IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 386
5425162

	BETWEEN	SYLVIA ANDERSEN Applicant
	A N D	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority:	James Crichton
Representatives:	Simon Scott, Counsel for Applicant Gregory Peploe, Advocate for Respondent
Investigation Meeting:	26 August 2013 at Hamilton
Date of Determination:	28 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Andersen) claims that she has validly raised a personal grievance in terms of the law or, in the alternative, should be granted leave to raise that personal grievance out of time. The respondent (Waikato DHB) resists both claims.

[2] Ms Andersen was summarily dismissed by Waikato DHB on 8 January 2013. She saw her lawyer on 22 January 2013 and instructed him to raise a personal grievance.

[3] The following day, on 23 January 2013, a letter was written to Waikato DHB in the following terms:

> *We are instructed by Sylvia Andersen in relation to her employment with Waikato DHB. Our instructions are to raise a personal grievance for unjustified dismissal.*

> *Before we are in a position to give further details in relation to Sylvia's grievance, please provide us with all documentation in relation to her dismissal (including, but not limited to, notes of meetings, letters to and from Waikato DHB, statement from staff and other documentation relied upon).*
>
> *We enclose an authority signed by Sylvia and look forward to your response within seven days.*

[4] For whatever reason, there was then an extensive delay in satisfying the request for information contained in the second paragraph of the above letter and the material was not received by Ms Andersen's solicitor until 18 March 2013. That is 69 days after time began to run from the date of dismissal.

[5] On 17 May 2013, Ms Andersen's lawyer provided the Waikato DHB with further and better particulars of the alleged personal grievance and it was not until a letter dated 25 June 2013 was received by Ms Andersen's solicitor on 28 June 2013 that Waikato DHB alleged the personal grievance was not raised within time.

[6] This was so notwithstanding that there were items of communication between the parties and specifically from Waikato DHB which did not raise the issue of the timeliness of the personal grievance raising, between the 17 May 2013 correspondence and the 25 June 2013 correspondence.

Issues

[7] The Authority will need to consider the following questions in order to determine this matter:

(a) Did the letter of 23 January 2013 constitute a valid raising of the personal grievance?

(b) If not, was there implied consent from Waikato DHB?

(c) If not, was the delay in raising the personal grievance occasioned by exceptional circumstances?

(d) Is it just to grant leave for the applicant to raise her grievance outside of the 90 days?

Did the letter of 23 January 2013 constitute a valid raising of the grievance?

[8] The law on the raising of personal grievances is well settled and not complex. Broadly, a party seeking to raise a personal grievance must provide the employer recipient with sufficient information to enable the employer to understand that a personal grievance is being raised, understand the nature of the personal grievance, and understand the remedies that are sought in order to put matters right, from the grievant's perspective.

[9] On the face of it, the letter forwarded on behalf of Ms Andersen meets the first two obligations but not the third. It is apparent that the claim is for alleged unjustified dismissal, it is apparent that a personal grievance is alleged but there is nothing to indicate what Ms Andersen seeks by way of remedy.

[10] Ms Andersen alleges that the Waikato DHB are simply advancing unmeritorious technical claims to defeat her legitimate entitlement. But that cannot be right. The letter plainly seeks further information from Waikato DHB and undertakes to provide "further details" after the consideration of the material sought. On the face of it then, Ms Andersen's own representative was evidencing a conclusion that the raising of the grievance was only partly effected by the 23 January 2013 letter.

[11] In the Authority's considered opinion, while the effect of the letter must be to identify to Waikato DHB that it is facing legal consequences in respect of a claimed personal grievance alleging unjustified dismissal, in the absence of any claimed remedy, or indeed any request from the sender for any particular engagement in the dispute resolution process (such as a referral to mediation for instance) it is difficult to regard the letter as a complete entity.

[12] It follows from the foregoing analysis that the Authority is not persuaded that the letter of 23 January 2013 validly raised Ms Andersen's personal grievance.

Did Waikato DHB give implied consent to the receipt of the grievance letter?

[13] Another way of postulating this same question is to ask whether Waikato DHB has condoned the failure to properly raise the personal grievance by their complete failure to raise the point until some weeks after the 90 days were up. As the Authority has already remarked, there were a series of exchanges between the parties once Ms Andersen's solicitor had provided the further particulars contemplated by the

original letter of 23 January 2013 and none of those exchanges raised any issue of the apparent failure of Ms Andersen to raise her grievance until the letter of 25 June 2013.

[14] There had been extensive correspondence between the parties going right back to the difficulties in Ms Andersen's lawyers receiving, by electronic means, the material sought in the 23 January 2013 letter.

[15] The Authority is satisfied on the evidence that there were two separate attempts made by Waikato DHB to send that material electronically but notwithstanding that evidence, there is no evidence that those two separate attempts to send the material resulted in either of them resulting in the material being successfully received.

[16] It was not until 18 March 2013 that the material was eventually provided successfully to Ms Andersen's solicitors. That date was still within time and had Ms Andersen's solicitors responded within 21 days of that date to Waikato DHB, the present proceedings would not have been necessary because it is common ground that the further information required to be provided in terms of the raising of the personal grievance would then have been made available to Waikato DHB within the 90 day period.

[17] But in fact it was not for nearly two months after the date of receipt that the additional information provided by Waikato DHB was considered, and that consideration resulted in a further letter from Ms Andersen's solicitors to Waikato DHB dated 17 May 2013. That date of course is outside the 90 day period but it is submitted for Ms Andersen that Waikato DHB, by its apparent acceptance of the original 23 January 2013 grievance letter, was lulling Ms Andersen's representative into a false sense of security.

[18] There is some force to this submission. Waikato DHB could have responded immediately to the 23 January 2013 letter and said that it was not sufficient to raise a grievance. They did not. Indeed, at no point in the numerous exchanges between the parties was there any suggestion that a grievance had not been validly raised until almost six months after the dismissal and when there had been extensive contact and correspondence between the parties about Ms Andersen's employment relationship problem.

[19] Waikato DHB protest that the 23 January 2013 letter did not ask them to do anything save to provide further and better particulars, which they say they did but of course the Authority has already established that Ms Andersen's solicitors did not receive that material in a timely fashion. Waikato DHB's point though is that they were not asked, for instance, to go to mediation or indeed to take any steps save for the provision of further material.

[20] But if they regarded the letter as anything other than a valid raising of the grievance one would have thought they would have said so. They are a large well resourced organisation with an extensive human resources department and it is difficult to understand why they would have engaged so extensively with Ms Andersen's representatives over a considerable period of time about Ms Andersen's employment relationship problem if they did not regard it as being validly raised.

[21] Of course the Authority has found as a fact that it was not validly raised but that does not obviate the point that Waikato DHB, as the recipient of the offending letter, had it in their power to either accept the raising by condonation or to protest the lack of specificity. In the Authority's considered opinion, Waikato DHB condoned at the original grievance letter's inadequacies and by their failure to act and raise the matter appropriately, Waikato DHB effectively validated an incomplete grievance raising letter.

[22] Put another way, it seems unfair and unjust for Waikato DHB to be allowed to effectively change their position at the eleventh hour, after behaving as if they accepted the grievance having been raised for that passage of time. In effect, the doctrine of estoppel should operate to prevent Waikato DHB from resiling from their previously accepting stance.

[23] Accordingly, the Authority is satisfied that, while the 23 January 2013 letter did not in fact comply with the law, Waikato DHB's failure to make it clear that it did not accept the letter as validly raising a personal grievance effectively perfected an imperfect communication and made it unfair and unjust for Waikato DHB to some months later seek to raise the technical point that the grievance had not been raised within time.

Was the delay in raising the personal grievance occasioned by exceptional circumstances?

[24] While the Authority has answered the fundamental question raised by this proceeding already, for the avoidance of doubt, it is appropriate that the Authority address the effect of s115 of the Employment Relations Act 2000 ("the Act"). The effect of the Act's provisions is to provide at s114 a power for the Authority to grant leave to raise a grievance out of time if the Authority is satisfied that exceptional circumstances exist. Section 115 of the Act creates four categories of exceptional circumstances although those categories are not exclusive. One such is provided at s115(b) and that particular category concerns itself with the circumstances where a grievant takes reasonable steps to have the grievance raised by an agent and the agent unreasonably fails to act.

[25] If the Authority's conclusion in respect to the condonation of the imperfect grievance letter is resisted, the Act's provisions in respect to exceptional circumstances are plainly relevant.

[26] This is a case where Ms Andersen took proper steps to instruct counsel and have counsel raise a personal grievance. There is nothing before the Authority that suggests that Ms Andersen did not do everything in her power to do what any reasonable lay person would do in such circumstances. She was dismissed from her employment and she promptly attended at her lawyers and instructed them to raise a personal grievance. Her affidavit before the Authority is clear on that. Her lawyers then wrote the 23 January 2013 letter to Waikato DHB and subsequently provided a copy of that to Ms Andersen.

[27] Waikato DHB sought to interest the Authority in the proposition that because Ms Andersen had received a copy of the correspondence, she would have been able to form the view that the correspondence was somehow inadequate.

[28] But that cannot be the position. Ms Andersen instructed counsel precisely because she did not know the niceties of the legal position. That is what many grievants do. And that is why they do it. While Ms Andersen's affidavit is silent on the point, the Authority thinks it fair to discern that Ms Andersen would have imagined that the copy letter that she had received fulfilled her legal obligations. Nothing in that letter would have put her on notice that she needed to take any further steps.

[29] On the face of it then, the Authority is satisfied that Ms Andersen falls squarely within the terms of s115(b) of the Act in that she has made "reasonable arrangements" for the grievance to be raised and nothing that happened subsequently to the making of those arrangements would have alerted her to the fact that there was a potential difficulty with the raising of the grievance. Ms Andersen was entitled to rely upon the expertise of the practitioner that she chose and the Authority is satisfied that she would have relied on that expertise.

[30] It follows from the foregoing analysis that the Authority is satisfied as an alternative conclusion that the steps taken by Ms Andersen to raise a grievance bring her squarely within the terms of s115(b) of the Act.

Is it just to grant leave?

[31] The Authority is satisfied that as an alternative basis for its conclusion that the grievance stands because of the condonation of the Waikato DHB, it is just to grant leave for the grievance to proceed.

[32] As the Authority has already identified, it is satisfied that Ms Andersen made reasonable arrangements to have the grievance raised and on the footing that the grievance was not raised by letter dated 23 January 2013, that must be an unreasonable failure on the part of an experienced employment lawyer such as the counsel instructed by Ms Andersen.

[33] Nothing in the factual matrix suggests any inappropriate behaviour by Ms Andersen. She was not unreasonably delaying or in any way seeking to extract any leverage by not dealing with the matter in a businesslike fashion. She saw her lawyer within a matter of a week or so of the dismissal and instructed him to act to raise the grievance and to deal with it on her behalf.

[34] While the Authority accepts Waikato DHB's submission that as a public sector body with a responsibility to properly manage scarce health funding, it would wish to avoid the costs of an investigation meeting, its best way of doing that is to focus its defence of employee claims so as to assist the Authority in its investigation process.

[35] The Authority is satisfied then that it is just to grant leave if its alternative conclusion of condonation is resisted.

Determination

[36] For reasons advanced in this determination already, the grievance has been properly raised, or in the alternative leave is granted for it to proceed and the matter needs now to proceed to resolution.

[37] Because the Authority has relied in part in its reasoning on the exceptional circumstances provision in the Act, the parties are now directed to mediation pursuant to s114(5) of the Act. At the conclusion of that process, counsel for Ms Andersen is to advise the Authority's support officer of the result of mediation and if the matter remains unresolved, the Authority will engage with the representatives to set the matter down for an investigation meeting.

Costs

[38] Costs are reserved.

James Crichton
Member of the Employment Relations Authority