IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 310
3004256

	BETWEEN	BLAKE WALKER Applicant
	AND	NEW ZEALAND COMPLIANCE AND REPAIRS LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Applicant in Person Danny Gelb, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions received:	28 August 2017 from Respondent
Determination:	06 October 2017

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 Blake Walker, raised his personal grievance with the Respondent, New Zealand Compliance and Repairs Limited (NZCRL), within 90 days of the grievance occurring or coming to his notice, whichever is the later in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievance before the Authority.

[2] NZCRL denies that Mr Walker raised his personal grievance within the requisite 90 days period.

[3] NZCRL does not consent to a personal grievance being raised outside the time period specified in the Act and does not accept that Mr Blake's delay in raising his grievance was caused by exceptional circumstances.

Issue

[4] The issue for determination is whether or not the Applicant raised a personal grievance within the statutory 90 day time period pursuant to s 114(1) of the Act.

Background Facts

[5] Mr Walker commenced employment with NZCRL as a Mechanic/Tyre Change/Balancer Machine Operator on or about 7 March 2016. He was provided with an individual employment agreement (the Employment Agreement) which stated:

> *Abandoning employment*
>
> *If the employee is away from work for 3 working days in a row without telling the employer or getting their permission – and the employer has made reasonable efforts to contact the employee to clarify the reason for their absence and whether they intend to return to work – the employer may regard the employment as abandoned.*
>
> *The employer will tell the employee that they are deemed to have ended their employment. The employment will finish at the end of the last day set out above.*
>
> *Ending employment: Serious misconduct*
>
> *If, after following a fair process, the employer concludes that the employee has engaged in serious misconduct, the employee may be dismissed without notice....*
>
> *Ending employment*
>
> *The employer might end the employee's job with reasonable cause, or the employee might resign.*
>
> *Unless otherwise set out in this agreement, either the employer or the employee can end employment by giving 2 weeks notice in writing.*
>
> *The employer may decide to pay the employee instead of the notice period.*

<u>Disputes</u>

...

If it is a personal grievance the employee has 90 days from the time the problem occurred or became known by the employee to raise the grievance with the employer.

Mr Walker had signed the Employment Agreement on 1 May 2016 above the Employee Acknowledgement which stated:

In signing this agreement, I Blake Walker accept the terms and conditions of my employment as detailed within this offer and declare that:

- *I have read, and fully understand the terms and conditions of this agreement, and have received a copy of it.*
- *I was told of my right to get independent advice on the terms and conditions of this agreement and I have been given time to take that advice.*
- *I have raised any issues I have about the terms and conditions of this agreement and my employer has responded to these issues. ...*

[6] Mr Walker received a letter dated 18 October 2016 requesting that he attend a disciplinary meeting on a proposed date of 20 October 2016 subject to his confirmation.

[7] Mr Walker met with Mr Ivan Axenov, Director, to discuss the letter later that same day, 18 October 2016, Mr Walker recorded that meeting during the course of which he recorded an exchange between himself and Mr Axenov which included the following exchange:

BW: *Yeah, so 4 o'clock Thursday?*

IA: *And get back to me or you can read it now and tell me*

BW: *I'll go through it later on, I'm a bit of a slow reader.*

IA: *no worries*

BW: *I'm just being honest mate, I don't want to sit here all bloody day doing it*

IA: *that's ok*

BW: *Um, ok, ok, so is this dismissal?*

IA: *Yes*

BW: *Dismissal.*

IA: *Yes*

BW: *Alrighty.*

IA: *OK*

BW: *I've enjoyed working for you brother.*

IA: *No worries, thanks.*

BW: *will see you soon*

[8] NZCRL confirms the recorded discussion took place, but submits that Mr Axenov does not have a good command of the English language, and that NZCRL did not dismiss Mr Walker on 18 October 2016.

[9] Following a text message sent by Mr Walker to Mr Axenov as a result of which the Office Manager emailed Mr Walker on 21 October 2016 asking him to confirm an understanding that he wanted to be paid his holiday pay in the sum of $706.09. Mr Walker responded by confirming that he did do so.

[10] That same day, 21 October 2016, NZCRL received an email from Ms Emma Monsellier, a lawyer instructed by Mr Walker, asking NZCRL to confirm: "*Whether Blake continues to remain an employee of the company and in receipt of his salary (together with contractual benefits) in the usual way?"*

[11] NZCRL paid Mr Walker's leave entitlements as requested on 23 October 2016.

Communications between Mr Walker and NZCRL from 27 October 2017

27 October 2016

[12] Mr Gelb was instructed to act on behalf of NZCRL, and he responded to Ms Monsellier on 27 October 2016, stating that (i) Mr Walker had not been dismissed; (ii) he was still an employee; (iii) NZCRL had paid out Mr Walker's leave entitlements at his request and (iv) it was treating his absenteeism as leave without pay.

4 November 2016

[13] Ms Monsellier responded on 4 November 2017 attaching a copy and transcript of the conversation between Mr Walker and Mr Axenov on 18 October 2016 and stating:

> *You state that my client has not been dismissed …*
>
> *Please find attached A RECORDING OF THAT MEETING …*
>
> *As you will appreciate from this recording my client is understandably confused as to his employment status. The recording makes it quite clear that Ivan has confirmed my client's dismissal. …*

> *In order that I may advise my client appropriately, please could you seek clarification once and for all from the company whether my client is in fact still employed?*
>
> *I also note that my client has received his final pay which includes all of the accrued but untaken annual leave. …*

[14] On 4 November 2016 Mr Gelb responded, stating that all Mr Walker's leave entitlements had been paid out at his request, Mr Walker had exceeded his leave entitlement and that:

> *My client has been waiting for your client to return to work as they have not terminated his employment. He is more than welcome to return to work on Monday. We will then need to reschedule the disciplinary meeting …*

7 November 2016

[15] After receiving instructions, Ms Monsellier replied on 7 November 2016 acknowledging NZCRL's confirmation that Mr Walker had not been dismissed and he could return to work, stating that Mr Walker required certain conditions to be met before he returned to work. Ms Monsellier set out the conditions as being:

> *1. That Ivan accepts that he did 'dismiss' our client in that meeting (regardless of whether or not that was his intent);*
>
> *2. Agrees to pay our client for those additional days off-work (19 October to 7 November 2016 inclusive) on the basis that he genuinely believed his employment had been terminated (he did not voluntarily refuse to attend work);*
>
> *3. A contribution towards our client's legal fees …*
>
> *4. Assurances that our client will not be subject to disciplinary proceedings unnecessarily...*
>
> *5. Provide clarity on whose tools are to be used ...*
>
> *6. The parties enter into a new employment agreement.*

9 November 2016

[16] NZCRL responded on 9 November 2016 confirming that: "*The employment relationship is still on foot"* and that Mr Walker's return was sought in order that the disciplinary meetings could occur.

[17] The email also stated: "*should your client want to negotiate variations to the employment agreement then my client will look at such requests. However, my client will not consider such an agreement to these variations as a precedent to your client returning to work".*

[18] NZCRL responded in answer to the conditions requested that (1) no dismissal had occurred; (2) no payment for Mr Walker's absence from work on 19 October – 7 November 2016; (3) no contribution towards Mr Walker's legal fees; (4) agreement to assurance sought that Mr Walker would not be subject to disciplinary proceedings unnecessarily; (5) no issue if employees want to use their own tools; and (6) a new employment agreement was not necessary, but a request for variation should be submitted.

10 November 2016

[19] Following receipt of this email from Mr Gelb, Ms Monsellier emailed Mr Walker on 10 November 2016 confirming that NZCRL maintained that Mr Walker had not been dismissed, and it was waiting for Mr Walker to return so it could proceed with the disciplinary process.

[20] Ms Monsellier also confirmed that NZCRL had not agreed to Mr Walker's return to work conditions, and explained that his options were:

> 1. *Maintain your position that you were unfairly dismissed and raise a grievance, or*
>
> 2. *Return to work and undergo disciplinary proceedings (which may or may not result in disciplinary sanctions) but waive your right to pursue a grievance for unfair dismissal.*

[21] Mr Walker responded by email that same day, 10 November 2016, confirming that he was: "*happy to proceed with the disciplinary process … ".*

14 November 2016

[22] Ms Monsellier sent a draft response to Mr Walker on 14 November 2016 asking for any amendments he would like to make before the letter was sent to NZCRL. The draft letter concluded:

> *In order that the parties may resolve this matter as amicably as possible and without either party incurring further legal costs, we confirm that our client will be prepared to return to work if the Company agrees to pay for those days off work (19 October to date) ... Should the company be agreeable to pay our client for those loss of earnings, then he will return to work. However, should this still remain unacceptable to your client, then he shall proceed with his grievance to MBIE (and/or the ERA should your client refuse to attend mediation),*

[23] Mr Walker replied informing Ms Monsellier that he had obtained another job until Christmas, and confirming that he was satisfied for Ms Monsellier to respond to NZCRL,

providing NZCRL with a further opportunity to accept the conditions he had presented for his return to work.

21 November 2016

[24] Ms Monsellier responded on 21 November 2016 explaining to Mr Walker that he could not return to work for NZCRL at that time as he had employment elsewhere, however he might want to enquire if NZCRL would let him return to his employment in the New Year.

[25] She pointed out that Mr Walker had the following options available to him:

> 1 *Proceed with a formal grievance against the company based upon your assertions that your employment was terminated in the meeting with Ivan on 18 October 2016 ...*
>
> *You may wish to pursue a grievance in person ... You will need to raise a grievance by contacting MBIE ...*
>
> *2. Alternatively, you could try and resolve the issues with Ivan and return to work.*

[26] Ms Monsellier concluded the letter: *"I should be grateful if you would have a think about how you wish to proceed and let me know accordingly."*

22 November 2016

[27] Mr Walker replied to Ms Monsellier on 22 November 2016 explaining that his temporary position had become: "*full time so I am not going to try get my old job back with NZ Cars"* and that he would therefore be pursuing the first option, asking if he would: "*still have an equal chance of success if I continue without you acting on my behalf?"*

[28] Ms Monsellier responded that issuing the claim in person would be the most cost-effective manner for him to proceed, and concluded the response by stating: "*In the interim, I will do nothing further until you confirm how you wish to proceed going forward."*

[29] That was the last communication between Ms Monsellier and Mr Walker.

Mediation Request 8 February 2017

[30] NZCRL had no further communication from Mr Walker or Ms Monsellier, but the MBIE mediation service contacted Mr Axenov on 8 February 2017 explaining that it had received a request from Mr Walker in relation to: "*alleged unjustified dismissal."*

[31] NZCRL did not respond to the mediation request and on 2 March 2017 the Mediation Service contacted Mr Gelb asking if there was an update on NZCRL's response.

[32] Mr Gelb responded on behalf of NZCRL on 2 March 2017 pointing out that no personal grievance had been raised by Mr Walker and: "*As the date of his departure was well over 90 days ago, even if he has a valid PG, which we say he doesn't then he is out of time for raising* it *and my client does not consent to any late raising of a PG".*

[33] Mr Walker filed a filed Statement of Problem with the Authority on 16 March 2017 in which Mr Walker claimed that he had been unfairly dismissed stating:

> *On the 18th October 2016, I received a letter from my employer for a 'formal notice of investigative disciplinary meeting." my boss {Ivan} gave me no information on what it meant and I asked him if it was a dismissal to which Ivan said "Yes". I was supposed to have a meeting on the 19th in regards to the letter but I needed to contact a lawyer so the meeting had to be rescheduled.. The Company advertised my job on TradeMe on the 19th October and also paid my final pay. This confirmed to me that I was fired unfairly.*

[34] NZCRL filed a Statement in Reply claiming that no personal grievance had been raised within 90 days of Mr Walker leaving employment at NZCRL and it did not consent to a personal grievance being raised outside the 90 day period.

Determination

Did Mr Blake raise his personal grievance within the 90 day statutory limitation period?

The Law

[35] 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.*

[36] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[37] 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."*

[38] 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 observer[1].

When did the dismissal occur?

[39] Mr Walker left NZCRL on 18 October 2016 and did not return to the workplace following that date.

[40] During the period 18 October to 9 November 2016 NZCRL maintained its position that Mr Walker had not been dismissed, and he could return to work.

[41] Whilst NZCRL claims that it has not terminated Mr Walker's employment, I consider that the verbal confirmation by Mr Axenov to Mr Walker that he had been dismissed was unequivocal. I note the submission by NZCRL that English is not Mr Axenov's first language, but I note that Mr Axenov as the sole director of NZCRL was appointed in August 2014, and the syntax and sentence structure used during that conversation was not complex or difficult to understand.

[42] Moreover NZCRL's actions after 18 October 2016 are consistent with a dismissal having occurred.

[43] Firstly it advertised a position on 19 October 2016 that Mr Walker recognised as the position he had occupied until the previous day. Whilst NZCRL may have been intending to supplement its workforce with an additional Mechanic/Tyre Change/Balance Machine Operator, Mr Walker had not been aware that NZCRL was increasing its workforce and NZCRL has not addressed this point in its submissions.

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

[44] Secondly, and more significantly, NZCRL paid Mr Walker's final pay on 23 October 2016, together with all his accrued but untaken annual leave.

[45] Pursuant to s 15 of the Holidays Act 2003 the purpose of the statutory provisions is to:

> *(a) Provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and*
>
> *(b) …*
>
> *(c) Require employers to pay employees at the end of their employment for annual holidays not taken or paid out; …*

[46] Holiday leave entitlement is to be paid by the employer to an employee when the employee's employment has ended[2]. Holiday pay may only be paid with an employee's pay in defined circumstances and subject to strict conditions[3].

[47] None of the special conditions applied in Mr Walker's situation, and therefore NZCRL's actions were consistent with the words of Mr Axenov on 18 October 2016 when he confirmed twice it was dismissal when asked by Mr Walker if that was the case and NZCRL paid to Mr Walker his final salary pay together with his outstanding holiday pay pursuant to s.27 (2) of the Holidays Act 2003.

[48] NZCRL claimed it was treating Mr Walker's absenteeism as leave without pay, but I find this is not consistent with any term of the Employment Agreement and the fact that it paid out his final pay and entitlements.

[49] Despite its assertions to the contrary, I find that the actions of NZCRL are consistent with Mr Walker being dismissed on 18 October 2016.

[50] I determine that the dismissal of Mr Walker by NZCRL occurred on 18 October 2016.

When did the dismissal come to Mr Walker's notice?

[51] In accordance with the Employment Agreement the employment could be ended in a number of ways: abandonment, for serious misconduct or general termination.

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[2] S 24 Holidays Act 2003
[3] S 28 Holidays Act 2003

[52] NZCRL did not terminate Mr Walker's employment in accordance with the provisions of these clauses such that there was a breach of the Employment Agreement:

- If NZCRL understood that Mr Walker had abandoned his employment, it failed to tell him it considered he had ended his employment pursuant to the "*Abandoning Employment"* clause;

- There was no process followed in relation to an allegation of serious misconduct and consequently Mr Walker could not be dismissed summarily pursuant to the "*Ending Employment: Serious misconduct"* clause; and

- Neither Mr Walker nor NZCRL gave 2 weeks' notice pursuant to the "*Ending Employment"* clause.

[53] Mr Blake instructed Ms Monsellier to act on his behalf on or about 21 October 2016 and I find that at that date the letter from Ms Monsellier to NZCRL appears to indicate that Mr Walker was not certain of his employment status because her letter is requesting that it confirm whether or not Mr Walker was still an employee.

[54] However I find that Mr Walker's actions are consistent with a belief on his part that his employment with NZCRL had terminated by reason of dismissal on 18 October 2016 as he:

- left the NZCRL workplace on 18 October 2016 after the meeting with Mr Axenov;

- requested NZCRL pay him his accrued leave entitlement;

- did not query the final payment made to him by NZCRL on 23 October 2016; and

- obtained alternative employment, initially on a temporary basis and then permanently.

[55] Moreover Ms Monsellier acting on instruction from Mr Walker confirms his understanding that he had been dismissed on 18 October 2016 in the letters dated:

- **4 November 2016** which is addressed to NZCRL states that the recording of the meeting between Mr Axenov and Mr Walker: "*makes it quite clear that Ivan has confirmed my client's dismissal*", and continues " *I also note that my client has received his final pay which includes all of the accrued but untaken annual leave";*

- **10 November 2016** which is addressed to Mr Walker and informs him that he had the option to: "*Maintain your position that you were unfairly dismissed";* and

- **21 November 2016** which is addressed to Mr Walker and advises that he had the option to: " *Proceed with a formal grievance against the company based upon your assertions that your employment was terminated in the meeting with Ivan on 18 October 2016".*

[56] I find that given these circumstances the dismissal had come to Mr Walker's notice on 18 October 2016.

[57] I further find that this conclusion is confirmed by the statement made by Mr Walker in the Statement of Problem that: "*The Company advertised my job on TradeMe on the 19th October and also paid out my final pay. This confirmed to me I was fired unfairly."*

[58] I find that the action alleged to be an unfair dismissal occurred, and came to Mr Walker's notice, on 18 October 2016, and that this is the relevant commencement date for the 90 day statutory period.

When did Mr Walker raise his personal grievance with NZCRL?

[59] During the period between 18 October 2016 and 8 February 2017 there were various communications between NZCRL and Ms Monsellier who was instructed by
Mr Walker.

[60] I have already found that the dismissal had occurred and came to Mr Walker's notice on 18 October 2016. This understanding had been communicated to NZCRL by Ms Monsellier in her letter dated 4 November 2016.

[61] From that date onwards NZCRL maintained its position that Mr Walker had not been dismissed. However despite that assertion I have found that its actions, and those of Mr Walker are consistent with a dismissal having taken place.

[62] I find that Ms Monsellier presented an option of raising a personal grievance to Mr Walker in relation to his assertion that he had been unfairly dismissed in the meeting with Mr Axenov on 18 October 2016 in her letter dated 21 November 2016.

[63] Mr Walker confirmed by email the following day that he wanted to proceed with the personal grievance and Ms Monsellier advised that Mr Walker could represent himself, and she would do nothing further until he confirmed how he wished to proceed.

[64] Mr Walker did not return to his employment at NZCRL, nor did he instruct Ms Monsellier to proceed to raise a personal grievance on his behalf.

[65] The MBIE Mediation Service contacted NZCRL on 8 February 2017. Whilst requesting mediation does not constitute the raising of a personal grievance of itself, taken in conjunction with other factors it may do so[4].

[66] Taken in combination with the correspondence between Ms Monsellier and NZCRL I find that NZCRL was aware that the mediation request was in relation to Mr Walker's claim of unjustifiable dismissal at the meeting dated 18 October 2016.

[67] However even if I were to accept that the request for mediation raised an unjustifiable dismissal, that request took place on 8 February 2017 which was 113 days after 18 October 2016, and outside the statutory 90 day time period for raising a personal grievance.

[68] NZCRL does not consent to Mr Walker raising a personal grievance outside the statutory 90 day time limit.

[69] An employee may raise a personal grievance outside the statutory time period in one of two circumstances pursuant to s 114 (4) of the Act. Section 114 provides:

> *(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*
>
> *(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

[4] *Underhill v Coca-Cola Amati (NZ) Ltd*[2017] NZEmpC 117 at [33] & [34]

> *a) Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*
>
> *b) Considers it just to do so*

Exceptional Circumstances

[70] Section 115 of the Act sets out the circumstances in which exceptional circumstances may be found:

> (5*) Further provision regarding exceptional circumstances under section 114 For the purposes of section 114(4)(a), exceptional circumstances include—*
>
> > *(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
> >
> > *(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*
> >
> > *(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or*
> >
> > *(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

[71] Mr Walker has not argued, and there is no evidence to establish, that he was so traumatised that he was unable to properly consider raising a personal grievance pursuant to s 115 (a) of the Act.

[72] There is no evidence in the communications between Ms Monsellier and Mr Walker that she unreasonably failed to raise Mr Walker's personal grievance within the statutory time frame pursuant to s. 115 (b) of the Act.

[73] The Employment Agreement contained an explanation for raising a personal grievance which included the statement: "*If it is a personal grievance, the employee has 90 days from the time the problem occurred, or became known to the employee, to raise the grievance with the employer".*

[74] Mr Walker had signed the Employment Agreement, acknowledging that he had read, fully understood and accepted the terms and conditions it contained, therefore I do not find exceptional circumstances pursuant to s 115 (c) of the Act.

[75] There is no evidence that NZCRL failed in its obligation to provide a statement of the reasons for dismissal since there is no evidence that Mr Walker requested one pursuant to s 115 (d) of the Act.

[76] I do not find exceptional circumstances pursuant to s 114(4)(a) of the Act, and therefore I do not consider that it is just to grant Mr Walker leave to proceed with his personal grievance.

[77] I determine that Mr Blake did not raise his personal grievance within the 90 day statutory limitation period and as such, he is outside the statutory time limit for doing so. I am therefore unable to assist him further.

Costs

[78] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicants will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[79] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority