

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Preston McIntyre (Applicant)
AND Thames Timber Limited (Respondent)
REPRESENTATIVES Terence Darby, for Applicant
Phil Ahern, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 19 May 2003
DATE OF DETERMINATION 20 May 2003

PRELIMINARY DETERMINATION OF THE AUTHORITY

The preliminary issues

Mr McIntyre's employment relationship problem is in two parts. The first relates to allegations of disadvantage in his employment and the other, to an unjustified dismissal. The respondent claims that the second of these alleged grievances was not raised with it within the 90 day timeframe set out in s.114 of the Employment Relations Act 2000.

This morning I met with Counsel to hear evidence and submissions about that preliminary issue. In addition, during the meeting, Mr Darby made an application for leave to raise the personal grievance out of time. This application (made without prejudice to the applicant's position that the grievance was raised in time) was to be considered in the event that I should find that it was not. Mr Ahern was already on notice that such an application might be lodged at the meeting, and advised that he was able to make submissions without further notice.

The facts

In May 2001 Mr McIntyre sought legal advice from Mr Darby in relation to a problem in his employment relationship with the respondent. The problem concerned hours of work and other matters. From that point on, Mr Darby acted for him in relation to the problem, which was the subject of mediation on 28 May. As early as mid May the parties discussed the fact that if the problem was not resolved, the termination of the employment (whether by resignation or dismissal) could result.

The parties were not able to agree on a way to resolve their differences. On May 29 the respondent put a final proposal to the applicant regarding hours of work and advised that if he did not resume

work on those terms on 31 May, his employment would be terminated. The applicant, through Mr Darby, faxed a reply which included the following:

“If your client company implements the threat contained in your letter, a grievance will be raised in respect of the unjustifiable dismissal.”

Mr Darby told me that the possibility that the employment might end, and Mr McIntyre’s attitude to this, was an inextricable part of all the discussions which took place between the parties up until 1 June 2001. He says that because of this, the respondent was aware of the applicant’s view about being dismissed, and was on notice of both personal grievance claims.

Mr McIntyre did not return to work on the proposed terms and on 1 June he was dismissed by letter. Within a day or two Mr McIntyre telephoned Mr Darby with instructions to continue to pursue both the original disadvantage grievance and the dismissal grievance. Mr Darby told me that this call confirmed earlier instructions given to him on 28 May after the mediation failed to resolve the employment problem.

Mr McIntyre told me that he believed he had arranged that Mr Darby would do *“whatever was necessary for my claim for unjustifiable dismissal and any other related legal claims to be pursued...[and] simply left all the legal and procedural matters to Mr Darby to take care of.”*

Mr Darby also stated:

“If the prior discussions and the exchange of correspondence did not constitute the raising of a personal grievance, I apologise to all parties concerned.”

My instructions are that if the grievance is held not to have been raised within the required period of 90 days, then application for leave pursuant to section 114(3) is to be made. Such application would be on the grounds referred to in s.114 (4) and 115(b).

The respondent does not deny the facts outlined above. However, it says that the grievance was not raised as required by s.114. Mr Ahern says on its behalf that:

- it did not dismiss the applicant until 1 June;
- prior advice (as contained in the fax quoted above) that the applicant planned to raise a grievance is not the same thing as actually raising it;
- s.114 (1) provides that a grievance must be raised *“within the period of 90 days **beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to the notice of the employee, which ever is the later...**”*
- hence, a grievance cannot be raised before it has arisen.

Conclusions

I conclude that the grievance was not raised in time, for all the reasons Mr Ahern has cited.

On the second preliminary issue, I note that Section 115(b) of the Employment Relations Act 2000 provides that exceptional circumstances justifying leave to raise a grievance out of time include:

“where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.”

The evidence is that Mr McIntyre gave clear instructions to his solicitor that he wished his grievance to be pursued. I conclude that these instructions amount to “*reasonable arrangements to have the grievance raised.*” Any subsequent failure to raise the grievance has arisen through a mistaken belief on Mr Darby’s part that he had already done so, and not through any lack on the applicant’s part.

I am satisfied that Mr McIntyre has grounds pursuant to s. 115(b) to raise his grievance out of time.

The parties have not yet attended mediation, but have signalled their willingness to do so should my conclusion be that the applicant had leave to pursue his grievance.

Costs in relation to this preliminary point.

I do not propose to deal with this issue now. All costs issues will be disposed of together, if necessary, after any investigation into the substantive matters has been completed.

Y S Oldfield
Member of Employment Relations Authority