

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 247/09  
5117249

BETWEEN                      HELEN MILNER  
   Applicant  
  
AND                                FONTERRA GROUP  
   Respondent

Member of Authority:      Yvonne Oldfield  
  
Representatives:            David Hayes for Applicant  
   Steven Palmer for Respondent  
  
Investigation Meeting:     9 July 2009  
  
Submissions received:     16 July from Applicant  
   17 July 2009 from Respondent  
  
Determination:              27 July 2009

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1] Ms Milner's employment relationship problem concerns an alleged personal grievance of unjustified dismissal<sup>1</sup>. The respondent ("Fonterra") claims that she did not raise this grievance within 90 days and is therefore precluded from bringing the matter before the Authority. This determination deals only with that preliminary matter. The issues to be addressed are:

- i. whether the grievance was raised within 90 days, and if not,
- ii. whether leave should be granted for the grievance to be raised out of time.

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<sup>1</sup> Ms Milner has in the past raised other grievances with the respondent. Although it is her position that aspects of those grievances are relevant background to her dismissal, her representative has advised that she does not wish to pursue them as separate causes of action.

### **Was the grievance raised in time?**

[2] Ms Milner was employed by the respondent in 2003 and in late 2006 held the position of forklift driver. On 5 December 2006 she was involved in an accident on the forklift. On 10 December she was admitted to hospital for four days with a collapsed lung. Ms Milner had a further pneumothorax in February 2007 and again in August 2007. By August 2007 she had received hospital treatment (including surgery) on six separate occasions. These included three admissions (on 21 February-7 March, 26 March-4 April, and 10-22 August.) She continues to suffer severe chronic pain as a result of the complications and has not returned to any sort of paid work.

[3] On 20 April 2007 Fonterra's private accident compensation provider, "Work Aon", determined that in terms of the Injury Prevention, Rehabilitation and Compensation Act 2001 Ms Milner's problems were not a result of her work accident or indeed of an accident at all. This was despite that fact that as early as February 2007 her medical advisers had noted that there seemed to be a relationship between the collapsed lung and the jolt to the chest she suffered in the forklift accident. On 1 May 2007 a Health Waikato cardiothoracic surgeon had confirmed this in writing, noting: "*it is my opinion that this pneumothorax is traumatic in aetiology rather than spontaneous.*"

[4] The process which led to the termination of Ms Milner's employment began on 16 May 2007 when the Respondent wrote to her raising concerns about an alleged failure to communicate regarding her medical condition and return to work plans. On 28 May Matt Laming, (Fonterra's West Waikato Warehousing Manager) met with Ms Milner at her home and told her that he would have to let her go given the lack of information about her health and return to work prospects. (Her current medical certificate was about to expire and had not been updated.) Ms Milner told me in her evidence that:

*"he kept referring to me having an illness. I told him I would be disputing Work Aon's decision that this was not a work accident but he appeared disinterested..."*

[5] However, because Ms Milner was challenging the assessment that she was not covered by the Injury Prevention Rehabilitation and Compensation Act 2001 Mr Laming agreed to “*give her a weeks grace*” while she pursued this.

[6] Three weeks went by and the respondent heard nothing more from Ms Milner. It therefore proceeded to dismiss her in a letter which included the following:

*“You are hereby formally notified that as from today, Friday the 29<sup>th</sup> of June 2007, you are given notice of the termination of your employment with Fonterra. Your employment will cease and you will be paid 2 weeks wages in lieu of notice and any other entitlements you may have.”*

[7] On 30 July Ms Milner learnt that her application for review of Work Aon’s determination had been successful and that the pneumothorax had been re-classified as a work related injury. Ms Milner had been in receipt of discretionary paid sick leave from January 2007 until 29 June 2007 but subsequent to the review she was placed on earnings related accident compensation. She continues in receipt of this today.

[8] Ms Milner told me: *“As I had been dismissed due to illness I did not think it was fair. When I received the Work Aon letter dated 30 July 2007 saying I had cover I did not immediately connect that to my grievance. I just knew I should not have been sacked. The sacking was a real blow to me. I was already feeling decimated from the accident and collapsed lung and treatment...”*

[9] Ms Milner sought advice about her dismissal, first from her union, and then from lawyers. On 5 July Garth O’Brien of Garth O’Brien Associates wrote to the respondent advising that Ms Milner intended to lodge a personal grievance. Then, on 10 October 2007, a solicitor from the Hamilton District Community Law Centre wrote on her behalf to the respondent saying that Ms Milner had:

*“indicated that she intends to lodge a Personal Grievance claim against you for unjustifiable dismissal.*

*Miss Milner provided the date of 13 July 2007 as her last day of employment. However, a letter is on hand from Fonterra dated 26 June 2007 stating Miss Milner's termination date as 29 June 2007. We invite you to clarify these dates.*

*If Ms Milner's last date of employment is indeed 29 June it is clear that this letter falls outside the 90 day notice period required under section 114 of the Employment Relations Act. We seek your consent to proceed to Mediation. Should you be adverse [sic] to giving your consent, please be advised that further action may be taken to raise the personal grievance outside the expiration period as per section 115 of the Act."*

[10] Alle Worner ("Employment Relations Lead" for the respondent) replied on 18 October 2007 saying:

*"Ms Milner's last day of service with Fonterra was the 29<sup>th</sup> of June 2007, as stated in the letter to Ms Milner...Ms Milner was entitled to 2 weeks wages in lieu of notice. The way in which our payroll system operates, the date of 13<sup>th</sup> July 2007 appeared on the payslip as part of the automated method of processing this.*

*Given the above... any grievance would now be outside the 90 day threshold provided for in the Act, we must now consider your request to proceed to Mediation. Having reviewed section 115 of the Act I can find no compelling reason to agree to your request therefore your request is declined."*

[11] Meanwhile, it had been realised that Ms Milner did not qualify for the services of the Law Centre and she had changed solicitors again. On 22 October 2007 Brook Law wrote to the respondent saying:

*"We understand that on 10 October 2007 the Community Law Centre sent to ...your Human Resources Department a letter advising of a personal grievance.*

*Prima facie this grievance advice may have been raised two weeks late. We seek your agreement to allow this personal grievance claim to be lodged as there appears to be good grounds for showing exceptional circumstances, in particular the hospitalisation of our client due to injuries now accepted to be a work accident...*

*there are also probably grounds to pursue a personal grievance because it was not until the 30 July 2007 that Work Aon finally approved the injury to the lung as part of the work injury. It follows that, in terms of section 114 of the ERA, it would have come to our client's notice that she had suffered a personal grievance due to dismissal in breach of the collective agreement had she the knowledge the injury was a work related injury."*

[12] The respondent's position is that Ms Milner's employment ended on 29 June. It says that the letter of 10 October was outside the 90 day limit but in any event it did not serve to raise the grievance because it said only that Ms Milner "intends to" raise a grievance. The respondent considers the grievance was not properly raised until the letter of 22 October.

[13] Ms Milner herself remains confused about when exactly her employment ended and notes that this was not just because of what was shown on her payslip. Her Certificate of Service records "*Period of Service 14.08.2003 to 13.07.2007.*" She says that she understood from what she had been advised at the time that the 90 day period did not expire until 10 October. She also believed her solicitor was raising a grievance in the letter of 10 October.

[14] In the alternative, Mr Hayes argues on her behalf that her cause of action arose on 30 July when it came to her attention that she had a work related injury, and therefore that her dismissal was in breach of clause 6.6 of the Fonterra Dairy Workers Collective Agreement 2006-2007 which provides:

**6.6 Accident leave:**

*When a worker suffers an accident at work which prevents that worker from attending normal duties, the Company will:*

*6.6.1 top up the compensation the worker receives from the Company's insurer to 100% of the worker's ordinary salary;*

6.6.2 *preserve the worker's position until the worker is cleared by his/her doctor to return to work (and if required by the Company this is confirmed by an agreed specialist nominated and paid for by the Company)...*

6.6.3 *if at any time after a worker is injured at work they are declared by their doctor as permanently unfit to return to their original position as a result of that accident...*

*...then the Company may terminate the workers employment and pay to the worker a severance package calculated using the redundancy formula as detailed in clause 10.4.3 of this agreement."*

[15] Mr Hayes submits that 30 July 2007 was the earliest that Ms Milner knew that Fonterra should not have dismissed her and the point at which the action resulting in the personal grievance came to her notice. If this argument is accepted, the 90 day period did not expire until after 22 October, by which time (as the respondent concedes) a grievance would have been properly raised.

### **Determination**

[16] If the respondent has (via the dates on the payslip and Certificate of Service) confused the applicant about the date of the termination that would more properly be regarded as a matter going to the exercise of the discretion under s. 114(4) of the Employment Relations Act. It does not affect the actual date of termination. I accept as a matter of fact that the employment ended on 29 June.

[17] Section 114(1) provides that a grievance must be raised within 90 days of 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.*" Mr Hayes argues that in this case the action alleged to amount to a personal grievance came to Ms Milner's notice on 30 July and therefore time runs from that date. In support of his argument he referred me to *Wyatt v Simpson Grierson [2007] ERNZ 489* in which Judge Couch noted at paragraph [29]:

*"the construction to be placed on ...s114 (1) of the Employment Relations Act 2000 is that the 90- day period will usually begin when the action alleged to amount to a*

*personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable."*

[18] It was not until 30 July that Work Aon agreed that Ms Milner's recurrent lung collapses resulted from a work related accident. However Ms Milner believed well before this (from what her surgeon had told her) that her injury was work related; that was why she had initiated a review of Work Aon's decision. She also knew (because of the terms of the collective agreement) that the consequences for her would be very different if she were suffering from an illness as opposed to a work related injury. Finally she knew from the discussion with Mr Laming that her employer did not accept that her injury was work related. In summary, she was aware of all the relevant circumstances by the time of the dismissal.

[19] It is also clear from Ms Milner's own words (quoted above) that she believed her dismissal was unjustifiable from the time it was first communicated to her in the termination letter. The date on which Ms Milner became aware of the circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable was, therefore, the date upon which she was advised that her job was terminated.

[20] The 90-day period runs from 29 June. The grievance was not raised in time.

### **Should leave be granted for the grievance to be raised out of time?**

[21] There is no evidence to indicate that Ms Milner instructed either her union or Mr O'Brien to raise a grievance. On 24 July she approached the Hamilton District Community Law Centre and saw solicitor Soraya Barker. Ms Barker provided affidavit evidence to the Authority. She confirmed that at her first interview Ms Milner told her that 13 July was the date of termination. She also handed over a large bundle of documents including the letter of termination but Ms Barker did not read them at that time. On 7 August Ms Barker was away on bereavement leave but unfortunately a message about this did not reach Ms Milner who attended for a follow up interview. She was very unwell and had travelled from Te Awamutu to Hamilton

for her appointment. Finding Ms Barker away, she was reluctant to tell her story all over again to another solicitor, so she just uplifted her documents and went home.

[22] On the 9 and 10 August, after her return from bereavement leave, Ms Barker contacted Ms Milner to arrange a time for another interview. This was scheduled for 14 August. However Ms Milner's admission to hospital intervened. Ms Barker told me that she spoke to Ms Milner in hospital and asked her if she would like her to proceed with a "*general personal grievance letter to Fonterra.*" Her instructions were not to do anything as she wanted to talk further with Ms Barker prior to taking action.

[23] Thereafter it was not until 8 October that Ms Milner rang the Law Centre to make a new appointment, which took place on 10 October. Ms Milner brought with her the termination letter and for the first time Ms Barker realised there was an issue around the date of termination. She immediately faxed to the respondent the letter of 10 October (quoted above.)

[24] In submissions for the applicant it is argued that the delay in raising the grievance was occasioned by exceptional circumstances namely:

- i. Ms Milner made reasonable arrangements to have the grievance raised on her behalf by Ms Barker, who unreasonably failed to ensure that the grievance was raised within the required time, and
- ii. If any of the delay was a result of late or unclear instructions from Ms Milner, this in itself was due to the exceptional circumstances of her serious health problems throughout 2007.

## **Determination**

[25] The first submission for the applicant is rejected. After considering the entire sequence of events, including the instructions given to Ms Barker on 14 August, I am not prepared to say that she failed to take reasonable steps to raise Ms Milner's grievance within the required time. With hindsight Ms Barker would no doubt do

certain things differently however it would be an overstatement to attribute the primary responsibility for this situation to her.

[26] However, I accept the second submission. During July, August and September 2007 Ms Milner was facing serious health issues, coping with intense pain, and in the last month, recuperating from thoracic surgery. She had also had to take steps to challenge Work Aon's mistake. All these difficulties arose as a result of a work related accident which had not been correctly identified. I consider these to be exceptional circumstances and am satisfied that they occasioned the delay in raising the grievance.

[27] **Leave is granted to raise the grievance out of time.**

### **Direction to mediation**

[28] As indicated to the parties already, I consider that the parties should return to mediation before investigation of the substantive matters. Mr Hayes has advised that he will be overseas from mid July until the end of August. I therefore direct the parties to attend mediation by the end of September. If mediation is not successful in resolving the grievance, the applicant's representative should advise the Authority accordingly and a further scheduling conference will be set up.

### **Costs**

[29] This issue is reserved pending the investigation of the substantive matters between the parties.

Yvonne Oldfield

Member of the Employment Relations Authority