

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 545
5359924

BETWEEN

NAOMI PATTERSON
Applicant

AND

PACIFIC ISLAND
EDUCATIONAL RESOURCE
CENTRE TRUST
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Prue Kapua, Counsel for Respondent

Investigation Meeting: 20 December 2011

Determination: 20 December 2011

DETERMINATION OF THE AUTHORITY

- A Ms Naomi Patterson did not raise her personal grievance for unjustified dismissal with her employer within 90 days of it arising as required by s114(1) of the Employment Relations Act 2000.**
- B Accordingly, the Authority does not have jurisdiction to hear Ms Patterson's dismissal grievance.**

Identity of the Employer

[1] The pleadings named the respondent as Pasifika Education Centre. A telephone conference was held with the parties on 4 November 2011 to clarify the correct legal name of Ms Patterson's employer because Pasifika Education Centre was not a legal entity.

[2] The parties were given additional time to provide the Authority with their view of the correct legal name of Ms Patterson's employer.

[3] Ms Patterson provided the Authority with a copy of her individual employment agreement which was given to her before she started work. It named her employer as The Pacific Education Centre ("PEC").

[4] That did not assist because PEC is also not a legal entity.

[5] Ms Kapua provided the Authority with a copy of a trust deed for the Pacific Island Educational Resource Centre Trust ("the Trust") and she advised that the trust's trading name was PEC. Ms Kapua said that the Inland Revenue Department had recorded the Trust as being Ms Patterson's employer.

[6] Mr Clyde Young, Acting Executive Director of PEC attended the investigation meeting today. He confirmed the Trust was Ms Patterson's employer.

[7] Mr Young and Ms Kapua both advised that the Trust was aware of Ms Patterson's grievance claims and also that the Authority was investigating the 90 day issue in respect of the dismissal grievance today. Ms Kapua expressly confirmed that she was instructed by the Trust in respect of these matters and was authorised to represent the Trust at today's investigation.

[8] The parties applied to change the name of the respondent by consent from PEC to the Trust. I am satisfied that the current pleadings and notice of hearing were served on the Trust (or representatives of the Trust) and that the Trust has also identified itself as Ms Patterson's employer.

[9] Accordingly, by consent, the name of the respondent is changed from PEC to Pacific Island Educational Resource Centre Trust.

Employment Relationship Problem

[10] In her Statement of Problem Ms Patterson claimed disadvantage and dismissal grievances. The disadvantage grievance arose out of her suspension during a disciplinary process and her dismissal occurred on 5 July 2011.

[11] The Trust disputed that the Authority had jurisdiction to hear Ms Patterson's grievances on the grounds that she had not properly raised them within 90 days of each grievance having arisen. The Trust advised that it did not consent to Ms Patterson raising any grievances out of the 90 day time limit.

[12] It was agreed during the telephone conference that Ms Patterson would be given time to take advice on the 90 day issue and that if she wanted to pursue her grievance claims then the 90 day issue would be dealt with separately as a preliminary issue before the substantive claims would be investigated.

[13] No application for leave to raise a personal grievance out of time under s114(4) of the Employment Relations Act 2000 ("the Act") has been made. Ms Patterson was asked about this during the investigation and she stated that after receiving legal advice she did not believe there were any exceptional circumstances as required by s114(4)(a) of the Act for granting such leave. Ms Patterson confirmed that none of the examples of exceptional circumstances set out in s115 of the Act applied to her situation.

Issue to be determined

[14] The only matter for the Authority to determine was whether Ms Patterson raised her dismissal grievance with her former employer within 90 days of 5 July 2011, being the date of her dismissal, as required by s114(1) of the Act.

Withdrawal of disadvantage grievance

[15] After taking legal advice, Ms Patterson advised the Authority via email that she did not intend to pursue her disadvantage grievance but did want to continue to pursue her dismissal grievance.

[16] Ms Patterson expressly confirmed under oath today that she had withdrawn her disadvantage grievance and that the only matter before the Authority for investigation was her dismissal grievance.

Section 114

[17] Section 114(1) of the Act states:

“Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise their 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.”

[18] Section 114(2) provides some guidance on the requirements for raising a personal grievance. It states:

“For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to resolve.”

[19] Section 114(3) allows the Authority to grant leave to an employee to raise their grievance after the expiration of the 90 day time limit, if the employer has not consented to that. Section 114(4) provides that the Authority may grant leave if the delay was occasioned by exceptional circumstances and it is just to do so. However, that provision is not relevant to this matter.

Investigation process

[20] Both parties were given an opportunity to file witness statements on the 90 day issue and statements were received from Mr Young and from Ms Patterson. Both witnesses attended the investigation meeting today to give evidence in person. However, evidence was only required from Ms Patterson, who was questioned by the Authority and cross examined by Ms Kapua. Ms Patterson’s evidence did not contradict Mr Young’s witness statement.

Relevant facts

[21] Ms Patterson was dismissed on 5 July 2011. She admitted that she did not raise her dismissal grievance with the Trust directly. Instead she relied on the Authority's service of her statement of problem on the Trust to have raised her dismissal grievance with the Trust.

[22] Whether a statement of problem has raised a grievance with an employer once it has been served is a moot point which will be dependent on the content of the statement of problem. The proper way for an employee to raise a grievance is to do so directly to their employer or former employer. It is usual for that to occur before a statement of problem is filed with the Authority.

[23] As the Authority pointed out in *Cumming v Absolute Insurance Limited*¹:

"There are no advantages in relying on the Authority's processes as a proxy for raising a grievance directly with an employer, but there are several disadvantages."

[24] Ms Patterson filed her statement of problem with the Authority on 27 September 2011 and she paid the filing fee that same day. However, Ms Patterson had filed an unsigned copy of the statement of problem, so her application was not processed. She was contacted by a support officer on 13 October 2011 and asked to sign the statement of problem and the refile it.

[25] Ms Patterson duly did so and a signed statement of problem was filed with the Authority on 13 October 2011 and processed that day. The Authority served it on the Trust by courier post which was recorded as having been delivered on 14 October 2011. The Trust acknowledged that was the date service occurred.

[26] In order to meet the 90 day time limit, Ms Patterson needed to have raised her dismissal grievance with the Trust by 3 October 2011. However, that did not occur. The Trust did not know anything about her dismissal grievance until it was served

¹ Member Cheyne, 26 July 2010, CA149/10

with the statement of problem on 14 October 2011; 101 days after Ms Patterson had been dismissed.

[27] After she was suspended, Ms Patterson instructed a solicitor to assist her. Her lawyer discussed the employment problem resolution clause in her employment agreement with her and advised her of the need to raise a grievance within 90 days. The 90 day time limit was also recorded in her employment agreement.

[28] Ms Patterson's evidence was that she did not instruct her lawyer to act for her in respect of her dismissal grievance. She just got some preliminary advice and then agreed she would go away and consider her options. Ms Patterson said she made it clear to her lawyer in July 2011 that she did not want him to act for her. She told me she had decided to deal with her issues herself.

Outcome

[29] I find that Ms Patterson did not raise her dismissal grievance with the Trust within 90 days of it arising, so the Authority does not have jurisdiction to determine her dismissal grievance.

Costs

[30] The Trust as the successful party is entitled to a contribution towards its legal costs.

[31] The parties are encouraged to resolve cost by agreement. If that is not possible costs are to be dealt with by an exchange of memoranda. The Trust has 14 days within which to file its costs submissions, Ms Patterson has 14 days within which to respond, and the Trust has a further 7 days within which to reply.

[32] Strict adherence to this timetable is required, and departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority