

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 209/09
5275677

BETWEEN ROBERT JAMES HUGHES
 Applicant

AND HERRON'S FOUR SQUARE
 LIMITED t/a TWIZEL FOUR
 SQUARE
 Respondent

Member of Authority: Helen Doyle

Representatives: The Applicant in person
 Neil McPhail, Counsel for Respondent

Determination: 3 December 2009

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] The Authority has been asked to determine, as a preliminary matter, whether Robert Hughes raised his personal grievances of unjustified action causing disadvantage and unjustified dismissal within the 90 day period set out in s.114 of the Employment Relations Act 2000.

[2] Mr McPhail, on behalf of the respondent, says that the applicant failed to raise personal grievance claims within the 90 day timeframe and that Herron's Four Square Limited (Herron's Four Square) does not consent to the personal grievance claims being raised outside of that period.

[3] The parties were happy for the Authority to deal with the matter on the basis of the information provided which included two transcripts from tape recordings of meetings on 7 and 8 May 2009 between the parties, correspondence from the parties, correspondence from the Authority and submissions from Mr McPhail.

[4] Mr Hughes was adamant that both grievances were raised within the 90 day period with Herron's Four Square but after considering the material I asked the Support Officer to communicate with both Mr Hughes and Mr McPhail about whether an application to extend time should be made before it determined the matter so that if the Authority reached the decision that one or both of the grievances had not been raised within the 90 day timeframe it could deal with that application as part and parcel of this determination.

[5] Mr Hughes was not agreeable to that and therefore the Authority has proceeded to determine the sole issue as to whether the grievances were raised within the 90 day timeframe. An applicant is entitled to have the Authority answer this question first and is not prevented, if the Authority then finds that the grievances were not raised within the 90 day period, from then making an application to extend time.

The facts against which the preliminary measure is to be determined

[6] In his statement of problem lodged with the Authority, Mr Hughes refers to the following problems:

- Unfair dismissal;
- Verbal abuse;
- Contract change without notice and negotiation;
- Being given an official warning without proper process;
- Untrue statements made to staff and customers.

[7] The dates of the alleged grievances and when they are said to have occurred is important in order to then be able to determine whether grievances about them were raised within 90 days.

[8] From the information that is available and from the transcripts of the recordings from the meetings of 7 and 8 May, I am able to establish the following. Monday, 4 May 2009 is when Mr Hughes alleges the first unjustified action occurred about his contract having been changed. Tuesday, 5 May 2009 is the date Mr Hughes alleges that he was verbally abused by Mr Herron and was given an official warning without any process. Wednesday, 6 May 2009 is the date that Mr Hughes says he

attended at work but was not apparently permitted to start because Mr and Mrs Herron of Herron's Four Square wanted a meeting first. Thursday, 7 March 2009 is when that meeting took place and that meeting was recorded.

[9] There is reference in the transcript to Mr Hughes intending to talk to the Department of Labour about a personal grievance and to Mr Hughes intention to organise a mediation. It is also clear from the transcript that there was no real discussion about the issues at that meeting beyond reference to a personal grievance. Later on during the afternoon of Thursday, 7 May, Mr Hughes was provided with a letter asking him to attend a disciplinary meeting on Friday, 8 May 2009.

[10] On Friday, 8 May 2009, the meeting took place and was taped by Mr and Mrs Herron with Mr Hughes' knowledge. It is clear from the recording that Mr and Mrs Herron raised their concerns with Mr Hughes and that Mr Hughes then raised issues he had with respect to his contract, concerns about verbal abuse and the official warning and Mr Hughes also raised discussions in front of staff and customers.

[11] There was further discussion about mediation, presumably following on from the 7 May meeting, and Mr Hughes is recorded in the transcript as saying *so they are my issues and you have time to go away and consider them*. It appears from the transcript that Mr Hughes' employment terminated at that same meeting, the Herron's saying that they accepted Mr Hughes resignation, but this being after he had talked about his issues. Although the timeframe for the grievance for unjustified actions appears to run from 4 May 2009, the timeframe for the grievance of the dismissal runs from 8 May 2009.

[12] There was an attempt by the appropriate person in the Department of Labour to organise a mediation. An email on the Authority file provided by Mr Hughes records that there was no recollection by the workplace co-ordinator at the mediation service as to what was discussed with the Herron's about the nature of the grievance to be mediated. Mediation did not in any event take place.

[13] Within the 90 day period from 8 May 2009, Mr Hughes lodged a statement of problem which was received by the Authority on 29 July 2009. It appears from the Authority file that he sent the problem to the Authority at its street address and that would delay its delivery. The Senior Support Officer returned the statement of problem to Mr Hughes together with his cheque of \$70 as he considered there were

matters that needed attention before the claim could be lodged with the Authority. They related to the description of the respondents as Mr and Mrs Herron rather than the company which was inconsistent with the provisions of the employment agreement and the fact that only one copy of the statement of problem had been lodged.

[14] Mr Hughes duly attended to the matters that had been brought to his attention by the Senior Support Officer and lodged a statement of problem again with the Authority on 5 August 2009. I am satisfied the statement of problem was then served on the respondent company as confirmed by a courier track-and-trace on 6 August 2009 at 8.59am.

Analysis and discussion

[15] Section 114(1) and (2) of the Employment Relations Act 2000 provides:

Raising personal grievance

(1) 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.

(2) 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 employer wants the employer to address.

[16] On the face of the transcript record of the meeting of 8 May 2009 there appears to be a clear raising of all the matters Mr Hughes now alleges as unjustified actions causing disadvantage. Mr McPhail submits that:

- They were raised as *issues* but were in essence complaints about Mr Hughes working situation.
- A further step was required from Mr Hughes to elevate the complaints into personal grievance claims.

- They were not accompanied with an express or implied indication that the employee sought redress of the matter by way of personal grievance.

I find that at the meeting on 8 May 2009 Mr Hughes clearly raised issues as set out in his statement of problem that fall within the definition of a personal grievance under s.103 of the Employment Relations Act 2000 of unjustified actions causing disadvantage – *Miriam Clark v Nelson Marlborough Institute of Technology* 19 August 2008 CC 12/08. These were grievances he clearly wanted Herron’s Four Square to address and the substance of the grievances was clear from the way they were described by Mr Hughes and the close proximity of the meeting to the alleged events. The word personal grievance was used at the meeting on 7 May 2009 without further elaboration but Mr Hughes then at the meeting on 8 May provided sufficient specifics about his grievances to enable them to be addressed – *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v. Edmond* [2008] ERNZ 139. Mr and Mrs Herron were told on 8 May 2009 Mr Hughes wanted to participate in mediation in this regard. There is no further requirement for reference to claims or that legal action will follow for the grievance to be raised.

[17] I am satisfied that the personal grievance in terms of the unjustified actions causing disadvantage was raised within 90 days for the purposes of s.114 of the Employment Relations Act 2000.

[18] I now turn to whether Mr Hughes raised a personal grievance that he was unjustifiably dismissed within the 90 days. I do not find that this was raised at the meeting on 8 May after Mr Hughes was told his resignation was accepted. I cannot be satisfied that it was raised when there was discussion about a mediation date between the workplace co-ordinator and the Herrons. It was raised by the serving on the company on 6 August 2009 with the statement of problem. An interesting calculation was provided by Mr Hughes that from 8 May 2009 at 3.00pm until 6 August 2009 at 9.00 am the time duration was 89 days and 18 hours. Whilst initially appealing in terms of calculating 90 days, s. 114 refers to days and not time and I accept that the grievance was raised one day outside of the 90 days from 8 May 2009. The last day within the 90 day timeframe was 5 August 2009 and the grievance was raised with Herron’s Four Square Limited on 6 August 2009.

[19] I find that the grievance of unjustified dismissal was raised outside of the 90 day time frame by one day.

[20] Mr Hughes may now make an application to the Authority to extend the time for raising a personal grievance of unjustified dismissal after the 90 day period has expired. Mr McPhail on behalf of the employer will have an opportunity under s.114 (4) to be heard on that application.

[21] I reserve any issue as to cost to be addressed if necessary at a later time.

Helen Doyle
Member of the Employment Relations Authority