

Whether grievance raised within 90 days

[4] Phil Horne, the Auckland Regional Manager for VINZ, dismissed Mr Ram on 24 August 2006. The dismissal followed complaints to the effect that Mr Ram had passed for certification vehicles he should not have passed, and had done so in breach of Land Transport rules in respect of vehicle standards. Land Transport New Zealand had sent a reviewer to investigate the complaints, and the dismissal was concerned with the same matters.

[5] Mr Ram's position was that he did not deny the breaches, but he was put under pressure to check more vehicles in a day than he was reasonably able to. He said further that he had been bullied and abused regarding the speed at which he worked and the number of vehicles he was able to check in a day, and had raised concerns about that matter with Mr Horne during the months of June and July 2007.

[6] Mr Horne said he investigated Mr Ram's concerns, and found the allegations could not be sustained. It was common ground that Mr Ram did not inform Mr Horne at the time that he was suffering from stress and had consulted his general practitioner about the problems he was experiencing.

[7] Mr Ram has not argued that he raised a separate grievance in respect of those problems. He did, however, repeat his allegations of pressure, bullying and abuse during the disciplinary meeting preceding his dismissal. By then Mr Horne had investigated the allegations and did not accept them. Mr Ram says his raising of these matters at the time amounted to the raising of his grievance in respect of the justification for his dismissal.

[8] The law concerning whether or not a grievance has been raised is set out in a number of decisions of the Employment Court, most usefully for present purposes in **Winstone Wallboards Limited v Samate**¹. The court said:

¹ [1993] 1 ERNZ 503

“... for the express purpose of early low level resolution of the grievance, it should be plain to an objective observer that the employee concerned has commenced the applicable grievance process, and has done so in a way that enables the employer to respond.”²

[9] Elsewhere it said:

“... What the legislature requires ... is the application in each case of nothing more than common sense. It is unnecessary and contrary to the Act to apply to the claimed submission of a grievance in the present case any test more complex than the one proposed ...: what did the parties understand was being communicated? I add one, but only one, important qualification and state the question this way: to an objective and disinterested observer, does the letter (in this case) present to the employer for consideration or decision any grievance that the employee may have against his or her employer because of one or more of the claims that are defined in s 27 of the Act?”³

[10] The decision was made under the Employment Contracts Act 1991, but the same test is applied in respect of s 114 of the Employment Relations Act.

[11] Mr Ram’s concerns about pressure, bullying and abuse were first raised as complaints and subsequently, in the course of the disciplinary meeting, as an explanation of his conduct. They did not have the flavour required by tests such as those set out in the **Winstone Wallboards** case, namely that they amount to more than complaints or explanations and are indicative of a grievance because of one or more of the grounds set out in the Act. Moreover, after he was advised of the decision to dismiss Mr Ram did not communicate to Mr Horne or VINZ any protest as to the justification for the decision.

[12] For this reason I do not accept that Mr Ram raised a personal grievance within the 90 day period in s 114(1).

Existence of exceptional circumstances warranting grant of leave to proceed

[13] Mr Ram raised his grievance in the form of the statement of problem he filed in the Authority on 5 October 2007, and which was received by VINZ upon service of

² At p 511

³ At p 509

the document by the Authority. In that manner, the grievance was raised 14 months after the dismissal.

[14] The Authority may grant leave to proceed with the grievance despite this if it is satisfied both that the delay in raising the grievance was occasioned by exceptional circumstances, and that it is just to do so.⁴

[15] Section 115 of the Employment Relations Act 2000 provides in part:

115. For the purposes of section 114 (4)(a), 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) ...”

[16] Mr Ram provided evidence that he was suffering from depression during the latter part of 2006 and into 2007. While I would accept he suffered a degree of disability as a result of the depression, the evidence does not persuade me he was so affected or traumatised by his dismissal that he was unable to properly consider raising that or any other grievance. On the contrary, he did consider the matter. He decided he would wait until he felt better before he pursued it.

[17] Further, even if Mr Ram was affected or traumatised to the necessary degree during the initial 90-day period and beyond, his psychotherapist wrote a letter of discharge to his general practitioner, dated 3 May 2007, recording a significant improvement and a positive view of the future. It cannot be said that, by 3 May 2007, Mr Ram was still so affected or traumatised that he was unable to properly consider raising his grievance. However it was another 5 months before the grievance was raised.

[18] Mr Ram was unaware of the time limit applying to the raising of grievances, but the parties’ written employment agreement contained a provision pointing out that limit and containing the requisite explanation of the procedure for resolving

⁴ s 114(4)

employment relationship problems. Accordingly exceptional circumstances of the kind set out in s 115(c) do not apply.

[19] Nothing else in the background to this matter would amount to an exceptional circumstance warranting a grant of leave to Mr Ram to proceed with his grievance.

[20] Accordingly, leave to proceed is declined.

Costs

[21] Costs are reserved. If either party seeks an order for costs it shall have 28 days from the date of this determination in which to file and copy to the other party a written statement of its position. If the other party wishes to reply it shall have a further 7 days from the date of receipt of the statement in which to file and copy the written reply.

R A Monaghan

Member of the Employment Relations Authority