

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 328
3116692

BETWEEN	WAYNE SOMERVILLE Applicant
A N D	GOODMAN FIELDER LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Maryline Suchley, advocate for Applicant Sarah McFetridge, counsel for Respondent
Investigation Meeting:	15 June 2021 in Christchurch
Submissions Received:	15 June 2021 from the Applicant 15 June 2021 from the Respondent
Date of Determination:	28 July 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Wayne Somerville worked for Goodman Fielder Limited. Mr Somerville had concerns about how he was treated during his employment and he says he raised these concerns with Goodman Fielder. Mr Somerville became frustrated with the lack of response to his concerns by Goodman Fielder and he resigned on 3 September 2019.

[2] Mr Somerville then sent an email to Goodman Fielder on 31 October 2019 raising personal grievances for unjustified dismissal and unjustifiable action causing disadvantage.

[3] Goodman Fielder says the email of 31 October 2019 did not raise personal grievances and as nothing further was received from Mr Somerville until much later in 2020 he failed to raise his personal grievances within the 90 day time period required by s 114 of the Employment Relations Act 2000 (the Act). On this basis it did not engage with Mr Somerville over his personal grievances.

[4] Mr Somerville's response to the lack of engagement was to lodge a statement of problem based on his personal grievances.

[5] Goodman Fielder objected to the statement of problem on the basis that the personal grievance giving rise to the employment relationship problem had not been raised within the 90 day time limit and therefore the Authority does not have jurisdiction to investigate it.

[6] The parties agreed that I would resolve the question raised by Goodman Fielder as a preliminary matter.

Issues for resolution of the preliminary matter

[7] The starting point for this preliminary matter is sections 114(1) and 114(2) of the Act. Section 114(1) of the Act requires any person wishing to raise a personal grievance to 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.

[8] Section 114(2) 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.

[9] In terms of taking steps to make Goodman Fielder aware of his personal grievances Mr Somerville says he did this in his email of 31 October 2019 or alternatively, at least in relation to his unjustifiable action causing disadvantage personal grievance, he did so when he raised his various concerns during his employment.

Did Mr Somerville raise a personal grievance in the email of 31 October 2019?

[10] Mr Somerville's case is that he raised a personal grievance on 31 October 2019 when he sent an email to Goodman Fielder advising it of his grievance. In that email he stated:

I'm writing to you regarding a personal grievance I am raising which resulted during my employment at Goodman Fielder

Specifically

- (1) unjustified dismissal (constructive dismissal)
- (2) bullying
- (3) unjustified disadvantage
- (4) breach of good faith

This personal grievance is primarily to preserve my rights as I seek advice on the issues that give reason to believe there is a personal grievance to answer I will provide more details around the specifics at a later date

Remedies

- (1) lost wages
- (2) compensation for hurt and humiliation
- (3) reinstatement

[11] In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic*¹ the Employment Court summarised the key principles for establishing if a grievance has been raised pursuant to s 114(2). Judge Holden said:

[36] The grievance process is designed to be informal and accessible.² A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used.³ Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.⁴

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.⁵

¹ *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

² *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

⁴ *Liunaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958 (EmpC) at 963; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC) at [45]; *Idea Services Ltd (In Statutory Management) v Barker*, above n 2, at [41].

⁵ *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.⁶

[12] So a personal grievance can be raised in writing or orally and by a series of communications, with consideration being given to the totality of the communications. The communication or series of communications must convey the substance of the complaint such that the employer knows what it is responding to, allowing it to address the merits with a view to resolving the complaint. And 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.

[13] Applying this to Mr Somerville's email of 31 October 2019 I conclude the email did not raise personal grievances as all it did was specify that he was raising personal grievances for unjustified dismissal and unjustifiable disadvantage.

Did Mr Somerville raise a personal grievance for unjustifiable action causing disadvantage through other communications with Goodman Fielder?

[14] In his statement of problem Mr Somerville describes his personal grievance for unjustifiable action causing disadvantage as being:

- (a) Deliberate attempts to continually place him in difficult working situations as well as actively preventing any job rotation or progression.
- (b) Ignoring his concerns or opinions.
- (c) Favouritism for other workers when it came to job placement, job rotation, on the day application for leave (i.e. leaving early) and access to break entitlements.
- (d) Workplace bullying.
- (e) Failing to act on Mr Somerville's complaints and therefore not providing a safe workplace.

⁶ *Creedy v Commissioner of Police*, above n 3, at [36]-[37].

[15] In contrast, in his evidence Mr Somerville described the concerns that he had during his employment with Goodman Fielder as centring on two main issues:

- (a) That he perceived that two other employees took longer breaks than the set times and were allowed to do this despite the supervisor being aware of it.
- (b) That he was not being given an opportunity to progress in his employment by being placed in a different role as part of the production run or processing cycle.

[16] Mr Somerville says he raised these two concerns with his manager on three occasions. Mr Somerville's manager, Nigel Hall, says these matters were discussed with Mr Somerville on at least two occasions. But he says they were raised as minor issues made in passing and they were more in line with a "gripe or grizzle" about day to day work in the context of general conversation about work. Mr Somerville did not express them as complaints and he did not ask Mr Hall to do anything about them.

[17] In relation to the two employees taking longer breaks Mr Somerville expressed this as being annoying and that the supervisor needed to deal with them. Mr Hall agreed with Mr Somerville on this point, seeing this as a supervision issue between the relevant employees and their supervisor. Mr Hall did not see this as being a complaint about work practices affecting Mr Somerville and he did not understand Mr Somerville to be raising complaints, let alone personal grievances nor did he understand Mr Somerville to be asking for some intervention or action by him on the concern.

[18] When Mr Somerville discussed the progression issue with Mr Hall, Mr Hall explained to Mr Somerville that the progression through roles was difficult because roles did not come up often but when they did he should apply and he would be assessed in the normal way. Again Mr Hall was left with the view that Mr Somerville was not raising a complaint nor did he want Mr Hall to intervene or take any steps in relation to the issue; the progression point seemed to be about Mr Somerville expressing frustration or annoyance rather than raising a complaint or a personal grievance.

[19] It is also clear from the evidence that Mr Somerville did not express any concern that he was being bullied or that there was some failing by Goodman Fielder to provide him with a

safe workplace. And it is clear that Mr Somerville never raised either of the two issues he did discuss, in a formal capacity or even in such a way that Goodman Fielder would have known it was expected to respond to his concerns by taking some action.

[20] When I consider the totality of the communications I conclude that Mr Somerville did not raise a personal grievance for unjustifiable action causing disadvantage:

- (a) Mr Somerville's communications to Goodman Fielder did not cover the points set out in the statement of problem. There was never any reference to bullying, an unsafe workplace, favouritism, deliberate placement of him in detrimental positions, denial of rights in terms of finishing early or taking breaks, or Goodman Fielder not acting on prior complaints.
- (b) The issues raised by Mr Somerville were limited to concerns he had about two other employees taking longer breaks than him with that being condoned by their supervisor and lack of progression. These were not raised as complaints or expressed as grievances and were not raised in a way that conveyed to Goodman Fielder that Mr Somerville expected it to take some action on them or even respond to them.

Conclusion

[21] Mr Somerville's personal grievances were not raised within the 90-day period and therefore, I do not have jurisdiction to proceed to investigate Mr Somerville's claims arising out of his personal grievances.

Costs

[22] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[23] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority