

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 126
5336411

BETWEEN

MARTIN WALLIS
Applicant

AND

STAR FOOD SERVICES
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Megan Williams for Applicant
Nigel Bryant Respondent

Investigation Meeting: 30 June 2011 at Napier

Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application from Martin Wallis for leave to bring a personal grievance out of time on the basis he took definitive steps for a representative to raise his personal grievance and the representative failed to do so. His representative was his union. The union decided not to take his case.

[2] Star Food Services Limited has opposed leave being granted.

Issues

[3] Has the applicant established exceptional circumstances under s 115 (b) of the Employment Relations Act? Did the applicant take definitive steps to make reasonable arrangements for a representative to raise a personal grievance? Was the delay in raising his personal grievance occasioned by the exceptional circumstances? Would it be just to grant leave?

The facts

[4] Mr Wallis was employed by Star Food Services Limited (Star Food Services and/or the respondent). The parties had an individual employment agreement. The agreement contained a clause for employment relationship problems, personal grievances and disputes and included the 90 day requirement to raise a personal grievance.

[5] On or about 25 May 2010 Star Food Services commenced a consultation process for change involving Mr Wallis. On 19 July 2010 Mr Wallis was informed of potential changes in the workplace and on 23 and 28 July Mr Wallis, his union representatives and the company met. Mr Wallis was made redundant on 28 July 2010. The union officials were involved in the two meetings with Mr Wallis. He ceased working on 29 July 2010. Mr Wallis was sent his final pay details on 3 August 2010. He was not entitled under his employment agreement to any redundancy compensation.

[6] Mr Wallis was provided with enhancements on leaving his employment. The employer paid for consolidating his cv (18 November 2010). Mr Wallis accepted a written reference was provided by the respondent (15 September 2010). The parties have a dispute about the details on interview skills training (18 November 2010).

[7] There was no further contact between the parties after 9 September 2010. Mr Wallis and Stan Renwick, union official, had some exchanges including emails dated 9, 15, and 30 September 2010. In particular Mr Wallis relies upon a reply from Mr Renwick dated 5 October 2010 to support him making arrangements for the union to raise his personal grievance. This email reads (verbatim) as follows:

I've been in touch with the Mediation Service today and they have advised that there is a reluctance from the Company to attend mediation and I've been advise (sic) to lodge with the Authority once again this I've done. So it's a matter of the Authority to force the issue from here on in.

[8] Mr Renwick did not lodge anything in the Authority.

[9] On 30 November 2010 Mr Renwick informed Mr Wallis that the union would not be taking his case any further by leaving a message on Mr Wallis' land line home phone. I accept that Mr Wallis did not know the union was making such a decision until he received a telephone message from Mr Renwick.

[10] Mr Wallis obtained a new legal representative on 26 January 2011. A statement of problem was lodged in the Authority on 2 March 2011 that claimed Mr Wallis had a personal grievance on the basis that he genuinely believed his personal grievance had been raised with the employer, and it outlined the background facts relied upon, and claimed 3 months lost wages, \$10,000 compensation, and costs.

[11] Star Food Services lodged a statement in reply that this was the first time it had heard of the claim and that it was outside the 90 days to raise a personal grievance.

[12] A telephone conference was held with the Authority on 28 March 2011, but adjourned for the applicant's representative to get instructions. The precise issue needing determination and the witnesses to be heard were discussed in a further telephone conference on 10 June 2011 when a decision was made by me to hold an investigation meeting and that I would need evidence from the union officials. This was because information provided by Mr Renwick in an email dated 19 May 2011 to Mr Wallis' representative did not make the situation very clear.

[13] Mr Wallis' representative conceded that it looked as if the applicant's union officials (Mr Renwick and Mrs Ryan) at the time did not carry out Mr Wallis' instructions. On 30 April 2011 Mr Wallis' representative applied for exceptional circumstances under s 114 and s115 (b) of the Employment Relations Act (the Act).

Determination

[14] No personal grievance was raised in time before the expiry of 90 days on or about 29 October 2010 until the statement of problem was lodged in the Authority on 2 March 2011. The raising of a personal grievance was clearly out of time.

[15] Mr Wallis says that he was left with the belief that his union would proceed with the matter because there was mention made of him disputing the employer's decision. This was supported by Mr Wallis' emails asking for an update from Mr Renwick and Mr Renwick's email in reply dated 5 October 2010.

[16] Mr Wallis' evidence relating to his discussions with the union officials at the time was not consistent with him now saying that he gave instructions to raise a personal grievance. I am not certain that he did give instructions to the union in particular to raise a personal grievance. From the information I can discern, at the time he was looking for what progress was being made with his case, and that could have related to attempts to have mediation. He did ask his union official how quickly his case would be heard, but without any other details it is not clear what his case related to because he had not discussed any remedies, I hold. In this regard Mr Renwick informed me that he was waiting on the Union national office for advice and information on whether there could be any compensation in redundancy. Mr Renwick accepted that he was responsible for raising personal grievances for members in his union role, but did not do so in this case. He was unconvincing in his evidence that he raised a personal grievance orally with the employer. Even if he thought he had, I hold that this was not properly done because he did not put the employer on proper notice of any remedies to resolve a personal grievance. I am further supported in my conclusion by him seeking advice and information on redundancy and compensation from the national union office.

[17] It is common ground that there were only two meetings that Mr Wallis' union officials attended. Mr Renwick attended the first meeting held on 23 July 2010. Mrs Colleen Ryan, another union official attended the second meeting held on 28 July 2010 in Mr Renwick's absence. She was summonsed, but given permission to provide an affidavit.

[18] If Mr Wallis made his arrangement for the personal grievance to be raised as he says with Mr Renwick this would have had to be done following the meeting Mr Renwick attended on 23 July, which was before any decision was made on the redundancy involving Mr Wallis. In such a circumstance a personal grievance could have only related to unjustified action at that time. That has not been pursued as a claim. I am not certain that Mr Wallis made any arrangements about raising a

personal grievance then, other than intimating challenging the employer's likely decision. Intimating the possibility of raising a personal grievance is not the same as raising one.

[19] Mrs Ryan certainly did not raise a personal grievance.

[20] The factors that lead me to doubt that definitive arrangements were made by Mr Wallis for the union to raise a personal grievance are:

- a. There have been no other emails and correspondence produced by Mr Wallis and the union officials supporting Mr Wallis making arrangements for the union to raise a personal grievance. I have no doubt that following the meeting attended by Mrs Ryan that Mr Wallis disputed the employer's decision, but there is not enough evidence that he wanted it resolved with personal grievance remedies. This is supported by Mr Renwick's decision to get advice and information from his head office; and Mr Wallis confirmed at the Authority's investigation meeting that he did not discuss the remedies he wanted to resolve a personal grievance.
- b. The emails 9 and 30 September and 5 October do not mention raising a personal grievance.
- c. Mr Renwick and Mr Wallis have confused the number of the meetings. I hold that this does not impact on Mr Renwick's and Mr Wallis' reliability because it is common ground that the two important meetings were held on 23 July and 28 July. There may have been an earlier meeting involving the company and this has caused the confusion about the number of meetings.
- d. Mr Renwick says he had a brief discussion with Mrs Ryan after she had attended the meeting on 28 July. The evidence as it relates to this discussion is not conclusive because of Mrs Ryan's affidavit.

- e. Mr Renwick's and Mrs Ryan's evidence differs on what they were doing with carrying out any arrangements to raise a grievance. They have referred to making a proposal or proposition and or searching for a solution to the problem. Both of them indicated the possibility of the union doing something, but not indicating exactly what, how and when.
- f. Mr Renwick's email dated 5 October 2010 to Mr Wallis was not accurate about lodging the matter in the Authority. He has explained what he meant, but that was not helpful for Mr Wallis who reasonably could have interpreted Mr Renwick's email differently.
- g. Mr Renwick could not support his comment in an email dated 19 May 2011 (to Mr Wallis' representative) that Mrs Ryan told the company a personal grievance would be pursued because he was not present at the meeting on 28 July and Mrs Ryan deposed that she can not recall if she used the words then. In any event if she had done so it would not have raised the personal grievance properly. Whether or not it was stated by anyone that a personal grievance would be raised was not definitive enough given that the employer disputed it.
- h. Mr Renwick's evidence is not consistent when he says that Mr Wallis made arrangements to raise a personal grievance with him, I hold. What Mr Renwick asserts now is not supported by any independent evidence.
- i. The union officials had to be summonsed, albeit Mr Renwick attended at his own expense. Mrs Ryan, through Mr Wallis' representative was given permission by me to provide an affidavit because she had commitments that made it difficult for her to attend the Authority's investigation. This permission was given, but on the proviso that if there were any questions she would have to be heard and arrangements would need to be made. Mr Wallis' representative agreed with this course. Mrs Ryan's affidavit raised matters that did not require her being questioned by the Authority and the respondent. I hold that her

affidavit does not support Mr Wallis' claims because she could not recall saying that she actually said the words *personal grievance*. She certainly did not indicate that Mr Wallis made any arrangements to have a personal grievance raised.

- j. It was Mrs Ryan who attended the meeting with Mr Wallis on 28 July. Mr Wallis' written statement at paragraph 4 when he says Mr Renwick attended the second meeting is not correct. I accept that there are different views on the number of the meetings and I hold that this is not determinative of anything given everyone agrees that two meetings did occur and that there is an explanation for the confusion on the numbering because there was an earlier preliminary meeting with the company.
- k. The example emails produced by Mr Wallis that he relies on (Renwick 5 October 2010 and Renwick and Wallis 9, 15 and 30 September 2010) are not definitive about raising a personal grievance other than simply that the matter would be taken further and arranging mediation.
- l. The union's decision not to take the matter further (30 November 2010) once it became clear that the employer would not attend mediation was made after the 90 day period had expired. The employment agreement was very clear on providing a statement that the 90 day requirement to raise a personal grievance applied (clause 17 (c)). There is no explanation for the lateness of this decision, except that any decision to raise a personal grievance was loosely an option relating to the request for mediation, the employer's decision being challenged without any personal grievance remedies and Mr Renwick's request for information on redundancy and compensation. Mr Wallis did not know the union was making such a decision
- m. There was no matter lodged by the union in the Authority, not even to get a direction from the Authority to make the employer attend mediation.

[21] Furthermore there is evidence that the matter had more to do with Mr Wallis' and the union's intention to have some mediation on an employment relationship problem over Mr Wallis disputing the employer's decision. A dispute over the decision was not enough to lead to, and mean, that a personal grievance would be raised where Mr Wallis and the union officials had not discussed any remedies for a personal grievance.

[22] At the time there was no clear claim discussed by Mr Wallis compared to the statement of problem which was lodged in the Authority for lost wages, compensation and costs at a later date. Mr Wallis and his union representatives did not discuss, prior to the statement of problem, any remedies, if arrangements were to be made to raise a personal grievance, except that Mr Renwick felt he needed to seek advice and get information on compensation and redundancy. This suggests any further action was dependant on such information.

[23] I accept Mr Wallis genuinely believed that the union would take up his challenge on the employer's decision, but this fell short of him making a definite arrangement to raise a personal grievance. If he believed raising a personal grievance was involved then he has been let down because no action was taken by Mr Renwick to raise a grievance. The lateness in which Mr Renwick informed Mr Wallis that the union would not take his case any further was unfortunate because it prevented Mr Wallis from getting other timely advice before the expiry of the 90 day period and especially where Mr Wallis believed the union would look after him.

Conclusion

[24] I make the point that the Court of Appeal has said that to require an instruction being given to raise a grievance would be too narrow approach. Evidence of definitive arrangements being made to raise a personal grievance is required. However, in this case Mr Wallis's and Mr Renwick's evidence did not support that there had been a definitive arrangement by Mr Wallis to raise a personal grievance, I hold. The facts here have to be applied with the law as set out in *Melville v Air New Zealand Limited* [2010] NZEMPLC 87 ARC 18/10 8 July 2010.

[25] It is my conclusion that Mr Wallis' claim that he made arrangements for the union to raise a personal grievance with the employer was not definitive enough because:

- a. The 5 October 2010 email does not explicitly support that occurring.
- b. There is an alternative to raising a personal grievance that exists which was that Mr Renwick was seeking for the employer to attend mediation to find some solution that possibly related to an employment relationship problem (other than a personal grievance) when he challenged the employer's decision.
- c. Mr Renwick was not accurate with his information to Mr Wallis about what he was doing and left Mr Wallis believing something else.
- d. Mr Renwick was seeking information and advice from the Union's national office on redundancy and compensation.
- e. The Union decided not to take Mr Wallis' case after the 90 day requirement had expired and there are no details about that decision and Mr Wallis did not know the union was making such a decision.
- f. There was no discussion between Mr Wallis and the Union on the remedies being sought if a personal grievance was to be raised.

[26] Therefore despite Mr Wallis' genuine belief based on the 5 October email that the union would raise a personal grievance Mr Wallis has not done enough to support that he made arrangements for the union to raise his personal grievance, I hold. It must follow that there are no exceptional circumstances under s 115 (b) of the Act.

Orders of the Authority

[27] The applicant's claim is dismissed.

[28] Costs are to lie where they fall.

P R Stapp
Member of the Employment Relations Authority