IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2012] NZERA Wellington 127
5292148

BETWEEN	ANTHONY MURRELL Applicant
A N D	CITY FITNESS GROUP LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	M D Fennessy for the Applicant A D N Gallagher for the Respondent
Investigation Meeting:	8 August 2012 at Palmerston North
Submissions	Received on 15 August 2012
Date of Determination:	18 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The issues for determination in this case are whether Mr Murrell filed a personal grievance for unjustified dismissal within time or, in the alternative, whether exceptional circumstances exist and it is just for Mr Murrell to be able to pursue his grievance out of time.

Factual discussion

[2] After being employed by the respondent, City Fitness, at its Palmerston North gym for three years, Mr Murrell was called into the manager's office on 12 December 2009 and given a letter suspending him and requiring him to attend a disciplinary meeting. The meeting was held on 15 December 2009. Mr Murrell was represented by his then advocate, not Mr Fennessy. After that disciplinary meeting, Mr Murrell's

advocate formed the belief that Mr Murrell was going to be dismissed whatever his responses were. Mr Murrell raised a personal grievance for unjustifiable action, namely the suspension, in writing. He sought mediation.

[3] In the meantime, on 17 December City Fitness wrote to Mr Murrell, care of his advocate, stating that it was looking at dismissal, but that he would be given an opportunity to make submissions about that by 21 December. Following a meeting of that date, Mr Murrell was summarily dismissed. On the same date City Fitness' lawyers wrote to Mr Murrell's advocate denying there had been any unjustifiable action and declining to attend mediation.

[4] The Authority became involved in this matter from 22 June 2010, when Mr Murrell's advocate filed a claim for unjustified action and unjustified dismissal. In its statement in reply dated 8 July, City Fitness claimed that the filing of the statement of problem was the first time that Mr Murrell had raised a personal grievance for unjustified dismissal, and that it did not consent to this claim being raised out of time. Mediation was held, but was unsuccessful in resolving the grievances.

[5] A conference call was accordingly held on 7 December 2010. Mr Murrell's advocate was asked on his view on the claim that the dismissal grievance was out of time. He submitted that he had raised a grievance on Mr Murrell's behalf after the dismissal and within the 90 day period required by law. He was then asked whether he intended to pursue the claim solely on the basis that it had been already raised, or whether he would claim in the alternative that if the dismissal grievance had not been raised in time, then exceptional circumstances existed. Mr Murrell's advocate indicated that while he did not want to pursue the matter solely on the basis that it was in time, he had not decided whether or not to claim exceptional circumstances, but would inform the Authority later by way of an amended statement of problem.

[6] After three prompts from Authority staff, the advocate responded on 22 February 2011, stating that he would be making a submission to the Authority soon. Despite another prompt from the Authority, nothing was received by it until 20 April 2012, over a year later, when the Authority was informed that Mr Murrell's current representative would be taking over the matter. No amended statement of problem was received however.

[7] The Authority held a further conference call on 16 May 2012, whereby Mr Fennessy was granted 14 days to amend the statement of problem, as he believed the existing one did not fully set out Mr Murrell's claims. That amended statement of problem was filed on 30 May. At a conference call on 11 June 2012, it was determined to progress the investigation by way of determining the 90 day issue first.

[8] The investigation meeting involved evidence by Mr Murrell and his former advocate. From that evidence and the documentation I draw the following conclusions.

[9] Right from the commencement of the disciplinary process for Mr Murrell's suspension and the subsequent meetings, Mr Murrell's advocate concluded that Mr Murrell was going to be dismissed and so advised him.

[10] After his dismissal Mr Murrell regularly asked his advocate how his case was going, either when he came to make payments for his outstanding bill, or met him around Palmerston North. However, I prefer the advocate's evidence that he had no recollection of Mr Murrell ever asking him to take a personal grievance for unjustified dismissal after his dismissal. Rather, Mr Murrell and his advocate had discussed this matter beforehand, and indications had been given to City Fitness that if dismissal was the outcome, a separate grievance would be pursued. It is significant that the alleged instruction from Mr Murrell to bring a separate grievance after he was dismissed only came out in Mr Murrell's oral evidence, and was not in his written evidence. In addition, Mr Murrell was suffering from financial difficulties and had other major issues that he had to deal with, aside from his employment issues, in the six months after his dismissal. He had engaged on a repayment plan with his advocate for the costs he had incurred before his dismissal, and only when that repayment plan was met was the grievance formally raised in writing with City Fitness, albeit by way of an employment relationship problem being filed in the Authority. I take it from those arrangements that the advocate was only going to take further actions on Mr Murrell's behalf once Mr Murrell could afford to pay him, and that Mr Murrell accepted those arrangements at the time. Mr Murrell's concerns with his advocate's work (or lack thereof) on his behalf appear more focussed on his failure to progress his grievances at the Authority level, between June 2010 and April 2012, which is entirely understandable. However, that does not provide any explanation for the failure of the dismissal grievance being raised before June 2010.

The most likely explanation for this delay, especially given the close nexus in time between Mr Murrell's other major problems having been resolved around the same time as his dismissal grievance was raised, and that he had found the money to pay his advocate and thus engage him to pursue his dismissal claim, is therefore that Mr Murrell did not make any arrangements to have the dismissal grievance raised until his serious personal issues and his bill to the advocate had been resolved.

[11] I do not accept that the advocate raised a grievance orally with City Fitness' lawyer after the dismissal and within the 90 days, at least to a sufficient standard to meet the tests set out in cases such as *Melville* v *Air New Zealand* [2010] NZEmpC 87 and [2010] NZCA 563, that a grievance needs to be specified sufficiently to enable the employer to address it. As was held in *Creedy* v *Commissioner of Police* [2006] ERNZ 517 it is insufficient for an employee to advise an employer that the employee simply considers that he or she has a personal grievance, or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment. For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. An employer must thus be given sufficient information to address the grievance - that is to respond on its merits with a view to resolving it soon and informally. Here, the advocate could not recall exactly what he had said to City Fitness' lawyer, but noted that she had responded only that the matter was outside the 90 days. Two key points arise from this. First, the Authority has no reliable evidence from which to find that the dismissal grievance was properly raised in time, and it is more likely that it was not, given the prompt raising of the suspension grievance. Second, if the advocate had raised the dismissal grievance properly by phone at some point, then it is most likely that that particular conversation did not take place until after the 90 days, as the response suggested, rather than City Fitness' lawyers *hiding behind any technicality*, as Mr Murrell's advocate claimed.

Determination

[12] On the basis of the factual findings above I am not satisfied that a grievance was raised within 90 days. It is inconsistent with documentation that preceded it (namely the suspension) and succeeded it (namely the filing of dismissal grievance with the Authority), as well as the evidence about City Fitness' lawyer's response to Mr Murrell's advocate allegedly raising the dismissal grievance by phone.

[13] To succeed in his claim for exceptional circumstances Mr Murrell must have made reasonable arrangements to have had the dismissal grievance raised by his advocate within the required time (90 days) – s.115(b). Given that Mr Murrell already had raised a grievance for unjustified suspension in writing, and that Mr Murrell did not expect his advocate to take any further action until his bill had been paid, it can not be held that Mr Murrell had made reasonable arrangements to have the dismissal grievance raised on his behalf by his agent. Instead, Mr Murrell took no steps until after he had paid his costs bill and dealt with the major issue that was affecting his life - around six months later. It is a reasonable inference to draw from the timeline that it was these factors (the money and the resolution of other very important matters in Mr Murrell's personal life) that were a prerequisite in Mr Murrell's mind to pursuing his personal grievance, unaware as he was of the 90 day rule.

[14] I therefore dismiss Mr Murrell's claims, apart from his existing disadvantage grievance, which will now need to be scheduled. A conference call is to be organised as soon as possible to achieve this objective.

Costs

[15] Costs are reserved.

G J Wood
Member of the Employment Relations Authority