

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 409  
5389203**

BETWEEN                      KIREAN WONNOCOTT  
   Applicant  
  
AND                                VULCAN STEEL LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Mark Beech, Counsel for Applicant  
   Chris Patterson, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions received:        24 October 2012 from Applicant  
   9 October 2012 from Respondent  
  
Determination:                19 November 2012

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment Relationship problem**

[1]        This determination addresses the preliminary issue of whether or not the Applicant, Mr Kirean Wonnocott, raised a personal grievance in relation to the issuing of a first written warning (the Warning) with the Respondent, Vulcan Steel Limited (Vulcan) within the 90 day statutory limitation period pursuant to s 114(1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievance before the Authority.

[2]        Mr Wonnocott claims that he raised a personal grievance in relation to the Warning on 21 March 2012 after he had read, and therefore had knowledge of, the Warning on 23 December 2011 and claims that this was within the 90 day statutory limitation period

[3]        Vulcan claim that Mr Wonnocott's personal grievance was raised outside the 90 day statutory limitation period on the basis that Mr Wonnocott either had knowledge of the Warning on 20 December 2011 as a result of the disciplinary meeting held on 20 December 2011; or alternatively on 21 or 22 December 2011, as a result of the Warning being delivered to Sharp Tudhope, his legal representatives, in accordance with its instructions.

[4] In the event that the Authority determines that Mr Wonnocott did not raise a personal grievance within the 90 day statutory limitation period, Mr Wonnocott claims that Vulcan consented to the raising of a personal grievance outside the 90 day statutory limitation period.

[5] Vulcan denies that it consented to Mr Wonnocott raising his personal grievance outside of the 90 day statutory limitation period.

[6] Mr Wonnocott, in the event that the Authority does not accept that Vulcan consented to him raising his personal grievance outside the 90 day statutory limitation period, seeks leave to raise the personal grievance out of time.

[7] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and on affidavit evidence and submissions from the parties.

### **The Issues**

[8] The issues for determination are:

- whether Mr Wonnocott had knowledge of the Warning as a result of the disciplinary meeting on 20 December 2011
- whether Mr Wonnocott had knowledge of the Warning through the agency of his representatives in the matter
- In the event that it is determined Mr Wonnocott did not raise his personal grievance in relation to the Warning within the 90 day statutory limitation period, whether Vulcan had consented to Mr Wonnocott raising his personal grievance outside of the 90 day statutory limitation period
- In the event that it is determined that Vulcan did not consent to Mr Wonnocott raising his personal grievance outside the 90 day statutory limitation period, whether Mr Wonnocott should be granted leave to raise the personal grievance outside of the 90 day statutory limitation period pursuant to s 115 (c ) of the Act

## Background Facts

[9] In or around September 2011 Vulcan experienced some concerns about Mr Wonnocott's actions, and had commenced an investigation into those concerns. The concerns related to information received by Vulcan that Mr Wonnocott had met with Mr Mike Miller who was employed by Steel & Tube Ltd.

[10] In a letter dated 2 November 2011, Vulcan had written to Mr Wonnocott stating that it had commenced the investigation: '*surrounding the circumstances of your meeting with a Steel and Tube employee*', on the basis that it needed to ensure there had not been a breach of Mr Wonnocott's employment terms and conditions, or of the Commerce Act 1986.

[11] Vulcan completed its investigation in early December 2011 and by letter dated 16 December 2011 had requested that Mr Wonnocott attend a meeting to be held on 20 December 2011 to discuss information which had been provided by Steel & Tube Ltd to Vulcan.

[12] Mr Wonnocott attended the meeting held on 20 December 2011 accompanied by his wife, Mrs Alice Wonnocott, and Ms Kelly Hymers and Mr Mark Beech of Sharp Tudhope, Lawyers, Mr Wonnocott's legal representatives. The meeting was also attended by Mr Brian Lanham, Vulcan's Tauranga Branch Manager, and Ms Lara Hellier, sole director of People Passion (2008) Limited who had been engaged to assist Vulcan in this matter.

[13] Ms Hymers took notes during the meeting. The notes record a discussion referencing rumours about Mr Wonnocott's actions, an investigation by Steel & Tube Limited, and whether or not Mr Wonnocott had met with Mr Miller.

[14] Following an adjournment during the meeting, Vulcan advised that Mr Wonnocott would be issued with a Warning and Mr Beech requested that the written confirmation of this be sent to Sharp Tudhope.

[15] Ms Hymers's notes record the following exchange as having taken place:

*directors have concerns about honesty but want Kirean back but will issue a written warning*

*no basis for issuing a warning and creates an unfair disadv\*\*\* claim*

*as long as employers know Kirean can challenge and comment on warning*

*warning issued over next couple of days ...*

*issue warning via us*

[16] On 21 December 2011 Ms Hellier sent a copy of the letter addressed to Mr Wonnocott and confirming the Warning by email to Sharp Tudhope. The letter had been signed by Mr Lanham and was dated 21 December 2011. The letter stated:

*We have reached a conclusion that your initial statement that you had had no contact with Mike Millar since leaving Steel and Tube was, by your own admission, untruthful and a lie. We have also reached the conclusion, on the balance, that it is more likely than not that you did meet with Mike Millar. As such, your continued denials as to whether a meeting took place are likewise untruthful.*

*Your actions around not being 'entirely upfront and honest' at the start of the investigation and your maintaining that you did not make contact has resulted in a first written warning on your personnel file; this warning shall remain on your file for twelve months.*

[17] Ms Hymers replied to the 21 December 2011 email from Ms Hellier by email dated 22 December 2011 acknowledging receipt. On that same day, 22 December 2011, Ms Hymers forwarded the email attaching the Warning to Mr Wonnocott, and later that day, at 4.17 p.m. Mrs Wonnocott sent an email to Ms Hymers stating: '*Kirean is not at home at the moment but I have let him know that I have received your email*'.

[18] Mr Wonnocott claims that he did not read the letter dated 12 December 2011 confirming the Warning until 23 December 2011.

## **Determination**

### **The law**

[19] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss 114(1) of the Act which states:

#### **1. Raising a Personal Grievance**

*(1) Every employee who wishes to raise a personal grievance must ... 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.*

[20] In accordance with this section, the parties are in agreement that the 90 day statutory limitation period begins on the day ‘*on which the action alleged to amount to a personal grievance*’, in this case the Warning, either occurred, or ‘*came to the notice of the employee*’. Therefore the question to be addressed initially is when did Mr Wonnocott become aware of the Warning?

**Did Mr Wonnocott have knowledge of the Warning as a result of the disciplinary meeting on 20 December 2011?**

[21] Mr Wonnocott was present at the disciplinary meeting held on 20 December 2011 at which his legal representatives and his wife were also present. At this meeting, following an adjournment, the notes made by Ms Hymers record that although the directors had concerns about honesty, they wished to maintain Mr Wonnocott as an employee, but would be issuing him with a written warning.

[22] In the Employment Court case *Drayton v Foodstuffs (South Island) Ltd*<sup>1</sup> Judge Travis accepted a submission that<sup>2</sup>:

*The words “came to the notice of the employee” are synonymous with knowledge of the action on the part of the employee*

[23] It is clear from Ms Hymers’s notes that there was a notification from Mr Wonnocott’s legal representatives at the meeting on 20 December 2011 that the issuing of a written warning would create a disadvantage grievance. The issue is whether or not the Warning had been issued, or was still to be issued following the meeting.

[24] In her affidavit Ms Hellier states that she recalls the words she used to Mr Wonnocott in connection with the Warning as being:

*“Kirean, we have carefully considered your explanation to Vulcan’s concerns, and have come to the conclusion that disciplinary action should be taken in relation to your actions. We consider that such disciplinary action should be limited to a written warning, and so Vulcan is going to issue you with a written warning. This warning will be provided to you in writing tomorrow”.*

[25] Whilst I consider that at this point Mr Wonnocott would have been aware that the Warning was the outcome of what had been discussed at the meeting on 20 December 2011, I also consider that the future tense phraseology of Ms Hellier’s words may be construed as

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<sup>1</sup> [1995] 2 ERNZ 523

<sup>2</sup> Ibid at page 529 lines 22-24

indicating that the issuing of the Warning was in the nature of a known future event, the confirmation of which would take place the following day.

[26] In *Creedy v Commissioner of Police*<sup>3</sup> the Employment Court observed<sup>4</sup>

*The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.*

[27] In this situation it would have been conceivable that Vulcan, which had indicated that it did not want to lose Mr Wonnocott as an employee, might have revisited the decision over night and reached a different conclusion. In this situation I determine that Mr Wonnocott did not have knowledge of the Warning at the meeting on 20 December 2011.

**Did Mr Wonnocott have knowledge of the Warning through the agency of his representatives in the matter?**

[28] Mr Wonnocott was represented by his legal representatives, Ms Hymers and Mr Beech, at the meeting on 20 December 2011. Ms Hymers's notes record, and Ms Hellier in her affidavit confirms, Mr Beech as stating that the Warning was to be issued to 'us' i.e. to Sharp Tudhope.

[29] In accordance with this instruction, on 21 December 2011 Ms Hellier had emailed the Warning which was dated 21 December 2011 to Ms Hymers, who acknowledged receipt by email on 22 December 2011.

[30] Mr Beech submits that it is difficult to impute direct knowledge of the agent to direct knowledge of the principal.

[31] Mr Patterson submits that it is a long held principle at common law that when a principal has authorised an agent to receive documents or money on the principal's behalf, receipt by the agent is receipt by the principal, citing *McGrath v Freer*<sup>5</sup> in support of this proposition.

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<sup>3</sup> [2006] ERNZ 517

<sup>4</sup> Ibid at para [29]

<sup>5</sup> (1982) 10 NZLR 688

[32] Mr Patterson further submits that it is a long held principle that knowledge acquired by an agent is imputed to his principal if the agent was at the time employed on the principal's behalf citing *Jessel Properties v UDC Finance*<sup>6</sup> in which the Court of Appeal held:<sup>7</sup>

*The general principle that notice given to or knowledge acquired by an agent is imputed to his principal only if the agent was at the time employed on the principal's behalf is recognised in the texts and the cases .... This accords with good sense and justice. Thus if notice is given to an agent in reliance on his ostensible authority to receive it, the principal will be stopped from denying receipt of the notice ... But there is no reason to prevent the principal from denying receipt in the absence of such reliance. Apart from this kind of case, the reason for imputing to the principal knowledge which the agent has acquired has been variously explained. Bowstead at p. 412 puts it in terms of a presumption that the knowledge will have been passed on, either because it was acquired in respect of a matter where the agent has power to bind the principal or because he has a duty to inform the principal.*

[33] I am persuaded by Mr Patterson's submission that this is a classic agency situation. During the meeting on 20 December 2011 Mr Beech was at the time 'employed on Mr Wonnocott's behalf' as his legal representative, and in this capacity he had instructed Vulcan to issue the Warning to Mr Wonnocott through Sharp Tudhope.

[34] Mr Wonnocott was present at the meeting and there is nothing in either Ms Hymers's notes or Ms Hellier's affidavit to indicate that he was not in agreement with this instruction. I therefore accept that Mr Beech and Sharp Tudhope were acting as Mr Wonnocott's agent in the matter.

[35] In accordance with the instruction issued by Mr Beech, Ms Hellier emailed the Warning to Ms Hymers on 21 December 2011. In this situation I consider that Ms Hymers was under a duty to immediately forward the emailed Warning letter to Mr Wonnocott.

[36] I find that the receipt by Sharp Tudhope, as acknowledged in the email from Ms Hymers to Ms Hellier on 22 December 2011, constituted receipt and knowledge on the part of Mr Wonnocott.

[37] I am persuaded that this is the correct conclusion given the desirability of certainty in the law. Having issued a warning in due accordance with an instruction from the employee's representative or agent, the employer should not be left in the uncertain situation of not knowing whether or not that warning has been delivered to the employee.

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<sup>6</sup> [1992] 1 NZLR 138

<sup>7</sup> Ibid at para [143]

[38] Such a situation could result in the representative or agent retaining the warning for some time, thereby extending the 90 day statutory limitation period indefinitely and making a nonsense of the statutory limitation period which provides some degree of certainty to both employers and employees. This would, I consider, be unreasonable to both parties and would result in considerable uncertainty in the law relating to the raising of personal grievances..

[39] Having found that the receipt and knowledge of the Warning by Sharp Tudhope in accordance with its instruction as Mr Wonnocott's legal representative constitutes receipt and knowledge of the Warning by Mr Wonnocott on either 21 or 22 December 2011, it follows that Mr Wonnocott did not raise his personal grievance in respect of the Warning until either 21 or 22 December 2011.

[40] This results in a finding that the notification of the personal grievance by Mr Wonnocott to Vulcan on 21 March 2012 took place either 92 or 91 days after the occurrence of the event.

[41] I determine that Mr Wonnocott did not raise his personal grievance in relation to the Warning within the 90 day statutory limitation period.

### **Did Vulcan consent to Mr Wonnocott raising his personal grievance out of time?**

#### **The Law**

[42] An employee must raise a personal grievance within the 90 day statutory limitation period in accordance with s 114(1) of the Act: *'unless the employer consents to the personal grievance being raised after the expiration of that period.*

[43] The Act is silent on whether consent by the employer must be express or implied. However the Employment Court in *Jacobsen Creative Surfaces Ltd v Findlater*<sup>8</sup> and *Phillips v Net Tel Communications*<sup>9</sup> held that whether or not an employer has consented to a personal grievance being raised outside the 90 day statutory limitation period will be a matter of fact and degree in each case, each case depending on its own particular facts.

[44] In *New Zealand Fisheries Ltd v Napier City Council*<sup>10</sup> the Court of Appeal stated<sup>11</sup>:

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<sup>8</sup> [1994] ERNZ 35

<sup>9</sup> [2002] 2 ERNZ 340

<sup>10</sup> (1990) 1 NZ ConvC, 342

*As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ...”*

[45] The issue of whether consent could be given impliedly was considered by the Employment Court in *Hawkins v Commissioner of Police*<sup>12</sup> which decided that ‘consent’ to a personal grievance being raised outside the 90 day statutory limitation period may be implied by the employer, and this decision was upheld on appeal by the subsequent Court of Appeal case,<sup>13</sup> in which the Court of Appeal stated<sup>14</sup>

*The real issue is not whether, in formal terms, the Commissioner “turned his mind” to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.*

#### *Facts*

[46] On 25 January 2012, in respect of another disciplinary matter, Sharp Tudhope sent a letter to Vulcan acknowledging a disciplinary meeting letter for Mr Wonnocott dated 24 January 2012 and confirming that Mr Wonnocott would be attending the disciplinary meeting scheduled for 26 January 2012. In that letter Sharp Tudhope also noted their view that the Warning was inconsistent with what had been discussed at the disciplinary meeting held on 20 December 2012.

[47] As a result of the disciplinary meeting on 25 January 2012, Mr Wonnocott received a second and final written warning on 22 February 2012.

[48] On 21 March 2012, Sharp Tudhope sent a letter to Vulcan raising a personal grievance in relation to the Warning issued to Mr Wonnocott.

[49] On 23 April 2012 a letter sent by Sharp Tudhope to Vulcan stated at paragraph ‘c’:

*We remind you that personal grievances have been raised in respect of the ...issuing of written warnings. Mr Wonnocott reserves his rights absolutely to pursue these grievances.*

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<sup>11</sup> Ibid at pg 190

<sup>12</sup> [2007] ERNZ 762

<sup>13</sup> *Commissioner of Police v Hawkins* [2009] NZCA 209

<sup>14</sup> Ibid at para [24]

[50] On 24 April 2012 Ms Melissa Barns-Graham of People Passion responded to Sharp Tudhope's letter of 23 April 2012, but did not make any reference in the letter to the comments about the personal grievances having been raised, and did not raise a 90 day statutory limitation period issue.

[51] Notes of a further disciplinary meeting held on 27 April 2012 with Mr Wonnocott and supplied to Sharp Tudhope by Ms Barns-Graham record Mr Beech as stating: *'Warning has been issued and it is currently under challenge.* There is no record in the notes of Vulcan challenging this statement or of its raising a 90 day statutory limitation period issue.

[52] On 3 May 2012 Vulcan sent a letter to Mr Wonnocott by email to Sharp Tudhope. The letter which is signed by Mr Neil Downing, Vulcan National Sales Manager, is a dismissal letter in which Mr Downing states:

*You have had two previous warnings, and although we acknowledge that you have raised an unjustified disadvantage grievance in relation to one of them, you have taken absolutely no steps to progress that grievance.*

[53] On 8 May 2012 Sharp Tudhope raised a personal grievance with Vulcan in relation to Mr Wonnocott's dismissal and requested urgent mediation, to which Vulcan responded on 11 May 2012. Vulcan did not raise a 90 day statutory limitation period issue in relation to the raising of the Warning personal grievance in that letter.

[54] In *Commissioner of Police v Hawkins*<sup>15</sup> the Court of Appeal made reference in relation to implied consent to:<sup>16</sup> *'what would reasonably be regarded by the objective observer'*.

[55] I find that the exchanges prior to 3 May 2012 between the parties are not decisive of the issue of whether Vulcan had *'turned its mind'* to the extension in respect of the 90 day statutory limitation period; but rather are indicative of what the Court of Appeal in *New Zealand Fisheries Ltd v Napier City Council*<sup>17</sup> described as *'mere acquiescence'*.

[56] However I find that the words set out in Vulcan's letter of 3 May 2012 that: *"... we acknowledge that you have raised an unjustified disadvantage grievance in relation to one of them"* indicate that it had, to the *'objective observer'*, turned its mind to impliedly consenting

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<sup>15</sup> [2009] NZCA 209

<sup>16</sup> Ibid at para [25]

<sup>17</sup> (1990) 1 NZ ConvC, 342

to the raising of the personal grievance in relation to the Warning outside the 90 day statutory limitation period.

[57] The fact that in the Statement in Reply filed with the Authority on 31 July 2012 Vulcan subsequently protested the raising of the personal grievance outside the 90 day statutory limitation period, I do not find to invalidate the implied consent contained within the 3 May 2012 letter.

[58] I determine that Vulcan consented to Mr Wonnocott raising a personal grievance in relation to the Warning outside the 90 day statutory limitation period.

**Should Mr Wonnocott should be granted leave to raise the personal grievance out of time pursuant to s 1115 (c ) of the Act?**

[59] Having found that Vulcan consented to Mr Wonnocott raising a personal grievance in relation to the Warning outside the 90 day statutory limitation period, I do not find that it is necessary for me to address this issue.

[60] A conference will be arranged shortly to progress the Authority's investigation.

#### **Costs**

[61] Costs are reserved.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**