

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 241
5360415

BETWEEN	BRIAN MCGEOWN Applicant
AND	ANDY ANDERSONS INDUSTRIAL SERVICES (2007) LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	B McGeown in person J Black, advocate for respondent
Investigation meeting:	On the papers
Determination:	16 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 31 January 2012¹ (the earlier determination) I found that the parties were in an employment relationship and that Mr McGeown was a casual employee of Andy Andersons Industrial Services (2007) Limited (AAISL).

[2] The purpose of the associated investigation meeting had been to address whether the parties were in an employment relationship or one of principal and contractor. Having determined that matter in Mr McGeown's favour, the next step was to address Mr McGeown's personal grievance. As framed in the statement of problem the grievance was that, although he was employed to do 'seasonal' work, he was dismissed unjustifiably by one of the two business partners who were his employers.

¹ *Brian McGeown v Andy Andersons Industrial Services (2007) Limited* [2012] NZERA Auckland 41

[3] Discussion during the meeting led me to question whether Mr McGeown had an employment relationship problem which could proceed in any event, then to identify and raise with the parties the following additional issues:

- (a) whether the actions to which Mr McGeown took exception, and which formed the basis of his personal grievance, were the actions of his employer for the purposes of the personal grievance;
- (b) whether the termination of his employment was effected by his employer; and
- (c) whether Mr McGeown's personal grievance was commenced in the Authority within the 3 year timeframe set out in s 114(6) of the Employment Relations Act.

[4] The determination noted further that there may be a further issue, which was not raised at the investigation meeting. That issue concerned whether a personal grievance had been raised in terms of s 114(1) of the Employment Relations Act 2000.

[5] The determination set out preliminary findings relevant to the first three issues, and invited the parties to respond in respect of all four. I have received the responses and now determine those matters.

Were the actions in question the actions of Mr McGeown's employer

[6] The definition of 'employment relationship problem' set out at s 4 of the Employment Relations Act 2000 includes for relevant purposes the relationship between 'an employer and an employee employed by the employer'. The definition of personal grievance set out in s 103(1) of the Act begins with:

*... personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim -
(a) that the employee has been unjustifiably dismissed; or*

[7] The actions to which Mr McGeown took exception concerned exchanges between Mr McGeown and 'Frank' which occurred on 23 December 2007 on the site where Mr McGeown was working. Mr McGeown has asserted throughout that Frank

was a business partner of John Black, the owner and managing director of AAISL. The exchanges amounted to adverse comments by Frank on the number of Mr McGeown's absences from the site and on Mr McGeown's willingness to work on heights. They included statements by Frank to the effect that Mr McGeown would not be working at the site for much longer.

[8] In saying he has a personal grievance and citing AAISL as a party to his claim Mr McGeown is in effect seeking to make AAISL responsible for Frank's actions, or to attribute those actions to AAISL. If that was not his intention, then he cannot proceed against AAISL in any event. Nor can he say Frank's actions are those of AAISL so that AAISL is liable for them if as a matter of law Frank was a stranger to the employment relationship between himself and AAISL. That is why I posed the question set out in this section.

[9] At the relevant time Mr McGeown was working on a casual basis at a large industrial site with which AAISL had contracted to provide cleaning services. The preliminary finding set out in the earlier determination was that Frank was no more than another contractor on the site.

[10] Frank had a business of his own which contracted with AAISL. He had no management or supervisory role in respect of AAISL staff, although he was working in the same area as Mr McGeown at the site. Mr McGeown's supervisor on the site was a person named Junior, as Mr McGeown knew.

[11] I noted in the earlier determination that, when Mr McGeown was asked why he asserted that Frank was Mr Black's business partner, he said he assumed that was the case. I also found there was nothing in his interactions with AAISL to give Mr McGeown grounds for that assumption, and that Frank had neither actual nor ostensible authority in relation to Mr McGeown's employment.

[12] Having heard further from the parties, I confirm my finding that Frank's actions were not the actions of Mr McGeown's employer. Any statements Frank made - and in particular the statement to the effect that Mr McGeown's employment would terminate - were gratuitous, were not indicative of AAISL's intentions and were not binding on it.

Did actions of the employer amount to a dismissal which was unjustified

[13] The above finding means that any comment Frank made about the future of Mr McGeown's employment was not a statement of the employer's and did not amount to a dismissal. Accordingly the answer to the question with which this section is concerned is 'no'.

[14] Mr McGeown was very clear that he considered his employment to have been terminated by Frank. He has not otherwise raised any grievance in respect of the actions of AAISL. Accordingly I set out the following account of why Mr McGeown did not receive further work for completeness only.

[15] As found in the earlier determination, Mr McGeown was a casual employee. I record that Mr Black gave evidence at the investigation meeting that availability of work of the kind for which Mr McGeown was engaged was largely confined to the summer holiday break. Mr Black had a list of employees he would contact in order to offer that work.

[16] Mr Black said he was out of Auckland during the last week in December when he received a telephone call from Mr McGeown seeking to raise his concerns about Frank. Mr Black told Mr McGeown that Frank had no authority over his employment and that he would speak to Mr McGeown when he returned to Auckland. He attempted to contact Mr McGeown in early January 2008 to offer further work. He said he could not make contact on Mr McGeown's mobile phone, and nor could he speak to Mr McGeown directly on a landline because Mr McGeown lived at a boarding house. Mr Black was therefore obliged to leave messages. I accept that Mr McGeown may not have received the messages, but I also accept Mr Black's evidence that he attempted to leave them. Having said that, I note that in a document dated March 2008 Mr McGeown recorded that he received an offer of further work in what must have been early January.

[17] The nature of casual work is that there is no promise of work from one engagement to the next. There was nothing unusual in the account Mr Black gave of the way in which the allocation of work was managed here, or of why Mr McGeown received no further offers of work.

Was the personal grievance commenced within the 3 year time limit

[18] Section 114(6) of the Act reads:

No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[19] The events with which Mr McGeown's personal grievance is concerned occurred in December 2007. Proceedings were commenced in the Authority on 17 October 2011.

[20] As set out in the next section, I doubt whether a grievance was raised in accordance with s 114(1) and (2)² and note there has been no request for a grant of leave to raise the grievance out of time under s 114 (3) and (4).

[21] However if those views are wrong, then the present action cannot be commenced as the attempt to do so was made out of time under s 114(6).

[22] Mr McGeown's response when I raised the matter was to say he had relied on the advice of various Department of Labour employees to the effect that his attempt would be in time. However discussions about time limits may have occurred within the relevant timeframes in any event. For example one named employee was said to have indicated in December 2010 that there was still time to commence an action. Aside from this, to the extent that Mr McGeown's assertions concern the 3-year time limit, reliance on such advice is not a reason to allow the action to commence outside the time limit.

Was the personal grievance raised within the 90-day time limit

[23] By letter dated 9 January 2008 Mr McGeown asked AAISL to attend mediation. AAISL responded by saying it would not object to attending mediation but doubted the appropriateness of mediation since the parties' relationship was that of principal and independent contractor. Mr McGeown provided a document dated 11 March 2008, detailing the circumstances of his entry into the employment relationship

² That is, in terms of the test in *Creedy v Commissioner of Police* [2006] ERNZ 517

as well as of his encounter with Frank, to the mediation service of the Department of Labour but not at the time to AAISL.

[24] Grievances must be raised with the employer within the relevant 90-day period. A mere request that mediation be attended, followed by the provision of details of a grievance to the mediation service, does not amount to the raising of a grievance with the employer.

[25] If my views are correct, the failure to meet the time limits and requirements in s 114(1) – (4) mean this grievance cannot proceed.

Costs

[26] Costs are reserved.

[27] The material currently available indicates that neither party has received paid professional advice in the matters before the Authority. For that reason, and because the only witnesses were the parties themselves, it is unlikely that either party would receive an order for costs.

[28] If either party has information relevant to costs but not presently before the Authority, and that party seeks an order for costs, the party may have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written account of what is sought and why. The other party shall have a further 14 days from receipt of that account in which to file in the Authority, and copy to the other party, a written reply.

R A Monaghan

Member of the Employment Relations Authority