

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 415
3191699

BETWEEN TANE PUTAANGA
Applicant
AND MOVE FREIGHT LIMITED
Respondent

Member of Authority: Peter van Keulen
Representatives: Applicant in person
Terry Shelley and Peter Witton for the Respondent
Investigation Meeting: 8 May 2023 in Christchurch
Submissions Received: 8 May 2023 from the Applicant
8 May 2023 from the Respondent
Date of Determination: 3 August 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tane Putaanga was employed by Move Freight Limited as a Class 5 Driver.

[2] On 28 September 2019 Mr Putaanga suffered a workplace accident. As a result, Mr Putaanga was unable to work and it was not until February 2020 that he was deemed fit enough to commence a return-to-work programme.

[3] The return-to-work programme did not run smoothly for various reasons and in March 2022 Move Freight commenced a fitness for work process with Mr Putaanga. This concluded with Move Freight terminating Mr Putaanga's employment on 12 May 2022.

[4] The workplace accident, the return-to-work programme and the fitness for work process led to three areas of complaint for Mr Putaanga:

- (a) In regard to the workplace accident Mr Putaanga believed Move Freight had failed to protect him adequately and was responsible for the accident and the injuries he suffered.
- (b) During his absence and then the return-to-work programme Mr Putaanga believed he was not paid correctly by Move Freight.
- (c) In connection with the termination of his employment Mr Putaanga believed Move Freight had not properly allowed him to undertake the return-to-work programme and if it had (or did) then it would not have terminated his employment, and, in any event, the termination of his employment was not justified.

[5] Mr Putaanga and Move Freight were able to resolve his complaints about wage payments through mediation. The other two complaints were not resolved primarily because Move Freight asserted that Mr Putaanga had not raised the relevant and necessary personal grievances in time.¹

[6] In the end Mr Putaanga lodged a statement of problem in the Authority setting out two claims:

- (a) An unjustified action causing disadvantage arising out of the workplace accident and allegations that Move Freight did not adequately protect him.

¹ Section 114 of the Act.

(b) An unjustifiable dismissal.

[7] In its statement in reply Move Freight maintained its position that Mr Putaanga had not raised the necessary personal grievances within the required time frame and therefore the Authority does not have jurisdiction to investigate and determine Mr Putaanga's claims.

[8] Mr Putaanga has said, in response to Move Freight, that he did raise his personal grievances in time, or alternatively if he did not then I should allow the grievances to be raised outside of the 90-day period because there are exceptional circumstances relating to the timing of him raising the grievances.²

My investigation into the preliminary matter

[9] The parties agreed that I would resolve the question over whether Mr Putaanga raised his personal grievances within the requisite time frame as a preliminary matter.

[10] I investigated this preliminary matter by hearing evidence from Mr Putaanga and Terry Shelley of Move Logistics.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out the relevant facts and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What are the issues for this preliminary matter?

[12] Section 114(1) of the Act sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

² Sections 114(3), 114(4) and 115 of the Act.

[13] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

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.

[14] So, there are two parts:

- (a) Whatever communication being relied on as raising the personal grievance must be made within 90 days of the action giving rise to the grievance occurring or coming to the employee's notice.
- (b) The communication must make the employer aware that the employee is alleging a personal grievance.

[15] The key principles for establishing if a communication, which the employee says raises a personal grievance, has sufficient detail to make the employer aware that the employee is alleging a personal grievance have been addressed in various court decisions. The key principles are:³

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

to be specified nor does the complaint even need to be labelled a personal grievance.

- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.

[16] Putting all of this together the issues for me to resolve in terms of this preliminary matter are:

- (a) What communications does Mr Putaanga rely on as raising each of his personal grievances?
- (b) Did these communications occur within 90 days of the workplace accident (for the unjustified disadvantage grievance) and within 90 days of the termination of his employment (for the unjustifiable dismissal grievance)?
- (c) Did these communications sufficiently outline Mr Putaanga's complaints, in line with the principles above, so that that Move Freight was aware that Mr Putaanga was alleging personal grievances.

[17] If I determine that either of Mr Putaanga's personal grievances were not raised within the 90-day period then I will need to consider whether I grant leave for Mr Putaanga to raise the grievance(s) outside of the 90-day period. The granting of this leave is governed by sections 114(3), 114(4) and 115 of the Act. In short, I need to be satisfied that the delay in raising the personal grievance was caused by exceptional circumstances; with examples of the types of exceptional circumstances being set out in s 115.

What did Mr Putaanga do to raise his personal grievances?

[18] In February 2020, around four and a half months after the workplace accident Mr Putaanga was cleared to recommence work on a restricted basis. This was a return-to-work plan based around him working limited hours primarily as a passenger with another driver.

[19] There were some difficulties in organising this work due to COVID-19 lockdowns and associated restrictions.

[20] In June 2020 Mr Putaanga was moved a return-to-work plan which allowed him to drive on his own. The goal became to establish work of two 11 hour shifts each week.

[21] What followed over a period of nine months (to March 2021) were various attempts by Mr Putaanga and Move Freight to have Mr Putaanga work in some way to fulfil the return-to-work plan, however it was clear that Mr Putaanga was struggling to work consistently even at reduced hours.

[22] The details of what occurred and what did not occur in terms of Mr Putaanga working are not relevant for my resolution of the preliminary matter. What is relevant is that throughout this time there was some communication between Mr Putaanga, his union representative and Move Freight regarding Mr Putaanga's work. And what is clear from these communications is that Mr Putaanga did not raise any concerns or complaints about the workplace accident in a way that could be considered to have been raising a personal grievance.

[23] In April 2021 Mr Putaanga began writing out his personal grievance. He said it took him about six weeks to complete as he found it difficult to concentrate.

[24] On 18 May 2021 Mr Putaanga sent a letter to Move Freight that set out various complaints he had about the workplace accident and Move Freight's handling of his return to work; this letter set out the complaints as various personal grievances based on unjustified action causing disadvantage to Mr Putaanga's employment.

[25] On 29 May 2021 Move Freight responded to Mr Putaanga's letter advising him that he had not raised his personal grievance within the 90-day period and it would not consent to him raising it out of that time so it was not obliged to engage and try and resolve his complaints. However, Move Freight did outline its responses to Mr Putaanga's complaints, essentially on the basis that this was without prejudice to their view regarding the time frame, in order for Mr Putaanga to understand that even if his grievances were raised in time Move Freight did not accept there was any grounds for his complaints.

[26] Whilst there were some additional discussions around the personal grievances for unjustified action these did not advance matters as Move Freight continued to assert that the personal grievances were not raised in time and could not be advanced by Mr Putaanga.

[27] In May 2021 Mr Putaanga obtained some legal advice from a lawyer. It appears that this may have included advice about his personal grievances for unjustified action, but it focussed on a complaint Mr Putaanga had about not having been paid his correct wages during the return-to work programme.

[28] The parties then attended mediation in December 2021 and were able to resolve the dispute over Mr Putaanga's wages.

[29] In December 2021 Mr Putaanga went on annual leave – by this time he had only been working limited hours; Move Freight said this was largely shifts of five and a half hours.

[30] In February 2022 Move Freight extended Mr Putaanga's leave on the basis that he would engage with them over his capability to return to work. Move Freight said that by this time it had no clear indication of when Mr Putaanga might be able to return to work and if he did what that might look like in terms of duties and shift patterns.

[31] The process to ascertain Mr Putaanga's fitness for work culminated in a meeting on 12 May 2022 in which Move Freight confirmed to Mr Putaanga that it was terminating his employment effective immediately.

[32] In the meeting on 12 May 2022 when Move Freight confirmed the termination of Mr Putaanga's employment, Mr Putaanga disputed this decision stating that if Move Freight followed the return-to-work programme he would be able to work. He said quite clearly that he disagreed with the termination of his employment and he wanted to attend mediation to discuss it. Move Freight responded saying it had followed a fair process and was confident that termination was the right decision. It also said it would engage in mediation if that was what Mr Putaanga wanted.

[33] The parties subsequently attended mediation. It was following this that Mr Putaanga lodged his statement of problem in the Authority.

Did Mr Putaanga raise his personal grievances within the 90-day period?

[34] The first thing to record in answering this question is that the two events that give rise to Mr Putaanga's personal grievances are the workplace accident that occurred on 28 September 2019 and the termination of employment that occurred on 12 May 2022.

Personal grievance relating to workplace accident

[35] Based on the workplace accident occurring on 28 September 2019 Mr Putaanga's personal grievances needed to be raised by 28 December 2019. Mr Putaanga did not do this, the personal grievances relating to the workplace accident were only raised in the letter of 18 May 2021.

[36] On the evidence I heard in my investigation meeting, I am satisfied that Mr Putaanga did not raise a personal grievance in connection with the workplace accident within the requisite 90-day period.

Personal grievance for unjustifiable dismissal

[37] In my investigation meeting I had an opportunity to view the recording of the meeting of 12 May 2022. Based on this, it is clear to me that:

- (a) After Move Freight confirmed the termination of Mr Putaanga's employment he complained to it about the decision.
- (b) Mr Putaanga told Move Freight what the nature of his complaint was – dismissal in relation to process and substance, particularly as that related to the failed attempts with the return-to-work programme.
- (c) Mr Putaanga was effectively saying he could return to work if given the opportunity and this was in the context of having previously raised concerns about the implementation of the return-to-work programme.
- (d) Move Freight knew Mr Putaanga wanted to resolve this complaint, so it needed to respond, which it partly did in the meeting.
- (e) Mr Putaanga told Move Freight that he wanted to resolve his complaint through mediation, which Move Freight agreed to attend.

[38] Based on this I am satisfied that Mr Putaanga did raise a personal grievance for unjustifiable dismissal within the 90-day period.

Conclusion

[39] Mr Putaanga did not raise a personal grievance in relation to the workplace accident within the 90-day period.

[40] Mr Putaanga did raise a personal grievance for unjustifiable dismissal within the 90-day period and this grievance includes complaints about the implementation of the return-to-work programme.

Are there exceptional circumstances relating to the unjustified action personal grievance?

[41] In terms of Mr Putaanga's failure to raise his personal grievance for unjustified action causing disadvantage due to the workplace accident, the explanation was that it simply took Mr Putaanga a long time to write the grievance down as he struggled to concentrate.

[42] I am not satisfied that this amounts to exceptional circumstances as required in s 114(5) of the Act as it only explains the time it took Mr Putaanga to write up his grievance once he commenced writing it in March 2021.

[43] There is no explanation for the delay up to March 2021, which is over 18 months after the workplace accident. And it appears that during the time from the workplace accident until the letter of 18 May 2021 Mr Putaanga would have had a number of opportunities to raise his grievance:

- (a) During this time Mr Putaanga had various discussions with Move Freight about the workplace accident in terms of his return to work and he could have raised his grievance verbally through these discussions as he did with his unjustifiable dismissal personal grievance.
- (b) During this time Mr Putaanga had the assistance of, and presumably advice from, a union representative, who could have assisted with raising Mr Putaanga's grievances.

Conclusion

[44] In these circumstances I am not satisfied that there are exceptional circumstances and I

will not grant leave for Mr Putaanga to raise his personal grievance for unjustified action causing disadvantage relating to the workplace accident, outside of the 90-day period.

Orders

[45] Mr Putaanga did not raise his personal grievance for unjustified action causing disadvantage relating to the workplace accident within the 90-day period. And there are not any exceptional circumstances relating to the delay, so I will not grant leave to raise this grievance outside of the 90-day period.

[46] Mr Putaanga did raise his personal grievance for unjustifiable dismissal within the 90-day period and this claim can proceed to be investigated and determined.

[47] An Authority officer will now contact the parties to schedule a case management conference so that directions can be set for the investigation of Mr Putaanga's claim.

Costs

[48] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority