

Employment relationship problem

[1] This determination addresses the preliminary issue of whether the respondent, Kids at Home Limited (Kids at Home) provided either implied or express consent to the applicant, Ms Anna Ale, to raise claims of unjustifiably disadvantage outside the 90 day statutory timeframe required by s.114(1) of the Employment Relations Act 2000 (the Act).

[2] In the event that it is determined that Kids at Home did not provide Ms Ale with implied or express consent to raise her claims outside the statutory 90 day period, Ms Ale is required by s.114(3) of the Act to seek leave of the Authority to raise her grievances out of time.

[3] Ms Ale claims that, in an email from her counsel on 12 November 2013, she raised with Kids at Home various claims of unjustifiable disadvantage and an unjustified dismissal claim. Ms Ale further claims that by email on 13 February 2014, additional grievances were raised with Kids at Home including for workplace bullying and workplace stress. In his submissions to the Authority, Counsel for Ms Ale contends that Kids at Home impliedly consented to the raising of unjustifiable disadvantage grievances out of time.

[4] Kids at Home says that the unjustifiable disadvantage claims were not raised by Ms Ale within the 90 day statutory timeframe. Kids at Home says it expressly declined its consent to the personal grievance claims being raised by Ms Ale after the expiration of the statutory time frame.

[5] Kids at Home says there was no implied consent provided by it and the only live issue between the parties is the issue of whether or not Ms Ale was unjustifiably dismissed. There is no dispute that a personal grievance claim of unjustified dismissal was raised by Ms Ale within the 90 day period.

The legislation

[6] Section 114 of the Act states:

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise their grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the*

notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[7] As stated above, Ms Ale says that consent was impliedly given by Kids at Home to the raising by her of unjustifiable disadvantage grievances outside the 90 day timeframe.

Issue

[8] The issue for determination by the Authority is whether Kids at Home impliedly consented to the raising of certain unjustifiable disadvantage grievances outside the statutory 90 day time period?

Investigation meeting

[9] The parties agreed that the Authority could investigate and determine the issue in paragraph [8] on the papers. In order for the Authority to deal with the matter as expeditiously as possible, both counsel provided the Authority with helpful submissions.

[10] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

Ms Ale's employment by Kids at Home

[11] Ms Ale was employed by Kids at Home as a childhood education teacher from February 2010 until 6 November 2013 when she was dismissed.

[12] On 5 November 2013, Ms Ale gave Kids at Home 4 weeks' notice of resignation.

[13] On 12 November 2013, counsel for Ms Ale sent an email to Kids at Home making claims of unjustified disadvantage and unjustified dismissal by it.

[14] On 20 November 2013, during her notice of resignation, Ms Ale was dismissed with effect from 6 November 2013.

Personal grievance claims

[15] In his submissions to the Authority on 26 March 2015, Counsel for Ms Ale identifies Ms Ale's claims of unjustified dismissal and disadvantage as follows:

- Dismissal on 6 November 2013;
- Unfair performance appraisal process in August 2013;
- Manner in which she was required to return her work car on 4 October;
- Kids at Home's actions which resulted in her taking sick leave on 7 October 2013.

[16] In the email from Ms Ale's counsel to Kids at Home's representative on 12 November 2013 a number of unjustified disadvantage claims are alleged including the work car matter referred to above. This claim was raised within 90 days and so is not the subject of this determination which relates to the issue of implied consent to the other grievances being raised out of time.

[17] On 27 November 2013, in an email from counsel for Ms Ale to Kids at Home's representative, a personal grievance was raised for "*unjustified dismissal and disadvantage*".

[18] On 13 February 2014, counsel for Ms Ale wrote to Kids at Home stating:

I enclose a copy of the personal grievance email sent to you on 12 November 2013 to restate the dismissal grievance as the grievance on 12 November preceded the dismissal. This email is the formal raising of a dismissal grievance.

In addition to the above I advise that Anna has grievances for workplace bullying and workplace stress through overload of work.

[19] On 14 February 2014, the representative for Kids at Home responded stating that Kids at Home:

My client acknowledges your raising of a personal grievance for unjustified dismissal. She does not accept the personal grievance for workplace stress through overload of work. Your email below is the first time this matter has been raised by you or your client and is outside the 90 day timeframe for a personal grievance to be raised. On that basis it is rejected.

[20] For similar reasons set out in the email, Kids at Home rejected the workplace bullying allegation. The email then addresses the allegation of unjustified disadvantage in respect of the appraisal meeting on 2 August 2013 and states:

As you will realise, 12 November is more than 90 days from the date of 2 August...

[21] The wording of this email in my view is clear. Kids at Home acknowledged the raising by Ms Ale of her unjustified dismissal claim. With regard to the other personal grievance claims, Kids at Home stated it was refusing Ms Ale consent to raise them because they were outside the 90 day statutory timeframe. Neither the Statement of Problem filed on 30 May 2014 nor Statement in Reply filed on 17 June 2014 referred to this jurisdictional matter.

[22] On 10 November 2014, the representative for Kids at Home filed a memorandum in the Authority stating that Ms Ale's unjustified disadvantage claims were not raised until 12 November 2013 and were therefore outside the 90 day time limit. Counsel confirmed that Kids at Home had not consented to the extension of the time limit and further stated that Ms Ale had not sought the Authority's leave to raise personal grievances outside the 90 day time limit.

[23] No applications were brought on behalf of Ms Ale to bring personal grievance claims outside the 90 day time limit to the Authority.

[24] At paragraph 24 of counsel for Ms Ale's submissions, Mr Hope concedes that the disadvantage grievances were raised without any particularity on 12 November 2013. Counsel submits that there was no objection taken to this by Kids at Home nor were any particulars of the disadvantage grievances requested by it until March 2015. Counsel submits that this and other conduct by Kids at Home is indicative of its implied consent to the raising of the unjustified disadvantage grievances out of time.

[25] It is my finding that the alleged grievances relating to the meeting of 2 August 2013 were not raised by Ms Ale with Kids at Home until 12 November 2013. Even then the grievances were raised in general terms only, without specificity. In an email from the representative for Kids at Home on 14 February 2014, it was made clear that there was a jurisdictional issue with the raising of the grievances and that Kids at Home would not be giving consent. Similarly there was no consent given by Kids at Home to the bringing of grievances regarding as to alleged workplace bullying and

workplace stress outside the 90 day timeframe. Consent could not be implied as Kids at Home expressly stated through its representative that consent would not be given.

[26] This was reiterated by the representative for Kids at Home in the memorandum to the Authority on 10 November.

[27] Whether consent has occurred is a matter of fact and degree¹. The Court of Appeal stated in *Hawkins* that:

The real issue is not whether, in formal terms, the Commissioner “turned his mind” to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[28] It is my view that the email of 14 February 2014 and the subsequent memoranda by counsel was conduct by Kids at Home which made clear its intention that consent was not provided under the Act. The only personal grievance acknowledged by Kids at Home as being raised in time was Ms Ale’s unjustified dismissal claim.

[29] Kids at Home did not impliedly consented to the raising of the unjustifiable disadvantage grievances outside the statutory 90 day time period. Ms Ale will therefore need to apply to the Authority for leave to raise the personal grievances outside the 90 day time period.

[30] Ms Ale is not required to seek leave to raise her personal grievance regarding the work car issue of 4 October 2013 which was raised in time, by email of 12 November 2013.

[31] For the sake of clarity the current issues for the Authority to investigate are the alleged unjustifiable dismissal claim on 6 November 2013 and the work vehicle issue of 4 October 2013. All other claims are out of time and require the Authority’s leave under s.114 of the Act.

[32] Counsel for the parties are to confer with the Authority regarding a suitable timetable within which this application is to be made. Because of the delays in the filing of submissions in respect of this matter, the previous timetable will require adjustment.

¹ *Commissioner of Police v Hawkins* [2009] NZCA 209 at para [24].

Costs

[33] Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority