IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 403
5343259

	BETWEEN	ANDRE HENRY Applicant
	AND	CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Rachel Larmer
Representatives:	Anamika Singh, Counsel for Applicant Samantha Turner and Simon Clark, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions:	29 July 2011, Applicant's submissions 05 August 2011, Respondent's submissions
Determination:	16 September 2011

DETERMINATION OF THE AUTHORITY

A **Mr Andre Henry did not raise a personal grievance with his employer within 90 days of it arising as required by s114(1) of the Employment Relations Act 2000.**

B **Accordingly, the Authority does not have jurisdiction to hear Mr Henry's constructive dismissal grievance.**

Employment Relationship Problem

[1] Mr Andre Henry alleged that he was constructively dismissed from his employment as a Customer Services Representative in the Work and Income ("WINZ") contact centre in Hamilton. He tendered a written resignation dated 19 March 2010 which was stated to be "*effective immediately*" and which he alleged was the result of "*bullying and harassment*" from his manager.

[2] The Chief Executive of the Ministry of Social Development ("MSD") stated that Mr Henry had not raised a personal grievance claim within 90 days of the termination of his employment as required by s114(1) of the Employment Relations Act 2000 ("the Act"). MSD did not consent to him raising his grievance out of time.

[3] Without prejudice to its stance on the 90 day issue, MSD alleged that Mr Henry had resigned voluntarily. It said it fully and properly investigated his claim of bullying and harassment and concluded that his claims were not upheld.

[4] MSD noted that Mr Henry had not applied for, or been granted, leave to raise his grievance outside the 90 day time limit, so it submitted the Authority did not have jurisdiction to hear his claim. It requested that the 90 day issue be dealt with as a preliminary matter and Mr Henry agreed to that.

[5] Both parties agreed that the preliminary matter should be determined on the papers.

[6] This determination deals only with whether Mr Henry raised a personal grievance with his employer within 90 days in terms of s114(1) and (2) of the Act. Mr Henry has not applied for leave in terms of s114(2) of the Act and this determination does not address whether or not Mr Henry should be granted leave to raise his personal grievance outside the 90 day period in s114 of the Act.

Termination of employment

[7] Mr Henry's resignation letter stated he was resigning "*due to mental health reasons*". MSD wrote to Mr Henry on 23 March 2010 accepting his resignation and confirming it would take effect from 13 March 2010, which was his last date at work.

Legislation

[8] Section 114(1) of the Act provides that an employee must raise a personal grievance with their employer within 90 days of the grievance arising. Section 114(2) provides some guidance on the raising of a personal grievance, and 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 aware that the employee alleges a personal grievance that the employee wants the employer to resolve."*

Case law

[9] Various recent Employment Court decisions have clarified how s114 of the Act should be applied. The leading case on whether a personal grievance has been raised out of time is *Creedy v Commissioner of Police*[1] in which the Court held:

> *"[…] it is insufficient, and therefore not the raising of a 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 grievance as, for example, unjustified disadvantage in employment […] For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. […] What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates."*

[10] The Court in *Hawkins v Commissioner of Police*[2] held (citing *Goodall v Marigny (NZ) Ltd*[3]) that the test in s114(2) as to how a grievance must be raised is *"objective and requires a communication sufficient to enable the employer to address and remedy the grievance or for the parties to settle it in discussion."*

[11] In *Melville v Air New Zealand Limited*[4] the Court held that a statement by the applicant and her representative at the end of a disciplinary meeting to the effect that "*its not over*" and "*we'll be seeing you in Court*" did not raise a grievance sufficiently clearly to have enabled the employer to address it.

[1] [2006] 1 ERNZ 517
[2] [2007] ERNZ 762
[3] [2000] 2 ERNZ 60
[4] 8 July 2010, Travis J, ARC 18/10

[12] The Court in *Winstone Wallboards v Samate*[5] when considering the relevant provision in the Employment Contracts Act 1991 ("ECA") gave "*submit*" a narrow interpretation. It stated:

> *"[…] it should be plain to an objective observer that the employee concerned has commenced the applicable grievance process, and has done so in a way that enables the employer to respond."*

[13] In *Ruebe-Donaldson v Sky Network Television Ltd*[6] the Court held the term "*submit*" used in the ECA and the term "*raise*" used in s114 of the CAT were "*virtually synonymous*".

[14] The Court in *Chief Executive of the Department of Corrections v Waitai*[7] held "*the key test is what the employer reasonably could have taken from the words used*."

Applicant's submissions

[15] Mr Henry alleged that he raised his dismissal grievance in a letter dated 12 April 2010 addressed to Mr Peter Hughes, Chief Executive of MSD within 90 days of the termination of his employment.

[16] Mr Henry's letter of 12 April 2010 stated *"I am writing to you to express my disgust and the reason I was 'forced' with no other options but to resign*." He then set out examples of what he alleged amounted to bullying and harassment and then stated "*this really needs to be investigated and current staff interviewed and prior staff contacted."*

[17] Ms Singh submitted that Mr Henry's 12 April 2010 letter "*contains sufficient specificity in the sense that he made it known to the respondent that he alleged a personal grievance and that he wanted the respondent to address it."* She also submitted *"the content of the letter falls squarely within the meaning of s103 and therefore validly raises his personal grievance for the purposes of s114."*

[5] [1993] 1 ERNZ 503, 511
[6] 13 August 2004, Travis J, AC 44/04
[7] [2010] NZEMPC 164

[18] Ms Singh did not identify the parts of the 12 April 2010 letter which she alleged supported her submission or explain why she held that view.

Respondent's submissions

[19] MSD says that Mr Henry did not attempt to raise a grievance with it until 13 April 2011, 396 days after his employment ended. It says the last date Mr Henry could raise a grievance about the termination of his employment was 17 June 2010.

[20] MSD relied on the following part of his 12 April 2010 letter in support of its submission that he had decided not to raise a personal grievance:

> *"I have had a meeting with a lawyer to take out a personal grievance. They think I have a case but going down this road could jeopardise my future work prospects… Hence this letter is my only resort to letting someone know how nasty this woman is…"*

[21] MSD submitted this quotation showed that Mr Henry, with the benefit of legal advice, was specifically not raising a personal grievance because he did not want to jeopardise his future work prospects.

[22] MSD submitted that Mr Henry's letter of 12 April 2011 did not raise a grievance, but merely communicated a number of concerns or complaints. It submitted that on an objective view the letter did not make it clear that Mr Henry had commenced a grievance process.

Outcome

[23] I find that Mr Henry's letter of 12 April 2010 did not met the test in s114(2) of the Act for raising a personal grievance because it was not objectively clear that he had commenced a grievance process and that legal consequences could potentially follow.

[24] Mr Henry's letter of 12 April 2010 did not give MSD positive notice of a particular claim (such as an unjustified dismissal claim). No remedies were specified

and there was no request to attend mediation. I find his letter was no more than notice he believed he had a grievance. It did not set out how he wanted his alleged grievance resolved, or that if it was not resolved then defined legal consequences would follow.

[25] I consider that Mr Henry's letter would have objectively left MSD with the impression that he had received advice that he had a personal grievance claim but that he had elected not to pursue it. A reasonable interpretation of his 12 April 2010 letter is that he disliked his manager and wanted MSD to investigate her conduct. I find that the letter of 12 April 2010 just indicated that he had considered raising a grievance, it did not say he actually was raising a grievance.

[26] As the Court held in *Creedy*[8] (and affirmed in subsequent decisions in *Hawkins*,[9] *Melville*,[10] and *Coy*[11]) it is not sufficient for the purposes of s114(1) of the Act for an employee to simply inform the employer they consider they have a grievance, even where the type of grievance is specified. Section 114(2) requires sufficient details of the grievance to be provided to make the employer aware of the basis of the grievance, so that it may address and remedy it in accordance with the problem solving mechanisms of the Act.

[27] I consider that Mr Henry's letter of 12 April 2010 makes it clear that he knew what a grievance was and, acting on independent legal advice, choose not to pursue it. He merely raised a complaint which MSD, as he had requested, investigated.

[28] Mr Henry did not raise his grievance within 90 days of it arising, so the Authority does not have jurisdiction to determine his constructive dismissal claim.

Costs

[29] MSD as the successful party is entitled to a contribution towards its legal costs.

[8] Ibid 1
[9] Ibid 2
[10] Ibid 4
[11] 19 November 2007, Colgan CJ, CC 23/07

[30] The parties are encouraged to resolve cost by agreement. If that is not possible costs are to be dealt with by an exchange of memoranda. MSD has 14 days within which to file its costs submissions, Mr Henry has 14 days within which to respond, and MSD has a further 7 days within which to reply.

[31] Strict adherence to this timetable is required, and departure from it requires the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority