

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 231  
5335708

BETWEEN                      LORNA JORDAN  
  
AND                                K. PASGAARD & COMPANY  
   LTD

Member of Authority:        Yvonne Oldfield  
  
Representatives:              Mark Beech for Applicant  
   Kim Stretton for Respondent  
  
Submissions:                    3 May 2011 for Applicant, 25 May 2011 for Respondent  
  
Determination:                31 May 2011

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship Problem**

[1]     The substantive employment relationship problem in this matter was lodged on 24 February 2011. It concerns an allegation that Mrs Jordan was constructively and unjustifiably dismissed on or shortly after 1 October 2010. In its 3 March 2011 Statement in Reply the respondent asserted that:

*“there has been correspondence between the parties following Ms Jordan’s resignation, however no grievance has been raised on [her] behalf...”*

[2]     The Reply noted that the applicant purported to have raised the grievance by letter dated 8 November 2010 and asserted that:

*“the letter does not comply with Section 14 of the Employment Relations Act 2000. More importantly, the letter was sent on a ‘without prejudice’ basis and therefore may not be taken into account when determining if a grievance has been raised.”*

[3] On 1 April I conducted a telephone conference with the representatives to discuss how matters should be progressed. The following was agreed:

- (i) the question whether the grievance was raised within 90 days would be dealt with as a preliminary issue;
- (ii) having signalled the applicant's intention to apply for leave to raise the grievance out of time (in the alternative to the claim that it had been raised within the 90 day period) Mr Beech would lodge that application with the Authority according to an agreed timetable;
- (iii) written submissions on the preliminary issues would also be timetabled and it was agreed that subject to the parties' confirmation that an investigation meeting was not required, the Authority would determine the preliminary issues on papers;
- (iv) for the purposes of determining the preliminary issues only, the Authority would have regard to the above mentioned letter of 8 November 2010 and the chain of correspondence which followed, and
- (v) if the applicant were successful in the preliminary matter, without prejudice material on the file would be sealed and the matter would be passed to another member of the Authority for determination of the grievance.

### **Issues**

[4] Mrs Jordan's application for leave to raise a grievance out of time was lodged in the Authority by amended Statement of Problem on 7 April 2011 and replied to on 26 April 2011. Submissions followed as agreed and the parties have confirmed that a determination may be made on papers. The issues for determination are:

- (i) whether the grievance was lodged within the statutory timeframe, and if not

- (ii) whether leave should be granted for it to be raised out of time.

**(i) Was the grievance raised within 90 days?**

[5] The letter of 8 November set out a chronology of the events which Mrs Jordan says led to her resignation; a resignation which it was alleged “*could be construed as a dismissal of our client.*” It went on, at paragraph (8), to outline the writer’s advice to Mrs Jordan about the remedies she might receive “*if she were to formally raise a grievance against the company.*” A claim was proposed “*in full and final settlement of all issues*” and the letter ended with:

*“Please provide us with your response no later than 5 p.m. 16 November 2010. If no response is received, our advice to our client will be to formally raise a grievance against the company...”*

[6] On 17 November the respondent’s General Manager acknowledged this correspondence and explained (without more) that he was seeking advice. On 1 December 2010 Mrs Jordan’s solicitors reminded him that he had not replied and stated:

*“Please provide us with a response as a matter of urgency as if nothing is received by 5 p.m. on 3 December 2010 we will advise our client to formally raise a grievance and file a Statement of Problem with the Employment Relations Authority.*

[7] The respondent’s advisors wrote back on 2 December 2010. That letter provided a substantive response, setting out in some detail the respondent’s views on the chronology of events. It did not seek further particulars and rejected Mrs Jordan’s claim to settle the matter.

[8] On 9 December Mrs Jordan’s advisors replied seeking an:

*“appropriate and realistic offer...”*

*If no such offer is made by your client, our client will have no option but to file a Statement of Problem in the Authority and request an urgent mediation....*

...

*“Given the previous delays, we request an answer by close of business on 13 December 2010.”*

[9] On 14 December 2010 the respondent’s representative advised that further instructions were being sought.<sup>1</sup> On 20 December Counsel for the applicant reminded the respondent’s representative that it was awaiting a response. There was no further correspondence between the parties before the 90 day period expired on 30 December 2010.

[10] Subsequently, in correspondence dated 18 February 2011, the respondents’ representative made the following statement: *“I recommend mediation as a forum to resolve Ms Jordan’s grievance.”* At no time prior to the lodging of the Statement in Reply did the respondent deny that a grievance had been raised.

#### *Determination*

[11] As noted already, it is the applicant’s position that a grievance was raised by the 8 November 2010 letter and subsequent correspondence. The applicant relies on that letter, and those which followed, only in relation to the question whether her grievance was brought to the attention of the respondent as required by s.114.

[12] I begin by recording that the letter of 8 November opened communications between the parties and contains no reference to anything of potential prejudice to the respondent. It sets out the allegations giving rise to the grievance (to which no privilege attaches) and a settlement offer by the applicant, in respect of which the applicant has waived privilege for the purposes of determination of the preliminary issue.

[13] I accept that no privilege attaches to those parts of the letter (or subsequent letters) which relate to the question whether the grievance was raised. Relevant sections of this material have therefore been taken into consideration here, and reproduced, where necessary, without disclosure of privileged material.

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<sup>1</sup> The respondent’s solicitor says that on or about 16 December 2010 she sent another letter however the applicant’s representatives say they did not receive this at the time. For this reason, and because nothing in the letter would change the outcome of this determination, I have not had regard to it.

[14] 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 Court<sup>2</sup> 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.”*

[15] Although much of the content of the letter of 8 November was disputed by the respondent, it set out Mrs Jordan’s concerns comprehensively and made it clear that she believed these matters gave rise to a constructive dismissal. I am satisfied that the respondent was made aware of the nature of the alleged employment problem and had sufficient detail to be able to respond to it.

[16] The real issue here is whether (taken individually or as a series) the correspondence from Mrs Jordan’s solicitors actually raised a grievance or merely signalled the possibility that a grievance would be raised.

[17] It is argued for the applicant that the phrase “*formally raise a grievance*” means the formal step of filing in the Authority rather than the raising of a grievance with the employer, because:

*“the fact that the word formally is used can only point to the fact that at the least a grievance had been raised informally with the employer itself.”*

[18] The applicant also notes that the respondent took active steps to resolve the matter by entering into correspondence and responding to the specifics of the applicant’s concerns.

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<sup>2</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 paragraph

[19] I accept the respondent's assertion that the letters of 8 November and 1 December do not, separately or together, amount to the raising of a grievance. Both refer to advice to be given rather than instructions received.

[20] However the letter of 9 December goes further. It states that if the respondent does not make a satisfactory offer to settle, Mrs Jordan "*will have no option but to file a Statement of Problem in the Authority.*" These words indicate that Counsel had instructions to file in the Authority if the matter did not settle. The raising of a grievance can be inferred from this reference to proceeding in the Authority. Indeed, the respondent drew the same inference as is apparent from the use of the word "grievance" in the letter of 18 February.

[21] Although the letter of 9 December does not explicitly raise a grievance, I am satisfied that it does so by clear implication, especially in the context of the exchange of correspondence set out above. The requirements of s. 114 have been met.

**(ii) Should leave be granted for the grievance to be raised outside the statutory time limit?**

[22] Even if the letter of 9 December did not by implication raise the grievance the circumstances justify the granting of leave.

[23] The applicant has argued that the circumstances were exceptional in that the respondent conducted itself as though it accepted that the grievance had been raised, actively engaging in attempts to resolve or address the issues, and the applicant in turn acted in reliance on this conduct.

[24] I was referred by Mr Beech to *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* [2008] ERNZ 139 where (as in this case) the respondent was willing to attend mediation after the 90 day period had expired. Chief Judge Colgan noted at paragraph [61] of that determination:

*"as a matter of equity and good conscience, the plaintiff's preparedness to agree to resolve the grievance by mediation, counts against its subsequent decision that Mr Edmonds had not raised his grievance beforehand. Although it is unnecessary to determine whether in law this amounts to an estoppel, an employer pursuing*

*such a course ought not, in my view, to be heard to assert in equity and good conscience after the dispute resolution process had commenced, that the employee should be found to have been disentitled to have engaged in that process.”*

[25] Mr Beech also referred me to case law in support of the principle that consent to the late raising of a grievance may be implied by engagement in a process of negotiation or mediation<sup>3</sup> and demonstrated through correspondence and the raising of a substantive defence.<sup>4</sup> These cases make it clear that a later protest to jurisdiction does not override earlier implied consent, and by extension, support the assertion that the respondent is effectively estopped from challenging jurisdiction when it has previously given the applicant to understand that it considered the grievance to have been raised.

[26] These submissions are accepted as applying to the facts of this case. The letter of 2 December incorporated a substantive response to the grievance thereby demonstrating acceptance that it had been raised already. It was followed by the 18 February letter which expressly acknowledged the existence of a grievance and offered engagement in mediation, thereby indicating that if the grievance had not previously been raised implied consent was given to it being raised out of time.

[27] Whatever approach is taken, I am satisfied that Mrs Jordan is entitled to have her grievance heard. As indicated, the file will now be passed to another Member to arrange the investigation of the substantive matters.

### **Costs**

[28] Costs are reserved.

Yvonne Oldfield

Member of the Employment Relations Authority

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<sup>3</sup> *Jacobsen v Creative Surfaces Ltd* [1994] 1 ERNZ 53

<sup>4</sup> *Phillips v Net Tel Communications Ltd* [2002] 2 ERNZ 340