Determination Number: WA 108/06
File Number: 5037582

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY WELLINGTON OFFICE

BETWEEN	Wanita Anne Rarere
AND	Electrotech Controls Limited
REPRESENTATIVES	David Oliver for Applicant Matthew Lawson for Respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	Napier, 19 July 2006
DATE OF DETERMINATION	July 2006

DETERMINATION OF THE AUTHORITY

Introduction

1. This determination relates to issues concerning the 90 days for the raising of personal grievances. Ms Rarere has four different types of personal grievance she wants the Authority to investigate. The respondent (Electrotech) claims that all four have been raised out of time, that it has not consented to them being raised out of time, that exceptional circumstances do not exist and that it is not just to investigate any of them. Actions for recovery of monies against Electrotech, as well as one for a penalty for a breach of good faith, exist independently and therefore must be investigated separately in any event.

The Facts

2. In order of occurrence, Ms Rarere's first grievance relates to a claim for sexual harassment, which she says occurred in October 2002. That concern relates to her allegedly being given monotonous and backbreaking work to do as punishment for refusal to go out on a date with another contractor on a site.

3. The second, a discrimination claim, relating to alleged unfair classification of children she was responsible for at a Christmas party, occurred in December 2004.

4. Ms Rarere's third and fourth grievances are interlinked. They relate to her treatment at the end of her apprenticeship with Electrotech.

5. Ms Rarere was an electrical apprentice with Electrotech, commencing her employment on 8 January 2001. On 13 May 2005 Electrotech was told that Ms Rarere had completed the requirements of her apprenticeship contract. Ms Rarere had not completed the qualifications necessary to become a registered electrician, however.

6. There were then issues between the parties about whether Ms Rarere's employment with Electrotech would continue and, if so, in what form. Ms Rarere went on stress leave from 18 July 2005 onward and never returned.

7. The week before that she had engaged an employment advocate, Ms Megan Williams. Ms Williams contacted Electrotech's Managing Director, Mr Richie Richards, on 18 July to discuss Ms Rarere's concerns on her behalf. Mr Richards wanted to know what Ms Rarere's concerns were before he would meet with Ms Williams. At this point Mr Richards asked Ms Williams whether Ms Rarere was lodging a personal grievance, as this might necessitate him bringing in his lawyers, and Ms Williams replied - "*not at this stage*".

8. Ms Rarere then sent Ms Williams a five page written statement about her concerns, following her request, which was on sent to Mr Richards on 27 July. In that letter Ms Rarere reported concerns about the potential termination of her employment, including actions to her disadvantage, concerns over the sexual harassment incident and her concerns over discrimination in the treatment of children at Electrotech's Christmas function. Ms Rarere went on to suggest that other staff be sent on training courses, and that she could be given a written apology and a reference from Mr Richards. She also asked for her entire employee file. Ms Rarere concludes by thanking Mr Richards for all the good times and giving her a job. She also stated:

> *"I would like to withdraw my application for further employment as after what has happened in the last couple of weeks and the feeling of uncertainty of my position with this company, I am looking for a more permanent job for my career to be developed further, especially since I may be adding to my family and becoming a caregiver for a six year old boy who will need a secure and happy environment."*

9. Mr Richards responded on 28 July stating that he would conduct an investigation into the accusations and that if from the investigation it was felt that there was a need for a written apology then there would be no problem about that.

10. Nothing happened for over two weeks until Ms Williams wrote to Mr Richards on 15 August. She stated that Ms Rarere would like an apology from the people concerned and also a reference to help her seek other employment.

11. Mr Richards responded that day, stating that he would first conduct an investigation. He also stated:

> *"Although this letter does not state anything suggesting a problem, can you please confirm whether your client is initiating a dispute procedure."*

12. That was an effort to clarify the situation for all concerned from a legal perspective.

13. Ms Williams responded:

> *"Thank you for your prompt reply. I think it would be fair to say that whether or not Wanita initiates a disputes procedure would depend on your response."*

14. Mr Richards responded stating:

> *"I do really need to know what Wanita's position is before giving you a reply, as I am not prepared to provide a reply that may either be used against us or prejudice our position. If Wanita has a dispute, then we need to be informed and on what grounds."*

15. Ms Williams then wrote to Ms Rarere stating that she did not appear to be getting very far with Mr Richards and that he was being careful not to incriminate himself. She asked her whether she wanted her to tell Mr Richards that she had no dispute or that she did in fact have a dispute, in which case they would then need to fine tune exactly what the dispute was. She concluded:

> *"It would appear, to get him to the table and get an apology, you may have to lodge a personal grievance so that they take you seriously. The grounds of the personal grievance would be that in your opinion you have been disadvantaged by your treatment at Electrotech."*

16. Ms Rarere responded, on 16 August, stating:

> *"Sounds as though we should lodge a personal grievance, I think if they can't figure out what to apologise about after reading the letter, then there is no use waiting any longer."*

17. Ms Williams' sole response was, in the middle of September, to try and arrange mediation with the Department of Labour. Ms Williams had been on leave for a week of the three weeks that had elapsed since getting her instructions from Ms Rarere.

18. When contacted by the Mediation Service in October Mr Richards declined to attend mediation as he did not believe there were any problems put forward by Ms Rarere requiring mediation, nor that any personal grievance had been raised.

19. When informed in late October by the Department of Labour's Mediation Service that Mr Richards would not attend mediation, Ms Williams wrote to Mr Richards on 30 October, stating:

> *"As you know I sent you documentation written out by Wanita regarding her claim. She is claiming a personal grievance under s.103(1)(b) in that she considers she was disadvantaged in the work place, details spelt out in the document I forwarded to you."*

20. No personal grievance for unjustified dismissal was raised.

21. I note that through this period Ms Rarere had been attempting to contact Ms Williams, but had been unable to do so and Ms Williams had not responded to messages.

22. In response, Mr Richards stated that this was the first time Ms Williams had indicated Ms Rarere was raising a personal grievance:

> *"…even though I specifically asked that question of you in our last verbal discussion some three months ago, your response at the time was 'it depends on what my (Electrotech's) reply to Wanita's letter was going to be'. I asked specifically for you to reply back in writing stating what the specific problems are with Wanita and the resolutions required. I have never received an answer or further correspondence from you on this matter … Now that you have put in writing that a personal grievance has been raised I would request that you follow the correct procedures for placing this and forward further correspondence to our solicitors..."*

23. Electrotech's current representatives then wrote to Ms Williams on 18 November, stating that Ms Rarere's claims were all out of time. Ms Rarere subsequently received this letter on 29 November 2005. On 6 December she contacted her present representatives and met with them on 12 December 2005, where she asked them to represent her. They then raised all the existing issues (including a claim for the first time for unjustified dismissal) with Electrotech in writing on 27 January 2006, following receipt of Ms Rarere's employment file on 18 January. This claim was based on alleged breaches of s.66 and a legitimate expectation of ongoing employment. Subsequently, the statement of problem was filed on 24 April 2006.

The Law

24. Personal grievances must be raised within 90 days of the date on which the action alleged to constitute a personal grievance occurred. Otherwise, unless the employer consents to the late raising of the grievance, an employee must apply to the Authority claiming exceptional circumstances and that it is just for the Authority to investigate the grievance.

25. The justice of the case refers to overall fairness to both parties, in equity and good conscience, considering that a refusal to grant leave will determine the matter without its merits having been fully investigated.

26. Section 114(2) provides:

> *"…a grievance is raised with an employer as soon as an 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".*

27. *Ruebe-Donaldson v. Sky Network Television Ltd (No1)* [2004] 2 ERNZ 83 makes clear that the purpose of requiring a grievance to be raised is to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin. To enable an employer to address a complaint and any remedy a minimum level of sufficiency of detail of the complaint is necessary. This is consistent with the finding in *Houston v. Barker* [1992] 3 ERNZ 469, at 482, that:

> *"…the legislative purpose…of the 90 day period…was to cause contended grievances to be expeditiously identified as grievances and appropriately addressed as such between the affected parties, rather than to have the situation arise where, say 12 months or much later after the alleged grievance arose, it was then identified through submission to an affected employer as a contended grievance and then belatedly dealt with…"*

28. In *Creedy v. Commissioner of Police* unreported, Colgan CJ, AC 29/06, 23 May 2006, the Court dealt with the issue of what was meant by raising a grievance. As is stated in para.36:

> *"It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it so it is insufficient and therefore 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 a statutory type of personal grievance …for an employer to be able to address a grievance as the legislation clearly states an 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 needs to 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.
…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."

Determination

29. In this case Mr Richards specifically asked Ms Williams both orally and in writing whether she was raising a personal grievance or dispute on behalf of her client. There was never any affirmative response to those requests. An employer raising a direct question in these circumstances is entitled to a direct response. Mr Richards, for instance, had already mentioned that if the matter was to be raised as a grievance he may involve his lawyers. These requests overrode the possibility of Ms Rarere's written concerns constituting the raising of grievances in and of themselves, I find. As *Houston* makes clear a worker's concerns must be identified as grievances and thus Electrotech was entitled to conclude that it had not been raised as such in the absence of a positive response to Mr Richards' direct questions. That is not to say that such requests can be used as a delaying tactic by employers, but I find that this was not the case here. As a result I find that the provisions of s.114(2) were not met and all of Ms Rarere's claims were not raised with Electrotech as required until after the 90 days had passed.

30. Ms Rarere relies on s. 122 (nature of grievance may be different type from that alleged) and s. 160(3) (Authority not bound to treat matter as the type described by parties) as ways around the need for the 90 day restrictions. S.122 does not apply in relation to grievances not raised in time as it is the subject matter of the grievance, not the way it is categorised that is important in this context. S.160(3) is a provision of general application and therefore, as a matter of statutory interpretation, must be interpreted as subordinate to more specific provisions. It thus does not assist Ms Rarere as it can not be utilised to override the specific requirements of s.114 in relation to personal grievances.

31. Further, the letter sent by Electrotech's lawyers clearly reserved its rights to pursue the 90 day issue and therefore did not constitute consent, directly or by implication, to the raising of the grievance after 90 days, I find. I do not accept that there was any implied consent to the raising of the claims outside the 90 day period either.

Investigations undertaken by Electrotech were clearly put in place before any grievance was raised, as a result of Mr Richards' specific questions. Furthermore, the correspondence did not show any implied consent, as covered above.

32. It is clear that no exceptional circumstances exist in respect of the claims for sexual harassment and discrimination. Both took place well outside a 90 day period before Ms Williams was even instructed to act on Ms Rarere's behalf. Therefore a claim for exceptional circumstances under s.115(b) cannot lie, yet this was the only evidence that might support a claim for exceptional circumstances. It follows that those grievances can not be investigated by the Authority.

33. The matter is different with respect to the disadvantage and dismissal grievances, however, even although neither was properly raised until 30 October 2005 and 27 January 2006 respectively. I find that Ms Rarere made reasonable arrangements to have these grievances raised on her behalf by Ms Williams within 90 days. Her email of 16 August is clear evidence of that. Ms Rarere is a lay person. She was asked whether she wanted to raise a personal grievance over the disadvantage to her of her treatment by Electrotech and she responded positively. That constitutes reasonable arrangements for a lay person. Such people engage representatives to formulate grievances according to legal requirements. Here Ms Rarere had given Ms Williams sufficient information on which to do so, including any "fine tuning" necessary, and then she continued to try and contact Ms Williams about progress, without success.

34. Furthermore, it is also quite clear that Ms Williams unreasonably failed to ensure that the grievances were raised within the required time, which would have been 18 September 2005 for the unjustifiable action and 19 October for the unjustifiable dismissal. Although Ms Williams was well intentioned in trying to get mediation on these matters she failed Ms Rarere by not raising grievances. Mediation is not dependent on the raising of a grievance, nor vice-versa.

35. I find that Ms Rarere has considered throughout that the way her employment ended was unfair and this was what she wanted raised as a personal grievance. I find that a reasonable representative would have identified the grievance, based on Ms Rarere's

written account, as constituting both a dismissal and a disadvantage grievance (even if only in the alternative). This was only remedied over two months later, by Ms Rarere's new representatives. This does not affect her application for two reasons, I find. First, the exceptional circumstances over the raising of the dismissal grievance continued for that period, as Ms Rarere acted reasonably and in a reasonably timely fashion in obtaining new representation. Second, as the subject matter for grounds for a dismissal grievance were contained in Ms Rarere's letter, recourse can be had to s.122, in that the Authority could determine the disadvantage grievance as a dismissal grievance in any event.

36. It therefore follows that the delay in raising the disadvantage and dismissal personal grievances were occasioned by exceptional circumstances, as set out in s.115(b).

37. I consider that it is just for the Authority to grant leave for Ms Rarere to pursue these grievances, as she has genuine concerns about how her employment was ended, the delays were not particularly significant and there has been no evidence of prejudice to Electrotech in having to defend those claims. In fact Electrotech has filed a full statement of reply and witnesses are available to defend Electrotech's actions in this regard. Furthermore, the failings in the way the matter was dealt with were primarily those of Ms Williams, not Ms Rarere, and it is implicit in s.115(b) that Ms Rarere should not be disadvantaged by that.

38. As I have granted leave, I am required to direct Electrotech and Ms Rarere to use mediation to mutually resolve the grievances. This mediation is to take place within 21 days of the date of this determination. I remind the parties that they must comply with this direction and attempt in good faith to reach a settlement of their differences.

Costs

39. Costs are reserved.

G J Wood
Member of the Employment Relations Authority