

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 15
3078632

BETWEEN DANIEL ROY MAXWELL
Applicant

AND AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Applicant, in person
Tom Jarman, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 15 January 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 25 November 2019 Mr Maxwell filed an application in the Authority seeking remedies for actions by his then employer AFFCO New Zealand Limited (AFFCO), which he says unjustifiably disadvantaged him in his employment. His claim also concerns issues relating to entitlement to accident compensation and wage arrears for unpaid public holidays. In its statement in reply dated 29 November AFFCO raised jurisdictional issues with Mr Maxwell's claim including that the Authority did not have jurisdiction to deal with matters relating to entitlement to accident compensation, that Mr Maxwell had not raised personal grievances within the statutory 90 day time frame and it did not consent to those personal grievances being raised out of time.¹

The Authority's investigation

¹ Section 114 Employment Relations Act 2000.

[2] The Authority directed the parties to mediation in early 2020 which did not resolve the issues between them. On 27 May 2020 the Authority wrote to the parties setting out issues as to jurisdiction apparent from the statement of problem and statement in reply. The parties were required to file specific information by 10 June 2020. Mr Maxwell has not provided the requested information or otherwise engaged with the Authority process. AFFCO provided the requested information which was copied to Mr Maxwell. On 6 July 2020 AFFCO filed a memorandum seeking dismissal of the application for “want of prosecution” and/or because it is a vexatious or frivolous claim.

[3] In early November this employment relationship problem was reallocated to me and I directed a case management conference be held with the parties to progress the matter. A case management conference was held on 17 November. It proceeded in the absence of Mr Maxwell. Immediately prior to the commencement of the case management conference the Authority Officer rang the contact telephone number provided by Mr Maxwell in his statement of problem and left a message that it would proceed in his absence. For completeness, in the days leading up to the case management conference the Authority Officer tried to contact Mr Maxwell. He has not responded to these attempts to contact him.

[4] By minute dated 17 November 2020 the matters discussed during the case management conference were summarised including the history of the application before the Authority, that in addition to the statement of problem and statement in reply AFFCO had filed further information, the issues to be investigated and determined, a proposed timetable for filing any further information and that the matter would then be determined on the papers. The parties were invited to file any objection to the proposal within seven days of the date of the minute. Neither party filed any objection to the proposal.

[5] I am satisfied the parties have had a fair opportunity to participate in the Authority process and comment on all information before the Authority. It is time to move to determine this employment relationship problem based on the information before the Authority. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions

on issues necessary to dispose of the matter and specified orders made. It has not recorded all information received.

Issues

- [6] The issues identified for investigation and determination are:
- (i) Did Mr Maxwell raise a personal grievance/s within the 90-day statutory time frame?
 - (ii) If so, did Mr Maxwell suffer a disadvantage in his employment arising from:
 - a. the circumstances of a work related injury suffered on 6 June 2019 including how the injury occurred and how it was recorded;
 - b. non-payment of wages for subsequent days off work;
 - c. his use of leave being treated as misconduct;
 - d. workplace harassment in the boning room;
 - e. not being paid statutory holidays during Christmas 2018;
 - f. being issued a written warning for “intent” and attendance?
 - (iii) If so, is he entitled to any remedies including wage arrears for sick leave, time off for injury and unpaid statutory holidays, compensation for hurt, humiliation and injury to feeling?

Relevant law – raising a personal grievance

[7] Section 114 of the Act provides that an employee must raise a personal grievance with the employer within a period of 90 days.² The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

² Section 114 Employment Relations Act 2000.

[8] A personal grievance is raised with the 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 the employee wants the employer to address. In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:³

The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Discussion

Unjustified action – ACC decline following injury at work 6 June

[9] The relevant information has been carefully read and considered. The Authority understands Mr Maxwell's claim to be his claim for ACC cover was declined because his manager incorrectly recorded the reason he left work early on 6 June 2019 and this led to ACC (or AFFCO's provider) declining cover and compensation. It is not clear from the information provided if Mr Maxwell has challenged the decline of cover. The Authority does not have jurisdiction to consider whether Mr Maxwell's claim for entitlement to accident compensation was properly declined and is unable to further consider this aspect of Mr Maxwell's claim⁴.

[10] The issues raised concerning the alleged actions of the manager and the circumstances of the injury are unclear and appear to be contradicted by the supporting

³ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [36]–[38].

⁴ Section 161 Employment Relations Act 2000.

material Mr Maxwell filed with the statement of problem. AFFCO sought to clarify the issues with Mr Maxwell and he did not respond with further relevant information. Accordingly, I find a personal grievance was not raised because it was not raised sufficiently to allow AFFCO to respond to the claim “on its merits with a view to resolving it soon and informally”⁵.

Unjustified action – use of leave treated as misconduct

[11] From a review of the material before the Authority this issue was first raised in the statement of problem. It appears to be a generalised claim. The time frame and sufficiency of information requirements for raising a personal grievance have not been met. There is no information before the Authority which would suggest any delay in raising the grievance was occasioned by exceptional circumstances⁶.

Unjustified action – unpaid statutory holidays during Christmas 2018

[12] From a review of the information Mr Maxwell purported to raise a personal grievance concerning non-payment for public holidays in the Christmas and New Year period 2018/2019 in an email to the plant manager on 26 August 2019. This grievance was not raised within the statutory 90-day time frame to do so and leave has not been sought to raise it out of time. There is no information before the Authority which would suggest the delay in raising the grievance was occasioned by exceptional circumstances⁷.

[13] Consideration has been given to whether Mr Maxwell is entitled to wage arrears for public holidays falling on 1 and 2 January 2019. AFFCO does not dispute he was not paid for those days. It says he is not entitled to payment because they were not otherwise working days⁸. The wage and time records have been provided to the Authority and they support this conclusion. Mr Maxwell does not have an entitlement for unpaid public holidays for 1 and 2 January 2019.

⁵ Refer [8] above.

⁶ Section 114(4) Employment Relations Act 2000.

⁷ Section 114(4) Employment Relations Act 2000.

⁸ Section 49 Holidays Act 2003.

Unjustified action – first warning 14 March 2019 and second warning 24 July 2019

[14] Mr Maxwell received written warnings on the above dates. From a review of the information personal grievances concerning the warnings were purportedly raised in the statement of problem filed in the Authority on 25 November 2019. These grievances were not raised within the statutory 90-day time frame and leave has not been sought to raise them out of time. There is no information before the Authority which would suggest the delay in raising the grievance was occasioned by exceptional circumstances⁹.

Unjustified action - alleged boning room harassment

[15] The email exchanges between Mr Maxwell and the plant manager concerning this personal grievance have been carefully read and considered. In addition to the statement of problem this is the only record of Mr Maxwell raising this issue with his employer. Mr Maxwell has not raised the issues sufficiently to allow AFFCO to respond to the claim “on its merits with a view to resolving it soon and informally”¹⁰. It is accepted Mr Maxwell raised concerns but he did not do so in a manner which amounts to the raising of a personal grievance.

Outcome

[16] Mr Maxwell’s application is unsuccessful. The personal grievances were either not raised within the statutory 90-day period or where not raised with sufficient information to meet the statutory requirements. There is insufficient basis to grant leave to raise the grievances out of time. The Authority does not have jurisdiction to deal with the decline of ACC cover and on the information before the Authority including wage and time records there is no basis to award wage arrears for public holidays falling on 1 and 2 January 2019.

[17] A copy of this determination should be served on all addresses for service provided by the parties.

⁹ Section 114(4) Employment Relations Act 2000.

¹⁰ Refer [8] above.

Costs

[18] Given this matter was determined on the papers there does not appear to be any issue as to costs. If costs are sought memoranda are to be filed and served within ten working days of the date of this determination.

Marija Urlich
Member of the Employment Relations Authority