

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Frank Morse (Applicant)  
**AND** Living Earth Limited (Respondent)  
**REPRESENTATIVES** David Fleming, Counsel for the Applicant  
Douglas Stewart, Advocate for the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 9 June 2005  
**SUBMISSIONS RECEIVED** 28 July 2005  
11 August 2005  
**DATE OF DETERMINATION** 9 September 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] In a *Statement of Problem* received by the Authority on 1 April 2005, the Applicant claims that he was unjustifiably dismissed from his employment with Living Earth Limited. Mr Morse also makes an allegation of discrimination on the grounds of involvement in the activities of a union pursuant to section 103(1)(c) of the Employment Relations Act 2000 (“the Act”).
- [2] In a *Statement in Reply* received by the Authority on 15 April 2005, Living Earth Limited (“Living Earth”) says that Mr Morse failed to raise his alleged personal grievance with his employer within the period of 90 days set down by subsection 114(1) of the Act. Furthermore, Living Earth does not consent to the personal grievance being raised after the expiration of the 90 day period.
- [3] Following a conference call between the parties and the Authority, it was accepted that the Authority should determine the preliminary matter. That is: If leave should be granted to Mr Morse to raise his personal grievance after the expiration of the 90 period on the grounds provided under subsection 114(4) of the Act. Leave can be granted if the Authority is satisfied that:
  - (a) That the delay in raising the personal grievance was occasioned by exceptional circumstances (including those set out in section 115); and
  - (b) It is considered just to do so.

## The Investigation of the Authority

- [4] It is only the preliminary matter that is being investigated by the Authority. It is not the role of the Authority at this point in the proceedings to make any findings in regard to the alleged personal grievance raised by Mr Morse. Both parties have presented submissions that in varying degrees, go to that matter and not the preliminary matter, albeit I accept that there is an inevitable common background or “overlap” pertaining to both matters.

## Background

- [5] Mr Morse was employed by Living Earth as a Maintenance Fitter for approximately six years. Due to the loss of a substantial contract early in 2004, the Company found it necessary to reduce its costs and some employees were made redundant. Mr Morse was one of those employees. He ceased his employment on 20 February 2004.
- [6] The evidence of Mr Morse is that at the time that he was informed of his redundancy, he raised it with the National Distribution Union but then reluctantly accepted that as Living Earth had decided that they no longer required a person to work full time in the workshop, he was no longer required. Mr Morse decided then that he probably did not have grounds to pursue a personal grievance relating to his dismissal on the ground of redundancy.
- [7] However, Mr Morse says that his view changed on or about 20 September 2004 or possibly a little later, when he visited the work site to buy some product. The evidence of Mr Morse is that at that time, he spoke to another Living Earth employee, Mr Terry Tito. Mr Morse says that Mr Tito told him that another employee, Mr Leon Bowlin, was doing the maintenance work that he used to do and that Mr Bowlin was doing this work on a full time basis.
- [8] Mr Morse subsequently phoned another Living Earth employee, Mr Keith Webb, and conveyed to him the discussion he had earlier with Mr Tito. Mr Webb confirmed Mr Tito’s view that Mr Bowlin was carrying out the duties that Mr Morse used to perform. Mr Morse then contacted a union organiser, Mr Barry Donaldson. Following a request from Mr Donaldson, Mr Webb prepared and signed a written statement dated 4 October 2004:

“To Whom it May Concern

We as employees of Living Earth Ltd at Pike Point have noticed since Mr Frank Morse was made redundant from the site workshop, that the company has put Leon Bowlin into the workshop and he has been there in the workshop full time for the past six months.”

This statement was also signed by another Living Earth employee, Mr Shaun Trout.

- [9] Via a letter dated 14 October 2004, the union raised a personal grievance on behalf of Mr Morse. It was alleged that:

“The deployment of Mr Bowlin to Mr Morse’s former role therefore leads Mr Morse to believe his redundancy was not genuine. Rather, Mr Morse believes the dismissal may have in fact been a device to allow the company to terminate the employment of an active union delegate who had been involved in a number of disputes with Roger Wark who was production manager at the time, and who decided on the redundancy.

Hence circumstances have recently come to Mr Morse's notice indicating that his termination was unjustifiable, and accordingly we are raising a personal grievance on his behalf in accordance with s 103 of the Employment Relations Act 2000."

## Determination

[10] Subsection 114(1) of the Act provides that:

"Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days **beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later**, unless the employer consents to the personal grievance being raised after the expiration of that period." (Emphasis added.)

[11] It must be said that prior to conducting an analysis of the evidence that arose during the investigation meeting, the focus of the Authority's investigation was on whether exceptional circumstances existed pursuant to subsection 114(4) of the Act, that would justify granting Mr Morse leave to raise his personal grievance after the expiry of the 90 day period provided by subsection 114(1) of the Act. However, given the overall evidence of Mr Morse, Mr Tito, Mr Webb and Mr Trout, it is my conclusion that it is not necessary for exceptional circumstances to be present to allow Mr Morse to proceed with his alleged personal grievance.

This is because I find that "**the action alleged to amount to a personal grievance**" more probably than not, "**came to the notice**" of Mr Morse some time in late September or early October 2004, when it was confirmed to him by other employees of Living Earth that Mr Bowlin appeared to be carrying out the role that Mr Morse previously performed.

[12] I also find that Mr Bowlin's time sheets largely confirm the evidence of Mr Tito, Mr Webb and Mr Trout as to the work being performed by Mr Bowlin, to the extent that Mr Morse has a prima facie argument that he has a personal grievance and that it has been raised within the period of 90 days of coming to his notice. Therefore, it follows that Mr Morse does not require the leave of the Authority to raise his alleged personal grievance.

[13] In case there remains any doubt, I convey to the parties that it is not the role of the Authority at this stage in proceedings, to determine the substance or otherwise of Mr Morse's alleged personal grievance. That matter must wait for another day.

## Mediation

[14] Given the above outcome, the Authority is not obliged to direct the parties to mediation under the provisions of subsection 114(5) of the Act. However, it seems appropriate to do so under the provisions of section 159 of the Act.

The parties are directed to attend mediation as soon as practicably possible and attempt in good faith to reach an agreed settlement of their differences. Proceedings before the Authority are suspended until the parties have done so, or the Authority otherwise directs.

**Costs**

- [15] Costs are reserved. The parties are invited to reach a resolution of this matter. Alternatively, depending on whether the matter of the alleged grievance proceeds to a further investigation meeting, the overall issue of costs should be held over awaiting the determination of that matter. In any event, leave is given to the parties to return to the Authority for a determination of costs should that be required.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**