

[3] Interex denies that the personal grievances were raised within 90 days of Mr MacDonald's dismissal. Interex does not consent to the grievances being raised outside of the 90-day period. In addition, Interex says that there are insufficient details in Ms Bickerton's letter to allow it to respond to Mr MacDonald's claims.

[4] Mr Lilleyman says that on about 23 February 2015 he found a copy of the letter dated 28 January 2015 on his desk in an envelope that was not post-marked. On 25 February 2015 Logan Smith, Interex's managing director, emailed Ms Bickerton telling her of the circumstances of the discovery of the letter and that Interex considered the grievances had not been raised within 90 days.

[5] Ms Bickerton says that she sent the letter on 28 January 2015 and EDS submits that the letter must be taken to have been received by 3 February 2015 and so submits the grievances were raised within 90 days.

[6] Mr MacDonald has not made an application under s.114(3) of the Employment Relations Act 2000 (the Act) for leave to raise his grievances after the 90-day period. Therefore, whether or not Mr MacDonald's current application to the Authority can proceed to be determined will be decided by this application.

[7] The statement of problem was lodged on 30 March 2015.

Issues

[8] I need to determine whether Mr MacDonald's personal grievances were raised with Interex within 90 days of his dismissal. In doing so I need to decide whether Mr MacDonald made Interex aware of, or took reasonable steps to make Interex aware of, the alleged personal grievances within the 90 days.¹

[9] That includes an examination of the circumstances in which the letter was sent to Interex and of Interex's system for receiving mail.

¹ Section 114(2) of the Act.

Determination

[10] I have received written submissions from Mr McGinn and from David Feist, director of EDS, and heard affirmed evidence on 16 July 2015 from Ms Bickerton and from Mr Lilleyman at an investigation meeting. Ms Bickerton and Ms Hossain appeared by video conference from Auckland.

[11] Ms Bickerton's evidence is that she wrote the 28 January 2015 letter on her own laptop. She is unable to print to EDS's printers from her laptop and so says she would have sent the letter to another work colleague to print it off. She says she signed the letter and then would have folded it and put it in a pre-paid envelope with a window. She saw the envelope Mr Lilleyman says the letter was sealed in when he received it and agreed that it is the kind of envelope she would have used.

[12] Ms Bickerton's evidence is that she then would have put the letter in a tray used for outgoing mail. She says that every day before 3 pm that mail is taken upstairs and given to the receptionist who gives it to a courier who collects EDS's outgoing mail.

[13] Ms Bickerton does not think she would have taken the mail upstairs herself. She is not sure what kind of mail service EDS uses.

[14] She says that she would have assumed that the 28 January 2015 letter would have been delivered to Interex in Christchurch either by the weekend or by Monday, 2 February 2015.

[15] The NZ Post website says that its "delivery target" around New Zealand for standard delivery, which is a business sized envelope with 80 cents postage on it of the kind used in this case, is three working days. If that target had been reached the letter would have been delivered to the letter box on Monday 2 February, if one assumes that NZ Post does not consider Saturday to be a working day. The website does not make clear what a working day is for delivery purposes.

[16] Mr Lilleyman says that the letter was received by him when it was placed on his desk directly in front of where he sits on Monday, 23 February 2015. He says the envelope was sealed before he opened it and that he later noticed that the pre-paid

envelope had not been post marked by NZ Post. In other words, the envelope and its 80 cents of pre-paid postage could, in principle, be used again.

[17] Mr Lilleyman says that the street address mailbox outside Interex's office is not generally used to receive post. Interex has a PO Box to which most of its mail goes. However, the mailbox is used by employees to put their timesheets in. Therefore, it is cleared every Monday by the accounts person. It is also cleared on approximately two other days of the week for junk mail and any other mail delivered before 8 am when the office opens.

[18] Mr Lilleyman also says that his desk is not so messy that the envelope would have lain on his desk undiscovered from the first week in February until he saw it and opened it on 23 February. In his opinion the envelope would have been delivered to the mailbox on 18 February at the latest.

[19] Section 114(1) of the Act provides that an employee must raise the grievance with his employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred.

[20] I also need to consider the test set out in s.114(2) of the Act which states that:

... 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 employer wants the employer to address.

[21] There is no suggestion in this case that Mr MacDonald or any representative raised the grievances verbally or in any other way than by the letter dated 28 January 2015. It is not sufficient for the employee merely to make reasonable attempts to make the employer aware by for example, posting a letter and expecting or hoping that it will be delivered within the 90 day period if the employer does not receive the letter within the 90 days.

[22] Mr Feist, for Mr MacDonald, made written submissions, dated 24 April 2015, in which he suggests that I should take as the date of the delivery of the letter the date on which it was posted. However, he does not refer me to a named case. I suspect that Mr Feist relies on the postal rule in relation to the formation of contracts to assert that merely posting a letter on the 90th day could amount to making the employer

aware that there was a personal grievance. However, that is not sufficient to meet the requirements of the Act.

[23] The Employment Court case of *Creedy v Commissioner of Police*² has been followed in *Coy v Commissioner of Police*³ where it was decided that:

*...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 address. This means the grievance should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that the employee considers that he or she has a personal grievance or even simply by specifying the statutory type of grievance. ...*⁴

[24] If receiving a letter or being told verbally within 90 days that the employee considers that he has a personal grievance may not amount to a grievance being sufficiently raised within 90 days then receiving no letter whatsoever until after the 90 day period is up cannot amount to a grievance being sufficiently raised.

[25] Mr Feist submits that Mr Lilleyman's evidence that the letter arrived at Interex's premises in an "unmarked envelope" should be "treated with some caution". Ms Houssain submitted that the process for acceptance and clearance of the mail at Interex's office were such that it was more likely than not that the mail had been delivered by 3 February but for some reason had not come to Mr Lilleyman's attention by then.

[26] However, having heard affirmed evidence from both Ms Bickerton and Mr Lilleyman and having had the opportunity to question them and to hear their answers to questions asked in cross-examination I conclude that the personal grievances were not raised within 90 days of the date of Mr MacDonald's dismissal because, for an unknown reason, the letter was not delivered to Interex's mailbox until after the 90 day period had expired.

[27] I accept that Ms Bickerton used the usual process in EDS' office for addressing and getting the personal grievance letter ready for the mail. However, neither Ms Bickerton nor I know whether the letter was actually picked up by the

² [2006] ERNZ 517

³ [2007] EmpC 23/07

⁴ Ibid., paragraph 13

courier that day. I do not know why Ms Bickerton decided to use the address of 4b Expo Place which is the address of the premises and the address given for both Mr Lilleyman and Mr Smith as directors of the company. There is no way of knowing whether the mail would have reached the company within 90 days had it been addressed to the company at either its registered address or its address for service, which are both the street address of Interex's accountants. However, whatever happened with the letter I am satisfied that it was not delivered to 4b Expo Place on or before 3 February 2015. Whether that was because of a glitch in the process at the EDS end or from some lack in the postal service is not clear. I suspect the latter because of the lack of post marking on the envelope.

[28] In any event, I find that the grievance was raised outside of the required 90 day period. It is possible that if the letter was delivered within 90 days that I could have decided that Mr MacDonald had taken reasonable steps to make Interex aware that he alleged a personal grievance he wanted them to address. However, I have heard no argument on that and in the absence of an application from Mr MacDonald under s.114(3) of the Act that the Authority should grant leave to raise the grievance outside of the 90-day period because of exceptional circumstances I cannot go on to consider that.

[29] That means that Mr MacDonald's application is dismissed.

Costs

[30] Mr McGinn seeks costs for the equivalent of a half day hearing on the basis that he prepared Mr Lilleyman's witness evidence, attended the preliminary investigation meeting and also had to provide written submissions in advance. The Authority's usual approach is to decide costs on a notional daily tariff of \$3,500 for a full day of hearing.

[31] EDS has 7 days from the date of this written record of the oral determination to make costs submissions, by email, in response to Mr McGinn's application for costs.

Christine Hickey
Member of the Employment Relations Authority