

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 287
3024494

BETWEEN ANTHONY CHARLES
 LEATHERS
 Applicant

AND THE TARADALE
 COMMUNITY AND SPORTS
 CLUB (INC)
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
 Dave Robb, advocate for the Respondent

Investigation Meeting: On the papers

Submissions and other 11 June 2018 and 31 January 2019 from the Applicant
documentation received: 24 October 2018 and 29 January 2019 from the
 Respondent

Date of Determination: 14 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Anthony Leathers claims he was unjustifiably dismissed, for redundancy, by the Taradale Community and Sports Club (Inc) (the Club). Mr Leathers was the manager of the Club at the time. He also claims he is owed wage arrears in the sum of \$7,500, being money due to him that was withheld from his final pay.

[2] The Club says Mr Leathers did not raise a personal grievance within the statutory 90 day timeframe. It does not consent to his raising the grievance out of time.

[3] Mr Leathers asserts he did raise his grievance well within 90 days but, if the Authority finds otherwise, he seeks leave to raise it out of time under the exceptional circumstances provisions of ss 114(4) and 115 of the Employment Relations Act 2000 (the Act).

[4] In the course of a telephone conference with the parties it was decided the Authority would determine the question of whether a personal grievance had been raised in time as a preliminary issue. The parties agreed to provide affidavits and submissions for this purpose.

[5] Regardless of the outcome of Mr Leathers' quest to pursue a personal grievance, he is entitled to pursue a claim for wage arrears in the Authority as a different, and considerably longer, timeframe exists for such claims.

Relevant Background

[6] Mr Leathers had been manager of the Club for less than five years when, on Friday 10 March 2017, he was asked to attend a meeting with the then Acting President and another committee member of the Club the following week. He was not informed in advance of the subject matter of the meeting. Mr Leathers attended the meeting, which was also attended by Dave Robb, as a Human Resources adviser to the Club. Mr Robb attended all subsequent meetings between the Club and Mr Leathers.

[7] In the course of the 13 March 2017 meeting, Mr Leathers was advised of his employer's proposal to restructure the Club's management. This entailed the disestablishment of his position of Club Manager. He was given a letter which set out the employer's proposal and its anticipated timeframe for consultation and decision making.

[8] The timeframe entailed the Club presenting the proposal to Mr Leathers on Monday 13 March 2017; meeting him again on Thursday 16 March to receive his feedback and any alternative proposals or suggestions; and having a further meeting with him on Friday 17 March to advise the Club's decision.

[9] As events unfolded, the proposed timeframe was lengthened considerably. Mr Leathers engaged an advocate who obtained an extension of 5 days for him to provide his feedback. Mr Leathers provided comprehensive written feedback to his employer's proposal on 21 March. The Club responded on 9 May providing further information and answers to queries that he had raised in his feedback.

[10] The parties met on 12 May for further discussion and again on 19 May 2017. At the latter meeting the Club informed Mr Leathers of its decision to proceed with disestablishing his position and provided him with a letter recording this. Mr Leathers was given notice of his dismissal for redundancy and was informed he would be paid until the expiry of his four week notice period, but would not be required to work during that time.

[11] A further meeting took place between the Club and Mr Leathers on 24 May 2017, during Mr Leathers' notice period. The main subject matter discussed in the meeting was payment for statutory holidays Mr Leathers had worked and annual leave owing to him. Another topic of discussion was a personal grievance claim that had been made against the Club by a former employee.

[12] Mr Leathers asserts he informed his employer of his personal grievance towards the end of this meeting. He said he did this with the member of the Club's committee who attended the meeting and Mr Robb.

[13] The Club disputes this and says Mr Leathers did not raise a personal grievance until he did so by letter to the Club dated 1 October 2017 which it received on 16 October 2017.

The Authority's investigation

[14] I have not set out a record of all the evidence heard or received nor recorded all submissions made by the parties but have set out the material facts and made findings on issues relevant to the determination of the applicant's claims in accordance with s 174E of the Employment Relations Act 2000 (the Act).

[15] This determination has been issued outside the timeframe set out at s 174D (2) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174D (3) to do, are exceptional.

Issues

[16] The first issue for determination is whether Mr Leathers raised a personal grievance with the Club within 90 days. If I find he did not raise his grievance within that timeframe, the next issues I will need to consider are whether the delay in raising the grievance was occasioned by exceptional circumstances, and whether it is just to grant leave to Mr Leathers to raise his personal grievance outside the statutory timeframe.

Relevant law

[17] Section 114(1) of the Act provides that a personal grievance must be raised with the employer within a 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 the period.

[18] The grievance is raised with the 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.¹

Evidence and submissions

[19] Mr Leathers provided submissions and evidence in support of his contention that he had raised his personal grievance within time. The evidence included recordings of three meetings with his employer which Mr Leathers initially referred to as proving that he had raised a grievance. He subsequently informed the Authority he realised they did not have relevance to the issue of when or whether he had raised his grievance. I itemise some of the evidence Mr Leathers provided below.

- (a) A six and a half page email to Mr Robb dated 8 June 2017 in which Mr Leathers stated "*As alluded to last we met I now do plan to seek recompense from the committee for hurt & humiliation as well as stress to myself and my family*". The email set out in detail:
- (i) Mr Leathers' view of events leading up to the 10 March 2017 request for him to attend a meeting with Ms Rowe and Mr Hansen;
 - (ii) his views of that, and subsequent, meetings with the Club over the proposed disestablishment of his position;
 - (iii) his concerns regarding his employer's process; and
 - (iv) his concerns regarding actions his employer was taking.

The email concluded that the events and actions pointed to "*a personal attack rather than a positional restructure. The process was flawed & showed a lack*

¹ Section 114(2) of the Act.

(of) fair treatment. The onus on this is completely in the hands of the employer."

- (b) An email dated 19 June 2017 from Mr Leathers to a Club committee member, Lloyd Fitness, who had attended the 19 May meeting at which Mr Leathers had been given notice of his dismissal for redundancy. Mr Leathers' email, copied to Mr Robb, was in response to an email from Mr Fitness earlier the same day. That email had informed Mr Leathers the Club had made deductions of \$7,895.00 to his final pay which related to holiday pay and payment for public holidays Mr Leathers had worked. Mr Leathers' email informed Mr Fitness he would not "*lay down*" or "*be silent*" about this; the Club's decision regarding the restructure had been "*very wrong*"; and he would fight it "*loudly and very publically*". Mr Leathers also noted "*This action makes my PG look better.*"
- (c) Emails between Mr Leathers and the Ministry of Business, Innovation and Employment's Mediation Service (the Mediation Service) between 27 and 29 June 2017 regarding his request for employment mediation. Those emails include the following sentences from the Mediation Service on 29 June 2017: "*From the information provided I understand you are wanting to pursue a personal grievance and recover unpaid wages. Please clarify if the personal grievance has been raised with your ex employer. This is something that you or a representative if you choose to have someone representative (sic) you, must do. It is not my role to do this.....Please clarify if the personal grievance has been raised. If not your mediation request may be premature.*"
- (d) An email from Mr Leathers to Mr Fitness dated 30 June 2017 stating "*Please be advised I am filing a personal grievance case against my former employer the Taradale Club & Alison Rowe as the acting President.*"

[20] The respondent's position is that Mr Leathers did not in fact raise a personal grievance until his letter of 1 October 2017 did so explicitly. This was, as noted in Mr Robb's submissions, "*well out of time*".

Discussion

[21] From the evidence referred to above I am satisfied Mr Leathers informed Mr Robb, his employer's representative, by email on 8 June 2017 of his dissatisfaction with how he had been treated during the redundancy process and with the actions his employer had taken. I also find it more likely than not he had stated his intention to take a personal grievance over this at the meeting of 24 May 2017.

[22] I have noted earlier that Mr Leathers had recorded meetings with his employer including that of 24 May. He said, however, in notes supplied to the Authority in relation to the 24 May meeting that, on completion of the discussion regarding another employee's personal grievance, he had walked to his car to get some documents for Mr Robb. He had turned off the recording at this point and did not turn it on again when he returned with the papers.

[23] According to Mr Leathers, Mr Robb had then asked him if there were any more surprises the Club needed to worry about, whereupon he had informed Mr Robb that he was "*going to file a personal grievance against the club for not following proper procedure as advised by* (a Labour Inspector with whom Mr Leathers said he had discussed his situation).

[24] The transcript of the 24 May meeting establishes that Mr Leathers did indeed leave to fetch documents from his vehicle and that he intended to return with those documents. I find it credible that he would turn off the recording at the point of leaving the meeting and not remember to turn it on again on his return. I accept the likelihood of this having occurred.

[25] As noted above, Mr Leathers' opening words in his 8 June 2017 email to Mr Robb are "*As alluded to last we met, I now do plan to seek recompense from the committee for hurt & humiliation as well as stress to myself and my family.*" There is no evidence of Mr Leathers meeting Mr Robb after the 24 May meeting and I find it likely the words I have underlined refer to that meeting as being the last time he met with Mr Robb. This supports Mr Leathers' claim to have referred to a personal grievance in the non-recorded continuation of the 24 May meeting after he had fetched documents from his car.

[26] Following Mr Leathers' realisation, after receiving Mr Fitness' email on 19 June 2017, that his employer had deducted almost \$8,000 from his final pay, his response to Mr Fitness included a reference to this further action by the Club making his "*PG look better*". While

not conclusive, this suggests Mr Leathers expected Mr Fitness, who had not been present at the 24 May meeting, to be aware he had advised the Club's committee member who had attended, and Mr Robb, of his personal grievance.

[27] The correspondence with the Mediation Service in late June 2017, in which Mr Leathers was asked to clarify whether he had raised his personal grievance with his employer, may have prompted him formally to advise Mr Fitness as well, by email of 30 June, that he was bringing a personal grievance against the Club.

[28] In *Creedy v Commissioner of Police*² former Chief Judge Colgan examined the requirements for raising a personal grievance and held that:

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, for example, unjustified disadvantage in employment (F) or an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.... That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[29] Mr Leathers' email to Mr Fitness did not, on its own, satisfy the requirements of s 114 in that it provided no information about the nature of the matter Mr Leathers wished his former employer to address. However, I find the totality of his communications to the Club, and its representative, Mr Robb, do satisfy those requirements.

[30] The first signal to his employer that he took issue with the Club's decision to dismiss him for redundancy was on 24 May when I have found on the balance of probabilities Mr Leathers orally advised Mr Robb and a Club committee member that he was "*going to file a personal grievance against the club for not following proper procedure...*".

[31] That was followed by a long email from Mr Leathers to Mr Robb on 8 June in which Mr Leathers referred to their last meeting and stated he would seek compensation from his

² [2006] ERNZ 517

employer for hurt, humiliation and stress. The email traversed the background to Mr Leathers' notification of redundancy and clearly notified his view that his employer had followed a flawed process and failed to act fairly in dismissing him.

[32] Finally, after the Club notified Mr Leathers it had deducted \$7,895 from the annual and statutory holidays pay he was owed, Mr Leathers' heated response in an email of 19 June 2017 referred to that action making his personal grievance look better. I note here that on 20 June Mr Leathers wrote a further email to Mr Fitness, with links to the *Employment New Zealand* website. It was clear from the content of his email that he was aware there was a distinction between an unlawful deductions matter under the Wages Protection Act and a personal grievance.

Summary and next steps

[33] I have found Mr Leathers raised a personal grievance within the statutory time frame.

[34] The parties have not yet attended mediation and will be directed to do so. Should mediation fail to resolve the issue, the Authority will convene a case management conference to set down a schedule for progressing Mr Leathers' personal grievance claims.

Costs

[35] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority