

[4] Specifically the issue for the Authority to address is whether the letter dated 26 June 2012 from Mr Laurence Ponniah, Mr Austin's solicitor, constituted the raising of a personal grievance of unjustifiable dismissal with YOOBEE. Mr Ponniah no longer represents Mr Austin.

[5] YOOBEE denies that the letter from Mr Ponniah dated 26 June 2012 raised a personal grievance in relation to the dismissal of Mr Austin which took place on 29 June 2012.

[6] I now proceed to determine as a preliminary issue whether or not Mr Austin raised the personal grievance claim of unjustifiable dismissal by letter dated 26 June 2012.

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

Prohibition on publication

[8] I order that the name and occupation of a person employed by YOOBEE and involved in the events which lead to the termination of Mr Austin's employment not be published. The person involved is to be referred to as Mr X, a letter bearing no relationship to his actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

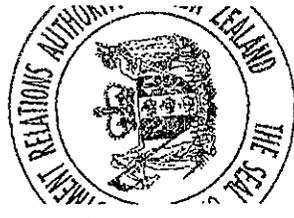
Issues

[9] The issue for determination is whether or not the letter from Mr Ponniah dated 26 June 2012 raised a personal grievance in relation to the dismissal of Mr Austin on 29 June 2012;

Brief Background Facts

[10] YOOBEE is a retailing business, specialising in information technology and electronic products. YOOBEE operates throughout a chain of retail stores throughout New Zealand, in addition to an online store.

[11] Mr Austin was employed as Store Manager in the Newmarket, Auckland, store (the Store). On 1 June 2012 an incident relating to a change to the Store's cell phone display being carried out under the direction of Mr X occurred between Mr Austin and Mr X.



[12] Following the incident Mr X had reported to Mr Andrew Howard, Mr Austin's Manager, that Mr Austin had refused to comply with his direction regarding the change to the cell phone display, and had behaved towards him in an aggressive manner.

[13] Mr Howard had subsequently spoken to Mr Austin about the incident. During the discussion Mr Howard had suspended Mr Austin on full pay.

[14] Mr Steve McLean, General Manager Operations, informed Mr Austin in a letter dated 8 June 2012, that he was required to attend a disciplinary meeting on 13 June 2012. The letter set out that Mr Austin would be asked to respond to two allegations:

- (i) Alleged misconduct, being that Mr Austin had refused to follow a reasonable instruction to merchandise the Store by instruction from Mr X; and
- (ii) Alleged serious misconduct, being that Mr Austin had made a verbal threat in relation to Mr X to Mr Howard following his suspension.

[15] The letter further advised that formal disciplinary action, which might include: "*termination of your employment or instant dismissal*" might be taken against Mr Austin.

[16] In the Statement in Reply YOOBEE set out that it carried out an investigation and disciplinary process during the period from 8 June to 29 June 2012. Throughout the period of this process Mr Austin was represented by Mr Ponniah.

[17] Mr Austin attended a disciplinary meeting on 19 June 2012 accompanied by Mr Ponniah. The meeting, which was also attended by Ms Coats, YOOBEE's legal counsel, was chaired by Mr McLean. Following some discussion, the meeting had been adjourned and deferred until 26 June 2012.

[18] On 25 June 2012 Mr Ponniah had written to YOOBEE's solicitors stating that Mr Austin was raising a personal grievance in relation to his suspension.

[19] The re-adjourned disciplinary meeting took place on 26 May 2012. During the meeting Mr Austin had been informed that YOOBEE considered the allegations against him to be substantiated, to constitute serious misconduct, and that summary dismissal was being considered as an outcome.



[20] Ms Coats confirmed the outcome of the investigation in a letter to Mr Ponniah that same day, 26 June 2012. In her response Ms Coats had written:

Yoobee proposes to summarily dismiss Mr Austin for serious misconduct. ...

Yoobee invites Mr Austin to provide feedback regarding this proposed disciplinary response. Mr Austin is required to attend a meeting at Yoobee's offices in Onehunga at 3 pm on Thursday 28 June 2012. ...

Mr Austin may provide written feedback in advance of the meeting, if that is his preference.

[21] Mr Ponniah had written to Ms Coats by letter dated 26 May 2012, which she had received on 27 June 2012, providing submissions in respect to the process and stating

We are instructed to hereby give notice that our client considers that he has a personal grievance in respect of the way he has been treated, the disciplinary hearing process adopted, the findings of serious misconduct and in respect of the intention to summarily dismiss him. We are taking instructions from our client in respect of filing an application to the Employment Relations Authority for reinstatement and damages.

We certainly hope you will reconsider your decision to summarily dismiss our client.

... As it appears, it is your intention to merely communicate your decision on penalty. We anticipate you could do this in writing ...

[22] Ms Coats responded to this letter on 28 June 2012. In the letter Ms Coats had written:

The meeting scheduled for 3pm today has been cancelled at your request. The company will proceed to consider the submissions contained in your letter of 27 June and will confirm its decision in writing. ...

In the meantime we acknowledge having been notified of your client's personal grievance claims and his intention to file proceedings in the Employment Relations Authority.

[23] By letter dated 29 June 2012 YOOBEE advised Mr Austin of its decision to dismiss him with immediate effect. In the letter Mr McLean had provided a full explanation of why, having considered Mr Austin's explanation and the feedback provided, YOOBEE had decided to proceed with the dismissal outcome, and had written:

I advised you that the company was proposing to terminate your employment summarily, and invited you to provide feedback. (The company's decision and invitation for feedback was then confirmed by letter from Bell Gully to Mr Ponniah, later on the same day).



By letter dated 28 June 2012, Mr Pomiah provided further submissions to the company

After careful consideration of all relevant circumstances, the company has decided to proceed with its proposal to dismiss you from its employment with immediate effect. ...

Although the company considers that summary dismissal may have been available to it, I have given due consideration to your feedback relating to your record of employment and personal circumstances and have therefore decided that you will be paid one month's salary in lieu of notice.

[24] The parties subsequently made arrangements to, and did, attend mediation, however this did not resolve the issues between the parties.

[25] On 5 November 2012 Mr Austin filed a Statement of Problem with the Employment Relations Authority in respect of a personal grievance for unjustifiable dismissal and unjustifiable disadvantage.

Determination

The Law

[26] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss 114(1) and (2) of the Act which state:

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.

(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.



[27] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[29] The relevant words and phrases of the legislation are in the past and present tenses so that the raising of a grievance is clearly contemplated as a grievance about an event that has occurred or is occurring. The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event as Mr Creedy's dismissal (actual or constructive) must have been in April 2001.

[30] Further, given that the scheme of the legislation is to allow an employer to remedy the grievance as soon as possible after being notified of it, it would be a nonsense to permit the notification of an event that might or might not occur.

[28] Mr Austin's employment was terminated with effect from 29 June 2012; the 90 day statutory period therefore expired on 26 September 2012. Even were I to accept that Mr Austin's employment ended on 2 July 2012, which I do not, the 90-day statutory period would therefore have expired on 29 September 2012. The Statement of Problem was not filed until 5 November 2012.

[29] To be raised a grievance must, in accordance with s 114(2) of the Act: "*be specified sufficiently to enable the employer to address it, presumably at the time*".²

[30] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer³.

[31] I find that on 26 June 2012 the termination of Mr Austin's employment had not been confirmed, it was a proposal only, an anticipated future event, at that stage, to which Mr Austin's feedback had been invited prior to the decision being finalised.

[32] I find confirmation of this in the letter from Mr Ponniah dated 26 June 2012 in which Mr Ponniah refers to "*the intention to summarily dismiss*" Mr Austin, and also suggests that the decision on penalty be confirmed: "*in writing*".

[33] I note also that following the feedback provided by Mr Ponniah on Mr Austin's behalf, on 29 June 2012 YOOBEE confirmed Mr Austin's dismissal, but had not proceeded with the proposal of summary dismissal, instead dismissing Mr Austin with salary in lieu of notice.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517

² *Melville v Air New Zealand Limited* [2010] NZEmpC 87, per Travis J at para [16]

³ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503



[34] I find that this indicates that on 26 June 2012 YOBBEE had not finalised a dismissal decision in respect of Mr Austin, but had thereafter considered the feedback provided by Mr Ponniah, and only after that consideration had confirmed the decision to terminate Mr Austin's employment, which had been three days following the 26 June 2012 letter from Mr Ponniah.

[35] There is no evidence that Mr Ponniah acting on instruction from Mr Austin, or Mr Austin himself, raised a personal grievance in relation to Mr Austin's dismissal after 29 June 2012.

[36] The communication which subsequently took place between the parties and the mediation service I do not find constitutes the raising of a personal grievance in terms of s 114 of the Act.

[37] I determine that Mr Austin failed to raise a personal grievance in relation to his dismissal within the 90-day time period as specified in s 114 (1) of the Act.

[38] The Authority will shortly contact Mr Austin and Ms Coats for a telephone conference to progress the matter.

Costs

[39] Costs are reserved pending the final resolution of the matter.



Eleanor Robinson
Member of the Employment Relations Authority



