IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 79
WRC 34/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SILVER FERN FARMS LIMITED Plaintiff
AND	DEVON NORTH Defendant

Hearing: By memoranda of submissions filed on 10 May, 4 and 9 June 2010

Appearances: Tim Cleary, Counsel for Plaintiff
Simon Mitchell, Counsel for Defendant

Judgment: 29 June 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] This challenge determines preliminary questions on the papers filed with the Court. The first is whether the defendant raised his grievance or grievances against his employer within the time allowed in law for doing so. The second question, assuming an affirmative answer to the first, determines the scope of that grievance or those grievances in view of the provisions of the Accident Compensation Act 2001.[1]

[2] The case is a challenge to an interlocutory determination of the Employment Relations Authority issued on 28 August 2009.[2] In the Authority the employer (now Silver Fern and formerly PPCS) asserted that Mr North had not raised his personal

[1] Title of statute amended from Injury, Prevention, Rehabilitation and Compensation Act 2001 (IPRC), effective as from 3 March 2010.
[2] WA123/09.

grievance with it within the statutory period of 90 days. It opposed his application for leave to raise a grievance late, and also sought to avoid Mr North's claims by submitting that they were not brought to the Authority within a period of three years of their occurrence. The Authority concluded that the New Zealand Meatworkers Union (the union) raised Mr North's grievance with the company precisely 90 days after the circumstances claimed to have constituted to the grievance had come to Mr North's notice. The Authority found that a grievance raised on the 90th day was within the statutory period for doing so as of right.

[3] In these circumstances the Authority did not need to consider whether leave should be granted to raise a grievance out of time. As to whether the grievance was filed in the Authority within the period of three years pursuant to s 114(6) of the Employment Relations Act 2000 (the Act), the Authority concluded that although an amended claim or amended claims may have been lodged with it after that three year period, it was the filing of the original proceeding within the three year period that satisfied the test. Mr North's amended statement of problem did not raise any new substantive issue but, rather, included a claim for leave to file out of time in exceptional circumstances if this was required. That issue of compliance with the three year time limit has not been pursued by the plaintiff on this challenge.

[4] The Authority concluded that it was seized of Mr North's grievances and urged the parties strongly to undertake further mediation before substantive proceedings could be investigated. This challenge has, however, intervened in that process.

[5] Mr North began work at the PPCS Pacific plant in November 1997. As a trimmer, his job, then and now, involves the removal of fat and other similar extraneous materials to improve product suitable for export. At all material times, Mr North was a member of the union. He suffered a wrist injury by accident on 2 September 2003 requiring him to take time off work and for which he received weekly earnings related compensation following the lodgement of his claim for his injury with the Accident Compensation Corporation (the Corporation).

[6] Silver Fern is what is known as an accredited employer under the Accident Compensation Act, permitted to self manage accident compensation claims and so enabling it to pay reduced levies.

[7] At the time, the relevant collective agreement created an expectation that injured employees would come in to work and attempt to undertake light duties. Although at the time of his injury Mr North had been undertaking preliminary training as a boner (de-boning carcass joints, a more vigorous and highly paid job than that of a trimmer), when he returned to work a few weeks after his injury he resumed as a trimmer. Mr North was subsequently declared fit for work but remained as a trimmer and did not resume boning training.

[8] On 29 July 2004 Mr North suffered a second injury to the same wrist. He lodged a claim for accident compensation, had time off work on weekly compensation, and undertook a rehabilitation process in relation to that injury.

[9] Although the evidence does not disclose when, at some stage Mr North approached the Pacific plant manager, Stuart Cruden, about his rehabilitation from his September 2003 injury. He subsequently put his concerns in writing to the company in a letter dated 15 March 2005. Mr North's complaint was that the plant nurse did not take sufficiently seriously his injury when it first occurred nor, in particular, his request for a referral to a doctor although a subsequent x-ray revealed that he had suffered a fractured scaphoid bone. Mr North complained that he was sent back to work by the nurse who had applied ice to his wrist and had strapped it up without proper investigation of the symptoms about which Mr North had complained.

[10] Mr North's 15 March 2005 complaint included that the work to which he returned as a trimmer was not light duties and required the frequent and extensive use of his still injured right wrist. Next, Mr North complained that when he sustained his further injury in July 2004 there was no rehabilitation plan in place despite having told a company representative that he was having difficulty with his wrist. Mr North complained that the second injury would not have occurred if the first had been managed properly and if he had been rehabilitated. He complained

that the second injury left him with a disability. He asserted that because he was undertaking the work of a boner at the time of his first injury and that he was about to become a night shift boner, he should be entitled to 100 per cent of what he would have earned in that role.

[11] In this letter Mr North asked Silver Fern to address three issues as follows:

> 1. Poor treatment of my injury in not referring me for medical care at the beginning.
>
> 2. No rehabilitation plan.
>
> 3. My correct entitlement while I was on alternative work.
>
> 4. All of this caused me and my family considerable stress and worry.
>
> I would appreciate your consideration of these concerns and look forward to a meeting with you.

[12] The company's response was by letter dated 1 April 2005 addressed to the union. The employer's letter summarised the company's records about Mr North's injuries. It then noted:

> You would only be entitle[d] to Boners rates of pay if you [were] a signed off competent Boner and would have been Boning during this period. This is not the case in your situation and therefore you have been paid your correct entitlements during this period.
> …
> Alternative work is specified by the restrictions identified by the Doctor. If those restrictions do not inhibit an employee doing their normal duties then they will continue with the normal duties.
> …
> The investigation shows that correct medical treatment was followed at the plant. Medical certificates followed by the company. Correct payments followed by the company.

[13] Mr North then complained to the Corporation as a result of his dissatisfaction with the employer's response. The Corporation's finding was contained in a lengthy letter dated 13 April 2006. It appears from this response that the employer had been invited by ACC to respond to its "Statement of Events" sent to the employer on 14 March 2006. There also appear to have been discussions between the plant manager and the Corporation's complaints' investigator.

[14] The Corporation concluded that the employer had breached two of the rights contained in the "Code of ACC Claimants' Rights", these being the right to be treated with dignity and respect and the right to be treated fairly.

[15] The employer was directed by the Corporation to provide Mr North with a written apology addressing the rights it had breached and he was advised to expect the apology within seven days. A copy of the Corporation's letter of 13 April 2006 was sent to the employer. The company accepted the Corporation's findings and apologised to Mr North for the lack of rehabilitation process in relation to his first injury.

[16] Mr North says that it was only after receipt of the Corporation's letter of 13 April 2006 that he consulted an organiser of the union based in Palmerston North who dealt with "industrial" issues and advised him to pursue a personal grievance. He says that his previous dealings with union representatives about these issues had been with people who dealt with accident compensation rather than industrial issues.

[17] On 12 July 2006 the union's Paul Wintringham wrote to the employer alleging a personal grievance in reliance on the Corporation's findings. There is no doubt that this letter, sent by facsimile transmission and so presumably received on the same day by the employer (12 July 2006), raised a personal grievance or personal grievances on Mr North's behalf. The employer acknowledges that this letter purported to raise a personal grievance or personal grievances.

[18] Mr North's statement of problem was lodged with the Employment Relations Authority on 13 March 2009. An amended statement of problem dated 7 August 2009 was filed on or about that date. The matter was investigated by the Authority on 26 August 2009 with its determination being issued two days later.

[19] Mr North's grievance relates to his treatment by his employer after he suffered the work injury in 2003. Specifically, Mr North says that Silver Fern disadvantaged him unjustifiably in his employment by not assisting him appropriately to return to work and, more particularly, that no rehabilitation plan was prepared for that purpose. Mr North says that his grievance or grievances were

raised in the letter from the union to the company dated 12 July 2006 and that his proceedings were lodged in the Authority in March 2009. Mr North says that he did not know, until he read the letter to him from the Corporation dated 13 April 2006, that he had been treated unfairly in his employment and, in the view of the Corporation, that he should receive an apology from the company for this. Mr North says that although he had previously been unhappy with the way he had been treated, his receipt of this letter was the first realisation by him that he may have been disadvantaged unjustifiably in his employment by Silver Fern.

[20] The Authority found (and this is now common ground) that the grievance was raised with the employer on Mr North's behalf on 12 July 2006. The plaintiff's primary argument in the Authority was that the grievance arose or came to Mr North's notice (whichever was the latter) more than 90 days before 12 July 2006. The Authority concluded that the grievance could not have come to Mr North's notice any earlier than 14 April 2006 when he received the Corporation's letter which he says first alerted him to the fact of having a grievance or grievances.

The grounds of challenge

[21] Section 114(1) states:

> **114 Raising personal grievance**
>
> (1) Every employee who wishes to raise a personal grievance must, … 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, …

[22] The plaintiff submits that the Authority interpreted and applied erroneously s 114(1) of the Act. At paragraph 4 of its determination it stated:

> [4] This is a matter that concerns the cause of action complained about coming to the employee's notice and not the date on which the action complained about occurred. I have relied on s 114 (1) of the Act.

[23] That section focuses, however, not on a cause of action coming to the employee's notice but, rather, the coming to notice of the action (or, by necessary implication, omission) alleged to amount to a personal grievance.

[24] The judgment of this Court in *Warburton v Mastertrade Ltd*[3] confirms the correctness of the plaintiff's position and the error of the Authority.

[25] The plaintiff points out that Mr North's personal grievance set out in his letter of 12 July 2006 concerned the "process [of rehabilitation] complained of and failure to comply with the requirements of the Injury Prevention, Rehabilitation, and Compensation Act 2001 …". Those events complained about occurred between 2 September 2003 and when his injury incurred on that date resolved itself. The plaintiff says that these events could not have occurred after 29 July 2004 when the second injury occurred resulting in incapacity. Mr North acknowledged this in his letter of 15 March 2005 to the company where he mentioned that his concern lay with rehabilitation during the period until 29 July 2004. The plaintiff says that in these circumstances the 90 day time limit expired on 26 October 2004.

[26] The plaintiff points out that Mr North expressed his lack of satisfaction with his rehabilitation following the 2 September 2003 injury in his 2005 letter and has confirmed this in his affidavit filed in this proceeding. The plaintiff says, therefore, that Mr North was aware of the acts or omissions that underlay his personal grievance because those were the acts and omissions about which he was dissatisfied and so expressed himself at the time. It is significant, in the plaintiff's submission, that Mr North did not, however, raise a grievance about these until after the accident compensation complaints procedure had been completed which was well after the close of the 90 day time limit on 26 October 2004. The plaintiff says that although Mr North may have later become more aware that he may have had grounds for a "personal grievance" as this is defined in law as a result of reading the outcome of the accident compensation complaints process, and then getting union advice, that is not a consideration that is relevant to a determination under s 114.

[27] Next, the plaintiff says that although the letter of 15 March 2005 may possibly have raised a grievance, Mr North nevertheless disclaims this and it is not so pleaded in his statement of defence. In any event, the plaintiff says, no Authority proceedings were brought within three years of the letter of 15 March 2005 so that it

[3] [1999] 1 ERNZ 636, 647-648.

cannot in any event have been the foundation for a grievance or grievances pursuant to s 114(6) of the Act.

[28] Turning to Mr North's claim for leave to proceed, if he is unsuccessful on the first issue the plaintiff says that he has not pleaded or proved any extenuating circumstances under s 115 of the Act.

[29] Presuming that these first arguments for the plaintiff are unsuccessful, it then says that Mr North's proceeding is barred under s 133(5) of the IPRC Act [now the Accident Compensation Act]. The personal grievance described by him in the 12 July 2006 letter concerns Mr North's rehabilitation rights and the company's rehabilitation obligations under the IPRC Act. The plaintiff submits that Mr North had rights of review or appeal about these matters under ss 6 and 68 of that legislation but chose not to exercise those rights except to the extent that he invoked the Corporation's complaint procedure.

Decision of challenge

[30] The defendant submits that 14 April 2006 was the date on which the 90 day period should be found to have commenced. He says that this was the date on which he received the Corporation's letter dated 13 April 2006 in which it upheld complaints made on his behalf about his treatment by the company. It is unclear whether Mr North relied upon union advice received by him subsequently. In these circumstances I will assume that the defendant's case is that the 90 day period began on 14 April 2006.

[31] Mr Mitchell, counsel for the defendant, emphasises Mr North's evidence in relation to his receipt of that letter that:

> Until I received this letter, I did not know that there had been any particular breach of my rights. I had been unhappy with the way I had been treated. However, this letter was the first time I was aware that there had been actual breaches of the ACC obligations of the Company and ACC.

[32] The legislation on which Mr North relies, however, refers to the coming to notice of the employee of the occurrence of the action alleged to amount to a

personal grievance: s 114(1) paraphrased. The statute provides for an extended period for the raising of a personal grievance in circumstances where an employee is unaware of the occurrence of an act (or omission) which is alleged to amount to a personal grievance. The evidence shows, however, that even if he may not have categorised it as a personal grievance, Mr North was aware of the acts or omissions of his employer which he now says constituted a personal grievance but before he received confirmation of his concerns by way of the outcome of the Corporation's complaint procedure. The legislation does not as specify focus on "any particular breach of … rights" as Mr North has termed it in his affidavit.

[33] The defendant's case on the interpretation of s 114 is that the time from which the 90 day period begins to run is not only that of the employee's awareness of the act or omission of the employer with which the employee is dissatisfied, but also that this gives rise to an awareness of the existence of a personal grievance. So in this case Mr North says that it was only when he received the Corporation's complaint report in his favour and was advised by his union that he had grounds for a personal grievance that the 90 day period began to run. Mr Mitchell submits that although there are occasions (and this is one of them) when events or incidents occur in the workplace, an employee aware of the event or incident may nevertheless not be aware that it gives rise to a personal grievance. Counsel submitted that in such situations it is only when the employee achieves that state of second awareness that the 90 day period commences. Counsel submits that this is reinforced by the use of the word "action" in s 114(1) rather than another word such as "event" or "incident".

[34] Mr Mitchell relies on the judgment of this Court in *Wyatt v Simpson Grierson.*[4] There the Judge found, construing s 114(1):

> … the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[4] [2007] ERNZ 489.

[35] That is not, however, the same position as here. Mr Mitchell's argument would advance the case for employees a step further. *Wyatt* says that not only must there be an awareness of the act or omission but the 90 day period does not begin to run until the employee considers (forms a "reasonable belief") that the employer's action was unjustifiable. Mr Mitchell's argument goes one step further, however, and would have three necessary constituents: the awareness or appreciation of the act or omission, that it was unjustifiable and that this amounted to a personal grievance. In this case the *Wyatt* test would have been satisfied by April 2006 in that Mr North was aware of the acts or omissions of his employer in relation to his rehabilitation and, at that time, also considered them to have been unjustifiable warranting the complaint that he made in March about them.

[36] Mr Mitchell argues that the reference in the *Wyatt* case to "unjustifiable" is to the technical meaning of that term in personal grievance law under the Act rather than to its meaning in common parlance.

[37] Mr Mitchell distinguishes, on the one hand, being "concerned about the actions of your employer" and, on the other, considering "that you have a personal grievance". Counsel submits that the extended time for raising a grievance under s 114(1) does not begin to run until the latter status is achieved and that, in Mr North's case, this was not until his receipt of the complaint decision letter from the Corporation.

[38] In addition to relying on the *Wyatt* case, Mr Mitchell seeks to distinguish the *Warburton* case relied on by the plaintiff. Mr Mitchell submits that the Court in *Warburton* found that the 90 day period began to run from when the employee realised he had exercisable grievance rights. Counsel relies upon the following passage at p647 of the reported judgment:

> [The section] - focusing upon its context, "the date on which the action alleged to amount to a personal grievance ... came to the notice of the employee"/the second limb of the subsection - obviously contemplates information/facts coming to the notice of the affected employee which is inherently sufficient to reasonably cause him/her to conclude that an earlier termination of employment then believed to comprise a justifiable termination was in fact a personal grievance of unjustifiable dismissal. In that event I hold the 90-day period will commence to run from the date upon

> which this altered awareness began in fact, or should reasonably have occurred.

[39] In this regard Mr Mitchell submits that in ascertaining when the defendant ought reasonably to have become aware of the personal grievance, the employer's apology is important. Counsel submitted that although throughout 2005 Mr North had been concerned about the company's behaviour and told it so, this simply was met by complete and adamant denials of any failure on its part to meet its obligations. Once the company's failings were pointed out to it by the Corporation, however, it apologised to Mr North, thereby accepting at least some of its failings.

[40] Turning to the next issue which is whether Mr North's complaints constitute a personal grievance, he relies on the Corporation's complaints findings in the letter of 13 April 2006 that the employer breaches specified rehabilitation rights in employment and, in particular, the right of recognition that he would not be under physical, emotional, social, or financial strain and the separate right that he would be treated fairly. Mr Mitchell submits that his client's personal grievance is an unjustified disadvantage grievance, based on unjustified disadvantageous action of the employer under s 103(1)(b) of the Act. Counsel submits that such grievances cover a broad range of acts or omissions in employment. In the judgment in *Tranz Rail Ltd v Rail and Maritime Transport Union*[5] the Court of Appeal noted at paragraph 26:

> Broadly speaking, terms of employment are all the rights, benefits and obligations arising out of the employment relationship. The concept is necessarily wider than the terms of an employment contract.

[41] Mr Mitchell also relies on such analogous situations as a failure to implement proper security measures in employment (*Davis v Portage Licensing Trust*)[6] and directions to carry out duties for which an employee was medically unfit (*Atilano v Sky City Auckland Ltd*).[7] Counsel affirms that this is not a claim for damages arising out of personal injury and is not barred under s 133(5) of the Accident Compensation Act.

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[5] [1999] 1 ERNZ 460.
[6] [2006] ERNZ 268.
[7] AC72/99, 21 September 1999.

[42] Although Mr North was no doubt encouraged by the Corporation's advice to him received in mid April that the employer had breached his rights, that was confirmation of what Mr North already believed and had alleged in his earlier dealings with the company. The Corporation's advice and Mr Wintringham's subsequent confirmation was not of the existence of circumstances constituting a grievance but, rather, confirmatory of what Mr North already believed (that he had been unfairly treated) and had indeed complained of to his employer.

[43] I respectfully agree with the analysis and interpretation of s 114(1) in the *Wyatt* judgment. That was summarised at paragraph [29] as follows:

> … if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[44] I do not accept the defendant's submission that his further step of a requirement of belief in the existence of a personal grievance, in terms of the statute, is a correct interpretation of s 114(1).

[45] I conclude, applying that interpretation of s 114(1) to the fact, that the defendant's personal grievance was raised with the plaintiff substantially more than 90 days after the date on which the action alleged to amount to that grievance occurred or came to the notice of Mr North. The Authority's determination was erroneous and is set aside. Pursuant to s 183(2) this judgment stands in its place.

[46] As Mr Cleary submits, there is no case made out for the defendant for leave under s 114(3) to raise the grievance after the expiration of that period of 90 days. It is clear from the evidence that the 90 day period began running, at the latest, on 15 March 2005. It was 15 months before the grievance was raised. Apart from Mr North's election to complain formally to the Corporation during that period, there is no other explanation for the delay or account of what occurred. It is significant, also, that Mr North was represented by his union in respect of these matters during that period. He says that the union representative or representatives dealing with his case at the time were experienced in accident compensation matters but not in "industrial matters". I infer that Mr North claims that his union's representative throughout this

period was unaware of his personal grievance entitlements. That is a surprising proposition about a major union such as the Meatworkers Union and an inference that I would not be prepared to draw in the absence of cogent evidence.

[47] Further, the statute required any applicable collective or individual agreement governing Mr North's employment to have included a plain language explanation of the services available for the resolution of employment relationship problems including a reference to the requirement to raise a personal grievance within 90 days. In the absence of any evidence about Mr North's or the union's knowledge of these relevant elements, I would not be prepared to find in favour of Mr North under s 114(3).

[48] For the foregoing reasons, the plaintiff's challenge succeeds and Mr North's personal grievance or grievances fail.

[49] The plaintiff is entitled to a contribution to its costs in both the Authority and in this Court on the challenge. In reality, I imagine that the question of costs will be between the company and the union and they should have an opportunity to attempt to resolve those directly before the Court is asked to fix them. Any application for costs by the plaintiff may be made by memorandum filed and served within two calendar months of the date of this judgment with the plaintiff having the period of one month to respond by memorandum.

G L Colgan
Chief Judge

Judgment signed at 9.30 am on Tuesday 29 June 2010