IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 51
5532481

	BETWEEN	TODD LUCAS BENTLEY and SARA LOUISE EDDINGTON First Applicants
	A N D	BRKEL HOLSTEINS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Emma Middlemass, Counsel for the Applicants David Jackson, Counsel for the Respondent
Investigation Meeting:	On the papers by consent
Submissions Received:	17 March and 13 April 2015 from the Applicants 30 March 2015 from the Respondent
Date of Determination:	21 April 2015

DETERMINATION OF THE AUTHORITY

A. The applicants' agent did raise valid personal grievances with the respondent on behalf of the applicants within the statutory 90 day period. Alternatively, if she did not, leave is granted to the applicants to raise their personal grievances outside of the statutory 90 day time period.

B. Costs are reserved.

Employment relationship problem

[1] Ms Eddington claims that she was unjustifiably dismissed by the respondent on 22 August 2014 and Mr Bentley claims that he was unjustifiably dismissed by the

respondent on 1 September 2014. They were both farm workers on the respondent's dairy farm.

[2] This determination on a preliminary matter relates to the question of whether the applicants raised valid personal grievances with the respondent following their alleged dismissals within the 90 day time limit provided for in s.114(1) of the Employment Relations Act 2000 (the Act) and, if they did not, whether the Authority should grant them leave to raise their personal grievances after the expiration of that 90 day period.

Brief summary of the events

[3] Ms Middlemass advises the Authority that she was instructed by Mr Bentley and Ms Eddington to raise personal grievances on their behalf on 2 September 2014. The Authority has seen a copy of a letter sent by Ms Middlemass to the solicitors acting for the respondent, Berry & Co, dated 3 September 2014. This letter bore the heading *"Without prejudice save as to costs"*. The letter commenced as follows:

> *Dear Partners,*
>
> ***Re: BRKEL Holsteins Ltd – Todd Bentley & Sara Eddington***
>
> *We advise that we act as solicitors for Mr Bentley and Ms Eddington who, up until recently, both had employment contracts with your clients (as director and shareholders of the Company).*
>
> *We have taken instructions from them regarding a personal grievance against your client due to the following events occurring:*

[4] The letter then proceeded to describe a number of alleged events that took place affecting Ms Eddington and Mr Bentley during their employment. The letter finished in the following way:

> *On the basis of all the above information, we have informed both of our clients that they have strong grounds to lay a personal grievance with the Employment Relations Authority.*
>
> *Please take instructions from your clients and advise.*
>
> *We look forward to hearing from you.*
>
> *Yours faithfully,*
> ***Dean & Associates***
>
> ***Emma Middlemass***
> *Solicitor*

[5] The Statement of Problem was lodged with the Authority on 28 November 2014.

The issues

[6] The Authority must determine the following:

(a) Whether the letter from Ms Middlemass to Berry & Co dated 3 September 2014 constituted a valid personal grievance; and

(b) If it did not, whether the Authority should grant leave to the applicants to raise a personal grievance outside of the period of 90 days.

The law

[7] Sections 114 and 115 of the Act provide as follows:

> ***114 Raising personal grievance***
> *(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.*
> *(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.*
> *(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.*
> *(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on*

> *which the personal grievance was raised in accordance with this section.*
>
> ***115 Further provision regarding exceptional circumstances under section 114***
> *For the purposes of section 114(4)(a), exceptional circumstances include—*
> *(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
> *(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*
> *(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or*
> *(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

[8] It is also well established that a personal grievance must be raised with sufficient specificity for the respondent to be able to understand what the personal grievance is, a principle established by the Employment Court in *Creedy v. Commissioner of Police* [2006] ERNZ 517.

Did Ms Middlemass' letter of 3 September 2014 raise a valid personal grievance?

[9] Ms Eddington was apparently dismissed on 22 August 2014 and Mr Bentley was dismissed on 1 September 2014. Therefore, there is no question that the letter by Ms Middlemass of 3 September 2014 was sent within 90 days of the alleged dismissals.

[10] In addition, I am satisfied that the letter traversed the respective complaints of Ms Eddington and Mr Bentley in sufficient detail to satisfy the test of specificity required by *Creedy*. These details cover some 15 paragraphs of the letter.

[11] Ms Middlemass herself states that she believes that her letter did not comply with the requirements of s.114 of the Act, however, because the matter was marked *"without prejudice save as to costs"* and because *"the wording was not sufficient to raise a Personal Grievance (as it 'warned' the Respondents that a personal grievance may be filed)"*.

[12] If it were not for the words *"without prejudice save as to costs"* being marked on Ms Middlemass' letter, nothing in its content appears to comprise a without prejudice communication. Crucially, the letter does not contain any offer to settle but merely sets out, in some detail, the complaints that Ms Eddington and Mr Bentley had with respect to the respondent.

[13] It is not all that unusual for lay people to write the words *"without prejudice"* on letters of a legal nature mistakenly thinking that these words are somehow required or that they import some sort of legal significance when the letters themselves are not technically without prejudice. Whilst it is less common for a lawyer to do so, it is not all that rare. Indeed, it is reasonably frequent that open and without prejudice communications are contained in a single letter (a practice which is best avoided). Taking the letter as a whole, therefore, I am not wholly convinced that it is a without prejudice letter.

[14] However, if I am wrong in that regard, I respectfully adopt the reasoning of Member Oldfield in the Employment Relations Authority matter of *Lorna Jordan v. K Pasgaard & Company Ltd* [2011] NZERA Auckland 231 in which she held that no privilege attaches to those parts of a letter or subsequent letters which relate to the question whether a grievance was raised.

[15] In conclusion, I do not believe that the words *"without prejudice save as to costs"* marked on Ms Middlemass' letter, in themselves, prevents her letter from adequately raising a personal grievance on behalf of her clients.

[16] Turning to whether the letter merely communicated an intention to raise a grievance or actually did raise that grievance, I am mindful of the wording of s.114(1) of the Act which requires every employee who wishes to raise a personal grievance to raise the grievance *"with his or her employer"*. First, this does not preclude an employee engaging an agent to raise that grievance and it does not preclude that employee or agent raising the grievance with an agent of the employer.

[17] The key point is, however, that Ms Middlemass' letter made reference to her clients have strong grounds to lay a personal grievance with the Employment Relations Authority. Whilst she has used unconventional language to describe the lodging of her clients' proceedings with the Authority, a commonsense and purposive

reading of the phrase used by Ms Middlemass is that she was saying that her clients had strong grounds to pursue an application with the Authority.

[18] There is a two-step process required to be followed in bringing a matter concerning alleged unjustified dismissal before the Authority:

(a) First, a personal grievance must be raised with the employer within 90 days of the alleged dismissal; and

(b) Having done so, the employee has three years after that date on which the personal grievance was raised to commence the action in the Authority by lodging an application in the prescribed form[1].

[19] In my view, Ms Middlemass was referring to the second of these two stages when she referred to laying a personal grievance with the Employment Relations Authority.

[20] There are no prescribed words to use when raising a personal grievance with an employer, save that those words must raise the grievance with sufficient specificity to enable the employer to know what to address[2]. It is my view that Ms Middlemass' letter, despite her own views on the matter, comprised the first stage of the two step process referred to above, and did sufficiently raise personal grievances with the employer's agent within 90 days of the alleged dismissals.

Did exceptional circumstances occasion the delay in raising the personal grievances?

[21] If I am wrong in that regard, then I am of the view that exceptional circumstances did occasion the delay in raising the personal grievance.

[22] I accept the evidence tended by Ms Middlemass that she was instructed to raise personal grievances on behalf of the applicants. In other words, I accept that the applicants made *"reasonable arrangements to have the grievances raised on their behalf by their agent"*.

[23] If Ms Middlemass' letter of 3 September 2013 does not satisfy the requirements of s.114(1) of the Act and the specificity test in *Creedy*, then, given that

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1 Section 158 of the Act
2 *Creedy* at para.[36]

Ms Middlemass is a qualified lawyer whom one would expect to act in accordance with the requirements of the Act, I am also satisfied that she unreasonably failed to ensure that the grievances were raised within the required time. As I have said, however, in fact I do not believe that Ms Middlemass unreasonably failed to do so, despite her own misgivings.

Is it just to grant leave?

[24] Finally, I must consider whether it is just to grant leave to the applicants to raise their personal grievances outside of the 90 day period, if they have not already done so. First, Ms Middlemass raised the concerns of the applicants in some detail almost immediately after Mr Bentley's dismissal, and, at most, 12 days after Ms Eddington's dismissal. The respondent was therefore fully aware of the applicants' concerns in some detail.

[25] Furthermore, the Statement of Problem was lodged with the Authority within 90 days of Mr Bentley's dismissal and only a few days outside of the 90 day period since Ms Eddington's dismissal.

[26] Furthermore, the allegations against the respondent, on their face, are serious ones and, all other things being equal, deserve to be investigated.

[27] I turn briefly to the submissions raised by Mr Jackson opposing the applicants' application for leave to raise their grievances out of time. Mr Jackson submits that the applicants' approach to the application is inconsistent with their own Statement of Problem. He is relying on the statement in the Statement of Problem, which was expressed in the words of the applicants, that they *"may lay a personal grievance with the Employment Relations Authority"*. Mr Jackson says that this conflicts with the evidence that they clearly instructed Ms Middlemass to raise a personal grievance on their behalf.

[28] With respect, as I have already alluded to above, the *laying of a personal grievance with the Employment Relations Authority* is the second step in a two-stage process. Therefore, this statement does not contradict the evidence tendered by Ms Middlemass that she was instructed to raise a personal grievance with the employer. That instruction had to be the raising of a personal grievance with the employer, not the lodging of an application with the Authority, because raising a personal grievance with the employer was the first necessary step.

[29] Mr Jackson also submits that it would not be just to allow the applicants leave to bring their personal grievances out of time because of the passage of time since the incidents took place, *the scandalous allegation(s) made as to the respondent's conduct and the substantive merits or otherwise of the alleged grievances"*.

[30] The alleged dismissals took place in late August and early September 2014 and the Statement of Problem was lodged with the Authority on 28 November 2014. The respondent has chosen to challenge the Authority's jurisdiction, which is their right, but it is that process of determining this preliminary issue that has contributed to the passage of time. In any event, I do not accept that the passage of time has been excessive.

[31] Whilst it is true that some of the allegations made by the applicants against the respondent are quite concerning, whether they are *scandalous* or not requires an investigation by the Authority, as does determining what the substantive merits of the alleged grievances are.

Conclusion

[32] I conclude that the applicants have properly raised their personal grievances within the time limit set out in s.114(1) of the Act but, if I am wrong in that respect, that they should each be granted leave to raise their grievances outside of the time period specified in s.114(1) of the Act pursuant to s.114(4) of the Act.

Directions

[33] The respondent does not appear to have lodged a Statement in Reply. It is therefore directed to do so by no later than 14 days of the date of this determination.

[34] Once the Statement in Reply has been both lodged and served, I direct the parties to attend mediation and the Mediation Service will be contacted by the Authority to request that it facilitates that mediation process.

[35] If the matter does not settle during mediation and there remain matters to be disposed of by the Authority, then the parties may make submissions to the Authority as to whether I should be the Member who hears the substantive matter given that Ms Middlemass's letter has been characterised both by her and by the respondent (erroneously in my view) to be without prejudice correspondence. If either party

believes that, having seen that correspondence, I should not determine the substantive matter, consideration will be given to another Member being allocated the file, subject to work load and other relevant factors.

Costs

[36] Costs are reserved.

David Appleton
Member of the Employment Relations Authority