

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 164
5388883

BETWEEN OFFSHORE MARINE
 SERVICES (NZ) LIMITED
 Applicant

AND ARTHUR UDOVENKO
 Respondent

Member of Authority: Michele Ryan

Representatives: Ms Susan Hornsby-Geluk, Counsel for the Applicant
 The Respondent, in person

Investigation Meeting: On the papers

Submissions Received: 31 July and 10 September 2013 for the Applicant
 29 August 2013 for the Respondent

Determination: 20 December 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Offshore Marine Services Limited (OMS) employs personnel to work on externally owned vessels or platforms in the oil and gas industry. In November 2011 Mr Udovenko was employed by OMS to work as a chief mate on a fixed term project aboard a vessel, *MV Polarcis Alima* (the *Alima*), owned by a third party.

[2] On 10 December 2011 Mr Arthur Udovenko was suspended from duties pending a disciplinary investigation into concerns arising from disharmony between Mr Udovenko and the Master and Chief Officer of the *Alima*.

[3] Mr Udovenko remained on suspension until 29 March 2012 when he was advised by OMS that the *Alima* would be leaving New Zealand waters in mid April 2012 and that it would not be able to finish its inquiries before Mr Udovenko's fixed

term employment would end. Mr Udovenko was placed on paid special leave until mid-April 2012 when his employment with OMS concluded.

[4] In early April 2012 a disagreement between Mr Udovenko and OMS surfaced which resulted in an application to the Authority by OMS in July 2012 for a declaration that it had properly paid Mr Udovenko and had no further wages liability.

[5] This determination arises as a consequence of counterclaims contained in Mr Udovenko's 'Statement in Reply and Counterclaim' (the counterclaim) dated 31 July 2012 as they relate to claims of personal grievances. Strictly speaking, Mr Udovenko remains the named respondent associated with OMS's application and his response.

[6] Mr Udovenko's counterclaim alleges he was unjustifiably disadvantaged by his suspension and refers to loss of DP and sea time¹ as evidence of Mr Udovenko's disadvantage. In addition, Mr Udovenko appears to claim also that the loss of DP and sea time form a separate claim, in and of itself, of an unjustified disadvantage.

[7] Mr Udovenko submits he raised both personal grievances within the statutory time frame but says if he did not, he should be granted leave to raise the personal grievances out of time.

[8] There is also some uncertainty as to whether Mr Udovenko sought, within the counterclaim, to claim that he has raised a personal grievance for unjustified dismissal. I shall return to this matter later in this determination.

[9] OMS denies that Mr Udovenko raised any personal grievances within the time period the legislation requires. It says his claims of personal grievances were raised belatedly and only after OMS had lodged its application in the Authority on 12 July 2012. OMS says there is evidence that as at 13 July 2012 Mr Udovenko did not consider he had any claims against it and that it was not until 31 July 2012, when it received a copy of Mr Udovenko's counterclaim, that it became aware of Mr Udovenko's claims.

[10] OMS does not consent to Mr Udovenko raising the alleged personal grievance claims outside the statutory time frame and further states that there are no exceptional

¹ It appears that loss of DP time and sea time may cause a diminishment to rank and has a potential to impact on future employment positions and associated remuneration scales.

circumstances which require the Authority to grant leave to have his claims raised out of time.

The issues

[11] Before the Authority is able to investigate whether or not Mr Udovenko has been unjustifiably disadvantaged (or unjustifiably dismissed) in the ways he alleges, the Authority must first determine:

- (i) whether Mr Udovenko validly raised personal grievances in relation to (a) his suspension, and/or (b) his DP and sea time, within the relevant 90 days statutory timeframe;
- (ii) whether OMS is able to rely on the contents of an email which advises Mr Udovenko has no claims;
- (iii) whether are there exceptional circumstances which would allow leave to be granted to raise a personal grievance out of time;
- (iv) whether Mr Udovenko has claimed a personal grievance for unjustified dismissal.

[12] During a directions conference on 8 May 2013 the parties agreed to have these preliminary matters determined on the papers and timetabling was agreed for an exchange of additional evidence and submissions.

Did Mr Udovenko raise personal grievances of an unjustified disadvantage with OMS within the statutory time frame?

The law

[13] Section 114 of the Employment Relations Act 2000 requires every employee who wishes to raise a personal grievance to do so within 90 days beginning with the date the action which is alleged to amount to a personal grievance occurred or came to the notice of the employee.

[14] To raise a grievance an employee must make, or have taken reasonable steps to make, their employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[15] On 10 December 2011, when the *Alima* was docked in Wellington Mr Udovenko was suspended. I regard this as the date on which the actions alleged to amount to personal grievances occurred or came to Mr Udovenko's notice with respect to his claims that he was unjustifiably disadvantaged both by the suspension, and by loss of DP and sea time. To comply with the 90 day statutory timeframe Mr Udovenko was required to raise personal grievances about these matters on or before 10 March 2012.

[16] *Creedy v. Commissions of Police*² is the leading case as to what is required to raise a grievance. In that case the Chief Judge said:

[36] *It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and not a raising of the grievance, 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 the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address...

That is not to find, however that the raising cannot be oral or that any particular formula of words is to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[37] *...It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

[17] More recently, the Chief Judge in *Turner v Talley's Group Ltd*³ reaffirmed the approach taken in *Creedy* as follows:

The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the Creedy tests.

² [2006] 1 ERNZ 517

³ [2013] NZEmpC 31

Raising a personal grievance about the suspension within 90 days

[18] Having reviewed a range of documents in regards to this matter I note that on 2 June 2012 Mr Udovenko advised OMS that he was not happy with the way it was dealing with his suspension and on 7 July 2012 via his representative, listed his suspension (and sea time) as “*items*” he wished to discuss. These and any other documents that were authored after 10 March 2013 by or on behalf of Mr Udovenko are not relevant to my assessment on the 90 day issue.

[19] It was accepted by OMS that the following documents may be relevant to my assessment as to whether or not Mr Udovenko raised a personal grievance(s) within the statutory timeframe. I have recorded the material documents and relevant statements below:

- ***Email dated 12 December 2011:*** Mr Udovenko’s representative to OMS;

I therefore now raise our objection to Arthur’s suspension and request that he be returned promptly to the vessel to complete his swing.

- ***Transcript of audio recording of meeting held on 21 December 2011:*** Mr Udovenko’s representative to OMS;

Before we do that I’d like to make some opening points...Thank you. We have grave concerns about what’s happening here today. We don’t believe that there is good cause either for suspension, or certainly not for dismissal or threat of dismissal. What we can see in the material that’s been sent through there is a pattern of continual undermining by the master and the supernumerary chief officer of a good employee concerned for the safety and reputation of the company. And we believe that there have been procedural flaws and that there are many of them, but we can talk about that a bit later. And we will certainly be looking for um remedies in terms of this. We’re looking for Arthur’s lifting of the suspension, and his return to work...

...

Later in the meeting Mr Udovenko’s representative stated:

Can you please explain where in the collective agreement or in any procedural process that suspension fits in?

Later still, in response to why he had not signed the ship’s articles to record he had left the ship when suspended, Mr Udovenko said:

Because I was suspended unlawfully.

- **Letter of 17 January 2013:** Mr Udovenko to OMS.

I deliberately did not sign the ship's articles as my position is that I am suspended from the ship unlawfully, on the basis of fabricated allegations.

[20] An inquiry as to whether a grievance has been specified sufficiently to enable the employer to address the matter should be assessed objectively, i.e. from the standpoint of an objective observer⁴. The Authority may consider the totality of communications between the parties in its assessment as to whether a grievance has been sufficiently raised⁵.

[21] I do not consider the Authority needs to go beyond the content of the meeting of 21 December 2011 to find that a personal grievance about Mr Udovenko's suspension was raised. It is clear that Mr Udovenko's representative advised OMS that there was specific concerns (a) about the employers actions in suspending Mr Udovenko; (b) the legitimacy of the action; (c) that the action was perceived as procedurally flawed, and (d) he requested the suspension be removed and returned to his position. On an objective basis I am in no doubt that the concern was raised to a sufficient degree that the employer could comprehend there was a grievance, the nature of it and how the employee wished it to be dealt with.⁶

[22] It is plain that during the meeting of 21 December 2011 and subsequently, that the parties canvassed their separate concerns associated with the time when Mr Udovenko was at sea on the *Alima*. There is an inference by OMS that given the multitude of issues raised by Mr Udovenko and the extensive material he provided, that it was difficult for it to be able to reasonably conclude that a personal grievance was raised about the suspension.

[23] I accept that Mr Udovenko's personal grievance claim about his suspension was likely to have been overshadowed for OMS as it sought to respond to Mr Udovenko's other concerns. However I am not persuaded that OMS's failure to discern that a personal grievance has been raised can be used as a successful mechanism to say that a personal grievance was not raised.

⁴ *Winstone Wallboards Ltd v. Samate* [1993] 1 ERNZ 503

⁵ *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958

⁶ Supra at footnote 4

[24] Nor am I satisfied that the nature of the exchange by Mr Udovenko's representative can be limited in character to a fact finding exercise, and thus not an action of raising a personal grievance, as submitted by OMS. A subsequent request for information (once furnished), may assist an employee to assess the merits of advancing the raised personal grievance but I do not consider a request for information invalidates the raised personal grievance.

[25] I find that the *Creedy* tests were sufficiently met in the course of the parties' discussions during the meeting of 21 December 2011 and Mr Udovenko, via his representative, raised a personal grievance about his suspension within 90 days of the event occurring or coming to his notice.

Raising a personal grievance about loss of DP and sea time within 90 days

[26] I am unable to conclude on the evidence that Mr Udovenko properly raised a distinct personal grievance with OMS about DP and sea time within the 90 day timeframe.

[27] The first piece of correspondence sent to OMS in respect to 'sea time' appears to have been sent on 7 July 2012. I do not accept any inference that any concern about DP and sea hours only came to Mr Udovenko's notice within 90 days prior to this correspondence. If I accepted this reasoning then Mr Udovenko first became aware that his DP and sea hours may be negatively affected was 132 days after his suspension, on 10 April 2012 at the earliest.

[28] Mr Udovenko is a very experienced seaman and it is apparent from his evidence that he has a keen understanding of what is required in the maritime industry to maintain rank. I consider it more likely than not that Mr Udovenko was cognisant on the day he was suspended that DP and sea time may be affected by that action. The correspondence of 7 July 2012 is outside the statutory timeframe to raise a personal grievance and is not relevant to assessment on the 90 day issue.

[29] Mr Udovenko's submissions did not refer me to any particular documents in respect to DP and sea time which satisfy the *Creedy* tests and establish that a personal grievance was raised about DP and sea time within 90 days of awareness that DP and sea time may be affected.

Is OMS able to rely on an email dated 13 July 2012 which advises Mr Udovenko has no claims against it?

[30] OMS refers to an email sent by Mr Udovenko's wife in her position as General Secretary, NZ Merchant Service Guild IUOW to the Authority on 13 July 2012 as evidence that Mr Udovenko did not have any claims with it and therefore had not raised personal grievance claims. The salient portions of the email state:

Please note that at the moment Arthur Udovenko does not have any claims against [OMS] for wages...

Later in the email:

*As we mentioned above, Arthur Udovenko has **no current claims** against OMS Ltd.*

[31] The email was sent in the event of the Authority arranging a directions conference with the parties to deal with procedural issues relating to OMS's application for a declaration, and against a background whereby Mr Udovenko had filed an action in the High Court Admiralty Division against OMS's client.

[32] OMS has referred to the word "*claim*" as referring to a legal cause of action and that in an employment relations environment may refer to a personal grievance. I agree that the term is used interchangeably.

[33] I note that the email was not sent directly to OMS. I consider the email was likely authored to communicate with the Authority about matters that Mr Udovenko and/or his representative considered would be of legitimate interest to the Authority, such as whether concurrent or similar claims had already been lodged with it. I consider the use of the word 'claim' in the context referred to above, on balance was more likely to be used to convey that no formal legal causes of action had been filed by Mr Udovenko against OMS in the Authority. I consider also that Mr Udovenko was under no obligation to alert the Authority as to what claims he considered he may have against OMS.

[34] I am unwilling to conclude that the statements made in the email evidence in a definitive way that Mr Udovenko had not raised a personal grievance (at least in regards to the suspension).

Are there exceptional circumstances which would allow the Authority to grant leave to raise a personal grievance out of time?

[35] In the absence of an employer's consent, an employee may apply to the Authority for leave to raise a personal grievance after the expiration of the 90 days. The Authority may grant that application if it is satisfied that the delay in raising the personal grievance was occasioned (caused) by exceptional circumstances and considers it just to do so. Section 115 provides four examples of exceptional circumstances including where an employee made 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.

[36] Mr Udovenko set out circumstances which he says are exceptional. He asserts that the union to which he belongs is under resourced and has no in-house counsel. I understand the inference Mr Udovenko wishes me to take is that the union did not have the human resources capacity to raise the personal grievance. Further, he advises that he is married to the General Secretary of the union and that her role prevented him from discussing his concerns with her and he was therefore represented by a less experienced Organiser.

[37] The Authority must be satisfied that the delay in raising the personal grievance was caused by exceptional circumstances. Even if I accepted the circumstances proffered by Mr Udovenko were exceptional (which I do not), Mr Udovenko has not connected the exceptional circumstances he claims, as cause of the delay in raising the personal grievance as to DP and sea time.

[38] I regard Mr Udovenko's argument that the union has limited man power or that he was not properly advised as cause for the delay as undermined by the fact that his representative did successfully raise a personal grievance about his suspension within the required time frame.

[39] I am unable to conclude that exceptional circumstances caused the delay in raising a personal grievance about DP and sea time and do not grant leave to raise this personal grievance out of time.

Did Mr Udovenko raise a personal grievance for an unjustified dismissal?

[40] OMS takes issues with certain passages contained in Mr Udovenko's counterclaim, as follow:

- 3.2 *...that there was no lawful ability under the parties' employment agreement to terminate [Mr Udovenko's] fixed term employment agreement early...*
- 3.3 *Significant losses have been incurred by the Respondent as a result of the Applicants actions under this head, as particularised below;*
- 3.5 (f) *When the respondent accepted the job...he was promised a job until around early July 2012. He therefore reasonably expected that he would work until July and have income until this date... the Respondent lost pay...*

[41] OMS submits this claim cannot be brought by way of a breach of contract because the only way to challenge a dismissal is by way of a personal grievance. As noted, OMS says no personal grievance for an unjustified dismissal was raised within 90 days.

[42] I understand Mr Udovenko to say that this aspect of his counterclaim is for *"the balance of wages under my fixed term contract"*. I do not regard this claim as a means to obtain general damages for the termination of his employment, which as OMS correctly submits is precluded by s.113. Rather, Mr Udovenko seeks wages for the period between when his fixed term employment concluded and when he anticipated it would conclude. I do not accept as OMS contends that Mr Udovenko is attempting to raise a personal grievance for an unjustified dismissal or the inference that the claim is a covert means to challenge the termination of his employment to achieve the same end.

[43] Mr Udovenko does not challenge OMS's submission that he has not (previously) raised a personal grievance for an unjustified dismissal. Nor do I understand Mr Udovenko to have asserted in his counterclaim that he has been unjustifiably dismissed or that he has raised a personal grievance for an unjustifiable dismissal. In these circumstances there is no requirement for the Authority to determine whether Mr Udovenko raised a personal grievance on the grounds of an unjustifiable dismissal because I find Mr Udovenko does not make this claim.

[44] However Mr Udovenko does purport in his submissions in reply in this matter to now raise a personal grievance that his dismissal was unjustified. This claim appears to be in response to a statement within OMS's submissions that Mr Udovenko *"was not dismissed until 19 April 2012"*.

[45] I do not accept that OMS is suggesting that Mr Udovenko was dismissed, (in the context of a unilateral sending away by the employer) and consider it more likely that the word “dismissed” was used inadvertently. I am unwilling to allow Mr Udovenko to seize upon a mistakenly used word in final submissions in the context of this determination to now raise a new claim that he was unjustifiably dismissed. Should Mr Udovenko wish to proceed with this matter he will need to lodge a statement of problem with the Authority in the usual way.

Mediation

[46] The parties are directed to attend mediation. Given the time of year, the parties must attend within 7 weeks’ of the date of this determination. If the matter is not resolved and Mr Udovenko wishes to pursue his personal grievance claim in respect of his suspension, a conference call will be convened to make arrangements for an investigation of the matter.

Costs

[47] Costs are reserved.

Summary of findings

- (i) Mr Udovenko raised a personal grievance in regards to his suspension.
- (ii) There are no exceptional circumstances which caused the delay to Mr Udovenko raising a personal grievance about DP and sea time, and leave has not been given to raise a personal grievance about these matters out of time.
- (iii) In the context of this determination I find Mr Udovenko has not claimed he was unjustifiably dismissed and he has not raised a personal grievance about this matter.

Michele Ryan

Member of the Employment Relations Authority