

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 247/10  
5286245

BETWEEN                      PATRICK WAMBURA  
Applicant

AND                              COOK/MCLEOD  
SHAREMILKERS  
Respondent

Member of Authority:      K J Anderson

Representatives:            S Parsons, Counsel for Applicant  
A McLeod, Advocate for Respondents

On the Papers:                3 February 2010

Determination:                24 May 2010

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER**

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**The Preliminary Matter**

[1]      Mr Wambura claims that he was unjustifiably dismissed from his employment on or about late July 2008. He filed a Statement of Problem with the Authority which was received on 9<sup>th</sup> November 2009. Not surprisingly, given that there is no tangible evidence of raising a personal grievance with his employer prior to filing his application with the Authority, Mr Wambura recognises that pursuant to s.114 of the Employment Relations Act 2000 (“the Act”), the raising of his personal grievance in the Authority, is substantially outside the 90 limit under the Act and he makes application for leave to raise the personal grievance on the grounds that there are exceptional circumstances.

[2]      Following a conference call with the parties on 18<sup>th</sup> December 2009, whereby the parties agreed that the 90 days preliminary matter should be determined on the papers, Mr Wambura has provided a sworn affidavit setting out the circumstances

relating to his grievance. The affidavit was forwarded to the respondent on 3<sup>rd</sup> February allowing for a response but none has been received.

### **Background**

[3] Mr Wambura was employed in the position of Dairy Herd Manager, by Mr Andrew McLeod “*about February 2008.*” He attests that he entered into an employment agreement for a fixed term of two years. Mr Wambura is a Kenyan citizen who was working on a work visa issued by Immigration New Zealand.

[4] Mr Wambura attests that in April 2008, he had an agreement with Mr McLeod that he would go for a one month holiday in Kenya and return to work at the beginning of August 2008. Mr Wambura also says that as agreed with Mr McLeod, he emailed him from Kenya on 28<sup>th</sup> July 2008 informing of his return. The Authority has sighted this email. On 29<sup>th</sup> July 2008, Mr Wambura left Kenya arriving at Kuala Lumpur Airport on the same day. However, he was prevented from boarding his plane to Auckland. Mr Wambura says that the airline told him that Immigration New Zealand (INZ) had cancelled his work visa, and upon speaking to INZ he was told that the work visa had been cancelled by his employer.

[5] Mr Wambura says that he contacted Mr McLeod and was informed that he should look for a place to stay in Malaysia so that Mr McLeod could organise the “paperwork” for Mr Wambura to apply for another work visa. Mr Wambura then rang Mr McLeod the next day (30<sup>th</sup> July 2008) and asked him to send some money to the Kuala Lumpur Airport but Mr McLeod said he couldn’t do that and then hung up the phone. Mr Wambura says that upon calling him again, Mr McLeod hung up the phone.

[6] Mr Wambura subsequently arrived back in Kenya on 15<sup>th</sup> August 2008. On 3<sup>rd</sup> October 2009, Mr Wambura returned to New Zealand taking up employment on another farm. Mr Wambura attests that on 2<sup>nd</sup> November 2009, the Manawatu Community Law Centre forwarded a letter to the respondent raising a personal grievance. This letter has not been produced and there is no other evidence of a personal grievance being raised. Nor is there any explanation of what Mr Wambura

did between 15<sup>th</sup> August 2008 and 3<sup>rd</sup> October 2009 when he returned to New Zealand.

### **Determination**

[7] While Mr Parsons on behalf of Mr Wambura submits that in addition, or alternatively, to the content of Mr Wambura's affidavit, the two emails attached to the affidavit show that Mr Wambura did raise a personal grievance within 90 days of becoming aware of his "employment problem." The emails are dated 30<sup>th</sup> July and 15<sup>th</sup> August 2008. But neither of these emails, even remotely, makes any mention of a personal grievance. Both of them simply relate to Mr Wambura being stranded at Kuala Lumpur Airport, seeking money and assistance with the processing of a work visa.

[8] I find that pursuant to s.114(4) of the Employment Relations Act 2000, that there are no exceptional circumstances that exist to a sufficient degree to warrant granting leave to Mr Wambura to raise a personal grievance outside the 90 day limit. Costs are not applicable.

**K J Anderson**  
**Member of the Employment Relations Authority**