

Issues

[3] Before proceeding with the substantive issues, I must determine whether or not Mr North raised his personal grievance in 90 days under s 114 of the Employment Relations Act.

The law

[4] This is a matter that concerns the cause of action complained about coming to the employee's notice and not the date on which the action complained about occurred. I have relied on s 114 (1) of the Act. For completeness the Act says;

114 Raising personal grievance

(1) 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.

...

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

...

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114 (4) (a), exceptional circumstances include-

...

(b) 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; or...

[5] Also, the ninety-day limit that the grievance must be raised is inclusive of the day that the grievance came to the notice of the employee by relying on the words "beginning with".

The facts

[6] Mr North suffered an injury at work in 2003. Following his injury Mr North complained through his union (the New Zealand Meat Workers Union) to ACC about his treatment. His complaint was assessed by ACC.

[7] ACC wrote to Mr North on 13 April 2006 with its findings and a remedy. PPCS Ltd (now Silverfern Farms Limited) was directed to provide Mr North with a written apology. The apology was provided. Mr North says he does not know the day he received the letter dated 13 April from ACC, but says that the first opportunity for him to receive it would have been on 14 April 2006. I am satisfied that it was more likely that he received the letter on 14 April because it was a day after the letter was dated and it was presumably sent on the same day that it was dated. There was no evidence suggesting anything else. The amended statement of problem (in reply to the respondent's statement in reply filed in the Authority that challenged the timing of the grievance being raised) says he became aware of the grievance on 14 April 2006. He says he then approached his union for advice on what action he could take about the actions of the company because he was aware for the first time that there was a specific finding about the company's actions. It was confirmed for him that the company had acted unjustifiably when he received the apology. He says he was told by the union that he could put in a grievance, and he left that to the union.

[8] On 12 July 2006, the late, Mr Paul Wintringham, union organiser, wrote to the company raising a personal grievance. It was received by the company the same day.

Determination

[9] I find that the personal grievance that was raised on Mr North's behalf was triggered by the ACC letter dated 13 April 2006, which Mr North received on 14 April and is the starting point for raising the grievance. I find that this was the first time that Mr North became aware that he had a grievance against his employer because he asked the union what he could do. This was not challenged. Prior to that Mr North's complaint was made to ACC. Once he received ACC's findings and conclusions he was entitled to raise a grievance on a cause of action that came to his notice on the day he received the letter dated 13 April from ACC on 14 April. This is,

instead of relying on the 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred.

[10] I have reached this conclusion because:

- a. Mr North sought advice from the union on what he could do in regard to his employment after he received the letter dated 13 April from ACC. This was at the earliest 14 April. Mr North's evidence that the first opportunity he had to receive that letter was on 14 April. This was not challenged.
- b. There is no evidence that any personal grievance was considered before Mr North approached the union for advice upon learning that the company had not acted properly in regard to its employment obligations and that it had been directed to apologise. Indeed prior to this Mr North's focus was on a complaint with ACC about how the company dealt with his injury under the Prevention, Rehabilitation and Compensation Act. He was using the union's ACC advocate to help on that matter.
- c. The ACC complaint was an entirely separate matter as it related to his injury and the company's action in dealing with that.
- d. Mr North's personal grievance has nothing to do with his injury, but is about how the company treated him.
- e. The ACC letter highlighted that there had been breaches by PPCS, which the company had denied.
- f. This is a situation where Mr North reasonably became aware of the circumstances and formed a reasonable belief that that the employer's action was unjustified, especially given that PPCS had denied any concerns about the treatment, denied the complaints about his treatment and stated that no rehabilitation plan was needed. Indeed both parties were awaiting ACC findings and conclusions about the injury and rehabilitation.
- g. PPCS received Mr Wintringham's letter on 12 July 2007 (supported by a date stamp).

[11] Next I find that the personal grievance was raised by the union on Mr North's behalf on 12 July 2006. This amounts to exactly 90 days when the grievance was

raised (including 14 April 2006 because that was the earliest date that the personal grievance could have come the notice of Mr North when he received the ACC letter and he went to the union for advice). It is surprising that neither party had documented an actual count of the days: Mr Mitchell thought the grievance was raised in 89 days and Mr Williams did not know the number of days.

[12] Mr North's personal grievance was raised in the 90 days by it being raised on the ninetieth (90th) day. This meets the time required to raise a personal grievance under s 114 (1) of the Act.

[13] The statement of problem was filed on 13 March 2009. From 12 July 2006 the filing of the grievance is within the three years required under s 114 (6) of the Act. Once it was filed it does not matter if it is then amended. In any case the amended statement of problem that was filed did not raise anything new but simply covered off an application for exceptional circumstances if it was needed. This was a legitimate reply to the respondent's refusal to consent to the personal grievance proceeding after the required period.

[14] It is not necessary for me to deal with the alternative claim that there were, exceptional circumstances under s 115 (b) of the Act.

Orders of the Authority

[15] The applicant is able to proceed with his personal grievance claim.

[16] I am required to direct the parties to attend mediation where there has been a finding that exceptional circumstances exist. Section 114 (5) of the Act requires me to direct the parties to mediation if there are exceptional circumstances occasioning any delay. I am also required to consider mediation under s 159 of the Act, and I can confirm that I have done that previously. The parties have been to mediation, but given that there are unusual aspects to this matter, that the claim is relatively modest and that the matter must be capable of being resolved, I strongly urge the parties to return to mediation. I reserve leave for the parties to return to the Authority for any further consideration on a direction to attend mediation, and if it is necessary to proceed with the substantive issues.

[17] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority