IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

[2013] NZERA Christchurch 125
5412635

	BETWEEN	WIKITORIA TE RANGI Applicant
	AND	INVERCARGILL PASSENGER TRANSPORT LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Lesley Soper, Advocate for Applicant Janet Copeland, Counsel for Respondent
Investigation Meeting:	18 June 2013 at Invercargill
Submissions received:	At the investigation
Determination:	26 June 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Wiki Te Rangi, claims she was unjustifiably dismissed by the respondent, Invercargill Passenger Transport Limited (IPTL), on 1 December 2012.

[2] IPTL's response is the Authority does not have jurisdiction to investigate the alleged grievance as it was not properly raised within the 90 days required by s.114(1) of the Employment Relations Act 2000.

[3] The parties agree the question of whether or not a grievance had been validly raised should be decided as a separate and preliminary matter.

Background

[4] As already said, Ms Te Rangi was dismissed on 1 December 2012. She subsequently sought assistance and, having approached others, was referred to the

New Zealand Tramways and Public Passenger Transport Employees Union [Inc.]. A reaction was, however, delayed due to leave taken by the official handling her grievance, Mr Kevin O'Sullivan. The two eventually met late February when Mr O'Sullivan was in Otago and Southland.

[5] On 28 February 2013, and having returned to Wellington, Mr O'Sullivan sent an email to Mr Daniel Hartigan, IPTL's Invercargill Operations Manager. It reads:

> *Hi Daniel,*
>
> *On behalf of Wiki TeRangi, we raise as a personal grievance under S114 of the Employment Relations Act, her dismissal from Invercargill Passenger Transport on 1 December 2012 on the basis of allegations of serious misconduct.*
>
> *We will be seeking the assistance of the Department of Labour Mediation Service, a copy of which will be forwarded to you in due course.*
>
> *Thank you.*
>
> *Kevin*

[6] The following day, 1 March 2013, Mr O'Sullivan wrote to the Ministry of Business, Innovation and Employment (MBIE) seeking the assistance of a mediator. The letter, which was copied to Mr Hartigan, includes advice:

> *We believe her dismissal was not fair and reasonable in all the circumstances, and therefore unjustified, and now seek your assistance in resolving the matter, which has been raised as a personal grievance.*

[7] Mr Hartigan, who does not have delegation to hire or fire, passed the earlier e-mail to Mr Antonio Baas, IPTL's Managing Director.

[8] Subsequently, and probably on either 13 or 14 March 2013, a MBIE mediation support officer contacted Mr Hartigan by telephone. Mr Hartigan says he got the impression mediation was compulsory and agreed to attend on a date to be subsequently advised. The conversation was followed by a notice advising the mediation was scheduled for Thursday, 2 May 2013.

[9] In the interim there had been two other pertinent events.

[10] First it appears the mediation service sent the parties initial advice it had been contacted and suggested four possible dates on or about 7 March. This was sent to Ms Soper (who had been retained by Mr O'Sullivan) but Mr Hartigan asserts he was unaware of it and could not advise whether or not it was received by IPTL. Here it should be noted Mr Sullivan was unaware of this or the subsequent scheduling of the mediation till well after the event.

[11] Second, Mr Baas sought legal advice. On 11 March 2013, Ms Copeland wrote to Mr O'Sullivan. Her letter contains the following:

> *Whilst it is acknowledged that the grievance was raised on the 90th day after Ms Te Rangi was dismissed, it was not raised with sufficient specificity to enable our client to address it. In the absence of sufficient detail as to the basis of Ms Te Rangi's claim our client does not consider that a valid grievance has been raised within the required statutory timeframe. Our client therefore does not accept that a grievance has been validly raised.*
>
> *Our client is unwilling to agree to the raising of the purported grievance out of time and accordingly is unwilling to attend mediation in respect of this matter.*

[12] Mr O'Sullivan responded by letter dated 15 March 2013. He asserts IPTL should be fully conversant with the grievances' specifics and that the matter had been raised in accordance with the Act.

[13] Notwithstanding the letter of 15 March, IPTL's position remained unchanged and was reiterated in a letter from Ms Copeland on 20 March. The scheduled mediation was vacated and the Union subsequently filed an application in the Authority seeking an order IPTL be required to attend a mediation. That led to this investigation.

Determination

[14] There are, potentially, three questions to be answered. They are:

a. Does the e-mail of 28 February raise a personal grievance given the requirements of the Act;

b. If not, is the inadequacy rectified by letter of 1 March; and

c. If the answer remains no, did the respondent accept the grievance out of time by agreeing a mediation date.

[15] If the answer remains no, Ms Te Rangi is precluded from progressing her claim as there is no application to proceed out of time (s.114(4) of the Act).

[16] As stated in Ms Copeland's letters IPTL is of the view the e-mail of 28 February fails to adequately raise the grievance due to a lack of specificity.

[17] I conclude the case law supports that view. In *Creedy v Commissioner of Police* [2006] ERNZ 517 the Employment Court made the following comment at paragraph 36 when addressing the required level of specificity:

> *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 in employment as Mr Barrowclough did on Mr Creedy's behalf in this case.*

[18] At paragraph 39 the Court observed *the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee.*

[19] The Court recently endorsed this approach in *Turner v Talley's Group Limited* [2013] NZEmpC 31. There it said:

> *The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the Creedy tests.*

[20] Here Mr O'Sullivan did no more than say there is a grievance, mention dismissal and then mediation. *Creedy* expressly states this is inadequate and here it should be noted Mr Hartigan's evidence he still remains bemused as to why Ms Te Rangi thought she had been unjustly treated was not challenged.

[21] In addition and as was said in *Turner*, there is a requirement the employer be advised how the grievant wants the matter dealt with. Given mediation is not a remedy as contemplated by the Act, I cannot consider that requirement to have been

complied with and the employer's lack of knowledge regarding remedies meant they could not address the matter quickly and directly as envisaged by *Creedy*.

[22] That conclusion raises the question of whether or not the deficiencies were rectified by the letter of 1 March. I conclude the answer is no. It adds little to the earlier e-mail and gives no indication as to why the Union thought the dismissal was not fair and reasonable or mention remedies.

[23] Finally there is the question of implied consent which arises as a result of Mr Hartigan's agreement to attend mediation. Again, I conclude the answer is no. The union was clearly advised of the company's position in respect of acceptance of the claim before a mediation date was discussed with MBIE and the result of Mr Hartigan's erroneous belief mediation was compulsory (namely the setting of a date) was quickly rectified with the second letter of 20 March. The substantive matter was never addressed or discussed.

[24] For the above reasons I conclude Ms Te Rangi's grievance has not been raised as required by the Act, nor has IPTL accepted the grievance out of time. In the absence of an application pursuant to s.114(4) it must therefore fail.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority