IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 440
5352488

	BETWEEN	BRONWYN HIGGINS Applicant
	AND	SPA & POOL WAREHOUSE LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Applicant in person Julie Mettrick, Counsel for Respondent
Investigation Meeting:	On the papers
Evidence:	30 August 2011, affidavit from Applicant No evidence from Respondent
Submissions Received	9 September 2011, Respondent's submissions No submissions from Applicant
Determination:	11 October 2011

DETERMINATION OF THE AUTHORITY

A. Ms Bronwyn Higgins did not raise a personal grievance with her employer within 90 days of it arising as required by s.114(1) of the Employment Relations Act 2000 ("the Act") so the Authority does not have jurisdiction to hear her personal grievance claim.

Employment relationship problem

[1] Ms Bronwyn Higgins alleged she was unjustifiably dismissed from her employment as a sales and pool care customer service representative on 22 April 2011.

[2] SPWL submitted that Ms Higgins did not sufficiently raise her personal grievance claim within 90 days as required by s.114 of the Employment Relations Act 2000 ("the Act"). It said it was not aware of her dismissal grievance until it was served with a copy of her Statement of Problem on 6 August 2011.

[3] SPWL said it did not consent to Ms Higgins raising a grievance out of time and it alleged that the Authority did not have jurisdiction to hear her claim.

[4] Ms Higgins submitted that she raised her personal grievance claim for unjustified dismissal in an email to Mr Simon Hall, a manager of Spa & Pool Warehouse Limited ("SPWL"), on 26 April 2011.

[5] This determination deals only with whether Ms Higgins raised a personal grievance with her employer within 90 days in terms of s.114(1) and (2) of the Act. Ms Higgins has not applied for leave under s.114(3) of the Act to raise a grievance out of time so this determination does not address whether such leave should be granted.

[6] SPWL requested that the 90 day issue be dealt with as a preliminary matter and Ms Higgins agreed with that. Both parties agreed that the Authority should determine this matter on the papers.

[7] Ms Higgins filed an affidavit in support of her claim that she had raised her grievance within 90 days of it occurring but did not file submissions. SPWL did not file any evidence but it did file submissions in support of its claim that Ms Higgins' grievance had not been raised within 90 days.

Relevant facts

[8] Ms Higgins' employment was verbally terminated by Mr Hall in a discussion with her on 22 April 2011. She also received written confirmation of the termination of her employment by way of an email which Mr Hall sent to her ACC case worker on 23 April 2011 which stated (among other things): *"I have verbally terminated Bronwyn's employment yesterday"*.

[9] The 90 day period within which Ms Higgins had to raise her grievance commenced on 22 April 2011 and expired on 20 July 2011.

[10] Ms Higgins lodged her statement of problem with the Authority on 5 August 2011 and it was served by the Authority via Courier Post Track and Trace on SPWL

on 6 August 2011. SPWL said this was the first time it became aware of Ms Higgins' dismissal grievance.

[11] Ms Higgins disputed that. She deposed that she telephoned Mr Hall on 26 April 2011 and told him she was unhappy about the termination, believed his reasons were unfair and not within the law, and in order to settle her grievance, she *"requested from Mr Hall either mediation, compensation or as a last resort litigation"*.

[12] Ms Higgins stated that Mr Hall refused to discuss the matter and hung up on her, so she emailed him to record her unhappiness and frustration with his decision and the manner in which he was treating her. Ms Higgins's email to Mr Hall on 26 April 2011 stated:

> *"Dear Simon*
>
> *Re: Our telephone conversation*
>
> *Simon as I stated I am very unhappy, with your reasoning for my termination. And your reasoning is not fair or legal. I am contacting you again, as to work out the situation.* (sic)
>
> *As I have said I have talked to the Labour Department, there are three options, compensation, mediation and court.*
>
> *The ball is now in your court.*
>
> *Regards,*
> *Bronwyn Kearns"*

[13] As an aside, the applicant's maiden name is Kearns and her married name is Higgins. The applicant prefers to be addressed by her married name of Higgins.

[14] Mr Hall responded to the 26 April 2011 email by return email that same day which simply stated *"Fine, I will get back to you."* The next contact between the parties was a letter dated 13 May 2011 which Mr Hall sent Ms Higgins, which I set out below in its entirety.

[15] The letter of 13 May 2011 stated:

> *"Dear Bronwyn*
>
> *Further to our verbal discussion Friday 22 April 2011.*

> *As per your current ACC medical certificate, which states you will be off work from 15th March 2011 for 90 days. I calculate this to expire around the 13th June 2011?*
>
> *The matter of your employment would need to be reviewed at that time (i.e. when her medical certificate expired around 13 June 2011) and I would require medical clearance for you to return to work.*
>
> *As previously stated, I will require you to be fit for work and able to resume your normal duties.*
>
> *If you do not have medical clearance to return to your full duties at that time I will need to arrange a meeting with you to discuss this because I will require certainty for the sake of the business, so will need to look at all options.*
>
> *If you are physically cleared for full duties your job remains open, but I would still need to discuss: behavioural concerns, areas of work performance, and workplace protocols that are of concern to me at that time. I will detail this further to you at that time.*
>
> *Also, as stated to you verbally on Good Friday, the length of time you have been off work has highlighted the weaknesses in the present staffing arrangements. I will need to change this due to the changing needs of the business, but I will wait until I know what the situation is in respect of your medical issues."*

[16] Ms Higgins' responded via email on 17 May 2011 which expressed her confusion about the letter because she believed her employment has been terminated on 22 April 2011, which she noted had been confirmed in Mr Hall's email to her ACC case manager on 23 April 2011. Ms Higgins also stated:

> *"I have no intention of working for you, your company, or any other business we have discussed in previous times. […] I am writing to ask your attendance at mediation, which will be arranged via the Labour Department."*

[17] On 19 May 2011, Mr Hall responded via email to Ms Higgins' request for mediation by stating:

> *"I require to know what you believe the employment issues to be, procedural and/or substantive, so that I am able to properly address the situation and advise you whether to make a referral for mediation.*
>
> *Please provide me with those issues in writing […]*
>
> *I am not trying to be difficult but do require to know what issues you would like to discuss at mediation and what your are hoping to achieve through mediation."*

[18] On 1 June 2011, Ms Higgins rang Mr Hall to ask whether he would attend mediation. She made a note of their discussion which recorded that Mr Hall had asked "*What's the point*" in response to her request if he would be willing to attend mediation. She also noted her response was "*I again said so I could at least find out what the personal flare up was on Thursday?*"

[19] On 1 June 2011, subsequent to their telephone discussion, Mr Hall emailed Ms Higgins and stated *"Would you please re-read my last email sent 19th May and respond to it properly."*

[20] On 7 June 2011, Mr Hall emailed Ms Higgins in response to her request for a reference and copy of her employment agreement. He stated *"Yes I am happy to give you a reference, but am a little confused as I haven't had a reply to my letter dated 13 May to clarify things? Perhaps you could clarify how you see things, then can get on to it"*.

Legislation

[21] Section 114(1) of the Act provides that an employee must raise a personal grievance with their employer within 90 days of the grievance occurring or coming to the employee's attention. Section 114(2) provides some guidance on the raising of a personal grievance, and states:

> *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 resolve.*

Case law

[22] Various recent Employment Court decisions have clarified how s.114 of the Act should be applied. The leading case on whether a personal grievance has been raised out of time is *Creedy v. Commissioner of Police*[1] in which the Court held:

> *"Case law under the previous Employment Contracts Act 1991 on what constituted the submissions of a grievance (as it was called under that enactment) was codified and built on by Parliament in 20000 by s.114(2). That provides that a grievance is raised with an employer "… as soon as the employee has made, or has taken*

[1] [2006] 1 ERNZ 517

> *reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address".*
>
> *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 the personal grievance as, for example, unjustified disadvantage in employment*** *as Mr Barrowclough did not Mr Creedy's behalf in this case. As the Court has determined in cases under the pervious legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. 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."*** (emphasis added)

[23] The Court in *Hawkins v. Commissioner of Police*[2] held (citing *Goodall v. Marigny (NZ) Ltd*[3]) that the test in s.114(2) as to how a grievance must be raised is *"objective and requires a communication sufficient to enable the employer to address and remedy the grievance or for the parties to settle it in discussion"*.

[24] In *Melville v. Air New Zealand Ltd*[4] the Court held that a statement by the applicant and her representative at the end of a disciplinary meeting to the effect that *"its not over"* and *"we'll be seeing you in Court"* did not raise a grievance sufficiently clearly to have enabled the employer to address it.

[25] The Court in *Winstone Wallboards v. Samate*[5], when considering the relevant provision in the Employment Contracts Act 1991 ("ECA"), gave *"submit"* a narrow interpretation. It stated:

> *[…] 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 respond.*

[26] In *Ruebe-Donaldson v. Sky Network Television Ltd*[6] the Court held the term *"submit"* used in the ECA and the term *"raised"* used in s.114 of the Act were *"virtually synonymous"*.

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2 [2007] ERNZ 762
3 [2000] 2 ERNZ 60
4 8 July 2010, Travis J, ARC18/10
5 [1993] 1 ERNZ 503
6 13 August 2004, Travis J, AC4404

[27] The Court in *Chief Executive of the Department of Corrections v. Waitai*[7] held:

> *The key test is what the employer reasonably could have taken from the words used.*

Applicant's affidavit

[28] Ms Higgins believed that her telephone and email contact with Mr Hall on 26 April 2011 were *"reasonable steps and that Mr Hall's email response shows that he was in fact made aware of my grievance and my chosen course of action"*.

[29] Ms Higgins believed that Mr Hall's email which stated "*Fine, I will get back to you."* showed "*he understood that I had both informed him of my grievance and of what course of action I wished to take"*.

Respondent's submissions

[30] The respondent submitted that Ms Higgins did not sufficiently specify what her grievance was with her termination in a way which enabled the respondent to adequately address her issues.

[31] Ms Mettrick submitted that SPWL did not know what it was required to address and it made *"several attempts at seeking clarification"*. She relied in this regard on the emails between Ms Higgins and Mr Hall outlined above to establish that the respondent was unclear about what Ms Higgins was unhappy about and what she was seeking to address that.

[32] SPWL submitted that Ms Higgins' email of 26 April 2011 could not reasonably constitute the raising of a personal grievance because the respondent was not made sufficiently aware of the grievance to enable it to respond.

[33] SPWL submitted that it did not become aware of the nature of Ms Higgins' personal grievance until it was served with the statement of problem on 6 August 2011 which it said was well was outside of the 90 day period.

[34] Ms Metterick submitted that Ms Higgins' was aware of the requirement to raise a grievance within 90 days because her employment agreement dated 28 August 2007 at clause 16(c) stated:

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[7] [2010] NZEMPC 164

> *"Attention is drawn to the requirement for any personal grievance to be lodged with the employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee."*

Outcome

[35] I find that Ms Higgins' telephone conversation and email on 26 April 2011 did not meet the test in s.114(2) of the Act for raising a personal grievance because neither of these communications made it objectively clear that she had commenced a grievance process and that legal consequences could potentially follow from that if her grievance was not resolved in a manner she had specified.

[36] Ms Higgins' letter and telephone discussion with Mr Hall did not give positive notice of a particular claim (such as an unjustified dismissal claim), it merely stated she was unhappy with his reasons for ending her employment. No remedies were specified, so the respondent could not have been put on notice of how Ms Higgins wanted her grievance resolved.

[37] Ms Higgins merely proposed three options – compensation, mediation, or Court. This proposal did not explain what remedies she was seeking or how she wanted her grievance resolved. Nor did these options make it clear that if her concerns were not resolved then defined legal consequences would follow.

[38] I find that Ms Higgins' communications on 26 April 2011 with Mr Hall did not go further than merely expressing her dissatisfaction and unhappiness with the reasons he had given for ending her employment. The mere expression of unhappiness or dissatisfaction to an employer about its decision does not amount to the raising of a grievance.

[39] I consider that Ms Higgins did not take reasonable steps, as required by s.114(2) of the Act, to make SPWL aware that she believed she had a personal grievance which she wanted it to address. The evidence has satisfied me that SPWL was not aware of the information that s.114(2) required in order for a grievance to be "raised" under the Act.

[40] On 19 May 2011 Mr Hall asked Ms Higgins to explain what the employment issues were so he could properly address it. He asked for her to set out her issues in writing. He then reiterated that in an email on 1 June 2011. This request for

information indicates that SPWL was not aware that Ms Higgins had raised a personal grievance claim.

[41] As the Court held in *Creedy*[8] and confirmed in subsequent decisions in *Hawkins*[9], *Melville*[10] and *Coy*[11], it is not sufficient for the purposes of s.114(1) of the Act for an employee to simply inform the employer that they consider they have a grievance, even where the type of grievance is specified. I find that Ms Higgins did not even go as far as informing SPWL she had a grievance and she clearly did not identify a particular grievance.

[42] Section 114(2) requires sufficient details of the grievance to be provided to make the employer aware of the basis of the grievance so that it may address and remedy it in accordance with the problem-solving mechanisms of the Act. That did not occur in this case.

[43] I find that Ms Higgins did not specifically state that she believed she had a grievance, she did not identify the type of grievance, she did not discuss the facts which she said gave rise to her grievance, and she did not identify the nature of the relief or remedies sought, and she did not advise SPWL how she wanted her concerns addressed.

[44] The information communicated by Ms Higgins to Mr Hall on 26 April 2011 was not sufficient to amount to the raising of her dismissal grievance. It follows that I have concluded that she did not raise a personal grievance claim for unjustified dismissal within 90 days of it arising with SPWL, so the Authority does not have jurisdiction to determine her claim.

Costs

[45] SPWL, as the successful party, is entitled to a contribution towards its actual legal costs.

[46] The parties are encouraged to resolve costs by agreement. If that is not possible, then costs are to be dealt with by an exchange of memoranda as per the following timetable.

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8 Ibid *Creedy*
9 Ibid *Hawkins*
10 Ibid *Melville*
11 19 November 2007, Colgan CJ, CC23/07

[47] SPWL has 14 days within which to file its costs submissions. Ms Higgins has 14 days within which to respond and SPWL has a further seven days within which to reply.

[48] Strict adherence to this timetable is required, and departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority