

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 140  
5458942

BETWEEN                      DARREN ABBOT  
Applicant

A N D                              THE PALLET COMPANY  
(BOP) LIMITED previously  
known as BAY PALLETS  
(2012) LIMITED  
Respondent

Member of Authority:      Rachel Larmer

Representatives:              Frances Meikleham, Counsel for the Applicant  
Phil Townsend, Advocate for the Respondent

Investigation Meeting:      On the papers

Submissions received:      30 March 2015 and 23 April 2015 from the Applicant  
15 April 2015 from the Respondent

Date of Determination:      15 May 2015

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**DETERMINATION OF THE AUTHORITY**

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- A.      The Pallet Company (BOP) Limited (Bay Pallets) impliedly consented to Mr Darren Abbott raising his disadvantage grievance outside of the 90 day time limit so the Authority has jurisdiction to investigate this claim.**

**Employment relationship problem**

[1]      This determination deals with the preliminary issue of whether the Authority has jurisdiction to hear Mr Abbot's disadvantage grievance.

**Issues**

- [2]      The issues that require determination include:
- (a)      What is required to raise a personal grievance?
  - (b)      What did Mr Abbot do to raise his unjustified disadvantage grievance?

- (c) Did Mr Abbot properly raise a disadvantage grievance with Bay Pallets?
- (d) If not, did Bay Pallets consent to Mr Abbot raising a disadvantage grievance out of time?
- (e) If not, should the Authority exercise its discretion under s.114(4) of the Act to allow Mr Abbot to raise his disadvantage grievance(s) outside of the 90 day time period?
- (f) Does the Authority have jurisdiction hear Mr Abbot's disadvantage grievance(s)?

### **What is required to raise a personal grievance?**

[3] Section 114(1) of the Employment Relations Act 2000 (the Act) requires a personal grievance to be raised with an employer within 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 employer, whichever is the later.

[4] Under s.114(2) of the Act a personal grievance is raised:

*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 employer wants the employer to address.*

[5] The leading case on what is required to constitute the raising of a personal grievance claim is the Employment Court's decision in *Creedy v. Commissioner of Police*<sup>1</sup>.

[6] In *Creedy* the Chief Judge of the Employment Court held:

*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 her has a personal grievance or even by specifying the statutory type of the grievance. [...] For an employer to address a grievance as the legislation contemplates, the employer must know what to address [...]. An employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it as soon and informally, at least in the first instance.*

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<sup>1</sup> [2006] ERNZ 517

[7] The Employment Court in *Creedy* made it clear that an aggrieved employee must provide their employer with sufficient information to enable the employer to address the alleged grievance. The grievance must therefore be sufficiently specified to enable the employer to address it. It is insufficient for an employee to merely advise that they believe they have a personal grievance, even if they have identified the type of grievance alleged.

[8] In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information so the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.

[9] No particular form of words is needed, nor does the grievance have to be raised in writing. A grievance may also be raised by way of a series of interactions between the parties<sup>2</sup>. For example an employee may rely on the employer's prior knowledge of events or disputes to supplement the employee's notification about the raising of a personal grievance<sup>3</sup>.

[10] In *Ideal Services Limited (in statutory management) v. Barker*<sup>4</sup> the Employment Court held that while the employer would have been aware that the employee took issue with her dismissal, it had no way of knowing why that was, so as to enable it to address the employee's concerns. The grievance was therefore not raised sufficiently.

[11] Whether the employee has presented enough information about the alleged grievance to their employer to enable the employer to address or resolve it is to be objectively determined, and will depend on the particular facts of each case. The employee bears the onus, on the balance of probabilities, of establishing that they raised their personal grievance with their employer within the 90 day time limit required under s.114(1) of the Act.

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<sup>2</sup> *Ovation New Zealand Limited (formerly Bernard Matthews New Zealand Limited) v. Puhia* [2011] NZEmpC 11.

<sup>3</sup> *Dickson v. Unilever New Zealand Limited* (2009) No. 6 NZELR 463

<sup>4</sup> [2012] NZEmpC 11

### **What did Mr Abbot do to raise his unjustified disadvantage grievance?**

[12] Mr Abbott relies on letters of 26 August and 02 October 2013 (taken together) sent from Mr Sharp (his then representative) to Mr Steve Watson (Director of Bay Pallets) as having adequately raised his disadvantage grievances.

[13] The letter dated 26 August 2013 from Mr Sharp to Mr Watson referred to the fact that Mr Abbot had taken sick leave from his employment on 05 August 2013 and had a medical certificate advising he would be unable to return to work until 29 August due to a stress related condition.

[14] Mr Sharp alleged that after Mr Abbot took sick leave, Mr Watson arranged for Ms Kathryn Sass to take over as Operations Manager and that Mr Abbot had been asked to return his keys, telephone and work vehicle and was directed to stay away from the premises and also to not ring the business.

[15] Mr Sharp further alleged that Mr Abbot's work email account had been "broken into" and he had been denied access to it, his fuel card had been cancelled, the locks changed at the company plant and that the TradeMe account which Mr Abbot operated to sell company goods had been taken over.

[16] Mr Sharp says that those actions indicated that a decision had been made to terminate Mr Abbot's employment so Mr Watson asked for confirmation as to what decisions had been made about Mr Abbot's employment.

[17] Mr Sharp pointed out that because Mr Abbot was a shareholder, Managing Director and employee of Bay Pallets, he was a member of the Board of Directors (together with Mr Watson and Nick Barton) but despite that he was not aware of any meetings of decisions of the Board concerning his employment.

[18] Mr Sharp states that "*once these matters concerning Darren's employment have been clarified we will then advise our client's position as to his employment situation*".

[19] On 02 October 2013, Mr Sharp wrote to Mr Abbot formally advising of a personal grievance (singular) against the company on the grounds that:

*Leading up to and following [Mr Abbot] taking sick leave on 5 August 2014 his employment was affected to his disadvantage by unjustifiable actions on behalf of the company being:*

- (a) *Putting Mr Abbot under undue stress during his employment leading up to his taking sick leave;*
- (b) *After Mr Abbot took sick leave the company took actions to prevent him returning to his employment, including requiring that he stay away from the premises, changing the locks on the premises, requesting that he return his keys, car, fuel card and phone; and*
- (c) *That his private information has been accessed by having his email account broken into and access denied to him, and his TradeMe account taken over.*

[20] Mr Sharp also states that:

*In advising of this personal grievance, Mr Abbot refers to the matters raised in our letter of 26 August 2013 and the responses Steve Watson provided in his letter of 26 August 2013. Our client does not accept the contents of the company's response to the extent that it contradicts allegations in our earlier letter. [...]*

[21] Mr Sharp concludes the letter by stating:

*In regard to appropriate remedies for the personal grievance we will be writing to the company putting forward a settlement proposal relating to Mr Abbot's employment and wider relationship with the company under a separate without prejudice letter.*

### **Did Mr Abbot properly raise the a disadvantage grievance with Bay Pallets?**

[22] Mr Abbot submits that the totality of his representative's communications on 26 August and 02 October 2013 were sufficient to meet the requirements of s.114(1) of the Act.

[23] Mr Abbot submits that he brought his disadvantage grievance to the attention of his employer in such a way that the employer could have addressed it had it been minded to do so. I do not accept that.

[24] The letter of 02 October specifically identifies three issues which Mr Abbot claims had disadvantaged him;

- (a) He was subjected to undue stress;
- (b) He was prevented from returning to his employment;

- (c) His email account broken into, he was denied access to it and his TradeMe account taken over.

[25] Although the 02 October letter specifically refers to the 26 August letter, neither letter provides any dates in respect of the three specific matters identified in the 02 October letter. There are no specifics about how or why he was prevented from returning to work (he was on certified sick leave so I am unsure how a return to work issue even arose in such circumstances). The 02 October letter also fails to identify what remedies Mr Abbot is seeking.

[26] Although Mr Abbot did specifically state he considered he had a disadvantage grievance I do not consider he conveyed sufficient information to Bay Pallets to enable it to be in a position where it was able to respond to the merits of his alleged grievance, with a view to resolving it at an early stage. There are no details of who had allegedly engaged in the actions that were of concern to Mr Abbot, when they occurred or what he was seeking in order to resolve the alleged disadvantage he claims to have suffered.

[27] I consider that the letter of 02 October appears to be raising one disadvantage grievance because the letter refers in a couple of places to *personal grievance* (singular) not to grievances plural. Although I consider it is unclear from the 02 October letter the implication is that the three matters Mr Abbot refers to have in totality together amount to one disadvantage grievance.

[28] I am therefore not satisfied that Mr Abbot has discharged the onus of establishing to the required standard that he raised a disadvantage grievance in accordance with the requirements of s.114(1) of the Act.

**Did Bay Pallets impliedly consent to Mr Abbot raising a disadvantage grievance out of time?**

[29] An employee can pursue a grievance that was raised outside of the 90 day time limit if the employer consents to that. Consent can be actual or implied. Whether consent (implied or express) has occurred for an employee to raise a grievance outside of the 90 day period is a matter of fact and degree. The real issue is whether or not

the employer can objectively be reasonably taken to have consented to an extension of time<sup>5</sup>.

[30] On 7 October 2013 Mr Watson wrote to Mr Sharp stating that the company rejects Mr Abbot's personal grievance but was happy to enter into mediation regarding the personal grievance.

[31] Bay Pallets also filed a Statement in Reply in response to Mr Abbot's first Statement of Problem (SoP) which was filed on 07 May 2014. The first Statement in Reply substantively responded to the SoP. It did not raise a jurisdiction issue on the basis that Mr Abbot had not raised a disadvantage grievance within the require time period. The parties also attended mediation on 06 July 2014.

[32] The Employment Court in *Jacobsen Creative Surfaces Ltd v. Findlater* held that if an employer, who is ignorant of the time constraints for raising a grievance, purposely takes steps to resolve the alleged grievance (such entering into negotiations or by attending mediation), then that amounts to consent by the employer to the employee raising a grievance out of time.

[33] The Court of Appeal in *Hawkins* made it clear that an employee does not need to plead consent in all cases.

[34] I find that Bay Pallets has impliedly consented to Mr Abbot raising his disadvantage grievance out of time by suggesting mediation, by attending mediation, and by filing a Statement in Reply. These activities constitute active engagement in an attempt to resolve Mr Abbot's issues and therefore provide sufficient evidence of Bay Pallet's implied consent to Mr Abbot's disadvantage grievance being raised out of time<sup>6</sup>.

[35] I am therefore satisfied, on the balance of probabilities that Bay Pallets impliedly consented to Mr Abbot raising his grievance out of time. Accordingly, there is no need to consider s.114(4) of the Act.

**Does the Authority have jurisdiction to hear Mr Abbot's disadvantage grievance(s)?**

[36] I find that Bay Pallet's implied consent to Mr Abbot raising a grievance outside of the 90 day time period relates only to the three matters identified in

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<sup>5</sup> Supra

<sup>6</sup> See *Commissioner of Police v. Hawkins* [2009] NZCA 209

connection with the disadvantage grievance identified by Mr Sharp in his letter to Mr Watson of 02 October.

[37] The information currently before the Authority suggests that Mr Abbot may wish to extend the ambit of his disadvantage grievance to other new alleged disadvantages which fall outside those specific matters identified in the 02 October letter.

[38] If that is correct then I find that it is not appropriate for him to do so on the basis that any new potential disadvantage grievances were not properly raised with his employer. I also consider Bay Pallets has not impliedly or expressly consented to any new disadvantage grievances being raised outside of the 90 day period.

[39] Mr Abbot may therefore pursue a disadvantage grievance that relates to allegations he:

- (a) Was subjected to undue stress;
- (b) Prevented from returning to work; and
- (c) Had his private email accessed by another person, was denied access to his email and had his TradeMe account "*taken over*".

[40] The Authority's investigation of his disadvantage claim will be limited to the above allegations.

### **Costs**

[41] Costs are reserved and shall be addressed once the substantive matters are resolved.

**Rachel Larmer**  
**Member of the Employment Relations Authority**