IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 299/07
5091512

	BETWEEN	STEPHEN ROSS WACKROW Applicant
	AND	FONTERRA CO-OPERATIVE GROUP LIMITED Respondent

Member of Authority:	R A Monaghan
Representatives:	A R Drake, Counsel for Applicant P M Muir, Counsel for Respondent
Submissions received:	24 August 2007 from Applicant 20 and 31 August 2007 from Respondent
Determination:	28 September 2007

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTERS

Employment relationship problem

[1] Stephen Wackrow says he was unjustifiably dismissed by his former employer, Fonterra Co-operative Group Limited ("Fonterra") and that his employment agreement was breached. He also seeks remedies in respect of a suspension, the circumstances of which were partly addressed in earlier litigation to which I will refer.

[2] Fonterra says no personal grievance was raised in respect of the dismissal within the 90 day period specified in s 114(1) of the Employment Relations Act 2000. In particular it says a letter it received within that period was not sufficient for the purposes of s 114(2), which reads:

> "(2) For the purposes of subsection (1) a grievance is raised with an employer as soon as an 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."

[3] Fonterra said in its statement in reply that it did not receive a purported raising of the grievance in the form of the present statement of problem until three years and two days after the dismissal occurred. It said further that the delay was outside the three year time limit in s 114(6) of the Act, and the grievance cannot proceed.

[4] Section 114(6) reads:

> "(6) No action may be commenced in the Authority or Court in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this section."

[5] This determination addresses the arguments raised in respect of s 114(1) and (2) ("the 90-day issue") and s 114 (6) ("the three year time limit").

Background

[6] On 17 March 2004 Mr Wackrow was charged with conspiring in or about 2001 to defraud a number of organisations including his then-employer - which became part of the Fonterra Group - in relation to the export of powdered milk products. On 18 March 2004 Fonterra informed Mr Wackrow that, from 19 March 2004, he was suspended for an indefinite period. By letter dated 24 March 2004 Fonterra asked him to attend a meeting to provide details of the events with which the charges were concerned, and advised that his employment may be terminated as a result of the meeting.

[7] Mr Wackrow approached the Employment Relations Authority for interim injunctions:

(a) reinstating him in his employment;

(b) restraining Fonterra from requiring him to attend disciplinary meetings until the criminal proceedings had been determined; and
(c) restraining Fonterra from dismissing or suspending him until the criminal proceedings had been determined.[1]

[8] The Employment Court heard a challenge to the Authority's determination, and issued its decision on 10 June 2004.[2] It:

(a) found that issues in respect of the suspension were largely historic by then, and declined to make an order in the nature of a quia timet injunction in relation to any future suspension;
(b) declined to issue an injunction restraining Fonterra from requiring Mr Wackrow to attend a meeting of a disciplinary nature; and
(c) issued an injunction preventing Fonterra's investigation from traversing any matters relating to the background to or the criminal charge faced by Mr Wackrow, referring specifically to a list of the questions Fonterra proposed to put to Mr Wackrow.

[9] Fonterra then required Mr Wackrow to attend a disciplinary meeting to answer questions permitted under the orders of the court. Mr Wackrow did so on 16 June 2004. His solicitor provided his written answers to each of Fonterra's questions. The questions were arranged under the broad headings of trust and confidence issues, disrepute, and ability to continue to perform the job. These matters were all associated with the implications of the laying and reporting of the charges against Mr Wackrow. They did not, and could not, address whether Mr Wackrow was actually guilty of misconduct of the kind suggested by the content of the charges. The material I have suggests Mr Wackrow elected to rely on his written responses and as a result there was little, if any, discussion of the responses.

[10] By letter dated 22 June 2004 Fonterra advised Mr Wackrow that it had decided to summarily terminate his employment. The letter gave a detailed account of the company's reasoning, and commented on Mr Wackrow's responses to its questions.

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[1] **Wackrow v Fonterra Co-operative Group Limited**, 19 April 2004, D King, AA 130/04
[2] **Wackrow v Fonterra Co-Operative Group Limited** [2004] 1 ERNZ 350

Overall the reason it gave for the decision to dismiss was that it had lost trust and confidence in Mr Wackrow, with particular reference to what it saw as his unco-operative behaviour on 16 June, his inadequate responses to its questions, and his inability to allay the company's concerns about trust and confidence and reputation issues.

[11] By letter to Fonterra dated 25 June 2004, sent by post and email, Mr Wackrow said:

> "This is to give notice that I will be bringing a personal grievance against Fonterra in respect of the unjustified dismissal. This is separate from and additional to the personal grievance which I gave notice of in March 2004 relating to the unjustified suspension of my employment.
>
> Please note that in respect of my personal grievance for unjustified dismissal I will be seeking reinstatement in addition to other remedies."

[12] Since I was not addressed on the fact that the bringing of the grievance and the request for reinstatement were couched in the future tense, I assume no issue arises out of that matter.

[13] It appears no further action was taken in respect of the dismissal until the present statement of problem was prepared. The statement was filed in the Authority, and recorded as received on Monday 25 June 2007. Counsel for Mr Wackrow said a copy was provided to Fonterra's solicitors by facsimile. It appears that was done on Friday 22 June 2007.

The 90 day issue

[14] Submissions on this point were brief. They concerned whether Mr Wackrow's letter of 25 June 2004 was sufficient to 'raise' a grievance for the purposes of s 114(1) and (2), with specific reference to an aspect of the decision of the Employment Court in **Creedy v Commissioner of Police**[3] which was not disturbed on appeal. There has not been any application, in the alternative, for leave to raise the grievance out of time.

[3] [2006] 1 ERNZ 517

[15] The relevant passage from **Creedy** was:

> "[36] 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 raising of the grievance, for an employee simply 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."

[16] Counsel for Fonterra cited a number of well-known decisions under the Employment Contracts Act 1991, in which the Employment Court addressed whether a personal grievance had been 'submitted' in time under that Act and stressed the importance of doing so in a manner which enabled the employer to respond or remedy the grievance.[4] Counsel also cited a decision in which the Employment Court found the words 'submit' (in terms of the Employment Contracts Act) and 'raise' (in terms of the Employment Relations Act) were virtually synonymous in the present context[5], before turning to the above passage.

[17] With reference to the second sentence in the quoted passage from **Creedy**, counsel said Mr Wackrow's letter of 25 June amounts to no more than Mr Wackrow's advice that he considers he has a personal grievance, together with a specification of the statutory type of grievance. She said that because no further information was provided Fonterra was unable to respond to or address the grievance. Her submissions in reply referred in particular to the lack of information about the aspects of the dismissal which led to the applicant considering the dismissal unjustified. The submissions said further that the Employment Relations Act does not require an employer to work out which (if any) aspects of a dismissal are being challenged in a grievance claim.

[18] Counsel for Mr Wackrow sought to distinguish **Creedy**, primarily on the ground that the employer in that case genuinely had no understanding of the nature of

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[4] Section 114(2) of the Employment Relations Act was intended to reflect those decisions
[5] **Ruebe-Donaldson v Sky Network Television (No 1)** [2004] 2 ERNZ 83

the disadvantage grievance alleged while here Fonterra knew precisely the nature of the grievance. The submission went on to say the grievance was that the summary dismissal imposed for the reasons set out in Fonterra's letter of 22 June, and to which the 25 June letter was the response, was unjustified and reinstatement would be sought. The relevant issues and arguments had been canvassed in great detail in the earlier litigation as well as in correspondence.

[19] Since the parties' positions were based primarily on **Creedy**, I step back to consider whether the parties have correctly stated the effect of the decision. I note, in addition, that questions of whether a grievance has been 'raised' or 'submitted' are dealt with on a case by case basis.

[20] In **Creedy** the employee's representative had written a letter asserting unjustified disadvantage arising out of the unfair way in which a disciplinary procedure had been applied. In relevant respects the letter said barely more than that. Although the employer sought further details of the actions complained of, none were provided. The matter had a lengthy history, which included the imposition of a stand down from duty and investigations which led to Mr Creedy's being charged with 39 disciplinary offences. With reference to the statutory elements of a disadvantage grievance, a better indication at least of the unjustified actions in question would have assisted in identifying what the employer was to address.

[21] The fundamental difficulty faced by the employer in **Creedy** was one which can be encountered when faced with similarly broadly stated allegations of unjustified disadvantage, sexual harassment, discrimination, or unjustified and constructive dismissal. When there is no reference to the acts (or omissions) amounting to sexual harassment, discrimination or constructive dismissal it can be very difficult to identify what is to be addressed. A similar difficulty may also be faced when an unjustified dismissal has been alleged and, for example, the employee concerned has left the workplace in the course of a dispute or as the result of a misunderstanding. There may be a question about whether there was a dismissal at all, and the employer may genuinely be unaware of why a dismissal is being alleged. The court's comments regarding the adequacy, or not, of simply specifying the type of grievance in question should be read in that light.

[22] Here, although the 25 June letter appears to be as broadly stated as the letter in **Creedy,** it does not create quite the same difficulty when it comes to identifying the acts (or omissions) to be addressed**.** The relevant act of dismissal at least can be readily identified. The lack of justification for the dismissal is the primary ground on which Mr Wackrow says he has a personal grievance. The question is whether **Creedy** should be read as requiring him to go further than that in order to provide Fonterra with something to address.

[23] Regarding how far an employee has to go in order to give the employer a grievance to 'address', the Employment Court once said:

> "So little is required."[6]

[24] With reference to the submissions for Fonterra, comments and observations made in the reported decisions should be viewed in the context of the factual material the courts were considering. For example in **Winstone Wallboards Limited v Samate**[7] the relevant communication amounted to a request for written reasons for the dismissal in question, coupled with a statement that if no response was forthcoming "I am instructed to lodged a claim in Court against your action as it was unlawful and has caused a lot of inconvenient and losses to my client since his dismissal."

[25] The court said:

> "… for the express purpose of early low level resolution of the grievance, it should be plain to an objective observer that the employee concerned has commenced the applicable grievance process, and has done so in a way that enables the employer to respond."[8]

[26] Elsewhere it said:

> "[counsel] submitted that, in short, the letter did not enable the employer to remedy the grievance and could not therefore be a submission of a grievance.

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[6] **McCarthy v Lydiard Shoe Company Limited** unreported, Judge Finnigan, AEC 70/94, p 12. There was an approach to the employer to request reinstatement, but the representative did not indicate the employee had a grievance in terms of the Act. By itself this was not sufficient to carry an inference that the dismissal in question was being challenged as a grievance, and was not a 'submission'.
[7] [1993] 1 ERNZ 503
[8] At p 511

> With respect I reject these submissions. Clause 4 of the First Schedule is a later step, separated in time from cl 3. What the legislature requires … is the application in each case of nothing more than common sense. It is unnecessary and contrary to the Act to apply to the claimed submission of a grievance in the present case any test more complex than the one proposed …: what did the parties understand was being communicated? I add one, but only one, important qualification and state the question this way: to an objective and disinterested observer, does the letter (in this case) present to the employer for consideration or decision any grievance that the employee may have against his or her employer because of one or more of the claims that are defined in s 27 of the Act?"[9]

[27] The Court found on the facts that, objectively viewed, the letter should have made it clear to the employer that the employee was submitting a grievance about his dismissal.

[28] Notably, the purported submission of the grievance was couched in very broad terms, as happened here. The court rejected a submission to the effect that the detail of the claim of unjustified dismissal had to be provided in order to properly 'submit' the grievance. Indeed it was acknowledged that the provision of such detail was the next step in the standard grievance procedure contained in the First Schedule of the Employment Contracts Act. I was not addressed on whether the absence of a corresponding provision in the Employment Relations Act makes any difference here.

[29] Other decisions cited also contained passages referring to the need for an employer to have something to which it could respond, or which it could address. However they turned on their own facts. For example, in **Goodall v Marigny (NZ) Limited** the court said:

> "[counsel] is correct in contending that the submission of a grievance is something significantly less formal than a description of its nature, the facts giving rise to it and the remedies sought as required by the cl 4 written statement.
>
> [referring to the **Winstone Wallboards** case] … I would replace the statement 'enables the employer to respond' with the statement 'enables the employer to remedy the grievance rapidly and as near as possible to the point of origin.'"[10]

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[9] At p 509
[10] [2000] 2 ERNZ 60, 69

[30] The difficulty created on the facts in **Goodall** was different from that in **Winstone Wallboards**. In contrast with the latter, the former centred on material which did not contain express reference to the personal grievance procedure or to any type of grievance but did contain an indication of the nature of the concern. Despite the absence of an express reference to the personal grievance procedure the court found that the letters were an effective communication that Mr Goodall was aggrieved because of claims that certain warnings were invalid. They went far enough.

[31] **Farmers Trading Limited v Opuariki**[11] is a case where the court found there was not enough material for the employer to make a meaningful response. The employee and her union delegate had refused to sign a letter of dismissal, and the delegate had said the matter would be 'taken further'. Other than an indication from the delegate that the union would not be pursuing the matter but someone 'outside the union' was dealing with it, nothing further was presented to the employer within the 90 day period. The court found these actions were not sufficient to amount to the submission of a grievance.

[32] These and other cases addressed various aspects of whether there must be express reference to the fact that a personal grievance was being pursued as well as to the type of grievance in question, and of the approach to be taken when something has been put to the employer without such express reference. In commenting on the need for the employee to put something to which the employer could respond, or could address or remedy, the court each time was considering on the facts before it whether it was clear to the employer that the employee was aggrieved about a particular matter in the statutory sense of having a grievance, and wanted something done about it. I do not read the cases as requiring an employee to go further and set out details of the kind set out in clause 4 of the standard grievance procedure in the Employment Contracts Act. In effect, those are the kinds of details said to be missing here.

[33] I do not read the decision in **Creedy** as setting a different standard from that in the decisions made under the Employment Contracts Act. The court repeated the importance of the employer knowing what to address, with reference to cases under

[11] [1998] 1 ERNZ 313

the ‘earlier legislation’. It said the employee’s obligation was not lessened under the present legislation. The extent of that obligation is as just discussed. The court in **Creedy** did not say the obligation was a higher one.

[34] Applying that approach, and bearing in mind the relatively low level to be met before an employer has something to ‘address’, I find that Mr Wackrow’s sense of grievance about his dismissal in the statutory sense, and his wish to have something done about it, were conveyed. Further, the case law permits recourse to the surrounding circumstances in order to ascertain whether a grievance has been raised. To the extent that it is necessary to do so here, I find there is sufficient in the earlier litigation, the responses to Fonterra’s questions, and Fonterra’s view of those responses, to identify significant features of Mr Wackrow’s sense of grievance. Beyond that, Mr Wackrow was not obliged to present his argument in support before his grievance could be said to have been ‘raised’.

[35] I therefore conclude that the grievance was raised within the 90-day period.

Filing of grievance outside 3 year time limit

[36] The submissions for Fonterra did not address the application of s 114(6) in any detail. They merely repeated the passage in the statement of reply to which I have referred at [3], and set out the contents of s 114(6). In doing so they confused the raising of the grievance with the commencement of proceedings.

[37] The submission on behalf of Mr Wackrow was that the three year period commenced with the date on which Mr Wackrow’s grievance was raised, namely 25 June 2004. It ended on the close of business on 25 June 2007. Since I have found the 25 June letter was sufficient to raise a grievance, and the present proceedings were commenced in the Authority on 25 June 2007, I conclude that they have been filed in time.

[38] Further, even if the actual expiry of the three year period occurred on Sunday 24 June 2007, by virtue of s 35 of the Acts Interpretation Act 1999 the period effectively expired on the next working day, Monday 25 June 2007.

[39] Accordingly the proceedings have been filed in time.

Costs

[40] Costs are reserved pending a resolution of the substantive matters.

R A Monaghan
Member of the Employment Relations Authority