

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

2013 NZERA Auckland 46
5374236

BETWEEN	SHAUN MICHAEL MCCARTNEY Applicant
AND	ATLAS CONCRETE LIMITED First Respondent
	FIRST UNION (formerly National Distribution Union) Second Respondent

Member of Authority: R A Monaghan

Representatives: S McCartney in person
J Turner, counsel for first respondent
P Cranney, counsel for second respondent

Investigation meeting: 10 December 2012

Determination: 8 February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shaun McCartney says his former employer, Atlas Concrete Limited (ACL) dismissed him unjustifiably. The dismissal was for serious misconduct following an incident involving allegedly threatening and abusive behaviour towards colleagues, and was imposed with immediate effect on 7 April 2009.

[2] By letter to ACL dated 15 May 2009 Mr McCartney's former union, First Union (the National Distribution Union as it then was) said Mr McCartney was dismissed unjustifiably. The letter denied the misconduct occurred, said sanctions other than dismissal should have been considered, and sought remedies including reinstatement. It ended by referring to the absence on leave of the union organiser handling the matter, and suggesting discussions resume on the organiser's return.

[3] ACL replied in a letter dated 21 May 2009, denying that ‘a valid grievance’ was raised, saying it believed the dismissal was justified on the facts, and declining to provide the remedies sought. It says in response to Mr McCartney’s claim in the Authority that the 15 May letter did not itself suffice to raise a grievance, and that it was awaiting discussions with the union organiser so it could identify what Mr McCartney wanted it to address. Instead the union organiser and a union secretary indicated at a meeting in June 2009 that the grievance was either withdrawn or not going ahead.

[4] The union had a policy of not pursuing grievances on behalf of its members when it considered the grievance had little chance of success. It accepts at least that in June 2009 it conveyed to ACL that it would not be proceeding with the grievance on Mr McCartney’s behalf. It discussed the matter with Mr McCartney in June and July 2009, and confirmed in a letter to him dated 13 August 2009 that it would not represent him further in the grievance.

[5] Mr McCartney believes the union has not met its obligations to him, including in respect of his grievance, and seeks the reimbursement of his membership fees.

[6] This determination addresses whether:

- the 15 May 2009 letter sufficed to raise Mr McCartney’s grievance;
- any grievance raised was then withdrawn in June 2009;
- the union breached its obligations to Mr McCartney;
- if there was a breach, a refund of Mr McCartney’s membership fees should be ordered.

Did the 15 May 2009 letter suffice to raise a grievance

[7] The requirements for raising a personal grievance were set out as follows in *Creedy v Commissioner of Police*¹:

[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.

¹ [2006] ERNZ 517, in passages not affected by subsequent appeals

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 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 Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.

[8] The 15 May letter did enough to meet the requirements just set out. I do not accept that the suggestion that the grievance be discussed further on the return of the union organiser is capable of casting doubt on whether the letter itself raised a grievance. I accept that ACL hoped or expected to obtain further details of the grievance during these discussions, but not that the details were necessary before it could be said a grievance had been raised.

[9] For these reasons I find the 15 May letter sufficed to raise a personal grievance.

Was the grievance withdrawn in June 2009

[10] ACL's chief financial officer, Gregory Stewart, gave the following account of his conversation with the union secretary regarding Mr McCartney's grievance:

I met with Mr Karl Andersen of the NDU personally on or about Monday 29 June 2009, where he confirmed to me that the NDU was not representing Mr McCartney any further, that he did not think that there was any basis for any alleged grievance, that it was not going to go anywhere and should be withdrawn or to be treated as having been withdrawn ...

[11] Mr Andersen agreed that he confirmed the union was not acting any longer, but not that that he made the further comments attributed to him.

[12] The key point is that the union advised it was no longer representing Mr McCartney. Even if Mr Stewart's account of what else was said is correct, the union had no authority to withdraw the grievance if it was no longer acting for Mr McCartney and Mr Stewart should have recognised that. He should also have

recognised that any other comments were merely expressions of the speaker's views. They did not amount to a withdrawal of the grievance, let alone an authorised withdrawal.

[13] I find further that, even if the union was not prepared to advance a grievance on Mr McCartney's behalf, Mr McCartney remained entitled to do so himself as has occurred.²

Did the union breach an obligation to Mr McCartney

[14] The union rules current at the relevant time included the following:

54.2 Any member of the union may request the union to act in any legal proceedings and/or the negotiation and/or enforcement of any contract/agreement or other arrangement affecting them in their employment.

54.3 Where any request is made pursuant to rule 54.2 the appropriate regional, national or sector secretaries shall decide whether or not to so act.

[15] The union declined to act for Mr McCartney because it considered his case had insufficient prospects of success. The mere fact of Mr McCartney's membership did not oblige the union to represent him in his grievance, and the rules permitted it to decline to do so. The union did not make its decision arbitrarily or without sufficient knowledge of the background, and engaged with Mr McCartney on a number of his concerns before confirming its position to him in writing in August.

[16] I do not accept that the union breached an obligation to Mr McCartney in respect of his personal grievance. Although Mr McCartney is dissatisfied with other aspects of his exchanges with the union at the time, none of these give rise to any breach of obligation.

Should Mr McCartney receive a refund of his union membership fees

[17] No breach of obligation has been established and there are no grounds on which to order the repayment to Mr McCartney of his membership fees.

² cf *Ovation New Zealand Limited (formerly Bernard Matthews New Zealand Limited) v Puhia* [2011] NZEmpC 11

Further investigation

[18] Mr McCartney's statement of problem included numerous allegations against ACL and the union from which no cause of action could be identified. Other allegations concerned matters which, even if a cause of action could be identified, were clearly outside the jurisdiction of the Authority. The difficulties with the statement of problem were addressed during a lengthy teleconference between the Authority and the parties, resulting in a minute dated 20 August 2012.

[19] With reference to the contents of the discussion and the minute, I now turn to the scope of any further investigation by the Authority.

1. Claims against the union

[20] One of the difficulties with the statement of problem concerned precisely what claim was being made against the union, what remedy was sought, and on what grounds. That matter was resolved by identifying the issues addressed in this determination. I have found in favour of the union on those issues. No other matters remain outstanding between Mr McCartney and the union, and the union is not required to participate in the remainder of the Authority's investigation.

2. Claims against ACL other than the personal grievance

[21] Other difficulties concerned precisely what claim other than the personal grievance was being made against ACL, what remedy was sought, and on what grounds. The 20 August minute identified the following possibilities:

- health and safety issues; and
- claims for payment under the applicable collective employment agreement (cea).

[22] It appears that some matters arising in respect of the health and safety issues, and which may be within the jurisdiction of the Authority, concern the background to the incident which led to Mr McCartney's dismissal and amount to an explanation of it. They will be addressed in that context but not as claims in their own right.

[23] Any health and safety issue remaining - being a matter which is justiciable - appears to be concerned with alleged poor vehicle maintenance procedures which Mr McCartney says caused him to have an accident in or about 2007-2008. Nothing he said about that matter indicates the Authority has any jurisdiction in respect of it and I find accordingly.

[24] The claims for payment were for payments of: a meal allowance; a qualification payment; a bowl cleaning allowance; and long service leave. I recorded in the minute that, on the wording of the relevant provisions in the cea, I did not consider Mr McCartney was entitled to qualification payments or long service leave. I will confirm which of these claims can proceed during a further teleconference yet to be scheduled.

3. The personal grievance

[25] The personal grievance will proceed to an investigation into its merits.

Costs

[26] Costs are reserved.

[27] If the union seeks an order for costs it is to file and serve a memorandum on the matter within 28 days of the date of this determination. If Mr McCartney and ACL wish to reply they are to do so within 14 days of the date of receipt of the memorandum.

[28] Otherwise costs are reserved pending a resolution or determination of the remaining substantive matters.

R A Monaghan

Member of the Employment Relations Authority