IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 246
ARC 12/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BARRY DUNN Plaintiff
AND	WAITEMATA DISTRICT HEALTH BOARD Defendant

Hearing:	By memoranda of submissions by the plaintiff on 23 July, the defendant 16 August and counsel for plaintiff in reply 30 August 2013
Appearances:	Jeremy Sutton, counsel for plaintiff Anthony Russell, counsel for defendant
Judgment:	19 December 2013

INTERLOCUTORY JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] In February 2002, the plaintiff, Mr Barry Dunn, was appointed to the position of Team Co-ordinator Mental Health by the defendant, Waitemata District Health Board (the WDHB). The plaintiff's employment was terminated on 23 October 2008 to be effective from 28 November 2008.

[2] Mr Dunn raised three personal grievances against the WDHB. The first two related to allegations of unjustifiable disadvantage in his employment and the third related to his allegation that he was unjustifiably dismissed. It is only the personal grievance as to unjustifiable dismissal that the plaintiff is still pursuing in this Court. On 24 July 2012, Mr Dunn filed a memorandum in the Employment Relations Authority (the Authority) withdrawing two unjustifiable disadvantage grievances.

[3] The WDHB had denied the allegations of unjustifiable disadvantage and dismissal, but in any event raised the defence that the grievances were not raised within the 90-day period prescribed by s 114(1) of the Employment Relations Act 2000 (the Act). The WDHB did not consent to the grievances being raised outside the 90-day period. The grievances were therefore referred to the Authority by Mr Dunn. By agreement the Authority was asked to rule on the limitation point on consideration of the papers filed. On 18 December 2012, the Authority issued a determination[1] ruling that Mr Dunn did not raise a personal grievance in respect of the dismissal within the 90-day period and therefore it did not have jurisdiction to pursue its investigation further. Costs were reserved.

[4] Mr Dunn has filed a challenge to the Authority's determination and seeks a hearing de novo. As the two disadvantage grievances had already been withdrawn, the determination of the Authority only dealt with the issue of limitation in respect of Mr Dunn's claim to have been unjustifiably dismissed. In the statement of claim which has been filed in the challenge Mr Dunn seeks the following remedies.

a) A finding that the personal grievance was brought in time;

b) A finding that the plaintiff was unfairly dismissed;

c) Reparation of lost income, the amount of which will be quantified at the hearing;

d) Legal costs associated with the claim.

[5] The Court has now been asked by the parties to make a decision on the limitation issue as a preliminary point. It has been agreed that the Court may decide the matter on the basis of the documents filed as directed in a minute of the Court issued on 15 May 2013. The parties have now filed all of the documents required. If the decision on limitation favours the plaintiff then the Court will proceed to hear the plaintiff's substantive challenge and give a judgment on his unjustified dismissal grievance.

[1] [2012] NZERA Auckland 464.

Factual outline

[6] A document referred to as an Agreed Statement of Facts was filed with the Court on 9 July 2013. This, however, is more in the form of a chronology of events. Using this document and the other documents now filed, I will provide a brief factual outline for the purposes of determining this issue. Of course if the substantive proceedings do go ahead then any statement as to fact in this judgment would not be binding on the parties and the Court would need to determine the substantive issue on the basis of the facts presented and appropriately tested during the course of the hearing.

[7] On 4 October 2007 Mr Dunn's representative, the Public Service Association (PSA), raised a personal grievance of unjustified disadvantage with the defendant. It related to a lack of support and clear process in decisions made by the WDHB against him, alleged harassment, and a verbal warning. Mediation as to the resolution of this dispute on 30 March 2008 and 30 April 2008 was unsuccessful.

[8] The Authority's determination, dated 18 December 2012, mentioned a further disadvantage grievance raised by Mr Dunn. This alleged that he was disadvantaged in his employment by unjustified actions of the WDHB. He alleged that he was subject to workplace bullying and that the WDHB failed to act in good faith in relation to various matters pertaining to his absence on sick leave during 2008. It appears that there may have been reference to the subsequent dismissal in this grievance, although the date of when this was raised is not referred to in the determination. In any event, the determination refers to the fact that Mr Dunn withdrew the two unjustifiable disadvantage grievances and wished to pursue the claim of unjustifiable dismissal and apparently an allegation of breach of good faith. That latter matter has not been continued through into the challenge.

[9] Mr Dunn was placed on sick leave from 20 March 2008. While on sick leave an Occupational Health Report was prepared on Mr Dunn on behalf of the WDHB. This addressed various issues and "a barrier" allegedly preventing Mr Dunn from

returning to work. It was prepared by Dr CTC Kenny, a specialist occupational physician within the WDHB's own occupational health and safety division at North Shore Hospital. Dr Kenny's report is dated 21 July 2008 and it is directed to the Locality Manager of the WDHB. In answer to the final question in the report as to whether there were other factors contributing to Mr Dunn's incapacity or acting as a barrier to his successful occupational rehabilitation, Dr Kenny stated that the major barrier was the current proceedings resulting from the personal grievance and consequent employment mediation.

[10] On 19 August 2008, the WDHB wrote to Mr Dunn requesting that he provide notification as to his intention to return to work. Not receiving a reply, the WDHB wrote again to Mr Dunn on 9 September 2008, informing him that if no reply was received, the WDHB would assume that he did not intend to return to work and would look at terminating his employment. Mr Dunn was represented at this stage, by Mr Mark Ryan, a barrister experienced in employment law. He responded on Mr Dunn's behalf on 11 September 2008. That letter indicated that Mr Dunn would possibly return to work but that would be conditional upon the WDHB removing the barriers as outlined in Dr Kenny's report. On 19 September 2008, the WDHB sought clarification from Mr Ryan as to the "barriers" that the plaintiff sought resolution upon. Unfortunately at this stage there were delays in Mr Dunn responding to the WDHB in a timely manner through Mr Ryan.

[11] No response was initially provided to the letter of 19 September 2008, seeking the clarification. On 13 October 2008 the WDHB again wrote to Mr Ryan informing him that if Mr Dunn did not provide the information requested by 20 October 2008 then his employment would be terminated on notice. A copy of this letter was sent to Mr Dunn. On 28 October 2008 Mr Ryan belatedly replied to the WDHB's letter of 19 September 2008. No mention was made of the letter of 13 October 2008, indicating that Mr Dunn's employment was in danger of being terminated. It may not have been received by Mr Dunn or Mr Ryan. However, it was sent to them by facsimile and ordinary post.

[12] On 23 October 2008, the WDHB, not having received a reply in the interim, wrote to Mr Dunn with a copy to Mr Ryan informing him that as it had not received

the information requested his employment was terminated with one month's notice. This letter is quite significant in the consideration of these matters and I set it out in full as follows:

> 23 October 2008
>
> **PRIVATE & CONFIDENTIAL**
>
> Barry Dunn
> …
>
> **TERMINATION OF EMPLOYMENT ON NOTICE**
>
> I refer to my correspondence to your lawyer of 19 September 2008 and 13 October 2008 (as attached).
>
> Waitemata District Health Board ("**WDHB**") have been seeking information since August on your return to work and what you say needs to be done to facilitate this.
>
> I advised by my letter of 13 October that if this information was not provided by 20 October, WDHB would proceed to terminate your employment on notice. WDHB are unable to keep your position open indefinitely, while you are not actually performing the role.
>
> As WDHB have not received this information, your employment is terminated with one month's notice, last effective day of employment being 28 November 2008.
>
> You are welcome to provide the requested information within the notice period and if it is received, it will be considered by WDHB before your termination date and WDHB may review its decision in regards to such.
>
> Yours sincerely
>
> [signed]
>
> Blair Nugent
> Human Resources Manager
> Mental Health Services
>
> cc. **FACSIMLE: …**
> Mark Ryan
> Barrister
> PO Box 941
> Auckland

[13] This letter was sent by facsimile to Mr Ryan. He wrote to the WDHB on 30 October 2008 indicating that he had only received the letter terminating the employment dated 23 October 2008 on 29 October 2008. In his letter, he informed the WDHB as follows:

> …
>
> Mental Health Services Group
> Waitemata District Health Board
> ***TAKAPUNA***
>
> ***By Facsimile: …***
>
> ***Attention: Mr Blair Nugent***
>
> Dear Mr Nugent
>
> ***re: Barry Dunn***
>
> On 29 October 2008 I received your letter of 23 October 2008 advising my client of termination of his employment on notice.
>
> I have sent to you a letter outlining the barriers preventing Mr Dunn's possible return to work. It seems that you have not have received this letter albeit it was sent after your letter of 23 October 2008.
>
> I advised that your decision to terminate my client's employment is premature and in the circumstances is unjustified.
>
> If WDHB fails to identify the practical steps that it is going to put in place to enable Mr Dunn to return to his position with WDHB and terminate Mr Dunn's employment on 28 November 2008 then an additional employment relationship problem alleging unjustified dismissal will be pursued in the Employment Relations Authority.
>
> If you wish to discuss this matter further please do not hesitate to contact me.
>
> Yours faithfully,
>
> [signed]
>
> Mark Ryan
> MR:jj
> c.c. Mr Barry Dunn
> …
> West Harbour
> *WAITAKERE*

[14] On 4 November 2008 having received the letter of 30 October 2008 from Mr Ryan, the WDHB replied reiterating its attempts to resolve the problem over the previous year and also made it clear that it was still willing to discuss the matter. Mr Ryan responded to this letter the following day simply requesting the reasons for Mr Dunn's dismissal pursuant to s 120 of the Act. The WDHB replied to this letter on 12 November 2008 giving reasons and reiterating its willingness to meet with Mr Dunn to resolve the issues further. Mr Dunn did not respond to this letter. On 18 December 2009, more than 12 months after the WDHB's letter of 12 November 2008, Mr Dunn lodged a statement of problem with the Authority.

[15] There was clearly a crossing of correspondence between the WDHB and Mr Ryan at the time when the notice of termination was given. However, the issue for determination in this judgment is whether, having regard to all the surrounding circumstances, the correspondence emanating from Mr Ryan amounts to the raising of a personal grievance in respect of the dismissal within the 90-day period prescribed in s 114(1) of the Act. There is no dispute that Mr Ryan's letter of 30 October 2008 was written within the 90-day period. The issue is whether it is sufficient to constitute the raising of a grievance. Alternatively, an issue to be decided is whether the actions of the WDHB as employer, following the termination, amount to an express or implied consent to the personal grievance being raised after the expiration of the prescribed period, if indeed, that is the case. An issue has also been raised by the WDHB as to whether the dismissal occurred when the letter was sent to Mr Dunn, or whether it occurred at the expiry of the one month's notice. If it is the latter then the WDHB, through its counsel Mr Russell, submits that no grievance was raised after that date.

Other Provisions of s 114

[16] For purposes of completeness I mention the other provisions in s 114 of the Act. At this stage Mr Dunn simply seeks to have a judgment confirming that his grievance was raised within the specified time period. If it is held that he did not raise the grievance within the specified time period then he still has the entitlement under the section to apply to the Authority or the Court for leave to raise the grievance after the expiration of the period. In view of the fact that there is also a

three year limitation contained in s 114(6) for the commencement of proceedings, in addition to seeking leave to raise the grievance, Mr Dunn would also need to seek an order extending the time for bringing any proceedings. Normally such applications are made out of an abundance of caution contemporaneously with the type of application which Mr Dunn has made in this case. Even though he has not done so and without giving any indication as to the likelihood of success or otherwise of such an application, the jurisdiction is possibly still open to him.

The Authority's determination

[17] In the Authority the WDHB submitted as it has in this challenge that the letter dated 30 October 2008 from Mr Ryan, did not constitute the raising of a personal grievance. Accordingly, it was submitted that the grievance in respect of the unjustifiable dismissal was not raised inside the 90-day limit provided in s 114(1) of the Act. The Authority determined that the letter from the lawyer did not raise a personal grievance. It held that by 30 October 2008 Mr Dunn had not been unjustifiably dismissed and he could therefore not raise a grievance for unjustified dismissal. The Authority held that Mr Dunn, at that stage, was only under notice of termination. The WDHB remained amenable to resolving the employment problem, and confirmed this in its correspondence. In addition Mr Dunn himself had, against the background of the earlier correspondence and in the letter of 30 October 2008, made the raising of a personal grievance conditional upon the WDHB failing to identify the practicable steps that it was going to put in place to enable Mr Dunn to return to work. The Authority therefore determined that it lacked jurisdiction to pursue its investigation further.

[18] In its determination the Authority appears to have accepted the submission from the defendant that in view of the fact that the letter of 23 October 2008 to Mr Dunn provided a termination of employment with one month's notice, the termination had not been effected by the time that Mr Ryan wrote his letter of 30 October 2008. The defendant relied for that submission on: *Poverty Bay Electric Power Board v Atkinson;*[2] *Gibson v GFW Agri-Products Ltd;*[3] and *New Zealand*

[2] [1992] 3 ERNZ 413.
[3] [1994] 2 ERNZ 309.

Automobile Association Inc v McKay.[4] Both counsel relied upon the Court's statements in *Creedy v Commissioner of Police.*[5]

[19] While it is clear that Mr Dunn's employment was terminated subject to a notice period of one month, the Authority would appear to be incorrect in holding that the grievance raised during a notice period relating to the dismissal is invalid. In *McKay* the Court considered the type of situation which in fact has arisen in this case. It held that it would be contrary to the scheme of the legislation to say that an employee, having been given notice of a dismissal and knowing that his or her replacement had been appointed and announced, had to wait for the inevitable expiry of the notice period before the law entitled him or her to submit a challenge to the dismissal by personal grievance. The Court in that case contemplated that, in any event, a grievance could be submitted during the notice period as an alleged unjustifiable disadvantage thereby becoming conflated with a dismissal grievance once the notice of termination had expired and the termination effected.

[20] The Authority would similarly appear to have erred in placing too great a reliance on the conditional nature of Mr Ryan's correspondence as opposed to what the correspondence was actually communicating to the defendant. Mr Sutton, in his submissions for Mr Dunn to the Court, has placed reliance upon *Winstone Wallboard Ltd v Samate*.[6] A similar situation was considered in that case where a letter in response, which alleged that the dismissal was unlawful, also requested further information. In that case the letter was deemed to be a proper submission of a personal grievance.

Conclusions

[21] Ultimately the question which falls to be considered in this case is whether the grievance has been expressed with such specificity as to enable the employer to address the problem. That is the ambit of s 114(2) of the Act which states:

> … A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a

[4] [1996] 2 ERNZ 622.
[5] [2011] ERNZ 285.
[6] A133/92, 16 June 1993.

> representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[22] That statutory provision was the subject of a lengthy discussion in *Creedy v Commissioner of Police* and *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds.*[7] The Court stated in *Edmonds* as follows:

> [58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every "i" to be dotted and "t" to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient. ...

[23] In the present case, having regard to the principles which are set forth in the statutory provisions and the authorities dealing with the point, what needs to be considered is not just Mr Ryan's letter of 30 October 2008 per se, but the entire context in which that letter was written. This would include the correspondence leading up to it and all of the surrounding circumstances. Mr Dunn had raised a grievance back in 2007 and there is an indication that he raised a subsequent grievance. The letter of dismissal from the WDHB dated 23 October 2008 relates the dismissal to the fact that Mr Dunn had not given an indication of when he expected to return to work. However, in the later correspondence in which the WDHB wrote to Mr Ryan, being the letters of 4 November 2008 and 12 November 2008, earlier performance issues giving rise to one or more of the disadvantage grievances are raised as being part of the reasons for the dismissal.

[24] Significant also is the fact that on 28 October 2008 at a time when Mr Dunn and Mr Ryan appear to have been unaware of the letter of termination of employment dated 23 October 2008, Mr Ryan wrote, somewhat belatedly, replying to the WDHB's letter of 19 September 2008. There was therefore a range of

[7] [2008] ERNZ 139.

correspondence taking place between the parties. Some of this was crossing over with other letters and in which context Mr Ryan's letter of 30 October 2008 needs to be considered.

[25] It is really not possible for the WDHB to allege that arising out of Mr Ryan's letter of 30 October 2008, the grievance had not been expressed with enough clarity and specificity for it to be able to address and resolve the problem at hand. The WDHB was well aware of the nature of Mr Dunn's grievances and Mr Ryan made it plain that he regarded the decision to terminate Mr Dunn's employment as premature and unjustified. He made it plain that unless resolved the grievance would be pursued further in the Authority. Quite apart from this, the WDHB had, of its own volition, referred Mr Dunn to Dr Kenny. As indicated earlier, a comprehensive report was received from Dr Kenny dated 21 July 2008. I note also that Mr Dunn had consulted a psychiatrist. Whether the psychiatrist's report was ever made available is not clear but certainly the fact that Mr Dunn had consulted a psychiatrist about his difficulties was known to the WDHB and was part of the overall factual matrix being considered leading up to the termination of employment.

[26] It is somewhat facetious to say that the letter of 23 October 2008 from the WDHB to Mr Dunn was not a termination of employment. In view of the heading to the letter and the tone in which it was written a termination of employment was being effected. In addition to this, while the notice period was running and in response to Mr Ryan's letter of 5 November 2008 requesting reasons for Mr Dunn's dismissal, on 12 November 2008 the WDHB wrote stating "we advise that Mr Dunn's employment was terminated by WDHB on notice as he was unable to perform the position that he was employed for". The letter is careful in specifying that the termination was on notice. However, the letter would have left Mr Dunn and Mr Ryan in no doubt as to what was going to happen when the notice expired. There was an invitation for further discussions in the hope that the matter might be resolved. However, the only issue to be decided at this point is whether the WDHB had received the raising of a grievance with sufficient clarity to enable it to deal with the matter. The defendant cannot say that it was not so aware because the various correspondence between the parties that I have considered prove that it was.

[27] This particular case is distinguishable from decisions such as *Idea Services Ltd (in Stat Man) v Barker*[8] and *Dickson v Unilever New Zealand Ltd*[9] where on an assessment of the document, which is alleged to have raised the grievance in those cases, the surrounding circumstances being the context in which the letters were written was not sufficient to enable the Court to be satisfied that the employer was properly informed. That is not the position here where the letter raising the grievance as the result of the termination of employment was the culmination of an employment relationship problem with considerable history between the parties. On the basis of the discussion in *McKay*, Mr Ryan's letter could be regarded as a reiteration of the earlier disadvantage grievances, which had been submitted and the raising of a further disadvantage grievance relating to the dismissal on notice which would crystallise once the notice had expired. It is true that even with the earlier disadvantage grievances there were clear difficulties with the issue of whether those grievances had been raised within the 90-day period specified in s 114 of the Act. Eventually, however, those grievances were to be withdrawn as indicated by the determination of the Authority but there is no doubt that Mr Dunn intended to continue with the unjustified dismissal grievance.

[28] Clearly the situation would have been different for Mr Dunn if the background of the earlier complaints and the psychiatric and occupational health issues had not been present. However, the fact that they were present in Mr Dunn's case for a lengthy period leading up to the dismissal would mean that it would be totally artificial to consider Mr Ryan's letter in isolation and impose upon it the rigid considerations applied in decisions such as *Barker* and *Dickson.* Clearly in order to give effect to what the Court stated in *Edmonds* all of the surrounding circumstances need to be considered and each case will need to be determined separately on its own facts..

Disposition

[29] In this particular case, I find that Mr Dunn did raise his grievance with sufficient clarity within the 90-day period. It is therefore not necessary to consider

[8] [2012] NZEmpC 112.
[9] (2009) 6 NZELR 463.

whether the actions of the WDHB following the dismissal amounted to an express or implied consent to the grievance being raised after the prescribed period. It is extremely regrettable that Mr Dunn then waited more than 12 months to commence proceedings before the Authority. Some discussion takes place in counsel's submissions as to that delay. However, I accept the submissions of Mr Sutton, now acting on behalf of Mr Dunn, that it is not a relevant consideration to the issue which is to be determined in this judgment. Quite apart from that, as already indicated, the Act allows a period of three years for the commencement of a personal grievance action.[10]

[30] In view of the findings in this judgment, the determination of the Authority is set aside. By virtue of the challenge the Court is now seized of the matter and the substantive grievance for unjustifiable dismissal should proceed to a hearing in the Court.

[31] Costs were reserved by the Authority in its determination. It does not appear that there has been any subsequent determination on costs. At this stage, I consider it appropriate that costs in respect of the Authority's investigation and the hearing of the challenge insofar as this preliminary point are concerned should be reserved pending the outcome of the substantive issues on their merits. It is essential that Mr Dunn now pursues his grievance without further delay. The Registrar is to allocate a directions conference date in February 2014, so that appropriate timetabling directions can be made.

M E Perkins
Judge

Judgment signed at 2.30pm on 19 December 2013

[10] At s 114(6) of the Act.