IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 180/10
5163968

	BETWEEN	IAN PARR Applicant
	AND	CHIEF OF DEFENCE FORCE OF NEW ZEALAND Respondent

Member of Authority:	G J Wood
Representatives:	Ian Parr on his own behalf Nigel Lucie-Smith for the Respondent
Investigation Meeting:	19 October 2010 at Wellington
Submissions Received:	19 October 2010
Determination:	5 November 2010

DETERMINATION OF THE AUTHORITY

The Issues

[1] This determination is about whether the applicant, Mr Ian Parr, is precluded from bringing a personal grievance for alleged victimisation, because it is out of time. The respondent, the Chief of the Defence Force (Defence), claims that the first time he became aware of claims of victimisation of Mr Parr were in his statement of problem, filed as a disadvantage grievance on 13 July 2010. Defence resists this claim as being out of time.

[2] Mr Parr contends that one of the three claims of victimisation is within time, but that in any event there were exceptional circumstances for him formalising them later, in that he was told by the union official representing him that such claims were sufficiently connected to the employment relationship problem he did raise within time, namely that he could not be forcibly relocated from Porirua to Trentham and was therefore entitled to redundancy compensation.

[3] The issues for determination are whether Mr Parr's claims of victimisation are out of time, and if so, whether there were exceptional circumstances occasioning the delay and it is just for the Authority to hear and determine them nevertheless.

The Facts

[4] Mr Parr worked for the Defence Force for over 30 years until he resigned in November 2008. One of the areas he worked was in human resources. Here he worked with a higher graded Human Resources Manager with whom he had a number of disagreements over matters of operational policy, such as Kiwisaver and different superannuation schemes.

[5] Some time around the end of April or May 2008 Mr Parr claims that he was threatened by that manager on two occasions. On the first occasion he did not report the alleged threats to anybody. On the second occasion he advised another senior member of staff of them, without asking for any particular action to be taken.

[6] Around the same time the Defence Force decided to relocate staff such as Mr Parr from Porirua to Trentham and entered into consultation with Mr Parr's union accordingly.

[7] Mr Parr claims that in the course of this process (whereby the Defence Force claimed that he could be relocated to Trentham and he claimed that he was entitled to redundancy compensation) he was again threatened by the same senior Human Resources Manager, towards the end of October or early November 2008. Mr Parr relies on a letter from NZDF dated 20 October which stated that the Defence Force refuted that it was *trying to scare you off*. That phrase is contained in a paragraph headed "Resolution", noting the disappointment of the Defence Force that the matters had not been resolved, but that engagement with the union had been occurring and that the Defence Force was keen to resolve matters with him. Again when raising this matter Mr Parr did not ask his manager, who he claims passed on a fresh threat from the same Human Resources Manager, to take any action at that point, pending the Defence Force's response on his claim for redundancy compensation.

[8] In December 2008 his union raised a personal grievance on Mr Parr's behalf. In the letter raising the *personal grievance and/or dispute* by the union it was clear that the grievance raised related to Mr Parr's transfer to Trentham and the actions taken by the Defence Force surrounding that, not any prior victimisation.

[9] Mr Parr gave evidence that the union organiser told him that his claims of victimisation were covered by the phrase *unjustifiable action* and he relied on this advice before he signed the letter authorising the raising of the grievance.

[10] Mediation not having resolved the situation, Mr Parr's union filed *a dispute* with the Authority on 29 May 2009. On 14 October 2009 Mr Parr contacted the Authority to note that the union was no longer acting for him.

[11] During a case management conference on 30 October 2009 Mr Parr noted that there were other issues that he wanted to raise at an investigation meeting that had not yet been raised with the Authority, but would need to be filed with an amended statement of problem. When advised that this may bring issues to the fore about whether such grievances were raised in the timeframe, Mr Parr made the comment that his first grievance could be expanded on. Later Mr Parr sought from the Authority a copy of his original letter raising his grievance, which the Authority did not have. In an email dated 2 November Mr Parr noted that the union had refused to provide him with a copy.

[12] On 20 January 2010 Mr Parr sent an email stating:

> *I have now found myself a lawyer so once I have requested information we will be filing an amended statement.*

[13] In response to a question as to when he would file his amended statement of problem Mr Parr indicated that he needed information from Defence first.

[14] On 22 March Mr Parr's lawyer indicated to the Authority that they had received correspondence from the Defence Force. Subsequent emails did not indicate any further requests for the letter raising the grievance.

[15] On 13 April Mr Parr informed the Authority that, for financial reasons, he would be continuing with the case himself. He did not file an amended statement of problem until 13 July, for the first time formally specifically raising his personal grievance alleging victimisation.

The Law

[16] What constitutes the raising of a grievance was addressed in *Creedy v. Commissioner of Police* [2006] ERNZ 517. At paras.32-3 it was held:

> *[32] …The legislative purpose of requiring a grievance to be raised was … to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin … . Although done orally or in writing, to have enabled an employer to know of the complaint and to address it by way of remedy, cases under the previous legislation required a minimum level of sufficiency of detail of the complaint. The position is no different now.*
> …
> [35]… *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 employee wants the employer to address.*
> *[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance …As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.*

[17] Section 114 provides for the Authority to grant leave for a grievance to be raised after the expiry of the 90 day period if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so.

[18] Section 115(b) provides one example of exceptional circumstances, which is where an employee has made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[19] In *GFW Agri-Products Ltd v. Gibson* [1995] 2 ERNZ 323 the Court of Appeal stated at para.[330]:

> *Further there is no formality or difficulty involved in notifying a grievance to an employer and failing to do so within 90 days generally will not be 'occasioned by' circumstances which, on a practical approach, have left reasonable time to secure any necessary advice and notify the grievance.*

[20] In *Wilkins & Field Ltd v. Fortune* [1998] 2 ERNZ 70 the Court of Appeal held at para.[77]:

> *An inquiry under s.33(4) calls for an explanation for the failure to submit the personal grievance within the 90 days and the identification of particular circumstances which fairly satisfy the two-fold test, namely that they constitute exceptional circumstances and that they occasioned the delay in submitting the personal grievance within time.*

Determination

[21] It is clear from *Creedy* that all of Mr Parr's claims of victimisation are out of time. This is because the discussions with Defence personnel close to the time of the alleged incidents of victimisation did not constitute the raising of a personal grievance, because no action was sought of Defence. Furthermore, the letter raising the grievance provided insufficient detail (in fact none) for the Defence Force to be able to make a response to try and resolve the grievance, of which it was not made aware.

[22] While I accept Mr Parr's evidence that his representative was aware that he claimed that he wanted to take a personal grievance for victimisation, arguably giving rise to a claim under s.115(b), I do not accept that any exceptional circumstances occasioned the full degree of delay. The claims of victimisation arose between April and November 2008. The Defence Force was first properly put on notice of Mr Parr's claims on 13 July 2010, a delay of around two years.

[23] Once Mr Parr had instructed his own lawyer and had received the documents from the Defence Force (which may or not have related to the claims of victimisation) in March 2010, there was another almost four month delay by Mr Parr before the grievance was properly raised. I conclude that that part of the delay, in itself a very significant delay, was not occasioned by any exceptional circumstances, as Mr Parr had secured legal advice and could have raised the grievance soon thereafter.

[24] It therefore follows Mr Parr has failed to satisfy the Authority that the delays were occasioned by exceptional circumstances. I therefore dismiss Mr Parr's application to the Authority to hear and determine his claims of victimisation.

Costs

[25] Costs are reserved.

G J Wood
Member of the Employment Relations Authority