IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 14/10
File Number: 5278584

	BETWEEN	Waaka Peacock Applicant
	AND	AFFCO New Zealand Limited Respondent

Member of Authority:	Denis Asher
Representatives:	Marie Gittings-Nolan for Mr Peacock Graeme Malone for the Company
Investigation Meeting	Whanganui, 28 January 2010
Submissions Received	On the day of the investigation
Determination:	1 February 2010

DETERMINATION OF THE AUTHORITY: Exceptional Circumstances

The Problem

[1] Mr Peacock says he was verbally abused and assaulted by his manager. He alleges other unjustified actions to his disadvantage, including a claim he was required to undertake unsafe work. The respondent (the Company) says all of Mr Peacock's claims other than the allegation, which it denies, of an unsafe

workplace have been filed outside of the statutory 90-day requirement. It does not consent to these matters being raised out of time.

[2] By way of a preliminary decision, are any of Mr Peacock's grievances out of time? If they are, should Mr Peacock's application for exceptional circumstances per ss 114 & 115 of the Employment Relations Act 2000 (the Act) be granted?

The Investigation

[3] During a telephone conference on 7 October 2009 I directed the parties to mediation and, in the event the matter did not settle, a one-day investigation in Whanganui on 28 January 2010: mediation did not resolve this problem.

[4] The parties attempted without success to settle this matter on their own terms during the 28 January investigation.

Background

[5] Mr Peacock is employed by the Company as a seasonal worker in one of its boning rooms.

[6] Mr Peacock alleges that, during August 2008, he was verbally abused and assaulted by a Company manager.

[7] Shortly after that incident Mr Peacock was issued with a written warning for failing to follow instructions: he alleges he has been unjustifiably disadvantaged by that warning. He seeks its withdrawal.

[8] Other allegations of unjustified disadvantaged include being yelled and sworn at by managers during meetings with Company representatives, being *"kicked off"* (oral evidence) a cutting saw, being threatened with, and actual loss of, overtime and being required to work in an unsafe environment.

[9] Mr Peacock claims he referred these matters to, successively, his union, an advocate, a lawyer and, finally, to his present advocate, Ms Gittings-Nolan: he says that, except for Ms Gittings-Nolan, they failed to represent his grievances to the Company. As a result of their failure to act within 90-days he now asks the Authority for leave to raise his grievances by way of exceptional circumstances.

Discussion

[10] The Company agrees that Mr Peacock's union did not raise any grievances with it on his behalf.

[11] Despite challenging Mr Peacock's claim of exceptional circumstances, the Company is not able to challenge his claim that two other parties failed to act on his instruction. Similarly, it did not take issue with the evidence of a Union delegate called by Mr Peacock who confirmed that the Union's site secretary refused to act on the applicant's behalf, in respect of his original allegation he had been unjustifiably disadvantaged as a result of being verbally abused and assaulted by a Company manager.

[12] While this determination does not make any findings in respect of Mr Peacock's substantive allegations, the evidence before me is such that I can observe that – unless the applicant is able to adduce additional evidence – he is unlikely to succeed on any of his claims of unjustified disadvantage. That is because the Company investigated the original complaint of assault and abuse and found there was no evidence to support it, concluded the alleged assault was any way not foreseeable but found instead that there was evidence to justify the warning given Mr Peacock. There is no evidence to dispute the Company's response that Mr Peacock was not denied overtime, or threatened with its loss. There is also no evidence to dispute its claim that it looked into and satisfied itself the workplace was not unsafe, and that it was undertaking a trial of new equipment and Mr Peacock was not obliged to work in that environment if it created discomfort for him.

[13] There is evidence of Mr Peacock being spoken to directly, loudly and by way of obscene language. The latter is unnecessary, offensive and raises the risk – if repeated – of unjustified disadvantage.

[14] But – in mitigation – it was pointed out by Company witnesses, and confirmed by Mr Peacock's union delegate witness, that the applicant had difficulty accepting directions. He would often challenge them if he disagreed with instructions and reserved to himself the right to determine what was safe or not despite others (including his union), and regardless of comparative expertise, disagreeing with his assessment. Furthermore, in these exchanges, Mr Peacock often spoke loudly, talked over others and did not lend himself to a measured exchange. What can be said in his favour is that Mr Peacock does not use the obscene language to his managers that he has complained of being used at him.

[15] As a result of the above, and setting aside the 90-day issue, I have no difficulty in advancing a firm view that – without substantial corroborative evidence over and above his own – Mr Peacock's various claims of unjustified disadvantage are unlikely to succeed.

[16] In the alternative, in the event of succeeding with his claims, the compensation payable to the applicant is nothing like what he originally claimed and contributory fault findings are likely to deprive Mr Peacock of most if not all of the fruits of any success.

[17] These preliminary conclusions, if sustained, have – as I advised Mr Peacock at the investigation – significant costs implications: costs typically follow the event and in this case could readily total $3,000 being awarded to the successful party when they are represented, in respect of the substantive employment problem.

Findings

[18] The evidence on the 90-day issue is clear: Mr Peacock sought to raise his personal grievances with a succession of representatives who refused or failed

to act on his instruction. Evidence of Mr Peacock's photocopied fax communications to one of these advocates well within the 90-day period of one of his alleged grievances is clear proof of his efforts.

[19] I do not accept the respondent's argument that, in a nutshell, having failed to raise his concerns directly with the respondent at several meetings, Mr Peacock's situation therefore does not meet the exceptional circumstances provisions in the Act: ss 114 (4) (a) & (b) and ss 115 (b). That is because, as provided in the legislation, the applicant *made reasonable arrangements to have the grievance raised on his … behalf by an agent … and the agent unreasonably failed to ensure that the grievance was raised within the required time* (ss 115 (b)).

[20] The Act is clear: *In any case where the Authority grants leave under subsection (4), the Authority* ***must*** *direct the employer and employee to use mediation to seek to mutually resolve the grievance* (emphasis added; ss 114 (5)).

Determination

[39] I find in favour of Mr Peacock's application for leave to raise his personal grievances and direct the parties to mediation. Mediation is to be undertaken by close of business on Thursday 4 March 2010.

[40] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority