

**NOTE: This determination contains an order at paragraph [8] prohibiting publication of certain information.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 160  
3190440

BETWEEN            BDX  
                                 Applicant  
  
AND                    PZY  
                                 Respondent

Member of Authority:      Rachel Larmer

Representatives:            Adam Mapu, advocate for the Applicant  
   Chris Rowe, advocate for the Respondent

Investigation Meeting:      On the papers

Submissions Received:      20 December 2022 from the Applicant  
   25 and 26 January 2023 from the Respondent  
   7 February 2023 from the Applicant  
   21 March 2023 from the Applicant  
   23 March 2023 from the Respondent

Date of Determination:      30 March 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1]     On 21 March 2023 the Applicant applied for a non-publication order, to cover the parties' names and information that would identify them.

[2]     The Applicant said identifying him may have a detrimental impact on his ability to obtain work, because of the nature of the allegations he had made.

[3] The Applicant said that disclosing his details would not be in the public interest, it would not aid him in personally moving forward and it could result in him being retraumatized in future. He said that his privacy should take precedence over public access to information about him.

[4] The Respondent pointed out that the Applicant only sought a non-publication order after the Authority had told the parties it would be finding in the Respondent's favour on the jurisdiction issues and declining the leave application.<sup>1</sup> The Respondent said he was "*the victim here*", and he needed to clear his name, so he had not sought a non-publication order.

[5] The Authority considered that the sexual nature of the allegations, the Applicant's youth coupled with his self-disclosed mental health issues, his inability to find work, the fact that lurid information about other witnesses and individuals who are not witnesses was recorded in the transcripts of the secret recordings,<sup>2</sup> and the Applicant's stated intention to challenge this determination meant an interim non-publication order was appropriate, in order to maintain the status quo, for the time being.

[6] It was necessary to ensure that any challenge to the Authority's failure to issue a permanent non-publication order was not rendered nugatory. The interim nature of the non-publication order means it will be revisited by the Authority when it hears the substantive wage arrears claim. There should be no expectation of it continuing past then.

[7] If a challenge is filed to this determination, then the Applicant is also able to ask the Employment Court to decide whether this interim non-publication order should be made final.

[8] The Authority has therefore issued an interim non-publication order, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), that prevents publication of the parties' and witnesses' names in this matter, and information identifying them. However, this non-publication order does not apply to any information that is recorded in this preliminary jurisdiction determination, which is a matter of public record.

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<sup>1</sup> This advice was given to the parties so they would know whether they had to file evidence on the personal grievance claims when they filed their evidence for the (other) substantive claims which had been set down for an investigation meeting. This early indication was given by the Authority to save the parties' the time and costs of preparing personal grievance evidence that would not be heard by the Authority.

<sup>2</sup> Some of which has been referred to in this determination.

[9] The Authority has therefore used three randomly generated letters for the parties' names.

### **Employment Relationship Problem**

[10] The Applicant was employed as an apprentice by the Respondent from 20 August 2020 to early February 2022, under an individual employment agreement.

[11] The Respondent is an individual who operates a business under a 'trading as' name that reflects his surname and the type of business it is. The Applicant worked in the Respondent's workshop alongside the Respondent and other employees.

[12] On 19 September 2022 the Applicant lodged a Statement of Problem that identified two personal grievance claims and a wage arrears claim.<sup>3</sup> The Applicant's first personal grievance claim was that he had been unjustifiably disadvantaged in his employment, as a result of being subjected to sexual harassment by the Respondent.

[13] The Applicant alleged the unwanted sexual harassment consisted of language and/or physical behaviour of a sexual nature. These allegations were denied by the Respondent.

[14] The Applicant's second personal grievance claim was that he had been unjustifiably dismissed by the Respondent via text message on 10 February 2022. The Respondent denied that the Applicant was dismissed, and said his employment ended because he resigned in writing, and verbally, on 11 February 2022.

[15] The Respondent disputed the Authority's jurisdiction to investigate the Applicant's personal grievance claims, on the grounds they had been raised outside of the 90 day time limit required by s 114(1) of the Act.

[16] The Respondent pointed out that the Applicant had a problem resolution clause in his employment agreement, that had clearly put him on notice that personal grievance claims had to be raised with his employer within 90 days of them arising, or coming to his attention, whichever was the later.

[17] The Respondent did not consent to the Applicant raising any personal grievance claims out of time. The Applicant believed he had raised his personal grievances claims within time.

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<sup>3</sup> The wage arrears claim has been set down for a substantive investigation meeting. The Statement of Problem raised another claim, which was withdrawn at the Case Management Conference.

However, the Applicant also said that if was wrong about that, then he sought leave from the Authority to raise his two personal grievance claims out of time.

[18] This preliminary determination addressed the disputed jurisdiction issue and the leave application.

### **Authority's investigation**

[19] By agreement, the jurisdiction matter was determined 'on the papers'. Both parties filed affidavit evidence, written submissions and transcripts of secret recordings the Applicant had made of his conversations, during in person meetings with the Respondent held on 11 and 21 February 2022 and, with another (former) work colleague on 11 February 2022, as the colleague was driving the Applicant home.

### **Issues**

[20] The following issues are to be determined:

- (a) What communications are said to have raised the personal grievance claims?
- (b) When did the personal grievance claims arise, or come to the Applicant's attention?
- (c) When and how did the Applicant raise his personal grievance claims?
- (d) Did the Authority have jurisdiction over the Applicant's personal grievance claims?
- (e) If not, should the Applicant be granted leave to raise his personal grievance claims out of time?
- (f) What costs and disbursements should the successful party be awarded?

### **What communications are said to have raised the personal grievance claims?**

[21] The key evidence the Applicant relied on to show he had raised his personal grievance claims consisted of:<sup>4</sup>

- (a) A text message the Applicant sent the Respondent on 9 February 2022 that said (among other things):

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<sup>4</sup> The Authority notes the Applicant relied on all of the transcripts, so these have been considered in their entirety, but it was impractical to set all of that information out. The key parts of the transcripts have been quoted in this determination, but the Authority's decision was based on a review of all of the transcripts.

[...] I am fed up with the abuse that I cope (sic) from you as well as all the sexual harassment that you give me/all the inappropriate touching that you do to me. [...];

- (b) Parts of the transcripts he made of the secretly recorded conversations the Applicant's father had with the Respondent on 11 February 2022, namely:

Applicant's father: *Because you can't sack someone [Respondent's name] with a fucking text; [...]*

Applicant's father: *You said "bring the keys down, you're outta here". What's that? That's a fucking dismissal; [...]* and

Applicant's father: *Oh you fucking touched my son's ass enough, you know.*

- (c) Parts of the transcripts the Applicant made of the secretly recorded conversations he had with the Respondent on 21 February, namely:

Applicant: *"We both know you did a cheeky finger up the bum and stuff."*

Respondent: *"I only pinched your bum I never put my finger up your ass."*

Applicant: *"That's aw (sic) you did a couple but umm I was not phased (sic) by that."*

### **When did the personal grievance claims arise, or come to the Applicant's attention?**

#### *Alleged sexual harassment*

[22] The Applicant claimed he had been sexually harassed in his workplace by the Respondent, in some manner, on most days of his employment. He said that this sometimes happened in private and other times in view of other staff.

[23] No complaints were made by the Applicant while he was employed. The Applicant claimed that he noted down some of these incidents of alleged sexual harassment on the Notes App on his phone when they happened, and then wrote them out on his notepad later at home.

[24] The Respondent, given what he knew about the Applicant's reading and writing abilities, did not believe that he had the writing skills to have been able to have written the notes that he produced to the Authority so he (the Respondent) believed someone else must have prepared the notes the Applicant produced.

[25] The Respondent denied sexually harassing the Applicant at all. Other employees provided affidavits to the Authority confirming that they had not seen, or heard about, any incidences of alleged sexual harassment in the workplace.

*Alleged continuing course of conduct*

[26] The Applicant said the alleged sexual harassment was a continuing course of conduct throughout his employment.

[27] The Applicant said that he saw the text message he received from the Respondent on 10 February 2022 as “*revealing a complete lack of disregard for his wellbeing*”. The Applicant therefore took action by texting back that he was “*fed up with the abuse*”. The Applicant said his personal grievance for sexual harassment crystallised in his mind on that date.

*Background to 10 February 2022 texts*

[28] The Respondent said that on 8 February 2022, towards the end of the workday, the Applicant deliberately head butted a trailer that was on the hoist in the workshop. The Respondent said there was no reason for the Applicant to have done that, but that there was no visible injury to him at the time.

[29] The Respondent asked the Applicant whether he needed to go home or seek medical treatment and the Applicant declined both. The Applicant said he went to White Cross on 9 February 2022 and was advised to take five days off work, due to a concussion. The Applicant sent a text to the Respondent on 9 February 2022 to say he would not be back at work that week.

[30] The Respondent observed that the Applicant had locked up all of his tools before he left work that day, which was something he had never done before. The Respondent said that was so unusual that he took a photograph of the locked-up tools on 11 February 2022.

[31] The Respondent relied on that to support his belief that the Applicant had decided on 8 February 2022 that he would be leaving work, so his subsequent actions, and failure to return to work were taken in line with that decision he (the Applicant) had already made.

*Texts exchanged on 10 February 2022*

[32] On 10 February 2022 the Respondent replied to the text the Applicant had sent the previous day, that said he would be off work for five days. The Respondent’s reply text said

*“Sorry to hear very disappointed in your actions the last couple of weeks will be having talks when you return.”*

[33] The Applicant replied to the text from the Respondent with his text on 10 February 2022 that said: *“I’ve been very disappointed in your actions since day one. I am fed up with the abuse that I cope (sic) from you as well as all the sexual harassment that you give me/or the inappropriate touching that you do to me.”*

[34] The Respondent replied to the Applicant via another text message on 10 February 2022 that said: *“[Applicant] please return your key. You need to get some help.”* The Respondent also sent the Applicant’s father a text on 10 February 2022 and said: *“Tell [Applicant] to send back all his uniform pants and the new work boots. I have just changed the workshop locks and this will be my last text or phone call.”*

#### *Unannounced visit to workshop on 11 February 2022*

[35] The Applicant and his father made an unannounced visit to the Respondent’s workshop on 11 February 2022, which they said was to return tools. The Respondent believed the visit was done to intimidate him. When they arrived at the workplace the Applicant’s father handed the Respondent the Applicant’s written resignation. The resignation document cannot be found.

[36] Unknown to the Respondent, the Applicant secretly recorded their discussion.

[37] The Respondent claimed the Applicant’s father threatened to kill the Respondent’s father-in-law. That was disputed by the Applicant. There were also discussions about who was and wasn’t *“a paedophile”* or *“fucken predator”*, who had been to prison for interfering with whom, along with (allegedly, and therefore disputed) threats to kill.

#### *Secret recording and transcript of 11 February 2022 discussions*

[38] While at the workplace, the Applicant’s father told the Respondent that his son was resigning, and that was verbally confirmed by the Applicant. The relevant part of their discussion, as recorded in the transcript of the secret recording, said:

Applicant’s father: *If you wanna go a lawyer I’ll get a lawyer too.*

Respondent: *I’ve got one, it’s all sorted.*

Applicant’s father: *So where’s your paperwork?*

Respondent: *Why do you want to see that?*

Applicant's father: *Because you can't sack someone, [Respondent's name], with a fucking text.*

Respondent: *Who said I sacked him?*

Applicant's father: *You dumb shit, you text (sic) me last night.*

Applicant: *What did it say?*

Applicant's father: *You said "bring the keys down, you're out of here." What's that? That's a fucking dismissal.*

Respondent: *[Applicant's father's name] get moving or I'll ring the Police right now.*

Applicant's father: *Sweet as.*

Respondent: *You've been warned. You wanna go?*

Applicant's father: *Where's your fucking lawyer mate? You think it's funny mate? I think you're funny mate.*

[39] The part of the discussion on 11 February 2022 that dealt with the alleged sexual harassment and alleged threatened assault said:

Applicant's father: *Oh you fucking touched my son's arse enough, you know.*

Respondent: *Have I?*

Applicant's father: *I should drop you now.*

Respondent: *Oh give it a go mate. Give it a go.*

[40] An argument then ensued.

[41] The Applicant indicated he would be returning to the workplace the following week to work out the last two weeks of his notice period. However, the Respondent told the Applicant "*there is no job for ya (sic) here so we'll have to pay you or whatever. There's no point coming back.*"

### *Finding*

[42] The latest date the sexual harassment personal grievance could have become known to the Applicant was 10 February 2022. Therefore at the latest, the 90 day period ran from that date.

[43] The Applicant must have known from the texts that he and his father received from the Respondent on 10 February 2022 that he had been dismissed. The 90 day time limit therefore ran from that date.

**When and how did the Applicant raise his personal grievance claims?**

[44] The Applicant claimed that his text messages on 10 February 2022, and the discussions he and his father had with the Respondent on 11 February 2022, and that he and the Respondent had on 21 February 2022, were taken together sufficient to have raised his personal grievance claims within the required 90 day time limit.

*11 February 2022 transcript excerpts*

[45] According to the transcript of what was discussed on 11 February 2022, the Applicant said to the Respondent:

Applicant: *[...] You'll be happy to know I've got nothing on you as much as I ... nah what I'll say. I know I'm an anxious person, but some of the ways you treated me weren't okay. Whether or not that's me being ...[...]*

Respondent: *Can you give me an example, [Applicant's name]? Just a basic ...*

Applicant: *Your text messages. I've got multiple ones when I haven't replied to you in the space of two hours and you threatened to fire me.*

Respondent: *Oh okay. OK maybe when I was drunk probably eh?*

[46] The parties then have a discussion about the circumstances surrounding that. The Applicant also said:

Applicant: *Whether it's me being too anxious or you being abusive I don't know but I couldn't handle it here.*

[47] They have a talk about work issues and then discuss the text messages they had exchanged on 10 February 2022:

Applicant: *[...] I realised my text that I sent you is open for interpretation.*

*I didn't mean I'm going to a lawyer or anything. I just [...]*

- Respondent: *So you're going to drop all that stuff?*
- Applicant: *Of course.*
- Respondent: *So that's as far as it goes then. That's as far as it goes.*
- Applicant: *Dad is a bit of a hothead.*

[48] When he was handing back the work keys to the Respondent the Applicant asked if the Respondent was sure he did not want the Applicant to return to work out the remaining two weeks of his notice.<sup>5</sup> The Respondent said there was “*no point having you back*” because he (the Applicant) can’t “*be on tools*”, due to his injury.

[49] The Authority noted that the parties left that conversation on 11 February 2022 on what appeared to be good terms.

*21 February 2022 transcript excerpts*

[50] When the Applicant and Respondent spoke again on 21 February 2022, the transcript of the secret recording (among many other things) referred back to the discussions that had occurred on 11 February 2022 regarding the allegations the Applicant’s father had made:

- Applicant: *Between you and me I wasn't phased (sic) about all that shit.*
- Respondent: *So I don't know what it's about man, I just didn't understand that. Cos I just want to get it in writing that this.... In case it comes back ... I don't trust your old man eh.*
- Applicant: *Nah, he's ... he's a hothead. But he won't I've told him to back off.*

[51] This was a follow-on from the part of the conversation that had occurred on 11 February 2022, when the Respondent told the Applicant’s father he (the Respondent) was going to go to his lawyer over comments the father had made that day, so that there was a record made of their exchange.

[52] The 21 February 2022 transcript records a discussion about what had been said on 11 February 2022 and it went on to record the following exchange:

- Respondent: *[...] if you've got any evidence please push it forward for a case or something. Because*

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<sup>5</sup> That was based on the Applicant’s belief that he had resigned on 11 February 2022.

*when you accuse somebody of sexual harassment it's pretty fucking serious.*

Applicant: *We both knew you did the cheeky finger up the bum and stuff.*

Respondent: *I only pinched your bum but I never put my finger up your ass.*

Applicant: *That's aw (sic) you did a couple but um I was not phased (sic) by that. But you know you said be careful who you go to for advice. I had a breakdown one day talking um about the messaging and that and I said to Dad "Oh, I put up with all this" and he sort of said yeah ..and he blew it out of all proportion. It's not going further.*

#### *Applicant's advocate's letter*

[53] On 18 August 2022 the Applicant's advocate sent a letter to the Respondent. This letter alleged that the Respondent "*constantly subjected [Applicant] to sexual harassment, which [Applicant] raised in a text message to [Respondent] on 8 February 2022.*"

[54] The letter also stated that the Applicant had been unjustifiably dismissed, and that grievances had been verbally raised by the Applicant and his father with the Respondent on 11 February 2022. The letter also referred to the wage arrears claim, saying that the Applicant had not been paid for all of the hours he had worked.

#### *Finding on when grievances were raised*

[55] The 18 August 2022 letter was well outside the 90 day time limit, so that was insufficient to have raised the grievances in itself.

#### **Did the Authority have jurisdiction over the Applicant's personal grievance claims?**

[56] None of the communications the Applicant relied on had individually raised personal grievance claims.

[57] The Authority therefore had to determine whether or not the totality of the parties' communications (texts and verbal conversations) had been sufficient to have put the Respondent on notice that the Applicant had raised personal grievance claims with him, for sexual harassment and unjustified dismissal.

[58] The totality of the communications relied on had not fully or fairly put the Respondent on notice that the Applicant had an unjustified disadvantage grievance for sexual harassment

or unjustified dismissal claim. No details of the allegations that gave rise to the alleged grievances had been provided, no dates of the alleged incidents or sexual harassment had been provided, and no remedies had been sought.

[59] The Applicant's express communications gave the contrary impression, namely that there were no outstanding issues for the Respondent to address or resolve. The Applicant had made it clear on 11 February 2022, and again on 21 February 2022, that he did not intend to take the allegations his father had made on 11 February 2022 any further. The Applicant expressly told the Respondent on 21 February 2022 "*It's not going further.*"

[60] Those comments were made about the sexual harassment and unjustified dismissal allegations. That evidence fundamentally contradicted the Applicant's claim that he had verbally raised personal grievance claims with the Respondent in February 2022 that had not been resolved.

[61] The totality of the communications relied on could not have reasonably alerted the Respondent to the fact that there were personal grievance claims that he needed to address or resolve. There was insufficient information provided by the Applicant to have enabled the Respondent to have attempted to resolve the Applicant's grievances, had the Respondent wanted to do so.

[62] The text message on 10 February 2022 was a knee jerk reaction to the indication that the Respondent had some issues he wanted to discuss with the Applicant. It could be seen as an immature 'tit for tat' response, because it was a bare allegation without any details provided.

[63] Likewise, the comment by the Applicant's father about the Respondent 'touching his son's bum' was not put forward as the raising of a grievance claim, but was part of the antagonistic communications that were taking place, because the father was predominantly angry that the Respondent had dismissed his son by text message the previous day.

[64] In terms of the comments that the Applicant made on 21 February 2022, he knew the discussion was being secretly recorded while the Respondent did not. The transcript showed the Applicant said he did not want to take matters further and that he had also told his father to

“back off”. The Applicant also communicated that view (he did not want to take matters further) to his (former) colleague on 11 February 2022 while they were driving home together.<sup>6</sup>

[65] The totality of the communications between the parties did not objectively establish that the Applicant had clearly raised personal grievance claims with the Respondent in February 2022.

[66] The totality of the communications was such that the Respondent would likely reasonably have been left with the impression that, although the Applicant and his father had both made adverse comments to the Respondent and about him, by the end of their discussions the parties had resolved their issues amicably, so had left on good terms. The Applicant had made it clear that any issues were behind them, as he did not want to take any further action.

[67] It was not until the Applicant’s advocate wrote to the Respondent on 18 August 2022 that the personal grievance claims were properly raised. That was outside the 90 day time limit imposed by s 114(1) of the Act.

**Should the Authority grant the Applicant leave to raise his personal grievance claims out of time?**

[68] Because the Respondent did not consent to the personal grievances being raised out of time, the Authority did not have jurisdiction to consider them unless leave was granted to the Applicant to raise his two personal grievance claims out of time.

[69] Section 114(4) of the Act gives the Authority discretion to grant leave to an employee to raise personal grievances after the expiration of the 90 day period, if the delay in raising the personal grievance “*was occasioned by exceptional circumstances*”, and the Authority considered it just to grant leave.

[70] Time should only be extended if there are exceptional circumstances that are established by the evidence. If exceptional circumstances were established, then the Authority would need to consider the overall justice of the case. That would include assessing the pros and cons of allowing personal grievance claims to be pursued outside of the statutory timeframe.

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<sup>6</sup> During another secretly recorded conversation, that was typed up into a transcript that was provided to the Authority.

[71] Section 115 of the Act sets out a number of non-exhaustive examples of “*exceptional circumstances*” including, as per s 115(a) of the Act:

Where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the 90 day time period required by section 114(1) of the Act.

[72] Although the Applicant said in his affidavit that “[s]*exual harassment, dismissal and head injury caused me significant health problems*”, the Authority was not satisfied that the evidence established that he had been so affected or traumatised by either the sexual harassment or the dismissal that he was unable to properly consider raising the grievance within the 90 day period.

[73] The evidence provided therefore fell far short of what would be required to establish that the delay in raising the personal grievance was due to exceptional circumstances.

[74] The application for leave to raise personal grievances out of time was not made until the Applicant filed his submissions on the jurisdiction issue, on 20 December 2022. No explanation was provided for the extensive delay between the 18 August 2022 letter and the leave application being filed.

[75] There was no evidence provided that the Applicant being unable to give instructions, or consider filing proceedings, prior to 18 August 2022.

### **Summary of outcome**

[76] The Applicant did not raise his personal grievances for unjustified disadvantage (namely alleged sexual harassment) and/or unjustified dismissal until 18 August 2022, which was outside the 90 day time period required by s 114(1) of the Act.

[77] Although the Applicant made a late application for leave to raise these two grievances out of time, the Authority was not satisfied that the delay was occasioned by exceptional circumstances or that there was sufficient evidence to adequately explain his delay in raising the personal grievances or in making his leave application.

[78] Accordingly, the Authority declined the Applicant’s request for leave under s 114(4) of the Act to raise his personal grievance claims out of time. On that basis, the Authority did not have jurisdiction over either of the Applicant’s intended personal grievance claims, so they cannot proceed.

[79] The Authority did have jurisdiction over the Applicant's wage arrears claims and the query he had about whether his annual leave had been paid correctly. Those matters have already been scheduled for a substantive investigation meeting.

**What, if any, costs should be awarded?**

[80] The Respondent as the successful party is entitled to a contribution towards his actual legal costs.

[81] For the purposes of assessing costs, this matter will be dealt with as if it involved a two hour investigation meeting. The current notional daily tariff is \$4,500 for the first day of an investigation meeting, so a pro rata apportionment of the current notional daily tariff is \$1,500.

[82] Accordingly, within 28 days of the date of this determination, the Applicant is ordered to contribute \$1,500 towards the Respondent's legal costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**