

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 396
5415179

BETWEEN PHILLIP McGARRETT
Applicant

A N D METALLIC SWEEPING
(1998) LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Christopher Twigley, Counsel for the Applicant
Tim McGinn, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 15 September 2014 from the Applicant
19 September 2014 from the Respondent
25 September 2014 from the Applicant

Date of Determination: 26 September 2014

DETERMINATION OF THE AUTHORITY

A The Authority does not have jurisdiction to investigate Mr Phillip McGarrett's personal grievance claim because he did not raise a dismissal grievance with his employer within 90 days of it arising.

Employment relationship problem

[1] Metallic Sweeping (1998) Limited (Metallic Sweeping) provides street cleaning services to the Gisborne District Council (the Council) under the terms of a commercial contract.

[2] Mr McGarrett was initially employed by Metallic Sweeping as a casual labourer on 19 November 2010 under a written individual employment agreement. The terms of this agreement were varied on or around 18 April 2011 with Mr

McGarrett being promoted to the role of “Working Supervisor”. This role change was recorded in a letter to him dated 18 April 2011.

[3] On 11 February 2013 Metallic Sweeping wrote to Mr McGarrett drawing his attention to various performance concerns. On 14 February 2013 Metallic Sweeping’s Managing Director, Mr Peter, phoned Mr McGarrett to discuss the contents of the 11 February letter. During this conversation Mr McGarrett advised Mr Peter that he was resigning immediately in response to the letter.

[4] Mr McGarrett confirmed his resignation by faxing Metallic Sweeping on 18 February 2013 a letter incorrectly dated 18 March 2013. The date should have been 18 February (not March). In his resignation letter Mr McGarrett responded to the concerns Metallic Sweeping had identified in its letter of 11 February. He also expressed concern over wage and holiday pay issues saying he was unhappy because he believed he was owed wage arrears.

[5] In his resignation letter Mr McGarrett says he could not carry on his employment with Metallic Sweeping because of “*conflict of interest. (sic) & this upset me a great deal*”.

[6] In a letter dated 19 February 2013 Metallic Sweeping wrote to Mr McGarrett recordings its understanding of the events surrounding Mr McGarrett’s resignation.

[7] Mr McGarrett replied to that by a faxed letter dated 5 March 2013 which contained the following statement:

“I am submitting to you the following.

- (1) A personal grievance!*
- (2) Arrears of wages or holiday pay”*

[8] On 27 March 2013 Mr McGarrett lodged a Statement of Problem with the Authority which identified the problem that he wanted resolved as being “*Mr Peter hasn’t complied with my request for information letter dated 5/3/2013*”. In the section which required him to set out the facts that had given rise to the problem, Mr McGarrett stated:

“I have taken a personal grievance against my former employer on the basis of duress, conflict of interest.”

[9] In the remedies section Mr McGarrett recorded that he wanted the problem resolved in the following way:

- (1) *“Order Mr Peter to comply with my request in my letter to him 5/3/2013.*
- (2) *Elect “mediation”.*

[10] The Authority served Mr McGarrett’s Statement of Problem on Metallic Sweeping on 2 April 2013. The 90 day period for raising a personal grievance relating to a resignation that occurred on 14 February 2013 concluded on 15 May 2013.

[11] The Authority wrote to the parties on 12 June 2013 asking Mr McGarrett to clarify his claims including the type of personal grievance he wanted investigated and the remedies he was seeking.

[12] The Authority noted that the Statement of Problem identified the issue to be investigated as *“the non- provision of information requested in his letter of 5/3”*. The Authority also identified that given that Mr McGarrett was not a Union member, then his reference to *“taken a PG against my employer on the basis of duress”* did not seem to apply to his situation because a duress personal grievance relates to membership or non-membership of a Union or employee organisation.

[13] On 20 June 2013 Mr McGarrett emailed the Authority further information but instead of addressing the matters raised by the Authority he referred to issues involving annual holidays and public holidays and about his credit rating. This additional information also referred again to duress, noting that *“I was unsatisfied with Mr Peter’s attitude, ignorance, arrogant ways towards me and his staff ...”*.

[14] The Authority emailed the parties on 20 June 2013 again expressing concern about the inadequacy of the information provided by Mr McGarrett in terms of what claims he wanted investigated, the facts he relied on in support of each claim and the remedies he was seeking. A telephone conference was scheduled for 25 July to discuss progress of the matter and Mr McGarrett was urged to take advice about his claims.

[15] On 23 July 2013 Mr McGarrett filed an Amended Statement of Problem which identified the problem he wanted the Authority to resolve as being *“I have a personal*

grievance arising from my constructive dismissal and the unfair treatment I received while employed by the respondent". This Amended Statement of Problem filed by Mr McGarrett's representative did not refer to Metallic Sweeping's letter of 11 February or to the conversation Mr McGarrett had with Mr Peter on 14 February.

[16] Metallic Sweeping objected to Mr McGarrett raising an unjustified dismissal personal grievance in the Amended Statement of Problem on the basis that it had been raised out of time.

[17] The Authority tried to progress this matter during 2013 but did not receive any replies to its attempts to communicate with Mr McGarrett's representative. This matter was marked as abandoned in May 2014 after not having received any response from Mr McGarrett or his representative since November 2013. On 29 August 2014 Mr McGarrett's representative asked the Authority to set the matter down for an investigation meeting.

Relevant law

[18] Section 114(1) of the Act requires an employee to raise a personal grievance with their employer within 90 days beginning with the date on which the alleged grievance occurred or came to the attention of the employee, whichever is later, unless the employer consents to the personal grievance being raised out of time.

[19] Whether an employee has raised a grievance within 90 days depends on whether they made their employer aware that they had a grievance which they wanted the employer to address. The leading case on what is required to raise a personal grievance is the Employment Court's decision in *Creedy v Commissioner of Police*.¹

[20] The Employment Court in *Creedy* made it clear that an aggrieved employee must provide their employer with sufficient information to enable the employer to address the alleged grievance. The grievance must therefore be sufficiently specified to enable the employer to address it. It is insufficient for an employee to merely advise that they believe they have a personal grievance, even if they identify the type of grievance alleged.

[21] In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information so the employer is in a position where

¹ [2006] ERNZ 517.

it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.

[22] No particular form or words are needed, nor does a grievance have to be raised in writing. A grievance may also be raised in a series of interactions between the parties². For example, an employee may rely on the employer's prior knowledge of events or disputes to supplement the employee's notification about the raising of a personal grievance³.

[23] Whether the employee has presented enough information about the alleged grievance to the employer to enable the employer to address or resolve it, is to be objectively determined. The employee bears the onus (on the balance of probabilities) of establishing that they raise their personal grievance with the employer within the 90 day time limit specified in s.114(1) of the Act.

[24] The parties agreed that the jurisdiction issue could be dealt with on the papers. The parties filed an Agreed Statement of Facts. They also both filed submissions.

Issues

[25] This determination addresses the preliminary jurisdiction issue only. The sole issue to be determined is whether or not Mr McGarrett raised his personal grievance for unjustified dismissal in accordance with the requirements of s.114(1) of the Employment Relations Act 2000 (the Act).

Did Mr McGarrett raise a dismissal grievance within 90 days of his employment ending?

[26] Mr Twigley submits that Mr McGarrett did raise his dismissal grievance within 90 days. Mr McGarrett relies on his faxes of 18 February (incorrectly dated March) and 5 March 2013 and on the Statement of Problem filed on 27 March 2013, either singly or collectively as having raised his dismissal grievance.

Fax of 18 February

[27] Mr McGarrett's fax of 18 February 2013 did not refer to a personal grievance. The only reference Mr McGarrett made was to a "*conflict of interest*". That was not

² *Ovation New Zealand Ltd (formerly Bernard Matthews New Zealand Ltd) v. Puhia* [2011] NZEmpC 11

³ *Dickson v. Unilever New Zealand Ltd* (2009) 6 NZELR 463

linked to a personal grievance claim and he did not explain what the alleged “*conflict of interest*” was. Nor did he identify any remedies for the issues he referred to in his letter.

[28] I find this fax did not raise a dismissal grievance.

Letter of 5 March

[29] In his letter of 5 March 2013 Mr McGarrett used the words “*personal grievance*” but he did not relate them to anything. He did not identify the type of grievance he wished to raise, the facts which gave rise to the alleged grievance or the remedies he was seeking to resolve the alleged grievance.

[30] Mr Twigley submits that by saying in the 5 March letter “*I would not have taken the role I took had it not been for your letter to me dated 11/2/13 where you made insinuations and implied certain things!*” Mr McGarrett raised his dismissal grievance.

[31] I do not accept that. Mr Twigley submits that Mr McGarrett’s words (“*taken the role [he] took*”) when read in conjunction with his fax of 18 February made it clear to Metallic Sweeping that Mr McGarrett was giving notice of a personal grievance and the grounds of the personal grievance.

[32] I do not accept that submission. There was nothing in the fax of 18 February that put Metallic Sweeping on notice that Mr McGarrett wanted to pursue a dismissal grievance. His fax was confirmation of his resignation. The complaints he made in his fax were around wage and holiday pay concerns.

[33] Mr Twigley submitted that Mr McGarrett’s words (“*taken the role [he] took*”) put Metallic Sweeping on notice of the nature of the grievance, or the facts that gave rise to the grievance, or the remedies sought in respect of the grievance. I do not accept that information can be reasonably taken from the words that were actually used by Mr McGarrett.

Statement of Problem

[34] The Statement of Problem filed by Mr McGarrett on 27 March 2013 refers to a personal grievance “*on the basis of duress and conflict of interest*”. There was no mention of a dismissal grievance. The identifiable grievance was a personal

grievance under s.103(1)(f) of the Act which relates to duress in relation to an employee's membership or non-membership of a Union or employees' organisation.

[35] The Statement of Problem (which was served on Metallic Sweeping on or around 2 April 2013) merely referred to the fact that "*I have taken a personal grievance against my former employer on the basis of duress ...*". Mr Twigley submits that the reference to "*duress*" can be read to say that Mr McGarrett believed he had been forced into resigning by Mr Peter.

[36] I do not accept that. That is not what Mr McGarrett said. Nor did he clarify that when asked to do so by the Authority in June last year.

[37] I find that Mr McGarrett's reference to "*conflict of interest*" did not inform Metallic Sweeping of the nature of a dismissal grievance. I find that Metallic Sweeping was not given sufficient information to enable it to address the grievance. I find that it was not in a position to be able to assess the merits or to resolve it informally based on the inadequate information provided by Mr McGarrett.

[38] I do not accept that the information in the Statement of Problem sufficiently raised a personal grievance in accordance with what recent Employment Court decisions have identified is required.

Combined communications

[39] Having concluded that the 18 February fax, the 5 March letter and the Statement of Problem did not in themselves raise a dismissal grievance I now turn to consider whether they did in combination. I conclude they did not.

[40] I find that the totality of these communications would not reasonably have put Metallic Sweeping on notice of the nature of Mr McGarrett's intended personal grievance claim, the facts which gave rise to it or what was sought to resolve it.

[41] I do not accept Mr Twigley's submissions that "*there is no issue as to lack of specificity*". It was not apparent to the Authority or to Metallic Sweeping from the Statement of Problem and supporting documentation what the basis of Mr McGarrett's claims were or the type of grievance he was raising or the remedies he was seeking.

[42] It was so unclear what Mr McGarrett was wanting investigated that the Authority had to write to him twice to try to get some clarity over what he wanted investigated, the facts he relied on and the remedies he was seeking.

[43] I find that none of the communications from Mr McGarrett to Metallic Sweeping from the point of his resignation to the point of the Amended Statement of Problem being filed with the Authority on 23 July 2013 could be taken as having adequately raised an unjustified dismissal grievance either individually or collectively.

[44] I therefore find that Mr McGarrett has failed to meet the threshold required under s.114(1) of the Act by raising an unjustified dismissal grievance within 90 days of his employment ending on 14 February 2013.

Should leave be granted to raise a grievance out of time?

[45] In his submissions Mr Twigley submits that if Mr McGarrett is held not to have raised a grievance within time then he should be given leave to do so out of time on the grounds that Mr McGarrett was “*a lay person*”.

[46] The mere reference to it being appropriate to grant leave to raise a grievance out of time (made by Mr Twigley in his submissions) is the first time the issue of granting leave has been raised. No leave application has been made.

[47] Metallic Sweeping objected to the raising of leave in this way. Mr Twigley then filed reply submissions that introduced for the first time (disputed) evidence from the bar purportedly in support of the leave application. None of this evidence appeared to fall within the circumstances described in s.114(4) of the Act.

[48] No grounds were referred to by Mr Twigley in his submissions to support why Mr McGarrett should be granted leave other than the mere statement that Mr McGarrett was a “*lay person*”. No evidence was supplied in support of the granting of leave (apart from evidence from the bar by way of reply submissions).

[49] No explanation for the 17 month delay between the alleged grievance arising and the purported leave application has been given. No reference was made to s.114(4) of the Act which addresses leave applications. No explanation was given as

to why the information about the nature of the grievance which Mr McGarrett wanted to pursue (and which had been sought twice by the Authority) was not provided.

[50] The Authority indicated to the parties as early as 20 August 2013 that the 90 day issue would be dealt with by way of a preliminary investigation. Mr McGarrett did not at that point, or any point subsequently, indicate an intention to apply for leave to raise a grievance out of time under s.114(3) of the Act. He has still not applied for leave.

[51] Mr McGarrett also failed to respond to the Authority's attempts to schedule an investigation meeting until 29 August 2014 (247 days after the Authority first raised this issue with him). No explanation has been provided for this delay. Mr Twigley failed to deal with this in his submissions.

[52] There is nothing before the Authority to suggest that any of the requirements of s.114(4) of the Act (which relate to the granting of leave) have been met. I am therefore not satisfied that the delay in raising the dismissal grievance was due to "exceptional circumstances"⁴ or that it would be "just"⁵ to grant leave.

[53] I therefore decline to exercise the Authority's discretion to grant Mr McGarrett leave to raise his dismissal grievance out of time.

Outcome

[54] I find that Mr McGarrett's faxes of 18 February and 5 March 2013 and his Statement of Problem do not meet the test imposed by *Creedy*. There was insufficient information contained in these documents to have properly or adequately informed Metallic Sweeping of what the alleged grievance was about so that it had an opportunity of resolving it.

[55] I find that Mr McGarrett is unable to discharge the onus on him to establish that he raised his dismissal grievance with Metallic Sweeping within 90 days of his employment ending. He has therefore failed to meet the requirements of s.114(1) of the Act.

⁴ Section 114(4)(a) of the Act.

⁵ Section 114(4)(b) of the Act.

[56] Accordingly, I find the Authority does not have jurisdiction to hear Mr McGarrett's dismissal grievance. He has not been granted leave to raise his grievance out of time and Metallic Sweeping does not consent to him doing so. Mr McGarrett's current Authority proceedings are therefore dismissed.

Costs

[57] Metallic Sweeping as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to reach agreement on costs. If that is not possible, Metallic Sweeping has 14 days within which to file a costs memorandum, Mr McGarrett then has 14 days within which to respond, and Metallic Sweeping has a further seven days within which to file a reply. This timetable will be strictly enforced.

Rachel Larmer
Member of the Employment Relations Authority