

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 24  
5355419

BETWEEN

ASHISH MAHARAJ  
Applicant

AND

RECON PROFESSIONAL  
SERVICES LIMITED  
Respondent

Member of Authority: Michele Ryan  
Representatives: Applicant in person  
Scott Murray for the Respondent  
Investigation Meeting: 17 October 2012 and 8 February 2013  
Determination: 14 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Ashish Maharaj was employed as a security guard with Recon Professional Services Ltd, (Recon Services) from 24 November 2010 until 3 June 2011 when he was summarily dismissed.

[2] This determination deals with the preliminary issues as to whether or not Mr Maharaj raised personal grievance claims for unjustified disadvantage and unjustified dismissal with Recon Services within 90 days in accordance with the Employment Relations Act 2000, such that he is entitled to pursue his grievances before the Authority.

**The Authority's investigation**

[3] Mr Maharaj filed a statement of problem with the Wellington Employment Relations Authority on 31 August 2011, the 90<sup>th</sup> day following his dismissal on 3 June 2011.

[4] Recon Services in its statement in reply dated 7 September 2011 advised it had only become aware that Mr Maharaj wished to raise his personal grievances on 5 September 2011 when it received from the Authority a copy of Mr Maharaj's statement of problem.

[5] The parties were directed to mediation but were unable to settle the matter. In an amended statement in reply Recon Services advised that Mr Maharaj's application should be dismissed as his grievances were not raised in time.

[6] On 17 October 2011 the Authority commenced its investigation into whether Mr Maharaj had raised his grievances according to the statutory requirements contained at s.114 of the Employment Relations Act 2000. As the investigation meeting progressed Mr Maharaj became increasingly distressed and particularly so when evidence was deposed which did not accord with his version of events. Mr Maharaj's agitation was manifested by threatening gestures and statements directed towards Recon Services' Operations Manager, Mr Scott Murray, including repeated outbursts where he swore at Mr Murray. The meeting was adjourned in circumstances where I considered Mr Maharaj was unable to restrain his behaviour and conduct himself civilly.

[7] Another investigation was scheduled for 8 February 2013. The Authority arranged for a security guard to attend following a request by Recon Services for suitable security and where I concluded it was prudent to do so. Prior to the commencement of the second meeting Mr Maharaj undertook to behave in a respectful manner however the meeting deteriorated in a similar way as it had on 17 October 2012. The meeting was adjourned and the parties agreed that I should determine the matter on the information gathered.

### **Issues**

[8] Mr Maharaj alleges that he raised unjustifiable disadvantage and unjustifiable dismissal grievances. The alleged grievances fall into two different time-bands and the Authority is required to assess and determine on an objective basis:

- whether Mr Maharaj raised a personal grievance claim for unjustifiable disadvantage on 2 June 2011; and

- whether Mr Maharaj raised a personal grievance claim for an unjustifiable dismissal within 90 days of date on which he was dismissed.

### **Background information**

[9] At the beginning of the Authority's investigation Mr Maharaj said that on at least three occasions prior to the events which led to his dismissal he had raised separate personal grievance claims with Recon Services including in respect to a written warning he had received on 21 February 2011. On further questioning Mr Maharaj agreed that he had informed Recon Services on one occasion only that he was going to raise a personal grievance, but that he had later decided to not take the matter any further. As regards the two other occasions, Mr Maharaj acknowledged that he had canvassed with colleagues and a supervisor the possibility of raising personal grievances but these matters were not progressed with Recon Services' senior management. Mr Maharaj accepted that none of those previous matters are relevant to this inquiry.

### **The law**

[10] Section 114 of the Employment Relations Act 2000 set out the requirements when raising a personal grievance. It states:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4) raise the grievance with his or her employer within the period of 90 days...
- (2) 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, 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 an employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

### ***Did Mr Maharaj raise a personal grievance on 2 June 2011 that he was unjustifiably disadvantaged?***

[11] Mr Maharaj was required to attend a meeting on 2 June 2011 to respond to concerns Recon Services had raised with him with respect to "*issues regarding [his] general performance*". The letter by which Mr Maharaj was requested to attend the

meeting detailed three allegations relating to three specific events regarding Mr Maharaj's language and behaviour towards other staff on Thursday, 26 May 2011.

[12] The meeting of 2 June was attended by Mr Maharaj, his support person, Mr Phillip Dixon, Recon's Managing Director, Mr Blair Malcolm, and Mr Murray. It is clear the meeting between the parties was fraught.

[13] Mr Dixon provided a signed statement dated 14 July 2012 to the Authority. The statement says *inter alia*: "Mr Maharaj had throughout the meeting repeatedly informed his employers that as he was being treated unfairly he would be pursuing a personal grievance through the employment courts". On questioning by the Authority Mr Dixon agreed that he had not written the statement and says that Mr Maharaj had written the statement for him. He advised that he had not read the statement properly and acknowledged that the contents did not reflect his memory of the meeting. I am unwilling to accept the contents of Mr Dixon's written statement in these circumstances.

[14] Mr Dixon's oral evidence is that Mr Murray read out the allegations against Mr Maharaj and that Mr Maharaj responded to some of the issues, however Mr Maharaj disputed the exact words he was accused of saying and wanted to know which staff members had said what about him. He says an argument ensued. Mr Dixon does not recall Mr Maharaj using words or phrases that would indicate he was raising a personal grievance. He denies that Mr Maharaj had said the matter was "unfair", "unjust", or "wrong". He does not recall the use of the phrase "personal grievance" or that Mr Maharaj was going to the Employment Court.

[15] Mr Maharaj's evidence is that he became angry when Recon Services would not disclose which staff members had made complaints about him or provide him with copies of complaints made by staff. Mr Maharaj says he asked 3 or 4 times for copies of the complaints made against him. He considers Mr Dixon's memory to be at fault and says he told Recon Services that he was going to take them to the Employment Court. He says he then told Mr Murray and Mr Malcolm "this is bullshit, I am out of here". Mr Maharaj left the meeting.

[16] Both Mr Murray's and Mr Malcolm's evidence largely concurs. Mr Murray says Mr Maharaj denied the allegations against him and in particular using the exact words that were alleged he has said to other staff. Mr Murray says Mr Maharaj

became agitated when he [Mr Murray] was unwilling to provide emails to Mr Maharaj detailing complaints about Mr Maharaj's behaviour as each document contained information about other matters. Mr Murray says the meeting quickly deteriorated with Mr Maharaj saying he was "*sick of being called to account*" and accused Recon Services of interrogating him. He says Mr Maharaj got out of his chair and said "*I am going on a hunger strike and I'm going to the press. You can go f... yourselves*". A contemporaneous file note records "*[Mr Maharaj] storms out of the office, swearing, left his rep Phil in office with Scott and Blair*". Mr Murray and Mr Malcolm each deny that Mr Maharaj made any complaint or raised a personal grievance.

[17] Mr Maharaj's written submissions state that by his actions and words during the meeting of 2 June 2011 he had raised a personal grievance.

[18] It is clear from the evidence that Mr Maharaj was forthright in expressing his dissatisfaction with his employer's requirement to have him respond to its concerns. However I do not consider that Mr Maharaj's words of anger and/or criticism of management sufficiently advised his employer what it was that Mr Maharaj expected Recon Services to address such that it could reasonably conclude that a personal grievance has been raised. In *Board of Trustees of Te Kura Kaupapa Motukake o Tawhiuau v Edmonds*<sup>1</sup> Colgan CJ said that the grievance process is designed to deal with employment relationship problems speedily and informally and that the raising of a grievance should not be unduly technical. The Court stated:

...an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every "i" to be dotted and "t" to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient.

[19] Inglis J observed in *Idea Services Limited (In Statutory Management) v Valerie Barker* that the Court had "*repeatedly emphasised the requirements for*

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<sup>1</sup> [2008] ERNZ 139

raising a personal grievance”, citing the following passage from *Creedy v Commissioner of Police*<sup>2</sup> where the Chief Judge held that:

[36] “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 ... For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[37]...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. ”

[20] After careful assessment of the evidence obtained I am not satisfied that Mr Maharaj raised a personal grievance during the meeting of 2 June 2011. The participants of the meeting each state in various ways that Mr Maharaj was primarily concerned to deny the allegations and dispute the veracity of the complaints laid against him. There is no evidence that Mr Maharaj advised his employer with sufficient specificity what the issue was that Recon was required to address or that he took reasonable steps to do so.

[21] None of the witnesses, with the exception of Mr Maharaj, recall a declaration that he would take matters to the Employment Court and I do not accept that this statement was made. However even if Mr Maharaj did advise that he was going to the Employment Court this assertion did not provide any detail to Recon Services about what Mr Maharaj required it to respond to.

[22] I find that Mr Maharaj did not sufficiently advise his employer during the meeting of 2 June 2011 what it was that he wished Recon Services to address and I do not consider he raised a personal grievance with his employer at this time.

[23] I also do not accept that Mr Maharaj raised a personal grievance when he spoke to two employees that he was raising a personal grievance as he left the building after the meeting. Again I find his assertion of raising a personal grievance with other staff was insufficient to put his employer on notice of what Mr Maharaj

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<sup>2</sup> [2006] ERNZ 517, in passages not subject to appeal

expected Recon Services to address. Mr Murray advised that no staff member reported to management the communications Mr Maharaj's made. In any case talking with other employees who do not have management responsibilities is insufficient to properly raise a grievance.

[24] On balance, I am not persuaded that Mr Maharaj raised a personal grievance claim for an unjustified disadvantage with Recon Services which satisfied the statutory requirements. In these circumstances he is precluded from pursuing this matter with the Authority.

***Did Mr Maharaj raise a personal grievance following his dismissal?***

[25] Mr Maharaj was dismissed by Recon Services on 3 June 2011. Mr Maharaj referred the Authority to a range of actions by which he says he raised personal grievance claims for unjustified dismissal with his employer.

[26] First, Mr Maharaj says that on 3 June 2011 when he was notified over the phone by Mr Murray and Managing Director, Mr Blair Malcolm, of his dismissal he told Recon Services management that it was "*wrong, unjust and cruel*" to dismiss him. He says at the end of the phone call he informed management that he would be taking a personal grievance.

[27] Mr Scott and Mr Malcolm say that they called Mr Maharaj using a speaker phone so that each manager should listen and communicate with Mr Maharaj. Mr Scott says he advised Mr Maharaj that his employment was being terminated. Both Mr Scott and Mr Murray each agree that Mr Maharaj responded saying Recon Services' actions were "*wrong, unjust and cruel*". Mr Scott and Mr Malcolm both say Mr Maharaj did not advise what exactly was wrong, unjust and cruel about his dismissal and each emphatically deny that Mr Maharaj made any reference to a personal grievance. Mr Scott and Mr Malcolm say the phone call was very brief however the focus of Mr Maharaj's response was his repeated questions put to them as to how he was now going to feed himself and his dog.

[28] I prefer the evidence of Mr Scott and Mr Malcolm and do not accept that Mr Maharaj raised claims for personal grievances during the phone call of 3 June 2011. I make this finding on the basis because Mr Maharaj's evidence on the matter vacillated throughout the course of the investigation meeting.

- a. Mr Maharaj was initially adamant in his evidence that he had said he was “*taking a personal grievance*”.
- b. Later he said he may not have used the phrase “*personal grievance*” but rather he may have reiterated he “*will be taking [Recon Services] to the Employment Court*”.
- c. Still later in his evidence he says it should have been obvious by his general communications during the phone call that he was going to take a personal grievance.
- d. In or around mid-June Mr Maharaj attended the Lower Hutt Community Law Centre and was referred to a solicitor in a private law firm. He says he wanted legal advice as to whether or not he had a personal grievance. He says he met with a solicitor on 22 June 2011 and during that meeting he received advice that he had grounds for personal grievance claims.

[29] On balance I do not consider that Mr Maharaj raised personal grievance claims on 3 June 2011 during a telephone discussion with Recon’s senior management when he had not yet obtained legal advice and was unaware whether he had grounds on which to raise these types of claims.

[30] As with my findings in regards to Mr Maharaj’s claim that he raised an unjustified disadvantage on 2 June it is clear from current case law that a personal grievance is not raised simply by an employee informing an employer that he or she simply considers they have a personal grievance or will be taking legal action.

[31] Second Mr Maharaj says it should be obvious from his letter to Recon Services on 7 June 2011 that he had raised a personal grievance. The correspondence of 7 June 2011 depicts Mr Maharaj requesting Recon Services to provide him with a full copy of his personal file and copies of all communications held at Recon Services which refer to him. The correspondence as a request for personal information under the Privacy Act 1993. Having reviewed the contents of Mr Maharaj’s letter there is no reference to any matter which Recon Services is required to address apart from the provision of information. I do not consider there is any basis to support Mr Maharaj’s proposition that Recon Services could have or should have drawn an inference from correspondence requesting information that he was raising a personal grievance.

[32] Third, whilst Mr Maharaj acknowledges that he did not instruct the solicitor he met to formally raise a personal grievance, he produced a letter written on his behalf by the solicitor to Work & Income which states amongst other things that Mr Maharaj has taken a personal grievance. During the Authority's investigation Mr Maharaj accepted that this letter was not sent to Recon Services and therefore it was not made aware of its existence and could not be taken to know he had raised a grievance. It was sent to Work & Income for another purpose.

[33] It is not disputed that Mr Maharaj was advised of his dismissal on 3 June 2011 and that 31 August 2011 was the 90th day following his dismissal.

[34] Mr Maharaj's primary focus before the Authority was that he raised a personal grievance when he lodged his statement of problem on the afternoon of 31 August 2011 at the Wellington Employment Relations Authority. Mr Maharaj says by lodging his statement of problem he had raised his grievance within the statutory required timeframe.

[35] I am unable to accept Mr Maharaj's submission that lodging a statement of problem with the Authority on the 90<sup>th</sup> day satisfies the legislative requirement to raise a grievance with his employer. A statement of problem lodged with the Authority within 90 days does not fulfil Mr Maharaj's obligation to "*...make, the employer ... aware that the employee alleges a personal grievance...*"<sup>3</sup>

[36] Mr Maharaj further says that the Authority's support staff promised him that the statement of problem would be faxed to Recon Services that day and says he relied on that promise to assume that Recon Services would become aware of his personal grievance that afternoon and within 90 days. I do not accept that Mr Maharaj was given the assurance he alleges. The Authority does not serve notices including statements of problem to other parties by facsimile, this is not a process used by the Authority.

[37] Further, it is not a responsibility of the Authority to effect a raising of a grievance with an employer on behalf of an applicant. The Authority does not act as an agent for any party before it, to do so would be to inconsistent with its mandate to exercise independence and maintain impartiality when investigating and determining employment relationship problems.

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<sup>3</sup> Section 114 (2)

[38] Whilst an employer may become aware that a personal grievance has been raised by receipt of a statement of problem sent by the Authority, the employer must receive the statement of problem within 90 days of the grievance arising. The onus is on the employee raising the grievance to ensure the employer become aware of the personal grievance within 90 days of the action which led to the grievance. Mr Maharaj's action by lodging a statement of problem with the Authority did not ensure that Recon Services was presented with his personal grievance within 90 days of it arising. He cannot rely on the Authority to have raised the grievance on his behalf by assuming his application would be processed and Recon Services would be notified on the same day.

[39] I accept Recon Services' evidence that it did not receive a copy of the Statement of Problem until 5 September 2011, five days after the period in which Mr Maharaj was able to raise a personal grievance in relation to his dismissal.

**Summary of findings as to whether Mr Maharaj raised an unjustified dismissal personal grievance with his employer within 90 days of his dismissal**

[40] When I consider Mr Maharaj's communications with Recon Services I do not accept that Mr Maharaj sufficiently raised a personal grievance with his employer in any of the separate and various ways he has described to the Authority.

[41] When I consider the totality of his correspondence I remain of the view that Mr Maharaj did not present to Recon a grievance of sufficient specificity that Recon Services was able to consider and respond to. The only relevant communications that can be objectively relied on is the discussion Mr Maharaj had with Recon Services on the day of his dismissal where he advised it was "*unjust, wrong and cruel*" to be dismissed, and later a request for information held on his personal file. Neither of these communications specified with sufficient detail what it was the Recon Services was required to respond to or address.

[42] It is clear that Mr Maharaj's statement of problem was received by Recon Services outside the 90 day time frame and therefore does not satisfy the legislative requirements to raise a personal grievance.

[43] Much of the information presented by Mr Maharaj to the Authority was based on assumptions Mr Maharaj had made that it should have been obvious to Recon Services that he wished to take a personal grievance. However there is no evidence to

support his view that Recon was aware or reasonably should have been aware of Mr Maharaj's dissatisfaction until it received a copy of his statement of problem.

[44] In all the circumstances I find Mr Maharaj did not raise personal grievances for unjustified disadvantage and unjustified dismissal within the required statutory time frame and he is unable to pursue his claims before the Authority.

**Costs**

[45] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority