

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 150
5454485

BETWEEN JASON FRANCIS MURPHY
Applicant

A N D MACAULAY MOTORS
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Janet Copeland/Rebecca Laney, Counsel for Respondent

Investigation Meeting: 17 September 2014 at Queenstown

Date of Determination: 26 September 2014

DETERMINATION OF THE AUTHORITY

A. Jason Murphy raised his personal grievance within 90 days.

B. The parties are directed to attend mediation.

Employment relationship problem

[1] A preliminary issue for determination is whether or not Jason Murphy has raised a personal grievance with Macaulay Motors Limited (Macaulay Motors) within the 90 day statutory timeframe. If it is found that Mr Murphy did not raise a grievance within the 90 day period then there is an issue whether leave could be granted to raise a grievance outside of 90 days under ss.114 (3) and (4) of the Employment Relations Act 2000 (the Act).

[2] Macaulay Motors does not accept that the grievance was raised within the 90 days statutory timeframe, has not consented to it being raised out of time, and does

not accept that there are grounds before the Authority to grant leave to raise it outside of that period.

The issues

[3] The issues for determination by the Authority are as follows:

- (a) Did Mr Murphy raise a personal grievance within the 90 day statutory timeframe?
- (b) Should leave be granted in the event a grievance was not raised within the 90 day period to raise that grievance out of time?

Background facts

[4] Mr Murphy commenced employment with the Queenstown branch of Macaulay Motors on or about 5 December 2011.

[5] The Service Operations Manager for Macaulay Motors is Stephen Snoep. Although usually based in Invercargill Mr Snoep was running the Queenstown service division as the service manager, Simon Jones, was away when the employment relationship with Mr Murphy ended.

[6] The 90 day period runs in this case from 21 January 2014 and expires on 21 April 2014.

[7] Mr Murphy's employment with Macaulay Motors ended on 21 January 2014. The evidence suggests a dispute as to whether Mr Murphy was dismissed or whether he resigned.

[8] Mr Murphy says that he raised a personal grievance with Mr Snoep within the 90 day period about the dismissal in a series of telephone calls and he also relies on the contents of his Statement of Problem.

The telephone calls

[9] On 24 January 2014 Mr Snoep telephoned Mr Murphy asking for his physical address so he could forward a letter confirming the events of 21 January. I think it is likely that Mr Murphy during the telephone call mentioned he had been advised to seek advice if he was not happy with the letter.

[10] Mr Snoep duly sent the letter dated 24 January 2014 to Mr Murphy at the address provided. It is useful to set the letter out in full to put later conversations and the content of a statement of problem into context.

Dear Jason,

Thanks for the telephone conversation this morning and your providing of an address. Further to our meeting last Tuesday afternoon, 21/1/2014 we discussed the need to formalise that conversation in letter form, when you were able to provide me with an address. We discussed in particular, your cigarette smoking whilst working with flammable liquids in the workshop. This is strictly against our health and safety policy and poses risk not only to yourself but other staff also.

We have experienced considerable customer dissatisfaction. The need for re work of careless mistakes, a series of oil leaks on Transit vans and a dissatisfied rental company. Many of these came to light in your absence. Some customers have voiced concern about your workmanship and have asked that you don't work on their vehicle is [sic] in the future, or we will lose their business.

Simon has spoken to you about taking responsibility for your workmanship at different times in the past. I sent you a letter covering among other things, the need to adhere to health and safety policy.

As we discussed all of the above, I invited you for comment and input. Your input was very limited and offered little explanation, other than to acknowledge an oil leak that had been crudely disguised with sealer in a recently re short blocked Transit.

However, you did agree that this level of workmanship was below the required standard. I asked "what are we going to do Jason, this can't carry on". You replied "you should sack me, because I'm not up to the job". I agreed with you and suggested you should give some thought to an alternative career and we should part company and go our own separate ways.

We agreed that your current staff account balance would be deducted from the residue of your annual leave entitlement, which I suggested was in the vicinity of 13 days.

[11] Mr Murphy called and spoke to Mr Snoep by telephone on two further occasions in late February or March 2014. Prior to the calls he said he had spoken to someone from the Employment Relations Info line and was told to ask for mediation and raise a personal grievance for unjustified dismissal. Mr Murphy said that he advised Mr Snoep that he wanted mediation but Mr Snoep did not want to hear about mediation from him.

[12] Mr Snoep did not accept in his evidence that Mr Murphy ever used the word grievance and that at no stage did he indicate he was dissatisfied with the outcome of the meeting on 21 January 2014. He said on or about 12 March 2014 he received a call on his mobile phone from Mr Murphy asking him *what have you done about mediation*. Mr Snoep replied that he had done nothing and that he had no intention of initiating mediation. He thought it was a very unusual question.

[13] Mr Murphy during the telephone call tried to justify some repairs that he had done and wanted some letters from unsatisfied customers. He also told Mr Snoep that his mother had just been diagnosed with terminal cancer.

[14] Mr Snoep recalled a third discussion with Mr Murphy also in March. He was unsure when the call occurred but knew it was before Mr Murphy's mother died on 18 March 2014. Mr Snoep recalls Mr Murphy defending the concerns raised at the 21 January 2014 meeting on the call and going through each of the issues in detail. He also referred to some other issues of concern that he had set out in a letter dated 30 May 2013. Mr Snoep said that during the conversations he had with Mr Murphy there was no indication that he wanted his job back or was dissatisfied with the outcome of the 21 January 2014 meeting and he did not therefore consider Mr Murphy wished to take the matter further.

[15] Mr Murphy explained that his mother was diagnosed with terminal cancer three weeks before she died on 18 March 2014. This was clearly a very stressful and difficult period for Mr Murphy and it may have impacted on his recollection of exactly what was said during the telephone calls.

[16] The main focus in the circumstances as to whether a grievance was raised within the 90 day timeframe should be on the contents of the statement of problem which was lodged and served within the statutory timeframe.

[17] On 3 April 2014, Mr Murphy lodged a Statement of Problem with the Employment Relations Authority. He named the respondent as Steve Snoep. The address for Mr Snoep in the Statement of Problem was that of the Invercargill Branch of Macauley Motors. Mr Murphy described the problem that he wished the Authority to resolve as *dismissal 21/1/14* and that the facts that had given rise to the problem as *letter from Steve Snoep dated 24/1/14*.

[18] Whilst the information on the front page of the Statement of Problem was minimal Mr Murphy attached to the problem a number of typed pages and a medical certificate dated 21 January 2014. The medical certificate provided that Mr Murphy was seen by the Doctor on 21 January 2014 and was in her opinion medically unfit for work for two days and should be fit to resume work on 23 January.

[19] The typed pages that were annexed concerned matters referred to in the 24 January 2014 letter. One page was about the transit oil leak front covers and another was about the dissatisfied rental company. Mr Murphy wrote about the transit oil leak that he had earlier requested proper Ford sealant. He concludes that page with *I got sacked before I could apply it [the approved Ford sealant] to any cover.* There is reference to a dissatisfied rental company in the 24 January 2014 letter. Mr Murphy wrote about that in an annexure to the Statement of Problem that he asked about the jobs he did for the rental company's and *he told me "nothing" this was over a telephone conversation.* Further he wrote about any dissatisfaction with the workmanship on rental vehicles- *I only found this out when we spoke on the telephone regarding the letter dated 24 January 2014.*

[20] The final typed page attached to the Statement of Problem is headed *Sacked while on Doctors certificate.* Mr Murphy sets out an account of 21 January including what medication he had taken for the back injury. He writes specifically that he was asked to come back into work by Mr Snoep and went into his office and he was then sacked. He wrote there was nobody else in the room and he could not say or make a lot of sense due to the medications he was on. Further than he later found out he was allergic to these pills.

[21] From a perusal of the administrative file I am able to ascertain that the Statement of Problem was delivered to the Invercargill branch of Macauley Motors at 10.09am on 4 April 2014 by courier post. Mr Snoep said in his written evidence that on receipt of the Statement of Problem he discussed the matter with Grant Price, Managing Principal who advised him to ring Ms Copeland.

[22] On 13 April 2014, Ms Copeland lodged a Statement in Reply that the application should be dismissed on the basis that Mr Snoep did not have an employment relationship with Mr Murphy, that Mr Snoep did not consider Mr Murphy had validly raised a personal grievance claim and that his claim did not disclose a clear cause of action. There was no reference to the correct employer but

following a telephone conference with the Authority a written employment agreement was produced between Macaulay Motors and Mr Murphy.

Was a personal grievance raised within 90 days?

[23] Section 114(2) of the Act provides:

For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[24] Ms Laney in her submissions accepted that a grievance could be raised by a statement of problem – *Premier Events Group Limited v Beattie (No 3)* [2012] NZEmpC 79. There is no dispute that the statement of problem was served within the 90 day timeframe. Ms Laney submits that Mr Murphy misidentified the employer and did not raise his grievance in the statement of problem with sufficient specificity.

Misidentifying the employer in the statement of problem

[25] Chief Judge Colgan specifically dealt with the issue of employer misidentification in raising a personal grievance in *Premier Events Group Limited*. It is useful to set out the relevant parts from that judgment that followed an analysis of two cases decided under the Employment Contracts Act 1991 where personal grievance had been raised with entities other than the employer. In both cases it was found the grievance was properly raised as it had found its way to the employer within the 90 day period. In one of the cases a submission that communication of a grievance through a third party was not permitted was rejected. Chief Judge Colgan then stated at [10] and [11] about the case in front of him:

[10] This case does not concern employer misidentification but I consider that the case law supports a finding that an employee may raise a personal grievance if a third party brings that grievance to the attention of the employer within the 90-day period. An employee who submitted an application to the Authority could be confident (because that is the normal procedure) that the Authority would serve that application to the named employer soon after its submission. While this method of raising a personal grievance runs the risk that service may occur outside the 90-day window, in this case a count back from the date of service includes some part of Mr Regan's employment.

[11] Further, I consider that this approach is mandated by the terms of s 114(2) itself which define the raising of a grievance with an employer as occurring “as soon as the employee has made, or has taken reasonable steps to make, the employer or a

representative of the employer aware”. What is required is that the employee has made the employer aware of the grievance and that awareness occurred in this case when the employer was served with the statement of problem. In addition, the inclusion of the words “has taken reasonable steps to make”, a phrase which was absent from the Employment Contracts Act, also clearly allows a grievance to be raised where reasonable steps have been taken even if the employee has not succeeded in directly raising the grievance with the employer. I consider that Parliament's use of this phrase confirms this Court's interpretation that a “circuitous route”^[9] for raising a personal grievance may be permissible depending on the facts of the case. In this case, the reasonable steps taken were the filing of the claim with the Authority.

[26] Mr Snoep was a representative of Macaulay Motors. The statement of problem was served at the Invercargill business of Macaulay Motors and Mr Snoep sought advice from the Managing Principal of Macaulay Motors about it and was advised to contact the company lawyer. This was within 90 days of the 21 January 2014.

[27] I do not find that the fact Mr Snoep, a representative of Macaulay Motors, was described in the statement of problem as the respondent means that Mr Murphy did not take a reasonable step to raise his personal grievance by lodging a Statement of Problem with the Employment Relations Authority.

Sufficient specificity

[28] In *McCreedy v. Commissioner of Police* [2006] ERNZ 517 at para.[36] the Employment Court referred to what an employer needs to be advised of in relation to a grievance being raised with sufficient specificity:

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 or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[29] Mr Murphy identified his grievance as a dismissal in the Statement of Problem and the date it occurred. The attachments to the Statement of Problem need to be considered as to whether the grievance was specified sufficiently to enable a response from Macauley Motors.

[30] Ms Laney submits that Mr Murphy has not expressly stated why he considers he has a personal grievance and has not provided anything for Macaulay Motors to respond to. Ms Laney submits that there is nothing as to why the dismissal was alleged to be unjustified, unfair or unreasonable.

[31] The letter of 24 January 2014 was written by Mr Snoep to formalise the 21 January 2014 conversation. Mr Murphy sets out in some detail in his attachments to the Statement of Problem his view of the issues set out in the letter. He also refers to being *sacked* while on a doctor's certificate and the effect of medication on his ability at the meeting to contribute or understand. I find that was clear enough to show a basis on which Mr Murphy considered the dismissal to be unfair or unreasonable. I also find that attachments show that Mr Murphy did not agree with what he considered to be the grounds on which he was dismissed.

[32] Mr Murphy does not state what remedies he seeks only that he would like the problem resolved by mediation. Remedies though are not required to be set out or quantified to validly raise a personal grievance.

[33] I find that the Statement of Problem and attachments assessed objectively bring to the attention of Macaulay Motors that Mr Murphy wishes to challenge as unjustified his dismissal and the grounds/reasons he believes he was unjustifiably dismissed. Mr Snoep was present at the meeting on 21 January 2014 and he also wrote the letter of 24 January 2014. I find that the grievance was specified sufficiently so that Macaulay Motors could address it.

Determination

[34] Mr Murphy raised his personal grievance of unjustified dismissal within 90 days.

[35] Having concluded that a personal grievance was raised by Mr Murphy within 90 days it is not necessary for the Authority to go on to consider whether there were exceptional circumstances.

[36] The parties have not attended mediation and I consider it would be constructive for them to do so in this case.

[37] I direct the parties to attend mediation.

Costs

[38] Costs are reserved. Mr Murphy was not represented so there may be no issue as to costs at this preliminary stage.

Helen Doyle
Member of the Employment Relations Authority