

[5] The respondent also submits that leave should not be granted to raise the grievance out of time because the failure to raise the grievance within time was not occasioned by an exceptional circumstance and in any event it is not just to grant leave.

[6] Lastly, the respondent says that the Service and Food Workers' Union was not the applicant's properly appointed agent or alternatively it was not an agent for the purposes of s.115(b) of the Employment Relations Act 2000.

Background

[7] On 13 February 2007 the applicant was summarily dismissed from his employment as Kaitiaki Taiao with the respondent. His dismissal related to alleged dereliction of duty in relation to his management of the school swimming pool and it is also alleged that he misled the Principle (Pem Bird) as to the condition of the pool.

[8] Following his dismissal Mr Edmonds contacted his Union Organiser, Jacqui Hurst. It was Ms Hurst's evidence that she met Mr Edmonds regularly in the latter part of February and he was very upset about the dismissal. Mr Edmonds instructed her to take a personal grievance against the respondent and she agreed to do so.

[9] It was Ms Hurst's evidence that she contacted the school on 23 February 2007 and on 27 February, Alex Hope (who was representing the respondent), rang her and told her that he was representing the respondent and that all correspondence and submissions were to go through him.

[10] It was Ms Hurst's evidence that on 1 March she called Alex Hope in the afternoon. Mr Edmonds was present with her in the office at the time and Alex Hope was on the speakerphone. It was Ms Hurst's evidence that she informed Alex Hope that she was notifying the respondent of John Edmonds' personal grievance for unjustified dismissal. It was her evidence that she told Mr Hope that the respondent had breached the dismissal procedure in the CEA and had failed to allow Mr Edmonds to have a representative present. There was also a discussion between them about a statement published in the respondent's newsletter about Mr Edmonds' dismissal. Mr Edmonds thought that the statement defamed him.

[11] It was also Ms Hurst's evidence that she told Mr Hope that the respondent had not acted in good faith and had not treated Mr Edmonds fairly or reasonably.

[12] It was Mr Hope's evidence that on 1 March Mr Hurst advised him that Mr Edmonds had a personal grievance against the school principal. He asked what the grievance was for and she advised that it was for unjustified dismissal and disadvantage pursuant to ss.103(1)(a) and 103(1)(b) of the Employment Relations Act 2000.

[13] It was Mr Hope's evidence that he then asked what the grievance actually was and what the background facts of it were. Ms Hurst advised him that there had been a breach of clause 6.8 of the collective agreement (disciplinary procedures) and there had also been a breach of Part 7 of the collective agreement (resolution of employment relationship problem). She then went on to advise Mr Hope that the employer's statement in its newsletter had been defamatory of Mr Edmonds.

[14] Mr Hope said he then asked again what the background facts were to the grievance complaint as he did not understand exactly what Mr Edmonds was complaining about. Ms Hurst advised that she would be submitting the grievance in writing. Mr Hope did not recall Ms Hurst telling him that Mr Edmonds' complaint was that he had not been allowed a representative at the dismissal meeting.

[15] Mr Hope completed the following file note in respect of his discussion with Ms Hurst:

“Jacquie – raises PG – lack of process, s.103a and b – unjustifiable dismissal and disadvantage – clause 6.8 of CA and also Part 7 breaches – newsletter put out into community advising that caretaker dismissed – Union wants to meet in Rotorua”.

[16] It was Mr Hope's evidence that he was particularly careful in his questioning of Ms Hurst during that telephone conversation as he was aware of the recent decision of Creedy v. Commissioner of Police [2006] 1 ERNZ 517 and he had acted for Mark Creedy in the Employment Relations Authority and had given evidence in the Employment Court.

[17] On 15 March, Ms Hurst submitted Mr Edmonds' grievance in writing. That letter read:

Dear Alex,

Attention: Principal Pem Bird, Te Kura Kaupapa Motuhake o Tawhiau

Re: John Edmonds.

On instructions from our Union member John Edmonds, whom we are authorised to represent and act for pursuant to s.236 of the Employment Relations Act.

We refer to our telephone conversation at 4.07pm on 01/03/07 concerning our Union member John Edmonds' employment relationship problem.

We take this opportunity to invoke a personal grievance under Part 7 of the School Caretakers and Cleaners (including canteen workers) Collective Agreement, also under s.103 of the Employment Relations Act and amendments.

NOTICE OF GRIEVANCE

1. Our Union member Mr John Edmonds was unjustifiably dismissed in terms of s.103 (1) (a) of the Employment Relations Act and amendments.

2. Our Union member Mr John Edmonds was treated unfairly in terms of Part 7 of the School Caretakers and Cleaners (including canteen workers) Collective Agreement.

FACTS:

1. Implications of bias and discrimination, that is failure to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.

2. Breach of Good Faith by the employer as to consultation of fair and reasonable dealing. Particular reference to the substantive omission by Mr Edmonds' employer to endeavour to facilitate open and honest communication between employer and employee.

3. Our Union member's (John Edmonds) employer was not open and honest in his dealings with our Union member and failed to treat our Union member in a fair and reasonable manner. Failure to consult with the decisions that had an adverse effect (that is, negative) effect on our Union member (John Edmonds) employment.

4. Failed to comply with the duty and general obligation of good faith, we believe the failure was deliberate and serious and the attempt was to undermine the employment relationship.

REMEDIES:

1. Compensation for humiliation, loss of dignity and injury to feelings.

2. Compensation for loss of wages.

3. Cost of any expenses relevant to the proceedings.

4. Costs of and incidental to any proceedings in the Employment Authority.

Please respond within 14 days from the date of this letter advising of:

1. Your view of the facts; and

2. Your reasons for not granting the remedies sought (if this is the case).

Yours faithfully,

Jacqui Hurst

Organiser

Service and Food Workers Union

Nga Ringa Tota, Rotorua

[18] On 27 March 2007, Mr Hope replied to Ms Hurst's submission of grievance on behalf of Mr Edmonds. His reply was written in Maori. The agreed translation of that letter reveals:

- A request for details of the grievance;
- A statement that Ms Hurst's statements under the heading Facts did not clarify the details of the claim and contained a number of errors;
- Attention should be given to the language in s.114 which requires the employee to advise the employer what is wrong that the employee wants remedied;
- The reader should have regard to Creedy v. Commissioner of Police AC29/06, 23 March 2006;
- A request for the details of John Edmonds' grievance;
- A statement that at this stage the school does not agree to the remedies claimed;
- The school agreed the problem should be taken to mediation. Ms Hurst was notified that there would be a request for a Maori interpreter because the school wished the proceedings to be conducted in Maori and according to Ngaati Manawa customary practice.

[19] It was Ms Hurst's evidence that on receipt of this letter she asked her National Secretary, John Ryall, to translate the letter for her. She got his translation back the

same day. The translation she received said that Mr Hope thought she had not set out the facts or wrongdoings of the grievance and he referred to the Creedy case. He said she needed to set out the reasons for the personal grievance and stated that the respondent did not agree with her signed statement.

[20] It was Ms Hurst's evidence that she got a copy of the Creedy case from a relative at the Wellington Community Law Centre. Her interpretation of that case was that it did not apply to this circumstance and that she had properly notified the respondent of the grievance. She thought this was because she had clearly set out the nature of the grievance in both her telephone discussion with Alex Hope on 1 March and in her letter of 15 March. She had not sent a simple one-liner as in the Creedy case. For these reasons, she believed that she did not have to write to Mr Hope further clarifying the grievance especially as he had agreed to go to mediation.

[21] It is not in dispute that on 17 March 2007 the parties attended mediation to discuss Mr Edmonds' grievance for unjustified dismissal. Mediation did not resolve the grievance.

[22] The parties agree that at the end of the mediation, Mr Hope advised that it was the respondent's view that the personal grievance had not been properly raised for the reasons set out in his letter of 27 March 2007 to the Union and the respondent did not consent to the grievance being raised out of time.

[23] Mr Hope also raised a preliminary issue in respect of the Union's representation of Mr Edmonds. It was his evidence he had not received any advice from the Service and Food Workers' Union Inc to the effect that clause 60 of the Union's constitution had been complied with.

Discussion and Findings

[24] In considering and deciding this matter I have had regard to the evidence before me, the submissions of the parties and relevant case law. In the interests of issuing this already delayed determination I am not recording the detailed submissions for the parties. They can be assured, however, that I have given them careful consideration.

[25] Section 114 (1) and (2) of the Act 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 beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee. (114(1)).
- A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employer wants the employer to address. (S114 (2)).

[26] Section 114 (3) and (4) of the Act provides:

- Where an 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 grievance after the expiration of the period. (s.113 (3)).
- The Authority may grant leave if it is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances set out in s.115 and it considers it just to do so. (s.114 (4)).

[27] The applicant asks in the alternative (if I find the applicant did not raise his grievance in time) to grant the applicant leave to raise his grievance in reliance on s.115 (b) of the Act. That section provides:

- Where the applicant made reasonable arrangements to have the grievance raised on his behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[28] In *Creedy* above the Court referred to *Ruebe-Donaldson v Sky Network Television (No.1)* [2004] 2 ERNZ 83. There the Court confirmed that the words 'raise' and 'submit'¹ are "virtually synonymous". This led to the conclusion that the

¹ The word used in the corresponding provisions of the Employment Contracts Act 1991.

requirements on an employee under the Employment Relations Act 2000 (in terms of notifying an allegation of personal grievance) are the same as they were under the previous legislation². The Court said at paragraph 32:

*“The legislative purpose of requiring a grievance to be raised was found to have been the same as that requiring its submission under the former legislation, namely to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin, to use the words of clause 3 of the First Schedule to the 1991 Act. Although done orally or in writing, to have enabled an employer to know of the complaint and to address it by way of remedy, cases under the previous legislation required a **minimum level of sufficiency of detail of the complaint. The position is no different now**”.* (Emphasis mine)

[29] Lastly I note the recent case of the issued by the Court in Christine Coy v Commissioner of Police CC 23/07 (Unreported) where the Chief Judge confirmed his findings in Creedy (cited above) that the grievance should be specified sufficiently to enable the employer to address it; that it is insufficient simply to allege the worker has a personal grievance or even to simply specify the type of grievance and that what is important is that the employer is able to respond as the legislative scheme mandates. However, he goes on to say:

“The requirement is certainly not for the detail that may subsequently be required when lodging a statement of problem in the Employment Relations Authority”.

[30] Having considered the evidence and submissions I am satisfied that Ms Hurst raise Mr Edmonds’ personal grievance with the respondent’s representative Mr Hope. The grievance was raised with sufficient detail when Ms Hurst advised Mr Hope during their telephone conversation on 1 March 2007 that Mr Edmonds was alleging a grievance of unjustified dismissal and unjustified disadvantage in that there had been a breaches of Clause 6.8 (Discipline and Dismissal Procedure) and Part 7 (Employment Relationship Problem Resolution) of the Collective Employment Agreement (CEA).

² Employment Contracts Act 1991.

[31] I accept Mr Hope's submission that Part 7 of the CEA relates to the resolution of employment relationship problems. However, it does highlight the basis on which a grievance may be founded including a dismissal that "*was not carried out properly*".

[32] More importantly, however, it is not disputed that Ms Hurst advised Mr Hope that it was alleged that the respondent had breached Cl.6.8 of the CEA in effecting the dismissal. Significantly this clause requires the employer to advise the employee in writing of the specific matters causing concern; the employee must be advised of the right to representation and given a reasonable time and opportunity to provide an explanation.

[33] The statement by Ms Hurst that the applicant alleged breach/es of Clause 6.8 of the Collective did, I find, specify the applicant's grievance with a minimum sufficiency of detail to advise the employer of a grievance that the employee wanted the employer to address. Certainly Ms Hurst could have provided more detail of the specific breaches alleged. She says that she advised that Mr Edmonds had not been advised of his right to representation. Mr Hope does not recall this being raised. Both witnesses were credible and I accept this is simply a difference in recollection. However, I find that the allegation that the respondent breached Clause 6.8 of the Collective was sufficient, in itself, to advise the employer that the employee did not think the dismissal had been conducted in accordance with the disciplinary procedure in the Collective and it gave Mr Hope information about what was being alleged that he could raise with the respondent's Principal by way of an inquiry as to the process adopted by him when addressing the concerns he had about the employee's management of the swimming pool and the associated issues which led the respondent to dismiss the applicant.

[34] Ms Hurst's written submission of grievance on 15 March did nothing to elucidate the grievances raised by her on 1 March and in fact only alleged further grounds for the alleged grievances being breaches of good faith, bias, discrimination and failure to consult with the applicant. It would have been better had Ms Hurst specified the precise breaches of Clause 6.8 of the collective, however, it is not fatal that she did not do so.

[35] The last issue to be addressed is the respondent's claim that the applicant was not the applicant's properly appointed agent.

[36] I am somewhat confused as to the exact nature of the complaint made. Mr Hope said that he had not received any advice from the Service & Food Workers Union Inc to the effect that Clause 60 of the Union's constitution had been complied with. Mr McKenna raised a concern that the Union being a party to the CEA was also acting for the applicant and this was inconsistent with the laws of agency.

[37] I suggest that if it has not already done so that the Union provide the respondent with a copy of the authorisation to act for Mr Edmonds. If there remains a genuine issue then I reserve leave for the respondent to come back to me to clarify the issue to allow it to be addressed in submissions and determined.

Determination

- It is my determination that the applicant's grievance was raised orally by his representative, Ms Hurst in her telephone conversation with Mr Hope on 1 March 2007. The grievance was raised with sufficient detail to satisfy the requirements of s.114 (1) & (2) of the Act.
- Leave is reserved for the respondent to clarify any concerns regarding the Union's right to represent the applicant. The applicant will be invited to respond to any issue raised.

Costs

[38] Costs in this matter are reserved and should be dealt with when costs in the substantive matter are dealt with.

J Scott
Member of the Employment Relations Authority