

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 403/09
5147256

BETWEEN	BRIAN SAIPE Applicant
AND	GOLDEN BRIDGE MARKETING LIMITED First Respondent
AND	STEVEN BRIANT Second Respondent
AND	HELEN BRIANT Third Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Applicant in person Michelle Dean for Respondents
Investigation Meeting:	19 May 2009
Submissions received:	22 May 2009 from Respondent 26 June 2009 from Applicant
Determination:	13 November 2009

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] The applicant's employment relationship problem (which includes alleged disadvantage grievances and an alleged grievance of unjustified dismissal) was lodged in the Authority on 18 December 2008. Golden Bridge Marketing Limited says that this was more than three years after the date on which the grievances were raised with it. It says all the grievances had been raised on or before the date of dismissal which it says was 15 November 2005.

[2] If this were found to be the case, it would deprive the Authority of jurisdiction to investigate the personal grievances, since section 114(6) of the Employment Relations Act 2000 provides:

“No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.”

[3] Mr Saipe’s position, as I understand it, is that his grievances were raised by letter dated 19 December 2005 (received by the respondents’ solicitors on 21 December 2005) and not before. He says that the three year time limit which is set by section 114 (6) runs in this case from 21 December 2005 and has been met. Therefore, he says, the Authority can proceed to investigate his personal grievances.

[4] All three respondents also say that the first respondent was Mr Saipe’s employer. Mr Saipe told me that he had been unsure as to who employed him and cited the directors of the first respondent out of caution.

Issues

[5] The issue for determination here is the question of when Mr Saipe raised each of his grievances. The outcome on that issue will determine whether the Authority has jurisdiction in relation to Mr Saipe’s personal grievances. If it does, a further issue will arise as to the identity of Mr Saipe’s employer.

When were the grievances raised?

[6] It appears not to be in dispute that Mr Saipe was employed in June 2005. By October of that year employment relationship problems had emerged. Mr Saipe and Mr Briant met on 25 October 2005 at which time Mr Saipe tabled a 7 page document setting out a number of concerns that he had in relation to his employment, including (but not limited to) alleged breaches of statutory obligations, and assertions that he had been required to work excessive hours and to undertake prolonged driving (causing back pain.) From what I understand, there is no dispute that Mr Saipe’s

presentation of this document amounted to the raising of several discrete personal grievances of disadvantage.

[7] On 15 November 2005 Mr Saipe, accompanied by his brother, met with Mr and Mrs Briant. Once again Mr Saipe raised issues of concern to him. The respondent says that these were a repeat of the matters raised in the letter of 25 October 2005. I accept that no matters of a new type were raised on 15 November but accept that Mr Saipe asserted that in the interval between 25 October 2005 and 15 November 2005 there had been further instances of the matters which he had previously claimed to be disadvantage grievances (such as working extended hours.)

[8] After a break the meeting resumed and Mr Briant advised Mr Saipe that he was dismissed. Mr Saipe returned company property before finishing up, for good, the same day. He received his final pay on 16 November 2005.

[9] Mr and Mrs Briant assert that as he was leaving Mr Saipe uttered words to the effect that he would “*be taking this further*” or would “*see them in court.*” The receptionist for Golden Bridge Marketing Limited (who was present at the time) confirmed this to the Authority. Mr Saipe’s brother also gave evidence to the Authority in which he stated that he was present when his brother left but had no recollection of him saying these words. Both Mr Saipe and his brother do say that at some point during the meeting Mr Saipe spoke of using the Employment Relations Service. Both say they understood this to be a repeat of an invitation to mediation first given on 25 October 2005. However they told me that they believed this was said before the dismissal took place.

[10] Immediately after Mr Saipe had left the first respondent’s premises Mr and Mrs Briant spoke with their solicitor, Ms Anna Fitzgibbon. Ms Fitzgibbon also gave evidence to the Authority. She stated that during that conversation Mr Briant told her that he understood that Mr Saipe intended to pursue a grievance. It was also Ms Fitzgibbon’s evidence that in the week that followed, she was contacted by the Employment Relations Mediation Service and advised that Mr Saipe wished to undertake mediation with the respondents. Ms Fitzgibbon told me she relayed to the mediation service the instructions she had been given: that her clients did not wish to attend mediation with Mr Saipe.

[11] Ms Fitzgibbon told me that she understood that the proposed mediation was to address all issues between the parties, including the alleged disadvantage grievances and the alleged dismissal grievance. In his evidence, Mr Saipe pointed out that he had sought to attend mediation with the respondents (and had approached the mediation service about this) well before he was dismissed. He asserts therefore that there was no basis for any assumption that any proposed mediation was to address the dismissal as well as the earlier concerns. He told me that he received a letter from the Employment Relations Service dated 23 November 2005 confirming the fact that the respondents declined mediation but making no mention of any claim of unjustified dismissal.

[12] On 19 December 2005 Mr Saipe wrote to Mr Briant. That letter opened:

“Golden Bridge Marketing Ltd is hereby formally notified of a personal grievance under the Employment Relations Act Section 103 Clause 1(a) that its dismissal of me was unjustified.”

[13] In the letter Mr Saipe went on to request:

- i. a written statement of reasons for the dismissal;
- ii. a copy of his wage and time records;
- iii. a copy of the employment agreement, and
- iv. a complete record of all personal information held about him (pursuant to the Privacy Act 1993).

[14] The letter noted that the employment agreement and personal information had been requested before, on 25 October 2005 and 9 November 2005 respectively. Finally Mr Saipe also requested copies of his call reports and of all instructions, policies and directions issued to him during his employment.

[15] The respondents say that the disadvantage grievances were raised on 25 October 2005. As for the dismissal grievance, they say that the use of the phrase “formally notified” in the letter of 19 December 2005 supports the contention that the dismissal grievance had already been raised informally (but effectively) on 15 November 2005. In support of that contention they say:

- i. both Mr and Mrs Briant recall Mr Saipe making a comment that indicated that he was raising the dismissal grievance;
- ii. their evidence is credible and consistent with what Ms Fitzgibbon said they reported to her at the time, and
- iii. is consistent with, and reinforced by, mediation having been progressed in the week which followed.

Determination

[16] Regarding the disadvantage grievances, I am satisfied that the letter of 19 December 2005 discloses no new matters of concern that had not been raised previously. I am satisfied that all the disadvantage grievances were raised on 25 October 2005.

[17] Regarding the dismissal grievance, I conclude on balance that Mr Saipe did utter the words described by Mr and Mrs Briant and the other staff member present. The evidence of the three witnesses for the respondent was credible, for all the reasons set out above, while the fact that Mr Saipe’s brother does not recall the comment does not amount to positive proof that it did not occur.

[18] This leaves the question of whether the words uttered amounted to a raising of the dismissal grievance. An employee “raises” a grievance with an employer by taking reasonable steps to make the employer aware that the employee claims to have a personal grievance that he or she wants the employer to address. Those reasonable steps may be oral, but must be sufficiently clear that the employer knows what it is that the employee wants addressed.

[19] I consider that, in the context of this case, there are two alternative ways in which Mr Saipe's parting words could be construed. The first is that he was signalling his intention to pursue the grievances he had raised on 25 October 2005, and only those. The second is that he was putting Mr and Mrs Briant on notice of his intention to pursue all the matters that had been the immediate subject of discussion between them, including the dismissal. Of these, the second construction is the one I find more plausible, and I accept that it amounts to the raising of the dismissal grievance.

[20] I am satisfied that the dismissal grievance was raised on 15 November 2005. It follows that the personal grievances have not been commenced in the Authority within the time limit set by section 114(6.) The Authority does not have jurisdiction to hear the personal grievances.

[21] I also note, in response to points raised by Mr Saipe in his submissions on the preliminary issues that the allegations giving rise to the claims of personal grievance might also, arguably, amount to breaches of the employment agreement. Relevant limitation periods under the Employment Relations Act are set out in the following sections of the Act:

"142 Limitation period for actions other than personal grievances

No action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose."

And

"135 ...

(5) An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of –

(a) the date when the cause of action first became known to the person bringing the action; or

(b) the date when the cause of action should reasonably have become known to the person bringing the action."

[22] Mr Saipe has asked that if he were found to be out of time to lodge his personal grievances the Authority might proceed to re-frame his employment relationship problems as breaches of contract. Given that his problem has several different aspects to it, some of which might be approached in more than one way, I consider this a task better left to him. The Authority will await his advice as to his intentions.

Costs

[23] The issue of costs is reserved at this stage.

Yvonne Oldfield

Member of the Employment Relations Authority