IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 31
5395990

	BETWEEN	MICHAEL KINLIM YAN Applicant
	AND	COMMISSIONER OF INLAND REVENUE Respondent

Member of Authority:	R A Monaghan
Representatives:	M Scott, counsel for applicant S Hornsby-Geluk, counsel for respondent
Investigation meeting:	13 December 2012
Determination:	30 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Kinlim Yan was employed as a solicitor in the Inland Revenue Department (IRD). His role was to offer tax technical and legal advice to IRD investigations and debt collection staff. From November 2010 he followed a series of performance improvement plans, and received disciplinary warnings in respect of failures to show satisfactory improvement at the end of relevant review periods. The succession of warnings culminated in his dismissal on the ground of poor performance.

[2] Mr Yan was advised of his dismissal on 19 December 2011. The dismissal was effective immediately, with payment in lieu of notice. Mr Yan says the dismissal was unjustified.

[3] Mr Yan also says he raised his personal grievance in a letter dated 23 February 2012. The letter read:

MY PERSONAL GRIEVANCE

...

I refer to your final decision to dismiss me from my employment, with immediate effect, as set out in your letter dated 19 December 2011.

I refer to s 103(1)(a) and (c) and 103A of the Employment Relations Act 2000. I view your decision as being both procedurally and substantively flawed, and unjustifiable. Therefore I now convey to you my personal grievance in respect of your decision and the actions leading up to it.

In terms of the statutory remedies I seek reinstatement of my employment, and compensation for lost wages, compensation for humiliation, loss of dignity and injury to feelings. ...

[4] The IRD replied in a letter dated 29 February 2012, declining to reinstate Mr Yan and saying there was no indication of what procedural and substantive flaws existed.

[5] Mr Yan contacted the IRD again by letter dated 27 April 2012, referring to the grievance he said he had raised and among other things proposing to *'explain to you the extreme frailty of your ... case.'* The explanation was later provided in a 21-page letter dated 31 May 2012.

[6] The IRD does not accept the 23 February letter was sufficient to raise the grievance because the letter gave no information about why Mr Yan believed the dismissal was flawed and unjustifiable. It accepts the information was provided in the 31 May letter.

[7] Accordingly the IRD says the grievance was not raised within the 90-day period required under s 114(1) of the Employment Relations Act 2000, and it does not consent to the grievance being raised outside that time.

[8] Mr Yan says even if the 23 February letter on its own does not raise the grievance, there was sufficient in all of the communications between the parties to indicate his view of why the dismissal and the actions leading up to it were flawed and unjustifiable.

[9] For those reasons Mr Yan says the grievance was raised in time. If the Authority finds it was not, then he seeks leave under s 114 (3) and (4) to raise the grievance out of time on the ground that exceptional circumstances existed and it is

just that leave be granted. He does not rely on any matter in the list of exceptional circumstances contained in s 115 of the Act, saying the list is not exclusive. The exceptional circumstance relied on was the illness of his representative.

[10] This determination addresses:

- whether the letter dated 23 February 2012 raised the grievance,
- if not, whether the parties' communications in total sufficed to raise the grievance,
- if the answer to both of the above is no, whether leave to raise the grievance should be granted in that,
    - an exceptional circumstance existed, and
    - it is just to grant the leave.

Did the 23 February letter raise the grievance

[11] The requirements for raising a personal grievance were set out as follows in *Creedy v Commissioner of Police*[1]:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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 personal grievance as, for example, unjustified disadvantage in employment … for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address … What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*
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> *[37] … It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required for example by the filing of a statement of problem in the Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.*

[12] Here the 23 February letter informed the IRD that Mr Yan considered he had a personal grievance, identified the grievance as arising from the dismissal, and advised of how Mr Yan wanted the grievance remedied.

[1] [2006] ERNZ 517, in passages not affected by subsequent appeals

[13] The IRD was entitled to enough information to allow it to understand and respond to the grievance on its merits, and to consider what remedy might be appropriate. On its own the letter did not give any information about why Mr Yan considered the dismissal to be procedurally and substantively flawed. For that reason it did not, on its own, suffice to raise a grievance.

[14] Further, the letter said nothing about a second grievance identified in the statement of problem as a 'grave disparity' of treatment between Mr Yan and his colleagues in determining work performance. As matters stand that grievance was not raised in time, and it was not identified in the application for a grant of leave to raise a grievance out of time. No such leave is given and the matter cannot proceed as a grievance in its own right.

Did the parties' communications in total suffice to raise the grievance

[15] Even if a communication such as the 23 February letter does not suffice to raise a grievance on its own, the totality of the communications between the parties may do so.[2]

[16] The communications relied on here all occurred before the dismissal. In that context I do not accept a submission that pre-dismissal communications have been considered in a host of cases, although they were relied on in *Dickson v Unilever New Zealand Limited*[3]. There the employee had asserted a personal grievance on the ground of unjustified dismissal, without providing further details. The Employment Court found on the facts that the employer was not able to deduce from pre-dismissal communications the grounds relied on in support of the grievance, and that the grievance was not raised in time. In general, however, there is a danger for employees in expecting an employer will make such deductions, and care must be taken with assertions that an employer knew or should have known why an employee was aggrieved with the employer's subsequent actions.

[17] The overall question is, as the Employment Court put it in another decision:

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[2] *Liumaihetau v Altherm East Auckland Limited* [1994] 1 ERNZ 958
[3] Wellington Employment Court, WC 9/09, 22 April 2009

> *[52] Looking at it from the [employer's] point of view, can it be said that it was both aware the [the employee] considered that his dismissal was unjustified and that it had sufficient knowledge of relevant events to deal with that allegation, either in an attempt to settle the grievance or, if that was not possible, to take steps to defend its position of [the employee] was to refer his grievance to the Employment Relations Authority for settlement?*[4]

[18] I discerned in Mr Yan's argument a blurring of the line between evidence relevant to the justification for his dismissal, and communications relevant to whether a personal grievance was raised in respect of the dismissal. The former is a matter for a substantive hearing, while the latter is relevant here.

[19] Thus Mr Scott submitted that relevant communications included exchanges between the parties during the performance reviews which preceded the earlier disciplinary warnings. I accept that the absence of a personal grievance in respect of each of the warnings does not prevent Mr Yan from raising concerns about them in any hearing of the substantive claim of unjustified dismissal.[5] That does not mean those events are relevant communications when ascertaining whether a personal grievance was raised in respect of the dismissal. The exchanges associated with the warnings are too remote from the events leading to Mr Yan's dismissal to amount to relevant communications for that purpose.

[20] Otherwise the relevant communications include extensive exchanges between the parties prompted by: Mr Yan's most recent performance review on 29 November 2011; and the IRD's letter dated 8 December 2011 advising of its preliminary decision to dismiss Mr Yan.

[21] Ironically it is the surfeit rather than the paucity of detail in Mr Yan's communications which has caused the difficulty here. The communications raised numerous criticisms, challenges and questions. Some of the points raised were minor, and parts of the communications were nitpicking or unnecessarily argumentative. Mr Yan's seeking to identify 21 unresolved issues for the purposes of the application in the Authority, then attempting to increase these to some 60 during the investigation meeting, made matters worse. The outcome of this employment relationship problem will not depend on an exhaustive assessment of all of the employer's actions in order

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[4] *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhuiau v Edmonds* [2008] ERNZ 139
[5] *Coy v Commissioner of Police* CC 23/07, 19 November 2007

to identify errors, nor on the number of errors identified. If it continues, Mr Yan's approach does not enhance the prospects of a resolution of this matter.

[22] Even so, I find that Mr Yan's pre-dismissal communications disclosed core themes in a consistent way. They included: Mr Yan did not agree he had failed to meet the minimum standards required of a solicitor at his level, and disputed a number of specific assessments made at the November 2011 review in particular; Mr Yan did not consider the standards were sufficiently clearly stated; Mr Yan did not believe the standards were being applied consistently; the IRD failed to take proper account of positive feedback about Mr Yan's work; and the IRD failed to be responsive to Mr Yan's queries.

[23] The IRD said (and I accept) that it responded to all of Mr Yan's concerns, and it attempted to explain its position to him. It had no reason to believe there were any outstanding matters when it received the 23 February letter, and if any matters were unresolved it was not possible to separate those from the rest of the detail Mr Yan had provided.

[24] Nothing in the information available to the Authority shows Mr Yan resiled from his concerns or accepted that they had been answered, or was at all likely to do so. His sustained and persistent challenges were such that it was unrealistic to believe he was satisfied with the responses he had received, or that he would abandon his views. Indeed the IRD had expressed concern, for example, about his consistent refusals to accept his performance was such that corrective action was warranted.

[25] I accept that the IRD could not know whether each of Mr Yan's discrete criticisms and challenges were being relied on in support of the grievance – or, if not, which of them were being relied on. However I do not believe that was required. It was sufficient that what I have described as themes be disclosed in the communications, as I have found they were.

[26] For the above reasons I find that the parties' communications in total sufficed to raise the grievance.

[27] Accordingly the grievance was raised in time.

Mediation

[28] The parties are directed to attend mediation within 28 days of the date of this determination.

[29] Two days in mid-April have been set aside for a hearing of the substantive matter in the Authority. For the parties' information, in my view as matters stand this will not be enough time to address all of the detail currently indicated and it will be necessary to reconsider these dates. If the grievance is not resolved at mediation it may be helpful in the interests of a more efficient hearing if at least the range of matters to be addressed, and details in support, can be narrowed during the process.

Costs

[30] Costs are reserved.

[31] It is open to the parties to address the matter in any resolution of the employment relationship problem. Otherwise costs will remain reserved for consideration after a determination of the substantive matter.

R A Monaghan
Member of the Employment Relations Authority