

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 53
3094012

BETWEEN	JEFF WILSON Applicant
AND	COFFEE PLUS LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	May Moncur, advocate for Applicant Glenn Finnigan, counsel for Respondent
Investigation Meeting:	12 February 2021
Submissions Received:	12 February 2021
Oral Determination:	12 February 2021
Written Record Issued:	15 February 2021

ORAL PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Leave is granted for Mr Wilson to raise his personal grievances outside the 90-day period.**
- B. The parties are directed to mediation.**
- C. Costs are reserved.**

Employment relationship problem

[1] On 27 February 2020 Mr Wilson lodged an application with the Authority claiming one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Coffee Plus Limited (CPL) and that he was unjustifiably dismissed.

[2] CPL says Mr Wilson failed to raise his personal grievances within the requisite 90-day period and accordingly the Authority does not have jurisdiction to investigate and determine his claims.

[3] Initially there was a dispute about whether the disadvantage personal grievance was raised within 90-days. However, at the investigation meeting Mr Max Whitehead conceded no grievance had been raised. There was no dispute that the unjustified dismissal claim was not raised within the 90-day period.

[4] Mr Wilson has applied for leave to extend the time to raise his personal grievances outside the 90-day period.

[5] By agreement with the parties this determination deals only with the preliminary issue of whether leave should be granted.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[7] Mr Wilson worked for CPL as its Operations Manager for about ten years. On 4 September 2019 he was invited to have a catch up meeting with Mr Mitchell Polglaze, General Manager, together with a second management employee, Ms Sharon Williams.

[8] At that meeting allegations of sexual harassment were raised with Mr Wilson and he was asked to hand in his company keys, cash flow card and vehicle, which he did.

[9] Mr Wilson says he sought advice from Mr Max Whitehead, an experienced employment advocate, on 5 September 2019. A disciplinary process was implemented by CPL which extended from September to November 2019. Mr Wilson was represented throughout the disciplinary process.

[10] On 17 October 2019 CPL notified Mr Wilson of its preliminary decision to terminate his employment for serious misconduct. Mr Wilson arranged an urgent

mediation through his representative at that time. Mediation took place on 4 November 2019.

[11] On 8 November 2019 Mr Wilson received an email from CPL confirming its decision to terminate his employment summarily, that is, without notice.

[12] CPL says it did not become aware Mr Wilson was raising personal grievances until he lodged his application with the Authority on 27 February 2020 and the statement of problem was served on the respondent. In its statement in reply CPL did not agree to the raising of the grievances outside the 90-day period.

[13] On 20 April 2020 Mr Wilson lodged an amended statement seeking leave to raise his personal grievances outside the statutory 90-day period. In his application for leave Mr Wilson says that prior to instructing his current advocate he had engaged two other representatives during the disciplinary process and after his dismissal. He acknowledges that due to communication problems no personal grievance was raised by either representative.

Legal test

[14] Under s 114(1) of the Act a personal grievance must be raised within 90 days. Time begins to run on the date on which the action alleged to amount to a personal grievance occurred or came to the employees notice, whichever is the later event. The section contemplates two situations where a personal grievance may be raised beyond the 90-day limitation. One of them is where the employer consents. The other is where the Authority grants leave because it is satisfied that the delay was occasioned by exceptional circumstances and that it is just to do so.¹

[15] The Act does not contain an exhaustive definition of exceptional circumstances for the Authority to apply when leave is sought, but s 115 of the Act does provide a definition of some of them.² Relevant to this determination is s 115(b) of the Act. Mr Wilson considers exceptional circumstances existed because he says he made reasonable arrangements to have the grievances raised on his behalf by an agent and that agent unreasonably failed to ensure the grievances were raised within the required time.

¹ Employment Relations Act 2000 (the Act), s 114(5).

² The Act, s 115.

Issues

[16] The questions for investigation and determination are:

- a) Did Mr Wilson make reasonable arrangements to have his grievances raised on his behalf by his agents?
- b) If the answer to a) is yes, did the agent unreasonably fail to ensure the grievances were raised within time?
- c) If the answers to a) and b) are yes, is it just to grant leave to extend time to raise the grievances?

Did Mr Wilson make reasonable arrangements to have his personal grievances raised by his agents?

[17] Mr Wilson alleges two personal grievances. The grievances are related to his concerns about the process followed by CPL during the disciplinary investigation and its subsequent decision to dismiss him.

Disadvantage personal grievance

[18] Section 114(2) of the Act makes it clear that 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] The Employment Court has summarised the following principles applicable to determining whether a grievance has been raised in accordance with s 114 of the Act:³

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

³ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36-38].

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[20] On 26 September 2019 while the disciplinary process was underway, Mr Wilson wrote to CPL, through his representative, setting out his view of the flaws in the procedure used by CPL. In his letter he told CPL it had exposed itself to a personal grievance for unjustified disadvantage.

[21] In correspondence between Mr Whitehead and CPL's lawyer, Mr Whitehead acknowledged that his 26 September 2019 letter was not "...lodging PG proceedings...".

[22] After CPL had set out in writing its proposal to terminate Mr Wilson's employment the parties attended mediation. Mr Polglaze told me the purpose of attending mediation was to avoid the potential of a personal grievance by way of an agreed exit. I have concluded it is more likely than not that Mr Polglaze was well aware that Mr Wilson had a personal grievance and he wished to avoid the possibility of litigation.

[23] Having reviewed the information I am satisfied that by the time the parties attended mediation Mr Wilson had taken reasonable steps and did provide CPL with sufficient information to address a grievance with a view to resolving it.

[24] Even if I am mistaken in that conclusion it is arguable that CPL impliedly consented to Mr Wilson raising his personal grievance when it attended and engaged in mediation in an attempt to resolve Mr Wilson's issues.⁴

Dismissal grievance

[25] After receiving notification of his dismissal on 8 November 2019 Mr Wilson says he discussed the next steps with Mr Whitehead including the possibility of raising a personal grievance.

[26] Mr Wilson told me he asked for some time to consider his next steps because he needed to speak with his wife. After discussing the matter with his wife Mr Wilson contacted Mr Whitehead and asked him to pursue a personal grievance.

⁴ *Vulcan Steel Ltd v Wonnocott* [2013] NZEmpC 15.

[27] Mr Whitehead was concerned that he would be conflicted if he continued to act for Mr Wilson because he would be expected to give evidence about his knowledge of the process used by CPL leading up to Mr Wilson's dismissal. Mr Whitehead referred Mr Wilson to WorkLaw Limited.

[28] On 3 December 2019 Mr Wilson had a discussion with Ms Emma Moss, an employment advocate with WorkLaw Limited. Mr Wilson told me he discussed representation with Ms Moss and instructed her to file a personal grievance with the Authority on his behalf. Ms Moss told me Mr Wilson never gave her any instructions to raise a personal grievance. I have accepted Ms Moss's evidence that she was under the impression Mr Whitehead had raised a grievance before he referred the file to her. This is supported by an email sent by Ms Moss to Mr Whitehead seeking a copy of the letter in which the grievance was raised.

[29] Following the contact between Mr Wilson and Ms Moss on 3 December 2019 Ms Moss wrote to Mr Wilson referring him to her terms of engagement and explaining the next steps in the process. Ms Moss advised Mr Wilson:

Once I've had an opportunity to review the documentation, then I would be in a better position to give you some advice as to potential next steps.

...

...I would look to do is draft the PG – with your input ...

[30] I have concluded that as at 3 December 2019 Mr Wilson had not given an instruction to Ms Moss to raise a personal grievance but he had an expectation that Ms Moss would draft proceedings and lodge an application with the Authority.

[31] At the investigation meeting Mr Wilson confirmed he did not understand the difference between raising a personal grievance and lodging proceedings in the Authority.

[32] Mr Wilson formally engaged Ms Moss on 9 December 2019. Ms Moss received Mr Wilson's file from Mr Whitehead and contacted Mr Wilson on 16 December 2019 seeking payment of the Authority's filing fee. I have concluded this was in anticipation of Ms Moss drafting proceedings and lodging an application. Mr Wilson confirmed at the investigation meeting that he did not pay the filing fee at that time.

[33] Despite making several enquiries during December 2019 and January 2020, no action was taken by Ms Moss to lodge a statement of problem on behalf of Mr Wilson. Despite giving Mr Wilson an assurance on 23 January 2020 that she would attend to his file, on 28 January Ms Moss emailed Mr Wilson and declined to represent him.

[34] Mr Wilson contacted Mr Whitehead immediately and raised with him the waste of time spent with Ms Moss and his concern that he was running out of the 90-days for his personal grievance. Mr Whitehead did not respond to Mr Wilson's concern about the 90-day time period. He did, however, arrange for another advocate to take over Mr Wilson's file.

[35] On 9 February 2020 Mr Wilson was contacted by Ms Moncur, who advised him she had been assigned his case and would look at it for him.

[36] Ms Moncur contacted CPL's lawyer on 13 February 2020. She reported that day to Mr Wilson and advised him she had raised a personal grievance on his behalf. The raising of the grievance was confirmed in an email that same day (although it was sent outside normal business hours so may not have been seen until 14 February 2020). It is apparent from the email that Ms Moncur was raising a personal grievance for unjustified dismissal.

Conclusion

[37] Reviewing the correspondence between Mr Wilson and his agents as a whole, I am satisfied he made reasonable arrangements to have his personal grievances raised within the 90-day period.

Did the agents unreasonably fail to ensure the grievances were raised within time?

[38] As noted by the Employment Court:⁵

If a dismissed employee engages a qualified, knowledgeable and experienced agent to advise on and protect the grievance's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such and agent to do so. The grievance steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievance and experience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.

⁵ *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83 at [29].

[39] Both Mr Whitehead and Ms Moss are experienced employment advocates. Mr Whitehead referred Mr Wilson to Work Law Ltd on the basis that he would receive expert assistance. Ms Moss was considered the most appropriate advocate to be allocated Mr Wilson's file and when that happened, Mr Whitehead made sure Ms Moss had access to Mr Wilson's complete file.

[40] Mr Wilson himself, concerned about the delays contacted Mr Whitehead and raised his concern that the 90 days was drawing to a close and sought his assistance. Still no steps were taken to protect Mr Wilson's interests. It was not until 5 days after the 90-day period had lapsed that Ms Moncur raised a personal grievance for unjustified dismissal with CPL.

[41] Mr Wilson was entitled to rely on the two agents engaged to protect his interests and raise his personal grievance within the statutory time limit. The onus was on either Mr Whitehead or Ms Moss to ensure this was done. I find Mr Whitehead and Ms Moss failed unreasonably to raise Mr Wilson's personal grievances.

Is it just to allow the grievance to be raised out of time?

[42] Having satisfied the first part of s 114(4) of the Act, I am required to consider whether it would be just to grant leave for Mr Wilson's grievance to be raised out of time. The relevant considerations include:

- a) The extent of the delay;
- b) The reasons for the delay;
- c) The ascertainable strength of Mr Wilson's claim;
- d) Whether there will be prejudice to CPL; and
- e) The overall justice of the case.

[43] The delay in raising Mr Wilson's grievance was five days. I have already noted that the delay was caused by exceptional circumstances. I am unable to ascertain the strength or otherwise of Mr Wilson's claim at this stage with any certainty.

[44] CPL says that allowing Mr Wilson to proceed with his personal grievance more than 18 months after his dismissal would cause prejudice to it. Mr Polglaze told me the

prejudice will arise by having to have employees come to give evidence and in particular the possible traumatising of the employee who made the allegations of sexual harassment.

[45] I accept that the investigation of personal grievances 18 months after the events have occurred presents a greater challenge for CPL than those investigated closer to the time. However, CPL was on notice from at least 13 February 2020 (5 days outside the 90-day time period) that Mr Wilson was challenging his dismissal and it was aware on 4 November 2019 that he was challenging the disciplinary investigation process. Denying Mr Wilson the opportunity to bring his claim in the particular circumstances of this case will, in my opinion, outweigh any prejudice to CPL.

[46] In all the circumstances I consider it just for leave to be granted to Mr Wilson to raise his grievances outside the 90-day time period.

Mediation

[47] Under s 114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve Mr Wilsons' grievances.

Costs

[48] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority