

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 144
3103797

BETWEEN	THEO SEEDS Applicant
AND	SUPERLOANS NAPIER LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Wally Hotton, advocate for the Respondent Andrew Bell, counsel for the Respondent
Investigation Meeting	On the papers
Submissions Received:	5 March and 7 April 2021 from the Respondent 25 March 2021 from the Applicant
Determination:	14 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 7 May 2020 Mr Seeds lodged, with the Authority, an application asking his claim of unjustified dismissal be addressed. The dismissal occurred on 27 January 2020.

[2] The statement in reply, while asserting the dismissal was justified, also raised the defence ... *that no personal grievance has been raised and the statutory time period to do so has expired. The employer does not consent to a grievance being*

*raised outside the time limitation at section 114 of the Employment Relations Act 2000.*¹

[3] After discussion with the parties it was decided the question of whether or not a grievance was properly raised would be determined as a preliminary issue. Consideration would be on the papers, with Superloans filing the first submission.

Background

[4] As already said, Mr Seeds was told he was dismissed in a letter dated 27 January 2020. The decision to dismiss followed meetings on 19 December 2019 and 10 January 2020 which led to advice, dated 13 January, that Superloans had reached a preliminary view dismissal was justified.

[5] That led to a further meeting on 24 January held to allow Mr Seeds to reply to the preliminary view and both parties' representatives attended. Mr Seeds failed to satisfy Superloans concerns, which led to confirmation of his dismissal.

[6] On 29 January Mr Hotton wrote to Superloans. He criticised Mr Bell's behaviour, labelled the meeting unfair, and argued he had been precluded from participating properly as Mr Seeds' advocate. He asked for another meeting before referring to the letter of dismissal and stating that if his request for another meeting was not granted he would seek the assistance of a mediator.

[7] The following day Mr Bell responded on Superloans behalf. Amidst other missives the response advises *we decline to meet with you further*. The reply also states *Superloans will assess on the merits any properly made application for mediation and decide whether it considers participation appropriate in all the circumstances*.

[8] It is clear the Mediation Service of the Ministry of Business, Innovation and Employment (MBIE) was approached by Mr Hotton as they advised Superloans they had received an application on 7 April 2020.

[9] On 14 April Mr Bell replied to MBIE advising his client saw no merit in attending as *the problem stipulated by the Applicant lacked merit*.

¹ Statement in Reply at 1.2

Discussion

[10] As already said, the issue is whether or not Mr Seeds raised his grievance as required by law. He originally said he did so via his application for mediation; Superloans disagreed.

[11] The applicable law is well summarised recently in *Disabilities Resource Centre Trust v Maxwell*.² There the Court said:

Grievances generally must be raised by employees with their employers within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period. A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. The raising of a grievance marks the first step to resolving it.³

[12] The only correspondence directly between the parties which could possibly be said to have constituted the raising of a grievance for unjustified dismissal was the letter of 29 January. While not initially argued, it is now submitted the answer is yes, the letter is adequate.

[13] In concluding it is insufficient I note the Court's comments in *Turner v Talley's*.⁴ At para [61] the Court said:

The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it, and how the employee wishes that to be dealt with. These are what might be called the Creedy tests.⁵

[14] I reach my conclusion as the letter primarily challenges the process adopted on 24 January. There is no reference to a personal grievance let alone advice one is being raised or contemplated and there is no mention of possible remedies. Having referred to the dismissal all that is said is if the request for a further meeting is rejected further action would follow. It is unclear whether or not the meeting would address the substantive allegations or the process used on 24 January which is the

² *Disabilities Resource Centre Trust v Maxwell* [2021] NZEmpC 14 at [11]

³ Section 114(2) of the Employment Relations Act 2000

⁴ *Turner v Talley's Group Limited* [2013] NZEmpC 31

⁵ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC)

subject of the bulk of the letters content, though the first seems more likely. I also have to take note of Mr Hotton's rather damaging acknowledgement that the filing with the Authority, which occurred after the expiry of 90 days, was *the first detailed piece of information arguing the case*.⁶

[15] For the above reasons I am not satisfied the letter of 29 January meets the requirements outlined by the Court in [13].

[16] Turning now to the application for mediation.

[17] It is well established a grievance can be raised by lodging an application with the Authority. The only reason why the same should not apply to mediation is the fact it is generally accepted the process is without prejudice, though I am not aware of any decision as to whether or not that extends to the raising of a grievance. It may well be it is improper but given the conclusion I shall reach I will proceed as if it were, as that was at least originally, the crux of Mr Hotton's argument.

[18] Superloan's position is that the application to MBIE was a repeat of that enunciated in the 29 January letter. It was a continued attack on Mr Bell's conduct during the meeting of 24 January and a request that it be addressed. Superloans says it contained nothing that suggested the lodging of a personal grievance challenging the dismissal and, on the face of it, this is supported by Mr Hotton's acknowledgment at paragraph 11 of his submission (refer [14] above).

[19] This disagreement gave rise to an obvious question – could someone please provide a copy of the application to MBIE as that would clarify the issue. I advised experience had taught me the mediation service took confidentiality very seriously and there was little to no chance a request from me would be viewed favourably.

[20] Both parties advised they had no access to the original filing. Mr Hotton was then adamant, despite advice as to why it could potentially be advantageous to his client in that it could well support his argument the grievance had been properly raised, that he would not seek a copy of the original filing from MBIE.

[21] Mr Hotton stated that rather than seeking a copy of the original application he would rely on correspondence he had with MBIE once the application was filed. All that does is confirm there was an application – there is no reference to its substance.

⁶ Applicants submission of 25 March 2021 at [11]

The only information I have in that regard is Superloans uncontested statement it was inadequate.

[22] That returns me to *Talley's* and a view the Court's comments remain good law. In support I again refer to the Court's decision in *Disabilities Resource Centre Trust*⁷ where it was said:

For an employer to be able to address a grievance as the legislation contemplates, the employer must know what it is it is addressing.⁸ It is important that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.⁹

[23] It is for Mr Seeds to establish there is, prima facie, a case to answer. That means, as said by the Court in [11], and as a first step, he is required to establish he has raised a valid grievance as required by law. Sadly his advocate has, in a situation where the evidence suggests otherwise and despite attempts to describe the requirements, steadfastly refused to try to confirm a grievance has been properly raised.

[24] The only remaining option was to then make an application the grievance be allowed to proceed out of time.¹⁰ Despite advice this would be prudent, if only as a cover in the alternate and in his clients' best interests, Mr Hotton was adamant it would not occur as it was not necessary.

[25] The failure to evidence the raising of a valid grievance, coupled with the refusal to try and remedy the deficiency, means the Authority cannot proceed.

Conclusion and orders

[26] For the above reasons I conclude Mr Seeds application he was unjustifiably dismissed is out of time and, given the refusal to lodge an application it be allowed to proceed out of time pursuant to s 114(3), it must be dismissed. Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

⁷ Above n 2 at [17] to [19]

⁸ Above n 5 at [36]

⁹ Above n 2

¹⁰ Section 114(3) of the Employment Relations Act 2000