IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 467
5300148

	BETWEEN	STUART AUSTIN Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	A Hope, Counsel for Applicant G Williams, Advocate for Respondent
Investigation:	On the papers
Determination:	28 October 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Via a *Statement of Problem* received by the Authority on 7th February 2011, Mr Austin claims that he was unjustifiably dismissed, effective from on or about 21st August 2009. The circumstances of the alleged dismissal involved Mr Austin being suspended from his employment, pursuant to a provision in his employment agreement (clause 17), due to an absence from work relating to an off-work accident that occurred on or about 4th January 2009. Mr Austin also claims that he was disadvantaged in his employment by the unjustified actions of his employer, Silver Fern Farms Limited (SFFL). Several grounds are advanced regarding this claim, largely related to the suspension from employment on medical grounds and matters leading up to that, pertaining to Mr Austin's injury and the management of the overall circumstances.

[2] In the *Statement in Reply* received by the Authority on 23rd February 2011, SFFL says that Mr Austin has raised his personal grievance(s) outside the 90 days

limit required by s.114(1) of the Employment Relations Act 2000 (the Act) and the company does not consent to the raising of the grievance(s) outside of the limited time.

[3] The outcome of a conference call convened by the Authority on 11th March 2011 was that the parties agreed that the preliminary matter pertaining to the 90 days issue should be determined on the papers. The Authority has received the following documents for consideration (along with the original documents) accordingly:

(a) An amended Statement of Problem with an attached sworn affidavit and supporting documents for Mr Austin, and written submissions.

(b) A Statement in Reply in response to the amended Statement of Problem along with written submissions for SFFL.

[4] The issue to be determined by the Authority is whether a personal grievance has been raised within the 90 days required by s.114 of the Act or, if not; whether leave should be granted on the basis that exceptional circumstances exist pursuant to s.114(4) and s.115 of the Act.

Background

[5] Mr Austin was employed by SFFL as a seasonal meat worker at the company's Te Aroha meat processing plant. On 4th January 2009, Mr Austin incurred an out-of-work injury while engaging in go-carting (the first injury).[1] Mr Austin was not incapacitated by this injury and he continued to carry out his normal employment related duties until he incurred a further injury at work on 13th January 2009. Upon attending a doctor on 19th January 2009, Mr Austin was found to be fit for "light duties" on a limited basis. It appears that he worked intermittently until some time in late April or early May 2009, when it seems that he was unable to work at all. A dispute arose in regard to whether the second injury was work related or whether it was directly related to the first injury, as first recorded within a letter dated 21st April 2009 from SFFL to Mr Austin.

[6] The evidence of Mr Austin is that in early May 2009, he had a meeting with the Plant Manager of the Te Aroha facility, Mr Felix O'Carroll. Mr Austin was

[1] A letter dated 21st April 2009 from SFFL to Mr Austin informs that the go-carting accident happened on 11th January 2009, but given the overall evidence it seems more probable that it was 4th January 2009.

accompanied by a representative from the union. Mr Austin says that the purpose of the meeting was to decide what should happen due to the fact that he could not continue to work. I get the impression from Mr Austin's evidence that at the time of this meeting, he was not being paid, or anticipated not being paid, apparently due to the fact that he had not been incapacitated (then) in regard to the accident on 13th January 2009. Mr Austin says that SFFL did not accept that his subsequent inability to work was caused by that accident. He alleges that he was told by Mr O'Carroll that his back injury, and the consequent inability to work, was the result of the go-cart injury incurred outside working hours. The further evidence of Mr Austin is that Mr O'Carroll told him that he would be "better off" being on accident compensation related to the off-work injury.

[7] Mr Austin visited a doctor on 6th May 2009. The medical certificate of this date records that he was "transferred to ACC injury (Ref: WL 28160)," which I understand to mean, that Mr Austin would receive accident compensation payments related to his go-kart injury.

[8] The evidence of Mr Austin is that he met with Mr O'Carroll on 8th May 2009 and was asked to sign a letter of the same date; the germane content being:

> Re. Transfer of ACC claim WL28119 SFF to ACC claim WL28160
> To whom it may concern.
> This letter is to notify Silver Fern Farms that I have withdrawn my ACC claim WL28119 SFF and transferred it to ACC claim WL28160, not work related.

Mr Austin says that he signed this letter without obtaining any advice as to the appropriateness of his action.[2]

[9] Mr Austin was subsequently referred by his ACC case manager to Dr Chris Milne; he examined Mr Austin on 5th June 2009 and prepared a comprehensive report. Relevant to the dispute that has arisen, Dr Milne records in his report to the ACC case manager, that:

> 3. It is likely that a specific work related accident caused this physical injury on 13-01-09. There may have been some minor triggering from the accident of 04-01-09 but essentially he was able to perform all his normal work duties prior to 13-01-09 and, on balance, I would conclude that the majority of the trauma occurred on that date. You may wish to explore this issue in more detail with his employer. That is the story as related to me today.

[2] The Authority understands that SFFL is a party to the accredited employer programme in partnership with ACC in that the company takes responsibility for managing their own workplace injury management including the management of employee work related claims.

[10] As a result of Dr Milne's report, Mr Austin received a letter dated 22nd June 2009 from the ACC case manager. Mr Austin was informed that his entitlements to accident compensation payments, based on the 4th January 2009 injury, would cease on 5th July 2009. In case there is any doubt, it is appropriate for it to be recorded that the Authority does not have any jurisdiction in regard to Mr Austin's ACC issues, appropriately, that is a matter for due process under the Accident Compensation Act 2001. I note that via a letter dated 23rd July 2009, Mr Austin's application for a review of the decision to cease paying him was to be considered by an independent reviewer. The Authority is unaware of the outcome of that review. Also, there is no evidence in regard to if and/or when, Mr Austin may have been fit to work again.

[11] Relevant to the matter before the Authority, is that via a letter dated 21st August 2009, from Mr O'Carroll, Mr Austin was informed that:

> This letter is to formally notify you that due to you being unable to attend work due to your non-work injury we have suspended your services at Silver Farms Te Aroha site until further notice. All your entitlements owing will be paid out to you, however once you are fit to return you will be reinstated to the employee list with all services. Under CEC clause 17(c) as follows:
>
> - Workers who are unable to work due to injury or sickness and who have a medical certificate to that effect shall continue to hold their start date ranking.
>
> Hence if you are off work for a period exceeding four weeks for a non work injury or sickness your employment will be suspended (terminated) until such time as you are medically certified as fit to resume work. This letter is a formal notice of your termination, [sic] on behalf of the Company I hope to see you in the new season and wish you a full recovery of [sic] your injury.

[12] The evidence of Mr Austin is that upon receiving the above letter, he spoke to his union about the situation, but was informed that there was nothing that could be done. Mr Austin says that on or about 7th May 2010, he instructed a lawyer to assist him. But he appears to be mistaken about that date, as on 8th February 2010, his current barrister, Mr Hope, wrote to SFFL on behalf of Mr Austin, requesting that the company provide all information relating to Mr Austin's injuries and the suspension/termination of his employment.

[13] SFFL duly provided the relevant material and among it was a handwritten file note dated 29th June 2009; thus:

> Bob
> Claimant withdrew our claim so whilst ACC dropping him and telling him its ours that is not our concern. File away. R.

I will return to the purported relevance of this note in due course.

The raising of a personal grievance

[14] Via a letter dated 23rd March 2010, Mr Hope raised two personal grievances on behalf of Mr Austin. It is alleged that SFFL unjustifiably disadvantaged Mr Austin in his employment by suspending him from his employment on 21st August 2009 and by failing to pay him compensation, as an accredited employer, for a work place injury, and/or there was a failure to not advise Mr Austin of the company's decision not to pay him compensation. It is further alleged that Mr Austin was unjustifiably dismissed on 21st August 2009.

[15] A prompt response was made by SFFL, via a letter dated 25th March 2010. In summary, the position of the company is that it does not accept that the personal grievance was raised within the 90 days required by s.114 of the Act; and further, SFFL says that: ["… the substantive reasons given for the claim of unjustified dismissal are irrelevant to the ending of Mr Austin's employment with Silver Fern Farms Limited."

Analysis and Conclusions

[16] The germane provisions of s.114 of the Act provide that:

> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), 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.
>
> (2) For the purposes of subsection (1), 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.
>
> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
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> (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority -

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
(b) considers it just to do so.

Was the personal grievance raised within 90 days?

[17] The argument for Mr Austin centres around subsection (1) of s.114 in relation to the 90 days time limit, 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 …" (emphasis added). It is submitted that it was on 8th February 2010 that the action alleged to amount to a personal grievance came to the notice of Mr Austin, when his lawyer obtained the aforementioned file note, as the result of the request for relevant information from SFFL. As already mentioned, Mr Hope wrote to SFFL on 8th February 2010 and while the letter was faxed, it seems unlikely that the company would have responded the same day. The evidence of Mr Austin is that: "*Silver Fern Farms wrote back and provided a large amount of material.*" It seems more probable that the file note in question would have come to the notice of Mr Austin some time after 8th February 2010. But in any event, I find that the file note in question does not have any particular relevance in regard to making Mr Austin aware that he had grounds to raise a personal grievance. Rather, I conclude that there are two possible dates that a grievance may have arisen. Firstly, it strikes me that the actions of SFFL in persuading Mr Austin to effectively "sign away" his accident claim against SFFL on 8th May 2009, may be a matter that could be subjected to further scrutiny. The second date that it could be argued that a personal grievance arose, relates to the letter dated 21st August 2009, whereby Mr Austin was informed that his employment was "suspended / terminated." In regard to the later date, Mr Austin was required to raise a personal grievance by on or about 20th November 2009; depending on when he received the letter dated 21st August 2009, and thereby obtained the requisite knowledge of potential grounds for a personal grievance.

[18] As Mr Austin did not raise a personal grievance(s) until 23rd March 2010, it follows that I must find that the personal grievance was not raised within the 90 days required by s.114(1) of the Act.

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

[19] The submissions for Mr Austin do not make any reference at all to the possibility that any exceptional circumstances should be considered by the Authority. Nonetheless, there is an obligation under s.114(4) of the Act for the Authority to consider the possibility that the delay in the raising the personal grievance, was "occasioned by exceptional circumstances" which may include one or more of the circumstances set out in s.115. But, unfortunately for Mr Austin, his circumstances do not fit within any of the criteria (a–d) of s.115 of the Act.[3]

[20] In conclusion, I have to say that I am somewhat troubled by the action of SFFL in regard to the plant manager, Mr O'Carroll, persuading Mr Austin to sign away his claim in regard to the work place accident that occurred on 13th January 2009, and the rather cavalier tone of the note referred to earlier. Indeed, it strikes me that if Mr Austin had been properly advised, the outcome for him may have been different; given the medical view (of Dr Milne), that the injury was work related. If indeed this is so, then it seems that Mr Austin may have been entitled to be paid by SFFL. However, Mr Austin says that when he became aware of the suspension / termination of his employment, he did consult with his union and was advised that there was nothing that could be done for him. While I cannot say for sure, it does seem to me that if the union had looked into the overall circumstances of Mr Austin, perhaps a different conclusion may have been reached. Nonetheless, there is no evidence that Mr Austin made any "reasonable arrangements" for the union to raise a grievance on his behalf, as is required to satisfy s.115(b) of the Act.[4]

Determination

[21] For the reasons set out above, I find that Mr Austin did not raise a personal grievance within the 90 days required by s.114(1) of the Act. And pursuant to s.114(4) and s.115 of the Act, I cannot find any exceptional circumstances that allow leave to be granted for Mr Austin to raise a personal grievance. The application is declined.

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[3] The *Te Aroha Collective Employment Agreement 2008-2009* (at clause 36) provides a compliant explanation concerning the resolution of employment relationship problems.
[4] See *Melville v Air New Zealand Limited* [2010] NZCA 563.

Costs: As SFFL was represented by the company's Group Employment Relations Manager, the matter of costs is not an issue.

K J Anderson
Member of the Employment Relations Authority