

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 159
3005616

BETWEEN ARWINDER SINGH
Applicant

A N D VR LOFTS MANAGEMENT
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Kenyon Stirling, Counsel for Applicant
Mark Ryan, Counsel for Respondent

Investigation Meeting: 20 September 2017 at Auckland

Submissions Received: 20 September 2017, from the Applicant
20 September 2017, from the Respondent

Date of Determination: 26 September 2017

DETERMINATION OF THE AUTHORITY

- A. Arwinder Singh did not raise his personal grievances for unjustified dismissal and unjustified action causing disadvantage within the requisite 90 day period.**
- B. VR Lofts Management Ltd did not consent to Mr Singh's grievances being raised outside the 90 day period.**
- C. Accordingly, the Authority does not have jurisdiction to investigate Mr Singh's personal grievances.**
- D. Costs are reserved.**

Employment relationship problem

[1] VR Lofts Management Ltd employed Mr Singh as a Housekeeping Manager at The Lofts, Queenstown from 18 July 2015.

[2] Mr Singh says that once he commenced work it became clear he was required to work in excess of 40 hours per week, for which he was not paid. He also says he did not have time to manage the housekeeping function at The Lofts, as he was required to do housekeeping and look after the reception area. His final complaint is that VR Lofts unreasonably refused to allow him two days annual leave on 3 and 4 September 2015. Mr Singh says the culmination of these three things led him to resign on 26 August 2015.

[3] As a result, Mr Singh raised three claims:

- (a) A personal grievance of unjustified action causing disadvantage to a term or condition of his employment;
- (b) A personal grievance for unjustified dismissal arising out of his resignation, such resignation amounting to a constructive dismissal;
- (c) Wage arrears for the failure to pay him for the additional hours he worked.

[4] In its statement in reply VR Lofts states:

- (a) Mr Singh is not owed any wages or salary for the period he worked;
- (b) Mr Singh did not raise his personal grievances within the requisite 90 day period;
- (c) VR Lofts does not consent to Mr Singh raising any grievances outside the 90 day period.

[5] In a case management telephone conference on 23 May 2017, the parties agreed that I would consider the question of whether the personal grievances were raised within the statutory 90 day timeframe as a preliminary matter.

Did Mr Singh raise his personal grievances within the requisite 90 day period?

[6] The question of whether Mr Singh's personal grievances were raised in time is governed by s 114 of the Employment Relations Act 2000 (the Act) which states:

- (1) Every employee who wishes to raise a personal grievance must, subject to sub-sections (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 the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[7] The test for whether the grievances were raised in the 90 day period is whether they were raised within 90 days of the actions, which are alleged to give rise to the grievances, occurring or the actions coming to the notice of the employee.

[8] It is, generally, easy to establish when an action occurred and therefore calculating compliance with s 114 of the Act is not problematic for this limb. However, establishing when an action came to the notice of an employee is less straightforward. Coming to the notice of an employee occurs when an employee becomes aware of the circumstances to the

extent necessary to form a reasonable belief that the employer's action was unjustifiable. Knowledge of a grievance is not necessary. So, the issue is not the time at which Mr Singh became aware that he may have a personal grievance but rather the point at which he considered (formed a "reasonable belief") that VR Lofts' actions were unjustifiable¹.

[9] Clearly the actions which gave rise to Mr Singh's personal grievances occurred up until 26 August 2015, when Mr Singh resigned.

[10] Mr Singh's evidence is that he resigned because of the unfair and unacceptable working conditions. It follows then that he formed the reasonable belief that VR Lofts' actions were unjustifiable at the time he resigned.

[11] Mr Singh did not raise his grievances when he resigned or any time immediately after his resignation.

[12] In fact, Mr Singh did not raise his grievances with VR Lofts before mediation, which took place on 17 August 2016.

[13] Mr Singh says that immediately after he resigned he was concerned with his immigration status so he did not raise any issues with VR Lofts. It was not until May 2016 when he sought legal advice on aspects of his immigration status that he was encouraged to pursue his grievances and his wage arrears claim. He did this through the mediation services of the Ministry of Business, Innovation and Employment and not directly with VR Lofts.

[14] Mediation services progressed Mr Singh's complaints by arranging mediation between Mr Singh and VR Lofts. There is no evidence before me that in the course of arranging the mediation either mediation services or Mr Singh set out what Mr Singh's complaints were to VR Lofts.

[15] Mr Singh's uncontested evidence is that he then raised his grievances directly with VR Lofts during mediation. Based on all of the evidence I have considered I conclude that this is

¹ *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79

the first time the grievances were raised with VR Lofts. As mediation occurred nearly 12 months after Mr Singh's resignation, it follows that Mr Singh's grievances were not raised within the 90 day period.

[16] This conclusion does not resolve this preliminary matter completely. Mr Singh asserts that, by attending mediation VR Lofts has consented to his grievances being raised after the 90 day period.

Has VR Lofts consented to Mr Singh's grievances being raised outside of the 90 day period?

[17] Counsel for Mr Singh relies on the decision of Judge Travis in *Phillips v Net Tel Communications*² where Judge Travis referred to *Jacobson Creative Surfaces Ltd v Findlater*³ and stated:

Both counsel accepted, as I do, that the law is correctly set out in *Jacobson* which held that even if an employer is ignorant of the time constraints imposed by s.33(2) affecting the grievance: "but purposely seeks to resolve the contended grievance through, say, a process of negotiation or mediation with the affected employee or his representative, then such an employer has plainly consented, I hold, to the submission of a stale grievance to him. In any given case it is a matter of fact and degree, I hold, as to whether what has materially occurred comprises a consent by a particular employer to the submitted grievance. (p54).

[18] Counsel submits that I can infer consent because VR Lofts attended mediation, the purpose of which was to negotiate Mr Singh's grievances.

[19] I do not accept that the mere attendance at mediation by an employer means it has consented to the late submission of a grievance. As Judge Travis says in *Phillips* the employer must attend mediation and seek to resolve the grievance.

² [2002] 2 ERNZ 340

³ [1994] 1 ERNZ 35

[20] This follows from a basic analysis of consent. In *New Zealand Fisheries Ltd v Napier City Council*⁴ the Court of Appeal stated:

As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ...”

[21] In *Anna Ale v Kids At Home Limited*⁵ Judge Inglis discussed the question of whether attendance at mediation of itself was sufficient to amount to consent. At [34] Judge Inglis stated:

It was also submitted that the defendant’s apparently unconditional attendance at two mediations was reflective of implied consent. Ms Burke submitted that attendance at mediation must be viewed in context. I agree. While attendance at mediation may be taken as signifying consent to pursue a grievance out of time, much will depend on the circumstances. Mediation is effectively mandatory in this jurisdiction. This will often make it difficult for the Court to conclude with any confidence that consent has been given simply by the act of attending mediation without expressly stating it is not to be construed as a waiver. Where, as here, there are a number of alleged grievances, some but not all of which are said to be within time, it will be difficult to conclude that attendance at mediation signifies consent. I do not accept that the defendant’s attendance at mediation can reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the particular circumstances.

[22] In summary, the question of whether an employer consents to the late raising of a personal grievance is one of fact and degree. Consent requires an affirmative action not just a passive standing by. But an affirmative action of merely participating in the grievance procedure is not enough. So, for example if the employer attends mediation without any other engagement in the substance of the grievance raised and where there is more than the grievance or claim to be mediated then this will not amount to consent. What I am looking for, as Judge Travis described it in *Phillips*, is an employer purposely seeking to resolve a grievance through that mediation.

⁴ (1990) 1 NZ ConvC 342 at p 190

⁵ [2015] NZEmpC 209

[23] In this case, there is no evidence to show the basis on which VR Lofts attended mediation. It is not clear if VR Lofts knew what the employment relationship problems were that would be discussed at mediation. In fact, the only evidence I have indicates that VR Lofts did not know what the employment relationship problems were, as they was not set out in the correspondence with mediation services and Mr Singh did not contact VR Lofts directly before mediation.

[24] I cannot infer that VR Lofts accepted that the parties would discuss Mr Singh's grievances at mediation simply because it attended mediation. I need something more than this.

[25] There is also no evidence as to what position VR Lofts took in relation to the grievances when they were raised in mediation as I could not hear any evidence about what was discussed in mediation.

[26] Further, there is no evidence to show an express acceptance or rejection by VR Lofts that the grievances could be raised outside of the 90 day timeframe. In fact, the only written response to the grievances is set out in the statement of reply and this expressly states that VR Lofts does not consent to the grievances being raised out of time.

[27] Finally, there is no evidence that VR Lofts engaged in discussing the substance of any of the grievances before mediation, during mediation or after.

[28] All that VR Lofts did was agree to attend mediation without indicating any objection to grievances being raised. As I have said, I need to see that VR Lofts sought to resolve the grievances – this requires more than simply agreeing to go to mediation without raising the issue of the 90 day period, particularly when VR Lofts did not know grievances would be raised in mediation.

[29] On this basis I am satisfied VR Lofts did not consent to the grievances being raised outside the 90 day period.

Are there special circumstances that mean I should allow the grievances to be raised outside of the 90 day period?

[30] Mr Singh did not make an application requesting the Authority to grant leave for the grievances to be raised outside of the 90 day period so there is no application for leave for me to consider.

Determination

[31] Mr Singh did not raise his personal grievances for unjustified dismissal and unjustified action causing disadvantage within the requisite 90 day period.

[32] VR Lofts did not consent to Mr Singh's grievances being raised outside the 90 day period.

[33] I do not have jurisdiction to hear and determine Mr Singh's personal grievances.

Costs

[34] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority