

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 248
5447293**

BETWEEN BRUCE MCKEE
 Applicant

AND LIVESTOCK IMPROVEMENT
 CORPORATION LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Richard Mark, Counsel for Applicant
 Erin Burke, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 21 May 2014 from Applicant
 5 June 2014 from Respondent

Determination: 18 June 2014

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship problem

[1] This determination addresses the preliminary issue of whether or not the Applicant, Mr Bruce McKee, raised a personal grievance with the Respondent, Livestock Improvement Corporation Limited (LIC) within the 90 day statutory limitation period pursuant to s 114(1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievance before the Authority.

[2] Mr McKee claims that he was unjustifiably constructively dismissed by LIC and unjustifiably disadvantaged in his employment by LIC's breach of good faith in failing to take appropriate steps in regard to his complaint of workplace bullying and resulting stress.

[3] LIC denies that it breached its duty of good faith to Mr McKee in regard to the handling of the workplace complaint of bullying or that Mr McKee was unjustifiably constructively dismissed, and claims that he failed to raise his personal grievance within the 90 days statutory time limitation period.

The Issues

[4] The issues for determination are whether or not:

- a. the email dated 7 December 2012 sent by Mr McKee to Mr Keith McGlade, Herd Test Manager, validly raised a personal grievance
- b. if it did not do so, whether the letter dated 6 September 2013 validly raised a personal grievance within the 90 days statutory time limitation

Brief Background Facts

[5] LIC is a co-operative belonging exclusively to New Zealand dairy farmer customers to whom it offers various services aimed at improving dairy cow performance.

[6] Mr McKee commenced employment with LIC on 5 June 2012 as a Herd Test Team Leader. He had previously worked for LIC during the 1990s until January 2002. In June 2012 his immediate Manager was Mr Doug Shanks.

[7] On 7 December 2012 Mr McKee lodged a formal complaint by email addressed to Mr Kevin McGlade, Herd Test Manager, and copied to Ms Katie Draper, LIC HR, concerning the inappropriate behaviour by Mr Shanks towards him, specifically that Mr Shanks was bullying him and he was suffering from stress as a result. The email was headed "*Formal Complaint*" and was a lengthy and detailed account of the complaint.

[8] LIC stated that following the notification of the complaint dated 7 December 2012 by Mr McKee, his interaction with Mr Shanks was removed, and it commenced an investigation into Mr Shank's conduct. As a result of the investigation, Mr Shanks was subsequently dismissed.

[9] Mr McKee, who had been away from LIC on sick leave from 9 January 2013, returned to work on or about 25 or 26 February 2013.

[10] Upon Mr McKee's return to work in late February 2013, LIC stated that it had provided him with extra support.

[11] On 30 May 2013 Mr McKee had resigned in writing, citing "*ongoing struggles with my health*" as the reason.

[12] By letter dated 6 September 2013 lawyers representing Mr McKee wrote to LIC. The letter is headed:

RE: Bruce Edmond McKee – failure to take appropriate steps to avoid stress in employment, and breach of duty of good faith in management of work place complaint, and wrongful termination grievances.

[13] The letter included the paragraph:

This shall confirm and supplement the record of his personal grievance recorded in his email addressed to your Mr K McGlade and copied to Ms K Draper dated 7 December 2012. ...

Mr McKee claims lost income and compensation arising from the consequences he has suffered from the incidents described in his 7 December 2012 grievance and the inadequacies of the assistance that should have been provided to him to overcome his consequential illness.

Determination

The law

[26] Section 114 of the Act is the section governing the raising a personal grievance. Section 114 of the Act states:

114 Raising personal grievance

- (1) *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.*
- (2) *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 address.*

[14] In *Turner v Talley's Group Limited*¹ Chief Judge Colgan stated:

[61] The raising of a grievance must be the bringing to the employer's notice of the employee's wish to challenge as unjustified one or more of the events defined in the statute as a grievance to a sufficient degree that the employer can comprehend that there is a grievance, the nature of it and how the employee wishes that to be dealt with. These are what might be called the Creedy tests.

[15] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer².

Does the email dated 7 December 2012 sent by Mr McKee to Mr Keith McGlade, Herd Test Manager, validly raise a personal grievance?

[16] The email dated 7 December 2012 specifies the grounds of the complaint in some detail, describes the effect Mr Shank's behaviour was having on Mr McKee's health, the inequality of staff treatment, and the fact that he started desperately looking for alternative employment. The remedies sought are limited to Mr McKee comment that: "... *if I were given a manager whom I could respect and have confidence in I could turn the staff morale around*" and his request for help.

[17] The email does not specify in the detail later set out in the Statement of Problem the facts upon which the personal grievance are based, nor are the remedies sought quantified, however I do not find that this suffices to invalidate the raising of a personal grievance in the email of 7 December 2012. As observed in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*³

Although what is raised must be more than bare advice of a personal grievance or even the type of grievance, the requirement is certainly not for the sort of detail that may be required subsequently when lodging a statement of problem with the Authority.

[16] Further as observed by Judge Travis in reference to s 114 (2) in *Melville v Air New Zealand Ltd*⁴: "*This means that the grievance must be specified sufficiently to enable the employer to address it, presumably at that time*".

¹ [2013] NZEmpC 31

² *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

³ [2008] ERNZ 139 at [24] per Colgan CJ

⁴ [2010] NZEmpC 87 at para [16]

[17] The email dated 7 December 2012 is clear that Mr McKee's grievance related to the behaviour of Mr Shanks towards him: "*I wish to make a complaint about my treatment in the workplace by my immediate manager, Doug Shanks*".

[18] The email continued to cite instances of the behaviour about which Mr McKee was complaining, and to advise of the effect it was having upon him: "*By mid-November I had become very concerned about how it was affecting me both physically and mentally. I was now experiencing chest pains as well as the constant knotted feeling in my stomach ...*". The email concluded with the statement that: "*I certainly need help from someone*".

[19] I find that the email put LIC on notice that Mr McKee was raising a personal grievance into the bullying and inappropriate management style of Mr Shanks. It specified the grievances sufficiently for LIC to be able to address them, and in fact LIC states that it did address the situation involving Mr Shanks of which Mr McKee complained.

[20] LIC submits that the email dated 7 December 2012 did not raise a personal grievance due to the fact that the basis of the complaint by Mr McKee was indicative of an employment relationship problem, namely between himself and Mr Shanks. I observe that personal grievances can, and regularly do, constitute personal grievances in terms of the Act.

[21] LIC further submits that Mr Shanks was not Mr McKee's employer, and therefore his conduct cannot be attributable to LIC. However employers are vicariously liable for what their employees do in the course of their work unless the employer can prove that the actions of the employee were outside the scope of his employment. I find that LIC cannot avoid liability merely by claiming that what Mr Shanks did was unauthorised by it as his employer.

[22] I determine that the email dated 7 December 2012 sent by Mr McKee to Mr Keith McGlade, Herd Test Manager, validly raised a personal grievance.

Did the letter dated 6 September 2013 validly raise a personal grievance within the 90 days statutory time limitation?

[23] On the basis that I have found that the email dated 7 December 2012 validly raised a personal grievance; it is not necessary for me to address the issue of whether the letter dated 6 September 2013 validly raised a personal grievance within the 90 days statutory time limitation.

[24] A conference will be arranged shortly to progress the Authority's investigation.

Costs

[25] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority