Determination Number: AA 13/07
File Number: 5050221

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Kishor Kumar
AND	NZ Automobile Association Incorporated
REPRESENTATIVES	Applicant in person Andrew Radich for Respondent
MEMBER OF AUTHORITY	Robin Arthur
INVESTIGATION MEETING	17 January 2007
DATE OF DETERMINATION	22 January 2007

DETERMINATION OF THE AUTHORITY

[1] This determination concerns a preliminary issue of whether the applicant's personal grievance was raised with the respondent within the required statutory period.

[2] The applicant alleges he was unjustifiably dismissed from his job as a vehicle testing offer for the respondent on 20 March 2006 and seeks a direction of his grievance to mediation.

[3] The respondent denies the allegation of an unjustified dismissal but opposes any direction to mediation as it says the grievance was not raised within the required 90 day period.

[4] Evidence considered in investigating this preliminary issue included written statements from the applicant, the respondent's managers Paul Gribble and Dolphi Rodrigues and its HR consultant Andrew Radich who were all present at the disciplinary meeting and dismissal of the applicant on 20 March 2006 ("the 20 March meeting"). All four attended and answered questions at the investigation meeting. At my request, Stuart Hurst, an organiser of the Engineering Printing and Manufacturing Union ("EPMU") also provided a written statement. He was on leave at the time of the investigation meeting and I did not require his attendance. During the meeting the applicant confirmed passages from Mr Hurst's statement as correct and I have not needed to make any arrangements to interview Mr Hurst in person.

The facts

[5] The applicant's employment agreement includes the following provision for dealing with employment relationship problems ("clause 23"):

> *In the event that you have an employment relationship problem, including a personal grievance … you should raise this issue with the Employer as soon as practicable, and in any event within 90 days of its arising or coming to your attention, whichever is the later. If you fail to raise a problem with the Employer within this timeframe, you may be prevented from seeking any remedies under the Employment Relations Act 2000.*
>
> *Once you have raised the problem, the Employer will acknowledge the complaint and endeavour to discuss and resolve the issue with you. In the event that the matter is not resolved at this point, either you or the Employee may request assistance from the*

mediation service of the Department of Labour and/or refer the matter to the Employment Relations Authority, in the manner set out in the Employment Relations Act 2000. …

[6] The clause then refers to an appendix to the employment agreement which repeats the requirement to raise a personal grievance within 90 days.

[7] By letter dated 14 March 2006 the respondent called the applicant to a disciplinary meeting to discuss work issues. The letter advised the applicant of the purpose of the meeting and his right to attend with a support person or representative.

[8] The applicant was not able to arrange a representative at the proposed time and the respondent rescheduled the meeting to a suitable time.

[9] The applicant was a member of the EPMU. He was not able to arrange for his union organiser Mr Hurst to attend the meeting but instead arranged for a representative identified only as "Dave" to go with him.

[10] I wanted to hear from "Dave" directly as he may have been able to assist with evidence about whether he or the applicant took any steps to raise a personal grievance at the conclusion of the 20 March meeting or subsequently. However the applicant told me he was unable to contact "Dave" and believed he may be overseas. He could not tell me Dave's surname or provide any contact details for him.

[11] It appears that the applicant told Mr Radich and Mr Hurst that "Dave" was a lawyer. However the applicant told me that he did not know if Dave was a lawyer but confirmed that Dave attended the meeting as his representative. Notes taken by Mr Radich in the 20 March meeting suggest that Dave made a verbal submission on the applicant's behalf. This included acknowledging a mistake and suggesting training and a final warning as the appropriate disciplinary outcome.

[12] The applicant insists that at the end of the disciplinary meeting that he spent as long as five minutes talking about how he did not accept the respondent's decision to dismiss him and would take the matter further.

[13] Mr Radich, Mr Gribble and Mr Rodrigues are similarly insistent that no such discussion took place. Instead they point to the notes taken by Mr Radich and Mr Gribble at the meeting which record no such comments from the applicant. Their evidence is that after Mr Gribble advised the applicant of the decision to dismiss him, Mr Gribble asked whether the applicant had any comments to make. The applicant then spoke about the conduct of another employee. Mr Radich then asked again whether the applicant had any comment to make on the decision to dismiss him. Mr Radich's meeting notes record the answer given as: "No".

[14] Shortly after the dismissal the applicant spoke with Mr Hurst. He asked for legal advice on the merits of a personal grievance. Mr Hurst agreed to refer the matter to the union's legal team.

[15] After some weeks – and before 4 June 2006 – Mr Hurst spoke again with the applicant and gave him the union's advice regarding a personal grievance.

[16] The applicant told me that following that discussion with Mr Hurst he understood that the union was not prepared to represent him in a personal grievance application. Instead he would have to take steps himself.

[17] On 4 June 2006 the applicant wrote a one page letter addressed to the Mediation Service of the Department of Labour. It referred to the reasons for his dismissal and described those reasons as unjustified. The letter included a "*request that the concerned parties be brought to mediation*". This letter was written some 76 days after the applicant's dismissal.

[18] Early in my investigation of this matter I obtained a copy of the Mediation Service electronic file notes of how it dealt with that request for mediation assistance. I provided copies of this record to the parties.

[19] Those notes show that the request was acknowledged within five days of it having been written. However the employer was not contacted by the Service until 29 August 2006. On 31 August Mr Radich told the Mediation Service that the respondent had not been advised of the grievance within 90 days. The Service officer's notes also record that in a call to Mr Kumar on 31 August Mr Kumar said that he had not written to the employer about the grievance.

[20] The notes show that Mr Kumar had called the Service on 28 and 29 August to check on progress with arranging a mediation. He was told that the Service had not contacted the employer as there were no contact details available. However the Service officer's notes record that while there were no contact details on the physical file, these details were on the electronic file notes. Contact phone numbers for both the applicant and the employer were was recorded in those file notes on 15 June – some ten weeks earlier.

[21] Since August 2006 the respondent has maintained its position that the grievance was not raised in time and that it does not consent to it being raised out outside the 90 day period.

The merits

[22] The applicant's position is that he has complied with the obligation to raise the grievance within 90 days – firstly, by saying in the 20 March meeting that he did not accept the dismissal decision and would take the matter further, and secondly, by writing to the Mediation Service on 4 June.

[23] The applicant confirmed to me that he had read clause 23 of his employment agreement shortly before the 20 March meeting and was aware of the requirement to raise any grievance within 90 days.

[24] In response to a question from me, Mr Radich confirmed that he understood that the specific words 'personal grievance' need not have been expressly mentioned but other more general words such as referring to taking the matter further might suffice to raise a grievance. He said that this understanding was the reason he took care to repeat the question to the applicant in the 20 March meeting as to whether he had any comment to make on the decision to dismiss him.

[25] I prefer the respondent witnesses' evidence on whether a grievance was raised in the 20 March meeting. On the balance of probabilities I consider it more likely than not that the applicant made no reference – directly or indirectly – to raising a grievance at that meeting. That is consistent with the brief notes taken by the managers at that meeting. It is also consistent with the applicant's actions – who by his own account, and confirmed by Mr Hurst's written statement – first sought advice from his union about the prospects for a successful personal grievance application. He was taking steps to assess his position before raising a grievance.

[26] Accordingly I find that a grievance was not raised on 20 March, either by the applicant or his representative.

[27] Neither do I find that a grievance was properly raised through the applicant's letter to the Mediation Service on 4 June 2006. At that time he appeared to be relying on the Mediation Service contacting the employer to advise of the applicant's grievance.

[28] That is not what is required by clause 23 of the employment agreement which the applicant had checked prior to his dismissal. The clause clearly requires a communication of the grievance directly to the employer. That communication may be made by the worker personally or through a representative, in words or in writing.

[29] The Mediation Service is an independent statutory service provided by the Department of Labour under the provisions of the Employment Relations Act 2000 ("the Act"). The Service is not and does not act as the representative of any party to an employment relationship problem. Of course while carrying out its statutory duties, it may communicate some information between parties but that does not extend to the notification required by clause 23 of the applicant's employment agreement.

[30] The applicant may be disappointed that the Service took so long to action his request for mediation assistance – and he may have hoped that by contacting the respondent, the Service would have advised the respondent of his personal grievance within the 90 day period. However that does not absolve the applicant of what was his clear obligation – to himself raise the grievance with the employer.

[31] Having found that that the grievance was not raised within 90 days, I have considered whether there are exceptional circumstances – as provided for under s114(4) of the Act – for granting leave to the applicant to raise his grievance outside that period.

[32] I discussed with the applicant each of the examples of exceptional circumstances given in section 115 of the Act. He accepts that he was not so affected by the dismissal that he was unable to properly consider raising the grievance within the 90 day period. Rather he acknowledges that he did in fact consider and act on the matter in that period – by talking with his union organiser and sending a letter to the Mediation Service. He also accepts that he had not relied on reasonable arrangements made with an agent to raise the grievance in time. He had not arranged for his representative "Dave" to raise the grievance and by 4 June he understood that the union would not act in a grievance for him. Neither do the other examples apply as his employment agreement set out the requirements for resolving problems and he was promptly provided with the reasons for his dimisssal in a letter dated 20 March 2006.

[33] The applicant was not able to point to anything else that was exceptional in the circumstances of his case. He told me that he had done what he understood was necessary to raise the grievance. While he may have believed his letter to the Mediation Service sufficient to raise the grievance, that, in my determination, was simply a misunderstanding of the requirements of his employment agreement and the law. It does not amount to an exceptional circumstance of the type which make it just to grant leave for the applicant to have his grievance dealt with now.

Determination

[34] As a result of my investigation I am satisfied that the applicant did not raise his personal grievance with the respondent within the 90 days required by his employment agreement and section 114(1) of the Employment Relations Act. I am also satisfied that there are no exceptional circumstances which would make it just to grant him leave under s114(4) of the Act to raise his grievance outside that period. Accordingly the application is dismissed.

Costs

[35] The respondent did not raise any issue of legal costs. Mr Radich, its human resources consultant, represented it throughout this matter, including during the one-and-a-half hour investigation meeting. If there is any issue of costs, the parties are encouraged to resolve them between themselves. If they are not able to do so, the respondent may ask for that issue to be determined by the Authority.

Robin Arthur
Member of Employment Relations Authority