

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 80/08
5104733

BETWEEN KENNETH FAIRBRASS
 Applicant

AND THE CHIEF OF DEFENCE
 FORCE
 Respondent

Member of Authority: G J Wood

Representatives: Russell Buchanan for Applicant
 Nigel Lucie-Smith and Joanna Holden for Respondent

Investigation Meeting: 15 May 2008 at Wellington

Submissions received: 3 June 2008

Determination: 11 June 2008

DETERMINATION OF THE AUTHORITY ON 90 DAY ISSUE

Employment Relationship Problem

[1] This case is about two personal grievances brought by Mr Fairbrass against the Chief of the Defence Force, following Mr Fairbrass' absence due to stress and his subsequent dismissal for incapacity.

[2] The issues for determination relate to whether the grievances were raised within 90 days and, if not, whether there are exceptional circumstances and it is just for the Authority to grant leave for them to be investigated.

Relevant Findings of Fact

[3] Mr Fairbrass had worked for the Army as its accommodation manager at the Trentham Support Battalion for many years. On 19 January 2007, following concerns he had about his new

manager, Major Graeme Tod, and his new assistant, he went on sick leave, which continued until his employment was terminated for incapacity on 12 July 2007.

[4] The Army was concerned about his ongoing absence and wrote to him three times about his absence. It received nothing except further medical certificates until 2 March, when Mr Fairbrass advised that he was going to be represented thereafter by the Public Service Association (PSA). The letter was headed *Work Related Stress* and asked that his absence from work be entered into the work-related injuries journal. It is also noted that Mr Fairbrass had referred himself to counselling under the Army's assistance programmes and that he would provide a full assessment of his medical position from his doctor.

[5] The Army did not accept Mr Fairbrass' ill health was a consequence of workplace stress and therefore refused to make any such entry in the workplace accident register. Lieutenant Colonel Cate Tarsau, the commanding officer of the Trentham battalion, wrote to the PSA accordingly on 13 March. She also sought further medical information from Mr Fairbrass and his approval to have an independent assessment by a specialist of the Army's choosing.

[6] Mr Fairbrass' general practitioner wrote to the Army on 6 March setting out his medical condition in some detail and indicated that Mr Fairbrass' view was that this resulted from a chain of command problem, in particular problems with his immediate boss. The doctor's view was that it was the work situation that was the cause of his illness. He recommended that Mr Fairbrass get further union and legal advice about his work situation. A report from his counsellor dated 22 March also indicated that while Mr Fairbrass had to look at the contributing factors to the illness, the Army needed to assess its own responsibility in failing to provide a "psycho-emotionally" safe environment.

[7] While Mr Fairbrass was unable to meet with the Army, he did undergo an independent assessment by an occupational physician, who assessed him on 15 May as suffering from depression and that he felt the cause was work-related. He was assessed as not being fit for normal duties for the next few weeks at least. He concluded that any return to work would be a graduated one and that medical support would be needed. He also made recommendations about whether Mr Fairbrass might be given a new manager and whether additional up-skilling of his assistant or other conditional assistance would be of benefit. He was, however, unable to conclude that the workplace was the predominant cause of Mr Fairbrass' illness.

[8] The Army then sought a meeting with Mr Fairbrass to try and facilitate his return to work. This meeting was subsequently set for 5 June. In the meantime, the Army became aware that

Mr Fairbrass was continuing in his role as president and treasurer of the Wellington Property Investors' Association, that he owned five residential properties that were tenanted and that he operated a property management business from home, as well as trading regularly on TradeMe. These matters were raised in a letter to Mr Fairbrass on 28 May.

[9] The parties met on 5 June as planned, to cover the issues of Mr Fairbrass' extended absence and the activities that he was alleged to have undertaken outside of his employment during this period. Mr Fairbrass was told that his employment could not continue much longer due to his absence and that the Army did not intend to change his reporting lines. Mr Fairbrass provided an updated medical certificate from his general practitioner, stating that he was still unfit to work and would be assessed again on 5 July.

[10] The PSA noted on Mr Fairbrass' behalf that he had cooperated with the Army in providing this medical information, that his GP, psychiatrist and psychologist were all satisfied that Mr Fairbrass was suffering from work-related stress and that while he was doing a little property management activity, his doctors had advised him that this was a good thing for him to do in his current condition. Given the circumstances the PSA organiser said he found trying to work with the Army *quite challenging*.

[11] When a specific question was asked about Mr Fairbrass' property investment and property management activities, Mr Fairbrass left the meeting. Mr Fairbrass subsequently provided a letter stating that he was innocent until proven guilty and that he did not intend to justify his property management activities. He also stated that he could not return to work until medically cleared. He requested a decision to be made and the outcome advised to the PSA.

[12] On 8 June Mr Fairbrass' claim for cover by the Accident Compensation Corporation was declined, as it was not accepted that his claim was for a work-related personal injury.

[13] The Army later suggested a further meeting for 22 June, but the PSA advised before that meeting that it no longer acted for Mr Fairbrass.

[14] The meeting on 22 June went ahead with Mr Fairbrass not in attendance. Instead he was represented by his present representative, Mr Buchanan, and Mr Fairbrass' daughter. The prospect of termination for incapacity was formally raised.

[15] Mr Buchanan claimed that Mr Fairbrass had a personal grievance over workplace issues and that notice had been given through the applicant's doctor letter of 6 March. This was disputed by the Army, which considered that it had never been notified that there was any personal grievance.

[16] Further information was sought on all the issues that same day by letter. Mr Buchanan responded on 28 June stating that he was surprised that the Army had not investigated Mr Fairbrass' concerns about workplace stress, despite knowing about them since March at the latest. He also gave various explanations for Mr Fairbrass' property management and other non-work activities, as well as informing the Army that Mr Fairbrass was still unable to return to work and that a date for such a return could not be given.

[17] On 12 July 2007, a Colonel Cunningham determined to dismiss Mr Fairbrass for incapacity with effect from that day, with one month's pay in lieu of notice. He was told that his retiring leave and other entitlements would be paid out in the next pay period. In relation to Mr Buchanan's claim of a personal grievance, he was told that there was still insufficient detail for the Army to address it. Colonel Cunningham stated that he had undertaken inquiries and was satisfied that there was nothing in the workplace that would support Mr Fairbrass' claim of work-related stress, but he was concerned about his other activities, which he said may have contributed to his illness.

[18] Mr Fairbrass remained on the pay system, being paid fortnightly until November. I am satisfied this was a result of a payroll error, as payroll was instructed that Mr Fairbrass was to be paid all his entitlements in a lump sum in the pay period immediately following termination on 12 July.

[19] Mr Fairbrass and Mr Buchanan were under no illusion that a personal grievance for unjustified dismissal had to be raised. Mr Buchanan had foreshadowed such in the meeting of 22 June. It was not, however, until 23 August that Mr Buchanan provided Mr Fairbrass with a grievance letter to raise with the Army. Mr Fairbrass did nothing with the draft until Mr Buchanan reminded him that time was running out for it to be raised. Accordingly, he returned the copy to Mr Buchanan on 2 October, albeit with some changes. He left it up to Mr Buchanan to raise the grievance, noting that he was available at any time to make a further appointment if one was needed.

[20] There was no contact between Mr Fairbrass and Mr Buchanan, however, until after Mr Buchanan raised the grievance on 11 October, one day out of time. Mr Buchanan explained to Mr Fairbrass, on receipt of an objection from the Army as to time, that he had inadvertently miscalculated the 90 day period. Mr Fairbrass gave evidence that he had not instructed Mr Buchanan to leave it until the 90th day before raising the grievance.

The Law

[21] The law on raising grievances was reviewed in *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v. Edmonds* (unreported, Colgan CJ, AC14/08, 16 May 2008). In para.[45] it was held:

The test for determining whether there has been a submission of a grievance was said to be whether, from an objective standpoint, the employee had presented a grievance to the employer for consideration.'

[22] In *Ruebe-Donaldson v. Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83, it was noted at para.[47]:

While there was no characterisation of a grievance as such, the correspondence was treated clearly by the employer as indicating an employment relationship problem. It was equally clear that the plaintiff was not raising a dispute (another form of employment relationship problem) but, rather, complaints about the way in which he had been treated by the employer, which is a disadvantage grievance.

[23] The Employment Court held in *Creedy v. Commissioner of Police* [2006] ERNZ 517 at para.[36] that:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it so it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

... It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[24] In *Goodall v. Marigny (NZ) Ltd* [2000] 2 ERNZ 60 it was held that the submission of a grievance is something significantly less formal than a description of its nature, the facts giving rise to it and the remedies sought. To *submit* meant *to present for consideration or decision*. It was also held that it should be plain to an objective observer that the employee concerned has commenced the applicable grievance process and has done so in a way that enables the employer to remedy the grievance rapidly and as near as possible to the point of origin.

[25] It is also clear that a grievance cannot be raised in advance of the decision which is subject to challenge, such as dismissal, coming into effect.

[26] Furthermore in *Creedy v. Commissioner of Police* (unreported, Supreme Court, Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ, SC57/2007, 23 April 2008) the Supreme Court held, in effect, that the Court of Appeal's judgment in *Wilkins & Field Ltd v. Fortune* [1998] 2 ERNZ 70 (CA) still applied, except that exceptional circumstances need merely be unusual, i.e. the exception to the rule. The Supreme Court also emphasised that:

Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.

Determination

[27] I accept that the Army was aware that Mr Fairbrass believed from 19 January 2007 that he was forced to leave work due to workplace stress. It was not clear within the 90 days from 19 January, however, how Mr Fairbrass wanted the issue addressed. Certainly Dr Dorfling was clear that he did not represent Mr Fairbrass in any employment relationship problem he may have, and therefore his medical report could not have constituted the raising of a grievance. Mr Fairbrass had at that time engaged the services of the PSA and therefore the same principles apply in respect of the letter from his counsellor.

[28] In any event, these matters were inextricably intertwined with the Army's desire to find out when Mr Fairbrass would be able to return to work, over which Mr Fairbrass was clearly represented by the PSA. It is therefore most likely that the PSA's focus was on trying to facilitate Mr Fairbrass' return to work and save his job rather than pursuing raising any personal grievance at that time, as it could have. Mr Fairbrass, in fact never instructed the PSA to raise a grievance on his behalf, despite it being his representative. It therefore follows that no grievance was raised within the 90 day period in relation to workplace stress.

[29] While Mr Fairbrass was depressed during the relevant period, I do not accept that he was so affected or traumatised by the matter that he was unable to properly consider raising the grievance within the period. In particular, Mr Fairbrass was able to write to the Army on 2 March, get medical assistance and get his union to represent him. While Mr Fairbrass is now dissatisfied with his union's representation, the fact that he was able to appoint the union and give it instructions

makes it sufficiently evident that he was not so affected or traumatised by the matter that he was unable to properly consider raising a grievance.

[30] There are no other potential exceptional circumstances in this matter and therefore I determine not to grant leave to Mr Fairbrass for the Authority to investigate his personal grievance for disadvantage, which was raised after the expiration of the 90 day period.

[31] Mr Buchanan raised a personal grievance on Mr Fairbrass' behalf 91 days after the date of his dismissal. I do not accept that the grievance was raised deliberately at the end of the 90 day period, because of Mr Fairbrass' evidence to that effect.

[32] While Mr Fairbrass delayed responding to Mr Buchanan's invitation to prepare documentation for the raising of the grievance for dismissal, I accept that he was not so affected or traumatised by the matter that he was unable to properly consider raising the grievance within the period. The fact is that he did consider it within the period and that approximately nine days were left for Mr Buchanan to raise the grievance.

[33] These were reasonable arrangements to have the grievance raised on his behalf by Mr Buchanan. I conclude that Mr Buchanan unreasonably failed to ensure that the grievance was raised within the 90 days. He had nine days to pursue the matter and he only did so on the tenth day. Even then, that was by a short letter, which although it set out the remedies sought, simply stated:

Mr Fairbrass believes that your decision to terminate his employment on the grounds of frustration is unjustified and consequently ... Mr Fairbrass considers that he has been unjustifiably dismissed.

[34] Mr Fairbrass had made it clear throughout that he did not believe he should be dismissed for incapacity and that he held the Army responsible for his illness in the first place. Given the extensive background to this matter, including the information from Mr Fairbrass' medical advisers and counsellors, the involvement of the PSA and Mr Buchanan's foreshadowing of a personal grievance should Mr Fairbrass later be dismissed for incapacity, then by the date of the grievance letter the Army should have been clear what Mr Fairbrass' concerns were and thus was able, if it wished to do so, to remedy the grievance rapidly and as near as possible to the point of origin. I therefore conclude that although the statement was very much of a bare bones nature, it was nonetheless sufficient, given the background circumstances, to constitute a proper raising of the grievance.

[35] There are clearly exceptional circumstances for the delay as noted above, namely the unreasonable failure by Mr Buchanan to ensure that the grievance was raised within the 90 days.

Given that there has been no demonstrated prejudice to the Army should leave be granted, I conclude that it is just for the Authority to investigate the personal grievance for unjustified dismissal. In this context, I note that in pursuing this claim Mr Fairbrass is entitled to argue that his dismissal for incapacity was unjustified because the legal cause for his incapacity is alleged to be the Army's own failures to provide a safe and healthy working environment for him.

Costs

[36] Mr Fairbrass has failed in his claim for unjustified disadvantage and has been granted an indulgence in being allowed to raise his personal grievance for unjustified dismissal out of time. It is therefore appropriate that costs be awarded in the Army's favour.

[37] The Army has used in-house counsel for which it is entitled to seek costs. The costs of \$1,635 plus GST are accepted as reasonable as a starting point for assessing costs. Two thirds of costs are reasonable in this situation and therefore \$1,200 is a reasonable level for the applicant to meet.

[38] I therefore order the applicant, Mr Kenneth Fairbrass, to pay to the respondent, the Chief of the Defence Force, the sum of \$1,200 in costs.

[39] As required under s.114(5), I direct the parties to henceforth use mediation to seek to mutually resolve the grievance between them. A conference call will be held after mediation, in the event that matters remain unresolved, to set a timetable for an investigation meeting for 29 and 30 July.

G J Wood
Member of the Employment Relations Authority