Determination Number: WA 175/05
File Number: WEA 131/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	NZ Amalgamated Engineering, Printing and Manufacturing Union Inc (first applicant)
AND	Colin Blackler & Daryl Moyes (second applicants)
AND	Carter Holt Harvey Limited (respondent)
REPRESENTATIVES	Tony Wilton for the applicants Peter Kiely for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Palmerston North, 27 October 2005
DATE OF DETERMINATION	14 November 2005

DETERMINATION OF AUTHORITY: Preliminary Matters

Employment Relationship Problem

1. The applicants say the Company has breached the terms of a collective employment agreement (CEA) between it and the Union (the first applicant) which gives

preference for re-employment to employees made redundant. Messrs Blackler and Moyes (the second applicants) say they have been disadvantaged by the breach – statement of problem received on 15 April 2005. The applicants seek a penalty, an order that the Company employ the second applicants, compensation for humiliation, etc and loss of benefits, and costs. During the investigation Mr Blacker withdrew his claim for re-employment.

2. The Company denies breaching the CEA and says that the second applicants do not have standing to bring personal grievances – statement in reply received on 6 May. It also says Messrs Blackler and Moyes are outside the ninety day limit for raising a grievance and that it does not consent to them raising a grievance. The Company says there are no exceptional circumstances that would justify the granting of leave to raise grievances outside the 90 day limit.

3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on a two-day investigation in Palmerston North commencing on 27 October. As it happened only one day was required. Witness statements were usefully provided in advance of the investigation.

4. Efforts by the parties following the investigation to settle their problem were unsuccessful.

Preliminary Determination

5. Before addressing the substantive matters, the parties agree that the Authority has to first determine the following preliminary matters:

   a. Do the second applicants have standing to raise personal grievances, under ss. 5, 6 & 103(1) (b) of the Act?

   b. Were the second applicants' grievances raised within the 90 day time limit set out in s. 114 of the Act? Or,

   c. As the respondent does not consent to the late raising of the grievances, do exceptional circumstances apply per ss 114(4) of the Act?

Background

6. The key facts are largely agreed.

7. Following consultation with the Union the Company implemented redundancies at its Levin plant in August 2004.

8. The second applicants were made redundant. Both were members of the Union. At that time Mr Blackler had 16 years service with the Company. Mr Moyes' service totalled 33 years. The genuineness of their selection for redundancy was not challenged, nor was the redundancy process.

9. Shortly after the redundancies the Company was required to recruit staff. It engaged an outside agency to conduct the recruitment process on its behalf.

10. In early November 2004, and in response to the respondent's moves to recruit more staff, the Union approached the Company to discuss the position of employees recently made redundant and the application of that part of the CEA (clause 11) which provided, under certain circumstances, for the preferential re-employment of workers made redundant in the previous 12-months. No agreement was reached by the Union or the Company as to the meaning of the preferential re-employment clause.

11. As a result of the vacancies, the second applicants sought re-employment.

12. On 16 November a Union organiser sent a letter to the Company stating, amongst other things, the following:

> *Please be on notice that if our members are passed over for vacancies for which they are qualified (ie, if they are able to do the work) and others are employed instead, the EPMU will take appropriate legal action to enforce the redundancy agreement. The remedies sought may include compliance and penalties for breach of agreement. There is also* ***the potential for personal grievances*** *in the wake of appointments made in breach of the preference obligation.*

(emphasis added)

13. Applicants for the vacant positions were required to complete various reasoning tests, and to undergo drug and alcohol testing and criminal record checks.

14. By letter dated 23 December 2004 the Company advised Messrs Blackler and Moyes that they had not been successful in obtaining re-employment.

15. The next communication to the Company of the Union and Messrs Blackler and Moyes' concerns was by way of the applicants filing in the Authority a statement of problem setting out an application for compliance and a penalty and personal grievances on 15 April 2005.

Respondent's Position

16. The Company says the second applicants do not have standing to pursue personal grievances against it. At the time the decision was made to not re-employ them the second applicants were not *"employees"* of the Company as defined in s. 6 of the Act. Furthermore, s. 103 (1) (b) of the Act is directed at breaches of *"on the job"* obligations, consistent with the findings of the Court of Appeal in *Wellington AHB* v *Wellington Hotel IOUW* [1992] 2 ERNZ 466. In that decision it was found that the employer's failure to re-employ the grievant did not amount to a personal grievance.

17. That line of reasoning is reinforced by the Court's decisions in *Victoria University* v *Haddon* [1996] 1 ERNZ 139 and the Employment Court's decision in *Hayden* v *Wellington Free Ambulance Service* [2002] 1 ERNZ 399. In the latter it was found that relief available under the Act is only available where a person has actually been employed on settled terms and conditions and that the Act did not contemplate grievances about unsuccessful job applications.

18. The Union's letter of 16 November 2004 was not sufficient to raise a personal grievance. It did not make the Company aware of an alleged grievance as is required by s. 114 (2) of the Act as it only referred to the *"potential"* grievances and there was nothing for the Company to *"address"* (s. 114 (2)). The letter was also not within the time frame *"beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee"* as required by s. 114 (1). As the

Company had not, at that time, made a decision about the second applicants' re-employment applications no disadvantage had accrued.

19. The letter of 16 November 2004 also failed to identify the second applicants as the employees alleging the personal grievance and thereby fails to meet the requirement of s. 114 (2).

20. The letter of 16 November 2004 was not sufficient for the purpose of raising grievances on behalf of the second applicants as it did not identify with any specificity the nature of the grievances of the grievants. Instead it simply said that future actions might give rise to grievances.

21. The second applicants were advised that their applications for re-employment had been unsuccessful by way of letters dated 23 December 2004: the first notice received by the Company of the grievance was the statement of problem filed on 15 April 2005. That is outside of the 90-day time limit set out in s. 114 (1) of the Act. The Company does not consent to the second applicants' grievances being raised out of time.

Applicant's Position

22. Because of my preliminary findings in favour of the applicants' position there is no need for me to summarise their arguments.

Discussion and Findings

23. I am satisfied that the second applicants are able to proceed with their grievances for the following reasons.

24. I am satisfied the second applicants have the necessary standing to bring their grievances. This is because of the effect of s. 103 (1) (b) of the Act and in particular the insertion of the words:

> *"that the … conditions of the employee's employment (**including any condition that survives termination of the employment**), **is or are or was (during employment***

that has since been terminated*) affected to the employee's disadvantage by some unjustifiable action etc"*

(emphasis added).

25. These words are additional to those appearing in an otherwise similar provision in s. 27 of the Employment Contracts Act 1991. To date there has been little case law addressing the application of this new provision. Some obiter appears in Waugh v The Commissioner of Police [2003] ERNZ 236, at par 100. As Goddard C J observed therein, *"The change in legislative wording must be intended to have some significance"*. I find that these words are clearly intended to overcome the effect of similar but different provisions previously set out in the Labour Relations and the Employment Contracts Acts. It is therefore appropriate to distinguish the Court of Appeal's decision in *Wellington AHB* (above).

26. I am satisfied these words have a plain meaning and are plainly intended to take account of parties – such as the Company and the Union – freely and deliberately entering into, in good faith, provisions that are designed to endure at least for 12 months after the employment relationship otherwise comes to an end, and to be readily accessible to the parties via the grievance and enforcement, etc provisions of the current Act. That approach is consistent with a major theme of the parties' redundancy provisions, i.e. the recognition of *"the serious consequences that the loss of permanent employment can have on the individual employees* (sic)*"* (clause 1). While limiting remedial action – at that point in the Redundancy Agreement – to encouraging individuals to remain in employment by relocation and/or retraining, the provisions overall attempt to mitigate the traumatic effects of permanent job loss.

27. Because of the significantly differing fact circumstances, I do not accept that the Employment Court's decision in *Hayden* (above) should be read as authority for determining the issue in this application. In particular Mr Hayden was not relying on a claim of preferential re-employment rights.

28. I accept the respondent's submissions that the second applicants' grievances were raised out of time. That is because the Act clearly does not provide for prospective or potential grievances, but instead requires the raising of grievances *"within the 90 days*

beginning with the date on which the action alleged to amount to personal grievance occurred or came *to the notice of the employee …"* (emphasis added, s. 114 (1)). As submitted by the Company, specificity is required including the identity of the employee and some clarification of what it is that the employee wants the employer to address (s. 114 (2)): neither were provided in the Union's letter of 16 November because neither could be provided in advance of a specific action.

29. However, and for the following reasons, I am satisfied that exceptional circumstances do apply and that it is just to grant leave to the second applicants to allow them to bring their grievances:

a. It is clear from the evidence disclosed in the Authority's investigation that the second applicants *"made reasonable arrangements to have the*(ir) *grievance*(s) *raised on* (their) *behalf by* (their) *agent, and the agent unreasonably failed to ensure that the grievance*(s were) *raised within the required time"* (s. 115 (b) of the Act). These arrangements included active discussion by the second applicants with their Union representatives, particularly a delegate and an organiser, before, during and after the Company advertised the vacancies that Messrs Blackler and Moyes unsuccessfully applied for.

b. The failure to act was that of the Union and not of the second applicants. That failure arose out of its belief it had communicated advice of the second applicants' personal grievances to the Company by way of its letter of 16 November 2004: by relying on that communication the Union unreasonably failed to ensure the second applicants' grievance was properly raised within the required time – ss. 115 (b) of the Act.

c. Because of the Union's 16 November 2004 letter and other advice from the Union, the Company was alerted to the potential for grievances if previous employees were not re-employed. It had the benefit of a preliminary, albeit generalised, warning.

d. The grievances were communicated to the Company via the filing of the statement of problem 112 days after its advice to the second applicants that their applications for re-employment were unsuccessful: while outside of the 90-day

period provided by the Act there is no evidence of the 22 day difference disadvantaging the Company in any way.

30. For the reasons set out above I am satisfied the second applicants enjoy standing and that it is just and appropriate to grant them leave to bring their grievances by way of exceptional circumstances.

31. Where do the parties go to from here? Sub-section 114 (5) is mandatory:

> *"In any case where the Authority grants leave under subsection (4), the Authority **must** direct the employer and employee to use mediation to seek to mutually resolve the grievance"*.

(emphasis added)

32. What this means is that the Act requires the parties, in light of the Authority's findings and determination, to now undertake further mediation. Before they do so I will take this opportunity to raise with them various issues that emerged during the investigation, in respect of their substantive positions, which warrant proper risk assessment. They are:

a. Mr Blackler no longer seeks employment with the Company. That is probably an appropriate election in light of an admission he made during his interview for re-employment. However, should his personal grievance succeed, an issue of contributory fault may arise in which case it would have to be considered in respect of his ongoing substantive claims.

b. The Company made a similarly frank admission, on this instance during the Authority's investigation. It was in respect of document 17 in the respondent's bundle, which is described as a reference check. The Company advised that a similar document had been produced in respect of the other second applicant. It was not tabled in the Authority's investigation and will need to be – along with an opportunity for the parties to comment – before a substantive determination can be arrived at. The Company agreed that the reference checks were a clear signal to the agency undertaking its recruitment exercise that it was not to recommend

the re-employment of the second applicants. In the event of my having to do so, that admission will need to be tested in the context of the meaning of the words *"workers whose employment has been terminated due to redundancy **shall**, within 12 months, **where practicable and all things being equal**, be given preference for re-employment"*, as set out at clause 11 of the CEA (emphasis added). In interpreting what those words mean, by application to the facts of this case, issues requiring determination include the parties' mutual good faith obligations and whether the Company's advice amounted to an unjustifiable disadvantage.

Determination

33. For the reasons set out above, and by way of a preliminary determination, I find in favour of the applicants' claim that Colin Blackler and Daryl Moyes enjoy standing to bring their grievances against the respondent, Carter Holt Harvey Limited, and are able to proceed to do so by way of the exceptional circumstances provision provided at ss. 114 (4) (a) and 115 (b) of the Act.

34. Consistent with the provisions of ss. 114 (5) of the Act the parties are directed to undertake mediation to seek to mutually resolve the grievance. In the first instance the parties are to confer and agree on a mutually convenient, as soon as practicably possible, date to resume mediation. Leave is reserved to the parties in the event that agreement cannot be reached.

35. As requested by the parties, costs are reserved.

Denis Asher

Member of Employment Relations Authority