

to Mr Singh's application for unjustified dismissal on the basis that he failed to raise a personal grievance within the statutory 90 day period.

[2] This determination is limited to the issue of whether or not a personal grievance was validly raised within the statutory 90 days of Mr Singh's dismissal and, if not, whether the Authority should grant leave for the grievance to be raised outside the 90 day period pursuant to s 114(4) of the Employment Relations Act (the Act).

[3] As permitted by s 174E 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 as a result. It has not recorded all evidence and submissions received.

Concurrent application

[4] On 25 September 2017 a Labour Inspector of the Ministry of Business Innovation and Employment lodged an application in the Authority against Ways Electronics and Mr Shobhit Saini, the managing director for Ways Electronics. The Labour Inspector made claims relating to the nature of the employment relationship between Mr Singh and Ways Electronics for a three week trial in 2015 plus payment of minimum wages for Mr Singh from 4 January to 11 October 2016.

[5] The Labour Inspector and Ways Electronics attended mediation in November 2017 and resolved the minimum wages claims relating to Mr Singh's employment. By way of a joint memorandum dated 21 December 2017 the Authority was advised of the resolution of Mr Singh's minimum wages claim and that the remaining issues for determination were the status of Mr Singh's engagement in 2015 and penalties.

[6] In a determination dated 31 August 2018 the Authority determined Mr Singh was an employee for the three weeks he worked for Ways Electronics in 2015.¹ The issue of penalties was reserved and is currently before the Authority for determination.

¹ *A Labour Inspector v Ways Electronics Limited & 1 Or* [2018] NZERA Wellington 76.

Raising of a personal grievance

[7] Mr Singh resigned from his employment by email on 11 October 2016 which states (verbatim):

This is Rohit pal Singh. I am IT technician in your company. I am giving you my resignation, and I didn't get any salary from last 2 months. I can't do work anymore with you. and please give me my all salary. please find the attachment file.

[8] In a letter attached to his email Mr Singh explains he is leaving because he was recently offered a new opportunity at a different company and he had decided to accept that offer. His letter goes on to set out a claim for arrears of wages.

[9] After receiving no response to his 11 October letter Mr Singh emailed Mr Saini on 13 October advising him that he would not be returning to work if his salary was not paid.

[10] Mr Singh contacted the Labour Inspector on 13 October 2017 and made an official complaint about Ways Electronics breaching minimum employment standards.

[11] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (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.
- (2) For the purposes of subsection (1), a grievance is raised with an 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.

[12] Section 114(2) makes it clear that a grievance is raised with an 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.

[13] What s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.² There is no formality involved in notifying a grievance to an employer.³

[14] In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information, so that the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.⁴

[15] In his statement of problem lodged with the Authority on 25 July 2018 Mr Singh does not make a claim for unjustified dismissal. Rather the claim appears to be for arrears of wages although there is mention of "mental harassment".

[16] In an amended statement of problem lodged in October 2018 Mr Singh claims he was unjustifiably constructively dismissed. This is the first time Mr Singh claims his resignation was not voluntary but was a dismissal. The claim is clearly outside the statutory 90 day period. Mr Singh left his employment on 13 October 2016. The statutory period of 90 days ended on 25 January 2017 (allowing for the period between 25 December and 5 January).

[17] In his letter dated 11 October Mr Singh refers to taking legal action. I have concluded his threat of legal action is in connection with the non-payment of his wages. That this threat of legal action is in relation to his unpaid wages is consistent with Mr Singh contacting the Labour Inspectorate two days later, on 13 October, to make a formal complaint about the payment of his wages.

[18] It was also on 13 October that Mr Singh notified Ways Electronics that he was leaving his employment immediately without working out the four weeks' notice he had provided on 11 October because he had not been paid. While Mr Singh refers to experiencing stress, mental upset and having to beg for his salary his resignation was already in effect and was, I have concluded, the result of Mr Singh gaining alternative employment.

² *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

³ *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

⁴ Above n 1.

[19] I am not satisfied Mr Singh has taken reasonable steps to raise his personal grievance for unjustified constructive dismissal. Mr Singh states in his letter to Mr Saini that his resignation was the result of his acceptance of an offer of employment with a new employer. While he mentions his unhappiness at not being paid he does not raise a personal grievance. At best Mr Singh has raised a claim for payment of arrears of wages.

Leave to raise a personal grievance outside the statutory timeframe

[20] Ways Electronics does not consent to the raising of the grievance outside the 90-day period. In submissions Mr Singh applied for the leave of the Authority to raise his grievance out of time pursuant to s 114 subsection (3) and (4) and s 115 of the Act which states:

- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
 - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.

115 Further provision regarding exceptional circumstances under section 114

- (1) 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) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
 - (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
 - (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[21] Mr Singh relies on s 115(b). He has submitted that the Labour Inspector advised him he would have to pursue the balance of his claims as a separate issue

through the Employment Relations Authority once the Labour Inspector's case had been resolved.

[22] I have concluded it is more likely than not that the Labour Inspector's reference to the balance of Mr Singh's claims refers to his claim for payment of all hours worked at the rate of pay set out in the employment agreement. The Labour Inspector is limited to claiming the applicable minimum wage rate and does not have the power to claim a higher rate even though this may be specified in the employment agreement.

[23] I am not satisfied Mr Singh discussed the raising of a personal grievance with the Labour Inspector and did not make reasonable arrangements to have his grievance raised on his behalf through an agent. In any event a Labour Inspector could not be an agent for Mr Singh in personal grievance matters as their powers are limited to issues relating to minimum standards.

[24] The Authority does not have jurisdiction to investigate Mr Singh's claim for unjustified constructive dismissal but does have jurisdiction to investigate and determine his arrears of wages claim.

Mediation

[25] The parties have not yet attended mediation. They are directed to attend mediation and attempt in good faith to resolve the outstanding arrears of wages claim. The parties must bear in mind that the arrears of wages claim will be affected by the payments made in December 2017 following resolution of the Labour Inspectors' claims and any record of settlement signed by the Labour Inspector and Ways Electronics dealing with Mr Singh's wages claims.

Costs

[26] Costs are reserved and will be dealt with once the arrears of wages claim has been finalised.

Vicki Campbell
Member of the Employment Relations Authority