

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA AUCKLAND 506
5321174**

BETWEEN VIANNEY TUALA
 Applicant

AND LINFOX LOGISTICS (NZ)
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Sione Fonua, Counsel for Applicant
 Vonda Hodgson, Counsel for Respondent

Investigation Meeting: 3 – 5 December 2014 at Auckland

Submissions received: 20 November & 3 December 2014 from Applicant
 24 November & 3 December 2014 from Respondent

Determination: 8 December 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether or not the Applicant, Mr Vianney Tuala, raised his personal grievance of unjustifiable disadvantage within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), with the Respondent Linfox Logistics (NZ) Limited (Linfox) such that he is entitled to pursue his grievance before the Authority.

[2] Linfox disputes that Mr Tuala raised his personal grievance for unjustifiable disadvantage within the 90 day statutory limitation period.

[3] Linfox further submits that, in the event that it is determined that Mr Tuala did raise his personal grievance of unjustifiable disadvantage within the 90 day statutory limitation period, Mr Tuala failed to commence his action in the Authority within the 3 year statutory time period in accordance with the requirements of s114 (6) of the Act.

Issues

[1] The issues for determination are:

- whether or not Mr Tuala raised his personal grievance in respect of unjustifiable disadvantage within the 90 day statutory limitation period pursuant to s 114(1) of the Act.

In the event that it is determined that Mr Tuala did raise a personal grievance within the 90 day statutory limitation period:

- whether or not he is time barred from bringing his claim pursuant to s 114(6) of the Act.

In the event that it is determined that Mr Tuala did not raise a personal grievance within the 3 year statutory limitation period:

- Should the Authority exercise its discretion under s 219 of the Act by making an order extending the time

Brief Background Facts

[2] Mr Tuala had been employed by Linfox to work as a Driver delivering goods to the Progressive Enterprises supermarkets. At the time of his dismissal he had been employed by Linfox for approximately 14 years.

[3] On 25 June 2009 Mr Tuala had received a Final Written Warning as a result of a finding that he had committed serious misconduct in respect of sexual harassment. The Final Written Warning letter set out a number of conditions to which Mr Tuala had agreed and upon which the continuation of his employment with Linfox was based.

[4] One of the conditions to which Mr Tuala agreed was:

You will relocate your place of work from the Favona Road contract to the FMCG business unit located at Verissimo Drive, and you will not undertake any work involving a visit to the Favona Road site.

[5] Mr Tuala claims that he was unjustifiably disadvantaged by the relocation of his place of work from the Progressive contract which was based at Favona Road to the Foodcap

contract which was based at Verissimo Drive, and that he raised this with Linfox in two written communications, the first being a document dated 27 July 2009 which is not addressed to any specific person, and the second being a letter dated 10 August 2009 addressed to Mr Nick Snelling, Operations Manager – Retail, and Ms Sue Griffin, Human Resources Manager.

[6] In the document dated 27 July 2009, written more than a month after Mr Tuala had received the Final Written Warning for sexual harassment and his consequent transfer to the Foodcap contract premises, Mr Tuala stated:

I have been disadvantaged by moving me to another site with different starting times 0230, 0500 or 1030. The 1030 start and arriving back 0130 or 0200 plays havoc with my body clock and at my age the work is very strenuous and hard. These bins are heavy even when they are empty. You have to lift them up to stack them on top of each other and I don't have the strength any more. I'm too old.

The 3 June 2009 was my first day at Foodcap and I have never done this work before and I hurt my back. ... On the 15 July I hurt my shoulder and am on ACC. ...

... I want to go back to Progressive with the same starting time...

[7] In the letter dated 10 August 2009 addressed to Mr Snelling and Ms Griffin, Mr Tuala had written:

This letter is to formally inform you that I am filing a personal grievance against you and will submit it for mediation regarding the disciplinary action taken against me.

I was allocated to another site FOODCAP which required lifting heavy meat bins and subsequent tore the ligaments from my left shoulder and was on ACC for 3 weeks... This raises questions about Health and Safety. I have lost earnings and suffered ill health because of this allocation.

[8] Mr Tuala's employment with Linfox was summarily terminated on 20 August 2009.

[9] On 21 September 2009 Mr Tuala wrote to Linfox advising that he was: “*raising a personal grievance with Linfox Logistics (NZ) Ltd on the grounds of Unjustifiable Dismissal*”.

[10] Mr Tuala subsequently filed a Statement of Problem in the Authority on 30 September 2010 in which he made a claim of “*unfair dismissal*”.

[11] Mr Tuala filed an Amended Statement of Problem in the Authority on 21 July 2014 in which he claimed:

- i. Disadvantaged in the work place;*
- ii. Personal Grievance for unjustifiable dismissal;*
- iii. The Respondent was in breach of its duty to act in good faith;*

Determination

Did Mr Tuala raise his personal grievance in respect of unjustifiable disadvantage within the 90 day statutory limitation period pursuant to s 114(1) of the Act?

[12] Section 114 (1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer 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

[13] A personal grievance as categorised in s.103 of the Act must be raised with an employer with sufficient specificity to enable the employer to address the problem. Section 114(2) of the Act states:

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] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising 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 Mr Barrowclough did on Mr Creedy's behalf in this case. 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.

[15] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer².

[16] Considering the two documents objectively, the first document which is not addressed to any particular person but appears to be written to Linfox with reference to the Final Written Warning with which Mr Tuala had been issued, and the second document being the letter dated 10 August 2009, I accept that Mr Tuala had sufficiently specified the nature of his disadvantage grievance for Linfox to be able to address it.

[17] In the document dated 27 July 2009 I find that Mr Tuala had set out clearly his grievance in relation to the hours and physical conditions of the work he was undertaking as a result of his transfer from the Progressive contract to the Foodcap contract. These conditions and the effect that they had on his physical well-being were also raised in the letter dated 10 August 2009.

[18] The document dated 27 July 2009 also makes it clear what Mr Tuala expected Linfox to do to resolve his personal grievance: "*I want to go back to Progressive with the same starting time ...*".

[19] I determine that Mr Tuala raised a personal grievance in relation to his disadvantage grievance within the 90-day time period as specified in s 114 (1) of the Act.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517

² *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

Is Mr Tuala time barred from bringing his claim pursuant to s 114(6) of the Act?

[20] Section 114 (6) of the Act states:

No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[21] After having raised the personal grievance in respect of unjustifiable disadvantage with his employer, Mr Tuala filed a Statement of Problem in the Authority on 30 September 2010 in which he made a claim of “*unfair dismissal*”. Whilst he refers to “*Health & Safety Issues*” under the section headed “*The facts that have given rise to the problem (or matter) are*”, there is no specific claim of unjustifiable disadvantage, rather that the alleged health and safety issues gave rise to the claim of unjustifiable dismissal.

[22] Of more importance in the consideration of this matter, I find that there is no evidence that Mr Tuala took any action in respect of the unjustifiable disadvantage claim until the filing of an Amended Statement of Problem dated 18 July 2014 in which he raised a separate claim to the claim of unjustifiable dismissal of unjustifiable disadvantage.

[23] I find that this is more than 3 years after he had raised the unjustifiable disadvantage claim with Linfox

[24] I determine that Mr Tuala is time barred from bringing his claim for unjustifiable disadvantage pursuant to s 114(6) of the Act.

Should the Authority exercise its discretion under s 219 of the Act by making an order extending the time?

[25] Section 219 of the Act states:

219 Validation of informal proceedings etc

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

[26] There has been no application by Mr Tuala or his Counsel for me to exercise my discretion pursuant to s 219 of the Act by making an order extending the statutory 3 year period set out in s 114(6) of the Act, and consequently I make no order extending the statutory 3 year time period.

Costs

[27] Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority