

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 228
3009275

BETWEEN LARRY MAXWELL
 Applicant

A N D FONTERRA CO-OPERATIVE
 GROUP LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Allan Halse, Advocate for Applicant
 Shan Wilson and Rachel Judge, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 June 2017 from Applicant
 13 June 2017 from Respondent
 29 June 2017 from Applicant
 06 July 2017 from Respondent
 18 July 2017 from Applicant
 18 July 2017 from Respondent

Date of Determination: 01 August 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Fonterra says that because Mr Maxwell had not directly raised a personal grievance with it, Fonterra only became aware that Mr Maxwell considered he had been unjustifiably disadvantaged in his employment after his Statement of Problem was served on it.

[2] Service occurred on 11 May 2017. Fonterra says the Authority does not have jurisdiction to consider any personal grievance claim that occurred before 10 February 2017, being 90 days prior to service of the Statement of Problem on Fonterra.

[3] Mr Maxwell is required to drive a forklift as part of his usual work duties. However he is currently on light duties because Fonterra instructed him not to drive the forklift using self-made wooden modifications which he had been using as the result of a work related injury that had occurred in August 2014.

[4] Fonterra instructed Mr Maxwell to stop driving with these self-made wooden modifications based on two expert reports from an occupational therapist which suggested that the self-made modifications were not only not necessary but they may contribute to fatigue and increased pressure on Mr Maxwell's upper back.

[5] Fonterra further says that it received advice from the supplier of the forklift that its equipment must not be used with the modifications that Mr Maxwell wants to use, creating legal risk to Fonterra if it allowed the situation of Mr Maxwell using his self-made wooden modifications while driving the forklift to continue.

[6] Mr Maxwell wants to continue using the wooden modifications because he believes they prevent him from suffering further back injury. He strongly objects to Fonterra's instruction not to continue using the wooden modifications while driving.

[7] Mr Maxwell has been on light duties since 12 September 2016 as a result of his refusal to comply with Fonterra's instruction that he cease using the self-made wooden modifications he had been using previously. Fonterra says that the continuation of these light duties are in its view "*a difficult solution to sustain long term*".

[8] Mr Larry Maxwell claims an unjustified disadvantage grievance against Fonterra Co-operative Group Limited (Fonterra) for its "*adverse impact [...] on [his] health and wellbeing.*" Mr Maxwell also claims that Fonterra also breached its duty of good faith to him.

[9] Although Mr Maxwell did not record that he was pursuing a penalty claim in the section of the Statement of Problem which set out the problem he wanted resolved, nevertheless in the remedies section he sought (among other remedies) that penalties be imposed on Fonterra for breaching its health and safety obligations and for "*considering communicating with the Dairy Workers Union Adviser*" about Mr Maxwell with what he says was an intent to breach his privacy.

[10] In paragraph 1 of his Statement of Problem Mr Maxwell sets out one unjustified disadvantage grievance. However in paragraph 2 of his Statement of Problem Mr Maxwell sets out a number of different concerns which date back to January 2015.

[11] Paragraph 3 in the Statement of Problem deals with the unjustified disadvantage grievance. Mr Maxwell identifies the following concerns in support of his disadvantage claim:

- a. A comment on 29 January 2015;
- b. A Work Outcomes Plan dated 2014 which he says he became aware of it August 2016;
- c. An investigation report completed on 28 October 2016;
- d. An attempt to 'engage' with a DWU union advisor in October 2016.

[12] Mr Maxwell did not record the date on which his disadvantage grievance arose or had come to his attention (if later than the date on which the grievance arose). Nor did Mr Maxwell identify what if anything he had done to raise a personal grievance or when or how or to whom a personal grievance claim had been raised.

[13] Fonterra took issue with the Authority's jurisdiction to determine Mr Maxwell's personal grievance claim on the basis he failed to raise it within the 90 day time limit specified by the Employment Relations Act 2000 (the Act).

[14] Fonterra does not consent to Mr Maxwell raising a personal grievance claim out of time and further says there were no exceptional circumstances for the delay so it would not be just for the Authority to have grant leave to Mr Maxwell to raise his grievance out of time.

[15] It was also unclear from the Statement of Problem what Mr Maxwell's alleged breach of good faith related to or which section in the Act he was basing his penalty claim on.

[16] The parties were invited to respond with submissions and any other evidence they wanted the Authority to consider in respect of the jurisdiction issue. Both parties did so. By agreement the jurisdiction matter has been determined on the papers.

[17] The Authority derives its jurisdiction to investigate employment relationship problems from the Act. Problems between parties to an employment relationship that do not fall within the express jurisdiction specified by the Act are not able to be investigated by the Authority.

[18] Mr Maxwell's representative Mr Halse initially rejected the Authority's invitation to provide further information to establish that the Authority had jurisdiction over the claims in Mr Maxwell's Statement of Problem. Mr Halse advised the Authority that it was unnecessary for Mr Maxwell to provide evidence establishing jurisdiction, because in Mr Halse's view the 90 day time period did not apply. I do not accept that.

[19] Section 114 (1) of the Act requires an employee who wishes to raise personal grievance to do so within 90 days beginning with the period on which the action alleged to amount to a personal grievance occurred or came to the employees notice, whichever is the later unless the employer consents to a personal grievance being raised outside of the 90 days.

[20] Section 114(2) of the Act states that in order to raise a grievance the employee must take reasonable steps to make the employer aware of the alleged personal grievance. The Employment Court has stated that an employee must provide sufficient information about the alleged grievance to enable the employer to address it.

[21] Where an employer has not consented to the raising of the grievance out of time an employee may seek leave from the Authority to raise it after the expiration of the 90 day period.

[22] The Authority has the discretion to grant leave if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it considers it just to grant leave to an employee to raise their personal grievance out of time¹.

[23] Section 115 of the Act sets out examples of exceptional circumstances, none of which apply in this case.

¹ Section 114(4) of the Act.

[24] Mr Maxwell has failed to identify either within the Statement of Problem or by way of the additional information and submissions filed by Mr Halse any unjustified action or disadvantage that arose on or after 10 February 2017.

[25] There do not appear to be any 'actions' by Fonterra within 90 days of service of the Statement of Problem which gave rise to any alleged disadvantage to Mr Maxwell.

[26] In submissions and further information filed by Mr Halse on 29 June 2017 he identified that the breach of good faith claim related to s.4(1A) of the Act. Section 4(1A) requires an employer that is proposing to make a decision that may adversely impact on an employee's ongoing employment to provide that employee with access to relevant information and opportunity to comment on that before a final decision is made.

[27] I find that s.4(1A) of the Act does not apply in the current situation because Mr Maxwell's employment was on-going and Fonterra had not at that point proposed making a decision which would or would be likely to have an adverse effect on the continuation of Mr Maxwell's employment.

[28] So there is no factual basis for the alleged breach of good faith identified in the Statement of Problem or the associated potential penalty claim to be investigated by the Authority.

[29] In respect of the potential penalty claim Mr Halse identified that Mr Maxwell was seeking a penalty under s.133(1) of the Act. This relates to a penalty for a breach of an employment agreement or for a breach of the Act for which a penalty is provided.

[30] Although Mr Halse was invited to identify what particular breaches he was relying on to give rise to the penalty claim he failed to do so. I am therefore not satisfied that there is a valid legal claim currently before the Authority which would potentially give rise to the Authority's penalty jurisdiction.

[31] Based on the information currently before the Authority, there is no evidence to show that Mr Maxwell raised any personal grievance claim within the 90 day period specified in s.114 of the Act.

[32] Although Mr Maxwell says that he was unhappy with his employer's actions something more than an expression of discontent is required in order to raise a personal grievance in accordance with the requirements of s.114(2) of the Act.

[33] The Employment Court in *Winstone Wallboards v Samate*² and *Goodall v Marigny (NZ) Ltd*³ stated that sufficient information had to be provided by an employee when they raised their grievance to enable the employer to address it or remedy it rapidly and as near as possible to the point of origin.

[34] The Employment Court in *Creedy v Commissioner of Police*⁴ said that for an employer to be able to address a grievance which an employee has raised then the employer must know what it is that it is required to address. Finally, in the *Chief Executive of the Department of Corrections v Waitai*⁵ the Employment Court confirmed that the key test is what the employer could reasonably have taken from the words used.

[35] At no stage did Mr Maxwell take reasonable steps to make Fonterra aware that he was alleging that he had been subjected to unjustified action which from his perspective had unjustifiably disadvantaged him in his employment. While Fonterra acknowledges that Mr Maxwell expressed health and safety related concerns he did not do so by raising a personal grievance claim.

[36] There is no evidence or information before the Authority that establishes to the required standard of proof that Mr Maxwell advised Fonterra that he considered he had suffered an unjustified disadvantage grievance. Nor did Mr Maxwell identify what solution or remedies he was seeking in order to address any perceived alleged disadvantage grievance.

[37] Mr Maxwell has not identified any exceptional circumstances which would explain his delay in raising his disadvantage grievance so he has not established the grounds that would enable the Authority to grant him leave to raise his disadvantage claim out of time.

[38] Mr Maxwell had the benefit of union representation at the time his concerns arose so he had professional advisers and union support available to him. These are

² [1993] 1 ERNZ 503.

³ [2000] 2 ERNZ 60.

⁴ [2006] ERNZ517.

factors that would have enabled him to have raised his grievance within time, thus weighing against a grant to leave to raise a disadvantage grievance outside the 90 day time limit.

[39] I accept Fonterra's submission that it would not be just for the Authority to exercise its discretion to allow Mr Maxwell to raise his personal grievance out of time in the circumstances.

[40] There is a public interest in employers being able to rely on the certainty of s.114 in the Act so an employee needs to bring themselves within the "exceptional circumstances" requirement in s.115 of the Act in order to be granted leave to raise a grievance out of time.

[41] I am not satisfied that the delay was caused by exceptional circumstances so do not consider I have the discretion to grant leave to Mr Maxwell to raise his grievance outside the 90 day time limit.

[42] For the reasons discussed, Mr Maxwell has not identified any actionable claim in his Statement of Problem over which the Authority has jurisdiction. I am therefore not satisfied that the Authority has jurisdiction to investigate the matter filed under AEA3009275 so it will not proceed.

Costs

[43] The parties are encouraged to resolve costs by agreement. If agreement is not reached then either party has seven days from the date of this determination within which to file a costs application. The other party has 7 days within which to file their costs response.

Rachel Larmer
Member of the Employment Relations Authority

⁵ [2010] NZEmpC164.