him.

[101] Accordingly, I find Mr Handley cannot satisfy the first requirement of s115(b) of the Act, which was the sole basis for his leave application. Given my conclusion on that point, there is no need for me to consider the rest of the issues that required determination.

Conclusion

[102] I find the requirements of s114(4) of the Act are not satisfied and Mr Handley is time barred from bringing a personal grievance claim for unjustified dismissal against the Council.

Costs

[103] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority

²⁰ Ibid 3