

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 522  
3058832

BETWEEN

DUNCAN GITTINS  
Applicant

A N D

AKAROA AREA SCHOOL BOARD  
OF TRUSTEES  
Respondent

Member of Authority: Peter van Keulen

Representatives: Allan Halse, advocate for Applicant  
Paul Robertson, counsel for Respondent

Investigation Meeting: On the papers

Information Received: 13 June 2019 and 21 August 2019 from the Applicant  
29 August 2019 from the Respondent

Date of Determination: 5 September 2019

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Akaroa Area School Board of Trustees (the Board) employed Duncan Gittins on two successive fixed term employment agreements. When the Board did not offer Mr Gittins further employment at the end of his second fixed term, Mr Gittins raised a personal grievance for unjustified action causing disadvantage through his union representative.

[2] The Board says the personal grievance was not raised within the requisite time frame and therefore I do not have jurisdiction to determine the personal grievance.

[3] Section 114(1) of the Employment Relations Act 2000 (the Act) requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[4] In this case the action giving rise to Mr Gittins' grievance is the termination of his employment at the expiry of his fixed term employment agreement. So the question is whether Mr Gittins raised his grievance within 90 days of the end of his employment.

[5] The Board claims Mr Gittins' employment ended on 13 December 2015 and the grievance was not raised until 11 April 2016, which is outside the 90-day period.

[6] In response to the Board's statement in reply, Mr Gittins' advocate lodged an application with the Authority. That application clearly set out the two positions taken by Mr Gittins in response:

(a) Mr Gittins' employment ended on 27 January 2016 (not 13 December 2015 as alleged by the Board) and therefore the grievance was raised within the 90-day period.

(b) In the alternative, if Mr Gittins' employment did in fact end on 13 December 2015, Mr Gittins applies for leave to raise his grievance after the expiry of the 90-day period pursuant to s 114(3) of the Act. In support of that application Mr Gittins' advocate says there are special circumstances pursuant to s 115(b) of the Act, which justify granting leave as he had instructed his union representative to raise the grievance but she unreasonably failed to do this within the required time.

[7] An affidavit in support of the application, from Mr Gittins' union representative dated 20 August 2019, was lodged and served on 21 August 2019.

[8] The affidavit sets out that Mr Gittins instructed the union representative to raise his grievance on 23 February 2016. The union representative believed that Mr Gittins' employment had ended on 27 January 2016 when the school year finished and Mr Gittins stopped receiving salary payments. It was the union's view that this was the date from which the 90-day period started and the union representative calculated the time for raising the grievance from that date. Once the last date for raising the grievance was established,

Mr Gittins and his union representative discussed the best timing for raising the grievance and in the circumstances, they decided to raise the grievance near the end of the 90-day period.

[9] In response to that affidavit counsel for the Board advised that the Board accepted that the mistaken view of when the employment ended was likely to constitute special circumstances and therefore the Board would not lodge any evidence in response to the affidavit – essentially the Board was electing not to oppose the application.

[10] So, this matter is reasonably straightforward. I have two possible situations:

- (a) Mr Gittins' employment ended on 27 January 2016, in which case his personal grievance was raised in time; or
- (b) Mr Gittins' employment ended on 13 December 2015, in which case his personal grievance was not raised in time but he did instruct his agent to raise the grievance and that agent unreasonably failed to do so in time – this amounts to special circumstances, supporting leave for the grievance to be raised out of time.

[11] At this interim stage, I will not determine the date when Mr Gittins' employment ended. I do not have sufficient information to determine that now and, in any event, it is not necessary for me to do so. Based on the two alternatives above I have jurisdiction to determine the substantive grievance either way, as I will grant leave for the grievance to be raised out of time if I subsequently determine that Mr Gittins' employment ended on 13 December 2015.

[12] As the parties have not yet attended mediation, pending the outcome of this preliminary matter, I now direct them to attend mediation.

[13] The Authority will forward a copy of the statement of problem and statement in reply to the mediation team of the Ministry of Business, Innovation and Employment for their information. A dispute resolution coordinator will contact the parties to arrange mediation in due course.

[14] In the interim, my investigation is suspended. It is Mr Gittins' responsibility to advise the Authority, following mediation, whether the matter has been resolved or whether I am required to continue my investigation.

**Costs**

[15] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority