IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 381
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	BETWEEN	KANE UNDERHILL First Applicant TYRONE UNDERHILL Second Applicant
	AND	COCA-COLA AMATIL (NZ) LTD Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicants in Person Bridget Smith, Counsel for Respondent
Investigation Meeting:	16 November 2016 at Auckland
Submissions received:	16 November 2016 from Applicant and from Respondent
Determination:	21 November 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] This determination addresses the preliminary issue as to whether or not the Applicants, Mr Kane Underhill and Mr Tyrone Underhill, raised their personal grievances with the Respondent, Coca-Cola Amatil (NZ) Ltd (CCANZ), within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that they are entitled to pursue their grievances before the Authority.

[2] CCANZ denies that the Applicants raised their personal grievances within the requisite 90 days period.

[3] CCANZ does not consent to a personal grievance being raised outside the time period specified in the Act and does not accept that the Applicants delay in raising their grievances was caused by exceptional circumstances.

Issue

[4] The issue for determination is whether or not the Applicants raised a personal grievance within the statutory 90 day time period

Background Facts

[5] The Applicants each commenced employment on a 12 month fixed term employment basis commencing 3 August 2015 as Trainee Vending Fillers. They were provided with individual employment agreements (the Employment Agreements) attached to letters of offer dated 29 July 2015, both of which they signed. The signatures on the letters of offer were below a statement which read:

> *I,* [name] *confirm that I have read the terms of employment set out in this letter and in the relevant fixed term employment agreement, that I fully understand them and their implications and that I now accept the offer of fixed term employment.*

[6] Schedule 2 of the Employment Agreements contained an explanation of the services available in order to resolve employment relationship problems, stating:

> *Note that if the problem is a personal grievance, the Employee must raise it with the Company within 90 days after the action complained of, or the date the Employee became aware of it, unless there are exceptional circumstances.*

[7] The Applicant's fixed term contracts ended and they subsequently signed a Vending Filler Services Agreements commencing September 2015. The Applicants claim that they were employees during the period they were employed in accordance with the Vending Filler Services Agreements. This is disputed by CCANZ who claim they were independent contractors during that time.

[8] For the purposes of this preliminary matter, the nature of the Applicants' Vending Filler Services Agreements with CCANZ is not being determined. This determination deals only with the preliminary issue of whether or not the Applicants raised a personal grievance with CCANZ within 90 days of the grievances occurring.

[9] The Applicants' Vending Filler Services Agreements were terminated by CCANZ on 26 May 2016. The Applicants did not carry out any work for CCANZ after that date.

[10] Following the termination on 26 May 2016, CCANZ received two identical letters from each of the Applicants, both of which were dated 7 June 2016. Each of the letters stated:

> *This is a written request to the Coca-Cola Vending Division of Coca-Cola Amatil (NZ) Ltd to provide me with a statement in writing of the reasons for the termination of my Employment Contract.*

and:

> *This is a formal written invitation for Mediation with the Department of Labour in regards to the termination of my Employment Contract with the Coca-Cola Vending Division of Coca-Cola Amatil (NZ) Ltd*

[11] Mr Robert Irvine, CCANZ's Commercial Manager – Vending, replied to the Applicants individually on 14 June 2016 stating in the responses which were identical apart from the addressee name:

> *I am writing to acknowledge receipt of your letters (both dated 7 June 2016) requesting (i) a written statement of reasons for termination and (ii) formally inviting us to mediation.*
>
> *…. We can provide a written statement for reasons of termination, however by inviting us to mediation would infer that there is an employment dispute to resolve which, to the best of my knowledge, there is not.*
>
> *If you feel that there is a dispute that needs formally addressing, then you would need to raise a specific personal grievance claim against Coca-Cola Amatil NZ. From there on we would then need an opportunity to respond before heading to mediation.*

[12] Mr Irvine was subsequently contacted by email dated 26 June 2016 by Mr Wayne Underhill, the Applicants' father. In that email Mr Underhill requested: "*two individual statements for the reasons of termination of Tyrone and Kane's Vending Filler Services Agreement".* The email further stated*:" we have been in communication with Mediation Services from MBIE …"*

[13] CCANZ explained to Mr Underhill that it would not engage with him without the Applicants' permission. No such permission was subsequently received.

[14] CCANZ responded to the request for reasons for the termination of the contract on 30 June 2016 stating:

> *We are writing to confirm the reasons for the termination of your services contract with Coca-Cola Amatil (N.Z.) Limited. You were engaged under a Vending Filler Services Agreement … rather than a contract of employment.*
>
> *…*
>
> *Despite the fact that you were not an employee at the time of the termination of your services, we have confirmed with the Ministry of Business, Innovation and Employment Services of our willingness to attend a mediation session …*

[15] The Applicants filed Statements of Problem with the Authority on 1 September 2016.

Determination

Did the Applicants raise their personal grievances within the 90 day statutory limitation period?

The Law

[16] Section 114 (1) of the Act states:

> *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.*

[17] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[18] Section 114(2) of the Act states:

> *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."*

[19] In *Wyatt v Simpson Grierson (A Partnership)*[1] the Employment Court stated:[2]

> *... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.*

[20] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police.*[3] In this case, Chief Judge Colgan stated:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising 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. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[21] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer[4].

[22] I therefore consider each interaction between the parties in light of these considerations.

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[1] [2007] ERNZ 489
[2] Ibid at para [29]
[3] *Creedy v Commissioner of Police*[2006] ERNZ 517
[4] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

[23] The contract between the Applicants and CCANZ was terminated on 26 May 2016. I find that that was the relevant date when the 90 day period in which to raise a personal grievance commenced.

Communications

[24] There were two communications sent to CCANZ on 7 June 2016. One was a request for the written reasons in writing for the termination of the contract.

[25] I find that requesting written reasons for termination of employment does not constitute the raising of a personal grievance.[5]

[26] The second communication from the Applicants on that date was a written invitation to CCANZ to attend mediation. CCANZ responded to these communications in emails dated 14 June 2016 in which it advised the Applicants that if they considered they had a dispute with CCANZ, they needed: "*to raise a specific personal grievance claim".*

[27] The Applicants believed that they had raised a personal grievance by notifying the MBIE Mediation Service and advising it that they believed they had been unjustifiably dismissed.

[28] The Act specifies that it is the employer with whom an employee must raise a personal grievance.[6] I find that the Applicants were aware of this requirement:

- The Employment Agreements provided to, and signed by the Applicants, in July 2015 advised in Schedule 2 that: "*that if the problem is a personal grievance, the Employee must raise it with the Company within 90 days";.*

- Mr Irvine in the email dated advised the Applicants that*: "If you feel that there is a dispute that needs formally addressing, then you would need to raise a specific personal grievance claim against Coca-Cola Amatil NZ.; and*

- Mr Tyrone Underhill had previously raised a personal grievance with a previous employer which had been heard in the Authority.[7] That case contained discussion about the statutory 90 day statutory time period.

[5] *Houston v Barker (t'a Salon Gaynor)*[1992] 3 ERNZ 469; *New Zealand Automobile Assoc Inc v McKay* [1996] 2 ERNZ 622
[6] S.114 (1) of the Act
[7] [2014] NZERA Auckland 456

> As a result I find it reasonable to conclude that he was aware, or ought reasonably to have been aware, of the statutory requirement that a personal grievance must be raised with the employer within the statutory 90 days

[29] However there was no personal grievance raised with CCANZ prior to it receiving copies of the Statements of Problem which had been filed with the Authority on 1 September 2016.

[30] I turn now to consider whether or not the filing of the Statements of Problem constitutes the raising of a personal grievance.

[31] I consider it relevant that Mr Irvine in the email dated 14 June 2016 advised the Applicants that they needed to: "*raise a specific personal grievance claim against Coca-Cola Amatil NZ".* His email did not state that the Applicants needed to raise a specific personal grievance **with** CCANZ

[32] There are no procedural steps that need to be taken by an applicant prior to commencing proceedings in the Authority specified in either the Act or the Employment Relations Authority Regulations 2000

[33] I find that the legislative requirements do not preclude this occurring by the filing of a statement of problem in the Authority with the employer being thereby notified of the grievance the employee wished to have remedied.

[34] The Applicants stated in an email dated 11 July 2016 to the MBIE mediation Service: "*We contend that we have been unjustifiably dismissed".* -The Applicants believed that applying to the MBIE Mediation Service and advising it that they believed they had been unjustifiably dismissed was sufficient to raise a personal grievance

[35] I find that the email to the MBIE Mediation Service did not constitute the raising of a personal grievance with CCANZ.

[36] CCANZ initially agreed to attend mediation. When it did so, no personal grievance had been raised with it, nor had a Statement of Problem been filed with the Authority.

[37] On 13 July 2016 that CCANZ informed the MBIE Mediator that it was no longer prepared to attend the mediation which was scheduled to take place on 10 August 2016.

[38] The MBIE Mediation Service advised the Applicants that same day, 13 July 2016, that the scheduled mediation was cancelled. The Applicants were advised that they could file

a formal claim in the Authority if unable to resolve the matter with their employer. Attached to that email was information on how to file with the Authority.

[39] As stated in *Creedy v Commissioner of Police, : " the scheme of the legislation: is to allow an employer to remedy the grievance as soon as possible after being notified ...".*[8] The legislative requirement specifies that a personal grievance be raised within a 90 time period in order that it can be addressed expeditiously.

[40] The Statement of Problem was filed on 1 September 2016 which was 9 days after the expiry date of the statutory 90 day period, and 49 days after the Applicants had been advised by the MBIE mediator that they could file a claim with the Authority.

[41] I find that by 13 July 2016 the Applicants were aware that CCANZ was not prepared to attend the scheduled mediation that day and that the next stage would be for them to file a formal statement of problem in the Authority. However despite this knowledge, they failed to file Statements of Problem until 1 September 2016.

[42] No exceptional circumstances for not having filed the Statements of Problem within the statutory 90 day time period have been submitted by the Applicants, and I find none, especially given Mr Tyrone Underhill's previous involvement with, and knowledge of, the process, and the advice provided by the MBIE Mediation Service on 13 July 2016.

[43] I determine that each of the Applicants did not raise their personal grievance within the 90 day statutory limitation period, and I am therefore unable to assist them further.

Costs

[44] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicants will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[45] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

[8] *Creedy v Commissioner of Police*[2006] ERNZ 517 at [30]