



# New Zealand Employment Relations Authority Decisions

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## Kane v Fonterra Cooperative Group Limited [2011] NZERA 47; [2011] NZERA Wellington 4 (25 January 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 4 5301282

BETWEEN NATHAN KANE

Applicant

AND FONTERRA COOPERATIVE

GROUP LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

P R Stapp

Natalie Christopher for Applicant

Bill Pepperell for Respondent

22 December 2010 at New Plymouth

25 January 2011

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant has applied for leave to raise a personal grievance out of time. He has claimed that he has exceptional circumstances under s 115 (b) of the Act. He claimed that it would be just to grant leave, if there are exceptional circumstances.

[2] Fonterra has opposed the application for leave.

#### Issues

[3] Did the applicant make reasonable arrangements to have a personal grievance raised and did his agent unreasonably fail to ensure the grievance was raised?

[4] Was the delay occasioned by the exceptional circumstances under s 115 (b) of the Act (applying s 114 (4) of the Act)?

[5] Would it be just to grant leave if there are exceptional circumstances?

#### The facts

[6] The applicant's employment ended on 3 November 2009 and Fonterra put the reasons in writing for Mr Kane. Mr Kane was represented by his union (a delegate) in the disciplinary process, and he says that he understood that the union would raise his personal grievance. However another union official, the organiser, says he did inform Mr Kane the union would

take a personal grievance and challenge his dismissal. What followed was that the union secretary made a decision not to raise a personal grievance. The organiser says he informed Mr Kane's sister and his lawyer that the union would not raise a personal grievance in the ninety day period following the dismissal. The 90 days would have expired on 31 January 2010.

[7] During the ninety day period Mr Kane wrote a letter, dated 30 December 2009, purportedly to send to Fonterra, but Fonterra never received the letter. It was not addressed to Fonterra. He sent the letter to his sister and his lawyer who he was using in a criminal matter. He was uncertain in his evidence about sending the letter to Fonterra. Also Mr Kane relied on his sister communicating with the union organiser twice around 21 January 2010, by telephone. There is proof of the calls, but Mr Kane's sister and the union organiser have different recollections about what they said during the calls.

[8] The union organiser says that the decision made by the union's secretary not to raise the personal grievance was because it had a slim chance of success. The union organiser says he told Mr Kane's sister that the union was not raising the grievance. Mr Kane's sister denied that. The union organiser says that he also told Mr Kane's lawyer at the time that the union would not raise the personal grievance, and this was not challenged.

[9] Mr Kane's lawyer found out that Fonterra had not received Mr Kane's letter and sent a letter dated 26 January 2010 to Fonterra. The letter was succinct and verbatim is as follows:

*We act for Mr Kane (sic) You should consider this letter as a formal submission of a personal grievance pursuant to [section 114](#) of the [Employment Relations Act 2000](#)*

*We shall report again to you once we have full details of Mr Kane's personal grievance.*

[10] Full details of the claim were then provided by Mr Kane's lawyer in another letter dated 30 March 2010, outside the time for raising a personal grievance.

[11] In a letter dated 11 August 2010 the Mr Kane's lawyer accepted;

- That Fonterra had not received any correspondence from the union raising a personal grievance,
- That Fonterra had not received adequate details of Mr Kane's personal grievance within 90 days, and
- That the letter dated 26 January 2010 (above) was not sufficient to raise Mr Kane's personal grievance.

[12] Mr Kane is on legal aid.

## **Submissions**

[13] Mr Kane's application relies on [s 115](#) (b) of the Act in that he made all reasonable arrangements to have his personal grievance raised by his union official, who Mr Kane claims unreasonably failed to do so. Also, his lawyer wants the Authority to consider that Mr Kane's lawyer's action at the time was taken in good faith with a belief that Fonterra had received his letter dated 30 December 2009 and that adequate details were not available from Fonterra in time.

[14] I have decided not to repeat Fonterra's submissions as these will become apparent in my comments.

[15] The facts here have to be applied with the law as set out in *The Chief Executive of the Department of Corrections v Aaron Waitai and Ors* [2010] NZ EmplC 164 WRC 24/09 21 December 2010 and *Lynette Melville v Air New Zealand Limited* [2010] NZEMPLC [87 ARC 18/10](#) 8 July 2010.

## **Determination**

[16] [Section 114](#) (4) (b) of the Act reads as follows:

*[the Authority] 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*

[17] Mr Kane has relied on [section 115](#) (b) of the Act which reads as follows:

*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 in the required time;...*

[18] Mr Kane has to satisfy both parts of [section 115\(b\)](#) that is:

- a. He made reasonable arrangements to have his grievance raised, and
- b. His agent unreasonably failed to ensure that the grievance was raised.

[19] He also has to then satisfy that any exceptional circumstances occasioned the delay as per [section 114](#) (4) of the Act.

[20] Mr Kane has relied on his union representatives. He believed that the union would raise his grievance when the union

organiser referred to challenging the dismissal and Mr Kane's knowledge as a union member about what was to happen. There is no question that his grievance was not raised by the union.

[21] The difficulty that Mr Kane has with his evidence is that the union organiser (summonsed) denied telling him and his sister that the union would raise the personal grievance, but says that he would have led Mr Kane to believe that the union would take a personal grievance and challenge the dismissal, which involved a step for an assessment of the matter prior to formally raising it. This assessment was done by the union's secretary. I accept this because the union secretary ultimately made the decision not to raise the grievance (not challenged).

[22] Next there is an issue about whether or not Mr Kane and or his sister were told by the union organiser that the union would not raise his personal grievance. The union organiser was adamant that he told Mr Kane's sister that the union would not be raising the personal grievance in one of the telephone calls they had.

[23] The union organiser's evidence is plausible in as much as:

- a. Mr Kane and his sister had been advised by their lawyer to check that the union had raised the grievance.
- b. Mr Kane did get further legal assistance in regard to his grievance during the 90 days and that makes it probable he did know the union was not raising the grievance on his behalf.
- c. Mr Kane wrote a letter dated 30 December 2009 about his views on the facts of his personal grievance. This could have only been to assist his agents. The letter was not addressed to Fonterra. Fonterra never received it. I have to say that the content of that letter would not have been sufficient to have put Fonterra on notice of a claim with the detail required if it had received it.
- d. The union organiser did not resile from his evidence that he told Mr Kane's sister that the union would not be raising the grievance. However, he did say that any comments he made to Mr Kane needed to be considered in the context that the union's secretary made the decision on whether or not the grievance would be raised. Thus, he says he could have said the union would take the grievance and challenge the dismissal as he was not the decision maker. This is consistent with the evidence that the union did not raise the grievance. These comments would not have been enough to formally raise a grievance under the law. There is no evidence that the comments were made to anyone at Fonterra. There was no evidence of any claim.
  - e. The union organiser says he was told by the union secretary that the union would not raise the grievance, and this was not challenged.
  - f. Mr Kane's and his sister's claim that they "*heard and understood the union would raise the personal grievance*" conflicts with their evidence that they were told the grievance would be raised by the union officials and that there is conflicting evidence from the union organiser. Mr Kane and his sister were both adamant about what they say they understood. Equally the union organiser was adamant he did not tell them the union would raise the grievance.
  - g. The union organiser says he told Mr Kane's lawyer on the telephone that the union would not be raising the personal grievance, which was not challenged.

h. Mr Kane's sister could not recall Mr Kane's letter dated 30 December 2009.

[24] The above tips the balance in favour of the union organiser's evidence I hold. For these reasons I prefer the union organiser's evidence.

[25] Mr Kane has relied on knowing that a personal grievance had to be "raised" because of his 18 years work experience and being a union member. This was not challenged. Knowing that, and the appropriate action being taken to raise the grievance, are entirely different matters, I hold, especially when the union exercised its discretion not to raise the grievance. Unfortunately for Mr Kane he did not pursue the matter as he is required to do under the law and his evidence has fallen short of establishing his instructions to the union to raise a grievance (applying *Melville v Air New Zealand Limited*.)

[26] The union in best practice should have raised his personal grievance and then left it to Mr Kane to pursue after the union had exercised its discretion not to take the grievance any further.

[27] This leads to the next issue, which is, whether Mr Kane's union unreasonably failed to ensure his grievance was raised?

[28] There was no obligation on the union to raise the grievance, I hold. It exercised its discretion, albeit inadequately by not properly communicating its decision to Mr Kane and or his sister, in writing. The verbal communication has possibly become confused and there has been some genuine misunderstanding. I accept that there were communication difficulties with Mr Kane's imprisonment, but any such difficulties should not have been insurmountable to maintain some contact with him directly. Indeed there were arrangements in place with the union between Mr Kane, his sister and their lawyer. Mr Kane had time to act when it was more than likely that he would have known about the union's position, I hold. He still had time before

the 90 days ran out (albeit at least 7 days) and had his sister helping, and she contacted the union and the lawyer. This is supported by the lawyer's letter dated 26 January 2010 where Mr Kane's lawyer had time to raise the grievance. Also, Mr Kane had involved his sister and the lawyer before the expiry of the 90 days on 31 December 2009.

[29] I accept that the union made its discretionary decision by assessing the likely success of any claim, and decided a personal grievance did not have much of a chance. It was entitled to make that assessment, I hold. Thus it could not be said to have unreasonably failed to ensure the grievance was raised, especially where there was time remaining for Mr Kane and or his sister to get other representation and have the grievance raised. Unfortunately for Mr Kane he then needed to act quickly. I accept his imprisonment would be a cause for difficulty, but not impossible to make some arrangements. Indeed he had his sister looking after his interests and had the service of a lawyer. Also, he had to rely on the expertise of his lawyer at the time, who unfortunately did not raise the grievance in time either, and for which there has been no explanation provided, except that she was acting in good faith to "submit" a grievance, without the details of the claim, and she put Fonterra on notice that more information was being gathered.

[30] It was submitted on Mr Kane's behalf that his lawyer at the time acted in good faith believing that Fonterra received Mr Kane's letter dated 30 December 2009 and that she could not get adequate details from Fonterra in time. The first point is not directly relevant and the second point is wrong, I hold. First, the Lawyer's letter dated 26 January 2010 had a mixed message about an intention of raising a personal grievance but waiting until the lawyer had more information. Second, there has been no evidence that the lawyer was seeking information from Fonterra because the letter never asked for it. It follows that Mr Kane had to be relying on his lawyer and that his lawyer failed to raise the personal grievance in time. Also, I conclude that Mr Kane's lawyer must have decided to get more information before completing the detail of the claim as required, and especially where her action to do so was deliberate and clear from reading her letter. It is less clear from any of the evidence about what information the lawyer actually had. There is evidence in the letter dated 26 January 2010 that she had been instructed at least to "submit" a personal grievance under [s 114](#) of Act (which would accord with attempting to raise a personal grievance), and it has not been challenged that the union organiser told Mr Kane's lawyer that the union would not be raising the grievance before the expiry of the ninety days. Thus, I can only conclude that this was the cause of the delay and not that the union had unreasonably not raised the grievance as claimed.

[31] It follows that Mr Kane did not make a reasonable attempt to have his personal grievance raised by an agent (the union and his lawyer) when the union made a decision not to raise the grievance in the 90 days and Mr Kane was informed of that position, at least through his sister. The union exercised its discretion not to raise the grievance.

[32] Therefore, I hold that the union did not unreasonably fail to raise the grievance in time because of the decision made by the union secretary and the decision was made before the 90 day period expired, although it could have ensured that Mr Kane was told directly and provided with a written record to accord with best practice. The events after that have not been relied upon in the current application for leave that involved Mr Kane's lawyer at the time. Also, I have to hold that the delay was not occasioned by the claim for exceptional circumstances relied upon by Mr Kane (applying [s 114](#) (4) of the Act).

### **Orders of the Authority**

[33] The applicant's claim is dismissed. [34] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority