IN THE EMPLOYMENT COURT
AUCKLAND

AC 45/07
ARC 40/06

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GREGORY JOHN WYATT Plaintiff
AND	SIMPSON GRIERSON (A PARTNERSHIP) Defendant

Hearing: 27 September 2006
Further submissions received 9 October 2006 and 27 October 2006
(Heard at Auckland)

Appearances: Plaintiff in Person
Penny Swarbrick, Counsel for Defendant

Judgment: 20 July 2007

JUDGMENT OF JUDGE AA COUCH

Introduction

[1] Mr Wyatt was employed by Simpson Grierson as a staff solicitor from 1998 until July 2002 when he was dismissed on grounds of redundancy. Mr Wyatt is aggrieved about two aspects of that employment relationship. One is that he believes his dismissal was unjustifiable. That is the subject of a personal grievance which is currently before the Employment Relations Authority but has yet to be investigated.

[2] Mr Wyatt's second broad complaint about his treatment by Simpson Grierson during the employment relationship is that he was underpaid. Specifically, he believes that the salary reviews conducted by Simpson Grierson in or about February

in each of the years 1999, 2000 and 2001 were carried out unfairly because he was paid less than comparable colleagues.

[3] Simpson Grierson's response is that there is no substance to these claims. It says that Mr Wyatt's salary was always fixed fairly and in accordance with the terms of his employment. Simpson Grierson also said that Mr Wyatt was not entitled to pursue these concerns as personal grievances because they had not been submitted to the firm within 90 days of each of the salary reviews.

[4] The issue of whether Mr Wyatt's personal grievances relating to salary were raised with Simpson Grierson in time was dealt with by the Authority as a preliminary issue. A factor complicating the hearing of this issue was that it potentially fell to be decided partly under the Employment Contracts Act 1991 and partly under the Employment Relations Act 2000. To the extent that the issue was governed by the 1991 Act, it had to be considered by the Authority exercising the jurisdiction of the now defunct Employment Tribunal. Otherwise, the matter had to be decided by the Authority exercising its jurisdiction under the 2000 Act. The Authority, very appropriately in my view, conducted a single hearing according to the process of the Employment Tribunal.

[5] Prior to that hearing, conducted on 27 March 2006, the principal issues between the parties were the dates on which it could properly be said that the 90 day period for submitting or raising a personal grievance began to run in each case and whether, in each case, Mr Wyatt had submitted his personal grievance within that 90 day period. In its first determination dated 1 May 2006 (AT 1/06), the Authority decided that the 90 day period began in each case at the time Mr Wyatt was notified of the result of his salary review. The Authority then found that Mr Wyatt had failed to submit a personal grievance within the 90 day period in any of the three years in question. The proceedings filed in the Court originally challenged the whole of this decision.

[6] In the course of the hearing on 27 March 2006, Mr Wyatt submitted that, if the Authority did reach that conclusion, he was nevertheless entitled to pursue his personal grievances because Simpson Grierson had consented to them being

submitted out of time. Because Simpson Grierson had no prior notice of this allegation, the Authority held a second hearing on 4 July 2006 to receive further evidence and submissions and issued a second determination on 6 July 2006 (AT 1A/06). The Authority found that Simpson Grierson had consented to the late submission of Mr Wyatt's personal grievances relating to 2000 and 2001 but not the personal grievance relating to 1999 .

The proceedings before the Court

[7] Through this process of elimination, the proceedings before the Court were narrowed to relate solely to the fixing of Mr Wyatt's salary in February 1999.

[8] It was inherent in the Authority's conclusions regarding the 1999 salary issue that it regarded the cause of action relied on by Mr Wyatt as having arisen prior to the Employment Relations Act 2000 coming into force on 2 October 2000. Applying the transitional provisions contained in s248 of the Employment Relations Act 2000, the Authority exercised the jurisdiction of the Employment Tribunal under the Employment Contracts Act 1991 in making that decision and that the proceedings in the Court were primarily by way of appeal pursuant to s95 of that Act.

[9] As it was part of Mr Wyatt's case that the cause of action with respect to the 1999 salary issue had yet to accrue, he framed the proceedings in the alternative as being a challenge to a determination of the Authority pursuant to s179 of the Employment Relations Act 2000. This was appropriate.

[10] By agreement, I received and considered the transcript of the evidence given before the Authority and no further evidence was given before the Court.

[11] The issues before the Court in relation to the 1999 salary claim have changed significantly since the proceedings were commenced. The original statement of claim, filed on 29 May 2006, focused on the Authority's conclusion that the 90 day period for submitting the personal grievance began when Mr Wyatt was notified of the result of the salary review on or about 1 February 1999.

[12] After the Authority had given its second determination on 6 July 2006, Mr Wyatt also challenged the Authority's conclusion that Simpson Grierson did not consent to the late submission of the personal grievance in respect of the 1999 salary review.

[13] In the course of the hearing before me on 27 September 2006 it became apparent that there was a jurisdictional issue which might render the Authority's decision in respect of the 1999 salary issue a nullity. Because neither party had considered this jurisdictional issue prior to the hearing on 27 September 2006, I asked Mr Wyatt and Ms Swarbrick to provide me with submissions on it which they duly did.

Summary of issues

[14] In summary, the issues to be decided with respect to Mr Wyatt's claim that his salary was fixed unfairly in 1999 were:

a) When the 90 day period for submitting or raising the personal grievance based on that claim began.

b) When the cause of action underlying the claim accrued and therefore whether the claim should be determined under the Employment Contracts Act 1991 or the Employment Relations Act 2000.

c) Whether Mr Wyatt submitted or raised the personal grievance within that 90 day period.

d) If not, whether Mr Wyatt raised the personal grievance subsequently and whether Simpson Grierson consented to that being done.

When does the 90 day period begin?

[15] Section 33(2) of the Employment Contracts Act 1991 and s114(1) of the Employment Relations Act 2000 contain similar provisions governing an employee's right to pursue a personal grievance. Each requires that the employer be made aware

of the personal grievance *"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 [submitted/raised] after the expiration of that period"*.

[16] The essence of Mr Wyatt's concern about the fixing of his salary in 1999 is that he believes it may have been carried out unfairly because other employees of Simpson Grierson in positions comparable to his may have been paid higher salaries. While Mr Wyatt suspects that this may be the case, he says that he does not know for sure because, despite efforts to find out exactly what other employees were actually paid, he has yet to receive that information. To date, Mr Wyatt says that his concern about the 1999 salary review is based on gossip and inference rather than knowledge. On this basis, Mr Wyatt says that *"the action alleged to amount to a personal grievance"*, which is the payment of different salaries to him and comparable colleagues, has yet to come to his notice because he does not know what those colleagues were actually paid. For these reasons, Mr Wyatt submits that the 90 day *"window"* within which he would have to submit any personal grievance regarding his 1999 salary has yet to open.

[17] Supporting the approach taken by the Authority, Ms Swarbrick observed that the "action" alleged by Mr Wyatt to amount to a personal grievance was the fixing of his salary in February 1999 and that the 90 day period must have begun then.

[18] In most cases, the 90 day period will begin when the action which gives rise to it occurs. That is because the reasons for the employer's action will be known at the time the action is taken. In some cases, however, an action which appears at the time to be justifiable will have been taken in circumstances which are not immediately apparent to the employee. In such cases, it will only be when the employee becomes aware of those circumstances that he or she has reason to feel aggrieved. When the 90 day period should begin in such cases has been the subject of relatively little judicial consideration and the facts of this case provide a timely opportunity for review. The focus of this must be the meaning in the context of s33(2) of the Employment Contracts Act 1991 or s114 of the Employment Relations Act 2000 of the words *"or came to the notice of the employee"*.

[19] I deliberately consider this issue in the context of both statutes. In *Ruebe-Donaldson v Sky Network Television Ltd (No1)* [2004] 2 ERNZ 83, Travis J concluded that the term "submit" in s33(2) of the Employment Contracts Act 1991 was *"virtually synonymous"* with the term "raise" in s114(1) of the Employment Relations Act 2000 – see paragraph [9] of that decision. In *Creedy v Commissioner of Police* [2006] ERNZ 517, Colgan CJ agreed and expressed the wider view that s114 simply codified and built upon the case law developed in relation to s33(2).

[20] The issue appears to have been first considered by the Court in *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 where Travis J said at page 529:

> *It is possible to envisage a situation, as has occurred in a number of dismissal cases, where the fact of dismissal and the reason giving rise to a claim that it is unjustified may be separated in time. For example there have been cases where the employee has been told that the dismissal is on the grounds of redundancy but later ascertains that the real reasons might be such matters as the employer's perception of that employee's performance. In such situations it could be contended that the action alleged to amount to the grievance had come to the notice of the employee not at the date of the dismissal but when the real reasons for that dismissal became apparent. That is not an issue that I have to resolve in the present case.*

[21] As is apparent from the final sentence above, this issue was not decisive of the case and this dictum may be regarded as *obiter dictum*. Nonetheless it seems to me to succinctly capture the issue and point to a sensible interpretation of the statutory provisions. It may also be noted that Travis J applied this approach in the earlier case of *Tippins v Trust Bank New Zealand Ltd* unreported, 4 May 1994, AEC 19/94 although he did not discuss it in principle.

[22] In *Robertson v IHC New Zealand Inc* [1999] 1 ERNZ 367, the issue was put squarely before the Court as a question of law referred by the Employment Tribunal pursuant to s93(1) of the Employment Contracts Act 1991. In a detailed decision, Palmer J reviewed the conflicting decisions of the Employment Tribunal on the point and referred to the observation of Travis J in *Drayton*. Adopting the approach suggested in *Drayton*, Palmer J interpreted s33(2) to mean that, where the employee did not discover the real reasons for a dismissal until after the event, the 90 day period would run from the time of discovery. Palmer J confirmed this approach in *Warburton v Mastertrade Ltd* [1999] 1 ERNZ 636.

[23] Considering the nearly identical provisions of s114 of the Employment Relations Act 2000 in the context of a personal grievance alleging discrimination, Shaw J took a similar approach in *Paul v Capital Coast District Health Board* [2005] ERNZ 197 where she said:

> *[39] Section 114 requires a consideration of more than when an action occurs. The calculation of the 90 days can also begin from the date on which the action which is alleged to amount to a personal grievance came to the notice of the employee.*
>
> *[40] The beginning date for calculating the 90 days must depend on what the claim alleges the action is. A discrimination claim under s 104 has two elements. The first is the refusal or omission to offer to afford an employee certain conditions of employment, etc. The second element is that this action is done by reason directly or indirectly of specified prohibited grounds of discrimination.*
>
> *[41] As Judge Travis held in* Drayton v Foodstuffs (South Island) Ltd *[[1995] 2 ERNZ 423, at p530]:*
>
> > *If an employee is unaware that the discriminatory action was by reason of [a prohibited ground] . . . then it may be said that for the purposes of s 33(2) that the action alleged to amount to a personal grievance has not yet come to the notice of the employee.*
>
> *[42] Therefore, in discrimination claims, time only begins to run under s 114 when both the action which gave rise to the personal grievance and the alleged reasons for that action have come to the notice of the employee.*

[24] In *Robertson*, Palmer J considered not only the situation where an employee actually becomes aware at a later stage of the circumstances said to make the employer's action unjustifiable but also where it is open to the employee to do so. Drawing a parallel between s33(2) of the Employment Contracts Act 1991 and the concept of reasonable discoverability as applied to personal injury claims under s4(7) of the Limitation Act 1950, Palmer J concluded that the 90 day period for submitting a personal grievance of unjustifiable dismissal ran from the date when the *"realisation of contended unjustifiable dismissal occurred, or should reasonably have been discerned by the affected employee as occurring."*

[25] There is an attractive argument in favour of this extension of the test for the commencement of the 90 day period. The purpose of the requirement that the employer be made aware of a personal grievance within 90 days is to enable it to be addressed promptly. This was expressly stated in clause 3 of the First Schedule to the Employment Contracts Act 1991 and is reflected in s101(ab) of the Employment

Relations Act 2000. It is also implicit in the requirement that a personal grievance be submitted or raised within the relatively short period of 90 days. If that 90 day period does not commence until the employee has actual knowledge of the essential circumstances of the employer's action, resolution of a personal grievance could be greatly delayed by an employee who receives some indication that there was more to the employer's action than at first appeared but does nothing to follow the matter up or is tardy in doing so. It would be inconsistent with the provisions of both statutes for employees to be allowed to pursue such stale grievances as of right. The inclusion of constructive knowledge as an alternative to actual knowledge would effectively deal with such situations.

[26] On the other hand, implying a "reasonable discoverability" or constructive knowledge test would be to go well beyond the plain meaning of the words of the statute. The process of interpreting statutes is governed by the Interpretation Act 1999, s5 of which provides:

> ***5. Ascertaining* meaning *of legislation*** *– (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*

[27] Palmer J gave his decision in *Robertson* before the Interpretation Act 1999 came into effect. Applying the provisions of s5 set out above, I think it doubtful whether his decision to import the concept of "reasonable discoverability" into the construction of s33(2) of the Employment Contracts Act 1991 could now be sustained with respect to that section or s114(1) of the Employment Relations Act 2000. As the outcome of this case does not turn on the point, however, I do not decide it.

[28] To properly apply s33(2) or s114(1), it is also necessary to deal with the extent of knowledge the employee must have before the 90 day period starts to run. Under the Employment Relations Act 2000, personal grievances are recognised as employment relationship problems and a comprehensive procedure provided to resolve them which is very different to the adversarial process of the courts of general jurisdiction. This statutory process includes discussion, mediation and investigation in which the parties must participate in good faith. In the course of

these processes, all relevant information should be disclosed and generally will be. Alternatively, if the employee's initial belief that he or she has been treated unjustifiably is unfounded, the evidence to that effect will also emerge. Whatever the outcome, it is one of the fundamental functions of the problem solving process of the Employment Relations Act 2000 to encourage and facilitate the exchange of information and views. It follows that an employee need not have every piece of evidence necessary to prove his or her case in an adversarial tribunal in order to submit a personal grievance to his or her employer. If the employee has the knowledge necessary to form a reasonable belief that the employer has acted in an unjustifiable manner, that will suffice.

[29] In summary, I find that the construction to be placed on s33(2) of the Employment Contracts Act 1991 and s114(1) of the Employment Relations Act 2000 is that 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.

[30] I return later in this judgment to consider the application of this interpretation to the facts of this case.

When did the cause of action accrue?

[31] The question of which statute applies to Mr Wyatt's claim is dealt with by the transitional provisions contained in s248 of the Employment Relations Act 2000. It provides:

> *(2) Where any cause of action has arisen before the commencement of this section under any of the provisions repealed by this Act and at that date no proceedings have been initiated in respect of that cause of action under those provisions, those provisions continue to apply to any proceedings commenced in respect of any such cause of action as if this Act had not been passed.*

[32] Section 248, along with the rest of the Employment Relations Act 2000, came into force on 2 October 2000. The statute which applies to Mr Wyatt's claim

is therefore to be determined according to whether the cause of action arose before or after that date.

[33] Ms Swarbrick submitted that, as Mr Wyatt's claim related to the salary review completed by Simpson Grierson on or about 1 February 1999, that is when the cause of action arose. This is, of course, the approach which was taken by the Authority.

[34] Mr Wyatt disagreed. He contended that submission of the personal grievance to the employer is an essential part of the cause of action because proceedings to obtain remedies cannot be pursued unless the grievance has been submitted in time. Mr Wyatt then submitted that, as the action he alleged to amount to the personal grievance had yet to come to his notice, he could not validly submit it to Simpson Grierson and that the cause of action has yet to accrue. On this basis, Mr Wyatt submitted that the applicable statute was the Employment Relations Act 2000.

[35] I do not accept this submission. It confuses the accrual of a cause of action with completion of the procedural steps necessary to obtain a remedy in respect of a cause of action. They are two separate and distinct concepts. This is amply demonstrated in the provisions of the Limitation Act 1950, s4 of which provides that no action may be brought more than 6 years after the accrual of certain causes of action. The initiation of proceedings is necessary to obtain a remedy but it is something which can properly occur up to 6 years after the cause of action accrues. Equally, a plaintiff who delays for 6 years or more may have a perfectly good cause of action in respect of which no remedy may be sought.

[36] It is settled law that, for most purposes, a cause of action accrues when all the necessary constituents of the cause of action come into existence. The established exceptions to that rule are claims for personal injury and building negligence cases where the doctrine of reasonable discoverability has been applied. With very few exceptions, such claims are made in tort as opposed to contract and there is strong authority for the proposition that this doctrine has no application to claims in contract – see *Murray v Morel & Co Ltd* [2006] 2 NZLR 366 (CA) at paragraphs

[43] to [53] affirmed by the Supreme Court on appeal and reported as *Trustees Executors Ltd v Murray & Ors* [2007] NZSC 27.

[37] To the extent that Mr Wyatt's claim in relation to his 1999 salary is founded in contract, I find that the cause of action accrued on 1 February 1999. Proceedings in respect of any such claim therefore had to be made under the Employment Contracts Act 1991 and within 6 years of that date. It was no doubt with that limitation in mind that Mr Wyatt filed his original proceedings, which were principally claims for breach of contract, on 27 January 2005 being just 4 days short of the 6 year time limit. Those proceedings were commenced, however, in the Employment Tribunal which, as the Authority correctly concluded in its first determination, had no jurisdiction to entertain them. While the Employment Court did have jurisdiction to hear and determine claims for breach of contract under the Employment Contracts Act 1991, the 6 year limitation period means it is now too late for Mr Wyatt to commence proceedings founded on such claims in this jurisdiction.

[38] To the extent that Mr Wyatt's contended personal grievance is based on issues other than breach of contract, the position is arguably different. Although Mr Wyatt did not suggest it, I feel bound to consider whether the date on which the cause of action embodied in such a personal grievance accrues at a different time to a claim in contract.

[39] A personal grievance is a statutory cause of action. It does not exist at common law and addresses issues not always remediable through conventional common law actions in contract or tort. It is appropriate, therefore, that in deciding when a cause of action to be pursued through the personal grievance process may properly be said to accrue, the Court should have close regard to the statute creating the personal grievance process.

[40] As noted earlier, the statutory purpose of imposing an obligation on an employee wishing to pursue a personal grievance to submit or raise it within 90 days is to enable it to be addressed and resolved promptly. As I have construed the statutory provisions creating the 90 day period, it only begins to run when the

employee has the knowledge necessary to initiate the grievance. That being so, the inevitable inference is that the beginning of the 90 day period is the first time at which the employee can reasonably be expected to take steps to have his or her personal grievance considered. In my view, that should also be regarded as the time at which the cause of action embodied in the personal grievance accrues. Any other conclusion would mean that time was running for one purpose but not the other, an outcome entirely inconsistent with a statute which emphasises fairness and practicality in problem solving.

Application to the evidence

[41] I turn now to the application of these principles to the evidence in this case. It is common ground that Simpson Grierson told Mr Wyatt what his 1999 salary would be on 1 February 1999. The essence of Mr Wyatt's personal grievance is that he believes the level at which this salary was set was unfair because of the circumstances in which it occurred, namely that other colleagues in comparable positions were given higher salaries.

[42] The initial issue this raises is whether it was necessary for Mr Wyatt to know anything other than the results of his own salary review in order to submit a personal grievance. The Authority found nothing more was required and that the 90 day period for submitting the personal grievance began on 1 February 1999 when Mr Wyatt was told what his salary was to be.

[43] With respect to the Authority member concerned, I cannot sustain that conclusion with respect to the complaint by Mr Wyatt that there was unjustifiable disparity between his salary and that of comparable colleagues. That is a matter he could not raise without some knowledge or indication of what the salaries of his colleagues were. Thus, I find that this is a case to which the alternative starting point for the 90 day period, that is when it *"came to the notice of the employee"*, applies.

[44] Proceeding on that basis, the issue is when Mr Wyatt became aware of the circumstances in which his 1999 salary was set to the extent necessary to form a reasonable belief that it had been set unfairly. This requires analysis of the evidence.

[45] Within Simpson Grierson, staff solicitors such as Mr Wyatt were given an annual fees budget they were encouraged to achieve. At the same time, the charge out rate of each staff solicitor was also determined by the firm. These two figures were obviously related, based on the number of chargeable hours work each employee was expected to do in the year. In his evidence, Mr Wyatt said that much of this information was available to staff through the computer system used to maintain the relevant records, called CMS. It took him some time to learn fully how to use CMS but, by the end of 2000, he was able to access the billing information relating not only to himself but also to his colleagues.

[46] Mr Wyatt went on to say that, although billing data for other employees was available to him through CMS, it did not provide access to their salaries and it was not the practice of salaried staff such as staff solicitors to disclose to each other what they were being paid. It was, however, widely discussed that there was a ratio of 4.5 to 1 between the billing budget and salary of staff solicitors. This was consistent with a document explaining Simpson Grierson's bonus scheme which recorded that an employee was eligible for a bonus if his or her fee income exceeded 4.5 times his or her salary. Mr Wyatt's evidence then was:

> *"Bonuses were awarded for "exceptional fee budget performance". If it was assumed that this meant exceeding one's budget, it was possible to derive a standard ratio between salary and budget, of 4.5."*

[47] Mr Wyatt said that he had acquired all of this information by February 2001. It was apparent from the balance of his evidence that he did draw the conclusion that salary and fee budget for staff solicitors at Simpson Grierson were generally fixed in the ratio of 1 to 4.5. On 22 May 2001, he emailed Rob Gapes, his team leader at Simpson Grierson, saying

> *I am seeking an explanation for the figures set out in the firm's letter to me notifying me the result of the 2001 Remuneration Review. The last sentence on the third page of the letter suggests that I contact either, or both, of you if I have any concerns about the figures. I have concerns: (1) The usual ratio of budget to salary is 4.5. mine is 5.2; (2) The usual ratio of budget to hourly rate is 1500. mine is 1364.*
>
> *These departures from the usual may well be completely understandable, once the reasons are made known. Am are[sic] entitled to know the*

> *reasons? If so, I would be grateful if you could advise as to what those reasons are.*

[48] It was also apparent that Mr Wyatt then went on to use this ratio and his knowledge of colleagues' fee budgets to calculate what he believed his colleagues' salaries were. In an email to Mr Gapes dated 14 December 2001, recording his impression of a meeting the previous day, Mr Wyatt said:

> *As indicated at the meeting, I am not happy about being paid $58,000 per annum, when other authors charged out at the same rate as I am are being paid approximately $73,000 per annum (applying the standard ratios).*

[49] Similar calculations based on the same ratio were used by Mr Wyatt in advancing his complaints about his salary in a lengthy and detailed memorandum to Simpson Grierson dated 15 May 2002.

[50] Mr Wyatt subsequently made requests to Simpson Grierson under the Privacy Act 1993 for disclosure of all personal information the firm held about him. He said that one of the documents he received in or about February 2003 showed the salary of one of his former colleagues. He described this person as having only half of his experience but receiving a salary of $66,000 compared to his $58,000.

[51] In what appears to have been a separate request under the Privacy Act made in December 2002, Mr Wyatt specifically sought information about the salaries of all other comparable staff. Not surprisingly, this information was not provided to him. Mr Wyatt's evidence was that he has yet to be told exactly what the salaries of those other staff were.

[52] Against the background of this evidence, Mr Wyatt submitted that he has yet to actually discover the circumstances in which his 1999 salary was fixed because he has not been told explicitly what the salaries of his colleagues were. On this basis, Mr Wyatt submitted that the 90 day period for submission or raising of his personal grievance has yet to commence.

[53] I do not accept this submission. It places the threshold at too high a level. As I have concluded earlier, the 90 day period will begin when the employee has

sufficient information to form a belief on reasonable grounds that the employer has acted in an unjustifiable manner. I find that knowledge of his colleagues' fee budgets and of the 4.5 to 1 ratio was all that was required for Mr Wyatt to properly raise a personal grievance about the level of his 1999 salary. On Mr Wyatt's own evidence, he had that knowledge by February 2001. I therefore fix the date on which the 90 day period began as 1 February 2001.

[54] This leads me to the conclusion that the cause of action in respect of Mr Wyatt's concerns about the 1999 performance review also arose on 1 February 2001, and the matter falls to be determined in accordance with the provisions of the Employment Relations Act 2000 rather than the Employment Contracts Act 1991. Accordingly, if Mr Wyatt is to be permitted to pursue his personal grievance, I must be satisfied that it was raised within 90 days of 1 February 2001, that is by 2 May 2001 or that it was raised later and Simpson Grierson consented to it being raised later.

[55] I consider firstly whether Mr Wyatt raised a personal grievance about his 1999 salary within the 90 day period. Mr Wyatt's evidence was that, in the period from 1 February 1999 to 1 February 2001 he made no complaint to Simpson Grierson about his salary and accepted that nothing he said to his employer could be construed as the submission of a personal grievance about his salary. The Authority's finding of fact to this effect was not challenged.

[56] Anticipating the possibility that the Court may conclude that the 90 day period for raising the grievance commenced on 1 February 2001, Mr Wyatt submitted that there was evidence on which it could be concluded that it had been raised in time. I cannot accept those submissions. They proceed on the assumption that, even if the 90 day period began on 1 February 2001, the matter would still fall to be considered under the personal grievance procedure contained in the employment contract between the parties concluded in March 1998. Pursuant to s245 of the Employment Relations Act 2000 that procedure ceased to have effect from 1 October 2000 and was replaced by the problem resolution regime of the new Act.

[57] Notwithstanding that difficulty, I have carefully considered the evidence of communication from Mr Wyatt to Simpson Grierson during the period between 1 February and 2 May 2001. In his evidence, Mr Wyatt relied on an email dated 27 February 2001 to Mr Gapes in which he said:

> *"It transpires that since I was made an Associate, in January 1999, I have had a reduced budget, reflecting a reduced salary. This reduction has been carried through into the 2001 Remuneration Review, and it explains why my budget is $30,000 less than one would expect."*

[58] While this extract from the email appears on its face to be making a complaint which involves salary, it was clear from the remainder of that email that what Mr Wyatt was seeking was a reduction in his fees target rather than an increase in his salary. It is also apparent that the email specifically related to the 2001 review which had then just been completed.

[59] I note also that, in answer to a question in cross examination, Mr Wyatt described this email as *"not much"*. He went on to suggest that its significance was that, if Simpson Grierson responded to it as he expected, it would have lead to discussion in which he *"would have had an opportunity to say more."* Later, Ms Swarbrick asked Mr Wyatt how Simpson Grierson was supposed to know that he was complaining about his 1999 and 2000 salaries. In response, Mr Wyatt referred again to the email of 27 February 2001 but than said that it would be an exaggeration to call it a complaint and that what it did was to raise issues which *"probably would have progressed to a complaint had my emails been addressed."* In another part of his evidence Mr Wyatt said that the response to this email was in fact a suggestion that there be a meeting to discuss his concerns but that this did not occur prior to 2 May 2001.

[60] In both his evidence and his submissions, Mr Wyatt referred to other emails which he sent to Simpson Grierson in February 2001 but he conceded that these could not be construed as raising a personal grievance about his salary.

[61] To raise a personal grievance for the purposes of s114 of the Employment Relations Act 2000, an employee must, at the very least, make a complaint about the issue he or she wishes the employer to address. In this case, I find that there was

nothing in the communications between Mr Wyatt and Simpson Grierson during the period from 1 February to 2 May 2001 which could objectively be construed as a complaint that Mr Wyatt's salary had been set unfairly in the 1999 salary review. I therefore conclude that Mr Wyatt did not raise such a personal grievance during the applicable 90 day period.

[62] This leads to the final issue which is whether Mr Wyatt's personal grievance in respect of his 1999 salary was submitted outside the 90 day period and Simpson Grierson has consented to that late submission.

[63] In its second determination, the Authority found that Mr Wyatt had submitted personal grievances relating to the salary reviews conducted in 2000 and 2001 in his memorandum to the firm dated 15 May 2002. The Authority then found that, by making an offer to Mr Wyatt on 24 June 2002 of settlement of all matters, Simpson Grierson had implicitly consented to the late submission of all the personal grievances of which the firm was then aware. That was the only basis on which the Authority concluded Simpson Grierson had consented to the late submission of personal grievances by Wyatt and he did not suggest there was any other basis for such a conclusion. The issue, therefore, is whether Mr Wyatt submitted a personal grievance regarding his 1999 salary before 24 June 2002.

[64] In his evidence, Mr Wyatt explained the circumstances in which the memorandum of 15 May 2002 was written as follows:

> *29. On 8 May 2002 I was called to a meeting with Rob Gapes and Denise Deegan, the respondent's HR manager. I was told that the firm was considering making my position redundant. A further meeting was scheduled for 10 May 2002.*
>
> *30. After the initial meeting, I considered my options and concluded that whatever might happen, I would no longer be working under the supervision of Rob Gapes. So the maintenance of our working relationship assumed much less importance and I decided to make a formal complaint. I told Denise Deegan of my intention at the meeting of 10 May 2002. She told me to put it in writing and deliver it to her within three working days.*

[65] I infer from this evidence that, in writing his memorandum of 15 May 2002, Mr Wyatt intended to record his complaints fully. This is reflected in the

memorandum itself which is 12 pages long, very detailed and carefully reasoned. As to the manner in which this memorandum dealt with the 1999 salary review, the Authority said:

> *[13] I do not consider that the memorandum of 15 May 2002 submitted any grievance in respect of the January 1999 pay review or workflow in that particular year, when Mr Wyatt was being supervised by Mr John Gresson, because paragraphs 6 to 12 of the memorandum, which cover the 1998-1999 period, are simply factual and raise no complaint expressly or even impliedly. If, as Mr Wyatt said, Ms Deegan had asked him to confirm his complaints or concerns in writing, he did not confirm any problem with the 1999 pay review. Presumably that was because he had no complaint about it.*

[66] In advancing his challenge to this conclusion, Mr Wyatt essentially submitted that the Authority's finding of fact was in error. He noted that, in addition to the memorandum of 15 May 2002, he had sent several emails to Simpson Grierson about his concerns. He then referred me to the decision in *Phillips v Net Tel Communications Ltd* [2002] 2 ERNZ 340 in which Travis J said

> *[28] In determining whether a grievance has been submitted by an employee, for the purposes of s 33(2) of the Act in a case where there has been a series of communications, each individual item can be examined to see whether, in itself, it constituted a submission, but the totality of the communications must also be examined. The issue is whether the communications, or any of them would, to an objective and disinterested observer, have presented to the employer for consideration or decision any grievance the employee may have had against his or her employer or former employer, because of one or more of the claims that are defined in s 27 of the Act: see the* Winstone *case and* Houston v Barker (t/a Salon Gaynor) *[1992] 3 ERNZ 469.*

[67] As to the individual communications, Mr Wyatt accepted that the memorandum of 15 May 2002 did not explicitly raise a personal grievance about the 1999 salary review but submitted that such an intention could properly be inferred from it. He concluded this submission by saying *"If the Appellant were not complaining about what he was paid in 1999, there would have been no point in referring to that subject."* Having carefully reviewed the memorandum, I do not accept Mr Wyatt's submission. I agree with the Authority that the references to the 1999 salary review in the memorandum are by way of background to the matters about which Mr Wyatt actually expressed concern, beginning with the 2000 salary review. I do not infer from what is said that Mr Wyatt was intending to make any

complaint about his 1999 salary. The answer to Mr Wyatt's final proposition is simply that, on an objective reading of the document, the first 11 paragraphs are setting the scene for what follows and are useful for that purpose.

[68] In the alternative, Mr Wyatt submitted that the totality of the communication between him and Simpson Grierson disclosed the submission of a personal grievance about the level at which his salary was set in 1999. This submission was largely based on the evidence of Don Mackinnon, a partner of Simpson Grierson at the time in question. Mr Wyatt took me through a detailed examination of a passage in the transcript recording his cross examination of Mr Mackinnon about his understanding of the memorandum of 15 May 2002. Mr Wyatt submitted that Mr Mackinnon's answers amounted to an acknowledgement that Mr Mackinnon understood this document to be complaining about the level of Mr Wyatt's salary since 1999. I do not accept this submission. When small pieces of the evidence are looked at in isolation, it might be said that they convey the impression Mr Wyatt suggested but the passage as a whole does not. It is clear from Mr Mackinnon's answers to the questions put by Mr Wyatt that he was not looking at a copy of the memorandum at the time of giving his evidence and that he did not have a clear recollection of its content. It is significant that, in many of his answers, Mr Mackinnon qualified his acceptance of the propositions put by Mr Wyatt with expressions such as *"if your memo says that"*. Given my finding that the memorandum of 15 May 2002 did not submit a personal grievance about Mr Wyatt's 1999 salary either explicitly or by inference, Mr McKinnon's answers to these questions in cross examination cannot bear the meaning Mr Wyatt ascribed to them.

[69] The balance of Mr Wyatt's submissions on this aspect of the matter were based on an assumption that I would find as a fact that Mr Mackinnon believed Mr Wyatt's memorandum of 15 May 2002 did effectively submit a personal grievance about his 1999 salary. Having made no such finding of fact, I need not deal with those further submissions.

Conclusions

[70] In summary, I have reached the following conclusions regarding Mr Wyatt's personal grievance relating to the level at which Simpson Grierson set his salary in February 1999:

a) The cause of action underlying the personal grievance accrued on 1 February 2001.

b) As a result, that personal grievance fell to be considered under the Employment Relations Act 2000.

c) The period of 90 days within which that personal grievance was required by s114 of the Employment Relations Act 2000 to be raised with Simpson Grierson began on 1 February 2001.

d) Mr Wyatt did not raise this personal grievance with Simpson Grierson during that period.

e) This personal grievance was not raised in Mr Wyatt's memorandum of 15 May 2002 or otherwise prior to Simpson Grierson making an offer of settlement on 24 June 2002.

f) As a result, Simpson Grierson did not consent to the late submission by Mr Wyatt of this personal grievance.

g) The Authority was correct to reject Mr Wyatt's request to determine this personal grievance.

[71] The challenge/appeal is unsuccessful.

[72] The Authority should now proceed with its investigation of the matters which remain before it.

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[73] Although it was not a matter before the Court in terms of the challenge lodged by Mr Wyatt, the view I have taken about when the cause of action embodied in a personal grievance arises will impact also on the manner in which the Authority determines Mr Wyatt's personal grievance arising out of the 2000 salary review. The Authority indicated that it intended to deal with that matter under the Employment Contracts Act 1991. To the extent that this grievance is based on an allegation of unjustifiable disparity between the results of Mr Wyatt's salary review and those of his colleagues, the cause of action underlying it should be regarded as having accrued on 1 February 2001 and the matter should therefore be determined according to the provisions of the Employment Relations Act 2000.

Costs

[74] As this judgment disposes of those aspects of the matter which are before the Court, it is appropriate that costs be fixed now. Simpson Grierson is entitled to a reasonable contribution to the costs and disbursements incurred in resisting Mr Wyatt's challenge/appeal. The parties are encouraged to fix costs by agreement but, if they are unable to do so, Ms Swarbrick should file and serve a memorandum within 28 days of the date of this judgment. Mr Wyatt should then file and serve a memorandum in reply within a further 21 days.

A A Couch
Judge

Judgment signed at 1pm on 20 July 2007