

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 470/10
5312242

BETWEEN CHRISTIAN JORDAN

AND COMPASS
 COMMUNICATIONS
 LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Christian Jordan in person
 Paul Woodhams, General Manager, for Respondent

Investigation Meeting: 19 October 2010

Further information
received: 19 October 2010 from Applicant

Determination: 4 November 2010

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] Mr Jordan lodged his employment relationship problem with the Authority on 13 July 2010. In the statement of problem Mr Jordan identified concerns about the fairness of his dismissal on 10 March 2010. He also alleged that, prior to the termination of his employment:

- i. other members of staff knew that he was accused of serious misconduct before he was notified of this himself;
- ii. he had been given a warning for sexual harassment “*wherein no evidence was presented;*”

- iii. he had been given other warnings for which there was “*no substantive grounds*” (including a warning for missing a sales meeting; he also cited an instance where he was called into a meeting to discuss alleged absenteeism) and
- iv. commission payments he received were less than he had understood he was entitled to.

[2] On 14 July Mr Woodhams (the respondent’s general manager) wrote to the Authority as follows:

“I wish to refer the Authority to schedule three of Mr Jordan’s employment agreement which states any personal grievances must be lodged with Compass Communications within 90 days from termination date.

As per section 114 of the employment relations act Compass does not consent to this personal grievance being raised after the 90 day period.”

[3] On 12 August I convened a telephone conference with Mr Woodhams and Mr Jordan at which Mr Woodhams confirmed that it was the respondent’s position that Mr Jordan had not raised a grievance with him within the 90 days required by section 114 (1). Mr Jordan advised that he believed he raised a grievance via email in early April 2010. Both wanted the 90 day issue to be determined as a preliminary point. A timetable was set for provision of copies of the email correspondence on which Mr Jordan sought to rely, for the parties to attend mediation, and, in the event mediation was not successful, for an investigation meeting limited to the preliminary issue.

[4] The matter was not resolved and the investigation meeting proceeded. I began by asking Mr Jordan to clarify what grievance or grievances he purported to have raised. Although the principal concern in his statement of problem was his alleged unjustified dismissal grievance it appeared that other concerns (as set out in paragraph [1] above) remained live issues for him. Mr Jordan responded by saying that he saw all the matters as connected. He said that even if they were not able to be brought as separate matters, they remained relevant background to the ending of his employment,

because, he said, they demonstrated a pattern of unfair and unreasonable treatment from the employer.

[5] Mr Woodhams protested that the warning for sexual harassment was about a year prior to the dismissal. As for the other matters, he was not even sure when Mr Jordan was claiming that they arose. Mr Jordan could not put a date on the other matters but conceded that the sexual harassment warning was well before his employment ended. He did not go so far as to concede that he had not raised these issues but told me he had not come prepared with evidence of having done so.

[6] Should Mr Jordan wish to pursue other grievances as claims in their own right, he will need to provide evidence that they were raised in accordance with section 114. Unless he does so the Authority will be unable to investigate them as stand alone grievances. This determination deals only with the question of whether the alleged unjustified dismissal grievance was raised within 90 days of the termination of Mr Jordan's employment.

The steps taken to raise the grievance

[7] The process which led to Mr Jordan's dismissal began on 2 March 2010 when Mr Woodhams called him to a meeting regarding allegations of serious misconduct. Over the course of the next week, whilst suspended from normal duties, Mr Jordan emailed Mr Woodhams several times questioning the process that was being followed. He made it clear that he had concerns that the allegations were not supported and that a proposed meeting needed to be rescheduled. As early as 8 March (two days before he was dismissed) he had stated:

“this entire proceeding is illegal (as per my previous email) so any reprimand which you hand down will be appealed to the Employment Tribunal in any case.”

[8] On 11 March 2010, one day after he was dismissed, Mr Jordan emailed Mr Woodhams as follows:

“I will be forwarding a copy of a complaint which is to be lodged with the Employment Tribunal next week in it I will also be requesting a reinstatement to my position with Compass as well as damages for wrongful termination and constructive dismissal as well as pain and suffering (details will be forwarded later.)

[9] I have been informed that Mr Jordan did attempt to file an application for interim reinstatement in the Authority in March. Having been told by a support officer that he needed to include an affidavit and undertaking as to damages, he then held off lodging his employment relationship problem while he sought legal advice.

[10] Meanwhile, there were further email exchanges about matters such as final pay and the return of keys to the respondent’s premises. As of 22 March 2010 Mr Jordan had not provided a copy of his complaint (by which he seems to have meant his statement of problem) to Mr Woodhams. In an email of that date he did however tell Mr Woodhams:

“Just to formally notify you a personal grievance for unjustified dismissal (I will be adding to this in the final application) is being submitted to the Department of Labour tomorrow a formal request for any and all evidentiary support including emails, letters, disciplinary notices etc will be forthcoming.”

[11] In an email of 6 April Mr Jordan emailed Mr Woodhams again, saying:

“I am still waiting for the evidence referred to in serious misconduct charge made against me prior to my dismissal you are required to provide this as well as access to my compass emails so I can proceed with my personal grievance....

...[if] you are going to provide them please confirm when they will be made available.

I will submit my personal grievance to the employment tribunal upon confirmation of your position regarding this matter.”

[12] Mr Woodhams responded on 7 April saying:

“we have no further comment to make regarding your termination from Compass. As far as Compass Communications is concerned this matter is closed.”

Determination

[13] Sections 114 (1) provides as follows:

“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.”

[14] Section 114 (6) goes on to say that once a grievance has been raised with the employer, a grievant has a further three years in which to lodge the matter with the Authority.

[15] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. In considering what this means, the Employment Court¹ has stated that the requirement is not for the sort of detail that would be required in a statement of problem, but rather:

“for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.”

¹ Creedy v Commissioner of Police [2006] ERNZ 517 paragraph [36].

[16] Nowhere in his emails to Mr Woodhams does Mr Jordan expressly state that he is raising a grievance with the respondent, but he does continually refer to the fact that he is preparing to lodge his grievance in the Employment Relations Authority. Several emails include requests for information which appears intended to accompany the application to the Authority.

[17] The Authority will not be satisfied that a grievance has been raised where there is uncertainty about the nature of the grievance or where it is unclear whether the grievant is definitely pursuing the matter. On the other hand, “*no particular formula of words*” is required provided the employer is made aware sufficiently of the grievance to be able to respond. Taken as a whole the correspondence from Mr Jordan to Mr Woodhams makes it clear that Mr Jordan considers he has been unjustifiably dismissed (and why) and that he is seeking redress for this. It is also clear (by the use of words like “formally”) that he wishes to put his employer on notice of this. I am satisfied that, by 6 April at the latest, he had taken reasonable steps to make Mr Woodhams aware that he alleged a personal grievance and that he wanted this addressed.

[18] Since this was within 90 days of the dismissal, the claim of unjustified dismissal can now be investigated by the Authority. For completeness I note that any claim for unpaid commission (being an arrears claim rather than a personal grievance) is not subject to the requirements set out in section 114. It forms part of the employment relationship to be investigated. As a next step the Authority support officer will arrange a conference call with the parties to discuss the process for investigation of these substantive matters.

Yvonne Oldfield

Member of the Employment Relations Authority