

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 187/07
5054500**

BETWEEN PETER STOTT
 Applicant

AND REDVALE CANINE CENTRE LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Paul Tremewan for Respondent

Determination: 21 June 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE

The problem

[1] The applicant Mr Peter Stott ("Mr Stott") applies to the Authority for an investigation into his dismissal from Redvale Canine Centre Limited ("Redvale"). Redvale says that Mr Stott did not raise his employment relationship problem within 90 days of it arising and therefore he is not permitted by law to have his problem investigated. This determination deals solely with the issue of whether the problem was raised within the time prescribed by law. If it was, Mr Stott is permitted as of right, to have his problem investigated.

The facts

[2] Mr Stott was employed by Redvale as its Kennel Manager. It is not disputed that he was dismissed on Easter Monday, 5 June 2006. Mr Stott maintains his dismissal was unjustifiable.

[3] Nor is it disputed that at the conclusion of the meeting at which Mr Stott was dismissed, he told Redvale director Mr Kenneth Muir ("Mr Muir") he was not happy and said *"I'll take this further"*. Mr Muir's response was that he *"had a good employment lawyer"*. Mr Stott telephoned Mr Muir later that same day and repeated his displeasure and intention to take the matter further. Mr Muir advised Mr Stott that he (Mr Stott) would need to put the matter in writing.

[4] Mr Stott completed a Department of Labour *Labour Inspectorate Complaint Form* with details of his employment relationship problem that he had been unjustifiably dismissed ("the complaint form"). The complaint form is endorsed as signed by Mr Stott on 18 June 2006. It was received by the Labour Inspectorate on 26 June 2006. The Labour Inspectorate advised Mr Stott that it did not deal with personal grievances and he would need to raise the problem with his employer. Mr Stott advised the Inspectorate that he wished to pursue his minimum wage entitlements through the Inspectorate.

[5] The complaint form referred to correspondence said by Mr Stott to have been provided to Mr Muir requesting a "*written statement of the dismissal*". Mr Stott tells the Authority that this correspondence was a letter he wrote dated 27 June 2006. That letter says this:-

*Ken Muir
Level 2, 24 Spring St College Hill
PO Box 6675 Wellesley St
Auckland*

*Dear Mr Muir
I am writing to you for a written statement setting out the reasons for the dismissal.
Sincerely,
Signature*

("the 27 June letter")

[6] While the 27 June letter may well have been written at the time the complaint form was received at the Labour Inspectorate on 26 June, it obviously was not sent before 26 June 2006 and I find accordingly.

[7] Mr Stott's wife Mrs Lee Stott ("Mrs Stott") gives evidence on oath that she posted the letter of 27 June. I find it more likely than not that she did so, on 28 June 2007.

[8] That same day, both Mr and Mrs Stott met with an employment advocate. The advocate was presented with a copy of the 27 June letter and advised Mr Stott to write further to Redvale. The advocate endorsed the copy of the 27 June letter in her own handwriting with further advice for Mr Stott to submit to Redvale.

[9] That advice was composed precisely as advised in a further letter by Mr Stott dated 3 July 2006 as follows:-

3 July 2006

*Ken Muir
Level 2/24 Spring St,
College Hill
PO Box 6675 Welleslay St
Auckland*

Dear Mr Muir

I am raising a personal grievance for wrongful dismissal. I am seeking lost of wages disstress of the dismissal. I have requeted on my letter on the 27 June for reeson for my dismissal. I will be contacting the labour department for nediation date.

*Sincerely,
Peter Stott.
Signature*

("the letter of 3 July ")

[10] Mrs Stott gives evidence on oath that she posted that letter of 3 July on either the 4th or 5th of July 2006.

[11] Mr and Mrs Stott both tell the Authority the advocate did not assist them thereafter and was extremely difficult to contact. They say they were ignored. I make no findings about the quality of the advocacy.

[12] Redvale through Mr Muir gives evidence on oath that both letters of 27 June and 3 July were not received by Redvale. He says in any case, they are incorrectly addressed and the correct post office box is PO Box 6575. Mr Muir also says that the Labour Inspectorate did not raise any issues regarding any claim of a personal grievance by Mr Stott.

[13] Both Mr & Mrs Stott say the letters of 27 June and 3 July were not returned to them undelivered.

[14] In a letter dated 27 October 2006 annexed to the statement of problem, Mr Stott states:-

Whilst I understand I am proceeding with this outside the 90 days specified, I wish to explain that the last 3 months have been extremely stressful.

And later:-

I contacted the Muirs by mail in July 06 to inform them I will be taking this matter further as a personal grievance but have received no reply as of today's date writing this letter.

The merits

[15] The law relevant to this preliminary issue is section 114 of the *Employment Relations Act 2000* ("the Act"). That section provides:-

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.

[16] The previous legislative regime referred to the submission of a grievance rather than the raising of one. In terms of the interpretation of submission there was no comparable provision to s114(2) and the term "submit" was given its meaning in practice by the institutions. The previous authorities are therefore of limited assistance.

[17] It is necessary to determine whether Mr Stott raised his personal grievance with Redvale within 90 days of it occurring. He was dismissed on 5 June 2006. His personal grievance was required to be raised by 4 September 2006.

[18] Mr Muir says the first he heard of Mr Stott's personal grievance was by the letter dated 27 October 2006 as annexed to the statement of problem lodged in the Authority and served on Redvale on 31 October 2006.

[19] The Act at section 114(2) specifies *"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"*.

[20] The subsection proceeds on the basis that the employer is made aware of an alleged personal grievance. That awareness I term "notice" of the specific grievance. I prefer "notice" rather than "knowledge". That notice may be either of two situations, firstly, actual notice which is not difficult and secondly, what I term constructive notice. This is where notice must be presumed or the employer is deemed to have notice.

[21] The presumption is necessary and desirable where the alleged grievant has done what can reasonably be expected of them to convey notice to the employer. As a matter of policy, it is right that constructive notice be permitted for to deny it, I suggest, would be to licence wilful blindness by an unprincipled employer.

[22] It is obvious that an employer cannot resolve something it has no actual notice of. The point of the 90 day rule is directed at facilitating resolution as near as possible to the problem. But that is an entirely different matter from whether substantive legal rights should be extinguished by matters of process.

[23] The preservation of substantive legal rights and the entitlement to pursue them is, I consider, expressly contemplated by section 114 because that section in my view, is a deeming provision - it deems demonstrated "reasonable steps" as a "raised" personal grievance. I regard it just, that an alleged grievant, so long as they can show reasonable steps were taken within 90 days to fix the employer with notice, should then be permitted to run their grievance as of right.

[24] I agree with an earlier Determination of the Authority¹ that taking reasonable steps to raise a personal grievance may in the particular circumstances be tantamount to actually raising the grievance, irrespective of receipt by the employer.

[25] I regard it just, especially in this equity and good conscience jurisdiction, that the preservation of an entitlement to pursue a personal grievance must rightly prevail over any consideration directed at ensuring such problems be resolved "at source" as expeditiously when they arise.

¹ *Warren v Xpressions Fashion Clothing Ltd*, WA139/05, 30 August 2005, G J Wood

[26] Section 114 says nothing about receipt by an employer and is framed only in terms of the grievant employee's actions. It is the grievant employee's actions and whether those actions were taken within 90 days that is relevant, not whether the employer received notice within 90 days. This is a further aspect which persuades me that the central issue is about preserving legal rights more than it is about facilitating expeditious resolution at source.

[27] For this same reason, I conclude this is not a matter requiring consideration as to whether to grant leave by reason of exceptional circumstances. It is not disputed that Mr Stott had marked his various advices to Redvale with the incorrect postal address. But I note there was also an alternate physical address that may have been sufficient to effect delivery. Just as I accept Mrs Stott posted the letters, I must also accept Mr Muir's evidence on oath that he did not receive them. But the issue is not one about receipt within 90 days because that is not what the section requires. It is enough in my view that Mr Stott took steps within 90 days. Therefore issues of leave for exceptional circumstances do not arise.

[28] I do not accept that Mr Stott's statement above "*whilst I understand I am proceeding with this outside the 90 days specified*" is to be regarded as a statement in conflict with or contrary to his assertion now that he had already raised his personal grievance. In any case, he goes on to say as much. I accept that statement as an acknowledgement only that he lodges in the Authority out of time (although that was not so being within 3 years), and accordingly I do not accept it as one putting in question his credibility.

[29] Mr Stott has shown to my satisfaction that he took steps to make his former employer aware of his alleged grievance. He did so by his letters dated 27 June and 3 July, notwithstanding the negligence or carelessness apparent from their incorrect addressing. His consultation with an employment disputes advocate persuades me of his *bona fides*. I have no reason not to accept Mrs Stott's sworn evidence that she posted the letters. For the avoidance of doubt, I also find that the advice of 3 July 2006 and its construction, is sufficient to have raised a personal grievance had it actually been received by Redvale.

[30] These are all steps I accept are genuine but significantly, reasonable, in terms of raising a personal grievance. As a matter of equity and good conscience, I see no compelling reason to deny Mr Stott his entitlement to pursue his legal rights.

[31] **I therefore determine that Mr Stott has taken reasonable steps to make his employer aware of his alleged personal grievance, and his grievance has therefore been raised within 90 days.**

[32] I now suspend this investigation for 28 days commencing from the date of this Determination.

Leon Robinson
Member of Employment Relations Authority