IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 293/07
File Number: 5082137

	BETWEEN	GEORGE HILL
	AND	METHODIST MISSION NORTHERN

Member of Authority:	Janet Scott
Representatives:	Tim Oldfield for applicant Parvez Akbar for Respondent
Investigation Meeting:	26 July 2007
Submissions received:	26 July & 8 August 2007 for applicant 3 August 2007 for respondent
Determination:	24 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was dismissed from his employment with the Methodist Mission Northern (the Mission) on 24 March 2006. The applicant seeks a declaration he has raised a personal grievance with the respondent in terms of s.114 (1) and (2) of the Employment Relations Act 2000 ("the Act"). In the alternative the applicant seeks leave to raise the grievance out of time pursuant to s.114 (3) of the Act because exceptional circumstances exist under s.115 (b) of the Act.

[2] It is the respondent's position that a personal grievance has not been raised by the applicant within 90 days pursuant to s.114 (1) and (2) of the Act. The respondent does not consent to the grievance being raised out of time and submits there are no grounds on which to grant leave to raise a grievance out of time.

Background

[3] The applicant, George Hill, starting working for the Methodist Mission in 1995. In 1997 he was appointed Kaiwhakahaere, manager of the Airdale Community Centre. His duties involved running the Community Centre and he was responsible for the food bank, the supervision of meals served to clients, the furniture bank and other similar activities.

[4] On 24 March 2006 the applicant was dismissed from his employment for serious misconduct. This followed an investigation by the respondent into an incident which occurred in the foyer of the Methodist Mission on 19 December 2005.

[5] The record of the meeting held with the applicant and his representative on 24 March, when the dismissal was confirmed, records the applicant as saying:

> *I will now go into mediation or Employment Tribunal and it will become very public and with the integrity of myself and the Mission's integrity will be available to challenge.*

[6] It was Mr Hill's evidence that after he was dismissed he discussed the matter with Daele O'Connor (Services Workers Union) and told her that he wanted to challenge the dismissal. It was agreed between them that the Union would take a personal grievance on his behalf.

[7] It was also Mr Hill's evidence that he rang Daele O'Connor frequently to get updates on what was happening with the personal grievance and that Ms O'Connor assured him that everything was under control. It was his evidence that he remembered at one stage that Ms O'Connor told him there were some delays because Paul Diver (the Mission's employment relations consultant) was overseas.

[8] It is Mr Hill's evidence Ms O'Connor wrote a letter to the Mission notifying it of a personal grievance on his behalf. That letter, dated 16 June 2006, was faxed to the Mission the same day. Mr Hill's evidence was that Ms O'Connor sent him a copy of the letter. They received no response from the Mission to that letter.

[9] It was also Mr Hill's evidence that Ms O'Connor moved to Christchurch and another organiser, No'ora Samuela took up the case on his behalf. The first he heard that the Mission was saying he had not notified them of a personal grievance was when Ms Samuela told him over the phone sometime in October or November 2006.

[10] Ms O'Connor's letter dated 16 June 2006 and addressed to Jaclyn Green at the Mission is set out below.

> *"Dear Jacqueline (sic),*
>
> *Re: George Hill personal grievance*
>
> *[1] We represent Mr Hill pursuant to section 236 of the Employment Relations Act 2000 (ERA). We write to notify Methodist Mission Northern (the employer) of Mr Hill's personal grievance for unjustified disadvantage.*
>
> *[2] Mr Hill's grievance relates to his termination of employment on 24 March 2006.*
>
> *[3] The employer received a letter of complaint from Jo Wickliffe who was supporting a client known to Methodist Mission Northern in her role as a lawyer regarding an incident in the Airdale (sic) Community Centre.*
>
> *[4] Mr Hill was required to attend a meeting on 22 December 2005. The employer clearly stated the meeting was only an investigative meeting and there would be no decision coming from this meeting. At no time did Mr Hill receive correspondence of any disciplinary process.*
>
> *[5] Subsequently from this meeting Mr Hill was issued a "warning for aggressive behaviour" on 23 December 2005.*
>
> *[6] Mr Hill disputed this decision in writing on the basis that he was following the policy of Methodist Mission Northern on Client Barring.*
>
> *[7] Mr Hill received a letter from the employer 12 January 2006 formally withdrawing the warning issued on 23 December 2005.*
>
> *[8] Mr Hill was then given the opportunity to attend the meeting on 10 February 2006 to comment on the allegations of serious misconduct.*
>
> *[9] Mr Hill received the letter dated 17 February 2006 advising that the matter will be investigated further. The employer was of the view that the allegations are more serious than initially suggested. Outlined in this letter the allegations are regarded as serious misconduct.*
>
> *[10] Meetings were convened on 21 and 27 February where the meeting was adjourned for the employer to consider Mr Hill's comments.*
>
> *[11] Both parties reconvened on 24 March 2006 when Mr Hill was informed the employer found the allegations were substantiated and therefore terminated the employment."*

[11] For the applicant it is submitted that s.114 needs to be interpreted with regard to the Objects of Part 9 which confirms that the Act continues to give special attention to personal grievances and facilitates the raising of personal grievances with employers. It is submitted this object is designed to avoid an

overly technical approach to the raising of grievances. The definition of facilitate it is submitted is to "make easy or easier"[1]

[12] Counsel for the applicant referred to relevant case law. It was argued that the question as to whether a grievance has been raised turns on the facts of each case Winstone Wallboards v Samate [1993] 1 ERNZ 503. It is the applicant's position that the respondent was aware of his personal grievance and the applicant took reasonable steps to make the respondent aware of the grievance by his letter of 5 January 2006[2], his oral protestations on 24 March and his letter of 16 June 2006.

[13] In this regard, it is the applicant's position that the Authority may find that a series of communications can amount to the raising of personal grievances (*Liumaihetau v. Altherm East Auckland Ltd* [1994] 1 ERNZ 958).

[14] The applicant further submits that Mr Hill's protest on 24 March was sufficient in itself to raise a grievance (*Houston v. Baakar (t/a Salon Gayner*) [1992] 3 ERNZ 469; *Poverty Bay Electric Power Board v. Atkinson* [1992] 2 ERNZ 413).

[15] In response to the respondent's submissions that Mr Hill's words at the meeting on 24 March related to a threat to make the matter public, it is rejected that this is the case. At that meeting the applicant's representative outlined the reasons for his dissatisfaction with the decision and the applicant made a specific reference to taking the matter to mediation or the Employment Tribunal. He did not say he was taking the matter to the media.

[16] It is submitted for the applicant then that the respondent has been overly technical in taking issue with the fact that the letter of 16 June 2006 refers to a personal grievance for unjustifiable disadvantage although it is also submitted that there is no reason why a personal grievance for unjustified disadvantage could not be raised in relation to a termination of employment.

[17] It also submits that the respondent was under a duty to advise the applicant that it did not consider that the letter of 16 June 2006 raised a personal grievance (*Fallon v. Barnardos New Zealand Inc* WEA51/06). In that case the Authority found the employer was under an obligation to advise the applicant it would not be regarding

[1] Concise Oxford Dictionary, 11th edition 2004.
[2] The applicant was initially given a warning with regard to the same events. He challenged that warning on 5 January 2006.

her advice as formal notice of grievance and to explain to her the reasons for its position because of, among other things, the good faith obligations in the Act.

[18] Finally, the Union submits for the applicant that should the Authority find that no grievance was raised, then the applicant out of an abundance of caution submits that the Authority should give leave to raise a grievance out of time under s.114(3) of the Act as exceptional circumstances exist under s.115(b) of the Act. It is the Union's position that the applicant instructed the Union to notify his employer of the personal grievance and that if no grievance has been raised then this is only because the Union, his representative, has unreasonably failed to do so.

[19] The respondent, for its part, sets out the provisions of s.114 (1) and (2) of the Act. Its position is that the applicant did not raise a personal grievance in accordance with the Act within 90 days. It also submits that there are no grounds on which to grant leave to the applicant to raise a grievance out of time. The respondent refers to relevant cases *Van der Zwan and Royal New Zealand Plunket Society* unreported AA 335/06; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517.

[20] The respondent goes on to reject the applicant's position that Mr Hill's grievance can be said to have been raised in a series of communications and notes that the factual matrix of this case distinguishes it from the facts of Liumaihetau (cited above). The respondent also denies Mr Hill's submission that he raised a grievance by way of oral protest on 24 March. Certainly it is accepted that he expressed disappointment with the decision made to dismiss him, but that does not suffice to raise a grievance under s.114 (1) and (2) of the Act.

[21] The respondent quotes the following passage from *Creedy*:

> *"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 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. I do not consider that this obligation was lessened in 2000. That is not to find, however, 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 legislation scheme mandates".

[22] The respondent goes on to address the letter of 16 June. It is the respondent's position that the letter notifies the respondent of a personal grievance of an unjustified disadvantage and says that it relates to the termination of the applicant's employment. The letter then sets out the facts that eventually led to the applicant's termination. Apart from raising issue with the warning, which was withdrawn, the letter does not satisfy the elements of s.114 (2) of the Act. The letter does not state at all what the applicant wants the respondent to address and it does not seek a response or any remedies. The reference to matters relating to the warning does not relate to the termination and the warning had been withdrawn anyway.

[23] It is the respondent's position that simply stating a personal grievance of unjustified disadvantage and relating it to the termination of the applicant's employment is not sufficient. Neither does relating it to the termination make the grievance one of an unjustified dismissal. Employees can have, as admitted in the applicant's submissions, a personal grievance for an unjustified disadvantage in respect of a termination. It the respondent's position that the letter dated 16 June does not comply with s.114 (2) of the Act.

[24] It is also the respondent's position that even if the letter dated 16 June had referred to a personal grievance of unjustified dismissal, it does not meet the requirements of s.114(2) of the Act. Such a proposition would create an absurd scenario where employers would have to seek clarification from former employees each time there was the slightest hint of a grievance arising.

[25] In respect of the applicant's submission in the alternative requesting the Authority leave to allow the applicant to raise this grievance out of time, it is the respondent's position that for the elements of s.115 (b) of the Act, the employee must have made reasonable arrangements to have the grievance raised and the agent must have unreasonably failed to ensure the grievance was raised in time.

[26] It is the respondent's position that the applicant must establish these elements have been complied with. There is no evidence from the applicant of either requirement having been met.

Discussion and Findings

[27] In considering and deciding this matter I have had regard to the evidence before me and to the submissions of the parties.

[28] 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 employee 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 employee wants the employer to address. (S114 (2)).

[29] 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 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)).

[30] 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.

[31] 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'*[3] are "*virtually synonymous*". This led to the conclusion that the 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 legislation[4]. The Court said:

> "*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)

[32] In considering the matter I have also had regard to the dictum that a case by case approach is called for in determining whether a grievance has been raised *Winstone* (cited above). In that case his Honour Finnigan J also said:

> *"It is unnecessary and contrary to the Act to apply to the claimed submission of a grievance in the present case any test more complex than this….. to an objective and disinterested observer, does the letter (in this case) present to the employer for consideration or decision any grievance that the employee may have against his or her employer because of one or more of the claims that are defined in s.27 of the Act"*.. [s.103 of the Employment Relations Act 2000].

[33] On the evidence before me in this matter I find that the applicant made the Mission aware of an allegation of personal grievance (unjustified dismissal) within the 90 days stipulated in s.114 (1) of the Act.

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[3] The word used in the corresponding provisions of the Employment Contracts Act 1991.
[4] Employment Contracts Act 1991.

[34] Firstly I find that the applicant raised a personal grievance at the meeting on 24 March 2006 when he was advised that his employment was to be terminated. It is not the case that the applicant's representative simply advised he was disappointed with the decision to terminate his employment. The applicant's representative advised why he disputed the respondent's decision and also advised that the applicant was *"gutted"*. Further the applicant said he would *"go into mediation or the Employment Tribunal"* While he did refer to the matter becoming public this was not a reference to going to the media as submitted for the Mission, but rather a statement that the integrity of *both* parties would become a matter of public scrutiny when it was dealt with [in accordance with the dispute resolution provisions of the Act]. (It needs to be recognised that this could only be the case if the matter was referred to the Authority[5] as discussions in mediation are confidential).

[35] On the matter of the letter to the Mission dated 16 June 2006, I accept the Union official initially referred to notifying a personal grievance of "unjustified disadvantage". However, that letter goes on to say in the very next paragraph ***"Mr Hill's grievance relates to his termination of employment of employment on 24 March 2006.***

[36] The letter goes on to outline all the events and meetings in the matter (including the fact that the initial warning given had been withdrawn) concluding with Mr Hill's dismissal.

[37] No explanation was offered for the fact the letter initially alleged a grievance of unjustified disadvantage – it may have been a typographical error that was not picked up when the letter was proof read. Nevertheless, I find that taken in its entirety it raises with the Mission a personal grievance relating to Mr Hill's termination.

[38] In closing on this I find the facts of *Van der Zwan* are distinguishable. As I understand that case counsel for the applicant raised numerous grievances on behalf of the applicant and provided no information going to those grievances.

[39] Otherwise I find that the submissions for the respondent imply a higher standard for raising a personal grievance than that set by the Act.

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[5] The appropriate institution under the ERA.

[40] In particular, with regard to the quote from his Hon. Colgan CJ at para 36 of *Reedy* (cited above at para 21), I find the respondent has been selective in reliance on the Court's findings on this point. I prefer to rely on the totality of the Honourable Judge's findings which includes the statement set out at paragraph 31 of this determination.

[41] In conclusion then, while I cannot find that Mr Hill's letter of 5 January 2006 raises a personal grievance relating to the applicant's dismissal[6], I do find that the communications made by Mr Hill and on his behalf both at the meeting of 24 March 2006 and the written communication dated 16 June individually and together made the Mission aware that Mr Hill was alleging he had been unjustifiably dismissed and that he was wanting the respondent to address his personal grievance. That letter did not specify how the applicant wanted the matter addressed. I note that sometimes such information is contained in letters raising a grievance but the Act does not require it.

Determination

[42] It is my determination in this matter that the applicant raised a grievance with his employer in accordance with the provisions of s.114 (1) & (2) of the Act.

Costs

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

Janet Scott
Member of the Employment Relations Authority

[6] It does, as part of the factual matrix of this case, confirm the fact the applicant did not accept the respondent's view of the events of 19 December.