MGZ mcphail gibson & zwart ltd

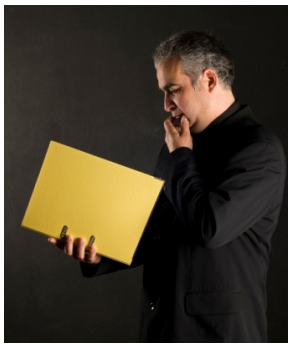
THE ADVOCATE

EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

Issue 211 | October 2012

Personal Grievance Claim Not Raised Correctly

The Employment Relations Act 2000 (s.114) requires that an employee must raise his/her personal grievance within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.



The question as to whether a personal grievance has been properly "*raised*" is often a matter of dispute.

In the recent case ***Idea Services Limited (in statutory management) v. Valerie Barker*** [2012] NZEmpC 112 dated 16 July 2012) the employer appealed from an Employment Relations Authority decision which held that Ms Barker had properly raised her grievance within the 90 day period.

The facts were as follows.

Ms Barker was a community services worker employed by Idea Services Ltd (ISL). After some issues arose, a formal investigation took place and on 17 September 2010; at a meeting held between Ms Barker and her manager, Ms Hudson, along with a union representative, Ms Barker was dismissed with two weeks' pay in lieu of notice.

It was common ground that at the conclusion of the meeting Ms Barker's union representative, Ms Hurst, stated:

"Thank you Merepeka for this outcome, this is to let you know that we will be taking action for [Ms Barker] under s 103 of the CEA Personal Grievance and also the Health and Safety employment act."

Subsequently, on 15 September 2010, Ms Barker wrote to ISL, advising:

"I am taking this opportunity to inform you that I will be pursuing a Personal Grievance against yourself as the Lakeland Branch, Community Service Manager."

Receipt of this letter was acknowledged by the employer on 23 September 2010.

On 10 October 2010, Ms Hurst (union representative) wrote to ISL advising that the opportunity was being taken to *"invoke, facilitate and submit a Personal Grievance*", and that the verbal submitting of a personal grievance on 17 August was confirmed. Ms Hurst went on to refer to various sections of the Employment Relations Act 2000 (the Act) and the Health and Safety in Employment Act 1992 that she said the grievance related to. She advised that Ms Barker would be seeking remedies under s 123 of the Act and advised that "*a hard copy of the communication will be posted."*

The following month, on 16 November 2010, a "*without prejudice*" letter was sent to ISL on Ms Barker's behalf. It referred to a personal grievance being raised on 10 October 2010, and sought an informal without prejudice meeting to discuss how matters might be resolved. In the letter, Mr Single, Ms Barker's advocate, said:

> *Briefly the issues are around the manner in which your Community Service Manager, Linda Hudson has been treating both our clients in a way which can only best be described as bullying and harassment."*

The employer did not take up the offer of a meeting.

A grievance was formally filed with the Employment Relations Authority, outside of the 90 day period.

While finding that none of the steps taken by and on Ms Barker's behalf individually were sufficient to raise a personal grievance within the requisite timeframe, the Authority held that the verbal statement on 17 August (in fact September) 2010 and the letters of 10 October and 16 November 2010, taken in conjunction with each other and viewed objectively, formed a totality of communications and that: "*Ms Barker had specified sufficiently the personal grievance to enable ISL to address it."*

The Authority also found that ISL: *"consistently with a duty of good faith [should have] responded to [the letters of 10 October and 16 November] by requesting specific details if it was unsure of the nature of the grievance."*

The Authority's decision was challenged by the employer on a number of grounds:

1. It argued that the good faith obligations referred to by the Employment Relations Authority do not apply after the employment ceases.

   In considering this the Court said:

   "As s 4(1A) makes clear, the good faith obligations are directed at supporting productive employment relationships. Once the relationship is over, the underlying rationale for the imposition of the obligation of good faith falls away. In the absence of an employment relationship (as specified in s 4(2)) or any express statutory requirement, no statutory obligation of good faith applies."

   On this basis, the Court held that the Authority was wrong to hold that the employer should have sought more details.

2. Next, the employer argued that the Authority was not entitled to rely on the "*without prejudice*" letter as forming part of the submission of the grievance.

   Here the Court held:

   "The 16 November 2010 letter was sent by the defendant's advocate to the plaintiff following Ms Barker's dismissal. The defendant sought a without prejudice meeting, with a view to discussing issues and determining whether a "way forward" could be found that was acceptable to Ms Barker, prior to "further action" being taken. The letter was expressed to be sent on a without prejudice basis, and it was clearly intended to initiate confidential settlement discussions aimed at resolving matters between the parties. I do not consider that the fact that no grievance had been formally filed at this stage undermines the privileged status of the communication. It is clear that the communication was directed at settling a dispute that the defendant had with the plaintiff. Nor do I consider that the absence of evidence that the plaintiff received the letter materially alters the position, as Mr Single suggested."

   The Court held that privilege could not be waived unilaterally, and that the letter remained privileged and could not be taken into account.

3. A further argument by the employer was that there was insufficient detail of the remedies sought for the submission of the grievance to be valid.

   The Authority had held that the letter of 10 October, along with the previous without prejudice communication, did adequately specify the grievance. The Court disagreed, and referred to a previous case ***Creedy***, which had stated:

   "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. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment … For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address … What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.
   …
   It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance."

   The Court in the present case went on to say:

   "At the 17 September meeting, the plaintiff was simply advised that the defendant would be taking "action" under s 103. The subsequent letter of 10 October gave no indication of the factor or factors that the defendant contended made her dismissal unjustified, and it did not attach the material that might otherwise have provided the necessary detail. Simply setting out a number of sections of the Act which the defendant asserted had been breached does not amount to adequate particularisation of a grievance. The 16 November letter was privileged and ought not to have been admitted in evidence."

   and

   "I do not consider that, either individually or when taken together, what was said at the dismissal meeting and in the subsequent letter of 10 October met the threshold requirements in s 114(2). The defendant did not adequately specify the nature of the alleged personal grievance which she wanted her employer to address. It follows that, on the evidence before the Authority, there was no basis for the finding that the grievance had been raised with the plaintiff within the timeframe specified in the Act."

While the facts of this case are a little unusual, due to the issues surrounding "*without prejudice*" correspondence, it is nevertheless a useful reminder to employers to carefully consider whether correspondence received within the 90 day period correctly raises a personal grievance. The substantial costs of defending a personal grievance case may be avoided in certain cases. McPhail Gibson & Zwart can assist you to determine whether a grievance has been properly raised.

McPhail Gibson & Zwart - PO Box 13-780, Christchurch **Tel** (03) 365 2345 **Fax** (03) 365 2347 **www.mgz.co.nz**
Neil McPhail - Email neil@mgz.co.nz Mobile 0274 387 803 **Raewyn Gibson** - Email raewyn@mgz.co.nz Mobile 0274 387 802
Peter Zwart - Email peter@mgz.co.nz Mobile 0274 367 757