

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 361
3209579

BETWEEN	MATTHEW BIDDLE Applicant
AND	IDESIGN ARCHITECTURE NZ LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Matthew Biddle in person Patrick Anderson, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	15 May 2023 from Applicant 4 May 2023 and 15 May 2023 from Respondent
Determination:	7 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Matthew Biddle was employed by iDesign Architecture NZ Limited (iDesign), his employment having commenced on 11 October 2021. In July 2022, following the publication of a newspaper article naming Mr Biddle, it came to iDesign's attention that Mr Biddle had been involved in proceedings before the Employment Relations Authority (Authority) relating to a previous employment relationship that was not listed on his curriculum vitae (CV) when applying for his role at iDesign.

[2] iDesign commenced an investigation process, and ultimately Mr Biddle was summarily dismissed from his employment on 2 August 2022. Mr Biddle claims that he was unjustifiably dismissed.

[3] A preliminary issue arises as to whether Mr Biddle raised a personal grievance as to the alleged unjustified dismissal within the 90-day period prescribed by s 114 of the Employment Relations Act 2000 (Act).

The Authority's investigation

[4] The preliminary matter subject to consideration in this determination has been, with the agreement of the parties, dealt with 'on the papers' based on documents received and written submissions.

[5] A case management conference was held on 26 April 2023 at which Mr Biddle confirmed that his position was that his grievance was raised within the 90-day period, and that he was not seeking leave to raise a grievance out of time on the basis of exceptional circumstances.

[6] As permitted by s 174E of 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.

Relevant principles

[7] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[8] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (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.

[9] There are several principles relevant to whether a personal grievance has been raised in accordance with s 114 of the Act. I summarise them as follows:¹

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517.

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more, will be insufficient.

[10] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:²

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Communications said to comprise the raising of the personal grievance

[11] Mr Biddle relies on a number of communications and events as establishing his claim that he raised a personal grievance within the statutory 90-day period. iDesign submits that Mr Biddle did not raise a personal grievance within the 90-day period and that that period expired on 31 October 2022.

[12] Prior to his dismissal, an email was sent by Mr Biddle following a meeting that took place on 28 July 2022. In that email, Mr Biddle took issue with the conduct of the meeting, and in particular issues relating to representation, asserting unfairness. Mr Biddle raised the issue, including what he alleged was a breach of good faith, in two further emails on 29 July 2022.

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [38].

[13] On 29 July 2022 iDesign wrote to Mr Biddle setting out iDesign's preliminary decision that the allegations were substantiated and amounted to serious misconduct, and that Mr Biddle should be dismissed without notice. The issue relating to the meeting of 28 July 2022 was further raised by Mr Biddle when providing a written response to iDesign's preliminary findings on 1 August 2022.

[14] In that response Mr Biddle raised procedural concerns relating to iDesign's investigation and disciplinary process and provided responses in relation to iDesign's two primary preliminary findings. The responses provided recorded Mr Biddle's disagreement with the allegations made in some reasonable level of detail.

[15] Communication of iDesign's final decision, that being to summarily dismiss Mr Biddle, was communicated via letter attached to an email from Rena Carleton, General Manager, on 2 August 2022. Mr Biddle responded, less than three hours later, as follows (without correction):

Hi Rena

I have gone through this letter and I will be raising this matter further in due course. I would like to give yourself a few more days the end of this week 5/8/22 prior to myself taking this matter further if no response is received I will proceed. Just for your reference designers don't have their full names on the plans so know on would know who has drawn the plans.

Regards

Matt Biddle

[16] On 4 August 2022 Ms Carleton provided a response to Mr Biddle's email of 2 August 2022 as follows:

Hi Matt,

Thank you for your message.

For the avoidance of doubt and without wishing to continue to debate the issue, the designers' initials are on the plans. All the regions know who the initials correspond to in practice because they call to speak with them. The designer sends the email with the plans (from their email address which states their name) and the plan has their initials on them.

That issue aside, for the reasons already advised to you, the company considers that the relationship of trust and confidence has been destroyed. The company stands by its decision, the process it undertook and the reasoning for the decision.

...

[17] Mr Biddle provided a further response the same day, as follows:

Hi Rena

Thank you for your reply. I will now lodge an application for unfair dismissal and be taking this matter further

Regards

Matt Biddle

[18] Mr Biddle submitted an application to Mediation Services on 5 August 2022. The mediation request form completed by Mr Biddle described the problem as being “unfair dismissal”, also contained references to unjustified dismissal, compensation, and reinstatement.

[19] On 5 August 2022 Mr Biddle emailed Ms Carleton asking for a reply to his email of 4 August “...around mediation”.

[20] A request for iDesign to engage in mediation was sent to Ms Carleton on 9 August 2022 by a Dispute Resolution Coordinator at Employment Mediation Services. That request was followed up on 12 August 2022, seemingly due to no response having been received. The emails contain no explicit reference to the nature of the Mr Biddle complaint or the reasons for mediation being sought.

Summary of submissions received

Mr Biddle’s submissions

[21] Mr Biddle has not sought leave based on exceptional circumstances and submits that he raised his personal grievance within the required 90-day period. Mr Biddle relies upon, in submitting that he raised the personal grievance with iDesign, a text message sent on 2 August 2022, correspondence sent on 4 August 2022, and his submitting a request for mediation on 5 August 2022.

[22] Mr Biddle also referred to Appendix Two of his individual employment agreement (IEA) which details a procedure for resolving employment relationship problems and personal grievances. He says that he referred the matter to mediation in accordance with step 6 as provided for in the IEA procedure. Mr Biddle says that steps 1-5 of the procedure were not required as an email from Ms Carlton made it clear that iDesign refused to engage in ‘further discussions’ and declined to attend mediation.

iDesign's submissions

[23] iDesign submits that a personal grievance was not raised by Mr Biddle within the relevant 90-day period. In summary, it submits that:

- (a) The email of 2 August 2022 does not identify the basis for any objection to iDesign's letter of the same date, that it merely addresses the possibility of a grievance being raised in the future, and that the language of the email as to the possible raising of a grievance in the future was expressed conditionally.
- (b) The correspondence of 4 August 2022, whilst mentioning "unfair dismissal", merely referred to the statutory type of grievance and was insufficient. Additionally, the letter of 4 August 2022 was directed at the possible raising of a grievance in the future and did not raise a grievance at that time.
- (c) On 9 August 2022 iDesign declined a request that had been made for it to attend mediation by Mr Biddle. It says it was not obligated to attend, did not attend because no personal grievance had been raised, that it was not supplied a copy of the mediation request form, and nor was it provided any of any of the details contained therein. Additionally, iDesign says that Mr Biddle did not raise an issue of grievance with steps 1 to 5 if the procedure in the IEA.

[24] iDesign also submit that a grievance was not raised when considering the totality of the correspondence given that the substance of Mr Biddle's complaint was not conveyed, no grounds for his claims were articulated, and Mr Biddle did not indicate how he wanted any grievance to be remedied.

Analysis and discussion

[25] To determine this matter, I first need to consider, when taken in isolation, any of the relevant communications raised a personal grievance. If not, I then need to consider whether a personal grievance was raised having regard to the 'totality of the communications'.

[26] Mr Biddle's email of 2 August 2022, albeit suggesting he raises the point "just for reference", alludes to a disagreement or contention as to the names of designers not appearing on design plans. That reference, which was responded to by Ms Carleton in her email of 4 August 2022, suggests some disagreement as to an assertion made in iDesign's letter confirming the dismissal, the issue having been raised in Mr Biddle's

response to iDesign's preliminary decision made that Mr Biddle's action had brought, or had the potential to bring, iDesign into disrepute.

[27] Whilst the email of 2 August 2022 contained some content reflecting disagreement, and to the extent anything is said by Mr Biddle as to the substance of his concerns (or grievance), the email of 2 August 2022 speaks only to the possibility of the matter, the substance of the matter being unclear, being raised in the future. However, I do note that the email, at least implicitly, seeks a response from iDesign. I find that the email of 2 August 2022 did not raise a personal grievance, and instead that it indicated a personal grievance may be raised in the future.

[28] What is clear is that, at least after having sent a further email on 4 August 2022, Mr Biddle had raised issue with an assertion made by iDesign as to the design plans, and more broadly as to the fairness of the dismissal. In terms of asserted unfairness, Mr Biddle did not elaborate on the reasons in his email of 4 August 2022. However, what he did do was inform iDesign that he was going to lodge an application for 'unfair' dismissal and that he would be taking the matter further.

[29] Mr Biddle's email of 4 August 2022 referred to the future lodgement of an application and 'taking the matter further'. I do not consider the reference to the future lodgement of an application means that Mr Biddle was not raising a personal grievance. Indeed, suggesting that an application would be lodged in the future, viewed objectively having regard to the context, indicates that a grievance had been raised, or at least that Mr Biddle thought it had, and that further action would be taken to progress it.

[30] I consider that at that time, having sent the email of 4 August 2022, Mr Biddle had taken reasonable steps to make iDesign aware that he had a personal grievance that he wanted it to address. I consider it sufficient that Mr Biddle had recorded, in the email of 2 August 2022, that he disagreed with at least one factual finding relevant to the dismissal. Further, Mr Biddle had raised issue, including on 28 July 2022 prior to the dismissal, with the procedural steps taken by iDesign during its investigation. Additionally, by indicating an application would be made for 'unfair' dismissal, I consider iDesign were on notice that Mr Biddle considered he had been unjustifiably dismissed and wanted iDesign to address his concerns that the dismissal was unfair.

[31] I consider it appropriate to record that, as of 4 August 2022, iDesign were in effect taking steps, in response to correspondence received from Mr Biddle, to defend

the steps it had taken when dismissing Mr Biddle. That included, the following statement made in Ms Carleton's email of 4 August 2022 made in response to Mr Biddle's 2 August 2022 email defending the dismissal on both substantive and procedural grounds:

...
That issue aside, for the reasons already advised to you, the company considers that the relationship of trust and confidence has been destroyed. The company stands by its decision, the process it undertook and the reasoning for the decision.

[32] Whilst the above response does not mean that a personal grievance had been raised at the time of the response having been sent, noting the prospective nature of Mr Biddle's earlier email, it does in my view evidence an understanding that Mr Biddle was taking issue with the dismissal. I consider that relevant to the later communications and Mr Biddle's 4 August 2022 assertion he had been unfairly dismissed,

[33] I also find when considering steps taken by Mr Biddle in applying for mediation and having regard to the timing of that application and the earlier communications, that a personal grievance was raised for the purposes of s 114(2) of the Act.

[34] I accept that the content of the application for mediation, somewhat curiously, was not provided to iDesign at the relevant time. However, the fact that mediation was requested, albeit the notification provided did not particularise Mr Biddle's claims, was clearly known to iDesign. iDesign were on notice that Mr Biddle considered his dismissal unfair, that he held concerns as to both the substantive findings made against him and with the procedure followed, and that he had submitted an application for mediation confirming that he wanted iDesign to address his grievance. I find that, having considered the totality of the communications, Mr Biddle raised a personal grievance for unjustified dismissal within the statutory 90-day period.

[35] For the purposes of s 114(2) of the Act, I record that I am also satisfied that Mr Biddle took reasonable steps to make iDesign aware that he alleged a personal grievance that he wanted iDesign to address. In the context of his earlier communications and having regard to the procedure for resolving employment relationship problems and personal grievances contained in the IEA, Mr Biddle took reasonable steps to make iDesign aware that he had a personal grievance he wanted it to address.

[36] Step 6 of the IEA procedure provides that an employee may file their personal grievance with Mediation Services. Whilst the procedure contains other steps, some of which are clearly alternatives to other steps rather than simply being sequential, I do not consider that determinative. Mr Biddle, broadly speaking, took steps that were consistent with the procedure contained in the IEA. He did so by communicating his dissatisfaction with the decision to dismiss, raising issues as to concerns with the procedure followed, communicating that he considered iDesign's actions gave rise to an 'unfair' dismissal claim, lodging a request for mediation, and following up iDesign as to whether it would attend mediation.

[37] Mr Biddle's communications all occurred in a context whereby iDesign advised that it stood by its decision, implying that it had considered the matter in light of Mr Biddle's 2 August 2022 email, as to both the process followed and its reasoning. Further, the context was such that iDesign were aware in some significant detail that Mr Biddle disagreed with its findings in relation to the allegations made, albeit that those more detailed responses from Mr Biddle were received prior to the dismissal.

[38] In conclusion, I find that, viewed objectively, Mr Biddle raised a personal grievance of unjustified dismissal based on the totality of his communications with iDesign.

Conclusion

[39] I find that Mr Biddle validly raised a personal grievance in terms of s 103(1)(c) of the Act within the 90-day period in compliance with s 114(1) of the Act.

[40] A further case management conference will be scheduled to discuss arrangements relating to the Authority's investigation of Mr Biddle's claims.

Costs

[41] Costs are reserved pending consideration of Mr Biddle's claim of unjustified dismissal.

Rowan Anderson
Member of the Employment Relations Authority