IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 15
ARC 84/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VULCAN STEEL LIMITED Plaintiff
AND	KIREAN WONNOCOTT Defendant

Hearing: By memoranda filed on 4 December 2012, 15 January, 7 February and 14 February 2013

Appearances: Chris Patterson and AEM Reid, counsel for plaintiff
Mark Beech and Jeremy Sparrow, counsel for defendant

Judgment: 20 February 2013

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] By consent, this challenge to a determination[1] of the Employment Relations Authority finding that Kirean Wonnocott raised his personal grievance validly, has been dealt with on the papers. This is to enable the parties and the Authority to retain the Authority investigation meeting dates on 8, 9 and 10 April 2013 if the grievance survives the challenge.

[2] Mr Wonnocott's personal grievance is that a written employment warning issued by his employer, Vulcan Steel Limited (Vulcan), disadvantaged him unjustifiably in his employment.

[3] After a preliminary investigation on the papers, the Authority concluded that Mr Wonnocott raised this personal grievance with Vulcan after the expiry of the 90

[1] [2012] NZERA Auckland 409.

day period for doing so. However, the Authority concluded that Vulcan consented impliedly to the late raising of the grievance so that it cannot now rely upon that limitation. In these circumstances, the Authority did not find it necessary to go on and consider whether, if Mr Wonnocott had been unsuccessful, he should nevertheless have been granted leave to raise his grievance out of time under ss 114(4) and 115 of the Employment Relations Act 2000 (the Act). That is a course and remains open potentially to Mr Wonnocott.

Background facts

[4] The plaintiff's non-de novo challenge focuses on whether the Authority correctly applied the law on implied consent to the raising of a grievance out of time to the facts of the case. The essential facts are as follows.

[5] Mr Wonnocott, accompanied by his wife and solicitors, attended a meeting with his employer's representatives (Vulcan's branch manager and a consultant from a company called People Passion (2008) Limited which was assisting Vulcan) on 20 December 2011. At the conclusion of the meeting the Vulcan representatives advised Mr Wonnocott that he would be issued with a written warning about his alleged misconduct. His lawyer, Mark Beech, asked that this warning be sent to his firm, then Sharp Tudhope in Tauranga. The records of the meeting also disclose that there was some discussion about Mr Wonnocott's ability to challenge the warning (when it was received) by way of personal grievance and that it would be sent to his solicitors over the "next couple of days".

[6] On the next day, 21 December 2011, Lara Hellier, the People Passion adviser, sent by email a formal written warning letter to Mr Wonnocott care of his solicitors. After outlining briefly the employer's conclusions, it said that these had "… resulted in a first written warning on your personnel file; this warning shall remain on your file for twelve months."

[7] On the following day, 22 December 2011, Mr Wonnocott's solicitors responded by email to Ms Hellier of People Passion, acknowledging receipt of the written warning. On the same day, 22 December 2011, Mr Wonnocott's solicitors

forwarded the warning letter to him by email. At 4.17 pm on that afternoon, Mr Wonnocott's wife emailed his solicitors advising that although the defendant was not at home, she had let him know that she had received the solicitors' email. Mr Wonnocott says that he did not read the warning letter until the following day, 23 December 2011.

[8] On 25 January 2012 Mr Wonnocott's solicitors wrote to Vulcan noting that the written warning that had been issued on 21 December 2011 was inconsistent with the discussions at the parties' meeting on 20 December 2011. The letter concluded that "Mr Wonnocott reserves his rights absolutely in respect of that warning". An inference to be drawn from this is that it referred to his right to challenge the justification for that warning.

[9] Following the meeting on 26 January 2012, Mr Wonnocott received a second and final written warning letter on 22 February 2012. This resulted in the letter from Mr Wonnocott's solicitors to Vulcan dated 21 March 2012 in which Mr Wonnocott raised a grievance in relation to the February 2012 warning, as well as purporting to do so in relation to the December warning.

[10] Mr Wonnocott's personal grievance alleged unjustified disadvantage in employment arising from the formal December warning. It was raised with Vulcan on 21 March 2012. If the defendant received the written warning on 23 December 2011 as he claims, the grievance was raised within the period of 90 days. If, however, the warning was given, or Mr Wonnocott became aware of it, on 20 or 21 December 2011, the 90 day period had expired by 21 March 2012 by a couple of days.

[11] In another letter sent by Mr Wonnocott's solicitors on 23 April 2012, they said:

> We remind you that personal grievances have been raised in respect of the … issuing of written warnings. Mr Wonnocott reserves his rights absolutely to pursue these grievances.

[12] On 24 April 2012 People Passion (on behalf of Vulcan) wrote in reply to Mr Wonnocott's solicitors, but made no reference in their letter to the raising of personal grievances or, in particular, to the 90 day statutory limitation period for doing so.

[13] There was a further meeting of the parties on 27 April 2012 at which Mr Wonnocott's solicitor stated that the (December) warning which had been issued was currently "under challenge". Again there is no reference to any mention of the 90 day statutory limitation period in the record of the meeting.

[14] On 3 May 2012 Vulcan wrote to Mr Wonnocott (via Sharp Tudhope) by email dismissing him and stating, among other things:

> You have had two previous warnings, and although we acknowledge that you have raised an unjustified disadvantage grievance in relation to one of them, you have taken absolutely no steps to progress that grievance.

[15] This reference to a failure to take steps appears to refer to the December 2011 warning grievance raised by the letter of 21 March 2012.

[16] On 8 May 2012 Sharp Tudhope raised a personal grievance with Vulcan in relation to Mr Wonnocott's dismissal and requested Vulcan's attendance at an urgent mediation. Vulcan responded by letter on 11 May 2012 but did not raise any question about the 90 day statutory limitation period for the December grievance in that letter.

[17] It was only for the first time in its statement in reply to Mr Wonnocott's personal grievance statement of problem filed in the Authority that, on 31 July 2012, Vulcan raised a protest about the date of the raising by the defendant of his personal grievance being beyond the 90 day statutory limitation period.

[18] The Authority concluded that Vulcan's letter of dismissal of 3 May 2012 consented, impliedly, to any lateness in the raising of the warning personal grievance of December 2011. The letter's reference to the failure to take steps to prosecute the grievance was found to have included an implicit consent to the late raising of the challenge.

The Employment Relations Act 2000

[19] The relevant legislative provision is s 114(1) of the Act which provides materially as follows:

> (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), 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, *unless the employer consents to the personal grievance being raised after the expiration of that period.* [my emphasis]
>
> …
>
> (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

Case law

[20] Consent under s 114(1) can be either express or implied by conduct. As a number of judgments of this Court confirm, whether there has been consent will be a matter of fact and degree: *Jacobsen Creative Surfaces Ltd v Findlater*[2] and *Phillips v Net Tel Communications.*[3]

[21] In *Jacobsen*, following the submission of a grievance appreciably out of time, the employer entered into correspondence with the employee's representatives and attended informal (in the sense of non-directed) mediation. It was only following the filing of a notice of intention to defend that the employer's representative raised the 90 day limitation issue, arguing that it had not given consent for a late submission. The Employment Court in *Jacobsen* declined to accept that, in these circumstances, the employer had to be aware of the expiration of the limitation period and for its consent to be so informed.

[22] The leading and most authoritative judgment is that in *Commissioner of Police v Hawkins.*[4] The Court of Appeal in *Hawkins* confirmed the Employment Court's approach to whether what occurred constitutes consent, must be a matter of

[2] [1994] ERNZ 35.
[3] [2002] 2 ERNZ 340.
[4] [2009] 3 NZLR 381..

fact and degree.[5] At [24] the Court of Appeal concluded that whether an employer has consented to the raising of a personal grievance out of time turns on whether the employer "… so conducted himself that he can reasonably be taken to have consented to an extension of time".

[23] The relevant facts in *Hawkins* were that counsel for the grievant wrote to the employer 87 days after what amounted to the date of the grievant's dismissal. The letter purported to put the employer on notice that the grievant was raising a personal grievance but did not contain any further particulars. The grievant's lawyer said that he would provide "full particulars and details of the … personal grievance …" when he anticipated being able to do so, about two weeks later. The Employment Court Judge in *Hawkins* characterised the contents of that letter as "no more than a formal notice that a grievance, in the sense that a particularised set of allegations was to be raised in the future".

[24] For a better appreciation of the facts as found by the Employment Court in *Hawkins* (there being no appeal against this Court's factual findings), it is necessary to go back to the Employment Court judgment appealed from, *Hawkins v Commissioner of Police.*[6] This discloses that very shortly after he promised to do so, the grievant's solicitor wrote to the employer providing particulars of the grievance. The employer responded, seeking further particulars and clarification of some matters, saying that the solicitor's second letter had been general, non-specific, and did not allow him reasonably to inquire into the matters alleged. Those further particulars were not provided because the grievant was then committed for trial on criminal charges connected with the events complained of. Two years later, the grievant was discharged without conviction whereupon his lawyer wrote again to the employer by letter which provided the details that had been sought two years previously. The parties then attended mediation which was unsuccessful and the grievant commenced proceedings in the Employment Relations Authority. It was then for the first time that the question whether the grievance had been raised out of time was taken up by the employer. The employer's consent was asserted, but denied.

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[5] At [20]
[6] [2007] ERNZ 762.

[25] The Employment Court found, at [19]-[20] of its judgment as follows:

> [19] I find that by his written responses and his subsequent willingness to engage in mediation with Mr Hawkins without raising the 90-day issue the defendant impliedly consented to the grievance being raised after the expiry of the 90-day period.
>
> [20] I conclude that the grievance was not properly raised before the expiry of the statutory 90-day period but the defendant's lack of protest and his active engagement with Mr Hawkins in relation to the grievance after that date is sufficient evidence of implied consent. In those circumstances the question of whether there are exceptional circumstances to grant leave to extend the time for filing does not arise.

[26] In *Hawkins* on appeal, the employer conceded that consent did not need to be given expressly. The Court of Appeal accepted that the employer in *Hawkins*, in continuing to deal with his situation after the expiry of the limitation period, could not have been unaware of its existence but yet failed to draw this to the grievant's attention.

[27] As the Court of Appeal noted in *Hawkins* at [24]:

> … The real issue is not whether, in formal terms, the [employer] "turned his mind" to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[28] In the *Hawkins* case, the Court of Appeal confirmed that it was "almost inconceivable" that the employer's representatives, including a human resources adviser, would have been unaware of the 90 day time limited and yet "there was no red light to [the grievant] – nor even an orange showing – with respect to time."

[29] As the Court of Appeal noted in *Hawkins* at [25]: "Whether it is seen as an implied consent, or what would reasonably be regarded by the objective observer, the result is the same: the claim is not out of time."

Discussion

[30] In this case there were three potential personal grievances of which that now in issue was the first. I agree with the Authority that the 90 day period for raising his grievance began with the receipt by Mr Wonnocott's solicitors of the letter formally recording his employment warning. That was received by the solicitors on 22

December 2011. The evidence is that by the time the solicitors had forwarded the email to Mr Wonnocott's home email address, it was not until the following day, 23 December 2011, when he first saw it. It was, however, he, Mr Wonnocott, who set the agenda for how the formal warning would be dealt with. At the meeting on 20 December 2011, after being advised that he would receive a formal written warning, Mr Wonnocott asked that this be sent not to him but to his solicitors. That request was acceded to by Vulcan and Mr Wonnocott cannot now complain justifiably, that he personally did not see the warning letter until it was forwarded on to him by his solicitors and eventually opened by him.

[31] So the Authority was correct to have concluded that Mr Wonnocott's solicitors' letter of 21 March 2012 purporting to raise a grievance in respect of this first written warning was out of time, albeit marginally.

[32] What has to be examined critically to determine whether there was implied consent are the events which occurred between the receipt by Vulcan of Mr Wonnocott's solicitors' letter of 21 March 2012 and when the 90 day point was first taken expressly by Vulcan.

[33] It is relevant to those post-21 March 2012 events that there had been other grievance-capable activity in the employment relationship before 21 March 2012. Mr Wonnocott attended another disciplinary meeting (also with his solicitors) on 26 January 2012. Before that meeting, Mr Wonnocott's solicitors invoked the detail of the December 2011 meeting, saying that the events then relied on by Vulcan which led to the intended 26 January 2012 meeting were inconsistent with what had been discussed between the parties at the first disciplinary meeting on 20 December 2011. As a result of the January 2012 disciplinary meeting, Mr Wonnocott was issued with a second and final written warning on 22 February 2012.

[34] The 21 March 2012 letter which purported to raise Mr Wonnocott's personal grievance in relation to what it accepted was the first written warning issued to him on 21 December 2011 noted, after addressing the disputed events:

> 3. Accordingly, Mr Wonnocott raises a personal grievance in relation to the first written warning based on an unfair disadvantage claim.

> As a result of this warning, Mr Wonnocott is now no longer entitled to the employee share scheme.
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> 4. This grievance is also in furtherance to the grievances raised on 12 December 2011. Mr Wonnocott wholly reserves his rights in relation to these grievances. We will correspond separately with you how we wish to resolve these grievances.

[35] The next correspondence was a letter from Vulcan to Mr Wonnocott (personally) dated 19 April 2012 inviting him to a further disciplinary meeting to be held on 24 April 2012. That included specific reference to the grievance having been raised and Mr Wonnocott's reservation of his "rights" to pursue this grievance.

[36] After correspondence between the parties (via their representatives) about further meetings, the next relevant and significant interchange was Vulcan's letter of 3 May 2012 addressed to Mr Wonnocott care of his solicitors. This confirmed his summary dismissal of which he had been advised earlier that day. Included in this lengthy letter, which addressed principally the reasons for Mr Wonnocott's dismissal, was further reference to the grievance. It is significant that the only criticism made of this by Vulcan was that the grievance had not been progressed.

[37] Mr Wonnocott's solicitors responded to his dismissal by an equally lengthy letter dated 8 May 2012 at the conclusion of which he raised another personal grievance (unjustified dismissal) and set out the remedies sought for this. Mr Wonnocott also expressed his willingness to attend an urgent mediation in an attempt to resolve those issues.

[38] At all relevant times, the employer was advised and represented actively not only by its human resources consultancy (People Passion) but also by its counsel Mr Patterson.

[39] In a short letter dated 11 May 2012, Mr Patterson, on behalf of Vulcan, wrote to Mr Wonnocott's solicitors what can best be described as a holding letter in response to Sharp Tudhope's of 8 May 2012 raising Mr Wonnocott's personal grievance for unjustified dismissal. In that letter, Mr Patterson wrote:

> 3. In relation to your request that the parties attend mediation, my client is willing to consider attending mediation only once further

particulars have been exchanged so that any issues to be discussed at the potential mediation can be narrowed down.

4. I also record that the parties have previously attended mediation which was a resounding and somewhat spectacular failure. The mediation was unilaterally terminated when your client left without even the courtesy of informing my client that he had decided that continuing with the mediation was no longer in his interest.

[40] Mr Patterson wrote again to Mr Wonnocott's solicitors by letter dated 30 May 2012. This was a lengthy and detailed letter which essentially rejected Mr Wonnocott's personal grievance claims and provided the employer's reasons for doing so. As to the "previous warnings", Mr Patterson's letter noted at paragraph 17:

17. Mr Wonnocott was aware of his previous warnings, they were mentioned briefly during the 27 April 2012 meeting, and Mr Wonnocott had no reasonable basis to believe that his previous warnings would not be taken into account. Mr Wonnocott was or ought to have been aware that both warnings reduced his employment security.

18. In relation to the personal grievances Mr Wonnocott has raised, I refer to your letter dated 21 March 2012 in which, at paragraph 4, you advise that you will correspond separately concerning how you wish to resolve those grievances. There has been no subsequent correspondence from you in relation to those grievances. As per your 21 March 2012 letter, Vulcan Steel has awaited further correspondence and particulars from you and as such, has not in any way breached its obligation to respond and try to resolve the grievances. Vulcan Steel cannot take steps to resolve any unspecified claim(s). To that extent, Vulcan Steel does not accept that your letters of 12 December 2011 and 21 March 2012 validly raised any personal grievance on behalf of Mr Wonnocott. I refer you to *Creedy v Commissioner of Police [2006] ERNZ 517* and *BOT of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds [2008] ERNZ 139*. In the *Creedy v Commissioner of Police* case the Court held that an employee was obliged to provide certain minimum information to an employer to validly raise a personal grievance:

> *"[36] 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"*

19. Neither of your letters detailed the grievances with specific information to enable Vulcan Steel to address the grievances, nor did they detail what remedies Mr Wonnocott sought from Vulcan Steel.

[41] Despite addressing the grievances, Mr Patterson's letter did not raise any question of non-compliance with the 90 day time limit. Its criticisms were directed at the adequacy of the information in the grievances that had been raised.

[42] Vulcan declined or refused to participate in the mediation process as proposed by Mr Wonnocott and his representatives although the reason for doing so was not that he had not raised the relevant personal grievance within time. At paragraph 23 of his letter of 30 May 2012, Mr Patterson, Vulcan's counsel, wrote:

> Vulcan Steel is not willing to attend mediation on the basis that, the previous mediation attended by the parties was unilaterally terminated by your client in circumstances which showed a lack of good faith on his part.

[43] Mr Wonnocott filed his proceedings by a statement of problem in the Employment Relations Authority on 17 July 2012.

[44] The limitation point was first taken in Vulcan's statement in reply filed in the Employment Relations Authority and dated 31 July 2012.

Decision

[45] Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test. In this case, the employer declined to participate in the grievance resolution process (initially by declining or refusing mediation) for reasons not including or associated with the time limitation issue. The employer did, nevertheless, engage with Mr Wonnocott in the grievance process to the extent that it responded comprehensively to his claims on their merits at a time when it was professionally represented and advised not only by a human resources consultant but by an experienced and knowledgeable barrister.

[46] As the case law establishes, whether there was implied consent is a matter of fact and degree. All relevant facts are for assessment individually and collectively. The facts of Mr Wonnocott's case are unique, if only because it involved multiple grievances, intense participation (even while his employment continued) of experienced employment lawyers on both sides; and a significant level of written recording of the parties' positions. As to the other element of "degree", the delay in raising the grievance was a day or two at most. This makes more likely the employer's consent. Had Mr Wonnocott been months out of time in raising his

grievance, it is likely that there would not have been consent, either expressed or implied.

[47] Vulcan must be taken to have been aware both of the fact and date of the raising of the grievance by Mr Wonnocott. It was professionally advised in relation to that grievance. Had it not consented to the late raising of the grievance, it would have so advised Mr Wonnocott's solicitors but did not do so before engaging in the grievance process. Vulcan did more than acquiesce in Mr Wonnocott's delay: its actions evidence implicit consent to the marginally late raising of the grievance.

[48] In all of the particular circumstances of the case outlined, I conclude, and agree with the Employment Relations Authority, that Vulcan consented impliedly to the late raising by Mr Wonnocott of his disadvantage personal grievance relating to his first formal warning.

[49] For these reasons the plaintiff's non-de novo challenge to the Authority's determination is dismissed. This judgment replaces the Authority's determination under s 183(2) even although it supports the determination. It follows, in my conclusion, that Mr Wonnocott is entitled to have the Authority determine that disadvantage grievance on its merits. The matter remains with the Authority for those purposes and the challenge is dismissed with costs. If these cannot be addressed, Mr Wonnocott may apply by memorandum filed within 30 days, with Vulcan having the same period to respond.

GL Colgan
Chief Judge

Judgment signed at 8.30 am on Wednesday 20 February 2013