IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 237/08
5098690

	BETWEEN	MEL TUINEAU Applicant
	AND	DEPARTMENT OF LABOUR Respondent

Member of Authority:	Dzintra King
Representatives:	Chris Johnson, Advocate for Applicant Michael Hargreaves, Counsel for Respondent
Submissions Received:	28 May 2008 from Applicant 9 June 2008 from Respondent
Determination:	7 July 2008

DETERMINATION OF THE AUTHORITY

---

[1] On 6 May 2008, after an Investigation Meeting which took place on 28 and 29 April and a conference call which took place on 5 May 2008, the Authority issued a Notice of Direction. In it the Authority stated that at the Investigation the parties had agreed that the applicant had not formally raised grievances with the Department.

[2] According to the file dealing with this matter the Authority first raised the possibility of the grievances not having been filed in time in the course of a conference call on 25 March 2008.

[3] At the Investigation the respondent advised it did not consent to the grievances being raised out of time. The applicant contended that the respondent had given implied consent.

[4] It was agreed that the parties would provide the Authority with submissions on the issue of whether or not the Department had impliedly consented. On the basis that the preliminary question would be decided on the papers the Authority commenced hearing the substantive matter.

[5] On 5 May 2008 a conference call was convened and a timetable agreed.

[6] Unfortunately, the Authority Member who originally dealt with this matter was unable to proceed dealing with it. This determination deals with the issue of whether or not the respondent impliedly consented to the late filing of the grievances. The respondent has conceded that it impliedly consented to the claims for compensation in respect of loss of a work vehicle and for the increased travelling time being raised out of time.

[7] The respondent says it has not consented to the following issues being raised:

- Promise of a health and safety officer's position;
- OOS claim;
- Stress claim

[8] In making this determination I have considered the submissions provided by the parties and have perused the substantial material on the file.

History of the Matter

[9] Judging from Ms Newman's letter of 19 December a number of issues were canvassed at a meeting on 15 December. These included stress, training, career advancement and compensation for loss of the vehicle.

[10] In a letter dated 19 December 2006 the applicant's then representative, Mr O'Brien, refers to the meeting and refers to the possible lodging of a personal grievance.

[11] In a letter dated 23 April Ms Newman responds to a request for mediation by asking what the outstanding issues are. On 31 May Mr O'Brien replies saying that there are unspecified outstanding matters but that the main issue is the loss of the vehicle.

[12] The original SIR dated 18 September 2007 states at para 2 (e): *"The applicant claims that the respondent has reneged on a promise to support and train her and provide the necessary industrial practice needed to achieve her goal to get an Inspector's position with the respondent after completing her university training"*

[13] At paras 2 (v) to 2 (x) the SIR deals with OOS although it refers only to 2007 issues.

[14] At paras 2 (y) to 2 (aa) the SIR refers to stress and an unsafe working environment.

[15] The respondent says it "*would welcome this matter being referred for mediation especially since there are some new matters raised which have not previously been referred to mediation"*.

[16] The parties attended mediation but the matters were not resolved.

[17] On 25 February 2008 the Authority asked that the applicant file amended SOP. This was received 11 March 2008. It sets out the main issues as being:

- *(A) Support and guidance to e given to Mel as per her employer's promise to do so to attain the mutually agreed goal of Health and Safety Inspector position.*
- *(B) Compensation for her Employer's failure four years ago to honour the agreement in (A) above.*
- *(C) Compensation for not being offered a fully safe working environment since 13th March 2003.*
- *(D) Compensation for the resultant stress suffered.*
- *(E) Compensation for issues related to the Re-location to the Auckland office and for Work-Related benefits.*

[18] The SOP then goes on to provide more detail about each of the issues.

[19] The amended SIR was received on 31 March 2008. This has headings including "Provision of support and guidance towards health and safety inspector's position", "Compensation for failure to provide support and guidance above",

"Compensation for not being offered a fully safe workplace since 13/03/2003", "Compensation for resultant stress". Nowhere does the respondent say these matters have not been raised within the requisite timeframe and that it does not give consent to their being raised.

[20] In answer to the question on the form *"Have you, the Respondent, tried to resolve this problem (or matter) by using mediation services provided by the Department of Labour?"* the respondent has answered *"Yes"*.

[21] The respondent also says it has used "*Correspondence and discussions, including mediation, with the applicant and her former solicitor"*.

[22] The SIR also states "*The Department of Labour's position is that a determination on the issues is needed"*.

[23] There is nothing here that indicates that the respondent does not understand what the issues that have been raised by the applicant are. At no stage did the respondent protest that the claims were outside the 90 day period.

[24] In *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 Palmer J observed that if a particular employer seeks to resolve the contended grievance through, say, a process of negotiation or mediation with the affected employee or the employee's representative, then such an employer has plainly consented to the submission of the stale grievance. It was held that the question was simply whether as a matter of fact and degree the actions of the employer constituted consent to the submission of a stale grievance.

[25] In *Phillips v Net Tel Communications Ltd* [2002] 2 ERNZ 340, where an employee was held to have brought a claim more than 6 months after the date on which the action alleged to amount to a personal grievance had occurred, a chain of correspondence between the parties' respective solicitors (including a letter inviting discussion and the filing by the employer of a notice of intention to defend) was held to have comprised an implied consent to the raising of a personal grievance out of time.

[26] It is clear from these cases that a later protest to jurisdiction cannot override an earlier implied consent.

[27] The respondent did not expressly consent. However, an assessment of the history of the concerns raised by the applicant with the Department of Labour, including mediations, correspondence and meetings; the filing of Statements in Reply which address the issues and raise no protest; the agreement to setting a date for the substantive hearing and the filing and exchanging of witness briefs can lead to no other conclusion than that the respondent was aware of the issues and impliedly consented.

[28] Costs are reserved. If the parties are unable to agree on the matter the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority