

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 24/10
5140576

BETWEEN PAUL HOLMES
 Applicant

AND META NZ LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Faye Birch, Representative for the Applicant
 Peter Zwart, Representative for the Respondent

Phone Conference: 30 November 2009

Submissions Received: 23 December 2009 from the Applicant
 29 January 2010 from the Respondent

Determination: 4 February 2010

DETERMINATION OF THE AUTHORITY

[1] Paul Holmes was employed by Meta NZ Limited (Meta) from about July until November 2008 when the company terminated the employment effective from 29 November 2008 citing a fundamental breakdown of trust and confidence between the parties.

[2] In August 2009 Mr Holmes lodged with the Authority a statement of problem in which there is a list of 6 matters that he wishes the Authority to resolve: three types of personal grievances, a breach of good faith by Meta, a breach of the Health and Safety in Employment Act 1992 by Meta and a breach of s.148 of the Employment Relations Act 2000 by Meta. The remedies sought are compensation and penalties.

[3] Later, Mr Holmes sought to add a number of other respondents but that was refused in an earlier determination.

[4] In its statement in reply Meta says that Mr Holmes never did anything to raise a personal grievance with it concerning his dismissal until Meta received his statement of problem about 9 months after the dismissal. The other parts of Mr Holmes' problem are resisted on the merits. At Meta's request I decided to deal with this issue as a preliminary issue. Both parties have provided submissions. The applicant did not comply with the original timetable, but I have nonetheless considered the submissions for the reasons explained to the parties.

[5] It is helpful to set out some background by reference principally to the statement of problem and its annexures. However, the essence of the problem between the parties for present purposes turns on written communications at the end of November 2008.

Background

[6] At Meta there was a restructuring which resulted in the establishment of a new position called *Eco Depot Manager* to which Mr Holmes was appointed. There were changes to existing positions and it seems that the new structure was not a welcome change for those whose existing employment was affected. Mr Holmes came to think that his new position became limited to that of a *charge hand* rather than the management position that he had applied for and been appointed to. Mr Holmes apparently took up this concern with his managers.

[7] At some point Meta senior managers raised with Mr Holmes a concern that he had neglected to disclose part of his employment history when applying for this position. Mr Holmes says that this amounted to the senior manager bullying him.

[8] On 15 September 2008, following meetings with two senior managers, Mr Holmes received a written warning. There is a letter dated 19 September that was sent to Mr Holmes by email on 23 September confirming that warning. The warning related to Mr Holmes' actions said to constitute a breach of his obligation to maintain confidentiality over information about a company investigation into employee theft. The alleged disclosure by Mr Holmes resulted in the company stopping its investigation. Mr Holmes says that this is a further example of him being bullied.

[9] On 20 September Mr Holmes suffered an accident at work. He sought medical attention on 25 September and on 30 September and 13 October saw his GP about stress and anxiety connected to work and pain associated with the accident.

[10] On 8 October there was a meeting between Mr Holmes and two senior managers which ended with his suspension on pay from his employment. Mr Holmes makes various complaints about this meeting. Mr Holmes later received a letter dated 8 October confirming his suspension on pay until 17 October pending an investigation into several issues. Mr Holmes wrote to Meta's general manager on 13 October advising about his health circumstances, complaining about the suspension and alerting Meta to his decision to instruct a *legal firm* in relation to serious issues he had with Meta management. The general manager responded proposing a meeting for Monday 20 October and extending the suspension until 24 October.

[11] Mr Holmes' representative (Ms Birch) spoke to Meta's representative on or about 16 October. In his statement of problem Mr Holmes says that *a personal grievance, for unjustifiable action causing disadvantage – s103(1)(b) – was lodged*. Meta's statement in reply acknowledges that there was a conversation between the representatives but it is not clear whether Meta accepts that such a grievance was then raised. For present purposes I will assume that it was. Mr Zwart later sent an email to Ms Birch from which it is apparent that there was an arrangement to meet on Monday 20 October. Mr Zwart also sent Ms Birch notes of the 8 October meeting made by Meta's senior managers. As part of the exchanges with his representative, Mr Holmes told her that he had secretly recorded the 8 October meeting and refuted Meta's notes of that meeting. Meta was not told of the existence of the recording until later in November.

[12] There appear to be disputes about what happened at the meeting on 20 October. What is not disputed is that there was some discussion about Mr Holmes' grievance in relation to the suspension and the warning and an agreement to participate in mediation concerning those grievances. There was also an exchange between the representatives concerning the possibility of a mutually agreed termination of the employment accompanied by compensation. No agreement was reached and the meeting ended. It has only recently emerged that Mr Holmes was carrying a recording device so that there is a record of parts of this meeting.

[13] After this meeting Mr Zwart sent an email to Ms Birch complaining that Mr Holmes left the meeting contrary to the express wishes of his employer so defaulting on his obligations and expressing concern about Mr Holmes' view that his manager was a liar. Mr Zwart sought to reconvene the meeting. That did not happen.

There was another email from Mr Zwart to Ms Birch on 23 October. By that time Mr Zwart had learnt that 24 November was the earliest that Ms Birch and Mr Holmes could attend mediation. In the email Mr Zwart said that such a delay was unacceptable and Mr Holmes was instructed to attend a meeting with his employer by no later than 5.00 on 29 October at a time and place to be discussed. This was characterised as a lawful and reasonable instruction, breach of which itself might be considered serious misconduct. Mr Holmes' was also cautioned that Meta might make a decision about the 8 October allegations in the absence of any further explanation from him which could result in the termination of his employment.

[14] There was a meeting between Mr Zwart, Ms Birch and a mediator on 29 October. Later the same day Mr Zwart sent an email to Ms Birch extending the time for Mr Holmes to respond to 5.00pm Tuesday 4 November. The communication made it clear that Meta considered it could justifiably dismiss Mr Holmes in the circumstances as at 29 October. Its position was described as a *tentative decision (conditional on no further input)*. Following this, Meta received a medical certificate certifying that Mr Holmes was medically unfit to attend work including meetings for 1 month. In the end there was agreement for the parties to attend mediation on 24 November.

[15] Mediation on 24 November did not resolve Mr Holmes' grievances. There was a separate meeting later the same day which the parties characterise as a disciplinary meeting. There are disagreements about what was said during this disciplinary meeting but it is not necessary to canvass those. Ms Birch sent Mr Zwart an email later on 24 November. It referred to Mr Holmes' personal grievances about various disadvantageous actions by the employer, the issues for discussion at the disciplinary meeting, Mr Holmes' sick leave and concluded with a request to discuss and resolve all these issues and to resume mediation.

[16] There was a response by email on 26 November (wrongly dated 26 October). That conveyed Meta's decision to dismiss Mr Holmes' effective from 29 November 2008. Meta expressed a reluctance to participate in any further mediation.

[17] As noted above, the next thing that happened was when Mr Holmes' statement of problem was lodged in the Authority on 18 August 2009 and served on the respondent soon after.

Raising a grievance about the dismissal

[18] Materially, under s.114(1) every employee who wishes to raise a grievance must raise their grievance with their employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred. A grievance is raised as soon as the employee has made or has taken reasonable steps to make their employer aware that the employee alleges a personal grievance that the employee wishes the employer to address. No particular formalities are required and the test is whether to an objective observer the communication was sufficient to elicit a response and for the employer to remedy the grievance or the parties to settle it in discussions: see *Goodall v Marigney (NZ) Ltd* [2000] 2 ERNZ 60.

[19] In *NZ Automobile Assn Inc v McKay* [1996] 2 ERNZ 622 the Employment Court held that the statutory grievance jurisdiction contained time limits for both the start and the end of the period within which a grievance must be submitted. In that case, the employee had submitted a grievance about his dismissal but did this before the termination of his employment. The Court held that only an unjustified disadvantage grievance could be submitted in that situation but other provisions of the statute permitted such a grievance to be adjudicated upon as an unjustified dismissal grievance after the termination of the employment. Changes to the statute do not detract from these principles.

[20] In light of *McKay*, the applicant's position must be that he validly raised a personal grievance about his dismissal by the communications on and before 24 November 2008 even though he only received notice of dismissal on 26 November and was dismissed on 29 November.

[21] The communication on 24 November opened with 6 paragraphs under the heading **1. Personal Grievance – Paul Holmes**. None of that communication touched on the issues involved in the then current disciplinary process or the foreshadowed tentative decision. I find that it only referred to the earlier grievances.

[22] The second section is headed **2. Clause 18.1.8 – Individual Employment Agreement**. There is no such clause but clause 18 does deal with termination of employment and includes subclauses 18.1.1 – 18.1.3 which partly refer to serious misconduct and suspension. The substance of this section is about the impasse between Mr Holmes and Meta over the topics for discussion at the disciplinary

meeting on 24 November. Meta wanted to discuss a topic that had apparently not been included in the list of topics for discussion. Nothing in this section reads as a grievance about the foreshadowed possibility of dismissal.

[23] The third section deals with sick leave and is irrelevant for present purposes. There is a concluding section that says Mr Holmes is keen to discuss and resolve issues with Meta and requests mediation to resume. Given the absence of any earlier reference to the foreshadowed dismissal the request for mediation must be read as referencing the unrelated unjustified disadvantage grievances.

[24] I have reviewed Mr Zwart's response on behalf of Meta. It does not support the contention that a grievance about the foreshadowed termination of Mr Holmes employment had been raised on 24 November or earlier.

[25] As a result I find that Mr Holmes did not raise a grievance about the termination of his employment within time. So little was required but nothing was done until August 2009.

Other matters

[26] The submissions for Mr Holmes refer to s.114(3) of the Act. I do not consider that there is an application for leave to raise a grievance out of time properly before the Authority for investigation and determination. If Mr Holmes considers that there are grounds he should make such an application and it will be dealt with in the usual way.

[27] The submissions also refer to s.122. Under that section the Authority may find that a personal grievance is of a type other than that alleged. The provision cannot assist Mr Holmes. A grievant must still raise the relevant subject as a matter for the employer's consideration and response. His earlier grievances were about matters other than the termination of his employment. The Authority cannot now turn those complaints into a grievance about his dismissal. To do that would ignore the statutory requirement for an employee to raise their grievance in a timely manner.

[28] In Meta's submissions Mr Zwart argued that cases referred to and points made in Mr Holmes' submissions are not relevant. I agree with Mr Zwart's submissions.

Conclusion

[29] Mr Holmes cannot pursue a grievance about the termination of his employment because he did not raise any such grievance with his employer within time.

[30] Costs are reserved.

[31] Arrangements for an investigation meeting to deal with the other aspects of Mr Holmes' problem will be made in due course. Meantime, the parties should consider further mediation now that there has been a determination about part of the problem.

Philip Cheyne
Member of the Employment Relations Authority