IN THE EMPLOYMENT COURT
WELLINGTON

WC 9/09
WRC 33/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NGAWHETU VIOLET DICKSON Plaintiff
AND	UNILEVER NEW ZEALAND LIMITED Defendant

Hearing: 23 February 2009
(Heard at Wellington)

Appearances: M V Smith, Counsel for Plaintiff
Karen Spackman, Counsel for Defendant

Judgment: 22 April 2009

JUDGMENT OF JUDGE C M SHAW

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[1] Ms Dickson's employment with Unilever New Zealand Limited ("Unilever") was terminated on 2 March 2007 for medical reasons. She raised a personal grievance alleging unjustified dismissal and a breach of contract claim in the Employment Relations Authority.

[2] The Authority in its decision[1] dealt with 3 preliminary issues:

1. It found that the personal grievance was not raised within 90 days and the delay was not occasioned by exceptional circumstances.

2. The plaintiff's claim for damages for breach of contract by being required to work on a packing line against her will related directly to her personal

[1] WA 134/08, 2 October 2008

injury and was therefore barred by s317(1) of the Injury Prevention, Rehabilitation and Compensation Act 2001 ("IPRC Act").

3. The claim was further barred by s113(1) of the Employment Relations Act 2000 (ER Act) which prevents an employee bringing a breach of contract claim in relation to the termination of employment and was therefore outside the Authority's jurisdiction.

[3] Ms Dickson challenged those findings by way of a de novo hearing. The challenge alleged a breach of contract and two personal grievances – one for unjustified dismissal arising out of the termination of her employment and the other for unjustified action and disadvantage which was described in the statement of claim as follows:

> *20. My agent's advice of 16 February 2007, in response to the defendant's offer of a severance payment, that the offer was unacceptable and that I would fight to keep my job raised a grievance based on unjustified action and disadvantage.*

[4] Mr Smith explained to the Court that the disadvantage grievance arises out of the employer's act of telling Ms Dickson her employment was to be terminated. In his submission, the agent's advice referred to above was evidence of the raising of that grievance.

[5] Ms Dickson did not advance any exceptional circumstances in the event the grievances are found to have been raised out of time.

[6] There are two preliminary issues for the Court. They are:

1. Were either of Ms Dickson's personal grievances properly raised within the 90-day limit?

2. Is the plaintiff's claim for general damages barred by the IPRC Act?

[7] The plaintiff's claim for special damages for loss of superannuation benefits as part of the breach of contract claim was discontinued at the hearing.

The facts

[8] Ms Dickson was originally employed in the stores part of the Unilever factory. She was transferred to the powders packing line in 2005 and shortly after suffered a work place injury. When she returned to work in 2006 she was placed in a temporary full time position in stores as a forklift driver as part of a plan to rehabilitate her. Ms Dickson worked in this position from March to 4 November 2006 when she had surgery on her elbow. When she presented for work in January 2007 after recovering from surgery she was advised that her employment would probably be terminated for medical reasons. A consultation and negotiation process began and her employment was ended on 2 March 2007.

[9] Ms Dickson's husband, Bernard Pedersen, was also an employee of Unilever and a union delegate there. When she was given notice of the termination of her employment he had discussions with Unilever's management about a monetary payment for Ms Dickson. An offer of a tax free payment was made by the human resources manager, Ms Tane, but was rejected. In any event Ms Tane later advised that such a payment would have reduced Ms Dickson's entitlement to accident compensation and would not have been of any benefit to her.

[10] Following the decision to terminate her employment on 16 February 2007 Mr Pederson told Ms Tane that they would fight for Ms Dickson's job but did not give any specific details to her about this or indicate that she would raise a personal grievance or claim for unjustified dismissal.

[11] On 19 April 2007 Ms Tane received a notice from Ms Dickson which purported to submit a personal grievance. It said:

> ***PERSONAL GRIEVANCE NOTICE***
>
> ***To Whom it may concern***
>
> *Please treat this letter as the submission of my personal grievance based on unjustified dismissal. Particulars of my grievance will be provided presently.*
>
> …

[12] No further particulars were provided by Ms Dickson and neither Mr Pedersen nor Ms Dickson had any discussions with the management of Unilever after that.

[13] In the letter of termination to Ms Dickson, Ms Tane had noted that Unilever had considered if there was a possibility of her returning to work at Unilever. She also acknowledged that Ms Dickson disagreed with a medical assessment which declared her to be unfit. At the hearing it was put to her that when Ms Tane received the notice of personal grievance she would have known what it was about because she was aware of Ms Dickson's desire to return to work and her belief she was fit to do so.

[14] In response Ms Tane said she did not know what angle was being taken by Ms Dickson in the notice of personal grievance. She thought the only conflict before termination was about the amount of money which was offered and which had been the subject of discussions between her and Mr Pedersen.

[15] The next communication about the personal grievance was a letter from Mr Smith, Ms Dickson's lawyer, on 11 July 2007, well beyond the expiry of 90 days. Mr Smith itemised the grounds supporting her claim for unjustified dismissal. He also raised the lawfulness of Ms Dickson's redeployment in 2005. He alleged it had been done in spite of her opposition and in breach of clause 15 of the collective agreement.

90-day issue

[16] Did the plaintiff comply with s114 of the ER Act by raising her personal grievances within 90 days of the grievances occurring?

[17] Section 114(2) states that a personal 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.*

[18] In *Creedy v Commissioner of Police*[2] Chief Judge Colgan held at paras [36] and [37]:

> *… 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 …*
>
> *… an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

[19] The Chief Judge noted at para [39] that the personal grievance procedures in the ER Act are:

> *… aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...*

[20] For the plaintiff, Mr Smith acknowledged this test but noted that in a later case the Chief Judge had held that the level of detail that a plaintiff ought to provide to raise a grievance requires a lower threshold than that required to raise a statement of problem in the Authority.[3]

[21] Mr Smith submitted that the required threshold for raising a grievance had been reached in relation to the unjustified dismissal grievance because of Ms Tane's prior knowledge of Ms Dickson's desire to be re-employed on the packing line and her disagreement with the medical assessment. This knowledge was demonstrated in the letter of termination. He submitted that once the grievance notice was received that earlier knowledge should have been sufficient for the defendant to move for resolution or to defend the claim.

[22] I find that the one matter of which Ms Tane was specifically aware was Ms Dickson's disagreement with the medical assessment. However, not even Mr Smith's letter of 11 July 2007 raises this as a basis for the personal grievance. If Ms

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[2] [2006] ERNZ 517
[3] *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139

Tane had thought that this was what the grievance was about she would have been wrong.

[23] In these circumstances the 19 April 2007 notice did not give enough information to enable Unilever to address the personal grievance. It contained no particulars of the merits of the grievance. I do not accept that Ms Tane or any other representative of Unilever would have been able to deduce the grounds relied on by Ms Dickson from the pre-termination discussions with her and Mr Pedersen.

[24] In relation to the unjustified disadvantage grievance it is the plaintiff's case this was raised after she was told that Unilever was going to terminate her employment. Mr Smith submitted that Mr Pedersen had raised an unjustified grievance by telling Ms Tane that they would fight for Ms Dickson's job.

[25] There is no requirement in law for a personal grievance to be raised in writing. However, whichever way a grievance is raised the same requirements of particularity apply to oral and written notices of grievance.

[26] Mr Pedersen's statement was simply insufficient to raise a grievance under s114. It does not give any particulars at all about the nature of the grievance or that it was an unjustified disadvantage.

[27] The Employment Relations Authority noted the unjustified disadvantage grievance was not included in either the statement of problem or the letter to the defendant from the plaintiff's lawyer on 11 July 2007 nor was any reference made to it in the 19 April 2007 note. I agree with the Authority that Mr Pedersen's statement only showed an intention to raise a grievance rather than the actual raising of the grievance at that time.

[28] I also agree with the Authority that it is unreasonable to expect Unilever to have understood what the grievance was when there were no remedies sought, no identification of the problem, and no proposals made to resolve the problem.

[29] I find that the plaintiff's failure to provide particulars of either personal grievance within the 90-day period required by s114 means that neither grievance was raised, even taking into account the low threshold of information stated in *Edmonds.*

Claim for damages

[30] Although not pleaded as such, this part of the preliminary hearing was effectively a strike out application. Ms Spackman submitted that the breach of contract claim should be dismissed because the claim for damages arises out of a personal injury and would therefore be barred by s317(1) of the IPRC Act.

[31] Mr Smith did not dispute that a claim arising from a personal injury is barred under that Act but submitted that the heads of claim as particularised do not derive from any injury but from the transfer in 2005 of Ms Dickson to the powders packing line from her job in stores driving a forklift.

[32] No evidence was led on this claim at this preliminary stage. The Court is limited in its consideration of this cause of action to what is in the statement of claim.

[33] The statement of claim alleges that Ms Dickson initially agreed to the transfer to the powders packing line but subsequently withdrew that consent as she did not believe she was physically capable of doing the job. The claim further alleges that she was threatened with disciplinary action for serious misconduct if she did not transfer to the packing line. Ms Dickson alleges that Unilever acted in breach of clause 15 of the collective agreement which covered her employment. That clause deals with work allocation.

[34] Ms Spackman submitted that an analysis of the statement of claim shows that the claim arises from the fact of the plaintiff having suffered an injury while working on the packing line. She pointed out that the statement of claim pleads that as a consequence of working on the packing job Ms Dickson suffered injuries.

[35] However, the pleading does not end there. Paragraph 10 reads:

> *For the high-handed and arrogant way the defendant breached my contract despite my objection I seek an award of general damages …*

[36] On the facts alleged in the statement of claim the transfer to the packing line preceded the injuries which led to her obtaining compensation under the IPRC Act. Therefore the allegation of breach of contract does not arise out of a personal injury. If this allegation is made out after a substantive hearing and a breach of contract is established there would be no statutory bar to damages being awarded to Ms Dickson.

[37] Ms Spackman advised that the defendant disputes the facts relied on by the plaintiff to support her allegation of breach of contract. It also will argue that clause 15 of the collective agreement is not an express term conferring any benefit on the plaintiff.

[38] I emphasise that my decision on this preliminary issue is made in reliance only on the pleadings and does not bind any Judge who hears the substantive case.

Conclusions

[39] Neither of the plaintiff's personal grievances was raised within 90 days and those claims are dismissed.

[40] The claim for breach of contract as pleaded in the statement of claim does not arise out of a personal injury and damages would not be barred by the IPRC Act. That cause of action is therefore viable and may proceed to a hearing in the Employment Court.

[41] Costs are reserved. In the absence of agreement between the parties the defendant is to file a memorandum as to costs by 1 May 2009. The plaintiff must respond by 8 May 2009.

C M SHAW
JUDGE

Judgment signed at 4.30pm on 22 April 2009