

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 257/08
5104563

BETWEEN PETER ANTHONY TAYLOR
Applicant

AND LAND TRANSPORT NEW
ZEALAND
Respondent

Member of Authority: Dzintra King
Representatives: Paula Sullivan, Counsel for Applicant
 Samantha Turner, Counsel for Respondent
Investigation Meeting: On the Papers
Submissions received: 30 May 2008 from Applicant
 1 July 2008 from Respondent
Determination: 17 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Peter Taylor, has filed a disadvantage and constructive dismissal personal grievance against the respondent, Land Transport New Zealand (“Land Transport”). The respondent says that Mr Taylor’s grievances have not been raised with the 90 day time limit required by s114 (1) Employment Relations Act 2000.

[2] If I find that the grievances have not been raised within the 90 day time frame Mr Taylor seeks leave pursuant to ss114 (3) and 115 (b).

[3] The parties agreed that this issue would be dealt with on the papers.

[4] Mr Taylor says that the matters giving rise to his disadvantage grievance only came to his attention on 3 August 2007 (two days after a meeting between the parties) and that the grievance was filed on 25 October 2007. An amended Statement of Problem was filed on 3 April 2008. This claimed that Mr Taylor had been constructively dismissed at the meeting on 1 August 2007.

[5] Mr Taylor also says that the respondent was made aware of his disadvantage grievance in early July 2007 in correspondence.

[6] Land Transport NZ says that the actions that gave rise to the disadvantage grievance occurred in some instances months or years prior to the 1 August 2007 meeting, specifically:

- 359 days had lapsed since the events regarding lack of supervision and management occurred;
- at least 816 days had lapsed between the 2005 restructure and the raising of the grievance;
- the unsafe workplace allegations relate to events that date back a minimum 150 days;
- the advertising of the Senior Investigator position relates to an advertisement in October 2006, at least 359 days prior to the grievance being raised.

[7] Land Transport NZ says there is no evidence to support the claim that there are exceptional circumstances and that it would not be just for the Authority to grant leave.

Employment Background

[8] From 1 December 2004 the Land Transport Safety Authority (“LTSA”) and Transfund were merged into one organisation, Land Transport NZ, with a restructuring of staff taking place in 2005 following a transition phase (“the 2005 restructuring”). This merger resulted in a change in the reporting structure of Land Transport Compliance staff.

[9] Prior to the restructuring Mr Taylor worked in LTSA's Hamilton office as a Compliance Officer reporting to Mr Kevin Nickson, the Regional Compliance Officer.

[10] Mr Taylor applied for an Investigator's position, was appointed to the position and started work as an Investigator in the new structure from 1 August 2005.

[11] Mr Taylor complains that the Senior Investigator, Mr Rob Crouch, gave him no support until late 2006. He also claims that he received little or no assistance from other managers regarding the files he was allocated.

[12] Mr Taylor and Mr Scott Bainbridge, a colleague, approached Mr Mark O'Donnell, Manager Investigations and Enforcement, regarding Mr Crouch in mid 2006. Mr Crouch's position was subsequently varied and he ceased to have responsibility for Hamilton. Mr Taylor was aware of this in mid 2006.

[13] In February 2007 three staff helped Mr Taylor and another investigator on the "Dial a Cab audit". Mr Taylor, against the advice of Mr Bainbridge, cancelled his Christmas leave to work on the audit, at a time when he had recently returned from bereavement leave.

[14] Mr Bainbridge was alerted by Mr John Marsden, Senior Investigator, to the fact that Mr Taylor seemed stressed. A meeting was arranged in mid February 2007. As a result of this Mr Taylor arranged a session with a psychologist paid for by Land Transport.

[15] The role of Senior Investigator, Hamilton, was created to give Mr Crouch an opportunity to concentrate on the Auckland area. Mr Taylor says that the creation of that position was not discussed with him although it was advertised in October 2006 to all relevant staff and had a week's closing date. Messrs O'Donnell, Doesburg (National Manager Commercial Road Transport) and Bainbridge all say they spoke to Mr Taylor about the position. Mr Taylor advised he was not interested in the additional pressure of a senior role.

[16] Mr Taylor subsequently indicated to Mr Bainbridge that he was unhappy that Mr O'Donnell had not spoken to him before the position was advertised. No application was received from Mr Taylor.

[17] The respondent says that Mr Taylor did not indicate that he was unhappy that Mr Bainbridge had been appointed and was therefore unable to address this concern at the time.

[18] On 28 May 2007 Mr Taylor gave Mr Bainbridge a medical certificate stating he would be absent for four weeks. Despite this, the next day Mr Taylor asked Mr Bainbridge if he could come back to work the following day. Mr Bainbridge said he could only do so if he had a medical certificate clearing him to return to work.

[19] Mr Taylor provided medical clearance on 1 June 2007 and returned to work that day. In the course of a discussion with Mr Bainbridge, Mr Taylor commented that his psychologist believed he had grounds for a personal grievance. Nothing further was said until 27 October 2007 when the disadvantage personal grievance was filed.

[20] On 1 June 2007 Mr Bainbridge offered Mr Taylor support in his return to work and asked permission to speak to Mr Taylor's doctor. He also asked for clarification about Mr Taylor's concerns.

[21] On 5 June 2007 Mr Taylor's wife phoned and said Mr Taylor had decided to take the original four weeks' sick leave. She said this was because Mr Bainbridge's letter of 1 June confirmed that Mr Bainbridge and LTSA would not provide any support.

[22] Shortly before the four weeks' leave was due to finish Mr O'Donnell wrote to Mr Taylor seeking permission to contact Mr Taylor's doctor so that Land Transport could ensure a safe return to work. He noted that no details of the illness had been provided and stated: *we remain concerned that you have not provided Land Transport NZ with specific concerns relating to your role as Investigator with the Commercial Road Transport unit, which you say has been the cause of ill health resulting in a period of four weeks off work.*

[23] Ms Paula Sullivan, Mr Taylor's legal representative, provided another certificate saying that Mr Taylor was unable to return to work for 21 days from 25 June 2007. No details were provided. She stated that a response to Mr Bainbridge's and Mr O'Donnell's letters would be provided shortly.

[24] On 4 July Ms Sullivan wrote to Mr O'Donnell outlining a number of concerns regarding Mr Taylor's position and work environment.

[25] A meeting was arranged for 1 August 2007. Mr Taylor, as requested by Land Transport, provided a detailed list of the work issues he wanted addressed. This letter is virtually identical to the Statement of Problem filed on 25 October 2007.

[26] At the 1 August meeting Ms Lynn Coory, Account Manager People & Culture, Mr O'Donnell and Mr Doesburg met with Mr and Mrs Taylor and Ms Sullivan to try and work through the issues and agree on a plan for Mr Taylor to return to work when his sick leave ended.

[27] The respondent says that at the meeting it tried to engage Mr Taylor in conversation regarding the historic issues he had previously raised to try and understand his concerns and what he believed was still unresolved. In the respondent's view, Mr Taylor was uncommunicative.

[28] Two options were raised regarding Mr Taylor's return to work:

- He could return to work at land Transport NZ in his then current position of Investigator; or
- He was given the option of returning to work in a new position, Regional Transport Advisor

[29] It was agreed he would return to work on a graduated basis for two weeks, and then full time.

[30] Mr Taylor was then asked if he additional concerns he wanted addressed. He did not identify any. Land Transport therefore felt that it had addressed Mr Taylor's issues to his satisfaction and that matters had been resolved.

[31] Land Transport says there was nothing to support a claim that any new facts or information had been brought to Mr Taylor's attention at that meeting.

[32] On 17 August Ms Sullivan wrote to land Transport saying that Mr Taylor was accepting the position offered in the Regulatory Department.

[33] He returned to work in the new role on 5 September. From the time he returned to work until he raised his disadvantage grievance on 25 October and the constructive dismissal grievance on 8 April Mr Taylor did not raise any concerns and Land Transport was not aware of any grievances.

Section 114 (1)

[34] This section requires a grievance to be raised within 90 days of the grievance occurring or coming to the notice of the employee, whichever, is later, unless the employer consents to the grievance being raised. Consent has not been given.

[35] Mr Taylor says the disadvantage grievance came to his notice only after the meeting on 1 August. The respondent says the grievances came to his notice at the time the events complained of occurred.

[36] In *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 the phrase "came to the notice" was said to be synonymous with actual knowledge of the action which allegedly gave rise to the grievance.

[37] Mr Taylor was aware at the time of issues regarding Mr Crouch. He had discussions regarding these with Messrs O'Donnell and Bainbridge in 2006. Nothing new arose in August 2007. He did not raise this grievance at the time it came to his notice.

[38] Mr Taylor was aware of the time of the 2005 restructuring of the issues he now seeks to raise. That was in August 2005.

[39] The unsafe workplace issues rely on events that purportedly occurred between July 2005 and 28 May 2007.

[40] Mr Taylor was aware of the circumstances surrounding the advertisement and subsequent appointment of the Hamilton-specific Senior Investigator position at the time. The position was advertised in October 2006.

[41] Mr Taylor had sufficient knowledge of the Regional Transport Advisor's position at the time he returned to work on 5 September 2007.

[42] I accept the respondent's submission that the phrase "came to the notice of" is intended to cover situations where the employee may subsequently find information to which he or she was not previously privy and which lead the employee to regard past events in a different light.

[43] I also accept the respondent's submission that nothing occurred at the meeting of 1 August 2007 that would have caused Mr Taylor to regard past events in a different light such that he could then construe those past events as constituting a personal grievance.

[44] Previous communications between Mr Taylor and his employer had been in relation to various workplace issues. The communications prior to 25 October 2007 were not sufficiently clear to alert the employer that Mr Taylor had a personal grievance he wanted addressed. Mr Taylor raised concerns and complaints but these do not in themselves constitute the raising of a personal grievance: *Runa and Rakaraku v Haulage Transport Ltd* (unreported, 13 February 2008, WA 18/08).

[45] Ms Sullivan said that the purpose of the meeting of 1 August was to enable Land Transport to provide a response to concerns that had previously been raised and put in writing. She also submitted that the respondent was made aware in early July of the grievances to be addressed at the meeting of 1 August.

[46] I accept the respondent's submission that the applicant cannot have it both ways: either the grievances were submitted in early July (in which case they are out of time as they relate to events which came to the applicant's notice months or years previously); or they were submitted after 1 August when new information had come to light which enabled the applicant to conclude he had a personal grievance.

Section 115 (b) and s 114 (4)

[47] I have no evidence regarding what if any instructions Mr Taylor gave Ms Sullivan regarding the filing of a personal grievance ; or when he did so and what she failed to do.

[48] Even if I had found there were exceptional circumstances I would still have to consider whether it would be just to grant leave. Factors such as the length of the delay and the prejudice to the employer in defending the claims would feature highly in such a consideration. There is also very little explanation for the delay. I would not have found it just to grant leave.

[49] Mr Taylor did not raise his personal grievances within the 90 day period. There are no exceptional circumstances.

Costs

[50] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority