

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 162  
5372667

BETWEEN

LYNETTE TURNER

Applicant

A N D

TALLEYS GROUP LIMITED

Respondent

Member of Authority: M B Loftus

Representatives: Angela Sharma, Counsel for Applicant  
Maree Kirk, Counsel for Respondent

Investigation Meeting: 1 August 2012 at Nelson

Submissions Received: At the investigation

Date of Determination: 3 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Lynette Turner, claims she was unjustifiably dismissed by the respondent, Talleys Group Limited (Talleys), in July 2011.

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

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

**Background**

[4] Mrs Turner was employed on what Talleys describes as a seasonal employment agreement. That is effectively a fixed term agreement applicable to a single production season of one particular product. That said, and with one six to seven month exception in 2009, Mrs Turner has been in Talleys employ for

approximately 10 years by virtue of moving from one seasonal agreement to another. It is for that reason she now contends her employment had effectively become permanent and termination upon cessation of this agreement was therefore a dismissal. That was not the line taken at the time with Mrs Turner then pursuing what now appears her alternate; namely she had a right to be appointed to the next Hoki seasons by virtue of previous practice, appointments and seniority.

[5] Talleys disagrees with both propositions. Movement between agreements is facilitated through expressions of interest from staff whose agreements are nearing completion and who wish to be considered for further engagements. Furthermore, the agreements expressly state there is no guarantee, express or implied, the employee will be given or considered for re-employment on another task or under another agreement upon the expiration of the present agreement.

[6] At the time of the events giving rise to this grievance Mrs Turner was engaged on an agreement covering the 2010-2011 half shell mussel season. It was envisaged the season would end toward the end of June or early July 2011. As events transpired the actual cessation date was 14 July 2011. That meant Mrs Turner had until 11 October to challenge her termination and Counsel agree this was the applicable date.

[7] At some point during June Mrs Turner expressed interest in engagement for the forthcoming Hoki season. It should be noted that season offered less employment opportunities than existed prior to its commencement and the workforce would reduce by about 12 at this time.

[8] Toward the end of June Mrs Turner was advised she would not be offered employment for the 2011 Hoki season. She voiced her dissatisfaction with the decision and questioned why staff with less experience had been appointed, especially as she had previous experience on Hoki. Her queries culminated in a meeting with Talleys personal manager, Mr Greg Cox. That meeting occurred on either 28 or 29 June. It did not see a change to the initial decision and Mrs Turner was not offered ongoing work.

[9] Mrs Turner chose to seek advice and approached the Nelson Bays Community Law Service where she spoke to Mr Tui Hammond. Mr Hammond suggested she ask Mr Cox for a written explanation as to why the employment had come to an end. Mr Hammond says his advice was driven by two factors: the first and prime consideration

was to assist Mrs Turner in obtaining alternate income through a benefit and the second was to confirm whether or not she had actually been dismissed.

[10] As a result Mrs Turner approached Mr Cox again. Despite disagreement as to how long the meeting took, it would appear from the oral evidence of both Mrs Turner and Mr Cox that it covered ground previously discussed in the June meeting and attainment of a benefit was a prime focus.

[11] Mrs Turner says Mr Cox refused to give her a letter but instead told her the Income Support Service (Work and Income) could telephone him directly and he would provide the necessary information.

[12] Mr Cox agrees with that evidence and states he did so as Work and Income were used to Talleys employees transiting to a benefit on the cessation of a season and, as a result, he and they had adopted this form of communication due to its speed and convenience.

[13] Mrs Turner advised Mr Hammond of the response and, as a result, he wrote to Mr Cox. The letter dated 25 July 2011 reads:

*I am writing on behalf of my client Lynette Turner who was employed by Talley's up until the 1<sup>st</sup> July 2011.*

*She was surprised to see that her name was not on the list in the Hoki season as it had been for the past 9-10 years.*

*She would like a letter explaining that her employment was terminated and the reason why, as this will have a huge impact on her being able to apply for a Benefit.*

*She has been given a Certificate of Service but this was declined by Work and Income as the reason for the loss of employment was not shown.*

*I await your reply.*

[14] Mr Cox responded on 27 July outlining Talleys' view the employment was seasonal, that it would naturally come to an end as a result and he had explained that to Mrs Turner.

[15] The response saw Mr Hammond conclude Mrs Turner should consider the services of an employment advocate or lawyer. He gave her a list of four names and

she chose a Ms Shayne Boyce. Mrs Turner contacted Ms Boyce who made arrangements to collect her file from the Community Law Service.

[16] Mrs Turner says she did not hear from Ms Boyce *with any immediacy* and began to try and make contact. She says, in her brief of evidence, that:

*I eventually spoke to her sometime in mid-September 2011. Disappointingly, she was not prepared to meet with me to talk about my employment issues. She told me that I did not have “a case” because I was a seasonal worker.*

[17] In oral evidence Mrs Turner revised her evidence. She initially said the conversation with Ms Boyce occurred in mid August and then finally settled on late August as the most likely time of the conversation’s occurrence.

[18] Mrs Turner then chose to pursue her claims via another representative. On 26 September she left a phone message asking Ms Sharma to return her call. That occurred on 29 September. Due to Ms Sharma’s workload the two did not meet until after the expiry of the 90 day period on 11 October. The meeting resulted in a letter from Ms Sharma to Talleys dated 27 October 2011. That letter clearly initiates a personal grievance. It also raises the possibility of claims in respect to annual leave entitlements and payments.

[19] Talleys responded by letter dated 8 November 2011. The letter denies the proposition that Mrs Turner was unjustifiably dismissed and gives an explanation as to why. It does not raise the 90 day issue. The letter comments on the annual leave issue, before closing with:

*Finally, we have no intention of changing our position with regard to Mrs Turners employment and nor do we accept that she has any chance of a successful claim against us.*

[20] Talleys subsequently woke to the 90 day issue and have pursued that line since. The matter has not been mediated.

## **Determination**

[21] Section 114 of the Act discusses the raising of a personal grievance. Every employee who wishes to raise a personal grievance must do so within 90 days (s.114(1)). Then:

*(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.*

*(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 ... may grant leave ... 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...*

[22] Mrs Turner's claim is advanced pursuant to s.114(2). It is her contention that she raised the grievance during the meeting of 28 or 29 June.

[23] Talleys does not accept that to be the case. Mr Cox states Mrs Turner expressed the dissatisfaction with the fact her application for the Hoki season had not been accepted and repeated her desire to work it. He is adamant there was no suggestion Mrs Turner felt she had been dismissed and nothing occurred that vaguely resembled the raising of a personal grievance. He adds he did not consider the possibility given Talley's practice of employing workers such as Mrs Turner on a season-by-season basis and its view termination upon the cessation of a season does not equate to a dismissal.

[24] Mrs Turner's contention she raised a personal grievance at this time faces one major hurdle. Her claim is she was unjustifiably dismissed. Dismissal occurs upon cessation. Cessation occurred on 14 July. The meeting at which she contended she raised her grievance occurred on either 28 or 29 June. That precedes the date of the alleged dismissal.

[25] It is well established that the statutory scheme does not allow for a grievance to be raised in respect of a future event, either known or anticipated (see *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) and the subsequent appeals - [2007] NZCA 311 reported at [2007] ERNZ 505 and [2008] NZSC 31 reported at [2008] ERNZ 109).

[26] In other words Mrs Turner is precluded from raising a dismissal grievance at the time she purports to have done so.

[27] In any event, and given the evidence of the parties, I would not have concluded, as a matter of fact, that the grievance had been raised at that point. When answering questions Mrs Turner agreed with Mr Cox's evidence that she queried why she was not on the list and expressed a desire to be there. She states she did not take the matter further and did not suggest she would challenge the decision. The issue discussed here is what is now the alternate proposition – namely that she was entitled to be appointed. That faces two impediments. First, like the dismissal claim, it is future focussed. Second, it is well established that a failure to consummate a future or proposed relationship can not form the basis of a grievance unless the grievant can be considered a *person intending to work* (s.5 of the Act) – (see for example *Hayden v Wellington Free Ambulance Service* [2002] 12 ERNZ 399).

[28] Similarly, and while it has not been claimed or suggested, I could not conclude a grievance was raised at the second meeting between Mrs Turner and Mr Cox. Whilst not absolutely clear, the evidence indicates the meeting occurred prior to cessation, albeit earlier in the day of the 14<sup>th</sup>. The evidence of Mrs Turner and Mr Cox is also consistent in that they agree the discussion was limited to the issue of non-appointment to the Hoki season, as opposed to dismissal from that which had previously passed and the emphasis was on Mrs Turner's ability to secure a benefit.

[29] Similarly, and again while it has not been claimed, I could not, given the facts, conclude that a grievance was raised by Mr Hammond's letter of 25 July. When answering questions Mr Hammond made it clear he did not raise a grievance and was not intending to do so. He says he had two aims. The first was facilitating Mrs Turner's attainment of a benefit and the second was to confirm whether or not there had actually been a termination. He accepts he did not then know if there were grounds for a grievance, let alone raise one.

[30] 25 July saw the last communication between Mrs Turner (and any of her representatives) and Talleys until Ms Sharma's letter of 27 October. 27 October is beyond the expiration of the 90 day period.

[31] There is however one further issue. That is the content of Talleys' response of 8 November. It does not raise the possibility of a 90 day defence and may therefore

constitute acceptance of the grievance out of time. I do not, however, consider that to be the case.

[32] In *Commissioner of Police v Hawkins* [2009] NZCA 209 the Court of Appeal confirmed the question of whether or not consent had been granted was a matter of fact and degree. The Courts have concluded a key indicia of consent is evidence of a willingness to engage in attempts to remedy the claim. For example, the Employment Court commented on the Commissioner's willingness to engage in mediation in the *Hawkins* case. In *Jacobsen Creative Services Limited v Findlater* [1994] 1 ERNZ 35 (EmpC) the Court concluded consent had occurred as the respondent had purposefully sought to resolve the grievance through a process of negotiation or mediation with the grievant.

[33] Notwithstanding the fact Talleys did not initially mention the 90 day issue, there is no evidence it entertained the claim or made any attempt to resolve it. Indeed, Mr Cox's response could be paraphrased as saying *you haven't got a case – go away* and the omission in respect of failing to mention the 90 day issue was remedied before the matter progressed further.

[34] In the alternative, and assuming I conclude the grievance was not raised as claimed, it is submitted there are grounds to allow it out of time. It is submitted this is due to the existence of exceptional circumstances occasioned by Ms Boyce's response and her failure to return Mrs Turner's file, thus allowing the matter to be progressed by another representative.

[35] I do not accept that contention. First, a granting of leave under s.114(3) requires an application (s.114(4)). There has been no application – only a comment which alluded to the possibility the issue may be canvassed during a telephone conference held to arrange this investigation meeting.

[36] If that were not sufficient to preclude the application, I note that I would not, given the evidence, grant it.

[37] The possibility of a claim allowing a grievance beyond the 90 day limit may be proffered as an alternate to a claim the grievance was properly raised has been considered by the Court (*Chief Executive of the Department of Corrections v Waitai* [2010] NZEmpC 164). There the Court concluded there were no exceptional

circumstances as, amidst other things, Mr Waitai did not instruct his representative to raise the claim.

[38] Here it is not just a case of instruction though that is not, in any event, the measure of what is required. An applicant must make reasonable arrangements to have the grievance raised – there need not be an express instruction (see *Melville v Air New Zealand Ltd* [2010] NZCA 563). Mrs Turner did not make reasonable arrangements, at least in respect to having Ms Boyce advance the matter. Indeed the opposite is apparent, with Mrs Turner stating, when answering questions, that she never had a chance and they did not discuss advancing the matter as Ms Boyce was adamant that she (Turner) did not have a case and it was not worth pursuing it.

[39] Notwithstanding conflicting evidence as to when that conversation occurred, Mrs Turner has settled on a time towards the end of August. That left some six weeks before the 90 day period expired. Mrs Turner attributes her failure to act for a considerable portion of that time to the fact she was awaiting the return of her file from Ms Boyce. She says she was leaving messages with the Ms Boyce to the effect she wanted the file.

[40] There are question marks over just how extensive those efforts were but, in any event, I discount them. There is nothing to have precluded Mrs Turner approaching a replacement advocate and instructing them to initiate a grievance along with advice full details would be provided in the near future. There is absolutely no evidence she considered doing so for approximately four weeks. Add to that the fact the evidence would indicate the files contents were minimal – perhaps Mrs Turner’s own notes of her meeting with Mr Cox in late June and the two letters between Messrs Cox and Hammond. Both could easily be replaced. To me, these factors exclude the possibility of a finding there were exceptional circumstances warranting the grant of an application allowing the grievance to be commenced beyond the 90 day period.

## **Conclusion**

[41] For the reasons above, it is my conclusion that:

- a. Mrs Turner did not raise her purported grievance within the required 90 day period; and

- b. There are no exceptional circumstances that would warrant an application, raised in the alternative, that leave be granted to raise the grievance out of time.

[42] Given these conclusions, Mrs Turner's application fails and her personal grievance claim is dismissed.

[43] This conclusion does not apply to the claim concerning annual leave entitlements and payments. It is covered by the normal rules of limitation and Mrs Turner has plenty of time to pursue the claim should it remain unresolved.

[44] Costs are reserved.

M B Loftus  
Member of the Employment Relations Authority