



[3] In its response to the application, Air New Zealand claimed that Ms Melville had not raised any personal grievance within the 90 day period as required under the Employment Relations Act 2000. The company advised that it did not consent to the raising of the grievance after the expiry of the statutory period and had not waived the 90 day requirement by lodging a statement in reply.

[4] As to the merits of the claim of unjustified dismissal, Air New Zealand alleged that the termination of Ms Melville's employment was justified in all the circumstances.

[5] Ms Melville and Air New Zealand attempted through mediation to resolve the employment relationship problem. When it remained unsettled the Authority heard counsel in a telephone conference and they agreed that a determination should be given on the preliminary issue of whether the unjustified dismissal grievance had been raised within 90 days. If the answer was no then the Authority should determine whether any exceptional circumstances were present for leave to be granted to Ms Melville, allowing her to raise the dismissal grievance after the expiry of the statutory period.

[6] It was agreed that the preliminary issue would be determined after consideration given 'on the papers.' Subsequently the Authority received submissions from counsel Ms McNally and Mr Cleary and also an affidavit sworn by Mr Phillip Townsend, an organiser of the NZ Amalgamated Engineering Printing and Manufacturing Union Inc (EPMU).

### **Whether unjustified dismissal grievance raised within 90 days**

[7] Air New Zealand claims that the first advice of a personal grievance claim brought in relation to Ms Melville's dismissal was given to it on about 27 July 2009 when the statement of problem was lodged in the Authority and served on the company. That was 125 days after she was dismissed.

[8] For Ms Melville it is claimed that the grievance was raised by Mr Townsend in anticipation of the dismissal, or that before dismissal notification was given by him of an intention to raise a grievance, or that words spoken by him immediately after the dismissal was announced had served to raise the grievance.

[9] I find from the plain words of s 114 of the Employment Relations Act that a prerequisite to raising any personal grievance is that the action alleged to amount to that grievance has either occurred or, having occurred, has come to the notice of the employee (whichever is the later). In the case of a dismissal, this means that there first has to be a dismissal before a grievance about justification for that action of the employer can be raised.

[10] It is therefore not sufficient that the dismissal has been anticipated or predicted or even threatened at the time the grievance is raised but before dismissal has taken place. It is not sufficient, I find, to give notice of intention to raise a grievance in advance of a dismissal, on the basis that that action is expected to be taken by the employer at a future time.

[11] Mr Townsend says that the grievance was raised immediately after Ms Melville was advised of her dismissal, when he said to the employer's representatives present at the meeting, "*see you in Court.*"

[12] I find that familiar retort from Mr Townsend cannot be regarded as raising a grievance, even in the context of the entire discussion at the meeting. Threats to engage in courtroom litigation are not the same as raising a grievance which requires, as the authorities clearly have held over the years, the grievance to be specified sufficiently to enable the employer to address it. The employer must be told what is required to be addressed by it. Uttering "*see you in Court,*" usually as a throw-away line, gives no detail as to any grievance or the particulars of any claim to be put before a court. Ironically, the place where grievances are to be resolved (if not in mediation) is the Authority, which is not a court.

[13] For the above reasons, I find that a personal grievance alleging unjustified dismissal was not raised within 90 days of Ms Melville's dismissal. The earliest that a grievance was raised was when the statement of problem was lodged and served on 27 July 2009, over a month after the expiry of the 90 day period.

#### **Application for leave to raise personal grievance out of time**

[14] In making this application on behalf of Ms Melville, reliance was placed on the particular ground under s 115(b):

*... where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time;*

[15] The Authority has not been provided with evidence in any form from Ms Melville about any steps she may have taken to make arrangements to have a dismissal grievance raised on her behalf. Mr Townsend in his affidavit states that Ms Melville made a number of calls to the office of the EPMU to check on progress of her personal grievance and she was told that work had started on drafting the statement of problem. This, of course, is hearsay since Mr Townsend was not present and did not take any of those calls himself.

[16] I find that at best it can only be inferred that Ms Melville wanted the EPMU to pursue a grievance about her dismissal. The union had been acting for her throughout an unusually long inquiry held into her alleged misconduct and it is reasonable to suppose that she wanted that assistance to continue after being dismissed. However, just what arrangements, if any, she made in that regard has not been the subject of evidence from her or anyone else with direct knowledge.

[17] For Mr Townsend's part it seems he thought that he had raised a grievance about the dismissal, before that event. If so, he had a mistaken view as to the requirements of the Act and the situation is not the same as one where an agent unreasonably fails to do something. Here it seems Mr Townsend thought he had done what was required.

[18] It does not seem from his affidavit that the preparation and lodging of a statement of problem was intended at the time to be the raising of a grievance, because Mr Townsend assumed the grievance had already been raised. There is no reference to the raising of a grievance in the statement of problem. Although there is no requirement for that, often as background that step is confirmed in these documents to have been taken.

[19] All the Authority can glean from the evidence and information that has been given is that Ms Melville's agent was of the mistaken belief that a grievance had been raised and that the next stage Ms Melville should expect was mediation and then an investigation by the Authority if that was unsuccessful.

[20] I do not consider there is anything exceptional in the circumstances of this case where the delay has proceeded from a misunderstanding of statutory requirements rather than an omission to act.

[21] For an application under s 114(3) and (4) of the Act to succeed, the Authority also has to reach the view that the granting of leave is just. I consider that the delay of some 35 days is a factor that even on its own rules out the granting of leave as being a 'just' course. That delay was over a third of the 90 day period required for raising a grievance. It is also relevant that the discovery of the failure to raise the grievance in time was made by the employer, the respondent Air New Zealand. The delay was simply left undetected to grow until the statement of problem was lodged.

### **Determination**

[22] The Authority finds that Ms Melville's dismissal grievance was not raised within 90 days. There are no exceptional circumstances surrounding that situation. In any event it would not be just to grant leave for the grievance to be raised outside 90 days.

[23] As counsel have been advised, the dates of 8 and 9 March remain available for an investigation meeting in relation to the grievance raised about the fairness of the inquiry held by Air New Zealand into Ms Melville's conduct. I consider that paragraph 7 of Mr Townsend's letter of 19 March raises an unjustified disadvantage grievance about Ms Melville's seven month suspension and about predetermination by the employer of its inquiry into her conduct. Particular remedial action by Air New Zealand was clearly requested in the letter.

[24] If counsel wish, a telephone conference can be held with the Authority to discuss whether an investigation of that particular grievance should proceed on 8/9 March or whether directions are sought about the disposal of this case.

[25] Costs are reserved.