IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 146
5312201

	BETWEEN	API PERENARA Applicant
	AND	WAIOTAHI CONTRACTORS LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	S Austin, Advocate for Applicant K Stretton, Advocate for Respondent
Investigation:	On the papers
Determination:	11 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his *Statement of Problem* received by the Authority on 13th July 2010, Mr Perenara claims that he was unjustifiably dismissed, effective from 7th September 2009. While Mr Perenara may have had grounds to raise a personal grievance, ostensibly, this was not done until 23rd April 2010, when his advocate wrote to Waiotahai Contractors Limited (WCL) and informed that Mr Perenara believed that his dismissal was "unjustifiable in the substantive [sic] and procedurally."

[2] In a *Statement in Reply* received by the Authority on 30th July 2010, WCL say that because the company was not made aware that Mr Perenara believed that he has a personal grievance, until it was raised in the letter of 23rd April 2010, then he has failed to raise his alleged grievance within the 90 days period provided by s 114(1) of the Employment Relations Act 2000 (the Act).

[3] On 19th August 2010, a conference call with the parties was convened by the Authority. It was accepted that there is preliminary issue. This is whether Mr Perenara raised his grievance within 90 days and this matter must be determined by the Authority before any investigation of his substantive claims can continue. An investigation meeting was set down for 8 November 2010 at Whakatane. On this day the Authority member and Ms Stretton and her client were present. Mr Austin and Mr Perenara failed to arrive. Upon being contacted by the Authority Support Officer, Mr Austin informed that he was unaware that the investigation meeting was to take place on that day. However, that explanation was not convincing. This is because the records of the Authority show that the *Notice of Investigation Meeting* and associated timetable information was couriered to Mr Austin on 19th August 2010. It is established that he received these documents. This is further evidenced by the fact that Mr Austin wrote to the Authority on 9th September 2010. In his letter, he specifically refers to the letter from the Authority of 19th August which accompanied the notice of the investigation meeting.

[4] During a further conference call with the parties on 17th November 2010, it was mutually agreed that the preliminary matter will now be determined by the Authority "on the papers." The Authority has received a sworn affidavit for Mr Perenara and also a sworn affidavit for Mr Gert Visser in support of Mr Perenara. For WCL there is a sworn witness statement from Mr Richard Claydon the Managing Director of the company. Both parties have provided written submissions in support of their respective arguments.

The arguments of the parties

Waiotahi Contractors Limited

[5] The basic argument for WCL is simple and explicit. The company says that Mr Perenara failed to raise a personal grievance within 90 days of the date of his dismissal; 7th September 2009. In support of this premise, WCL points to the letter dated 23rd April 2010 from Mr Austin to the company, and says that this was the first time that WCL was aware that Mr Perenara had an alleged personal grievance. WCL points to the time lapse before the grievance was raised, as being more than 7 months and the company does not consent to a grievance being raised out of time. WCL also say that there are not any exceptional circumstances, pursuant to s 115 of the Act, which occasioned the delay in raising the personal grievance.

Mr Perenara

[6] The evidence of Mr Perenara is that when he arrived at work at the Whakatane base of WCL on 7th September 2009, he was required to go to the office of Mr Gert Visser, the Project Manager. Mr Perenara says that Mr Visser was apologetic but informed him that: "*the Company had run out of work for me and that this would mean I was redundant*." Mr Perenara attests that Mr Visser told him that he was to '*finish straight away*" and that he would be paid to the end of the week. The further evidence of Mr Perenara is that:

> *I then said to Gert that I was not happy to be made redundant and I said that I thought that some of the new staff should be chosen first. I said that some of them had only started in the last few months. I also said that I thought that there was quite a bit of work on and that I had a lot of driving qualifications that meant I could do other work.*

[7] Mr Perenara says that Mr Visser apologised but confirmed that the company had "*made up its mind*" and that the decision could not be changed. Mr Perenara says that he felt that: "*I just had to accept what Gert told me and there was nothing I could do ….*" Mr Perenara then asked for the decision to be put in writing and he collected a letter later that day.

[8] There is further evidence from Mr Perenara about the actions he took to obtain other employment and the effects of losing his job, all of which would be relevant and probably of probative value in a substantive hearing. But there is no mention of pursuing a personal grievance or of using any language that might suggest that he felt that he had a grievance and that he had brought this to the attention of his employer before 23rd April 2010.

[9] The affidavit evidence of Mr Visser is consistent with that of Mr Perenara but also he alleges that he was forced by the Managing Director of WCL, Mr Richard Claydon, "get rid" of Mr Perenara. There is also further evidence that could be of assistance if the substantive matters pertaining Mr Perenara's dismissal were to be investigated by the Authority. But there is no mention by Mr Visser of Mr Perenara using any language that would, even in the most remote manner, suggest that he was raising a grievance in regard to his dismissal.

[10] The evidence of Mr Claydon is that the first indication that he had that Mr Perenara was challenging "*the redundancy decision*" was the letter from Mr Austin

dated 23 April 2010. Mr Claydon also draws attention to this letter omitting to make any reference to a grievance being raised at some earlier point in time. Mr Claydon also attests to Mr Visser pursuing a personal grievance within the Authority and he speculates that Mr Austin may have contacted Mr Perenara as a result of having earlier represented Mr Visser. Apart from the fact that this latter point is really just speculation on the part of Mr Claydon, it does not assist in regard to the determination of the preliminary matter. The only other relevant evidence of Mr Claydon, pertaining to the preliminary issue, is that he recalls Mr Visser informing him that Mr Perenara was *"not happy and he* [Mr Perenara] *wanted a letter confirming the redundancy in writing."*

Did Mr Perenara raise a personal grievance within 90 days of his dismissal on 7th September 2009 and if not, were there exceptional circumstances that occasioned the delay?

[11] Under the provisions of s 114(1) of the Act:

> 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 employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

And then at s 114(2):

> 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 address.

And at s 114(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 grievance after the expiration of that period.

[12] An analysis of the evidence pertaining to this matter is relatively straight forward. The subject matter of the grievance is the dismissal of Mr Peranara. The date "on which the action alleged to amount to a personal grievance occurred or came to the notice" of Mr Perenara, is 7th September 2009. Therefore, under the provisions of s 114 of the Act, the last day for Mr Perenara to raise a grievance was 4th January 2010. It is clear to me that the letter dated 23rd April 2010 is the only tangible evidence of a grievance being raised. Hence the raising of a grievance by Mr Perenara was substantially outside the 90-day period allowed. While I accept that Mr Perenara expressed to Mr Visser (the representative of the employer) that he was "unhappy"

about his position being made redundant and that he also gave some reasons as to why he was unhappy, I conclude that the expression of his unhappiness was not of sufficient "strength or purpose" to alert the employer to the existence of a personal grievance.[1] As was held by the Employment Court in *The Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v John Edmonds* [2008] ERNZ 139:

> In getting to the merits [of an employment relationship problem] an employer must know sufficiently of the complaint to be able to address it promptly and informally with a view to resolving it.

And further:

> What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient.

And finally:

> In cases where the employer may be less aware, or even unaware, of a grievance, the onus on an employee will be greater to inform the owner of the complaint.

Unfortunately for Mr Perenara, he did not even go close to informing his employer (via Mr Visser) on 7th September 2009 that he had a personal grievance. It follows that I find that Mr Perenara did not raise a personal grievance within the 90-day period required by the provisions of s 114 of the Act.

Should the Authority grant leave for the grievance to be raised after the expiration of the 90-day period?

[13] Pursuant to s 114(4), having heard from the employer, leave may be granted if the Authority:

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[14] Relevant to Mr Perenara's submissions, s 115 provides that exceptional circumstances include:

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
(b) ….
(c) ….
(d) ….

[1] *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512 at 524.

[15] It is submitted for Mr Perenara that he was so affected by his dismissal and the manner in which it was carried out that he was unable to properly consider raising the grievance within the 90-day period. On the evidence available to the Authority it is probable that the manner in which the dismissal was executed was unfair and unreasonable, but there is not sufficient evidence to suggest that Mr Peranara was so traumatised that he was unable to raise a personal grievance within 90 days of the dismissal.

[16] Finally, I do not accept that there is any merit in the submission for Mr Perenara that because Mr Perenara accepted the view of Mr Visser that there was nothing Mr Perenara could do about the circumstances relating to his dismissal, and as this was clearly incorrect, this constitutes an exceptional circumstance. Clearly, Mr Perenara could have sought advice at any time within the 90-day period. Furthermore, and of considerable significance, is the fact that Mr Perenara's employment agreement contains a comprehensive, plain language *Problem Resolution* procedure. Had Mr Perenara even casually glanced at this procedure he would have become aware of his rights in relation to raising a personal grievance. It is unclear if Mr Perenara had a copy of this agreement in his possession but even if he did not, it would have been a simple matter to have made a request to WCL to provide him with a copy. Unfortunately, there is no evidence at all that Mr Perenara made any attempt to ascertain his legal rights until he had contact with Mr Austin; apparently, some time shortly before 23rd April 2010.

Determination

[17] For the reasons set out above, I find that:

1. Mr Perenara failed to raise a personal grievance within the 90-day period required by the provisions of s 114 of the Employment Relations Act 2000.

2. Leave cannot be granted to Mr Perenara to raise a personal grievance after the expiration of the 90-day period as there is no evidence of any exceptional circumstances pursuant to s 115 of the Act.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority