Employment Court of New Zealand

Ale v Kids at Home Limited [2015] NZEmpC 209 (1 December 2015)

Last Updated: 4 December 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 209

EMPC 108/2015

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	ANNA ALE Plaintiff
AND	KIDS AT HOME LIMITED Defendant

Hearing:	14 October 2015 and by further submissions dated 20 October 2015 (Heard at Hamilton)
Appearances:	A Hope, counsel for plaintiff E Burke, counsel for defendant
Judgment:	1 December 2015

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms Ale was employed by Kids at Home as a lead visiting teacher until her dismissal in November 2013.

[2] Ms Ale contended that her dismissal was unjustified and that she had been subjected to unjustified disadvantage. She sought to pursue her claims in the Employment Relations Authority (the Authority).1 The Authority determined that aspects of her disadvantage grievance had not been raised within the 90-day timeframe for doing so. Ms Ale challenges the Authority's determination on a de

novo basis.

1 *Ale v Kids at Home Ltd* [2015] NZERA Auckland 103.

Legal framework

[3] A personal grievance may only be pursued as allowed by statute. Section

114(1) and (2) of the Employment Relations Act 2000 (the Act) provide that:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the 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.

(2) For the purposes of subsection (1), a 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.

[4] An unjustified disadvantage grievance is defined under s 103(1)(b) of the Act as a claim:

that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[5] In order to decide whether a personal grievance has been raised in time, the Court must identify the action alleged to amount to a personal grievance, when that came to the attention of the employee and when the employee raised the grievance within the meaning of s 114(2). The proviso to s 114(1) makes it clear that an employer may consent to a personal grievance being raised after the expiration of the statutory 90-day timeframe. Consent may be express or implied.

[6] Each of these issues requires an assessment of the background facts. These are distilled from the agreed documentation before the Court. Neither party called any evidence in support of their respective positions.

The facts

[7] Ms Ale was employed under an individual employment agreement which both parties signed. Clause 18 of the agreement dealt with the "Resolution of Employment Relationship Problems". It set out the procedure for dealing with employment relationship problems. Step 1 required Ms Ale to raise any problem or personal grievance with her manager in an effort to resolve it. If that did not prove possible, step 2 required her to write to her manager covering the details of her problem or grievance and the solution she sought to resolve the matter. Clause 18 made it clear that Ms Ale must raise a personal grievance with her employer within

90 days of the grievance arising or coming to her notice.

[8] Ms Ale attended a performance appraisal meeting on 2 August 2013. Ms Lovegrove (who was the managing director of Kids at Home) raised a number of concerns at the meeting. On 4 October 2013 Ms Lovegrove wrote to Ms Ale advising that a performance management process was to be put in place, and invited her to a meeting on 10 October 2013. Before the intended meeting took place, further issues arose. Ms Lovegrove wrote to Ms Ale again advising that two additional matters would need to be discussed. These related to an alleged incident involving a vehicle swap during which Ms Ale was said to have refused to provide Ms Lovegrove with a work vehicle when requested to do so, had threatened to call the Police and had shouted at her. The second related to a concern as to whether Ms Ale had satisfactorily accounted for her time. Ms Ale was advised that these matters would be discussed at the impending meeting, along with the other previously advised concerns.

[9] The meeting subsequently took place on 1 November 2013. Ms Ale was represented by her legal adviser (Mr Hope) at the meeting. It is apparent that several issues were discussed, including matters relating to the performance appraisal process. Following the meeting Ms Ale was advised in writing that she had committed serious misconduct and that Ms Lovegrove was proposing to dismiss her. Feedback on the proposed disciplinary action was sought by 6 November 2013.

[10] On 5 November 2013 an email was sent to Mr Quigan, an employment relations consultant for Kids at Home, advising that Ms Ale had resigned. It is apparent that discussions between the parties followed. The next document before the Court in chronological sequence is a further email from Mr Hope dated 12

November 2013, with the subject line: "Anna Ale - proposed settlement". It is this correspondence which is said to raise a grievance for unjustified dismissal and disadvantage. The alleged unjustified actions are specified and set out as follows:

1. An unfair investigation into allegations of misconduct; inadequate investigation, failure to provide sufficient detail of allegations, failure to receive responses and failure to give unbiased consideration to responses.

2. Jeopardising Ms Ale's teacher's registration by unilaterally and secretly contacting the Teacher's Council and withdrawing support for her re- registration.

3. Unreasonably demanding return of Ms Ale's work vehicle outside of work hours and then precipitating an incident at her house, after being asked to leave.

4. Carrying out a performance appraisal meeting in an unfair manner including failing or refusing to allow Ms Ale any input and assessing her on criteria and performance standards not previously advised and bullying and intimidating her at the meeting.

5. Demanding unreasonably and without explanation of the process, Ms Ale's

attendance at a further appraisal meeting a month after the first.

6. Unjustifiably elevating the second appraisal meeting to a performance management meeting.

[11] Ms Lovegrove wrote to Ms Ale on 20 November 2013 advising that she was being dismissed for serious misconduct, with effect from 6 November 2013.

[12] The parties attended mediation on 11 February 2014, prior to a grievance being filed with the Authority. Matters were not resolved

in that forum.

[13] On 13 February 2014 Mr Hope wrote to Ms Lovegrove, formally raising a grievance for unjustified dismissal, which had been foreshadowed in his earlier email of 12 November 2013. He went on to advise that:

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

Regarding the workload/stress issue you were aware that [Ms Ale] was carrying a heavy load with parent visits when she took up the added responsibilities of the Senior Visiting Teacher position. ... You will be aware of this as you referred to it at the disciplinary meeting on 1 November

2013. The workload issue caused her unnecessary stress.

In respect of the bullying it is [Ms Ale's] view that [Ms Lovegrove] deliberately subjected her to unnecessary pressure, covert and overt that caused her stress. This manifested itself as petty and unnecessary comments as well as the car and the performance appraisal incidents during the second half of 2013.

[14] The references to workplace stress and bullying can be put to one side. Counsel for the plaintiff confirmed during the course of argument that the only disadvantage grievances that the plaintiff wishes to pursue relate to item 5 (requiring attendance at further performance appraisal meeting) and item 6 (unwarranted elevation of performance appraisal to performance management at second meeting) identified in the 12 November 2013 email, together with a grievance relating to the performance appraisal meeting of 2 August 2013 (either as a stand-alone grievance, part of an ongoing disadvantage grievance relating to what was described as the performance appraisal process, or by way of relevant background context).

[15] Mr Quigan responded the following day to Mr Hope's correspondence of 13

February 2014 by acknowledging the raising of a personal grievance for unjustified dismissal but expressly rejecting the disadvantage grievances relating to workplace stress and workplace bullying on the basis that they were outside the 90-day timeframe for raising a grievance. Mr Quigan advised, in relation to item 4, that no date had been provided but said that it was assumed that it must relate to the 2

August 2013 performance appraisal meeting. He pointed out that the 12 November

email came later than 90 days from that date (it came 102 days after the meeting). No express objection was taken to items 5 and 6 as being out of time.

[16] A statement of problem was filed with the Authority, dated 29 May 2014. The statement of problem alleged that Ms Ale had been unjustifiably dismissed. Three separate unjustified disadvantages were alleged, including "the unfair performance appraisal process" Ms Ale had been required to undergo.2 This appears to have been the first time that the *process* was identified as giving rise to a personal grievance, rather than discrete events.

[17] The defendant filed a statement in reply. It did not raise any issues as to any of the alleged grievances being out of time.

[18] An investigation meeting was scheduled for 18 and 19 November 2014. On

10 November 2014 the defendant sought a number of directions from the Authority, and raised concerns about the relevance of some of the proposed evidence contained in witness briefs filed on behalf of the plaintiff. It was submitted that the plaintiff was seeking to introduce evidence relating to personal grievance claims outside the

90-day period, and was not entitled to do so.

[19] An amended statement of problem (dated 20 March 2015) was subsequently filed which added in a penalty claim and cited Ms Lovegrove as second respondent. It otherwise mirrored the claims contained within the original statement of problem. An amended statement in reply to the amended statement of problem was filed on 21

April 2015. The amended statement in reply substantively addressed each of the matters raised in the amended statement of problem. Again, the amended statement in reply did not raise any issues relating to whether any of the pleaded grievances

were time-barred.

2 The other two disadvantage grievances related to the manner in which Ms Ale had been required to return the work vehicle on 4 October 2013 and the "actions of the Respondent" which resulted in Ms Ale taking sick leave. Mr Hope confirmed during the course of argument that the third alleged grievance (unspecified actions of the employer resulting in Ms Ale taking sick leave) was not being pursued by the plaintiff.

[20] The Authority dealt with the application for directions in relation to the scope of the evidence as a preliminary issue. It concluded that:3

... the current issues for the Authority to investigate are the alleged unjustified 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.

Analysis

[21] The plaintiff adopted a three-pronged cascade approach to the application of s 114 in the present case, with counsel submitting that:

• The plaintiff validly raised a personal grievance in relation to items 5 and 6 in the email of 12 November 2013 and in relation to the performance appraisal process, which included the 2 August

2013 meeting as part of an ongoing grievance; but if not

• The defendant impliedly consented to the plaintiff pursuing a disadvantage grievance relating to the performance appraisal process out of time; but if not

• While the 2 August 2013 performance review meeting fell outside the 90 day timeframe, it is part of the relevant background context and can accordingly be referred to in the evidence presented at hearing.

[22] Ms Burke, counsel for the defendant, submits that the plaintiff did not raise an effective grievance in relation to the performance appraisal process generally, and that no consent was given for any such grievance to be raised out of time. It was also submitted that the 2 August 2013 meeting was a discrete event and could not reasonably be regarded as part of an ongoing grievance, and the defendant had made it very clear that a grievance in respect of the meeting had not been raised within time. While it was accepted that a personal grievance was raised in relation to item 6 of the 12 November 2013 email, a grievance had not been raised in respect of item 5

as no date was referred to.

3 At [31].

What disadvantage grievance/s were raised on 12 November 2013?

[23] As s 114 makes clear, an action alleged to amount to a personal grievance must be identified by the employee with sufficient clarity. The 12 November 2013 email specified six discrete matters alleged to have caused the plaintiff unjustified disadvantage. As Mr Quigan pointed out at the time, item 4 (performance appraisal meeting) could only have related to the 2 August 2013 performance appraisal meeting. He made it clear that the defendant considered that Ms Ale was out of time to raise an alleged disadvantage grievance in respect of this matter. This was a

proposition that Mr Hope accepted.4

[24] No issue was taken in Mr Quigan's correspondence with items 5 (demanding attendance at a further meeting) and 6 (elevating the performance appraisal process to a performance management process) as being out of time. That is not surprising. It can readily be inferred that the reference to a request for a further performance appraisal meeting referred to Ms Lovegrove's letter of 4 October 2013, which expressly refers to such a request having been made the previous day, and the same correspondence advises that attendance at a performance management meeting would be required. Both alleged grievances fell within the 90-day timeframe.

Was the 2 August 2013 performance review meeting part of a continuous cause of action and so within the 90-day timeframe?

[25] Mr Hope submitted that the way in which the 2 August 2013 meeting was conducted was part of a continuum of conduct causing disadvantage to Ms Ale, and accordingly could comprise part of a personal grievance, citing *Davis v Commissioner of Police*5 in support. There it was said that:6

As the case law establishes, particularly in relation to unjustified disadvantage grievances, the relevant evidence to be considered by the Court

4 I apprehend that this is sufficient to deal with the jurisdictional issues raised in Ms Burke's

memorandum of 20 October 2015 in respect of the extent to which matters relating to the 2 August

2013 meeting could be brought before the Court, having regard to the way in which the amended statement of claim was pleaded. Other concerns raised in the memorandum as to costs can be addressed in the context of any application for costs on this challenge.

5 *Davis v Commissioner of Police* [2013] NZEmpC 226.

6 At [47]. See also *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79, [2012] ERNZ

257 at [14]-[20].

is not necessarily confined to events in those 90 day periods. Disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct which needs to be understood to determine whether the employee has suffered an unjustified disadvantage in respect of what has happened to that period within the 90 day period. Remedies for unjustified disadvantage can, however, only relate to the grievance, that is to the events occurring within the relevant 90-day period, but the nature and scope of such remedies may need to be informed by a broader background to the events that should be compensated for.

[26] I do not read the judgment as authority for the proposition that pre-90-day events morph into in-time grievances simply because they form part of the background context. As the Court of Appeal observed in *Waikato District Health Board v Clear*, there can be no separate liability on an employer based on out of time actions or events.7 The point was also emphasised in *Coy v Commissioner of Police*

where it was held that:8

... the plaintiff is not entitled to rely upon events that occurred prior to 90 days before she raised the relevant personal grievances as independent disadvantage grievances ...

[27] The facts of the individual case will be pivotal. I agree with the observation in *Premier Events Group Ltd v Beattie*9 that an employee who alleges he or she is suffering a disadvantage is not required to raise a personal grievance every 90 days while the claim is considered by the employer or the employment institutions. Similarly, actions which may appear benign when viewed in isolation at the time, can assume a wholly different character when seen as part of an ongoing course of

conduct. Whether a personal grievance has been raised within time will be a question of fact and degree.

[28] In the present case, the 12 November 2013 email identified discrete disadvantage grievances in relation to different matters, not an alleged grievance as to the conduct of the performance appraisal process generally. Indeed the claim was not articulated in this way until a statement of problem was filed in the Authority on

29 May 2014, so well outside the statutory 90-day timeframe. I return to issues relating to consent below. Prior to 29 May 2014, the 2 August 2013 performance

appraisal meeting had been identified as a separate disadvantage grievance and the

7 *Waikato District Health Board v Clear* [2010] NZCA 305 at [31].

8 *Coy v Commissioner of Police* CC 23/07, 19 November 2007 at [6].

9 At [20].

defendant had correctly made it plain that such a grievance had been raised out of time and that it did not consent to it being pursued. I am not persuaded that, in the particular circumstances, the way in which the 2 August 2013 meeting was conducted can properly be viewed as part of an actionable ongoing course of conduct giving rise to separate liability.

[29] However, I accept that the 2 August 2013 meeting is likely to provide relevant background context at hearing, in terms of understanding events that followed and the grievances that are in issue.

Implied consent to raise a grievance out of time?

[30] Mr Hope submits that the defendant impliedly consented to the plaintiff raising a grievance in relation to the performance appraisal process generally from

15 August 2013 (namely the date 90 days prior to the 12 November 2013 email).

[31] In *Commissioner of Police v Hawkins* the Court of Appeal observed that in determining whether or not consent has been given for the purposes of s 114(1):10

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.

[32] I understood Mr Hope's submission to be based on a number of actions that the defendant willingly participated or acquiesced in. His first point was that because the defendant's then representative did not seek further details as to what issues were being referred to in the 12 November 2013 email, it could be inferred that no timing issue arose from the defendant's perspective.

[33] Ms Burke did not accept that an employer was under an obligation to seek particulars from an employee in such circumstances, and referred to *Talbot v Air New Zealand*11 in support. There it was said that: "the law has not developed to a

point that an employer is required ... to advise an employee of the steps they might

10 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [24]. See too *Phillips v Net Tel Communications* [2002] NZEmpC 138; [2002] 2 ERNZ 340 (EmpC) at [47] (consent to raising a grievance out of time may be implied by conduct).

11 *Talbot v Air New Zealand* [2015] NZEmpC 90 at [47].

take to sue them." The same principle applies in the present case. It was not incumbent on the defendant to take the initiative and make probing inquiries as to whether, and if so what, grievances Ms Ale wished to pursue against it. The responsibility to raise a grievance in compliance with s 114 rests with the employee, not the employer.

[34] It was also submitted that the defendant's apparently unconditional attendance at two mediations was reflective of implied consent. Ms Burke submitted that attendance at mediation must be viewed in context. I agree. While attendance at mediation may be taken as signifying consent to pursue a grievance out of time,

much will depend on the circumstances.12 Mediation is effectively mandatory in this

jurisdiction. This will often make it difficult for the Court to conclude with any confidence that consent has been given simply by the act of attending mediation without expressly stating that it is not to be construed as a waiver. Where, as here, there are a number of alleged grievances, some but not all of which are said to be within time, it will be difficult to conclude that attendance at mediation

signifies consent. I do not accept that the defendant's attendance at mediation can reasonably be construed as implied consent to pursue a disadvantage grievance out of time having regard to the particular circumstances.

[35] Mr Hope next submitted that the absence of any reference to the 90-day issue in the statement in reply filed with the Authority, or in subsequent communications with counsel and the Authority, was reflective of implied consent to pursue a disadvantage grievance in relation to the performance appraisal process from

15 August 2013.

[36] While, as Ms Burke pointed out, the amended statement in reply was filed after the Authority's preliminary determination had been issued (finding that various grievances had not been pursued within time), the original statement in reply was filed beforehand. Ms Burke was not acting for the defendant at the time. It is evident that the statement in reply that was filed did not raise any issues as to timeframe. The statement of problem alleged that the plaintiff was disadvantaged in

her employment by the "unfair performance appraisal process". The statement in

12 See, for example, *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 (EmpC) at 54.

reply alleged that the performance appraisal process that had been conducted was fair. No issues were raised about this alleged grievance being out of time.

[37] The plaintiff's amended statement of claim sought a declaration that the personal grievance relating to the performance appraisal process, in particular the requirement for a second appraisal and the upgrading of the performance appraisal meeting to a performance management meeting, which occurred after 15 August

2013 was raised within time. It was alleged that:

[8] On 12 November 2013, the Plaintiff through her counsel raised a personal grievance for unjustified dismissal (in the event that the preliminary decision was the final decision) and for the following disadvantages; (1) an unfair investigation, (2) jeopardising the Plaintiff's teachers registration, (3) the car swap incident, (4) *unfair performance appraisal meeting (2 August*

2013), (5) *demanding a second performance appraisal meeting without explanation* and (6) *unjustifiably elevating the second performance*

appraisal meeting to a performance management meeting. No issue was

ever taken with these raising of grievances except for item (4) above. (emphasis added)

[38] The defendant's statement of defence admitted the allegations in [8], simply noting that the grievance listed as (4) (unfair performance appraisal meeting) "did not contain a date." Ms Burke submitted that once an employer has raised an objection to a timing issue, that objection stands and cannot be undone by subsequent conduct, including (I infer) any admissions contained within a statement of defence. I do not accept this as a general proposition. The purpose of pleadings is to articulate for the opposing party and the Authority/Court what matters are in issue and the parties' respective positions on the allegations being advanced. Where an allegation is pleaded, and admitted, it is difficult to see how it does not overtake any previous objection. The pleadings reinforce the view I have already reached in relation to items 5 and 6 of the 12 November 2013 email. These were raised within time and even if they were not, the defendant consented to them being pursued out of time.

[39] Mr Hope also referred to an email of 10 November 2014 sent on behalf of the defendant to the Authority, in relation to the scope of the plaintiff's claims and advising that:

...her claim can only relate to the performance appraisal process from 15

August 2013 onwards. Incidents prior to **15 August 2013** are outside the 90 day limit.13

[40] This, Mr Hope submits, constituted implied consent to the plaintiff pursuing events relating to the performance appraisal process after 15 August. This is reinforced by the subsequent email of 14 February 2014 which took no issue with the pursuit of such a grievance. Rather the defendant raised a limited objection, with some matters isolated out as being pursued outside the 90-day timeframe (namely workplace bullying and stress) but no broader objection being raised. All of this occurred against the backdrop of a clear awareness of the statutory timeframe issue, the significance of it and prior communications relating to it.

[41] I have already found that items 5 and 6 of the email of 12 November 2013 were raised within the 90-day timeframe. As Ms Burke pointed out, these matters were the only steps in the "process" which occurred after 15 August 2013. That means that issues as to whether the defendant impliedly consented to a disadvantage grievance relating to the process from that date are largely moot. However, I accept that, when viewed objectively and in context, the defendant so conducted itself that it can reasonably be taken to have consented to a disadvantage grievance relating to the performance appraisal process from 15 August 2013 being raised out of time. No separate disadvantage grievance was raised within time in respect of the way in which the 2 August 2013 meeting was conducted and no consent was given by the defendant for any such grievance to be raised out of time.

Where to from here?

[42] Issues arise as to whether the plaintiff's claim remains in the Authority or now moves to the Court as a result of this judgment. That issue is informed by the full Court's judgment in *Abernethy v Dynea New Zealand Ltd*,14 which similarly involved a challenge to a preliminary determination of the Authority. There the

Court observed that:[15]

[13] Emphasis in original.

[14] *Abernethy v Dynea New Zealand Ltd* [2007] NZEmpC 83; [2007] ERNZ 271 (EmpC).

15 At [60].

If the employment relationship problem survives a challenge to a preliminary point, then it is for the Court to resolve it. That is because there is no power to remit the matter to the Authority and because the Authority no longer has the matter before it. We emphasise that this judgment concerns the situation where the Authority has, by a preliminary decision, disposed of the employment relationship problem which it had before it.

...

The situation is different where, for example, the Authority has determined a preliminary point in favour of a grievant and states that it will continue to investigate the substance of the employment relationship problem. Where an employer unsuccessfully challenges such a determination, the problem will still be before the Authority for resolution and there is no matter to be remitted by the Court, even if it had such a power of remission.

[43] In the present case the Authority's determination did not dispose of the employment relationship problem. Rather it had the effect of pruning it back. Contrary to Mr Hope's submissions, I do not accept that there is a requirement for the Court to proceed to deal with the plaintiff's substantive claim.

Conclusion

[44] The alleged disadvantage grievances identified as items 5 and 6 in the email of 12 November 2013 are within time. Implied consent was, in any event, given to the plaintiff raising a personal grievance in relation to the performance process from

15 August 2013. No separate disadvantage grievance was raised within time in respect of the 2 August 2013 meeting and no consent was given by the defendant for any such grievance to be raised out of time. Evidence in relation to the 2 August

2013 meeting is, however, likely to be contextually relevant to the plaintiff 's in-time claims.

[45] At the request of the parties costs are reserved. If costs cannot be agreed, the plaintiff may file and serve a memorandum and supporting material within 45 days of the date of this judgment, the defendant filing and serving a memorandum and any supporting material within a further 20 days, and anything strictly in reply within a

further 10 days.

Judgment signed at 11.30 am on 1 December 2015

Christina Inglis
Judge
