

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Ivonne McDonnell-Grant (Applicant)  
**AND** Country Ways Limited trading as Back Country (Respondent)  
**REPRESENTATIVES** Karen Castigione (Counsel for the Applicant)  
John Shingleton (Counsel for the Respondent)  
**MEMBER OF AUTHORITY** James Crichton  
**SUBMISSIONS RECEIVED** 26 August 2005 and 28 September 2005  
**DATE OF DETERMINATION** 6 October 2005

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] The applicant (Ms McDonnell-Grant) lodged her Statement of Problem on the 17<sup>th</sup> January 2005 alleging constructive dismissal.

[2] A Statement in Reply was filed on the 13<sup>th</sup> February 2005 alleging that there had been no constructive dismissal and that in any event, no personal grievance had been raised within the 90 days required. The respondent, Country Ways Limited (CWL) effectively claimed that there was, in consequence of the foregoing, no case for them to answer.

[3] The matter proceeded to an investigation meeting in Queenstown on the 24<sup>th</sup> August 2005 but because of weather disruption, Counsel for the respondent was not able to land at Queenstown Airport and the investigation meeting was consequently abandoned.

[4] A telephone conference which I convened with the parties' Counsel on 25 August 2005 produced an agreement between the parties that the two preliminary issues raised by CWL be dealt with by me on the papers. These two preliminary issues are:

- a. Whether the Statement of Problem discloses a cause of action; and
- b. Whether the applicant's claim should be struck out on the basis that a personal grievance was not raised with CWL within 90 days.

***Was the grievance properly raised?***

[5] Ms McDonnell-Grant's lawyer wrote to CWL on 12 March 2004 via facsimile in these terms:

*'I understand that you are the manager at Back Country (Country Ways Limited). I act for Ivonne. She has instructed me in regard to an employment problem that she has in respect of her employment with you.*

*In particular Ivonne has discussed with me the written warning that was issued to her on Monday 8 March 2004 and verbal warning that you issued to her yesterday.*

*Ivonne does not accept the warnings that you have issued to her and disputes the matters that you have relied upon to issue those warnings. On the instructions that I have received it would seem that you are taking a deliberate course of action to make Ivonne feel miserable in her employment, with the ultimate goal of forcing her to resign. You will be aware that if this behaviour continues and Ivonne is put in the position where she has no alternative but to resign, that your conduct will amount to unjustified dismissal ('constructive dismissal').*

*Given the nature of the employment problem that exists, I suggest that a mediator from the Employment Relations Service be engaged to resolve this problem before the situation becomes even worse than it already is. The steps that you have taken to date, (removal of functions from Ivonne without justification, and unilateral change to her employment hours/days without consultation with her) give rise to a personal grievance.*

*Please confirm that you or one of the directors of the company are available to attend mediation. I am sending a copy of this fax to the directors so that they may be kept aware of what is occurring.'*

[6] On the face of it, looking at this communication in a commonsense way, it would seem to me axiomatic that a reasonable person not otherwise involved in the dispute between the parties, would regard this letter as evidence that Ms McDonnell-Grant had:

- a. Had her lawyer raise an employment relationship problem direct with CWL
- b. In that letter protested about two warnings issued to her
- c. Notified CWL that the warnings are not accepted
- d. Alleged that CWL is *'taking a deliberate course of action to make Ivonne (Ms McDonnell-Grant) feel miserable in her employment, with the ultimate goal of forcing her to resign'*.
- e. Contended that were CWL's behaviour to continue then Ms McDonnell-Grant would be put in the position where she had no alternative but to resign and CWL's conduct would then amount to an unjustified dismissal (or constructive dismissal).
- f. Sought agreement for the intervention of the Mediation Service of the Department of Labour.
- g. Claimed that the steps taken by CWL *'to date'*, *'give rise to a personal grievance'*.

[7] CWL's submission on this point is that the Authority may only consider the actions taken by Ms McDonnell-Grant on or after the date of termination of employment because this is an allegation of constructive dismissal. As counsel for Ms McDonnell-Grant is quick to point out, there is no authority cited for this proposition and I am certainly not aware of any.

[8] In the Statement in Reply filed in response to Ms McDonnell-Grant's Statement of Problem, CWL advanced the rather different point that after receipt of the letter from Ms McDonnell-Grant's solicitor, they claim a telephone discussion took place with Ms McDonnell-Grant's solicitor and they understood that Ms McDonnell-Grant's solicitor would revert to them on the matters discussed but as nothing happened they assumed that the issue (presumably including the personal grievance) was resolved.

[9] I am not attracted by either of these contentions advanced by the respondent. It seems to me the commonsense approach in assessing the meaning of the letter to CWL dated 12 March 2004 is that it raised a personal grievance in respect to the matters traversed in the letter which I summarised at paragraph [5] above. I cannot see how that letter can be construed in any other way.

[10] I do not accept Mr Shingleton's submission that I am only able to consider actions taken by Ms McDonnell-Grant on or after the date of termination of employment. Such a view seems to me arbitrary and unfair and entirely without authority.

[11] Further, I do not accept the contention made by CWL in their Statement in Reply that by reason of the fact that the letter of 12 March 2004 resulted in them allegedly talking with Ms McDonnell-Grant's solicitor by telephone and leaving matters with her, that undoes the meaning of the 12 March 2004 letter.

[12] In my opinion, the letter was written in a cautious and somewhat judicious way so as not to further destabilise what was then a continuing employment relationship. The solicitor, in preparing the letter may well have thought that a more strident tone and a less opaque message might have further impacted on her client's declining employment relationship.

[13] Even if I am mistaken about the 12 March 2004 letter raising a personal grievance of itself, it seems to me that that letter, taken together with the resignation of Ms McDonnell-Grant which followed 6 days later on the 18<sup>th</sup> March 2004, must constitute proper notice of the personal grievance and the grounds of it.

[14] For the sake of completeness I note that it is not contended on behalf of CWL that either the 12 March 2004 facsimile or the resignation letter of Ms McDonnell-Grant dated 18 March 2004 was not received and so the only issue that I am required to determine is what those documents mean.

[15] Given my finding on the 90 day issue, it is not necessary for me to consider the '*exceptional circumstances*' argument advanced by either the applicant's submissions or the respondent's submissions.

***Does the Statement of Problem disclose a reasonable cause of action?***

[16] Mr Shingleton for CWL alleges that the Statement of Problem filed by Ms McDonnell-Grant does not disclose '*a reasonable cause of action*'.

[17] Mr Shingleton alleges (correctly) that the Authority has power to strike-out an application before it but in my opinion it will only take that step on rare occasions when in essence, the only complaint can be a want of legal form.

[18] It is not in my opinion appropriate for the same rules to be applied to Statements of Problem in an Employment Relations Authority matter as are applied to District and High Court pleadings or even as would have been required in the old Employment Tribunal.

[19] As I said in a recent determination *Perry and The Vice Chancellor of the University of Canterbury* CEA 85/05: '*...even if at first blush the test enunciated in the 'Shipwrights' case is made out, it is still available to the Authority to say that in pursuance of its 'equity and good conscience' jurisdiction and the unique nature of its investigative role, a striking out of a party's proceedings would in all the circumstances be unjust and inequitable*'.

[20] In that particular determination, I had considered the leading case on strike-out applications of *New Zealand* (with exceptions) *Shipwrights etc. Union v. New Zealand Amalgamated Engineering etc. IOUW* [1989] 3NZILR284 and, having applied the test in the *Shipwright's* case, I reached the

conclusion that the balancing factor against strike-out was the unique nature of the Authority's own procedure.

[21] In the instant case, it seems to me the only criticism that can be made of the Statement of Problem is that it does not look as if it was written by a lawyer and indeed it may not have been. In my opinion, it fairly sets out the nature of the problem that the applicant seeks to have the Authority address and I am certainly in no doubt about what Ms McDonnell-Grant is saying either in respect to the nature of the difficulties that she says she encountered or the facts surrounding them, or the remedy that she seeks to have me grant to her.

[22] For all those reasons then, the application to strike-out is declined.

***Determination***

[23] I determine that the personal grievance of Ms McDonnell-Grant was raised within the statutory time and accordingly the respondent's claim in this regard fails.

[24] I further determine that Ms McDonnell-Grant's Statement of Problem may stand and accordingly the respondent's strike-out application fails.

[25] I will convene a further telephone conference with the parties' representatives shortly so that a timetable can be agreed for the investigation meeting to deal with the substantive grievance.

***Costs***

[26] Costs in respect to this interlocutory matter are reserved.

James Crichton  
Member of Employment Relations Authority