Determination Number: AA 117/01
File Number: AEA 208/01

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND OFFICE**

| | |
|---|---|
| **BETWEEN** | Michelle Budden (Applicant) |
| **AND** | Telecom New Zealand Limited (Respondent) |
| **REPRESENTATIVES** | Patricia Cole for applicant<br>Penny Swarbrick for respondent |
| **MEMBER OF AUTHORITY** | Y S Oldfield |
| **CONSIDERATION OF PAPERS** | 11 July 2001, 30 July 2001 |
| **DATE OF DETERMINATION** | 22 August 2001 |

DETERMINATION OF THE AUTHORITY

Ms Budden lodged her statement of problem with the Authority on 18 April 2001. The problem related to an allegedly unjustified dismissal that took place on 19 October 2001. In its statement in reply the respondent (*Telecom*) indicated its view that no personal grievance had been raised by the applicant with the respondent within the requisite 90 day period. I convened a telephone conference with Ms Cole and Ms Swarbrick to discuss the process by which to deal with this preliminary jurisdictional issue. They informed me that they would be able to prepare an agreed statement of facts and on this basis we agreed that the issue could be dealt with "on the papers," those papers being the agreed statement of facts and written submissions.

I considered this material and reached the conclusion that the respondent was correct in asserting that the grievance had not been properly raised in terms of s. 114 of the Employment Relations Act 2001. However, the material also indicated a possibility that grounds existed, in terms of sections 114 and 115 of the Act, for leave to raise the grievance out of time. Although I had not been expressly asked to consider that issue, I considered it appropriate for me to do so pursuant to s. 160(3) which provides:

*"The Authority is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described."*

Following a telephone conference the parties agreed to deal with the additional issue by means of further written submissions. Having now considered that material, I have come to the conclusion that there are indeed grounds for leave to raise the grievance out of time. Reasons for my conclusions on both preliminary points follow.

The agreed facts

Ms Budden commenced her employment with the respondent in September 1994. On 19 October 2000 the respondent held a formal disciplinary meeting with Ms Budden after which it dismissed her summarily on the grounds of serious breach of trust and confidence.

On 18 November Ms Budden instructed Ms Cole in respect of her dismissal and requested that a personal grievance be taken. Ms Cole faxed a statement of problem to an Employment Relations Service mediator, the same day. On Monday 20 November Ms Cole telephoned Mr Joe Baycroft, Service Manager at Telecom to discuss Ms Budden's problem. He was unavailable or referred the matter to another person who was unavailable. No discussion took place. On 22 November the mediator was requested to arrange mediation. The Employment Relations Service subsequently contacted Mr Baycroft to propose a date for this (18 December.) The name of the applicant's representative was given but it is understood, no details of the claim. Telecom instructed Ms Swarbrick in relation to the mediation. She wrote to the mediation service (13 December) advising that no grievance had been raised, and declining to proceed with mediation. Nothing further appears to have happened before the holiday period intervened. The 90 day period expired on or about 17 January. On 24 February Ms Cole faxed to Ms Swarbrick details of the applicant's grievance.

The failure to raise the grievance within 90 days.

Section 114(1) provides:

*"Every employee who wishes to raise a personal grievance must…raise the grievance with his or her employer within the period of 90 days…*

Subsection (2) continues:

*"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."*

In her submission, Ms Swarbrick argued that it is an essential element of instituting the personal grievance provisions of the Act that the employee draw to the employer's attention in some way the nature of the personal grievance, and what it is the employee wants. She identifies the issue for determination as whether the personal grievance of the applicant was properly raised in terms of the Act. She argues that is was not, because:

- The grievance was not raised with the employer as required by the mandatory provisions of section 114(1);
- Section 114(1) contemplates direct communication from employee to employer, not to a third party;
- By referring the matter to mediation without advising the respondent or copying any written materials to the respondent, the applicant did not take "reasonable steps" to make the employer aware of the grievance;
- It would have been reasonable for the respondent to be advised at the time it was referred to mediation;
- The mediation service did not, as a matter of fact, advise the respondent of the nature of the claim. Even if they had done so, it would not have constituted compliance by the applicant with the provisions of section 114;

- No information about the grievance, other than the name of the applicant and her representative, was supplied to the respondent until 24 February 2001. That is the point at which the employer became aware of the nature of the grievance and what the employee wanted addressed.
- It would have been reasonable to supply that information when it was first available. That did not occur.
- It would also have been reasonable to supply that information to the respondent at the time the applicant first became aware of the respondent's view that grievance had not been raised. That did not occur.
- The grievance was raised with the employer on 24 February, well outside the 90 day limit provided by statute.

Ms Swarbrick has also noted that the Employment Relations Act provides that an employee must "raise" a grievance where previously the requirement was to "submit" a grievance. I consider there is some force to the argument (acknowledged but not conceded by Ms Swarbrick) that this change has lowered the threshold that an employee must meet. In any event, I have concluded that the agreed facts of this case would not meet even a very low threshold. I am satisfied that at a minimum the employer will need to know the identity of the applicant and that he or she has a problem relating to a personal grievance. The employer must be made aware in at least a general way of what the problem is. I am inclined to disagree with Ms Swarbrick on the question of whether the employer could be 'made aware' via notice from a mediator. I think it would be hard to say an employer had not been made aware if, for example, a written statement of problem had been forwarded to them from a mediator. However, this is not the case here. The mediator provided no details to the employer except possibly the name of the applicant (the agreed statement does not say.) All the respondent here had to go on was that the applicant had approached the mediation service for help; the evidence does not establish that it was told that the problem related to a personal grievance let alone what it concerned.

**The facts as outlined in the agreed statement are not sufficient to support a finding that the employer was aware that the applicant alleged a personal grievance that he wanted the employer to address. I conclude that the applicant did not make the employer aware of the grievance within the 90-day period.**

<u>The grant of leave to raise the grievance out of time.</u>

Section 114 (4) provides that the Authority may grant leave to raise the grievance after the expiration of the 90 day period if it:

*"(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.*

The respondent does not contest that the applicant made reasonable arrangements to have her grievance raised (through instructions to Ms Cole) and that the facts of this case sit squarely within the grounds provided for in section 115(b.) In other words, this is a case of exceptional circumstances in terms of s. 115. Ms Swarbrick points out however that in order to grant leave the Authority must be satisfied that not only that exceptional circumstances exist, but also that it is just to allow the applicant to raise his grievance. Here, she says, the delay disadvantages the respondent to such an extent that it would not be just to begin an investigation into the matter at this late stage.

This argument is not convincing. The respondent has been aware of the grievance since February. The delays in getting to this point are unfortunate, but not such as to seriously prejudice a defence.

I am satisfied that it is in the interests of justice for the applicant to be able to proceed with this problem. For all these reasons, I have no hesitation in granting leave to the applicant to raise her grievance out of time. Further to this I accept that the communication of 24 February constitutes the raising of the grievance out of time.

As a final point I note that of course this matter has not yet been to mediation. Counsel are advised that they will be requested to join a telephone conference to consider this course of action.

Costs are reserved, and will be dealt with at the conclusion of the investigation of the problem.

Y S Oldfield
Member of Employment Relations Authority