

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 291
3011632

BETWEEN WENDY BRENNAN
 Applicant

AND EARLY EDUCATION WAIKATO
 LIMITED
 Respondent

Member of Authority: TG Tetitaha

Representatives: A Halse, for Applicant
 S Grice, for Respondent

Investigation Meeting: ‘On the papers’

Submissions received: 7 August 2017 from Applicant
 10 August 2017 from Respondent

Determination: 21 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. The personal grievance of “failure to act as a fair and reasonable employee and conduct an appropriate investigation into numerous complaints and concerns laid by the applicant regarding workplace bullying” is dismissed pursuant to s114(1) of the Employment Relations Act 2000.**
- B. The issue for hearing is whether Ms Brennan was unjustifiably disadvantaged in her employment by EEWL’s actions from 14 April to 4 July 2016 including instituting a disciplinary process resulting in a warning and performance improvement plans.**
- C. Ms Brennan is directed to file an amended statement of problem by 4 October 2017 3 pm. Costs are reserved.**

Employment relationship problem

[1] Wendy Brennan alleges she was unjustifiably disadvantaged by various actions of her employer Early Education Waikato Limited (EEWL). A preliminary issue has arisen about whether she raised the personal grievances in her statement of problem with her employer within the statutory time limitation of 90 days.

Relevant Facts

[2] Ms Brennan was employed as the Centre Manager of EEWL childcare business in Hamilton.

[3] Tensions developed between Ms Brennan and her colleagues. Some colleagues complained about Ms Brennan in 2015. These were discussed with Ms Brennan by a manager. Ms Brennan complained about her colleagues' behaviour to her manager MR in January and February 2016.

[4] On 9 March 2016 EEWL held a meeting with Ms Brennan and her colleagues. EEWL recommended further facilitated meetings with her work colleagues to improve their relationships. Ms Brennan sent a note to MS stating the meeting would be ineffective.

[5] Meetings were held on 17 March and 7 April. Colleagues complained about Ms Brennan's behaviour at all of the meetings. Ms Brennan complained about her colleagues.

[6] In May 2016 EEWL became concerned about Ms Brennan's behaviour and how it was impacting upon her role. It asked her to meet with her manager MS to discuss concerns about her performance. MS, Ms Brennan and her representative met on 20 May.

[7] MS wrote to Ms Brennan on 27 May. She advised a preliminary decision to issue a final written warning had been made. Further correspondence was exchanged between the parties.

[8] On 12 July 2016 Ms Brennan raised through her representative Culturesafe NZ a personal grievance of unjustified disadvantage about the disciplinary process. She alleged bullying by MS prior and through the disciplinary process.

[9] EEWL engaged an independent investigator KA to investigate the bullying allegations. He reported to the parties on 2 February 2017. He concluded Ms Brennan had not been bullied by MS. However he went on to make remarks about the final warning stating it was "procedurally flawed" and if challenged, risked a determination against EEWL.

[10] On 13 February 2017 EEWL forwarded a copy of KA's report by email to Culturesafe NZ. The cover letter accepted the final written warning should not have been issued on 7 July 2016 and that it was rescinded.

[11] On 3 March 2017 Culturesafe NZ replied criticising KA's report. It requested an apology, compensation for hurt and humiliation and the costs involved in having the warning rescinded. The letter concluded by stating:

You are reminded that a personal grievance remains live at present in respect to the unjustified disciplinary process as an unjustified disadvantage.

[12] A written apology for the warning was made to Ms Brennan on 3 May 2017.

[13] Ms Brennan remained dissatisfied with this action. An undated statement of problem was filed on 29 May 2017 alleging she was unjustifiably disadvantaged by various actions of the respondent employer including:

- (a) Failure to act as a fair and reasonable employer and conduct an appropriate investigation into numerous complaints and concerns laid by the applicant regarding workplace bullying;
- (b) Placing the applicant on an unjustified and unwarranted performance management plans while dismissing the presence of bullying and inappropriate behaviour on part of her co-workers; and
- (c) Failing to provide a safe workplace as they were obligated to under the Employment Relations Act 2000 and Health and Safety at Work Act 2015.

[14] The parties are currently before the Authority to determine whether to strike out those claims due to the late raising of personal grievances.

Law

[15] Employees are required to raise their personal grievances within 90 days of the action alleged to amount to a grievance occurred or came to the notice of the employee.¹

[16] The Authority, after giving the employer an opportunity to be heard, may grant leave if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so (s114(4)).

¹ Section 114(1) Employment Relations Act 2000.

What date was a personal grievance raised?

[17] The majority of correspondence from Ms Brennan's representative, Culturesafe NZ about her matters does not raise any grievance. For example a letter from Culturesafe NZ dated 24 June 2016 alleging "... *Wendy would have a case for lodging a personal grievance for unjustified disadvantage should you proceed with your stated disciplinary process*". Whilst critical of EEWL's actions it does not explicitly raise a grievance. Rather it hints that Ms Brennan may do so in future.

[18] It is not until a letter from Culturesafe NZ dated 4 July 2016 (received by the EEWL on 12 July) that a personal grievance of unjustified disadvantage was raised.

[19] If the grievance was raised on 12 July 2016, it can only cover those events that took place 90 days prior to that date i.e. from 14 April 2016 onwards unless leave is granted to raise a grievance out of time. No application for leave has been filed despite opportunity to do so being given (see paragraph [23] below).

Has a personal grievance been raised within time and for what?

[20] The statement of problem refers to a personal grievance of "failure to act as a fair and reasonable employee and conduct an appropriate investigation into numerous complaints and concerns laid by the applicant regarding workplace bullying". The statement of problem in paragraphs 2.34 to 2.36 states the failure to investigate arose because Ms Brennan complained about bullying by colleagues in February and mid-March 2016. The last date for raising a personal grievance about the lack of investigation of her bullying complaint would have been 19 June 2016. She raised the personal grievance on 12 July 2016. No application for leave has been filed to raise this grievance outside of the 90 day time limitation.

[21] Therefore the personal grievance of "failure to act as a fair and reasonable employee and conduct an appropriate investigation into numerous complaints and concerns laid by the applicant regarding workplace bullying" is struck out because there is no jurisdiction to hear that cause of action.

[22] The bullying was investigated by KA and a report provided to the applicants advocate on 12 February 2017. KA found there was no bullying. Culturesafe NZ sent a letter dated 3 March 2017 criticising KA's report. Unfortunately it does not raise any grievance about KA's report. Instead the letter confines any personal grievance to the disciplinary process that occurred in May 2016 (see paragraph [11] above). The last day for raising a grievance about

KA's investigation report was 90 days after its receipt by Culturesafe NZ being 13 May 2017. The statement of problem at paragraphs 2.27 to 2.29 sets out a critique of KA's report. This information is largely irrelevant because it does not relate to any personal grievance before me. It should be deleted.

[23] Ms Brennan was given an opportunity to make submissions, file evidence and to seek leave to raise her personal grievances outside of the 90 day time limitation. Culturesafe NZ filed a one line email on 7 August 2017 alleging "ongoing bullying" and made unsubstantiated allegations against opposing Counsel. That reply was unhelpful. It was also disrespectful and discourteous to another representative. Lawyers are required by their professional rules of conduct to treat other lawyers with respect and courtesy.² The Authority expects similar courtesy to be shown by non-legally qualified representatives and has issued a Practice Note to this effect for all representatives appearing. The Registry shall be providing the parties with a copy of the "Conduct of Representatives in the Employment Relations Authority" Practice Note. I expect compliance with that Practice Note throughout this investigation.

[24] Unsurprisingly, the above email did not advance Ms Brennan's case at all. A further opportunity was offered to her to seek leave to file further submissions and evidence. Culturesafe NZ declined to do so on her behalf.

Disciplinary Process

[25] The only personal grievance that falls within the 90 day time limitation are the events in April/May 2016 largely pertaining to the disciplinary process.

[26] The statement of problem at paragraph 1 frames the personal grievances as being about bullying, the failures of the employer to rectify this and consequentially the unsafe workplace created (see paragraph [13] above).

[27] Ms Brennan is not required to prove bullying occurred at all. The legal test is whether Ms Brennan's employment has been affected to her disadvantage by some unjustifiable action by EEWL. It is accepted EEWL subjected Ms Brennan to a disciplinary process resulting in a warning and performance improvement plan. EEWL accepts a personal grievance was raised within time about the disciplinary process leading to the warning. At law the onus is upon EEWL to prove those actions were justified. There is no onus upon Ms Brennan to prove anything.

² Rule 10.1 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[28] I am also concerned that central procedural flaws are omitted from the statement of problem. One procedural flaw highlighted in KA's report was the failure to follow the "Disciplinary Procedures" in clause 30 of Ms Brennan's employment agreement. This would be a critical failure if proven. This is absent from the statement of problem.

[29] The statement of problem also fails to identify that the final warning was withdrawn, Ms Brennan asked for and was given the remedy of an apology and she remains employed by EEWL. The basis to claim compensatory damages of \$10,000 in these circumstances is also absent from the statement of problem.

Remedies

[30] The application for penalties for breaches of good faith raises a separate time limitation problem of its own. There is a statutory time limitation of 12 months to file proceedings in the Authority seeking penalties that starts from when the cause of action first became known to the applicant.³ The statement of problem seeks a penalty of \$10,000. All of the breaches of good faith described in paragraph 3.5 were known to Ms Brennan by 27 May 2016. She filed her proceedings on 29 May 2017. This is outside of the time limitation period. There may be a basis to strike those causes of action out.

[31] Interest is sought. Interest does not normally accrue on penalties or compensation awards. There is no stated basis for any award of interest in these circumstances. This remedy should be withdrawn.

[32] Given I have now struck out one personal grievance and am seeking clarity about the remaining grievances, Ms Brennan is directed to file an amended statement of problem by **4 October 2017 3 pm**.

[33] Costs are reserved.

TG Tetitaha
Member of the Employment Relations Authority

³ Section 135(5) Employment Relations Act 2000.