**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

[2011] NZERA Wellington 166
5322986

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| | BETWEEN | GWEN BROCKLEHURST<br>Applicant |
| | AND | KBM MACHINE MAINTENANCE LIMITED<br>Respondent |

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| Member of Authority: | R A Monaghan |
| Representatives: | D Oliver, advocate for applicant<br>K Bignold, advocate for respondent |
| Investigation Meeting: | 8 September 2011 at Napier |
| Submissions received: | 9 September 2011 from applicant<br>14 September 2011 from respondent |
| Determination: | 1 November 2011 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Gwen Brocklehurst says her former employer, KBM Machine Maintenance Limited (KBM):

(i) breached the employment agreement by unilaterally removing certain of her duties in October 2009;

(ii) breached s 4 of the Employment Relationship Act 2000 by failing to consult with her about the change in duties, for which a penalty is sought under s 4A of the Employment Relations Act 2000;

(iii) affected her employment to her disadvantage by its unjustifiable action in removing the duties, so that she has a personal grievance on that ground; and

(iv) dismissed her constructively and unjustifiably when she resigned in January 2010.

[2] KBM says the two personal grievances identified at (iii) and (iv) above were raised outside the 90-day time period specified in s 114(1) of the Act, and it does not consent to their being raised out of time.

[3] Mrs Brocklehurst seeks leave under s 114 (3) and (4) to raise her grievances out of time on the ground that exceptional circumstances existed and it is just that leave be granted. Regarding the existence of exceptional circumstances she relies on s 115, which reads in part:

> *For the purposes of s 114(4)(a) exceptional circumstances include –*
>
> *(a) ..*
> *(b) Where the employee has made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time;*

[4] This determination addresses whether leave should be granted to raise the two personal grievances.

[5] As may be inevitable in an application based on s 115(b), for the purposes of the present application privilege has been waived in respect of material that might otherwise have been considered inadmissible as evidence.

**Background**

1. A disadvantage grievance is raised with KBM

[6] Mrs Brocklehurst began her employment with KBM in or about March 2008 in the position of preventative maintenance co-ordinator. Her oral evidence was that the position was part time initially. In or about July 2008 she moved to the full time position of technician co-ordinator. Her hours of work were 40 per week, and her rate of pay was $19 per hour.

[7] A series of incidents commencing in October 2009 and culminating on 12 November 2009 caused Mrs Brocklehurst to approach Gary Tayler Limited for advice. She spoke to Adrian Tayler. Mr Tayler suggested she set out her account of events in writing, which she did.

[8] The account recorded events from 16 – 20 October, including a meeting of 19 October at which Mrs Brocklehurst said she was told she would be moved from the technician co-ordinator position back to the preventative maintenance position. According to the account KBM's managing director, Kevin Bignold, told her:

> *… I was no good at my job, that I was partly to blame for the company not making money and that they were going to move me back to running the PM department which is similar but more administrative than the tech coordinator role…*
>
> *At this stage I stressed to him that this had turned into an appraisal and that if I was that bad at my job he should have brought it to my attention before now. …*
>
> *I then stated that if I was no good at my job that I would leave. KB then said that they did not want me to leave because I was good at my job, committed and had shown continued loyalty to the company!*
>
> *I advised I would take 24 hours to think things over and stipulated again that if I did decide to leave I wanted to do it on good terms with no hard feelings or bad blood.*

[9] The account recorded a further discussion the next day. Mrs Brocklehurst told Mr Bignold that she felt she had nothing more to offer KBM, but indicated she would continue to report for work and would not leave until an immigration matter affecting her had been finalised. She expected the relevant process would be completed in 6 weeks. There was a further conversation during which Mr Bignold urged her to stay.

[10] The account further recorded that in late October and early November KBM had difficulties with its computer system, culminating with a loss of data. The circumstances were such that the Police were called in to investigate the actions of a former employee suspected of being the culprit. In the course of the investigation a police officer interviewed Mrs Brocklehurst on 12 November 2009.

[11] Mrs Brocklehurst was very upset by this interview and detailed the matter in her account. The associated allegations of fact were concerned with the police officer's conduct of the interview, and were not otherwise directly concerned with any action of KBM's. Mrs Brocklehurst ended the account by saying:

> *I have been left feeling that I can no longer work at KBM. My good name, character and work ethics have been sullied. Unfortunately KBM feel that due to my Immigration status that I have no course of redress or representation and as such have made me feel victimised, singled out and bullied.*

[12] Because of her upset, Mrs Brocklehurst began a period of sick leave. She did not return to work.

[13] Mr Tayler prepared a letter dated 18 November 2009 raising Mrs Brocklehurst's grievance. The letter referred only to the concern about the interview with the police officer and set out Mrs Brocklehurst's view of those facts. The grievance was that KBM (through the police officer) had failed to follow the law regarding investigation procedures and employees' rights, was trial by ambush and was unjustified.

[14] The parties attended mediation in early December 2009 but were unable to resolve the matter. Mrs Brocklehurst's personal grievance was lodged as an employment relationship problem in the Authority on 14 December 2009. It is plain from the statement of problem and the letter of grievance that the actions of the police officer were being treated as the actions of the employer for the purposes of the grievance, although at the time no legal basis for such an approach was identified.

[15] Mrs Brocklehurst's immigration matter was determined in or about December 2009. In a message from her advocate dated 11 January 2010 Mrs Brocklehurst advised that she was giving two weeks' notice of the termination of her employment

[16] The circumstances of the resignation were not incorporated in the statement of problem by way of amendment to it, and no additional personal grievance was raised in respect of the resignation.

[17] The employment relationship problem as lodged in December 2009, together with a claim for a penalty in respect of deductions from wages added by way of amendment to the statement of problem, was the subject of an investigation meeting in the Authority on 23 March 2011.

[18] The Authority said the issue arising in respect of the grievance was whether KBM was liable for the actions of a police officer investigating a criminal matter at KBM's request. It found there was no such liability and that there was no disadvantage grievance. Its determination was issued as *Brocklehurst v KBM Machine Maintenance Limited* 12 April 2010, WA 62/10.

2. Mrs Brocklehurst refers to her additional concerns

[19] By email message to Mrs Brocklehurst dated 2 February 2010 Mr Tayler advised he had encountered the presiding Authority member in another matter earlier that day. The member indicated Mrs Brocklehurst's personal grievance was likely to be unsuccessful. Mr Tayler sought Mrs Brocklehurst's instructions.

[20] In a further series of exchanges Mrs Brocklehurst asked why she would lose, and whether the Authority would take into account the events of October 2009. Mr Tayler advised that he disagreed with the view that the employer was not responsible for the conduct of the police, and said that the single act of breach concerned the police treatment of her. He believed the Authority would not consider the additional events to be relevant. Mrs Brocklehurst was persistent in saying she wanted to push the circumstances leading up to the police incident and KBM's treatment of her in October. Mr Tayler repeated that the Authority would probably not be interested in those events and reinforced the advice that her case was solely concerned with the employer's liability for the conduct of the police officer.

[21] In a message to Mr Tayler dated 11 February 2010 Mrs Brocklehurst said she would have resigned after her treatment in October, and that the events of 12 November were the final straw but not her main reason for seeking advice.

[22] On or about 11 February 2010 the principal of Gary Tayler Limited, Gary Tayler, took over as Mrs Brocklehurst's advocate. He advised Mrs Brocklehurst by message dated 12 February 2010 that the only relevant issue for the claim as filed was the employer's behaviour when the police officer came into the workplace, and the way in which Mrs Brocklehurst was interviewed.

[23] Mrs Brocklehurst met with Gary Taylor on 17 February to discuss the statements of evidence which were due to be filed in the Authority. Mrs Brocklehurst said in evidence at this investigation meeting that the discussion centred on the nature of the claim regarding the police officer's conduct, and an explanation of what 'vicarious liability' was.

[24] Mr Tayler detailed the advice he said he had given, setting out in an affidavit 11 bullet points which in essence amounted to reasons why Mrs Brocklehurst would be unlikely to succeed in a further personal grievance claim in respect of the October events. Even if that advice was given it did not identify the possibility of a grievance alleging constructive and unjustified dismissal, or assess the strengths and weaknesses of such a grievance.

[25] Further, the first bullet point referred to the fact of such a grievance being out of time, and asserted that Mrs Brocklehurst had 'done nothing about it'. I do not agree. Mrs Brocklehurst had sought advice and acted on the advice she received. The advice had not identified the possibility of such a grievance. There was nothing on which she could fail to act.

[26] I consider it unlikely that Mr Tayler engaged on 17 February in a discussion about the possibility of a disadvantage grievance in respect of the October events, and that he went on to explain why such a grievance would be unlikely to succeed, in the manner indicated by the affidavit. There was no supporting written record. Moreover the occurrence of such a discussion is inconsistent with the content of the emailed exchanges up to that date, which focussed attention on the claim in respect of the police officer's conduct, as well as exchanges after the Authority had issued its determination in April.

[27] In the post-determination exchanges Mrs Brocklehurst raised her concerns again, saying in a message dated 19 April that her questions still had not been answered. The questions were whether she had a legitimate claim other than in respect of the police officer's actions, or whether she had no claim at all. Mr Tayler could have reminded her of advice given on 17 February – if such advice was given – but instead he said she had no claim. When Mrs Brocklehurst replied listing her concerns again, he emphasised that no grievance had been raised and time limit had now expired. When she continued to persist and asked again whether the claims were legitimate, Mr Tayler advised, 'no not really'.

[28] Mrs Brocklehurst subsequently obtained alternative advice, which led to the raising of the present grievances in a letter dated 30 July 2010, and the filing of the present statement of problem.

[29] In the intervening period Gary Tayler Limited and Mrs Brocklehurst were engaged in proceedings in the Disputes Tribunal, the substance of which concerned the way in which Gary Tayler Limited had advised Mrs Brocklehurst[1]. The matter continued into the District Court on an appeal which was unsuccessful.[2]

**Whether exceptional circumstances existed**

[30] Two elements of s 115(b) must be satisfied in order for the circumstances to amount to 'exceptional circumstances'. They are whether:

> (i) the employee has made reasonable arrangements to have a grievance raised by the agent; and
> (ii) the agent has failed unreasonably to ensure that the grievance was raised in the required time.

1. Failure of agent to ensure grievance raised in time

[31] In *Melville v Air New Zealand Limited*[3] the Court of Appeal declined leave to appeal against a judgment of the Employment Court[4] which addressed the requirements of s 115(b). The court of appeal agreed there were two elements in s 115(b), and commented on the correctness of the Employment Court's findings in respect of the second element.

[32] The second element was addressed first in *Melville* because it was considered straightforward. I take the same approach here.

[33] I have no hesitation in finding the advice to proceed solely on the basis that the employer was responsible for the actions of the police officer in the circumstances set out in Mrs Brocklehurst's November account was misconceived, and a wrong application of the doctrine of vicarious liability. Mrs Brocklehurst's account of the facts did not suggest any legal basis for singling out the police officer's actions at the interview and seeking to proceed against KBM as Adrian Tayler sought to.

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[1] *Gary Tayler Limited v Gwen Brocklehurst* NAP CIV 2010-041-000256
[2] *Gary Tayler Limited v Gwen Brocklehurst* DC NAP CIV 2010-041-000391
[3] [2010] NZCA 563
[4] *Melville v Air New Zealand Ltd* [2010] NZEmpC 87

[34] On the other hand the overall circumstances to which Mrs Brocklehurst referred in the account, particularly the circumstances of the change of duties in October and her feelings about whether she could continue in KBM's employ, were capable on their face of providing the basis for a personal grievance on the ground of unjustified disadvantage of the kind she now seeks to raise.

[35] On the most favourable view of their approach, Adrian Tayler and later Gary Tayler may have believed that such a grievance had so little chance of success that they did not raise even the possibility of it with Mrs Brocklehurst. Even so Adrian Tayler at the outset - and later Gary Tayler - should have identified the possible claims arising out of the account of the facts which Mrs Brocklehurst had provided, and sought more information from her if necessary to clarify or confirm their advice. They should have provided Mrs Brocklehurst with an assessment of the strengths and weaknesses of the possible claims suggested by the account, and given an overall assessment of the chances of success. The assessment should have included the best-case and worst-case financial outcomes with reference to the remedies available, including consideration of the effect of any liability for costs.

[36] Even if the assessment was that a disadvantage grievance in respect of the change of duties in October had little chance of success, or raising such a grievance was not warranted by the remedies likely to be achieved, those matters should have been discussed with Mrs Brocklehurst. Having been given the opportunity to make an informed decision, Mrs Brocklehurst would then have been in a position to instruct Mr Tayler on whether or not to proceed.

[37] The failure to properly address the range of claims that could be available to Mrs Brocklehurst was aggravated when, during the exchanges in February 2010, Mrs Brocklehurst made it clear the additional concerns in the November account were important to her.

[38] By then a disadvantage grievance in respect of the October 2009 concerns would indeed have been out of time. Even so, when Mrs Brocklehurst made it clear she had concerns beyond her treatment at the hands of the police officer, an opportunity to provide her with the advice not given in November 2009 should have been taken.

[39] An application for leave to raise a grievance out of time would have been necessary, and could have been made at the time had Mrs Brocklehurst so instructed. I do not characterise her repeated attempts to refer to her additional concerns as a failure to make suitable arrangements to have her grievance raised. Instead her approaches were blocked and she was repeatedly assured that her case concerned the employer's liability for the police officer's actions. She cannot be expected to instruct her representative to proceed with a cause of action of whose existence she is unaware, and in respect of which she has received no advice.

[40] By February, too, Mrs Brocklehurst had resigned. She had already advised in her November account that she felt the actions of her employer were such that she could no longer continue in its employ. Her wish to complete the immigration matter she was addressing, and even her avowed wish to leave her employment on good terms, might be relevant to the strength of any allegation of unjustified constructive dismissal but was not a reason to pass over entirely the possibility of raising a grievance on that ground.

[41] A personal grievance in respect of the resignation would have been raised in time if it were raised in February when Mrs Brocklehurst was voicing her concerns and seeking further advice. She received no advice at all on the possibility of a constructive and unjustified dismissal grievance.

[42] Accordingly I find Mrs Brocklehurst's agent Adrian Tayler failed unreasonably to ensure Mrs Brocklehurst's disadvantage grievance in respect of the change in her duties was raised in the required time by failing to advise Mrs Brocklehurst of at least the possibility of raising such a grievance when he should have. If he assessed the likelihood of success as slight, he should have said so.

[43] I find further that, although Mrs Brocklehurst's agent Gary Tayler did not address the disadvantage grievance as he should have, by the time he was apprised of the matter the grievance was already out of time. In the present context his actions are not the cause of the failure to raise the grievance in time.

[44] I do, however, find Gary Tayler failed unreasonably to raise the constructive and unjustified dismissal grievance in time by failing to act on the information that

had been made available to Adrian Tayler as well as Mrs Brocklehurst's reiteration of her concerns in February, and failing to advise Mrs Brocklehurst about the possibility of such a grievance. Again, if he assessed the likelihood of success as slight, he should have said so. He compounded the failures by effectively affirming the advice already received from Adrian Tayler and pursuing the misconceived grievance based on the actions of the police officer.

2. Employee's failure to make reasonable arrangements to have grievance raised

[45] The issue in the application for leave to appeal in *Melville* concerned whether, in order to make 'reasonable arrangements' to have a grievance raised, an employee must give express instructions to that effect to the agent. The Court of Appeal said:

> *[27] If the Judge is to be taken as saying … that there must always be an express instruction by the claimant to the agent to bring a timeous claim, then we could not accept that as a matter of law. … In the words of the provision the employee has to make 'reasonable arrangements' to have the particular grievance raised on his or her behalf.*

[46] In *Melville* and another decision of the Employment Court referred to in *Melville* – namely *McMillan v Waikanae Holdings Ltd (t/as McCannics)*[5] – the courts found the grievants had not made reasonable arrangements to have their grievances raised with their respective employers. The grievants had discussed their concerns with their representatives and obtained advice, but despite being fixed with knowledge of the 90 day time limit they failed to ensure that the representatives proceeded to raise the grievances within the required time. Inaction both on their part and on the part of their respective agents meant the 90 day period passed without the grievances being raised.

[47] In neither of those two cases had the matters of concern to the grievant been treated as background, rather they were recognised as being the foundation for a possible grievance and addressed directly. Here Mrs Brocklehurst did not expressly instruct her agent to raise the disadvantage grievance as presently framed, or a grievance based on unjustified dismissal, because the advice she was given did not address those matters as it should have. She was advised where her grievance lay, and

[5] [2005] NZELR 402

on her instruction the grievance so advised was raised in time. Moreover when she expressed her doubts, she was assured that the grievance that had been raised was the only claim she had.

[48] Had Mrs Brocklehurst been advised of the possibility of the grievances now being raised - and given a discouraging assessment of the chances of success in which at the time she acquiesced or otherwise failed to give an instruction to proceed - I would have come to a different conclusion from the one I now reach. However she was not advised of the possibility at all, rather she was told the only claim she had was the one being pursued. I do not consider it reasonable to expect Mrs Brocklehurst to instruct an agent to raise grievances of the kind now raised in the face of such advice.

[49] I therefore conclude that Mrs Brocklehurst had made reasonable arrangements to have her grievance raised.

3. Conclusion

[50] Since I find both elements of s 115(b) are established, I find exceptional circumstances existed for the purposes of both of the grievances in question.

**Whether it is just to grant leave to raise the grievances**

[51] Section 114 (4) also has two elements, namely that exceptional circumstances exist and it is just to grant leave to raise a grievance. I have found the first is established in respect of both of Mrs Brocklehurst's grievances, and turn now to the second.

[52] Assessments of the justice of a grant of leave to raise a grievance out of time usually require a preliminary assessment of the merits of the grievance. Since I have not heard the merits in full, the assessment must be conducted at a relatively low threshold.

[53] Regarding the disadvantage grievance, on Mrs Brocklehurst's account there is room for argument that the change in her duties was effected in breach of her

employment agreement and in breach of the obligation to consult. On her account, the change was made in association with dissatisfaction with her performance.

[54] A fact far too frequently overlooked when such claims are brought in the Authority is that there are also several elements to the definition of a disadvantage grievance found in s 103(1)(b) of the Act. An aggrieved employee must show that:

. the relevant concern is within the scope of the employment relationship;
. the concern relates to a condition of employment;
. the condition was affected by an action of the employer's;
. the action was unjustifiable; and
. the condition affected by this unjustifiable action was affected to the employee's disadvantage.

[55] If Mrs Brocklehurst's account was accepted in a substantive hearing her grievance would probably succeed under the first four bullet points, but either the success or the extent of it is limited by the fifth. She would still have to show she suffered a disadvantage. Since her hours of work and rate of pay were not to be affected, and the jobs were similar, on her account what remains is her concern about being seen to be 'number 3' in the company. The remedy flowing from that may be limited.

[56] KBM says the change was effected within the terms of the employment agreement and in order to make Mrs Brocklehurst's job easier. If that is accepted and, for example, Mrs Brocklehurst's account of the October events is found to be inaccurate, then her disadvantage grievance would be unlikely to succeed.

[57] Further to the constructive and unjustified dismissal grievance, that grievance also rests on the change of duties advised in October 2009. An assessment of the kind set out above will again be necessary to ascertain whether or not KBM was guilty of a breach of duty to Mrs Brocklehurst to the extent that her resignation was caused by and reasonably foreseeable as a result. The grievance will be weakened to the extent that the decision to resign may be found on the facts to have been affected by actions for which the employer was not responsible, namely the actions of the police officer.

[58] Finally, although this too will be a matter to be addressed, I do not consider the mere fact that Mrs Brocklehurst awaited the outcome of her immigration matter before resigning to be necessarily fatal to the grievance.

[59] I do not have enough information about the October events to say Mrs Brocklehurst's grievances are plainly weak, to the extent that the balance is tipped in favour of declining leave to proceed. I can say only that, subject to the evidence available at a substantive hearing, they have merit.

[60] The justice of the case also involves balancing the interests of the employer.[6] A factor counting against a grant of leave to proceed is that KBM has already been through mediation and investigation in the Authority in respect of the events of late 2009 in particular. It is entitled to consider the matter as at an end, and should not be required to repeat the process in respect of matters that could have been raised in the first set of proceedings.

[61] Even so, in the event I declined leave to raise either of the grievances, the allegation of breach of the employment agreement and the request for an order for the payment of a penalty remain part of the present employment relationship problem. These claims are based on essentially the same facts as those underlying the grievances. Were leave to be declined, KBM would still face further litigation.

[62] For the reasons leave to raise the grievances is granted.

**Grant of leave to raise the grievances**

[63] For the above reasons, leave to raise both grievances is granted.

**Mediation**

[64] The parties are now directed to attend mediation within 42 days of the date of this determination.

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[6] *Creedy v Commissioner of Police* [2008] NZSC 31

**Costs**

[65] Costs are reserved pending a final resolution of this employment relationship problem.

[66] For the parties' information, unless there is information of which I am not aware, I would not consider it just to make an order for costs against KBM and in favour of Mrs Brocklehurst in respect of the present application for leave to raise the further grievances.

R A Monaghan
Member of the Employment Relations Authority