

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 335
3044254

BETWEEN GERAINT SCOTT
 Applicant

AND TRANSDEV WELLINGTON
 LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Ben Thompson, counsel for Applicant
 Gillian Service, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 1 February and 22 February 2019 from Applicant
 15 February 2019 from Respondent

Determination: 6 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Geraint Scott, was dismissed from his employment as a locomotive engineer on 26 September 2017 though that is not the subject of the current application which is expressed as being *an application under s 114(3) to raise a personal grievance outside the 90-day timeframe*.¹

[2] Transdev says a grievance challenging the dismissal was not raised until after the expiry of the 90 days provided for in s 114(1) of the Employment Relations Act 2000 (the Act). It is unwilling to accept the grievance out of time.

[3] The parties agreed the s 114(3) application be considered as a preliminary issue determined on the papers.

[4] The determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Discussion

[5] The conduct for which Mr Scott was dismissed, and which he denies, occurred on 5 September 2017. An investigation followed which culminated in Mr Scott's dismissal on 26 September 2017. The decision to dismiss was made by Transdev's Operations Manager, Angelique Jackson.

[6] Soon thereafter Mr Scott told his representative, union organiser Todd Valster, to raise a personal grievance. He confirmed this instruction by e-mail on 9 October.

[7] On 21 December 2017, which was a couple of days before the 90 day period expired, Mr Valster emailed Ms Jackson saying:

I am e-mailing you to formally to raise a personal grievance on behalf of Geraint Scott. Geraint believes TransDev's action of dismissing him on September 26th, 2017 was unjustified and has put him at a severe disadvantage.

Please accept this e-mail as formal notification of raising this personal grievance and acknowledge receipt of.

[8] Ms Jackson replied by e-mail saying *Confirming receipt of your email as per our discussion this afternoon*. The affidavits of both Ms Jackson and Mr Valster suggest the prior discussion was little more than advice a grievance was coming.

[9] On 12 March 2018 Mr Valster again emailed Ms Jackson saying he wished to progress the grievance and asking whether Transdev would attend mediation.

[10] Ms Jackson replied on 27 March. Having expressed comfort with Transdev's decision she went on to say:

At this point I'm unsure of what Geraint's grievance is — what part of the decision or process do you think is wrong? The usual process would be to send us some form of documentation (letter, email etc.)

¹ Paragraph 1.1 of Mr Scott's statement of problem dated 6 November 2018

which outlines the grievance and is supported by any evidence that is appropriate. This would also clearly state the reasons why he believes that he has a grievance. He must give enough detail about the problem for the employer to understand the issue(s).

[11] That said it is Mr Scott's position Ms Jackson did not go so far as to state the grievance has not been properly raised and that she had, earlier in the response, indicated mediation was still a possibility.

[12] Again the matter sat until counsel was instructed by Mr Scott's union in September 2018 and he wrote to Transdev on 3 October. It was the response to that, dated 15 October 2018, which alleged Mr Valster's email of 21 December 2017 was inadequate and did not properly raise the grievance.

[13] Mr Thompson replied on 29 October suggesting exceptional circumstances existed and the Authority would allow the case to proceed. Transdev replied on 31 October denying that was the case and refusing to either consent to the late raising of a grievance or attend mediation.

Discussion

[14] As already said this came to the Authority as an application pursuant to s 114(3) to raise a personal grievance beyond the 90 day period stipulated in s 114(1) of the Act.

[15] After having had the advantage of being informed by the affidavits Transdev now concedes Mr Scott made arrangements for the grievance to be raised and says Mr Valster's inaction constitutes an exceptional circumstance given s 115(b) of the Act. It does, however, continue to resist the application on the grounds it would be unjust to grant leave given the delay to date would prejudice its defense.

[16] That said, and having considered the background as outlined in the statement of problem, statement in reply and the affidavits appended to the parties submissions, I conclude the application is superfluous as the grievance was raised in time.

[17] What is required when raising a grievance was discussed in *Creedy v Commissioner of Police*.² There the Court said:

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

² *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC)

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 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.

[18] In *Creedy* the Court held a brief letter from the employee's barrister advising the employer his client had a personal grievance based on unjustified disadvantage did not meet the statutory requirements for raising a grievance

[19] Transdev's approach appears similar being based on a view Mr Valster's email of 21 December was inadequate in that it *...gave no indication of the factors or factors that Mr Scott believed made his dismissal unjustified, nor did it indicate why Mr Scott believed the dismissal put him at a disadvantage.*³ That approach reflects Ms Jackson's letter of 27 March 2018 and is reiterated in its submission where it says *this notification was in general terms* and failed to advise Mr Scott's view he as unjustifiably dismissed was confined to a specific point it may now have difficulty providing evidence about.⁴

[20] This misses a crucial point. In respect to a personal grievance it falls on the applicant to establish the occurrence of an action that might constitute a grievance as defined in s 103(1). Once that occurs the onus switches to the respondent which is then required to justify the action.

[21] *Creedy* involved a claim of unjustified disadvantage where there are multiple possibilities. It follows, as the Court found, that simply advising the existence of an alleged grievance is inadequate and there must be some indication of what act constitutes a disadvantage giving rise to a possible grievance.

[22] The present case differs. The allegation is unjustified dismissal. A dismissal is a dismissal and in this instance Transdev acknowledges the fact of dismissal.

[23] That acknowledgment means Mr Scott has established a prima facie case and technically need do no more. He need not, though most applicants do, explain why

³ Statement in Reply at [2.4]

⁴ Respondents submission of 15 February 2019 at [6(b)]

he considers the dismissal unjustified with the duty to justify the dismissal having already passed to the employer.

[24] In other words I conclude Mr Valster's letter, proffered prior to the expiry of the 90 days, was adequate. It advises a specific ground of grievance which the employer acknowledges. In doing so the employer accepts the duty of justification.

[25] The conclusion the grievance was in fact properly raised means Mr Scott has three years to pursue it.⁵ He is well within that timeframe which would have meant I would likely have concluded he could proceed had I been required to decide the s 114(3) application.

Conclusion

[26] For the above reasons I conclude Mr Scott's application is superfluous as he did raise his grievance within the timeframe specified in s 114(1) of the Act. He may proceed with his substantive claim and it is suggested the parties proceed to mediation in the first instance.

[27] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

⁵ Section 114(6) of the Employment Relations Act 2000