

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Colin James Stuart (Applicant)

AND Hind Properties Limited trading as Sudima Hotel Grand Chancellor
(Respondent)

REPRESENTATIVES Colin James Stuart In person
Warren Barnes, Advocate for Respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING 24 March 2005

DATE OF DETERMINATION 7 April 2005

DETERMINATION OF THE AUTHORITY

The respondent

[1] With the agreement of both parties I substitute the name of the respondent with Hind Properties Limited trading as Sudima Hotel Grand Chancellor (“Sudima Hotel”).

The employment relationship problem

[2] The applicant, Colin Stuart, was employed at the Sudima Hotel in Christchurch from September 2003 as a full time night porter. He was dismissed from his employment on 28 October 2003 and says that the dismissal was unjustified. Mr Stuart lodged a statement of problem with the Authority on 19 February 2004.

[3] In its statement in reply the respondent said that the personal grievance had not been raised within the 90 day period.

[4] During a telephone conference with the parties it was agreed there would be a preliminary investigation to determine whether the grievance had been raised within 90 days or whether the Authority should grant leave to raise the personal grievance after the expiration of that period. Mr Stuart subsequently lodged with the Authority an amended statement of problem seeking leave to raise the personal grievance after 90 days and the respondent lodged a statement of reply to that application. The respondent did not consent to the grievance being raised out of time.

[5] The issues for determination are:

- (a) Whether Mr Stuart raised his grievance within the 90 day period;

- (b) If Mr Stuart did not raise his grievance within the 90 day period whether the Authority should grant him leave to do so on the basis that the delay was occasioned by exceptional circumstances.

Did Mr Stuart raise his grievance within the 90 day period?

[6] Mr Stuart said that he advised Keith Holmes, the assistant manager, at the end of his disciplinary meeting on 28 October 2003 at 7am that a *personal grievance would be raised* and made it clear he was unhappy with the procedure adopted during the disciplinary process. Mr Holmes said that whilst it was clear Mr Stuart was not happy at the end of the meeting he did not mention anything about raising a grievance. Mr Holmes produced his own notes of the meeting of 28 October. There was no mention of the raising of a grievance in the notes. The notes provide that Mr Stuart telephoned Mr Holmes at 8.20am and disputed the reason for the dismissal as it was not in the contract that he signed. The notes reflect that Mr Holmes referred Mr Stuart to the staff handbook and asked him to look it up but that Mr Stuart said his copy of the handbook was upstairs. There is no suggestion from the notes that there was any further discussion after that between Mr Stuart and Mr Holmes.

[7] Mr Holmes wrote to Mr Stuart by letter dated 29 October 2003 confirming the decision to terminate his employment and saying that the termination was on the basis of wilful absence of duty by not showing up for a rostered shift on 23 October 2003.

[8] Mr Stuart said that he was told by Mr Holmes that the General Manager, Warren Barnes, would telephone him to discuss the matter but that did not happen. Mr Holmes said that he did not recall telling Mr Stuart that Mr Barnes would telephone him.

[9] Mr Stuart then wrote to Mr Holmes on 31 October 2003 asking for various payments to be made to him. He said in the letter that, *a separate letter will confirm the personal grievance it will be filed mid January within the 90 days.*

[10] Mr Holmes responded by letter dated 3 November 2003 and confirmed that Mr Stuart's final pay had been processed and that a pay-slip had been posted to him.

[11] There was no further communication between the parties until Mr Stuart posted to Mr Holmes on 5 February 2004 a copy of a letter that he had sent to the mediation service dated 21 January 2004 setting out his personal grievance. It was likely that the letter had been received by the hotel on the following day, 6 February, which was outside the 90 day period from the day that the grievance arose by 11 days. The 90 day period expired at the end of 26 January 2004.

Conclusion

[12] I found Mr Stuart to have a less reliable recollection than Mr Holmes about the nature of the discussions that took place at the time of dismissal and shortly thereafter. Mr Holmes' recollection was also supported by notes taken at the time of dismissal. Mr Stuart did not mention in his evidence for example that he had telephoned Mr Holmes shortly after his employment had been terminated to challenge the reason for his dismissal.

[13] I prefer the evidence of Mr Holmes that there was no actual reference to a personal grievance at the time of dismissal or during the telephone conversation shortly after the dismissal. Mr Holmes knew that Mr Stuart was unhappy at the time his employment was terminated. Mr Stuart shortly after his dismissal telephoned Mr Holmes to raise an issue about the reason for his dismissal not being contained in his employment agreement. Mr Holmes responded to Mr Stuart during the

telephone call and sent the letter of 29 October 2003 confirming the dismissal and the reason for the dismissal. I consider that the telephone discussion was in the nature of a request for reasons for the dismissal rather than the raising of a grievance.

[14] I find that if Mr Stuart had raised a personal grievance before his letter of 31 October 2003 there would have been no need for him to refer to the 90 day time frame. I am also of the view that had he been expecting Mr Barnes to make contact with him then it is likely that would have been recorded in his letter of 31 October 2003. There are two distinct matters dealt with in Mr Stuart's letter. The first is the question of the final pay which Mr Holmes responded to promptly and the second is that Mr Stuart would by separate letter confirm the personal grievance within 90 days. I find that it is only the first matter that Mr Stuart expected some response and action about at that time. The letter of 31 October indicates that it is Mr Stuart who intends to take a step in relation to the second matter rather than the respondent. The letter does not support Mr Stuart's position that he was waiting for the respondent to respond to him.

[15] Viewing the matter objectively I am not satisfied that Mr Stuart's dissatisfaction with his dismissal and his subsequent conversation with Mr Holmes constituted the raising of a personal grievance that Mr Stuart wanted his employer to address within the meaning of section 114 of the Employment Relations Act 2000. I find that Mr Stuart made it clear in his 31 October letter that he intended in the future to raise a grievance within the 90 day period but I do not find that a grievance was actually raised within the 90 day period.

[16] Mr Stuart did not raise his grievance within the 90 days period.

Should the Authority grant Mr Stuart leave to raise his grievance on the basis of exceptional circumstances?

[17] Mr Stuart could not recall initially whether he had posted a copy of the letter of 21 January to the hotel or whether the mediation service of the Department of Labour posted the letter on his behalf.

[18] During the investigation meeting Mr Stuart accepted that it was his writing on the envelope posted to the hotel on 5 February. He also accepted that he had written and signed on 5 February an extra note on the bottom of the copied letter to the hotel explaining that the document was a copy of a letter he had sent to the mediation service. Mr Stuart accepted that he must have posted a copy of his letter of 21 January to the hotel on 5 February 2004. In those circumstances, although I heard considerable evidence about difficulties Mr Stuart experienced in posting a letter to the mediation service and the letter being returned, I do not need to set out that evidence as it is not relevant.

[19] Mr Stuart explained that he posted the letter of 21 January 2004 which raised his personal grievance to the hotel on 5 February because he felt that the respondent had not responded to him. As I have earlier expressed it seemed clear from an objective reading of Mr Stuart's letter of 31 October that he was taking the next step within 90 days. Mr Stuart knew of the 90 day timeframe for raising a grievance and his employment agreement had a clear procedure for resolving employment relationship problems and personal grievances which referred several times to the 90 day time period. Mr Stuart did not give any other reason why he could not have posted the letter to the hotel at the same time he posted it to the mediation service. Although he had some other business commitments between December and January there was no suggestion the commitments would have prevented the posting of the letter on or about 21 January 2004.

Conclusions

[20] I am not satisfied that the delay in Mr Stuart raising his personal grievance was occasioned by exceptional circumstances within the meaning of sections 114 and 115 of the Employment Relations Act 2000.

Determination

[21] Mr Stuart did not raise his personal grievance within the 90 day limitation period.

[22] Mr Stuart's application for leave to raise the personal grievance outside of the 90 day time frame does not succeed and is dismissed.

Costs

[23] There is no issue of costs as neither party was represented.

Helen Doyle
Member of Employment Relations Authority