IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 130
5455243

	BETWEEN	JARVIS HANDY Applicant
	AND	NEW ZEALAND FIRE SERVICE COMMISSION Respondent

Member of Authority:	P R Stapp
Representatives:	Jarvis Handy, self represented Geoff Davenport, Counsel for Respondent
Investigation Meeting:	On the papers submitted by the parties
Determination:	18 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a preliminary matter in regard to the applicant (Mr Handy) raising a personal grievances against his employer, the New Zealand Fire Service Commission (NZFSC) in regard to claims of racial harassment, workplace bullying and unjustified dismissal and unjustified disadvantage.

[2] The NZFSC says that Mr Handy's claims relate to events and actions that occurred prior to any grievances being raised in the 90 days required under s.114 of the Employment Relations Act 2000 (the Act). This has the potential of becoming confusing so I will deal with each claimed personal grievance separately.

[3] The NZFSC has not consented to proceeding with any of the personal grievances as it says that they are outside the time for raising them. This relates to them all, but in regard to the unjustified dismissal and unjustified disadvantage claim

(over the procedure for dismissal) the NZFSC claims Mr Handy did not raise them in sufficient particularity to include how the grievances should be resolved, in other words did not claim any remedies.

[4] Also, the NZFSC denies that Mr Handy has any exceptional circumstances for the late raising of the personal grievances. It opposes leave being given to him to proceed out of time with his claims.

The facts

[5] Mr Handy was employed by NZFSC in the position of False Alarm Administrator from 20 July 2012.

[6] Mr Handy's employment was terminated on 1 November 2013. He wrote to the NZFSC on 15 November 2013 that purportedly raised a personal grievance for unjustified dismissal and unjustified disadvantage in regard to the procedure for dismissal and requested mediation with the Ministry of Business, Innovation and Employment (MBIE). The NZFSC put Mr Handy on notice (in writing) that it considered his letters did not constitute raising a personal grievance and by only asking for mediation did not sufficiently put the employer on notice of what Mr Handy wanted to resolve. In other words, it contests Mr Handy's letter dated 15 November 2013 properly raising the personal grievance. On 31 January 2014 Mr Handy's representative wrote to the NZFSC following up the matter on Mr Handy's behalf and included more matters about earlier events in his employment.

[7] Mr Handy in lodging his employment relationship problem in the Authority included other matters about alleged racial discrimination and bullying in the workplace that he outlined in the facts that he relies on in a document (Appendix 1 of the statement of problem) which has attached 365 pages of information and references plus a disc.

[8] There is a dispute on whether or not his grievances raised in his letter of 15 November and in the statement of problem were raised in time and whether there are any exceptional circumstances to request the grievances being raised out of time.

Determination

(a) Racial harassment and workplace bullying

[9] I find that the claims relating to racial harassment and workplace bullying were not raised within 90 days of the events and action claimed by Mr Handy. This is because:

(i) Mr Handy refers in his evidence to actions and events occurring prior to discussions he says he had in December 2012 and January 2013. There is no document that supports a personal grievance being raised within 90 days of the actions now complained about.

(ii) That the alleged actions and events as to racial harassment and workplace bullying must have occurred before any discussions with Mr Darren Stafford (the Revenue and Assurance Manager) in December 2012 and January 2013, but there is no evidence of the details of any personal grievance being raised during the timeframe.

(iii) That any discussions in December 2012 and January 2013 with Mr Stafford make no reference whatsoever to any personal grievance claim. Also, there is no reference to any specific and particularised detail in regard to actually raising a personal grievance. I accept that what he was raising was no more than a complaint in the context of his employment. I have no doubt that there were issues in his employment and in relationships, but those matters did not get raised as grievances, I hold.

(iv) That Mr Handy raised the matter of racial harassment and workplace bullying for the first time in his correspondence dated 31 January 2014.

[10] The references as to the matters in December 2012 and January 2013 raised by Mr Handy relate to his own opinions; and any reference to them in the statement of evidence is not proof of them being raised as a personal grievance at the time with the NZFSC, although I accept that Mr Handy is entitled to his opinions and point of view on his version of his employment. The matters that he is referring to are more akin to background in the context of his claim of unjustified dismissal and unjustified disadvantage relating to the dismissal. There is no detail relating to personal

grievance claims being raised otherwise. Also, they cannot be considered as on-going grievances.

[11] The emails and discussions relied on by Mr Handy in his statement of evidence cannot constitute raising a personal grievance in regard to racial harassment and workplace bullying because:

(i) What he raised was more in the nature of a complaint about his treatment;

(ii) It only provides a record of issues existing between co-workers.

(iii) Asserts a claim, but not raised as a personal grievance without anyone else being able to corroborate that he did so;

(iv) There is no direct proof of a discussion taking place on 11 January 2013 or any other details of any personal grievance being raised at that time;

(v) An electronic recording does not disclose details of any notice of a personal grievance being raised;

(vi) No documents mentioned the raising of a personal grievance before the 15 November 2013;

(vii) Mr Handy's purported personal grievance letter makes no mention of racial harassment and/or bullying. Remarks were made later, on 31 January 2014, but could be not construed at that time as raising a personal grievance in that letter, I hold. This is because it was clearly out of time by then in as much as it related to new allegations about racial harassment and workplace bullying.

[12] Therefore, the matters of racial harassment and bullying in the workplace are clearly out of time for being personal grievances on their own. That of course does not mean that they cannot be issues as to any background to the substantive matter of the dismissal being unjustified or not, so long as they are relevant. Mr Handy had turned his mind at the time to pursuing some action at least to be discussed and scoping an outcome before formalising any particular claims. The matters related to events preceding Mr Handy's employment ending and were only referred to from

31 January 2014. Thus, there has been no personal grievance in regard to the individual matters as claimed, raised within 90 days as required.

(b) Exceptional circumstances in regard to the racial harassment and workplace bullying matters

[13] I now turn to a claim that exceptional circumstances exist for the delay on the matters outside 90 days and that the Authority should grant leave to enable Mr Handy to proceed out of time with his personal grievances as to racial harassment and workplace bullying.

[14] Mr Handy relies on expecting the PSA (his union at the time) to act on his behalf. This conflicts with Mr Handy's evidence and information that he had discussions and sent emails to raise a personal grievance. Furthermore, there is no evidence of any request by him for the PSA to raise a personal grievance. He was looking for assistance from the PSA to get action on various matters and to discuss and scope an outcome (before formalising any particular claims).

[15] I am further supported by the following:

(i) Mr Handy consciously gathering information secretively to assist him. He had in his mind some course of action at least to assess any information first.

(ii) Mr Handy asked for discussions with the PSA and advice for the next steps forward.

(iii) The NZFSC informed Mr Handy about his failure to properly raise a personal grievance within the time allowed and gave him notice of the time requirements.

(iv) Mr Handy knew of the 90 day time requirement; for example his email to his representative (a lawyer) on 11 December 2013 where he mentioned the 90 days.

[16] There has been no case made out as to exceptional circumstances and, importantly, that the delay was occasioned by exceptional circumstances. I have not needed to cover the justice of the situation to consider granting any leave because the threshold has not been met.

(c) Employment ending, dismissal and unfair process

[17] Mr Handy's employment ended on 1 November 2013 and this was raised on 15 November 2013 in a claim for a personal grievance. This was also referred to by Mr Handy in his representative's letter dated 31 January 2014. The 31 January letter set out the legal remedies available, for the first time. The latter is no different to a party relying on remedies set for the first time in a statement of problem lodged in the Authority. Resetting and arranging remedies is occasionally done by applicants and their representatives for the first time when lodging documents in the Authority. The NZFSC rejects that Mr Handy ever raised a personal grievance on it. In other words, NZFSC says what he did raise was an invalid personal grievance and that his reference to seeking mediation on 15 November 2013 was a procedural step on what action he could ask for, but did not get to the next step and address how to resolve the problem as he saw it. Nevertheless, I hold that his aim was clear and given that he was dealing with a sophisticated employer with the resources available to NZFSC, it is more likely than not that it has reasonably foreseen what Mr Handy wanted to have considered.

[18] I am supported in my conclusion by the following case *Maharj v. Recon Professional Services Ltd*[1] where Judge Ford said:

> *[31] Mr Bennett's more substantial submission was that the combination of the letter Mr Maharaj wrote to Recon on 7 June 2011 under the Privacy Act requesting copies of all documents that Recon held on him, coupled with the telephone call Mr Maharaj made to Mr Murray on 16 June 2011 informing him that he was lodging a personal grievance were sufficient acts "in totality" to trigger the raising of a personal grievance under s114(1) of the Act.*
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> *[32] Mr Evans accepts that "at various times" Mr Maharaj had stated that he was "taking a personal grievance" but counsel submitted that, on its own, such statements were insufficient to raise a personal grievance. Mr Evans further submitted that a grievance had to "specified sufficiently to enable the employer to address it. The employer must be told what is required to be addressed by it". In support of the submissions in this regard, Mr Evans referred to the following oft cited passage from the judgment of this Court in* ***Cready v. Commissioner of Police*** *[2006] ERNZ 517 (EmpC) at [36]:*
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> > *"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*

[1] [2014] NZEmpC 114

> *considers that he or she has a personal grievance or even by specifying the statutory type of the 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 the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates."*

[19] In the same Judgment Judge Ford went on to say:

> *[35] … the raising of a grievance will involve more than the mere assertion that the employee considers that he/she has a personal grievance. As the Court stated in* ***Cready****, what is important is that the employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates. That is not to say, however, that, in order to raise a grievance, the employee must go as far as Mr Malcolm expressed it in the present case (see [20] above) and tell the employer "what resolution he wants to solve the problem" or "what outcome they want".*
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> *[36] In this regard, I respectfully agree with the observations made by Judge Inglis in* ***Idea Services Ltd (in statutory management) v. Barker*** *[2012] NZEmpC 112, [2012] ERNZ 454:*
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> > *"[40] … The informal, non-technical, nature of the personal grievance procedures relating to raising a personal grievance tells against an interpretation that requires an employee to specify the precise nature of the remedy or remedies they seek. The raising of a personal grievance is distinct from the more formal requirements attaching to the filing of a statement problem, or a statement of claim. Both necessitate particularisation of the relief sought. That is not a requirement imposed under s114(2).*
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> > *[41] Ultimately, the issue of whether the employer has done enough to inform his/her employer of the nature of the alleged grievance that he/she wants addressed will be objectively determined having regard to the facts of each case. This may be reflected in a number of communications, and there is no requirement that it be reduced to writing. Nor is there a requirement for the level of detail that might be expected in, for example, a statement of problem."*

[20] Mr Handy says that he raised a personal grievance on 15 November 2013 for unjustified dismissal and unjustified disadvantage action that occurred on 1 November as it related to his employment ending. The NZFSC claims this was invalid and not a properly raised personal grievance because it lacked detail in regard to how Mr Handy considered his personal grievance should be resolved, even though he did request

mediation. I do not accept the NZFSC's position for the reason that he had done enough and indeed asked for mediation.

Conclusion

[21] Mr Handy is able to pursue his claim for unjustified dismissal and unjustified action in regard to his dismissal from his letter dated 15 November 2013, and with the remedies first outlined in the 31 January 2014 letter and in the statement of problem. All the other matters he subsequently raised in the course of lodging his personal grievance in regard to racial harassment and workplace bullying can only be background and only where they are relevant to the primary matters.

[22] Mr Handy will need to clarify that he wishes to continue with his claim for three days leave that he claims the NZFSC has withheld from him, which is an arrears of wages claim.

Costs

[23] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority