

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 82
3021911

BETWEEN DONN LEWIS EDWIN
 CANNELL
 Applicant

AND GALE CONTRACTING LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Steven Zindel and Chloe Chai, Counsel for Applicant
 Sarah Wadworth and Miriam Radich, Counsel for
 Respondent

Investigation Meeting: 27 April 2018 at Blenheim

Submissions received: On the day from Applicant
 On the day from Respondent

Determination: 31 May 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A The only grievance raised within the statutory timeframe is an unjustified disadvantage grievance.**
- B The delay in raising the grievances of unjustified dismissal and engagement in adverse conduct for a prohibited health and safety reason was not occasioned by exceptional circumstances.**
- C The parties are directed to attend mediation on the unjustified disadvantage grievance.**
- D Costs are reserved.**

Employment relationship problem

[1] On 22 April 2016 Donn Cannell completed an application form for employment in the position of Hauler Operator at Gale Contracting Limited (Gale Contracting). On the same date he attended an unpaid induction course where procedures were explained, he consented to drug and alcohol testing and undertook a site visit. He was offered employment, signed an employment agreement and worked one full day for Gale Contracting on 26 April 2016. Mr Cannell went to work again on 27 April 2016 but did not remain on site and went home. He never returned again to work for Gale Contracting.

[2] Gale Contracting is a logging company that provides harvesting services for four forestry companies around the Marlborough area. It gave advice that it intended to terminate Mr Cannell's employment on 13 May 2016 with one week's notice. It relied on a trial period of 90 days pursuant to ss. 67A and 67B of the Employment Relations Act 2000 (the Act) in its employment agreement with Mr Cannell.

[3] This determination resolves preliminary issues.

[4] The first is whether Mr Cannell raised the personal grievances that are in the statement of problem¹ within the statutory timeframe under s 114 (1) of the Employment Relations Act 2000 (the Act).

[5] The second is, if personal grievances were not raised within the statutory timeframe, whether the delay in raising the personal grievances was occasioned by exceptional circumstances and whether it would be just to grant leave to raise the personal grievances after the expiration of the statutory period.

The investigation meeting

[6] It was agreed with counsel the Authority would hear all the evidence at the investigation meeting as the employment relationship was very brief but would only determine the preliminary issues. By agreement submissions were provided about the preliminary issues only. If the Authority does determine a preliminary issue in favour of the

¹ Statement of problem lodged with the Authority 1 November 2017

applicant and mediation is unsuccessful the Authority will provide an opportunity for final submissions.

Were personal grievances raised within the statutory time frame?

[7] Section 114(1) of the Act requires that a grievance must be raised with the employer within the period of 90 days from the date the action alleged to be a grievance occurred or came to the notice of the employee.

[8] There are three grievances alleged in the statement of problem.

[9] The first is a claim of an unjustified disadvantage on 27 April 2016 when it is alleged Mr Cannell was excluded from the workplace because he had voiced concerns about the fact there was passive smoking and that Gale Contracting was not managing its duties properly.

[10] The second is that Mr Cannell was unjustifiably dismissed on or about 13 May 2016.

[11] The third is that Gale Contracting engaged in adverse conduct for a prohibited health and safety reason under s 103(1)(j)(i) of the Act and s 89 (h)(vii) of the Health and Safety at Work Act 2015 by preventing Mr Cannell from working further and then dismissing him after he raised a health and safety issue [on 26 or 27 April 2016].

What occurred within the 90 day timeframe from 26 April 2016 and from 13 May 2016?

[12] On 26 April 2016 Mr Cannell signed an employment agreement and then commenced work. Mr Cannell subsequently complained to Matthew Gale who is one of two directors at Gale Contracting about employees smoking in his presence. Mr Cannell has prostate cancer but said at that time he was in remission however he remained concerned about passive smoking.

[13] I record there is a difference in view as to why Mr Cannell drove his own car to the skid site the following day on 27 April 2016 when workers are picked up and taken to the site. There is no dispute that he was reprimanded for doing so because his car did not have the necessary health and safety equipment. He was escorted back down the slope and he then left the work site and did not return to work.

[14] I am satisfied that Mr Gale knew that Mr Cannell was concerned about employees smoking in his presence by 27 April 2016.

Text messages

[15] Whilst Mr Cannell remained away from the work place after 27 April 2016 there were a series of text messages between him and Mr Gale. The first message was sent by Mr Cannell on 28 April 2016. Mr Cannell questioned Mr Gale “where am I at Matt with these smoke issues, with transport, workplace etc.” Mr Gale responded promptly that same day and said that he was catching up with the crew the next day to discuss and resolve.

[16] The next text message from Mr Gale to Mr Cannell on 2 May 2016 stated that he would talk to another employee Doug to see if he wants an extra pair of hands and he wrote “that may work for everyone.” Mr Cannell then sent two further text messages on 2 May and a third on 4 May chasing a response to that proposed course of action. On 4 May Mr Gale messaged Mr Cannell and stated he has spoken to Doug but there is not anything in the workshop and then in another text message that he did not say there was no work in the crew just nothing in the workshop. Mr Zindel placed some importance on the next text message sent by Mr Cannell on 4 May 2016.

All this because I won't tolerate cigarette smoke in my lungs, will seek out my legal situation. Cheers.

[17] Notwithstanding the above message Mr Cannell continued to send text messages to Mr Gale suggesting they meet on 5 May, 6 May and, 12 May 2016. Mr Gale responded on one occasion after 4 May. He said in his message that he was unavailable that day but at the office the following day. There was no response to a further message from Mr Cannell on receipt of that message about a time to meet. A further undated text message from Mr Cannell is to the effect that he drove to Gale Contracting site for a meeting. He expressed some displeasure at the cost of doing so. The evidence is that a meeting did not take place.

[18] By letter dated 13 May 2016 Mr Cannell was advised that his employment was to be terminated on one week's notice relying on a trial period in the employment agreement. Mr Cannell was given one week's notice with his last day of work being 20 May 2016.

Legal advice

[19] Mr Cannell sought advice from a solicitor at Mr Zindel's firm, Wayne Jones, within the 90 day time period. Mr Cannell was advised to seek independent legal advice in those circumstances but he has chosen not to do so.

[20] The evidence supports that Mr Jones was provided with copies of the text messages and the 13 May letter. Mr Jones sent an email to Mr Gale on 20 May 2016 advising that he was representing Mr Cannell and seeking a copy of the employment agreement.

[21] An employee from administration at Gale Contracting responded promptly to Mr Jones by email dated 23 May 2016 and sent him the page of the agreement containing the trial period. By email the same date Mr Jones requested wages and holiday pay be paid to Mr Cannell and he wanted confirmation that the whole of the employment agreement would be provided.

Email dated 25 July 2016

[22] The employment agreement was duly provided and by email dated 25 July 2016 Mr Jones wrote as follows:

Dear Matt,

We represent Mr Donn Cannell. Further to our email beneath, and in accordance with your Employment Contract Clause 23 (headed "personal grievances and disputes procedures") signed between you and our client, and pursuant to section 114 of the Employment Relations Act 2000, we give notice on behalf of our client of a personal grievance against your Company. In brief, our client alleges that, as a result of his antismoking stance, he has been discriminated against by your company and its employees, namely, by being denied entry to his workplace only two days into his employment contract. Our client advises he has no wish to avail himself of Clause 23, but if that is your preferred option, he understands he has no choice but to attend.

Response from Gale Contracting

[23] Gale Contracting instructed Radich Law. There was a response by way of letter to Mr Jones from Miriam Radich on 3 August 2016. Ms Radich responded to Mr Jones as follows:

Dear Wayne

1. We represent Gale Contracting Limited.
2. We have received your recent email correspondence in which you raise a Personal Grievance on behalf of Mr Donn Cannell.
3. As [administration] has communicated to you, Mr Cannell was terminated under the 90 day trial period. We are uncertain what your client's allegation is in relation to his *anti-smoking stance*. The Employer has a company policy that specifies that work vehicles, work containers and other enclosed work places are smoke free. We need more details of what you say the discrimination your client has suffered is before we can substantively respond to any personal grievance.
4. Furthermore, it is denied that your client was denied entry to his workplace two days into his employment. Your client abandoned his employment after he drove his own private vehicle up to a skid site and was reprimanded for doing that. He did not report for work after the second day. He was not stood down or otherwise told not to come to work. All Gale's employees are usually picked up from an agreed meeting place with company vehicles and transported to skid sites and Donn did not turn up for collection.
5. Based on what we know, there is no basis to any personal grievance but if you provide us with more detail about what you say the discrimination is, we and the Employer will consider that.
6. Thank you.

[24] There was then a period of inactivity between that letter and 24 May 2017 with no further communication between the parties.

Sufficient specificity

[25] Ms Wadworth submits that Mr Jones' email of 25 July 2016 does not raise the personal grievances which are now advanced on behalf of Mr Cannell. She submits that Mr Jones' email endeavoured to raise a grievance for discrimination which was inadequately described and invalid because the prohibited grounds of discrimination are confined to those in s 105 (1) of the Act.

[26] The starting point in determining whether a grievance is raised is s 114 (2) of the Act. That section provides that:

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] Ms Wadworth refers to the statement of the then Chief Judge Colgan in *Creedy v Commissioner of Police*² where he considered s 114 (2) in deciding whether a grievance was raised. He stated amongst other matters that what is important is that the employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates.³ It is also stated in *Creedy*⁴ that the raising can be oral and there is no particular formula of words that need to be used. The Employment Court has stated that a lower level of detail is required to raise a personal grievance than that required for a statement of problem.⁵

[28] I have considered whether all the interactions within the 90 day period, being the concern raised directly by Mr Cannell with Mr Gale about other employees smoking in his presence, the subsequent text messages and Mr Jones' email amount to the raising of a grievance.⁶

Conclusion about raising of a personal grievance(s) within the statutory time frame

[29] It is clear from cases in the employment area that simply stating what the grievance is considered to be without elaboration as to its merits is insufficient. That is because an employer is unable to understand what the basis of the grievance is in order to deal with it quickly and informally as contemplated by the Act and in this particular case the employment agreement.

[30] The email of 25 July 2016 has to be considered against the following interactions within the 90 day time frame. It was known by 27 April 2016 that Mr Cannell had a concern about other employees smoking in the work place. Mr Gale told Mr Cannell in a subsequent text message he would talk to the crew about that. The text messages support that Mr Gale took steps to see if there was other work available for Mr Cannell. On hearing that there was no alternative work Mr Cannell said he would see about his legal situation. Mr Cannell then attempted to meet with Mr Gale to discuss the matter without success. His employment was then terminated.

² *Creedy v Commissioner of Police* [2006] ERNZ 517

³ Above n 1 above at [36]

⁴ Above n 1 at [36]

⁵ *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 at [57]

⁶ Above n 5 at [51]

[31] Mr Jones was instructed and asked for some information from Gale Contracting and then wrote his email of 25 July 2016 within the 90 day time frame. He refers in his email specifically to clause 23 of the employment agreement and s 114 of the Act. He gives notice of “a personal grievance” but although the use of the phrase “discriminated against” in the email has been focused on he does not specify otherwise the type of grievance.

[32] The Employment Court in *Clark v Nelson Marlborough Institute of Technology*⁷ stated that it did not matter whether the employer recognised the complaint as a personal grievance or not. It was stated the issues are whether the complaint was a personal grievance within the meaning of s 103 and whether the letter complied with s 114(2) by conveying the substance of the complaint sufficiently to the employer.

[33] In the statement of problem it is specifically acknowledged that discrimination on the basis Mr Cannell was a non-smoker does not apply because the prohibited grounds of discrimination are confined to those in s 105(1) of the Act. That is not however the end of the matter. The substance of the concern as conveyed by Mr Jones in his email was that Mr Cannell was denied entry to the workplace after two days of employment because of his anti-smoking stance. An allegation that an employee is denied entry to a workplace is within the meaning of s 103 of the Act and could constitute an unjustified action causing disadvantage grievance even if not specifically stated to be a grievance of that nature.

[34] Ms Radich responded to the substance of that concern about being denied entry to the workplace in her letter of 3 August 2016 although requested more details of the discrimination aspect.

[35] There was a considerable delay in answering Ms Radich’s letter as set out earlier. I heard a good deal of evidence about why that was, in support of the second rather than this first issue. Whilst recognising that delay I have placed some weight on clause 23 of the employment agreement to which Mr Jones in his email of 25 July 2016 referred. If the process in the clause had been followed then there would have been a meeting within 14 days after receipt of the 25 July 2016 email.

[36] Clause 23 of the employment agreement is in line with the object of the Act in s 101(ab) that recognises employment relationship problems are more likely to be resolved

⁷ *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]

quickly and successfully if the problem is first raised and discussed directly between the parties to the relationship.

[37] The clause helpfully defines a personal grievance as being about a situation where an employee feels aggrieved because of an action or actions of the employer. It requires as a first step an employee speak to the foreman or owner so that the concern can be dealt with at once. Mr Cannell did that and it was clear to Gale Contracting that Mr Cannell felt aggrieved about other employees smoking in his presence.

[38] If step 1 does not resolve the matter then step 2 requires a written letter that covers three points. The first was details of the problem or grievance. The second was why the employee feels aggrieved and the third was the solution the employee seeks to resolve the matter. The details of the grievance being an alleged denial of entry to the workplace and why Mr Cannell felt aggrieved were set out. Mr Jones did not set out the solution sought although the reference to clause 23 in the last sentence does support knowledge that the next step could be a meeting.

[39] A meeting within 14 days of receiving the step 2 letter is the next step to discuss and attempt to resolve the matter. Although perhaps more relevant to an ongoing relationship the importance of attending such a meeting is reinforced by the statement in the employment agreement that either party failing to attend this meeting will be regarded as a serious breach of the employment relationship.

[40] There was no such meeting held. If a meeting had been held in accordance with the process in the employment agreement it would have provided an opportunity for further discussion and clarification and perhaps resolution at a much earlier stage.

[41] I return now to the personal grievances in the statement of problem and whether they were raised within the statutory time frame.

Unjustified disadvantage

[42] I find that within the 90 day period from 27 April 2016 by a series of interactions considered together Mr Cannell raised the personal grievance that he was unjustifiably disadvantaged in the workplace because he was excluded from the workplace having raised concerns about smoking. The first in the series of interactions was Mr Cannell raising

concerns about other employees smoking directly with his employer, there was then his subsequent text messages commencing with a question where he was at with smoke issues, transport and workplace and finally there was Mr Jones' email of 25 July 2016.

Unjustified dismissal

[43] Mr Zindel submits that an unjustified dismissal grievance was raised within 90 days. This appears to be on the basis that Mr Jones requested detail of the trial period and knew when he wrote the email of 25 July 2016 that Mr Cannell had been dismissed. Some reliance is placed on the 4 May text message set out above and that Ms Radich in her response of 3 August stated that Mr Cannell was terminated under the 90 day trial period.

[44] I do not find that the email of 25 July 2016 conveys the substance of a personal grievance of unjustified dismissal so that Gale Contracting could be said to be aware of it and could attempt to resolve the matter. Ms Radich was simply referring to a fact not responding to a grievance when she mentioned termination in her letter of 3 August 2016. The first time a grievance of unjustified dismissal was raised was on 8 August 2017 well outside of the 90 day period. The unjustified dismissal grievance was not I find raised under s 114 (1) of the Act within the statutory timeframe.

[45] One of the grounds advanced for exceptional circumstances is that Mr Cannell made reasonable arrangements to have this grievance raised on his behalf by Mr Jones and Mr Jones unreasonably failed to ensure it was raised within the required time.

[46] I could not be satisfied from the evidence of Mr Cannell and Mr Jones that Mr Cannell made reasonable attempts to have a concern about his dismissal raised or that Mr Jones unreasonably failed to ensure a grievance of that nature was raised. Mr Jones' evidence was that he had followed Mr Cannell's instructions in raising the grievance in July 2016. At the time Mr Jones wrote his email he knew there was a dismissal and that the trial period in the employment agreement was relied on.

[47] I do not find that a grievance of unjustified dismissal was raised within 90 days of 20 May 2016 and further I do not find that exceptional circumstances occasioned the delay.

Adverse conduct for a prohibited health and safety reason under s 103(1)(j)(i) of the Act and s 89 (h)(vii) of the Health and Safety at Work Act 2015

[48] This grievance was raised well outside of the 90 day period and arguably not clearly until the statement of problem was lodged. I do not therefore find this grievance was raised within the statutory timeframe and there is no evidence to support the delay in raising this grievance was occasioned by exceptional circumstances. Rather it seems that it was only raised when a new solicitor took the matter over in August 2017.

[49] In conclusion I have found one grievance of unjustified action causing disadvantage was raised within the statutory timeframe.

Mediation

[50] The parties have not attended mediation and I consider it would be constructive for that to occur.

[51] I direct the parties to attend mediation.

Costs

[52] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority