New Zealand Employment Relations Authority Decisions

McGregor v GMP Environmental Limited (Wellington) [2011] NZERA 966; [2011] NZERA Wellington 97 (3 June 2011)

Last Updated: 25 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY

WELLINGTON

[2011] NZERA Wellington 97

File Number: 5313220

BETWEEN MICHAEL MCGREGOR Applicant

AND GMP ENVIRONMENTAL LIMITED

Respondent

Member of Authority: Denis Asher

Representatives: Rachael Webb for Mr McGregor

Caroline McLorinan for the Company

Investigation Meeting On the papers

Submissions Received By 19 May 2011

Determination: 3 June 2011

DETERMINATION OF THE AUTHORITY

The Problem

[1] By way of a preliminary issue, did Mr McGregor raise his personal grievance within the statutory 90-day time frame?

The Investigation

[2] During the last telephone conference on 31 March 2011 the parties agreed to timelines for addressing this preliminary issue by way of written submissions.

Background

[3] Mr McGregor was employed by the Company for two and a half years.

[4] Redundancies took place in late 2008, starting with the first notice of the same at a meeting on 13 November 2008 when input was sought from employees.

[5] Mr McGregor says that, by letter the following day, he was advised he had been made redundant. He says, in the circumstances, the process adopted did not reflect a genuine consultation with employees.

[6] Other employees were made redundant during the same month.

[7] Mr McGregor also says he had concerns about the way in which his employer conducted drug testing, and that there were no in-house policies until the day he was shown a copy and asked to carry out a drug test. He says he formed the impression that he need to consent to the drug testing or face disciplinary action.

[8] The Company says Mr McGregor returned a positive drug test for THC (cannabis) in October 2008.

[9] In his statement of problem filed on 17 December 2010 Mr McGregor says he believes he was *"... unfairly treated by my employer* (in) *that proper procedures were not followed in respect of both the redundancy process and the implementation of a drug testing regime. I believe I was chosen for redundancy as a result of the outcome of the drug testing. I thus seek* (unspecified compensation for 3-months lost wages, humiliation, etc and legal costs and an employment reference)*"* (par 3 (b), above). I note here that the Authority is unable, at law, to direct a party to provide an employment reference.

[10] By affidavit evidence, Mr McGregor says he raised a grievance with his former employer about these matters both orally and, via correspondence from his counsel, in a number of letters.

[11] The Company disputes the applicant's claim he raised a grievance orally; it does accept that, via his lawyer, Mr McGregor made various inquires about the both

the drug testing regime and the redundancy process, including why he had been selected for redundancy. The Company answered those queries. The respondent also says that, notwithstanding the exchange of correspondence, no grievance was raised by Mr McGregor directly or through his counsel within the statutory 90-day period.

[12] Mr McGregor is legally aided.

[13] Mr McGregor is not seeking leave to file a grievance outside of the statutory

90-day period.

The Applicant's Position Summarised

[14] Mr McGregor says his grievance was notified to his employer orally and by his lawyer by way of correspondence. He relies on correspondence dated 22

December 2008, 29 January and 10 February 2009 (attached to his affidavit received on 28 February 2011 and his statement of problem).

[15] Mr McGregor says he had several discussions with a representative of the Company, Ms Emily Hayes, during which he made clear his concerns about the manner in which the drug policy had been presented, including that it had been presented with no real opportunity to consider it. Ms Hayes knew *"... I would want to take further steps as I made this very clear to her. The final discussion* (we) *had was for her to make it clear that she and I could not resolve the issue (in house) and that I should pursue a personal grievance. I made it very clear to* (her) *that I would indeed be taking such steps"* (par 7, applicant's affidavit received on 28 February).

[16] He also says the Company representative, *"... provided me with information as to how a personal grievance should formally be lodged and provided me with contact details for legal representatives who would be able to assist me"* (par 8, above).

The Company's Position Summarised

[17] The Company says Mr McGregor filed a statement of problem with the Authority on 17 December 2010 in which he claimed unjustified dismissal; while he raised concerns about random drug testing he did not make a claim in respect of that.

[18] The Company has raised a 90 day defence to the claim of unjustified dismissal and any other claim now being made and does not consent to them being raised out of time.

[19] Mr McGregor has not made an application to file a claim out of time.

[20] Affidavit evidence from the Company (by Ms Hayes) supports its claim the applicant raised no grievance in respect of his concerns about random drug testing, despite articulating his concerns to the Company's representative.

[21] The correspondence from the applicant's counsel, while asking a series of questions about the redundancy in particular, and while alluding to the possibility of Mr McGregor raising a grievance, in fact do not do so.

[22] In Ms Hayes' affidavit (dated 8 March 2011) she says, *"I am clear that while Michael talked to me about some concerns he had over the drug testing procedure, he did not raise a grievance with the Company through me at the time"* (par 4, above).

[23] Attached to Ms Hayes' affidavit are her hand written notes of a disciplinary meeting she attended on or about 15 October 2008 in respect of the applicant. They are initialled, she says by the people at the meeting (including the applicant, I assume, as he has not taken issue with that claim). They do not record Mr McGregor notifying a personal grievance.

[24] Ms Hayes agrees she also met with the applicant following his redundancy but cannot recall the dates and says the timing was complicated by his absence on sick leave. While she recalls him stating he was unhappy with redundancy because of its financial implications she does not remember him stating he had an issue with the process, or with his position being selected for redundancy.

[25] Ms Hayes confirms she explained to the applicant the process for raising a grievance but did not understand he was raising one with her or that any action would necessarily be taken, but that Mr McGregor wanted to consider his options and the Company would hear from him or his lawyer should he wish to file a grievance.

[26] Ms Hayes' evidence should be preferred as it is supported by documentary evidence.

[27] In respect of the redundancy grievance allegation, the Company's position is supported by an objective assessment of the correspondence relied on by Mr McGregor.

Discussion and Findings

[28] Section 114 of the Employment Relations Act 2000 (the Act) provides that, amongst other things,

Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her 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, whichever is the later ... .

[29] Mr McGregor's claims relies on discussions he had with a Company representative, Ms Hayes, and his counsel's correspondence.

[30] Mr McGregor's own account of his discussions with the Company representative is evidence he did not raise a grievance at that time. At pars 5, 6 & 7 of his affidavit received on 28 February 2011 the applicant says, through discussions with Ms Hayes, he made the Company aware of the *"**concern** which I had regarding what had taken place"* (emphasis added, par 6); and, *"Ultimately, it became clear after several discussions ... that she and I would not be able to resolve this impasse. ... She knew that I would want to take further steps ... .The final discussion that Ms Hayes and I had was for her to make it clear that she and I could not resolve the issue (in house) and that I **should** pursue a personal grievance. I made it very clear to Ms Hayes that **I would** indeed be taking such steps"* (emphasis added, par 7).

[31] This is plainly not evidence of somebody filing an actual grievance, but only of an intention to do so.

[32] My finding is reinforced by Mr McGregor's evidence that Ms Hayes provided him with information as to how he could raise a grievance and obtain legal representation (par 16 above). Plainly, he had not raised a grievance up to that point.

[33] Subsequent events are no better for the applicant's claim: the correspondence written on Mr McGregor's account is no different. The first letter of 22 December

2008 raises *"a number of **queries** in respect of"* redundancy and drug testing (emphasis added, above).

[34] It also said, *"We have some concerns ... "* about the drug testing procedure, and looked forward to the respondent's reply, but it did not state that a grievance was being raised in respect of those concerns.

[35] The next letter, of 28 January 2009, sought an answer to the 22 December

2008 correspondence: *"We also note that **if** our client wishes to raise a personal grievance he needs to do so within 90 days. As we have not had a response from you ... but to preserve the situation please treat this letter as notification that our client **will be** raising a personal grievance"* (emphasis added, above). Again, while reference is made to the possibility of the applicant raising a grievance, this letter is simple evidence not of a grievance being raised but of an intention to do so.

[36] The next item of correspondence, the applicant's counsel's letter of 10

February 2009, expresses the writer's disappointment with the respondent's reply (of

5 February), reiterates the belief there were shortcomings in the redundancy process and that *"we are trying to establish whether or not that is the case in order that we may properly advise our client"* (above).

[37] The writer discusses *"... the option of referring the matter direct to Mediation (but) we would like to engage with you in the first instance to see if the problem can be resolved through discussion"* (above). No express or implied mention is made in the letter amounting to notice of a personal grievance.

[38] The final letter of 19 February 2009 on behalf of Mr McGregor repeats the view that specific questions *"... have not really been answered"* (above) by the respondent, seeks more details, notes that (as previously raised) the applicant could

pursue a mediation while expressing a hesitation to do so without more information. Significantly, it also contains the

comment that, *"Without knowing the actual process which was followed we cannot advise our client as to whether the process was appropriate"* (above), and, I add, 'advise him whether or not to take a personal grievance'.

[39] No evidence exists of Mr McGregor ever raising a grievance, but only of an intention to do so (which he never acted on until after the expiry of 90-days).

[40] The case law in respect of raising a personal grievance is clear. In *Creedy* v

Commissioner of Police [2006] 1 ERNZSA A1 [36] the Chief Judge said,

[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 ... . What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[41] In The Chief Executive of the *Department of Corrections* v *Waitai* [2010] NZEmpC 164, Travis J found at par 48:

... the communications must, objectively viewed, have involved reasonable steps taken by the employee to make the employer aware that the employee alleged a personal grievance that the employee wanted the employer to address, with sufficient specification to enable the employer to address it.

[42] In a nutshell, and by application of an objective assessment, Mr McGregor can only be said to have (orally and in writing) raised concerns, expressed an intention to file a personal grievance but then failed to do so, in terms of *Waitai* (above) within the statutory 90-day period.

Determination

[43] Mr McGregor did not advise the respondent of his personal grievance within the statutory period and the Authority is therefore unable to take his employment relationship problem any further.

[44] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority
