IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 99
EMPC 301/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TANE MAHUNU PUTAANGA Plaintiff
AND	MOVE FREIGHT LIMITED Defendant

Hearing:	17 April 2024 (Heard at Christchurch)
Appearances:	Plaintiff in person T Shelley, agent for defendant
Judgment:	10 June 2024

JUDGMENT OF JUDGE KATHRYN BECK

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[1] This case involves a non-de novo challenge to part of a determination of the Employment Relations Authority.[1] The Authority found that Tane Putaanga failed to raise a grievance within 90 days about the failure by MOVe Freight Ltd (MOVe Freight) to adequately protect him from harm.

[2] The harm occurred on 28 September 2019 when he suffered a head injury in a workplace accident at the premises of Freshpork New Zealand (Freshpork).

[3] The Authority found that Mr Putaanga raised his grievance in a letter dated 18 May 2021.[2] It found this was outside the 90-day timeframe for raising a personal

1 *Putaanga v MOVe Freight Ltd* [2023] NZERA 415 (Member van Keulen).
2 At [35].

grievance, as prescribed in s 114(1) of the Employment Relations Act 2000 (the Act), and that there were no exceptional circumstances that would justify leave being granted to raise the grievance outside of time.[3]

[4] The nub of Mr Putaanga's claim in this Court is that he raised a personal grievance immediately after the accident through discussions he had with Sandra Valdes, the company's health and safety manager (southern region), who investigated the accident at the time.

[5] The Authority dealt with the 90-day issue as a preliminary matter. While it found against Mr Putaanga in relation to whether his disadvantage grievance was raised in time, it found in his favour in relation to him raising his unjustified dismissal grievance (including issues in relation to the return to work programme) in time. The hearing of that claim is on hold pending this challenge.

[6] The Court directed the parties to mediation which was unsuccessful.

[7] Both parties were representing themselves. There were some issues with the filing of briefs of evidence and the bundle of documents, but the hearing was able to proceed on 17 April 2024, albeit with only three witnesses – Mr Putaanga himself, and two witnesses for the company.

[8] Mr Putaanga had intended to call other witnesses, but they were reluctant to attend, and he was unaware of mechanisms such as summonses. While this was of concern to him, given the matters at issue, the two people who had direct knowledge of the discussions that are at the heart of this matter were Mr Putaanga and Ms Valdes, both of whom gave evidence. Accordingly, I do not consider that Mr Putaanga was prejudiced by his lack of knowledge or by the absence of other intended witnesses. The Court had what it needed to determine the relatively narrow issues before it.

[9] Mr Putaanga also sought to have the Court determine whether he had raised an additional grievance relating to what he alleged was harassment by the health and

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[3] At [36] and [44].

safety manager through her phone calls to him immediately after his accident. I have also dealt with that issue as part of this decision.

Issues

[10] The issues for determination by the Court are:

(a) whether Mr Putaanga raised a grievance of unjustified disadvantage in relation to the workplace accident, and allegations that MOVe Freight did not adequately protect him, within 90 days;

(b) whether Mr Putaanga raised a grievance of unjustified disadvantage in relation to the alleged harassment of him by the health and safety manager through "repeated phone calls" to him immediately following the accident, within 90 days; and

(c) if not, whether leave should be granted to raise the grievances outside of the 90-day period under ss 114–115 of the Act.

The law

[11] Under s 114 of the Act, an employee wishing to raise a personal grievance with his or her employer must do so within the employee notification period. Beyond that section, the Act does not specify what is involved in raising a personal grievance.

[12] Under s 114(2), a personal grievance is raised with an employer:

> … as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[13] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the Court summarised principles from earlier cases about what is required to raise a personal grievance.[4] The summary was:

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[4] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

> [36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
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> [37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
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> [38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[14] This provides a helpful framework for analysis in the circumstances of this case.

The facts

[15] Mr Putaanga worked for MOVe Freight as a class 5 driver and loader of pig carcasses from 21 January 2019. On 28 September 2019, he was loading two carcasses at the Freshpork Bay City site in Timaru, when the loadout rail dislodged and struck him on the side of the head, knocking him unconscious. He was alone at the time but was discovered a minute later by a worker at the site.[5] An ambulance was called and he was taken to hospital where he remained for a few hours. He was treated for a concussion and then discharged.

[16] In the days following the accident, Ms Valdes contacted Mr Putaanga by telephone on three occasions. There is some dispute about the nature of the calls but, in any event, a meeting was arranged for 4 October 2019. While Ms Valdes offered to meet Mr Putaanga at home, he elected to go to the office.

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[5] There was a concern by Mr Putaanga that the delay was more like 20 minutes, but contemporaneous documents record it as being one minute. Mr Putaanga's concern has been exacerbated by the fact that despite requests, he has never been provided with a copy of the CCTV footage of the accident that the company relies on. It appears this is no longer available, which is unfortunate.

[17] During that meeting, Mr Putaanga gave his recollection of the incident itself. This was recorded in handwriting by Ms Valdes as Mr Putaanga was not well enough to write anything himself at this stage. She read it to him, and he signed it. Apart from giving his account of the accident, Mr Putaanga said he also complained to her that a similar incident had occurred a few months previously, and clearly nothing had been done about it and that, as a result, he was now injured. He also said he put forward a design of a clip that would operate as a safety mechanism that would prevent it happening again.

[18] There is no dispute (at least from Ms Valdes) that Mr Putaanga raised the previous accident at the meeting.[6] She included this in her email report to various MOVe Freight managers and Freshpork.

[19] Mr Putaanga said he followed up on whether anything had been done to make the loading of carcasses safer. He was concerned that further incidents may occur in the future, including to him. When such incidents did reoccur, he followed up again.

[20] Mr Putaanga's head injury had serious consequences for him, causing him to suffer fatigue and headaches for some time after the accident. He was unable to return to work immediately. When he did return, it was on a gradual basis. There was an impact on his eyesight, and severe tinnitus was a permanent consequence.

[21] The injury was covered by the Accident Compensation Corporation (ACC), so Mr Putaanga was compensated for 80 per cent of his earnings while off work. MOVe Freight did not top up his earnings at all.

[22] Mr Putaanga required hearing aids after the accident, which were largely funded by ACC, but not fully. MOVe Freight contributed $500 to the $1,036 shortfall. He also required modifications to his glasses.

[23] A return to work plan was developed in conjunction with Southern Rehab, a rehabilitation service provider.

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6 The company submitted he had not complained at any stage.

[24] Increasing frustration with the return to work plan, and ongoing concerns about health and safety, caused Mr Putaanga to involve his union and to write to the company on 18 May 2021, "formally" raising a grievance. He set out various complaints about the workplace accident, how he was dealt with immediately after the accident, MOVe Freight's handling of his return to work, and his loss of income.

[25] For the purposes of this proceeding, the relevant complaints are the allegations that Ms Valdes bullied and harassed him through her phone calls immediately after the accident, and that the company had disadvantaged him through its unjustified action (or inaction) by failing to keep him safe. He said that the incident should and could have been avoided in the first place.

[26] On 29 May 2021, MOVe Freight responded to Mr Putaanga's letter, advising him that he had not raised his personal grievances within the 90-day period and that it would not consent to him raising them out of time. Despite this, the company set out a response to his complaints to show that (in its view), even if his grievance had been raised in time, there were not any grounds for the complaints.

[27] Mr Putaanga's return to work did not go smoothly, and ultimately his employment was terminated on 12 May 2022 due to medical incapacity.

[28] Mr Putaanga filed a statement of problem in the Authority, setting out two claims:[7]

(a) an unjustified action causing disadvantage arising out of the workplace accident and allegations that MOVe Freight did not adequately protect him; and

(b) an unjustifiable dismissal.

[29] The company claimed that both personal grievances were raised outside the 90-day time limit.

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7 *Putaanga v MOVe Freight Ltd*, above n 1, at [6].

[30] As already noted above, the Authority dealt with this as a preliminary issue. It found that the grievance in relation to his claim about the accident and injury suffered was not raised until the letter of 18 May 2021 and so was outside the 90-day time period. It also found there were no exceptional circumstances that would justify leave being granted to allow the grievance to be raised out of time.

Analysis

[31] Mr Putaanga submitted the letter of 18 May 2021 may have been outside the 90-day timeframe but that in fact he had raised the grievances about the incident – and Ms Valdes's treatment of him – well before then. He said it was only when he read the Authority's decision, which set out the law on how grievances can be raised, that he realised that the complaints he made immediately after the accident were relevant.

[32] Ms Valdes agrees that Mr Putaanga complained about the previous incidents and the fact that he was injured, but said she never understood him to be raising a grievance. Further, she said she was not the person with whom to raise it. She said that if she had understood him to be raising a personal grievance, she would have escalated it to her manager or human resources.

[33] MOVe Freight said it was not aware of any grievance at the time. It did not, however, call any witnesses, other than Ms Valdes, who had any direct knowledge of, or involvement in, the events at the time. Mr Shelley, who gave evidence for the company as the Group, People & Culture Manager and who was also its representative in Court, had only been with the company since 20 December 2022. Accordingly, he did not have any direct knowledge of what occurred before that time.

[34] Mr Shelley's evidence was that he had searched company records and could not find any record of a grievance having been raised before 18 May 2021. However, absence of evidence is not evidence of absence.[8] That is particularly applicable here where the assertion is that the grievance was raised verbally.

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[8] See for example *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [256].

[35] The key question is whether what was said to Ms Valdes during those three phone calls and the meeting amounted to raising a grievance or grievances.

Did Mr Putaanga take reasonable steps to make MOVe Freight aware that he had a personal grievance he wanted it to address in relation to the accident?

[36] Mr Putaanga said that on 30 September 2019, he complained to Ms Valdes about the accident being avoidable. He said that, on 1 October 2019, he again complained to her about the incident and told her why it should not have happened.

[37] When Ms Valdes called again on Wednesday 2 October 2019, Mr Putaanga said he again complained to her about the incident and how it should never have happened, and reluctantly agreed to meet on Friday 4 October 2019.

[38] He said that on 4 October 2029 when he met with her, they discussed the incident, the fact that it had happened before, how it should never have happened, and what could be done to prevent it happening again. He said he complained about the distance the rail could drop and provided her with a design that would prevent it from dropping at all, at an estimated cost of around one hour's labour and $20. He said Ms Valdes commented that this was a good design.

[39] In her 4 October 2019 email report, Ms Valdes recorded Mr Putaanga's comments about the rail moving during the loading process and his advice that many staff had previously received impact blows to the head/shoulders due to this.

[40] She herself was aware of an incident some time earlier which was similar to what happened to Mr Putaanga. It was common ground that on that earlier occasion, he, along with others, had raised concerns, which Ms Valdes said had been escalated. She was hopeful that the issue with the rail had been addressed at that time, but unfortunately that was not the case.

[41] In answer to questions from Mr Putaanga, Ms Valdes accepted that he had complained at their meeting about the loading rail not working and how frustrated he was that this was happening. At another point she agreed that "he complained he'd got hurt because it wasn't sorted", "it" being the loading rail. She also accepted that,

in one of her calls to him when trying to set up the meeting, it was likely he complained about being hit after somebody else had also been hit.

[42] Ms Valdes was at pains to point out, however, that although Mr Putaanga may have complained, he did not say it was a grievance. She said if he had done so, she would have escalated it. I accept that she would have done so. It was clear that she was vigilant and took her job seriously.

[43] Ms Valdes also confirmed that she submitted her reports (including what Mr Putaanga had said about this happening previously) to the relevant managers. This included providing information on the solution Mr Putaanga had proposed. She also agreed that he likely had an expectation that she would report those things to the relevant managers.

[44] Accordingly, it is apparent she did escalate the concerns, although not in her mind as a "grievance".

[45] She said she attempted to follow up on the issue in relation to the ongoing risk but was shut down by her manager and told it was outside her scope of responsibility.

[46] Extraordinarily, on 11 October 2020, the rail dislodged again, causing the carcasses and Mr Putaanga to "crash onto the floor". In his reporting email, Mr Putaanga advised that the safety chain being used was different to the design he proposed just after his accident, even though he had resubmitted the design to the company only five weeks previously.

[47] In terms of the evidence before the Court, the next event is the letter dated 18 May 2021.

[48] Mr Putaanga submitted that his discussions with Ms Valdes over the period 30 September 2019 to 4 October 2019 were sufficient to raise a grievance. His evidence was that he explained the nature of his complaint, being the failure to protect his health and safety and provide him with a safe workplace,[9] and then set out how he

[9] He does not suggest these were the exact words used but this was the essence of his complaint.

wanted it remedied, which was for Ms Valdes to ensure the issue was resolved. He said he gave her sufficient information about his complaints and that, together, they were his personal grievance.

[49] The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act, and whether the employee's concern complied with s 114(2) by conveying the substance of the concern.[10]

Was the nature of the complaint a personal grievance?

[50] In this case, the complaint was one of disadvantage arising from an action or inaction of the employer. It is not for this hearing to decide the merits of any grievance, but the elements of it were clearly there. Mr Putaanga alleged an unjustified action – that the employer failed to take sufficient steps to ensure his safety, which caused him harm or disadvantage.

Was the complaint conveyed to the employer?

[51] There is no doubt Mr Putaanga addressed his complaint to the employer. For an employee with health and safety concerns, the health and safety manager is a perfectly reasonable person with whom to raise the complaint/grievance. While Ms Valdes said she did not understand it to be a grievance per se, she understood and conveyed the substance of his concern to management. She escalated it as expected by Mr Putaanga. It was recorded in her report at the time. She also attempted to follow up.

[52] As stated in *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the grievance process is designed to be informal and accessible.[11] The purpose of the 90-day time limit is to ensure that issues are raised and dealt with in a timely way. When grievances are raised outside that timeframe, the employer can sometimes be prejudiced by the delay. That is not the case here.

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10 *Chief Executive of Manukau Institute of Technology v Zivaljevic*, above n 4, at [37].
11 At [36].

[53] This is not a matter that has come out of the blue for the employer. Mr Putaanga raised the issue again a year later, and then finally in the letter of 18 May 2021.

[54] The company knew about the concern from 4 October 2019, when Ms Valdez's report was provided. It was given sufficient information to respond.

[55] It appears there may have been issues with the extent to which it could improve the Freshpork site, but that is not a matter for this hearing.

[56] I find Mr Putaanga raised his grievance well within 90 days.

Did Mr Putaanga take reasonable steps to make MOVe Freight aware that he had a personal grievance that he wanted it to address in relation to Ms Valdes's treatment of him?

[57] Mr Putaanga said that on 30 September 2019, along with complaining about the accident, he also complained to Ms Valdes about the timing and manner of her phone call to him. He said he felt harassed as he had only just come out of hospital.

[58] His evidence was that on 1 October 2019, he again complained to Ms Valdes about her pressuring him to be interviewed while he was still recovering.

[59] When Ms Valdes called again on Wednesday 2 October 2019, Mr Putaanga said he reluctantly agreed to meet on Friday 4 October 2019.

[60] He said that on that date, when he met with her, he complained about her bullying him. He said he felt coerced into attending the meeting and that she was not allowing him time to recover.

[61] Ms Valdes took issue with Mr Putaanga's description of her phone calls. Her evidence was that she always asked about his wellbeing before moving on to attempts to set up an interview. She said she was persistent about the interviews because it was her job to complete the investigation; in her view, sooner was better than later. She denied that he ever told her he was feeling bullied or harassed, and said she took steps to ensure he was as comfortable as possible at the meeting.

[62] She said she was surprised and hurt to hear these allegations nearly five years after the events. Her evidence was that Mr Putaanga's descriptions of her behaviour were not consistent with her practice when dealing with people after an accident.

Was the nature of the complaint a personal grievance?

[63] Mr Putaanga said he complained each time to Ms Valdes about the calls but even when asked, did not expand on what that entailed; his evidence was simply that he complained.

[64] I accept his evidence that he felt pressured to meet when he would have preferred not to and that the daily calls were not welcome – even intrusive – when he was still very unwell. The meeting was delayed for a few days, but Mr Putaanga then agreed to attend, just to get it over with.

[65] It is fair to say that Ms Valdes was persistent in her attempts to meet with Mr Putaanga. She felt under pressure to complete her investigation and took her responsibility seriously. This may have meant that she did not hear what Mr Putaanga referred to as complaints as anything other than a normal reluctance and desire for delay. Whatever the reason, I accept her evidence that she never understood him to be complaining about her conduct.

[66] Bullying can of course amount to an unjustified disadvantage personal grievance. However, I do not consider Mr Putaanga's communications, even if he "complained" as he says, conveyed the substance of what he now says was a concern about bullying and harassment.

[67] There must be sufficient information to address the grievance. The employer must know what it is responding to. Even if advising Ms Valdes was sufficient (which I deal with below), I do not consider that Mr Putaanga provided enough information about the nature of his complaint to enable her to understand his concerns. This is apparent from Ms Valdes's genuine surprise at reading this information now, as part of these proceedings. That can be contrasted with Mr Putaanga's complaints about the previous incidents, which she recalled, understood and noted at the time.

Was the complaint conveyed to the employer?

[68] An employee must make the employer aware of the grievance. Mr Putaanga agreed that until his letter of 18 May 2021, he had not raised his concerns about Ms Valdes with anyone other than her. In this instance, properly raising a grievance would have involved advising someone in the company, other than just Ms Valdes, about the complaint. The purpose of raising a grievance is to enable the employer to do something about the issue. If they do not know about it, they are unable to address it. It was not sufficient to simply raise it with Ms Valdes, when it was her conduct that was in issue.

[69] Accordingly, the first time Mr Putaanga raised a grievance in relation to Ms Valdes's alleged harassment of him was in the letter of 18 May 2021, 18 months after the actions in question.

[70] I find the grievance was raised outside the 90-day time period.

Was the delay caused by exceptional circumstances?

[71] The next question for consideration is whether the delay was occasioned by exceptional circumstances.

[72] I accept that immediately after the accident, given the concussion and consequences to Mr Putaanga's health, he may have been unable to properly consider raising the grievance.[12] It is unclear – and there was no evidence – how long Mr Putaanga was seriously affected by the accident in this way. However, there is evidence that he was able to write a letter on 24 September 2020, requesting a contribution towards the cost of hearing aids; the letter is articulate and sets out the effect of the accident on him.

[73] Accordingly, while exceptional circumstances may have initially existed after the accident as a result of the accident, it is apparent these were no longer in play by 24 September 2020. Despite this, Mr Putaanga did not raise his grievance in relation

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[12] Employment Relations Act 2000, s 115(a).

to the alleged harassment until 18 May 2021, a further eight months later. Again, this is well outside the 90-day time period.

[74] Accordingly, I find that the delay in raising the grievance was not occasioned by exceptional circumstances, and there are no grounds to grant leave for it to be raised out of time.

[75] Having reached this conclusion, it is not necessary for me to consider whether the Court even had jurisdiction to consider the issue of Ms Valdes's treatment of Mr Putaanga. That jurisdictional issue arises because this is a non-de novo challenge relating to particular findings of the Authority, and this claim was not dealt with in its determination – it does not appear that the issue was even before the Authority for consideration.

[76] The claim was, however, set out in Mr Putaanga's statement of claim filed in the Court, and MOVe Freight responded to the claim in its statement of defence. Further, MOVe Freight did not take issue with it being before the Court, evidence was called on the issue, and both parties had the opportunity to make submissions on the claim. Therefore, in light of the effort expended by the parties on this issue, irrespective of any unresolved jurisdictional issues, it was appropriate to make a finding.

Outcome

[77] In its determination, the Authority found: "Mr Putaanga did not raise his personal grievance for unjustified action causing disadvantage relating to the workplace accident within the 90-day period."[13] The Authority erred in fact in reaching this conclusion, and insofar as its determination relates to that finding, Mr Putaanga's challenge is successful and this decision stands in its place.

[78] The rest of Mr Putaanga's challenge is unsuccessful, and it is dismissed.

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13 *Putaanga v MOVe Freight Ltd*, above n 1, at [45].

[79] As the Authority still has Mr Putaanga's personal grievance for unjustified dismissal before it, its preliminary determination on the health and safety issue did not bring his employment relationship problem to an end in the Authority – it merely pruned it.[14] Therefore, I find that there is no requirement for the Court to proceed to deal with the substantive claim; the Authority is best placed to do that. The registry should provide a copy of this judgment to the Authority as soon as practicable.

[80] As neither party is represented, costs ought not to be an issue. If Mr Putaanga seeks disbursements and the parties are unable to reach agreement, memoranda may be filed within 28 days of the date of this judgment, with a reply from MOVe Freight due within a further 14 days.

Kathryn Beck
Judge

Judgment signed at 4.40 pm on 10 June 2024

[14] See *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC) at [59]–[60]; and *Ale v Kids at Home Ltd* [2015] NZEmpC 209, [2015] ERNZ 1021 at [43].