



the substantive matter, that is, whether Mr Lowe was dismissed or he resigned, would be addressed at a later date.

[3] The Authority received written briefs of evidence from Mr Lowe and Mr Franciscus (Frank) Bankers, the sole director and owner of MEL, along with supporting evidential documents.

### **The Issue**

[4] It is commonly accepted that the preliminary issue for the Authority to determine is: Did Mr Lowe raise a personal grievance with his employer within the period of 90 days as required by s.114? And; if not, should the Authority grant leave to raise the grievance after the expiration of the 90-day period because it was occasioned by exceptional circumstances; and it is considered just to do so?

[5] At the investigation meeting on 12<sup>th</sup> August 2009, having considered the totality of the evidence presented, I gave an oral decision to the parties. I concluded that Mr Lowe had satisfied the requirements of s.114 of the Act and as a consequence, he was entitled to pursue a personal grievance related to the substantive matter. I now provide a written determination setting out the reasons for my oral decision.

### **Background**

[6] The issues arising relating to the preliminary 90-days matter are not complex and there is some inevitable overlap between the evidence as it relates to the 90-days issue and the substantive matter.

[7] Mr Lowe commenced his employment at MEL in March 2004. He was directly responsible to the owner of the business, Mr Frank Bankers. In August 2008, some issues arose relating to the day-to-day operation of the business prompting Mr Lowe to express some dissatisfaction. One of the issues for Mr Lowe was his employment contract.

[8] On Tuesday 26<sup>th</sup> August 2008, Mr Lowe returned his employment contract to Mr Bankers and informed him that he; “was not happy with the way things were going.” Mr Lowe also requested that Mr Bankers provide him with a reference as he

was going to assemble a CV and start “looking at other options.” Mr Lowe says that Mr Bankers asked him if he was giving notice. Mr Lowe replied that he wasn’t, but he would provide written notice when he found another job.

[9] The contrary evidence of Mr Bankers is that Mr Lowe came to him on 27<sup>th</sup> August 2008 and told him that he was handing in his notice, effectively giving the contractual one week’s notice.

[10] I am not required to determine this conflict in the evidence. It is enough to say that it is commonly accepted that the last day of employment for Mr Lowe at MEL was Tuesday, 2<sup>nd</sup> September, 2008.

[11] On or about 4<sup>th</sup> September 2008, Mr Lowe forwarded two pages of written material taken from the Department of Labour website. Among other details, the material provides information pertaining to dismissal, personal grievances and the 90-day limitation period. On the bottom of the first page Mr Lowe has handwritten: “I Andrew Lowe are [sic] requesting an Explanation [sic] of dismissal az [sic] of the 4/09/08.”

I find that this document cannot be held to be raising a grievance.

[12] Mr Bankers responded on 5<sup>th</sup> September 2008:

“ANDREW

AS ACTING IN GOOD FAITH I AM REPLYING TO YOUR LETTER. AS YOU GAVE NOTICE AND I DID NOT DISMISS YOU NO EXPLANATION IS REQUIRED ON MY PART.”

[13] Mr Lowe wrote again to Mr Bankers: [The letter is reproduced as presented.] “I andrew Lowe are not happy with the way things were hanld over my employment dismissal with matamata engineering LtD and wood like a copey of the wage book as i will be seeking compensation on this matter. I am happy to talk. You can ring me on 07 888 954.” The letter is dated 20<sup>th</sup> November 2008. The envelope it was enclosed in is postmarked Friday, 28<sup>th</sup> November 2008. Mr Bankers received it on Monday 1<sup>st</sup> December 2008. He then sought legal advice.

[14] Mr Bankers does not dispute that Mr Lowe has raised a grievance as he is aware that Mr Lowe is claiming that he was dismissed and did not resign. What is in dispute is whether Mr Lowe raised the grievance within the 90-day limitation period. Mr Bankers says (and it is accepted) that he did not receive Mr Lowe's letter until 1<sup>st</sup> December 2008. From 2<sup>nd</sup> September (the date on which the action alleged to amount to a personal grievance occurred) to 1<sup>st</sup> December 2008, is 91 days. Hence, Mr Bankers says that Mr Lowe is one day out of time. Initially, Mr Bankers took the view that Mr Lowe's grievance arose on 27<sup>th</sup> September 2008, when he alleges Mr Lowe resigned, but this cannot be correct as the "action alleged to amount to a personal grievance"<sup>1</sup> was the departure of Mr Lowe which occurred on 2<sup>nd</sup> September 2008.

### **Determination**

[15] I find that while it can be argued that Mr Lowe did not raise his personal grievance within the 90-day time limit, there are two particular factors which have lead me to conclude that Mr Lowe has satisfied the overall requirements of s.114 of the Act. Firstly, there are the postal details. A letter from New Zealand Post confirms Mr Lowe's letter would have been processed on the evening of Friday 28<sup>th</sup> November and should have been delivered to the MEL post office box on Saturday 29<sup>th</sup> November 2008. While Mr Bankers did not pick up his mail until Monday 1<sup>st</sup> December, I find that the letter was most probably delivered to the business address within the 90-day time frame. Secondly, even if the argument for Mr Bankers were to be accepted, I would be inclined to hold that the postal situation constitutes an exceptional circumstance and I consider it is just that Mr Lowe has leave to raise his grievance. It was not the fault of Mr Lowe that the post office box was not cleared until the Monday rather than the Saturday.

[16] There is of course a third aspect to all of this. As Chief Judge Colgan held in *Board of Trustees of Te Kura Kaupapa Motuhake o Ta Tawhiuau*, AC 14/08, 16 May 2008: "The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it."

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<sup>1</sup> S.114 (1) Employment Relations Act 2000

[17] While the above can be seen in the context of the employer's knowledge of the subject matter of the complaint in that case, the judgment also focuses on the objects of the Employment Relations Act 2000.<sup>2</sup> That is, being to allow access to dispute resolution mechanisms rather than adherence to rigid formal procedures. Given the overall circumstances of this case it would be wrong and an injustice for the Authority to deny Mr Lowe access to a dispute resolution process.

### **Conclusion**

[18] Given the oral decision of the Authority, the parties voluntarily sought the assistance of a Department of Labour Mediator who assisted them to record an agreed record of settlement. No further involvement of the Authority is required in regard to the substantive matter.

### **Costs**

[19] Costs are reserved.

**K J Anderson**  
**Member of the Employment Relations Authority**

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<sup>2</sup> S.101 Employment Relations Act 2000