

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2025] NZERA 25
3269139

BETWEEN

MARIA AGUIRRE
Applicant

AND

KAH NEW ZEALAND
LIMITED
Respondent

Member of Authority: Claire English

Representatives: Allan Halse, advocate for the Applicant
Bev Edwards, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 22 October 2024 from Applicant
27 August and 6 November 2024 from Respondent

Determination: 20 January 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In her statement of problem, the applicant Ms Aguirre raises claims of unjustified disadvantage and constructive dismissal.

[2] The respondent KAH New Zealand Limited (KAH) denies these claims, and also takes the position that Ms Aguirre has raised claims outside the statutory 90-day period for raising personal grievances, and it does not consent to the raising of claims out of time.

[3] Accordingly, this matter needs to be determined as a preliminary issue, and both parties have filed submissions and documents accordingly.

The Authority's investigation

[4] For the Authority's investigation written submissions were called for from both parties on the preliminary issue only. In the event, the applicant filed a signed witness statement from Mr Anthony Lugo-Sharpe, Ms Aguirre's manager for part of her employment with the respondent. Ms Edwards filed a signed affidavit from Ms Jo Thompson, who had previously assisted with Ms Aguirre's file. Ms Edwards also provided written submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Did Ms Aguirre raise her personal grievances for unjustified disadvantage with her employer within 90 days of the events she complains of?
- (b) Did Ms Aguirre raise her personal grievance for unjustified dismissal with her employer within 90 days of that event?

Background

[7] Ms Aguirre was employed by KAH in July 2018 as a food and beverage attendant. In the later part of her employment, Ms Aguirre reported to Mr Lugo-Sharpe, who worked at KAH for what appears to be approximately 6 months, up to his resignation on 24 May 2022¹.

[8] Ms Aguirre first resigned by way of email on 30 June 2022. Her email stated "it has been a pleasure working for the Chateau all these years". After discussions with Ms Carol Harrison, the Human Resources Manager, it was agreed that she would instead take leave from

¹ Mr Lugo-Sharpe's witness statement gives the date of his resignation, but not his start date. The statement of problem does not mention the dates or times Mr Lugo-Sharpe was Ms Aguirre's manager.

her employment, and return once she had been able to visit home. Ms Aguirre then retracted her resignation by email on 2 September 2022.

[9] She took leave as agreed from 5 September 2022 to 30 October 2022. However, she did not return to the workplace.

[10] On 18 November 2022, Ms Aguirre emailed her second resignation to Ms Harrison. Ms Aguirre's email was short, and stated:

Unfortunately I won't be coming back to work. I'm really sorry I know you all have made an effort waiting for me but I'm not ready to work at the moment. Going through a lot of things. Arjun will take the stuff from my room so you can get it back as soon as possible and he will hand you over the keys as well

Thank you, Antonella

[11] Ms Harrison accepted Ms Aguirre's second resignation.

[12] On 12 June 2023, Mr Halse emailed KAH, saying:

Attached is a signed authorisation form from Antonella Aguirre enabling me to represent her in respect to the personal grievance she raised with KAH on 28 January 2022. A copy of the personal grievance and KAH's response is attached.

We are preparing to file a Statement of Problem with the Employment Relations Authority (ERA) on Antonella's behalf and require her full personnel file. Please provide it by close of business, Friday, 16 June 2023.

We look forward to your response.

[13] The statement of problem was filed on 15 December 2023.

[14] The personal grievance raised by Ms Aguirre herself on 28 January 2022 was a complaint that she had been unfairly overlooked for promotion to the role of Lounge Bar Manager (set out at paragraph 1.1 of the statement of problem). KAH says that it was aware of this personal grievance and that it met with her at the time and resolved matters. It has provided an email from Ms Aguirre stating that she considered the matter resolved, and she received a promotion to a managerial position shortly thereafter.

[15] KAH says that Ms Aguirre never raised the other claims she now sets out in the statement of problem with it prior to the filing of the statement of problem on 15 December

2023. Those other claims are a claim of unjustified disadvantage by way of bullying which KAH failed to investigate or address (set out at paragraph 1.2 of the statement of problem); a claim of unjustified disadvantage due to failures to provide rest and meal breaks (set out at paragraph 1.3 of the statement of problem); and a claim of constructive dismissal set out at paragraph 1.4 of the statement of problem).

[16] KAH says that these claims have been raised well outside the 90 days provided for in the Act, and objects to these claims being raised out of time. It points out that a considerable amount of time has passed, and its operations have significantly changed over that time, including the winding up of its business at the Chateau, and staff turnover, which makes it difficult to respond to late claims. KAH also states that there is no pleading by Ms Aguirre of any exceptional circumstances, and it is not aware of any.

[17] In response, Ms Aguirre has filed a witness statement from Mr Lugo-Sharpe. Mr Lugo-Sharpe states that Ms Aguirre “reported” grievances to him as follows:

- a. that Ms Aguirre raised a grievance with him in April 2022, concerning her “being abused” by Mr Kulkarni, Mr Singh, and Mr Rashid. No detail is provided apart from the phrase “being abused”. Mr Lugo-Sharpe says he raised this with his manager, and his concerns were dismissed. No mention is made of how this matter was progressed or resolved (“the April 2022 claim”).
- b. That a grievance was reported to him relating to a meeting he attended with Ms Aguirre where “I suggested she be promoted”, and the suggestion was laughed at and Ms Aguirre was insulted by Mr Abhijeet Kulkarni. No date is given, or mention made of how this matter was progressed or resolved (“the undated refusal of promotion claim”).
- c. That Ms Aguirre raised concerns about abusive and threatening behaviour by Mr Abhijeet Kulkarni at a performance review meeting. No date is given, or mention made of how this matter was progressed or resolved. Mr Lugo-Sharpe says he did report this but the behaviour was denied (“the undated performance review claim”).

[18] Mr Lugo-Sharpe says that “the evidence of these personal grievances being reported by staff is shown through communications with the Labour Inspectorate.” He states that he “reported the grievances to the Labour Inspectorate” on 1 July 2022.

[19] KAH denies that the matters raised by Mr Lugo-Sharpe are accurate, or that they contain sufficient detail to be properly raised or responded to.

Analysis

[20] I have considered Mr Lugo-Sharpe’s witness statement. I have particularly considered it in relation to the claims made by Ms Aguirre in her statement of problem and the voluminous documents attached to that.

[21] First it is necessary that I consider Mr Lugo-Sharpe’s statement that “evidence” of the personal grievances is in his communications with the Labour Inspectorate. Mr Lugo-Sharpe says that he first contacted the Labour Inspectorate on 1 July 2022. He has provided an email to him from a Labour Inspector dated 31 August 2022, which indicates that there was phone contact on 1 June 2022 rather than 1 July 2022. This is then followed by an email from Mr Lugo-Sharpe dated 6 September 2022 which covers a range of matters, containing text on page 2 of that email referring to Ms Aguirre which is similar to Mr Lugo-Sharpe’s witness statement.

[22] It is important to note that Mr Lugo-Sharpe’s communication with the Labour Inspectorate was after the ending of his employment with KAH around the end of May 2022. This does not amount to Ms Aguirre raising a personal grievance claim with her employer. Grievances must be raised with the relevant employer not third parties. There is also no indication that Mr Lugo-Sharpe was authorised by Ms Aguirre to raise a personal grievance claim on her behalf when he was communicating with the Labour Inspector after the ending of his employment.

[23] As such, I do not consider Mr Lugo-Sharpe’s correspondence with the Labour Inspectorate to be relevant or helpful in answering the question as to whether Ms Aguirre raised personal grievance claims with her employer KAH within the statutory timeframes.

Claim 1.1 in the Statement of Problem – that Ms Aguirre was repeatedly overlooked for promotion to a higher position

[24] My view is that the undated refusal of promotion grievance referred to by Mr Lugo-Sharpe is the same as the claim set out at paragraph 1.1 of the statement of problem.

[25] Mr Lugo-Sharpe's description is consistent with the detail given by Ms Aguirre in her statement of problem, and is also consistent with the details given by KAH in its own replies.

[26] Having said this, there is no dispute that Ms Aguirre herself had raised this grievance directly with KAH on 28 January 2022. A letter from KAH dated 10 February 2022 acknowledges the raising of this grievance, and records that Mr Rashid met with her to discuss, but despite this she requested a formal response. The letter proceeds to set up a formal meeting accordingly on 14 February.

[27] KAH says that this meeting was held with Ms Aguirre on 14 February 2022, and resolved matters by way of discussion, with Mr Rashid and Mr Kulkarni agreeing to promote her to the role of Banquets Operations Manager. Meeting notes provided by KAH indicate that Ms Aguirre accepted this promotion and stated that she considered the matter resolved.

[28] There is no subsequent correspondence from Ms Aguirre on this subject. The next time this matter was drawn to KAH's attention was some 18 months later, by Mr Halse's email dated 12 June 2023 set out above, which refers specifically to this grievance by way of Ms Aguirre's letter of 28 January 2022 and seeks her "full personnel file". No explanation for the delay was provided, either then or now.

[29] There is no dispute that this grievance was raised within time. I have considered whether this should be read as a dispute that this grievance was not resolved to Ms Aguirre's satisfaction, but this is not the claim made in her statement of problem, or in the email from Mr Halse, which appears to rely on the original claim despite the intervening actions by KAH. I consider this significant.

[30] I also consider it significant that there is no contemporaneous correspondence from Ms Aguirre following on from her grievance letter of 28 January, an intervening meeting with Mr Rashid where she requested a formal response, the response letter of 10 February, and the meeting of 14 February. Ms Aguirre had expressed herself clearly and firmly, and KAH had

responded positively, by providing her with a formal response, both a formal and an informal meeting, and the promotion she requested. If for some reason Ms Aguirre had not been satisfied by the response, it was clearly open to her to continue to advocate for what she wanted, but KAH's position is that after discussion, it resolved matters by agreeing that she should have the promotion that she requested.

[31] In these circumstances, I find it more likely than not that, although properly raised, this matter was resolved at the time. No grievance was raised about the resolution either then or now. In these circumstances, I find that Ms Aguirre cannot properly progress the claim set out in paragraph 1.1 of the statement of problem. She is estopped from raising this claim again after its resolution to her benefit and satisfaction, and she has never raised any claim about that resolution.

Claim 1.2 in the Statement of Problem – that Ms Aguirre was subjected to bullying behaviours which were not investigated or addressed

[32] The April 2022 claim referred to by Mr Lugo-Sharpe as well as the undated performance review claim referred to by him are generally similar to the claim set out at paragraph 1.2 of the statement of problem.

[33] Unlike the undated refusal of promotion claim, there is no claim that Ms Aguirre raised these concerns in a formal way. KAH says that the first it was aware of these claims was on the filing of the statement of problem, which is dated 15 December 2023. This is more than a year after the ending of Ms Aguirre's employment on 18 November 2022. Ms Aguirre relies on Mr Lugo-Sharpe's witness statement to explain how and when she raised her grievances.

[34] In relation to the April 2022 claim, Mr Lugo-Sharpe states that the grievance was that at an unspecified time, some unspecified action occurred that Ms Aguirre told him was "abuse". He said he raised this with his manager and the conduct was denied. Ms Aguirre took no further action relating to this matter until the filing of her statement of problem on 15 December 2023, which raised a general bullying claim which is not on all fours with Mr Lugo-Sharpe's witness statement.

[35] Clearly the filing of the statement of problem on 15 December 2023 is well outside the period of 90 days from even the end of April 2022. It does not assist in ascertaining if the April 2022 claim was properly raised.

[36] The court has held that:

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 system mandates².

[37] Mr Lugo-Sharpe does not give any details as to what occurred that Ms Aguirre considered to be “abuse”. KAH is not able to consider such a complaint, or take any steps to potentially address or resolve it, in the absence of detail as to what Ms Aguirre considered to have been wrong. Mr Lugo-Sharpe’s witness statement falls short of providing any level of detail which would enable a grievance to be raised with KAH.

[38] I am equally concerned about the lack of dates provided by Mr Lugo-Sharpe. He does not state when Ms Aguirre “reported” this matter to him, he says only that she told him that the occurrence of this unspecified matter was sometime in the month of April 2022, and he does not say when he raised this with his manager. This lack of detail again means that KAH is not able to respond sufficiently. It is not enough for KAH to be put in the position of having to make its “best guess” about these matters.

[39] Mr Lugo-Sharpe’s witness statement (even taken at face value) falls short of demonstrating that this grievance was properly raised.

[40] I will now consider the undated performance review claim. Mr Lugo-Sharpe says that Ms Aguirre reported to him that Mr Kulkarni had engaged in “abusive and threatening behaviour” at a performance review meeting. Mr Lugo-Sharpe does not state what this behaviour was, or when the alleged meeting occurred, when Ms Aguirre raised these concerns with him, or when he raised them with his own manager. Both the lack of detail and the lack of any reference to dates suggest that this grievance has not been properly raised.

² *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[41] I have also taken into account that the undated performance review claim is not mentioned by Ms Aguirre in her statement of problem, and is not supported by two contemporaneous emails that she has provided mentioning Mr Kulkarni.

[42] The first email is dated 15 December 2021. In it, Ms Aguirre asks that she is not put on split shifts. She then says:

Abhijeet (Kulkarni) kept walking behind me or coming to me telling me do this, don't do this....I have been pulled out of my shift to do something else and I'm doing it correctly why I have someone in my ear telling me what I'm doing it's not right. He didn't even thank me...

[43] This is referred to at paragraph 2.6 of the statement of problem as a concern with split shifts and "giving inconsistent instructions".

[44] The second email from Ms Aguirre mentioning Mr Kulkarni is dated 3 February 2022. She states:

Abhijeet has been pushing us all with the workload and the wage cost...even calling us in the middle of a shift to tell us when need to go home....We also told Antony [Lugo-Sharpe] about the problems of communication that they have with Abhijeet....I'm very disappointed of how disorganised we are. I don't want people to be overworked...Please don't share this email with anyone.

[45] This is referred to at paragraph 2.12 of the statement of problem as "unrealistic workloads and bullying behaviours by Abhijeet", and "poor time management and poor communication from Abhijeet".

[46] Ms Aguirre then met with Mr Rashid and Mr Kulkarni on 14 February 2022, resulting in her being given a promotion. The meeting notes provided by KAH record that Mr Rashid then stated "all duty managers should equally do split shifts. I would like to see a flow through in the roster". Mr Kulkarni acknowledged this, and it was at this point that Ms Aguirre accepts that the matter was resolved.

[47] Taking all this into consideration, I find that Ms Aguirre did not raise a valid personal grievance about bullying behaviours that were not investigated or addressed. There is insufficient evidence that Ms Aguirre raised any issues about "bullying" or behaviour that might amount to that. There is evidence that Ms Aguirre raised some concerns about split shifts, workload, and communication, although she also asked that these concerns not be shared. There is also evidence that Ms Aguirre's concrete concerns about shifts and the sharing of

workload were discussed and addressed by Mr Rashid and Mr Kulkarni and that she accepted this. Mr Lugo-Sharpe's witness statement contains no details that would suggest otherwise, or which amount to the raising of a timely and valid personal grievance claim about bullying that had gone unaddressed.

[48] In these circumstances, I find that Ms Aguirre cannot properly progress the claim set out in paragraph 1.2 of the statement of problem.

Claim 1.3 in the Statement of Problem – that Ms Aguirre was unjustifiably disadvantaged by a failure to provide rest and meal breaks

[49] There is no indication that Ms Aguirre raised any claim with KAH about rest and meal breaks prior to her statement of problem.

[50] This was not mentioned in the contemporaneous correspondence that I have already referred to, and is not mentioned by Mr Lugo-Sharpe in his witness statement.

[51] Instead, there is evidence that Ms Aguirre complained about split shifts, and Mr Rashid spoke with her about ensuring this type of work was shared equally among the duty managers which Ms Aguirre agreed with. These matters were not referred to again until they were mentioned in the statement of problem, and even then, the statement of problem raises no claims in this regard.

[52] This does not suggest either an ongoing grievance, or that any concerns were raised about rest and meal breaks within time.

[53] In the absence of any evidence that Ms Aguirre raised this concern at all prior to the filing of the statement of problem more than 12 months after the ending of her employment, I find it more likely than not that these claims have not been validly raised.

Claim 1.4 in the Statement of Problem – that Ms Aguirre was constructively dismissed

[54] There is no indication that Ms Aguirre raised any claim with KAH about her dismissal prior to her statement of problem.

[55] Mr Lugo-Sharpe does not mention it, which is to be expected as his employment came to an end some six months prior to the ending of Ms Aguirre's own employment.

[56] There is contemporaneous email correspondence from Ms Aguirre to KAH about the ending of her employment. It is not disputed that Ms Aguirre resigned by email on 18 November 2022. Contemporaneous correspondence indicates that this was not a sudden decision by Ms Aguirre. She had first tendered her resignation on 30 June 2022, and the text of that email describes her work in a positive way. KAH did not rush to accept Ms Aguirre's resignation, but rather engaged in discussion with her about how she could be supported to stay in her employment, as shown by the subsequent agreement that Ms Aguirre take 2 months planned leave instead from September to October to visit her home country before returning to her employment. This suggests that KAH was active, responsive, and constructive, and that Ms Aguirre was a valued employee.

[57] Ms Aguirre then took the agreed leave, and following this, decided not to return to work and re-confirmed her resignation. In that second email on 18 November 2022, she again refers in positive terms to the efforts made to support her and states "I'm really sorry I know you all have made an effort waiting for me but I'm not ready to work at the moment". There is nothing to suggest that Ms Aguirre was dissatisfied with the way her employment was ending, or that she felt she could not return from her negotiated leave for reasons connected to KAH's conduct. In fact, Ms Aguirre's negotiation of a substantial amount of leave so she could travel home as an alternative to resigning suggests a willingness to maintain a good employment relationship.

[58] Neither the 30 June 2022 email nor the 18 November 2022 email can reasonably be said to raise a personal grievance claim of constructive dismissal. The first time this claim was raised was in the statement of problem dated 15 December 2023. Ms Aguirre's employment ended on 18 November 2022. This is clearly well beyond the 90-day period provided for the raising of personal grievances in s 114 of the Act.

[59] For completeness, Ms Aguirre has not raised any claim that exceptional circumstances applied, however I have considered this also. There is no evidence of any barrier to Ms Aguirre raising her claims at an earlier stage. The evidence of communications from her indicate to the contrary, that she was willing and able to raise her concerns, hold her ground and insist on a formal response rather than an informal one, and actively negotiate alternative outcomes that were objectively beneficial to her.

[60] As there is no evidence that Ms Aguirre raised her personal grievance claim of constructive dismissal within 90 days of the ending of her employment, I find that this claim cannot proceed in the Authority.

Orders

[61] The personal grievance claims set out at paragraph 1.1, 1.2, 1.3, and 1.4 of the statement of problem cannot be progressed for the reasons set out above.

[62] As these are the only claims raised by Ms Aguirre, the matter is therefore dismissed.

Costs

[63] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[64] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondent may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the applicant will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[65] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.³

Claire English
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1