

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 184
3259499

BETWEEN PETER SAUNDERS
 Applicant

AND SERVICE FOODS LIMITED
 Respondent

Member of Authority: Jeremy Lynch

Representatives: Parker Van Lawrence, advocate for the Applicant
 Lilli Wilkinson and Kirsty McDonald, counsel for the
 Respondent

Investigation Meeting: 12 February 2025 by audio-visual link

Submissions (and other 20 August 2024, 17 September 2024 and 4 March 2025
information) received: from the Applicant
 16 September 2024 from the Respondent

Date of Determination: 31 March 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent, Service Foods Limited (Service Foods), operates a food distribution business throughout New Zealand.

[2] Peter Saunders was employed by Service Foods in Auckland, in the position of Picker Packer – Freezer. Mr Saunders was dismissed from his employment for serious misconduct on 20 April 2023.

[3] Mr Saunders brings a number of matters before the Authority for resolution including personal grievances for unjustified disadvantage. Mr Saunders says his employment was unjustifiably disadvantaged by Service Foods because he was kicked by a co-worker in December 2023.

[4] In addition to unjustified disadvantage grievances, Mr Saunders also brought claims of unjustified dismissal, discrimination under s 103(1)(c) of the Employment Relations Act 2000 (the Act), together with claims under the Health and Safety at Work Act 2015, including that Service Foods has engaged in adverse conduct, and breached its duty to notify the Regulator, together with a claim of tortious battery, and an additional claim that Service Foods is liable to him in tort, for the intentional infliction of emotional harm.

[5] This determination deals only with the preliminary jurisdictional issue of whether Mr Saunders has raised a personal grievance for unjustified disadvantage, within the statutory 90-day timeframe.

The Authority's investigation

[6] By consent, this preliminary issue is determined on the papers.

[7] The Authority has received information, including submissions and supporting affidavit evidence from the parties, filed in accordance with timetabling directions. A sworn affidavit was provided by Mr Saunders. In addition, for the respondent, an affirmed affidavit was provided by Mabel Vivera, Service Foods' People and Culture Business Partner. In addition to Mr Saunders' primary submissions, he also provided submissions in reply.

[8] Having received the evidence, and the parties' submissions, the Authority convened a submissions-only investigation meeting on 12 February 2025, for the representatives to present their submissions.

[9] At the submissions-only investigation meeting, Mr Saunders' representative advised that personal grievance claims for unjustified dismissal and discrimination were no longer being pursued. On 4 March 2025, Mr Saunders confirmed to the Authority in writing that he had withdrawn his claims for unjustified dismissal and workplace discrimination.

[10] For completeness, Mr Saunders' statement of problem claimed an unjustified disadvantage personal grievance in respect of a written warning received on 8 March 2023. Other than the claim being listed in his statement of problem, Mr Saunders has not provided any further information in relation to this claim, and has not referred to this grievance at all in his affidavit or submissions. The Authority infers that Mr

Saunders is no longer pursuing this separate grievance, and it has not been considered as part of this determination.¹

[11] As permitted by s174E of the Act, this Determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including all the information provided by the parties and their submissions.

Issues

[12] The issues requiring investigation and determination are:

- (a) Whether Mr Saunders raised personal grievances for unjustified actions causing disadvantage within the statutory 90-day time period; and
- (b) Whether either party should be required to contribute to the other's costs?

Relevant law

[13] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to the 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 outside of the statutory 90-day timeframe.

[14] A grievance is raised with the 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.²

[15] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Her Honour Judge Holden summarised the applicable principles for raising a personal grievance:³

- [36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there have been a series of communications, not only would each be examined as to

¹ If this is incorrect, Mr Saunders may notify the Authority.

² Employment Relations Act 2000, s 114(2).

³ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]-[38].

whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it 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.

[16] Section 114(2) of the Act, and the issue of how a grievance is raised with an employer, was considered by the Employment Court in *Creedy v Commissioner of Police*:⁴

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 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 the statutory type of personal grievance as, for example, unjustified disadvantage in employment... 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. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs 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.

[17] In *Shaw v Bay of Plenty District Health Board*, the Court of Appeal observed that "... not every criticism of an employer or the culture within a workplace, will obviously constitute a personal grievance".⁵

[18] Under s 114(4) of the Act, the Authority has a discretion (after giving the employer an opportunity to be heard) to grant an employee leave to raise a personal grievance out of time, if it is satisfied that the delay in raising the grievance was occasioned by an exceptional circumstance, and considers it just to do so.

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

⁵ *Shaw v Bay of Plenty District Health Board* [2022] NZCA 241 at [19].

[19] Service Foods disputes all of Mr Saunders' claims, and says that his personal grievance has not been raised within the statutory 90-day timeframe. Service Foods does not consent to Mr Saunders' grievance being raised out of time.

[20] Mr Saunders has not filed an application seeking leave to bring a grievance out of time under s 114(3) of the Act. Rather, Mr Saunders' position is that his grievance has been raised within the statutory 90-day timeframe.

Background

[21] The following key events are relevant to the determination of this preliminary issue.

Alleged assault

[22] Service Foods has provided statements which record that in December 2022, Mr Saunders informed his supervisor that he had been kicked by a co-worker. Service Foods says the supervisor spoke to the co-worker about whom Mr Saunders had complained, and advised Mr Saunders of this. Service Foods says Mr Saunders was asked if he would like to make a formal complaint setting out the details of the incident so that the company could investigate further, but he declined.

[23] In addition, Service Foods accepts that on a separate occasion, Mr Saunders advised Vicki Mulholland (Head of Compliance) of the December 2022 alleged kicking incident. Service Foods accepts that this advice was provided to Ms Mulholland in January 2023. Service Foods again says that upon this issue being raised, enquiries were made of Mr Saunders as to whether he had made a formal complaint about the incident. Service Foods says Mr Saunders advised that although he had informed his supervisor at the time of the incident, he had not made a formal complaint. Ms Mulholland's statement records that she "...asked him if he was okay and he said he was fine".

[24] On 10 February 2023 during an unrelated disciplinary meeting, Mr Saunders again raised the alleged December 2022 kicking incident. Ms Vivera says that this was the first time she had heard of this incident. Ms Vivera says that she requested further information from Mr Saunders. She says she asked Mr Saunders to provide a written statement of the alleged assault so that it could be investigated, including details of when the incident occurred so that CCTV footage could be reviewed.

[25] Ms Vivera's evidence is that on 8 March 2023 she met with Mr Saunders for the purpose of concluding the disciplinary investigation. Notes of the meeting taken by Ms Vivera record that Mr Saunders "...had not provided any specific details about when or where [the incident] happened".

[26] Ms Vivera says that she explained to Mr Saunders that she wanted to investigate this incident but required more information as to what had happened. Ms Vivera says that she:

...offered to help Peter write a statement, but he declined. He said that he wanted to put the whole matter behind him and just wanted to get back to work.

[27] Ms Vivera says that Mr Saunders "made it very clear that he didn't want to take the complaint any further and he didn't want us to investigate it".

[28] Ms Vivera's evidence is that she spoke with the two staff members with whom Mr Saunders said he had discussed the incident. Ms Vivera says that both staff members had advised her that Peter had said he did not want to take the complaint any further.

[29] Ms Vivera's evidence is that:

Employees are regularly advised that when an incident occurs an incident report needs to be filed formally (either by hard copy [or] on our Safety Culture/IA auditor formal platform). Peter did not do this in this instance which limited our ability to take action.

... Peter was unable to provide any specific details of the allegation... He specifically and clearly told us that he didn't want to take the complaint further and that he didn't want us to investigate it.

[30] The Authority observes that there is no requirement for a grievance to be raised in writing, and there is no requirement for a formal complaint. What is required however, is sufficient specificity.⁶

Personal grievance "reminder"

[31] On 20 April 2023 Mr Saunders' employment was terminated summarily.

[32] On 5 September 2023 Mr Saunders sent Service Foods a "reminder of personal grievance" letter. In this letter, Mr Saunders claims to "... formally put into writing my

⁶ Above n 3, at [38].

oral grievance that I raised in January 2023 and then again in my disciplinary investigation meeting in February 2023...”.

[33] Mr Saunders’ personal grievance reminder letter was sent to Service Foods some 138 days after his summary dismissal, and significantly longer after the alleged assault incident (broadly accepted to have occurred some time in late December 2022).

[34] Mr Saunders says he orally raised a grievance firstly when he informed his supervisor about the kicking incident shortly after the event, and again with Ms Vivera during the 10 February 2023 disciplinary meeting.

[35] At the submissions-only investigation meeting, Mr Saunders’ representative clarified that the unjustified disadvantage personal grievance claim was in relation to the actual alleged kicking only. Mr Saunders’ representative clarified that no personal grievance was being pursued based on any claims that Service Foods has failed to act in relation to this incident.

Has Mr Saunders raised a personal grievance for unjustified action causing disadvantage within the statutory 90-day timeframe?

[36] Mr Saunders says that when he informed his supervisor of the kicking incident, he was instructed to put his complaint in writing. Mr Saunders says, “I wrote down a personal grievance detailing the incident and handed it to Kevin”.

[37] Service Foods denies receiving any written personal grievance from Mr Saunders (other than the ‘reminder’ letter of 5 September 2023). Mr Saunders did not provide the Authority with a copy of the written grievance he says he raised in December 2022. Nor has he provided any kind of description as to its contents. He simply says he wrote down a personal grievance and provided it to the company.

[38] As set out above in *Creedy*, it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that he or she considers that she has a personal grievance, or even by specifying the statutory type of personal grievance.⁷

[39] Under s 114 of the Act, more is required of Mr Saunders than merely notifying Service Foods that he had been kicked by a co-worker.

⁷ Above n 4, at [36].

[40] There is no dispute that Mr Saunders informed (at least) three Service Foods employees (all of whom were in positions of seniority) of the alleged kicking incident. It does not matter whether these complaints were recognised by Service Foods as a personal grievance. Rather, the issue is whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and if so whether Mr Saunders' communications complied with s 114(2) of the Act, by conveying the substance of his complaint to Service Foods.⁸

[41] Under s103(1)(b) of the Act, the unjustifiable action causing disadvantage to the employee's employment, must be the action of the employer. Presumably this is because the legislature wished for there to be a differential between personal grievances and mere complaints.

[42] As in *Shaw*,⁹ informing Service Foods of the kicking incident is more akin to a complaint, and does not constitute the raising of a personal grievance.

[43] In addition, despite Mr Saunders' claim to have written down a personal grievance following the December 2022 kicking incident, he has been unable to provide the Authority with any information in support of this claim. He did not provide a copy of his written grievance, and Service Foods disputes that any such written grievance was ever provided. Furthermore, he provided no description of the contents of his written personal grievance. As such, the Authority has been unable to assess whether the requirements of s 114(2) of the Act have been met in respect of the claimed written personal grievance.

[44] Despite the kicking incident being raised with Service Foods (on three occasions), the Authority is not satisfied that Service Foods was on notice that a grievance existed which Mr Saunders wanted it to address,¹⁰ or that Mr Saunders had taken reasonable steps to make Service Foods aware he had a grievance he wanted it to address, as required under s 114(2) of the Act.

Outcome

[45] Mr Saunders has not established that he raised within the 90-day statutory timeframe, a personal grievance for unjustified disadvantage in respect of the December

⁸ Above n 3, at [37].

⁹ Above n 5 at [19].

¹⁰ See *Devine v Heart Kids New Zealand Inc*[2024] NZEmpC 236 at [37]-[39].

2022 kicking complaint.

[46] A case management conference is to be scheduled to progress the investigation of the remaining issues of this employment relationship problem, and to discuss further mediation.

Costs

[47] Costs are reserved.

Jeremy Lynch
Member of the Employment Relations Authority