

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 141/09
5127908

BETWEEN ROSLYN JOHNS
 Applicant

AND VERSATILE BUILDINGS
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Rodger Poole, Counsel for Applicant
 Anne Toohey, Counsel for Respondent

Investigation meeting: 21 April 2009

Affidavits and
submissions received: 25 September, 24 October and 13 November 2008

Determination: 5 May 2009

DETERMINATION OF THE AUTHORITY AS TO A PRELIMINARY ISSUE

[1] Mrs Johns was dismissed from her employment with Versatile Buildings Limited¹ on 18 May 2006. She had worked for the respondent since 1998. She says her dismissal was unjustified and that Versatile has been aware of her personal grievance since August 2006. In the alternative she seeks leave to raise her personal grievance outside the 90-day timeframe.

[2] Versatile says the first it heard of Mrs John's claim of unjustified dismissal was the filing of her statement of problem in the Authority on 20 June 2008. Versatile says the Authority cannot hear this claim because it is well outside the 90-day statutory time frame and such a delay was not occasioned by exceptional circumstances.

¹ The identity of the respondent is discussed at paragraph [4].

[3] This determination deals with the preliminary issue as to whether Mrs John's personal grievance for unjustified dismissal was raised within the statutory timeframe or, in the alternative, whether that delay was occasioned by exceptional circumstances. By agreement this matter was to be determined on the papers. Subsequent to the filing of affidavit evidence and submissions in support of the respective positions it became evident there was a significant dispute. An investigation meeting was convened to deal with that issue. The parties were provided a further opportunity to provide submissions.

[4] The application identified the respondent as Spanbuild New Zealand Limited on the basis of information provided by the respondent's solicitors early in 2008. The respondent says Mrs Johns was employed by Versatile Buildings Limited and that this company is registered but no longer trading. I accept that this issue has not been clear between the parties. I am satisfied that Versatile Buildings Limited was Mrs John's employer at the time of her dismissal and that company is extant. There is no evidence that the obligations of Versatile have transferred to Spanbuild. Accordingly, the respondent is properly identified as Versatile New Zealand Limited.

Was the personal grievance for unjustified dismissal raised within 90-days?

[5] Mrs Johns says Versatile was on notice from 15 August 2006 of her personal grievance. She relies on the following email sent to Bruce Matheson, managing director, and John Allen, general manager, on that date:

Dear Sirs

I would like to bring to your attention that I have a personal grievance regarding my dismissal from Versatile Buildings Limited. My Personal Grievance is in relation to Section 123(1) (c) (i) of the Employment Relations Act 2000. I have also faxed this notification to you in writing with my signature.

[6] In his affidavit Mr Allen said the email, in his view, did not require a reply and that he did not reply. Mr Matheson did not reply either. Mr Allen averred that he had no idea what the grievance would be about or what the grounds were.

[7] Subsections 114(1) and (2) Employment Relations Act 2000 provide:

114 Raising personal grievance

- (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 later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
- (2) *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 representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[8] A personal grievance must be sufficiently specified to enable the employer to address it²:

“So it is insufficient, and therefore not raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment...As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.”

[9] The email of 15 August is not sufficient to raise a personal grievance; Versatile was not put on notice as to what Mrs John’s wanted addressed by way of personal grievance.

[10] Mr Poole submits that the email must be read in the context of Mrs John’s assertions during the disciplinary process that she had done nothing wrong and that the matters raised were inconsequential. He submits that this is the context in which the 15 August email must be read and that this context provides grounds for the personal grievance.

[11] I accept that a personal grievance may be raised by the cumulative effect of more than one communication³. In *Coy* a letter confirming an earlier expressed intention to raise a personal grievance was found sufficient by *a narrow margin*. There is no dispute Mrs John’s email was the first time a personal grievance was mentioned to Versatile. The email refers to the unjustified dismissal. The context Mrs John’s seeks to rely on arose prior to the decision to dismiss being made and concerns Mrs John’s denial of the allegations of serious misconduct. I find this is not a situation such as *Coy*; there is no link between the denials and the 15 August email which require them to be read together.

² *Creedy v Commissioner of Police* [2006] 1 ERNZ 517, 529

³ *Coy v Commission of Police* 19/11/07 Colgan CJ, CC23/07

[12] Mrs John's says Versatile knew she had raised a personal grievance. She relies on an exchange during an Authority investigation meeting in late November 2006 into a co-worker's personal grievance. Mrs John's gave evidence at that investigation meeting. She told me that during the course of her evidence the Authority member asked her if she was pursuing a personal grievance and before she could respond Versatile's lawyer informed the Authority that she was pursuing a personal grievance and that she was represented by the co-worker's representative. Mrs John's told me she thought she had said she was not sure if she would pursue a personal grievance.

[13] Mr Allen gave evidence that an issue was raised during that investigation meeting as to whether it was a conflict of interest for the representative to act for the co-worker and Mrs Johns and that it was clarified that he did not act for her. The issue was raised because the co-worker's representative had written to Versatile authorised to request copies of Mrs John's personal file including notes of the relevant disciplinary meeting.

[14] Mrs John's did not assert during the investigation meeting in late November 2006 that she was intending to pursue a personal grievance. She told me that she had not decided whether to pursue a personal grievance at this time and had not instructed the co-worker's representative to act on her behalf. She had authorised the representative to request copies of her personal records from Versatile in relation to the co-worker's personal grievance.

[15] Mrs John's evidence that she had not decided to pursue a personal grievance by November 2006 is significant. If Mrs Johns had no intention to pursue a personal grievance at this point then Versatile could not have known that that was her intention and could not have expressed such a view.

[16] I find it most likely that the Authority member questioned Mrs John's as to her intention, the recent correspondence with the co-worker's representative regarding Mrs John's was discussed and Mrs John's clarified her position - that the co-worker's representative did not act for her and she had not decided whether to pursue a personal grievance.

[17] Any reliance on the 15 August email to raise Mrs John's personal grievance is mistaken. It follows, and the evidence supports the conclusion, that Versatile did not assert that a personal grievance had been raised at the late November investigation meeting.

Leave to apply out of time

[18] Leave to apply out of time is made pursuant to section 115(1)(c) of the Act. Mrs Johns accepts that it is her signature on the employment agreement dated 8 March 2005. That document contains a plain language explanation concerning the resolution of employment relationship problems⁴. Grounds for leave on the basis sought do not exist.

Costs

[19] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If this is not possible then application for a timetable to be set should be made within 21 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority

⁴ Section 65 Employment Relations Act 2000