IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 149/10
5301496

	BETWEEN	KARYN ELIZABETH CUMMING Applicant
	A N D	ABSOLUTE INSURANCE LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Karyn Cumming, Applicant in person Scott Fairclough, Counsel for Respondent
Investigation Meeting:	On the papers
Determination:	26 July 2010

DETERMINATION OF THE AUTHORITY

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[1] This determination deals with whether Ms Cumming raised her personal grievance with her former employer within 90 days so as to entitle her to pursue her grievance before the Authority. The facts are not disputed but the legal effect of those facts is. The parties agreed to the Authority determining this issue based on the statement of problem and correspondence dated 20 April, 27 April, 29 April and 29 June.

[2] Ms Cumming says that she was dismissed on 12 January 2010. There is a letter to Ms Cummings of that date on the respondent's letterhead to that effect. For present purposes then Ms Cumming's personal grievance is a claim of unjustified dismissal on 12 January 2010.

[3] Ms Cumming did not communicate further with her former employer but on 6 April 20010 she lodged her statement of problem with the Authority. In accordance with the Authority's usual practice the application was sent to the respondent with a

covering letter advising the respondent to lodge a statement in reply within 14 days. The statement of problem and the covering letter dated 6 April 2010 were received by the respondent on 9 April 2010 which is the 88th day starting from 12 April 2010. The date of receipt is known because Mr Hudgell phoned the Authority on that date to ask for an extension of time to lodge a reply.

[4] The short point for the respondent is that the Authority did not have jurisdiction to accept the application because Ms Cumming had not first raised her personal grievance with her employer as required by s.114(1).

[5] Proceedings before the Authority are commenced by the lodging of an application in the prescribed form: see s.158. The Employment Relations Authority Regulations 2000 provide that a person may commence proceedings if that person wishes the Authority to resolve an employment relationship problem by lodging 2 copies of an application that complies with the regulations: see r.5. The regulations are to be interpreted and applied in a way that best enables the Authority to determine the substantial merits of a case without regard to technicalities and to deliver speedy, informal and practical justice to the parties in any matter before it. Here, however, the respondent says that Ms Cumming's grievance is not properly before the Authority despite her compliance with the requirements of s.158 and r.5.

[6] Neither the Act nor the Regulations specifies any procedural steps which must be taken by an applicant before commencing proceedings in the Authority. If Ms Cumming's statement of problem had been about a breach of her employment agreement, the recovery of arrears of wages or holiday pay, the recovery of a penalty for a breach of her employment agreement or the Act, compliance with a term of her employment agreement and so on, the respondent would have no legal basis for a complaint that the applicant must raise the issue with them before commencing proceedings. The wisdom of an applicant taking such an approach to litigation is of course a different matter. Is it different in the case of an employment relationship problem that is a personal grievance?

[7] The statutory purpose of s.114(1) and (2) is to enable the employer to remedy the grievance rapidly and as near as possible to the point of its origin: see *Creedy v. Commissioner of Police* [2006] ERNZ 517. That case was about whether the words used between the parties conveyed sufficient information to amount to the raising of a grievance but the comment about legislative purpose applies in a general sense still to

the present case. Some caution must be taken however with the cases under the Employment Contracts Act 1991 that led to the statement adopted in *Creedy*. The 1991 Act required employment contracts to contain an effective procedure for settling personal grievance. The standard procedure set out in the First Schedule to the 1991 Act only empowered the employee to refer a personal grievance to the Employment Tribunal if they were dissatisfied with the employer's written response to the employee's statement required by the procedure, or if the employer failed to provide a response or where both had agreed to waive these written statements. In other words, there was a statutorily required procedural step before an employee was empowered to commence proceedings in the Tribunal. The corollary was that the Tribunal could not entertain proceedings unless there had been compliance with the First Schedule. There is no similar procedural step in the Employment Relations Act 2000.

[8] Relevant objects of Part 9 of the 2000 Act are to recognise that in resolving problems access to information and mediation services is more important than adherence to rigid formal procedures; to recognise that problems are more likely to be resolved quickly and successfully if they are first raised and discussed directly between the parties; and to continue to give special attention to personal grievances and to facilitate the raising of grievances with employers: see s.101. The Act then provides at s.102 *An employee who believes that he or she has a personal grievance may pursue that grievance under this Act.* Section 114(1) provides that every employee who wishes to raise a grievance must raise their grievance with their employer within 90 days while s.114(2) says that a grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware of the alleged grievance.

[9] Within 90 days the respondent became aware of the Ms Cumming's grievance because Mr Hudgell received her statement of problem. It would be inconsistent with the objects of the 2000 Act about substance over technicalities to create the fiction that the respondent was not aware of Ms Cumming's grievance within time. I see no difference in an employer's capacity to respond to a grievance as contemplated by *Creedy* and the legislative purpose, whether first aware of it through the receipt of a statement of problem or by (say) a letter directly from the employee. Finally, I do not consider I can read into the words in s.114(1) *raise the grievance with his or her employer* a requirement akin to the First Schedule of the 1991 Act when Parliament chose not to include any equivalent procedure in the 2000 Act. For these reasons I

find that Ms Cumming has raised her personal grievance within time. A conference will be arranged shortly to progress the Authority's investigation.

[10] Costs are reserved.

Postscript

[11] Most employees with a grievance claim raise it with their employer before lodging a statement of problem with the Authority. I endorse that as a sensible approach even though the outcome of this determination means that it is not a requirement. There are no advantages in relying on the Authority processes as a proxy for raising a grievance directly with an employer but there are several significant disadvantages. Here, for example, Ms Cumming came close to missing the 90 day requirement.

Philip Cheyne
Member of the Employment Relations Authority