

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination number:
WA 18/08
5083020 and 5075731

BETWEEN ROYAL PUNA AND IAN
RAKURAKU
Applicants

AND HAULAGE TRANSPORT
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Michael McAleer, Counsel for Applicants
Doug Abraham, Advocate for Respondent
Investigation Meeting: 23 and 24 October 2007 at Napier
Determination: 13 February 2008

INTERIM DETERMINATION OF THE AUTHORITY

Issue for determination

[1] This is an interim determination to deal with the question whether the applicants (Mr Puna and/or Mr Rakuraku or the applicants) have raised all parts of their personal grievances within time and whether there has been any agreement reached between the parties on that matter, or decision made by the Authority which impacts on it.

[2] This matter was originally to be dealt with by Member Wood. In that regard, the Authority issued a directions notice dated 28 May 2007 in which Mr Wood set out the directions that were to apply in respect of the substantive hearing. The notice says in part:

Mr Rakuraku's claims for unjustifiable disadvantage are brought on the basis that they were all raised within 90 days of the actions coming to his attention.

By agreement, no investigation into whether exceptional circumstances exist will be required accordingly in either of the cases.

[3] Those words just referred to were the subject of dispute between the representatives at the investigation meeting which I presided over. In essence, Mr Abraham argued that the only matters capable of being investigated by the Authority were matters where a grievance had plainly been raised within 90 days of the event complained of, whereas Mr McAeer's contention was that the plain words of the directions notice were that the 90 day issue had been resolved on the footing that the grievances raised by the applicants were all accepted in principle as being within 90 days of the events complained of and therefore able to be considered by the Authority, without more, subject to Mr Abraham raising a substantive argument that they were *out of time*.

[4] At the time of the investigation meeting, Mr Wood was overseas on leave and accordingly I decided that, as a preliminary matter, the issue needed to be addressed and decided and that the parties needed to have the opportunity of making submissions to the Authority in relation to the disputed provisions in the notice of directions.

[5] When the file was transferred to my list, I arranged a telephone conference with the parties' representatives and this took place on 16 July 2007. Most of that telephone conference was taken up with timetabling matters to do with the organisation of the investigation meeting and the exchange of briefs of evidence. However, the issue now in contention was briefly traversed.

[6] Although it was not made clear to the Authority or to Mr McAleer at the time of the telephone conference, Mr Abraham recorded the telephone conference. By letter dated 26 October 2007 addressed to the Authority and copied to Mr McAleer, Mr Abraham revealed that he had taped the conversation and provided a typed transcript of the relevant part. Without at this point commenting on the propriety of the taping of such a communication without advice to either the Authority or the other party, or indeed considering the veracity of the transcript, it is appropriate to note what the transcript records as having been said on the issue.

[7] The transcript records Mr Abraham as raising the directions notice of 28 May 2007 issued by member Wood and has him saying:

In the third paragraph, says complaints for unjustifiable disadvantage are brought on the basis they were all raised within 90 days of the actions coming to his attention.

[8] The transcript then records a monosyllabic acknowledgement without an identified speaker and then has Mr Abraham recorded as asking the following question:

Now ... does that mean that we can't argue in any way shape or form the fact they haven't been brought up before then?

[9] Then Mr McAleer is recorded as responding to that question in the following way:

No, not at all, not at all, its only the contention of the, of the applicant they were raised, its obviously up to you to say they weren't.

[10] After a further observation of no moment from Mr Abraham Mr McAleer is recorded as continuing in the following vein:

Well your ... defence has not been ... disadvantaged at this stage, because your defence is quite clearly on the grounds of the 90 days, so it will be, and I don't want to pre-suppose anything Jim (a reference to me) it will be a matter of Jim deciding on the evidence as given whether the issue was raised or not.

[11] The transcript then records me remarking that it was a reasonable issue for Mr Abraham to raise as the Authority's minute could in my view be read *both ways*. Whatever the position in relation to the accuracy or otherwise of the transcript of the call, the remarks attributed to me and just referred to are indeed my view of the Authority's minute of 28 May 2007.

[12] The transcript then goes on to record another observation attributed to me which confirms the view that Mr Abraham may advance his objection to matters which he says are not capable of being dealt with as personal grievances because they have not been raised in time.

[13] The issue of the taping of the directions conference is raised by way of submission by Mr McAleer on the footing that the taping of such a communication without advice either to the Authority or to the opposing representative is at the very least discourteous.

[14] Two issues seem to me to arise. The first is the accuracy of the transcript and in that regard, I make orders later in this determination. The second issue is the propriety of the act itself, notwithstanding the apparent utility of the taping. As to the propriety, I agree absolutely with Mr McAleer. It is clearly surreptitious, discourteous and a breach of any proper process for a directions conference to be taped without the knowledge of the Authority or the opposing representative. If such an action were to have taken place in the context of a proceeding in a Court of record, it would in principle be a contempt of court and punishable accordingly.

[15] Before turning to consider the views advanced by each of the parties in relation to the matter before the Authority, I should record that, in order to preserve the respective positions of the parties pending a resolution of the instant dispute, I directed that the investigation meeting proceeded on

the basis that all matters were included in the issues for determination, inclusive of the elements of the applicants' personal grievances where the respondent argued that there was no proper notification pursuant to the *90 day rule*.

The applicants' position

[16] Mr Rakuraku alleges he has a personal grievance by reason of an alleged constructive dismissal and by reason of having suffered disadvantage as a consequence of the unjustified actions of Haulage Transport Ltd. Mr Puna, on the other hand, alleges that he has suffered a personal grievance only as a consequence of suffering disadvantage because of the unjustified actions of Haulage Transport Ltd.

[17] The applicants' submissions proceed on the basis that they did in fact notify Haulage Transport Ltd of their grievances within time, albeit that that notification was reasonably informal.

[18] The applicants also content that the 90 day period runs from the point at which they became aware that they had a personal grievance.

[19] Finally, the applicants say that the effect of Member Wood's direction was that, in relation to Mr Rakuraku, that applicant had *prima facie* raised his personal grievance within the 90 day period and that it was available to the representative for Haulage Transport Ltd to *raise a substantive argument in respect of the claim falling outside of the 90 day issue at the investigation meeting*. Counsel for the applicants notes that the representative for Haulage Transport Ltd *made no substantive application* at the investigation meeting and ... *merely indicated that he still maintaining the defence on behalf of his client, that the claims were not raised within the 90 days*.

The respondent's position

[20] Haulage Transport Ltd accept, that in respect to certain named allegations, the personal grievance of Mr Puna and Mr Rakuraku were raised in time but in respect to all the other allegations, no such concession is made.

[21] In relation to Mr Puna, Haulage Transport Ltd accepts that the allegations about lack of confidentiality of wage records and the allegation about making an inducement to leave the employment were matters that were raised within time. In relation to Mr Rakuraku the respondent accepts that the same allegation about making a inducement to leave the employment was raised within time but none of the other allegations.

[22] Haulage Transport Ltd's dispute the applicants' view that the 90 day rule can apply in circumstances where the complainant becomes aware that he has a personal grievance in which case the 90 days runs from the date the complainant becomes aware of the grievance.

[23] Haulage Transport Ltd resist the applicants' claim that the respondent must *raise a substantive argument* to prove its contention that the claim falls outside the 90 days. Haulage Transport Ltd say it is enough for the respondent to simply argue that position and maintain it during the course of the investigation meeting.

Determination

[24] The question in issue is whether the applicants, either singly or together, gave notification to their employer Haulage Transport Ltd of the existence of a personal grievance in respect to certain matters of concern to them and whether that was done within 90 days of the matters of concern or not.

[25] In my opinion, it is not enough for a applicant to simply complain about a matter in the workplace and say that that complaint, of itself, constitutes the raising of a personal grievance. An employee, in my opinion, must make it clear to his employer that the matter is taken so seriously as to constitute, in the employee's mind, a personal grievance, so as the employer is left in no doubt that the matter needs to be addressed or defined legal consequences will potentially follow.

[26] In the instant case, I am not persuaded that the majority of the claims made by Mr Puna and Mr Rakuraku were ever notified to the employer Haulage Transport Ltd in a way that would make it apparent to Haulage Transport Ltd that a personal grievance was on foot.

[27] While I have no doubt that Mr Puna and Mr Rakuraku were genuinely aggrieved by the issues they raised with the employer, I am not persuaded that, in the main, the steps they took legally constituted the raising of a personal grievance within the meaning of the Act.

[28] It follows that, in the main, in order for the applicants to take their employment relationship problem any further, they will need to seek leave pursuant to s.114(4) of the Act and they have not yet done so.

[29] The only matters which I find have properly been raised as personal grievances are the issues relating to the lack of confidentiality of wage records and the alleged inducement to leave the employment, in respect to both the applicants and both the causes of action.

[30] In making this finding, I am going further than the concession made on behalf of Haulage Ltd who have drawn a distinction between the two applicants in relation to the issue about lack of confidentiality of wage records, accepting that the grievance had been raised in relation to Mr Puna, but not in respect to Mr Rakuraku. I do not think the evidence supports that conclusion and accordingly I accept that the grievance has been raised under that head for both of the applicants.

[31] For the sake of completeness, I should also make clear that I accept the submission made on behalf of Haulage Transport Ltd that the 90 days runs from the date of the matter complained of or the date that the complainant became aware of the matter of concern but not within 90 days of the applicant becoming aware that he had a personal grievance. That is not the law and I accept the submission on behalf of Haulage Transport Ltd to that effect.

[32] I also refute the applicants' argument that Haulage Transport Ltd were required to make *a substantive application* in relation to the 90 day matter. I do not see the issue that way at all. Haulage Transport Ltd, throughout the investigation meeting maintained their stance that the bulk of the allegations made by the applicants were not raised properly as personal grievances and Haulage Transport Ltd had never consented to them being heard out of time. Mr Abraham for Haulage Transport Ltd consistently maintained his client's position throughout the investigation meeting and I am at a loss to understand what else he should have done to make the Authority aware of his client's position.

[33] Given my finding, the scope of the applicants' personal grievance is somewhat reduced but still alive. It is appropriate for the Authority to set a timetable for closing submissions on the substantive issue but obviously that timeline cannot commence to run until the challenge period for the present interim determination has been exhausted.

[34] During the *challenge period*, if the parties wish to explore again the prospects of settling the matter having heard from the Authority its view of the extent of the consideration of the personal grievances, then the parties are welcome to do that. If the parties elect to try to explore settlement on that basis, Mr McAleer is to advise Ms Marsden, the senior support office in the Wellington office of the Authority.

[35] If the parties do not wish to explore the prospect of settlement again, and there is no challenge to this interim determination, then the applicants' submissions on the substantive matter (as determined by this determination) are to be in the hands of the respondent and the Authority (Ms Marsden of the Wellington office) by 2 April 2008 and the respondent will file and serve its final

submissions by 16 April 2008. The applicants will then have a further seven days for any submissions strictly in reply.

[36] To deal with the issue of the accuracy of the transcript of my Directions Conference, I direct that Mr Abraham is to make arrangements with the Authority's Senior Support Officer, Wellington Office (Ms Marsden) to provide the original tape from which the transcript was made so that the transcript may be verified. The Authority will then issue a minute on the matter.

Costs

[37] Any question of costs will be dealt with in the substantive determination or, in the event the parties elect to try and resolve matters by agreement, can be negotiated between them.

James Crichton
Member of the Employment Relations Authority