

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 219  
5559968

BETWEEN

KYLE TRENT ALBERT  
SPENCER  
Applicant

A N D

SDK LIMITED Trading As  
Northliner Express  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Katharine Taurau, Counsel for the Applicant  
Kerry Amodeo, Counsel for the Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 8 July 2015 from the Applicant  
20 July 2015 from the Respondent

Date of Determination: 24 July 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**A. The unjustified constructive dismissal claim and the claims of unjustifiable disadvantage were not raised within the statutory 90 day time period.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] This determination addresses the preliminary issue of whether the applicant, Mr Kyle Trent Albert Spencer, raised his personal grievances with his employer, SDK Limited Trading As Northliner Express (Northliner), within 90 days of the actions alleged to amount to personal grievances occurring or coming to his notice, in accordance with s.114(1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

## **The legislation**

[2] Section 114 of the Act states:

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise their 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.*

## **Issue**

[3] The issue for determination by the Authority is whether Mr Spencer raised personal grievances of unjustified disadvantage and of unjustified constructive dismissal within 90 days of the date they occurred or came to his notice as required by s.114(1) of the Act?

## **Investigation meeting**

[4] The parties agreed that the Authority could investigate and determine the issue in paragraph [3] on the papers. In order for the Authority to deal with the matter as expeditiously as possible, both counsel provided the Authority with helpful submissions.

[5] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

## **Employment by Northliner**

[6] Mr Spencer was employed by Northliner as a workshop manager pursuant to an individual employment agreement which he signed on 29 May 2008 and which was signed by a director of Northliner, Ms Sharon Klinac on 9 June 2008.

[7] In his statement of problem, Mr Spencer raises issues concerning the way in which he was treated by Northliner from approximately December 2008 up until February 2014. It appears that the parties did not meet to discuss any issues arising out of their employment relationship until January 2014.

## **Termination of Mr Spencer's employment**

[8] On 4 March 2014, Northliner sent a letter to Mr Spencer recording that he had provided Northliner with a medical certificate dated 18 February 2014 stating that he was unfit to resume work for seven days from 14 February 2014 and that he should be fit to return to work on Tuesday 25 February 2014 at 7am. As Mr Spencer had not returned to work on 26 February, the letter cautioned that if Northliner did not hear from him by 7 March it may regard his employment as terminated by reason of abandonment.

[9] On 10 March 2014, Mr Ian McGovern, Consultant, wrote to Northliner stating that Mr Spencer had not abandoned his employment and had resigned *on or about 18 February*. Mr McGovern requested Mr Spencer's employment agreement. In a subsequent letter to Mr Amodeo on 9 June 2014, Mr McGovern confirmed that Mr Spencer had resigned on 18 February. Mr McGovern referred, in his letter to a discussion between Mr Spencer and Ms Klinac and stated :

*It was on the morning of the 18<sup>th</sup> February that he attempted to once again discuss these ongoing issues, with him saying he wanted to see her about these matters, but she just brushed him off saying words to the effect of 'oh, some time later'. This continuing and ongoing attitude and treatment of my client was the catalyst that made him decide that he could not work at SDK Ltd any longer and was the reason he handed his notice to Wayne, the Branch Manager on that day."*

[10] Northliner responded to Mr McGovern on the same day providing him with a copy of Mr Spencer's employment agreement and confirming that Mr Spencer's employment was deemed to have been terminated for abandonment as at 7 March.

[11] It is my view that Mr Spencer resigned from his employment with Northliner on 18 February 2014.

## **Raising personal grievances**

[12] Mr McGovern's letter to Northliner on 10 March 2014 did not raise a personal grievance. The letter simply confirmed Mr Spencer's resignation on 18<sup>th</sup> February 2014, requested a copy of Mr Spencer's employment agreement and concluded by stating:

*This is all I require at the moment but there are other matters that will need to be resolved, including the accuracy of his [Mr Spencer's] final pay and the uplifting of Kyle's[Mr Spencer's] personal tools from the Company.*

[13] The law is settled in relation to what constitutes the raising of a personal grievance under s.114 of the Act. The leading case is *Creedy v. Commissioner of Police*<sup>1</sup>, in which the Court stated:

*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 the statutory type of the personal grievance as, for example, unjustified disadvantage ... As the Court determined in cases under previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[14] This statement of the law was recently cited with approval by Judge Ford in *Snowdon v Radio New Zealand Limited*<sup>2</sup>.

[15] No evidence of any detail was provided by Mr McGovern as to the personal grievance, other than stating Mr Spencer had resigned on 18 February and had not abandoned his employment. There was no detail as to why Mr Spencer considered he had been unjustifiably dismissed or what Northliner was required to do to address the alleged grievance.

[16] On 16 May 2014, Mr McGovern wrote to Northliner raising a personal grievance claim alleging constructive dismissal. In the letter Mr McGovern also referred to alleged unjustified treatment of Mr Spencer by Northliner in the months leading up to the alleged constructive dismissal. Mr McGovern's letter was not received by Northliner until 19 May 2014.

[17] There was further correspondence between Mr McGovern, for Mr Spencer and Mr Amodeo, counsel for Northliner in May and June 2014 regarding the issue of whether the alleged personal grievance claims had been raised in time.

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<sup>1</sup> [2006] ERNZ 517

<sup>2</sup> [2014] NZEmpC45at para.[54]

[18] There was nothing further for approximately 9 months. On 11 February 2015, Northliner's lawyers wrote to Mr Spencer seeking repayment by him of the sum of approximately \$11,000 it claimed he owed it. Northliner sought payment of this sum by 16 February 2015.

[19] The next event occurred on 27 March 2015 when Ms Katherine Taurau of McLeods, Lawyers wrote to Mr Amodeo on behalf of Mr Spencer. In her letter Ms Taurau informed Mr Amodeo that McLeods, Lawyers had been instructed to act for Mr Spencer.

[20] Ms Taurau stated that Mr McGovern had been "*in error*" in stating that Mr Spencer's termination date was 18 February 2014 and that he had in fact been constructively dismissed by Northliner on 25 February 2014. Ms Taurau requested that the parties attend mediation.

[21] Mr Spencer now claims he was constructively dismissed on 25 February 2014 and that this was unjustified. Mr Spencer says this personal grievance and the unjustified disadvantages leading up to his dismissal were raised in writing with Northliner on 19 May 2014, when it received Mr McGovern's letter dated 16 May 2014. Therefore, Mr Spencer says his personal grievances were raised with Northliner within the 90 day period specified in s114 of the Act. I do not accept this to be the correct position. Mr Spencer's representative, Mr McGovern, confirmed to Northliner and to Mr Amodeo on more than one occasion that Mr Spencer had resigned on 18 February 2014. I find Mr Spencer resigned on 18 February 2014.

[22] An alleged constructive dismissal occurring on 25 February 2014, was raised for the first time by Mr Spencer's lawyer in her letter to Mr Amodeo on 27 March 2015. I do not accept this to have been the case.

[23] Northliner says the alleged personal grievance of constructive dismissal occurred on 18 February 2014 as confirmed by Mr Spencer's consultant, Mr McGovern. Therefore, Northliner says the raising of the grievances by letter of 16 May 2014 received on 19 May 2014 was outside the 90 day time frame specified in s114 of the Act. I accept this to be the case.

[24] In my view, the alleged unjustified constructive dismissal claim and unjustified disadvantage claims were not raised by Mr Spencer within the 90 day statutory timeframe. The requirements of the Act are clear. An employee who

considers that they have a personal grievance must raise it with their employer within 90 days in accordance with ss.114(1) and (2) of the Act.

[25] Northliner does not consent to Mr Spencer raising his grievances outside the 90 day timeframe. Therefore, if Mr Spencer wishes to pursue his grievances he must seek the Authority's leave to do so pursuant to s.114(3) of the Act.

### **Costs**

[26] Costs are reserved.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**