

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 286/09
5105900

BETWEEN DANIEL MURRAY
 Applicant

AND S & H LINCOLN LIMITED
 T/A SPONGE BAR
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Helen Gao, advocate for Respondent

Investigation Meeting: 17 August 2009

Determination: 18 August 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated a claim of personal grievance notified on behalf of Mr Daniel Murray to S & H Lincoln Limited. That company operated the Sponge Bar licensed premises in which Mr Murray was employed for just over two years.

[2] At the end of the investigation meeting I gave an oral determination that the Authority was unable proceed further and investigate the merits of the claim, as the grievance had not been raised within the 90 day period required by law.

[3] I confirm now in writing my findings from the evidence Mr Murray on 21 July 2007 met with Ms Helen Gao, a director of the employer, and following the discussion they had about aspects of his performance and conduct he did not return to work again after that. The following day Mr Murray received a text message from Mr

Steve Yao, a co-director of Ms Gao, that said “dan u cannot come back to work now,” and giving reasons for that statement.

[4] Mr Murray said that when having these final communications with Ms Gao and Mr Yao he told one or both of them he would be getting a lawyer immediately.

[5] He says that he contacted Mr David Feist, an employment law advocate, within a week and put the matter of his dismissal in his hands. A statement of problem was lodged in the Authority by Mr Feist, but not until the beginning of November 2007. Annexed to it was a letter dated 28 October 2007. Presumably Mr Feist sent that letter to the employer on or after that date, by then being some 98 days after Mr Murray’s employment had ended.

[6] The purpose of Mr Feist’s letter is expressed to be “to formally notify” the employer of a personal grievance. It refers to the meeting on 21 July at 1 am and advises that Mr Murray had said during it;

..... he would be “getting a lawyer” and commencing a personal grievance.

[7] Mr Murray’s evidence is that all he said was he would be getting a lawyer but had not indicated that this was for a particular purpose such as bringing a grievance.

[8] Even if he had stated his intention to see a lawyer so that a grievance could be brought, giving that advice does not amount to raising a grievance within the meaning of the Employment Relations Act 2000. The notes Mr Murray typed up immediately after his departure on 22 July 2007 do not indicate that he raised a grievance orally at that time.

[9] Under s 114(2) of the Act, to raise a grievance an employee has to make, or take reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employer wants the employer to address.

[10] Mr Murray’s evidence is that by the time he instructed Mr Feist to act for him he had become aware of the 90 day period in which he was required by law to bring his claim, but he put his trust in Mr Feist to do what was necessary.

[11] There is no evidence as to what Mr Feist did or did not do before writing his letter of 28 October and presumably sending it. Mr Murray has not been able to

make contact with him to find out. He did learn that the statement of problem had been lodged by Mr Feist, but that was not until he was contacted by the Mediation Service about mediation. He regards Mr Feist as having failed to carry out obligations contractually entered into with him.

Determination

[12] It is clear that Mr Murray believed from all the circumstances that he had been dismissed at the time he finished working for Sponge Bar on or about 22 July 2007. Therefore the 90 day period ran from then under s 114 of the Act. I find that a grievance was not raised within the statutory 90 day period.

[13] The employer through its director Ms Gao confirmed to the Authority that it had not consented and did not consent to the grievance being raised outside of the 90 day period. Consent cannot reasonably be inferred from the fact alone that Ms Gao and Mr Yao attended mediation with Mr Murray in late 2007.

[14] No application has been made to the Authority under s 114(3) for leave to raise the grievance outside 90 days on the grounds of exceptional circumstances. Accordingly, on my findings, the personal grievance claim cannot be investigated and determined by the Authority.

A Dumbleton
Member of the Employment Relations Authority