

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 385
3161481

BETWEEN RHONDA JEAN BURRIDGE
Applicant

AND DC LINEHAUL LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
Lance Cooper for the Respondent

Investigation Meeting: 8 August 2022

Submissions received: 21 June 2022, 5 July 2022 from the Applicant
26 June 2022, 11 July 2022 from the Respondent

Determination: 12 August 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Burridge has lodged a personal grievance claim for unjustified dismissal against her former employer, the respondent (“DCL”). Ms Burridge was dismissed on 4 November 2018. She says she raised a personal grievance with DCL within the 90-day statutory timeframe and that she lodged her claim in the Authority within three years after this. DCL disagrees.

The Authority’s investigation

[2] The parties agreed to have the preliminary matter determined on the papers. The parties provided written submissions and material to support their positions. Based on this

material I decided it was necessary to convene a brief investigation meeting on 8 August 2022 to allow for questions. This meeting was held by telephone conference call.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders made. It does not record all evidence and submissions received.

The issues

[4] The issues are:

- (a) Did Ms Burridge raise a personal grievance for unjustified dismissal within 90 days from when the dismissal arose?
- (b) If so, has Ms Burridge lodged the claim within three years after raising the personal grievance?

The law

[5] Section 114 (1) of the Employment Relations Act 2000 (“the Act”) includes that an employee must raise a personal grievance within 90 days beginning with the date when the action that the grievance is based on occurred or came to their notice.

[6] Section 114 (2) of the Act includes that:

“...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.”

[7] The Employment Court summarised principles arising from earlier cases about raising a personal grievance within 90 days.

[8] The grievance process is designed to be informal and accessible. A grievance may be raised orally or in writing with no formula of words that must be used. What matters is that the employee’s communications convey the substance of the complaint to the employer to enable it to respond, “with a view to resolving it soon and informally, at least in the first instance.”¹

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

Did Ms Burridge raise a personal grievance for unjustified dismissal within 90 days?

[9] Ms Burridge was employed as a long-haul truck driver by DCL. In October 2018 DCL raised disciplinary issues with Ms Burridge and another employee who she drove with. She was dismissed by letter on 4 November 2018. Ninety days starting with that date is 01 February 2019.

[10] Ms Burridge says that she raised a personal grievance for unjustified dismissal in a letter dated 28 January 2019 (“grievance letter”) and that the grievance letter was attached in three PDF pages to an email to DCL dated 29 January 2019 (“cover email”).

[11] Mr Cooper, the director of DCL says DCL did not receive the cover email and the attached grievance letter. He says Ms Burridge has altered her evidence to prove she raised the grievance within time.

[12] The factual issue to determine is whether it is likely that Ms Burridge emailed the grievance letter to DCL and so took reasonable steps to make sure DCL was aware of her grievance. If I am satisfied this happened, I will determine that the grievance was raised within the statutory time frame.

[13] I will now consider the issues that Mr Cooper says show that Ms Burridge’s evidence of raising the personal grievance is not credible, and that Mr Cooper did not receive the cover email with the grievance letter attached.

Two versions of the grievance letter

[14] Ms Burridge provided the grievance letter (“first version”) with her statement of problem when she brought in hard copies of this to the Authority. She then provided a different version of the grievance letter (“second version”) when the Authority asked her to provide the cover email for this preliminary matter. The second version has four extra sentences at the end. These sentences ask for compensation; propose negotiation, mediation or the Authority (in that order of escalation); and ask for a reply by 5 January 2019. I am

satisfied that the content of both versions of the grievance letter contain sufficient particulars to be considered raising of a personal grievance for unjustified dismissal.

[15] Ms Burridge says she prepared two versions of the grievance letter on the same day (28 January 2019). She explains she sought advice after the first version and added sentences at the end of the second version about compensation, mediation, and time to reply. I accept these things are likely to be included in employment advice and the language of ‘hurt and humiliation’ she used is consistent with this. I find it likely that Ms Burridge added the sentences after she received advice.

[16] Ms Burridge provided a cover email dated 29 January 2019 showing that three of the five PDF attachments were labelled as: ‘lance rhonda 28th jan.pdf 293.5kB’ ‘lance rhonda 28th pg 2.pdf 399.3kB’ and ‘lance Rhonda 28th pg 3.pdf 125.3kB’. The labels and size indicators appear consistent with the second version grievance letter in that it is three pages. The first page has wide line spacing, the second page (labelled “2”) has narrower spacing and more density in the text, and the last page (labelled “3”) has only four sentences and a sign off.

[17] Considering all of the above I find it likely that Ms Burridge erroneously lodged with the Authority a hard copy of the first version of the grievance letter and that when looking for the cover email for this preliminary matter she opened the attachment and found the second version. I accept her submission that she had nothing to gain by dishonestly adding extra sentences. The grievance letter material with or without those last sentences would have sufficient specificity to raise a grievance for unjustified dismissal. I accept the second version is likely the one that was attached to the cover email in three separate PDFs.

Wrong date to reply

[18] The second version asks for a reply by 5 January 2019 when the letter is dated 29th January 2019. I accept Ms Burridge’s explanation that this was likely in error and should probably have been 5 February 2019.

Communications on 29 January 2019

[19] The cover email containing the grievance letter shows it was sent at 4.58pm on 29 January 2019. It was sent to Mr Cooper's email address. Ms Burridge then sent Mr Cooper a text message at 5:59pm: "Please check email and confirm arrived thank you." Mr Cooper responded to that text at 6:26pm: "Sure have, read the reply, looking forward to police outcome, assisting them wherever possible, the transport industry doesn't need to be associated with you two cowboys, and that's a big No I won't negotiate with you *laughing face emoji*."

[20] Mr Cooper sent two emails also on 29 January 2019 to Ms Burridge, one at 5.29pm ("first email") and another at 6.13pm ("second email").

[21] The first email refers to compensation and ACC matters which were both in the grievance letter. It refers to having "no intention of negotiating" and that DCL considered it had treated Ms Burridge (and the other employee) "fairly" following "relevant legislation". The email says DCL "stands by its decision making" and was "very comfortable with the outcomes." I find this is a likely reference to the outcome of the disciplinary process. Other proceedings about alleged driving offences as instigated by Mr Cooper had not been completed at that stage.

[22] The second email appears to follow on from the first commencing as it does with "again". It raises a new claim against Ms Burridge and likely her co-worker. It refers to "information that has come to light" in relation to trailer damage and places a monetary figure for repairs. I find the email goes on to use language that is likely in response to the outcome of the disciplinary process: "again [this] proves and confirms that DC Linehaul is correct in its actions and are satisfied with the outcome."

[23] Mr Cooper tells me that in these communications he was not responding to any grievance letter. He says that he was responding to a raft of phone calls, messages and texts from both Ms Burridge and the other employee who was also dismissed. Mr Cooper described these messages and texts coming at all hours, he says they were threatening, and that they

included 'drivel' and 'thousands of words.' Ms Burrige denied she was threatening in her communications. I had none of these communications before me. Mr Cooper says he did not keep them because he did not know he would have to be involved in a grievance process, not having been notified of one.

[24] I find it likely after considering the above that the above emails and message were sent by Mr Cooper to Ms Burrige in response to the grievance letter sent to him. I find that Mr Cooper's message response of "sure have" to Ms Burrige after she checked if he got the email shows that she took reasonable steps to ensure he was aware of the grievance.

Grievance letter contains things that Ms Burrige could not by then have known

[25] Mr Cooper says that the first page of both versions of the grievance letter contains reference to Ms Burrige claiming that DCL had issues with other workers. Mr Cooper says that Ms Burrige could not have known about issues with other workers (he names a particular worker) until much later. He says this clearly shows that Ms Burrige created the grievance letter much later than 28 January 2019. The relevant sentence Mr Cooper refers to is a very general one. It is not specific about people or time. Ms Burrige says it related to things she had heard at the time. I find little in Mr Cooper's submission to support a finding that Ms Burrige has fabricated the grievance letter at a time later than 28 January 2019.

[26] Based on the above I find that Ms Burrige raised her personal grievance on 29 January 2019 and took reasonable steps to make sure DCL was aware of it.

[27] Accordingly, I find that Ms Burrige raised a personal grievance for unjustified dismissal within the 90-day statutory time frame.

Has Ms Burridge lodged the claim within three years after raising the personal grievance?

[28] Section 144 (6) of the Act says that no action may be commenced in the Authority in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised.

[29] Section 158 of the Act says that proceedings before the Authority are to be commenced by the lodging of an application in the prescribed form.

[30] Regulations 5 and 6 of the Employment Relations Authority Regulations 2000 (“the Regulations”) provide that the prescribed form is a Statement of Problem together with the prescribed fee.

[31] Clause 13 of Schedule 2 of the Act provides:

“No determination or order of the Authority, and no matter before the Authority, is to be held bad for want of form, or be void or in any way vitiated by reason of any informality or error of form.”

[32] Ms Burridge had her application accepted by the Authority when she filed a statement of problem with the prescribed fee on the 21 January 2022. I have found that Ms Burridge raised her personal grievance on 29 January 2019. She needs to have commenced her action in the Authority no more than 3 years after this date which would be 29 January 2022. Ms Burridge has commenced her action in relation to her personal grievance within the statutory three-year time frame.

[33] I note that it was not until 7 March 2022 that DCL were served with the Statement of Problem. However, the initial Statement of Problem was accepted on 21 January 2022. The Authority asked Ms Burridge to better collate the material that she had lodged. It was the re-collated material that was served on DCL. This is a step supported by clause 13 of Schedule 2 of the Act referred to above. This would explain to Mr Cooper the delay between lodging and service.

Summary

[34] I find Ms Burrige raised her personal grievance for unjustified dismissal against DCL within the statutory 90-day timeframe.

[35] I find Ms Burrige commenced the action based on the personal grievance for unjustified dismissal within the required three-year statutory time frame.

[36] The substantive matter will continue to be investigated. The parties should refer to the Directions of the Authority dated 7 July 2022 which sets out the likely issues for the substantive investigation and the timetable for evidence to be lodged for its investigation. The investigation meeting will be by video conference. The parties will need to consider how they can best participate by video conference and communicate this with the Authority Officer.

[37] Pending the investigation continuing the parties are directed to mediation. A notice to this effect will follow this determination. In the event that the parties resolve matters Ms Burrige is to contact the Authority to confirm so that the investigation meeting time can be vacated.

[38] Costs are reserved and will be dealt with as part of the substantive investigation process.

Antoinette Baker
Member of the Employment Relations Authority