IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 183/09
5161315

	BETWEEN	WENDY DENISE SCOTT Applicant
	AND	ANIMAL ATTRACTION LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Rhonda Harris, Counsel for the Applicant John Farrow, Counsel for the Respondent
Investigation Meeting:	14 October 2009 at Dunedin
Determination:	21 October 2009

DETERMINATION OF THE AUTHORITY

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[1] Wendy Scott worked for Animal Attraction Limited from October 2006 until about 1 October 2007 when she resigned in circumstances which she says give rise to a constructive dismissal personal grievance. Ms Scott lodged her statement of problem with the Authority and in its statement in reply the company says that Ms Scott did not properly raise her grievance within 90 days so she is not entitled to have it investigated and determined by the Authority. As to that, Ms Scott says that her grievance was raised within time by correspondence from her solicitor to the company. Alternatively Ms Scott says that the company impliedly consented to consider a late grievance if the correspondence is held not to constitute her raising her grievance. Without objection from the respondent and again in the alternative, counsel for Ms Scott also made an oral application for leave to raise a grievance out of time.

[2] This determination resolves these preliminary issues. However, I will first set out the relevant communications.

Communications about the grievance

[3] Judith Johnson is the company's principal. It is common ground that the relationship between Ms Scott and Ms Johnson was a good one at least until Ms Scott required time off due to an accident. On or about 30 September 2007 Ms Scott told Ms Johnson that she was resigning and she later confirmed that in writing. There were some discussions between Ms Scott and Ms Johnson at the time about the resignation but it has never been suggested by Ms Scott that she thereby raised any grievance. Ms Scott finished work on or about 1 October 2007.

[4] It is common ground that there was no communication with the company until Ms Johnson received a letter dated 12 December 2007 from Ms Scott's solicitor. It reads:

> *Dear Ms Johnson*
>
> *Re: Wendy Denise Scott ("Wendy") – Formal Notification of Personal Grievance – Constructive Dismissal – Animal Attraction*
>
> *We act for Wendy who has consulted us over the circumstances of her recent employment with you at Animal Attraction as a shop assistant.*
>
> *On the facts as presented by Wendy, we believe that she has a personal grievance based on constructive dismissal arising from her employment with you.*
>
> *Our intention is to fully outline the substantive and procedural grounds for this contention within a formal notification of personal grievance, however in the meantime could you please forward to the writer a copy of Wendy's employment contract. Furthermore, pursuant to section 130 of the Employment Relations Act …we require Wendy's wage and time records and ask that you forward those to this office immediately as is required by the ERA.*
>
> …

[5] Ms Johnson referred this letter to her solicitor who responded by letter dated 20 December 2007. In relation to the purported grievance it says *We note what you say about your intention to raise a personal grievance. We reserve our client's position on all aspects of that matter.*

[6] In early January 2008 Ms Johnson made a complaint to the police about missing takings and nominated Ms Scott as possibly responsible. Police contacted Ms Scott and then interviewed her. By late June 2008 Police advised Ms Scott that she would not face any charges in relation to the theft allegation because there was no evidence to substantiate any allegation against her. Over this period, Ms Scott chose not to take any further steps in relation to her personal grievance claim. She believed that it had been validly raised with her employer and that she had up to three years to commence proceedings so she did not need to take any further steps in the meantime. Ms Scott's evidence is that she did not want to deal with two court proceedings at the same time.

[7] On 16 July 2008 Ms Scott's solicitor wrote again to the company's solicitor. With respect to the grievance the letter says:

> …
>
> *Some time has passed since we notified you of Wendy's personal grievance. …. My client has been greatly stressed by your client's allegations and was reluctant to proceed with the personal grievance as she felt she was being harassed ….*
>
> *In order that we draft our substantive and procedural grounds in relation to our Notification of Personal Grievance dated 12 December 2007 based on constructive dismissal, we ask that time records and a copy of Wendy's Employment Contract are forwarded to our office immediately.*
>
> …

[8] There was no written response. On 17 September 2008 Ms Scott's solicitor wrote a third letter again asking for time records and the employment contract and saying *Correspondence outlining Wendy's procedural and substantive justifications for her personal grievance based on constructive dismissal will be with you within the next week.*

[9] That letter drew a response dated 23 September 2008. As to the grievance it says *We note your intention to supply grounds for your client's grievance to us. Clearly, the Police matter will not be relevant … - having occurred some time later.*

[10] The much promised grounds for the personal grievance claim arrived by letter dated 28 November 2008. To summarise, the letter says that Ms Johnson breached implied contractual obligations in the way that she responded to Ms Scott's work accident in June 2007, time off and rehabilitation requirements thereafter and

treatment plans. It specifies Ms Scott's compensation claims, asks for a response within 7 days and then says:

> *If your client is not prepared to provide remedies to Wendy's satisfaction, we ask that you notify us in regards your client's willingness to attend mediation at Mediation Services with Wendy. If your client does not consider Wendy's request for mediation, we are instructed to file proceedings … includ[ing] applications on an urgent basis for a direction that the parties attend mediation.*

[11] The company's solicitor rang Ms Johnson to say that a letter had arrived and on 5 December faxed it to her. Ms Johnson was then contacted by another solicitor in the firm, her solicitor being on leave. The stand-in solicitor sent a reply dated 12 December 2008 to Ms Scott's solicitor saying *Having discussed matters with our client, it is clear that there is a major dispute as to the facts upon which your client's grievance relies. Accordingly, we suggest that the matter be set down for mediation in the New Year.*

[12] Meantime Ms Johnson sought advice elsewhere and instructed another solicitor who on 5 February 2009 wrote to Ms Scott's solicitor saying that no grievance had been properly raised within time so the company was not prepared to attend mediation. On or after the date of this letter but before receiving it Ms Scott's solicitor contacted the Mediation Service to initiate arrangements for mediation but that did not progress as a result of the company's position as per the 5 February 2009 letter.

[13] These proceedings were lodged in the Authority on 7 May 2009.

Was the grievance raised in time?

[14] Counsel for the company refers me to *Creedy v Commissioner of Police* [2006] ERNZ 517 for the applicable principle as to what constitutes a raising of a grievance. There the Court said *…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 grievance.*

[15] Within 90 days starting in early October 2007, all that was done on Ms Scott's behalf was the letter dated 12 December 2007. It suffers from the precise defect identified in *Creedy*. It follows that Ms Scott's grievance was not raised in time.

Implied Consent?

[16] In *Commissioner of Police v Hawkins* [2009] 3 NZLR 381 the Court of Appeal endorsed earlier Employment Court cases finding that the employers had impliedly consented to out of time grievances. The Court of Appeal said *The real issue is … whether [the employer] so conducted himself that he can reasonably be taken to have consented to an extension of time* and noted that it is a question of fact and degree in each case.

[17] In the *Hawkins* case, just within time a letter was sent purporting to raise a grievance and promising full details later. That letter was acknowledged without protest. Several weeks later, outside time, there was a further letter summarising the grounds for the grievance. The employer wrote requesting further details so as to allow proper inquiries to be made. Two years later, following the disposition of criminal charges arising from the employment, there was a further detailed letter setting out the grievance and remedies. The parties then attended mediation but did not resolve the grievance. A statement of problem was lodged and, for the first time, the employer raised a 90 day defence. The Employment Court held as a fact that the employer had impliedly consented to the late grievance by his written responses and his willingness to engage in mediation: see *Hawkins v Commissioner of Police* [2007] ERNZ 762.

[18] The two earlier cases referred to in the Court of Appeal's *Hawkins* judgment are *Jacobsen Creative Services Limited v Findlater* [1994] 1 ERNZ 35 and *Philips v Net Tel Communications* [2002] 2 ERNZ 340. In *Findlater* there was some correspondence in response to a late grievance and the employer attended mediation but the grievance was not resolved. Then the employee filed proceedings and the employer filed its notice of intention to defend but did not refer to a 90 day issue. Soon after, the employer raised the 90 day issue. The Employment Court upheld the Employment Tribunal finding of implied consent. In *Philips* the employer was held to have impliedly consented to a late grievance when it refused the claim for compensation, expressed uncertainty and invited discussion about where the matter should proceed, and then filed a notice of intention to defend expressing its view that the proceedings should be dealt with by mediation without protest about the 90 day issue until several months later. These actions were found to be consistent with an acceptance of a late grievance.

[19] Applying the Court's approach in the *Philips* case, any dealings between these parties after the receipt of the letter dated 5 February 2009 from the company's solicitor are irrelevant for present purposes. That leaves the letters dated 20 December 2007, 23 September 2008 and 12 December 2008. The first response cannot be construed as implied consent because of the finding that no grievance was raised by the initial correspondence. In addition, the letter expressly reserves the employer's position with respect to the intention to raise a grievance. The letters in July and September 2008 on Ms Scott's behalf prior to the 23 September 2008 response suffer from the same defect as did her 12 December 2007 letter: they foreshadowed but did not raise any grievance. Accordingly the response on 23 September 2008 could not be the basis of implied consent to a late grievance.

[20] Ms Scott's grievance was raised by the letter dated 28 November 2008. The only basis for implied consent is the reply dated 12 December 2008. Ms Johnson in her evidence attempts to make something of the stand-in solicitor not discussing the response with her and the absence of any specific instruction from her to agree to mediation. However, that is really a matter between Ms Johnson and the solicitor and it does not affect the issue for determination which must be objectively assessed. The response is set out above. Read objectively, it must mean that the employer would engage in mediation on the merits of the grievance claim rather than rely on it being out of time. That response overtook the statement in December 2007 reserving the employer's position. The situation is not analogous to that in *Kerr v Associated Aviation (Wellington) Ltd*, 19/2/97, Palmer J, WEC7/97 where an employer without the benefit of advice was drawn in to responding to an out of time grievance because that solicitor's correspondence told him he was legally obliged to respond within 14 days. Here, the dealings were always through solicitors.

[21] I find that the employer implicitly consented to the late grievance. Having communicated that, it was too late to withdraw consent: see *Foster v Chief Executive of the Department of Corrections* 1/3/06, Y Oldfield (member), AA57/06.

Leave

[22] Because of the finding that Animal Attraction impliedly consented to the late grievance it is not necessary to deal with whether there were exceptional circumstances such that it would be just to grant leave for an out of time grievance.

Summary

[23] Ms Scott's grievance was raised out of time but Animal Attraction Limited impliedly consented to consider it.

[24] Nothing in this determination should be read as commenting on the merits of the grievance claim itself.

[25] Costs are reserved.

[26] The Authority will contact the parties in due course to make further arrangements which will include consideration about mediation.

Philip Cheyne
Member of the Employment Relations Authority