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THE ORDER PROHIBITING
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INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 256
3052593

BETWEEN PTQ
Applicant

AND Metallic Sweeping (1998) Limited
Respondent

Member of Authority: Philip Cheyne

Representatives: PTQ, the Applicant
Tim McGinn, for Respondent

Investigation Meeting: 25 May 2021, at Christchurch

Determination: 16 June 2021

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The claim is dismissed.

B. PTQ is to pay Metallic Sweeping (1998) Limited \$2,250.00 in costs.

C. I prohibit from publication the name of the applicant. This order ceases to have effect from 9.00am on Monday 19 July 2021.

Employment Relationship Problem

[1] PTQ was employed by Metallic Sweeping (1998) Limited in October 2018. Several days after starting work, PTQ was given notice of dismissal. He was paid in lieu and not required to work.

[2] PTQ lodged a statement of problem in the Authority, seeking financial reimbursement to cover his losses. He says he signed an employment agreement on the third day of work. On the fourth day, he was dismissed. The application was served on Metallic Sweeping through counsel on 29 January 2019.

[3] In reply, Metallic Sweeping says that PTQ's employment was terminated under a valid trial period provision, that he did not raise with it any personal grievance within 90 days, it does not consent to a personal grievance being raised out of time and in any event the circumstances of the termination of PTQ's employment would not give rise to a grievance.

[4] Despite mediation, the problem was not resolved.

[5] The following issues arise for determination:

- (a) Did PTQ raise his personal grievance within time?
- (b) If yes, was PTQ's employment terminated in accordance with an applicable trial period provision?
- (c) If not, was PTQ unjustifiably dismissed?
- (d) If yes, what remedies is PTQ entitled to?

Did PTQ raise his personal grievance within time?

[6] PTQ in his statement of problem does not give dates of events.

[7] Mr Walker is Metallic Sweeping's area manager. He says that PTQ came in on Monday 22 October 2018, looking for work. Mr Walker offered PTQ employment subject to a trial period and gave PTQ the proposed employment agreement that included a trial period clause. Mr Walker told PTQ he could start work the following day. PTQ started work on Tuesday 23 October. There is no reason to doubt this evidence.

[8] On Monday 29 October, Mr Walker came to learn that PTQ was subject to a trespass notice. The notice warned PTQ to stay off reserves and recreational parks owned by a district council. PTQ's job required him to enter those properties. That resulted in Mr Walker giving

one day's notice of termination of employment to PTQ. PTQ was not required to work out the notice period.

[9] PTQ's evidence is that he was dismissed on 30 October 2018, not on 29 October. Mr Peter is the managing director of Metallic Sweeping. Mr Walker sent an email to Mr Peter at 7.16pm on 29 October. In the email Mr Walker said "I have given Paul Carver the one days notice as required in our contract, and asked him not to come in tomorrow". I rely on the email to find that PTQ was told he was dismissed on 29 October and paid one day's notice, so his employment terminated on 30 October 2018. I treat 30 October 2018 as the date on which the action alleged to amount to a personal grievance occurred.

[10] PTQ brought his statement of problem and lodgement fee to the Authority office on 28 January 2019. It was served on counsel for Metallic Sweeping on 29 January 2019.

[11] Mr Walker's evidence is that PTQ had not raised his personal grievance claim with Metallic Sweeping before lodging his application in the Authority. PTQ did not challenge Mr Walker's evidence. There is no evidence from PTQ that he told Metallic Sweeping about his sense of grievance over the dismissal. I find that PTQ first attempted to raise his grievance with Metallic Sweeping by lodging his application in the Employment Relations Authority.

[12] Every employee who wishes to raise a personal grievance must raise it with their employer within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred.¹ PTQ's personal grievance first came to the notice of Metallic Sweeping on 29 January 2019. That is the 92nd day, starting on 30 October 2019. Because PTQ did not raise his personal grievance with Metallic Sweeping within time, he cannot proceed with a grievance claim now unless Metallic Sweeping consents to it being raised out of time or the delay was occasioned by exceptional circumstances and the Authority consents to it being raised out of time.

[13] Metallic Sweeping does not consent.

¹ Employment Relations Act 2000, s 1114(1).

[14] PTQ has not applied to the Authority for leave to raise his personal grievance claim out of time. There is no evidence to suggest that PTQ's delay in raising his personal grievance was occasioned by exceptional circumstances.

[15] PTQ's personal grievance application must be dismissed.

Summary

[16] It is not necessary to consider whether PTQ was subject to a valid 90 day trial period, so not entitled by law to bring a personal grievance.² It is not necessary to consider the submission that PTQ's employment agreement ended by operation of the law concerning frustration, rather than by dismissal effected by Mr Walker giving a day's notice under the contract. It is not necessary to apply the statutory test for justification, in the event that the employment had ended by dismissal, not frustration.

Costs

[17] Mr McGinn for Metallic Sweeping seeks costs. I am asked to set costs at more than the half day under the Authority's standard daily tariff approach. Mr McGinn says that PTQ delayed the matter and did not comply with directions. He says that additional time was caused by having to refresh himself about the file. Mr McGinn says that the case was never arguable and should never have been brought.

[18] The usual starting point is that costs should follow the event. There is no reason to depart from that principle. Metallic Sweeping is entitled to an award of costs.

[19] Often, the Authority applies a well-known daily tariff approach when assessing costs. I would depart from that approach only for good reasons, as I should avoid undermining the certainty communicated by the publicised tariff. I agree that the case should not have been pursued by PTQ as he had not raised his grievance with Metallic Sweeping, within time. However, a costs award is not a vehicle for the expression of disapproval of a party's case.

[20] The matter, when it came before me, was set for an investigation meeting to canvass the 90 day trial period issue and whether PTQ had raised his grievance within time. Earlier,

² Employment Relations Act 2000, s 67B(2).

PTQ had not complied with another Member's directions. He did not lodge statements of evidence. The result was that the respondent was not required to lodge its statements and the scheduled meeting was adjourned by the Member. I do not regard those circumstances as contributing in any significant way to Metallic Sweeping's costs. I acknowledge that delay in progressing the matter might cause time to be spent to refresh on a file, but the present case was not complex. I see no sufficient reason to depart from the application of a daily tariff approach to assessing costs. In saying that, I am mindful that the meeting took less than half a day but fix the applicable daily tariff at half of the amount for a first day. There will be an order for costs of \$2,250.00.

Non-publication

[21] PTQ applied for an order prohibiting the publication of his name and identifying details, on the ground that publication might negatively affect his ability to obtain future employment. Ordinarily, proceedings in the Authority are conducted in public and its determinations may be published, in accordance with the principle of open justice. PTQ's concern is not a sufficient ground to depart from that principle, so the application will be dismissed.

[22] However, PTQ should have an opportunity to challenge the refusal. I will prohibit publication of his name for approximately four weeks, so that he is able to challenge the refusal.

Philip Cheyne
Member of the Employment Relations Authority