

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 406/09
5155137

BETWEEN

MICHAEL JAMES
SUTHERLAND
Applicant

AND

THE PROPRIETORS OF TE
WHAKAARI
INCORPORATION t/a
TUKEMOKIHI STATION
Respondent

Member of Authority: Dzintra King

Representatives: M R Wolff, Counsel for Applicant
H Collier, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received 2 October 2009 from Applicant
25 September 2009 from Respondent

Determination: 17 November 2009

DETERMINATION OF THE AUTHORITY

[1] The sole matter to be determined in these proceedings relates to whether or not Mr Sutherland filed his personal grievance within the 90 day period.

[2] Section 114(1) Employment Relations Act 2000 states:

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.

[3] Section 114(2) states:

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 where the employee alleges a personal grievance that the employee wants the employer to address.

[4] Mr Sutherland filed a personal grievance on 10 February 2009 citing AG First Limited as his employer. Mr Sutherland's employment agreement was between him and the Proprietors of Te Whakaari.

[5] Also at issue is the related matter of date that the employment terminated. There was a meeting on 17 November 2008 at which Mr Sutherland was told by Mr Collier that his employment was being terminated. Mr Collier was the author of a letter dated 17 November 2008 which gave Mr Sutherland formal notice of a meeting to discuss the continuation of his employment. Prior to that time, there had been a number of communications between Mr Sutherland and Mr Collier. All these letters were on AG First letterhead and Mr Collier signed himself "*supervisor*".

[6] On 22 October 2008, Mr Collier wrote to Mr Sutherland regarding the possibility of termination of his employment and on that same date Mr Collier signing as "*supervisor*" on AG First letterhead issued Mr Sutherland with a formal written warning. On 3 November 2008 there was a letter from Mr Collier to Mr Allan Hall of the law firm Burnard Ball & Co also signed in his capacity as supervisor. The letter was headed "*The Proprietors of Te Whakaari and Mr Michael Sutherland*". On 11 November 2008, there is a letter from Mr Collier to Mr Sutherland regarding his fitness to work. On 17 November 2008, there was a further letter from Mr Collier to Mr Sutherland regarding ACC and authorisations to look at medical records.

[7] On 8 December 2008 there was a letter from Mr Collier to Mr Sutherland which summarised and confirmed the matters discussed on 17 November. In the 8 December letter, Mr Collier confirmed at point 11:

We have no option but to terminate your employment on the grounds of medical incapacity.

[8] The letter also confirmed to Mr Sutherland at point 12:

You are entitled to remain in your house for 30 days from today. You must vacate it by 18 December 2008.

[9] The letter sent to Mr Collier by Mr Wolff on 10 February stated:

We are instructed by Michael James Sutherland, Michael, to raise a personal grievance against AG First Limited

[10] This letter also stated:

Michael instructs the following: He was employed by the station from August 2006 as a shepherd general worker.

[11] On 17 February, Mr Collier, in this instance signing himself as “*Managing Director*” of AG First, said that Mr Sutherland was not and had never been an employee of AG First. On 19 February, Mr Wolff sent a letter addressed to Mr Dave Atkins of Tukemokihi Station, attaching a copy of the personal grievance letter of 10 February.

[12] On 12 March 2009 a Statement of Problem was filed in the Authority naming the respondent as the Proprietors of Te Whakaari.

Was the employment terminated on 17 November or 8 December 2008?

[13] Mr Sutherland’s employment agreement provides for the giving of three months’ notice. No notice was given. Mr Sutherland was on ACC. The employment agreement states:

If the employee is guilty of any serious misconduct the employer may terminate his employment without notice provided that no dismissal will be accepted unless it is conveyed to the employee in writing.

[14] The period of 90 days from 17 November 2008 is 15 February 2009. The period of 90 days from 8 December 2008 is 7 March 2009.

[15] In *Wilkinson v. ISL Computer Systems Ltd* [1993] 1 ERNZ 512 the Employment Court held that where a personal grievance had been served on a company that was not the employer but the company was made aware of the personal grievance before the expiry of the 90 days that that constituted a submission of the grievance pursuant to the Employment Contracts Act 1991.

[16] The employment ended on 8 December 2008 when the written confirmation was provided.

[17] The Statement in Reply was lodged by Mr Collier who signed himself "*Farm Supervisor Tukemokihi Station*". It is very clear that Mr Collier had been dealing with Mr Sutherland as a representative of the employer for a considerable period of time, certainly from 22 October 2008 on the documentation before me.

[18] The 10 February 2009 letter of personal grievance clearly stated that Mr Sutherland was an employee of the Station although it named AG First as the respondent. Mr Collier was dealing as a representative of the employer. He was the only person from whom Mr Sutherland had received correspondence since 22 October 2008. He was clearly in a position to be able to notify the actual respondent of the notification of a personal grievance. The personal grievance was submitted in time, regardless of whether the dismissal took place on 17 November 2008 orally or on 8 December 2008 in written form.

[19] The grievance having been submitted within 90 days, the Authority has jurisdiction to hear Mr Sutherland's personal grievance. It may be that now having this determination, the parties may wish to reconsider looking at the substance of the personal grievance in a mediation.

Costs

[20] Costs are reserved. If the matter proceeds to a substantive hearing I will determine the costs after that hearing. If the parties are able to resolve the substantive matter and wish to have costs on this matter determined, the applicant should file a memorandum to which the respondent should reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of the Employment Relations Authority