

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 732  
3062753

BETWEEN                      GLEN COLLINS  
Applicant

AND                              PARKS GARAGE LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Gregory Bennett, advocate for the Applicant  
Jane Taylor, counsel for the Respondent

Investigation Meeting:       3 October 2019 at Christchurch

Submissions [and further    On the day from the Applicant and the Respondent  
Information] Received:

Date of Determination:       20 December 2019

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**DETERMINATION OF THE AUTHORITY**

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- A      Glen Collins raised personal grievances of unjustified disadvantage and unjustified constructive dismissal within the statutory timeframe in the Employment Relations Act 2000.**
- B      Leave is reserved for Parks Garage Limited to lodge an amended statement in reply by 30 January 2020.**
- C      The parties are thereafter directed to attend mediation.**
- D      Costs are reserved until after the substantive matter has been determined.**

## **Employment Relationship Problem**

[1] This determination resolves a preliminary issue whether Glen Collins raised personal grievances that he was unjustifiably disadvantaged in his employment with Parks Garage Limited (Parks Garage) and unjustifiably constructively dismissed within the statutory timeframe.

[2] Parks Garage says that Mr Collins has failed to raise any personal grievance within the 90 day statutory timeframe provided in s114 of the Employment Relations Act 2000 (the Act) and that it does not consent to an extension of time for the applicant to raise a personal grievance. Parks Garage applies for the proceedings to be struck out.

[3] The Authority conducted an investigation into this preliminary issue and heard evidence from Mr Collins and Stuart Gerring who is the General Manager of Parks Garage.

### **The Issues**

[4] The Authority needs to determine the following issues in this matter:

- (a) When does the 90 day period begin for each of the alleged personal grievances?
- (b) How does Mr Collins say the grievances were raised?
- (c) Were the grievances specified sufficiently to enable Parks Garage to address them as the Act contemplates?
- (d) This will include an assessment of matters raised by Ms Taylor in final submissions including:
  - (i) Was Mr Collins in his letter of 23 January 2019 seeking further information or raising a grievance?
  - (ii) Was it clear that he wanted his concerns addressed?
  - (iii) Was the constructive dismissal raised in the statement of problem in the nature of an anticipated future event rather than one that had occurred or is occurring?
  - (iv) Did the statement of problem otherwise specify sufficiently a grievance of constructive dismissal?

**When does the statutory timeframe begin for each of the alleged personal grievances?**

[5] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must do so within 90 days of the action alleged to amount to a personal grievance occurring or coming to the notice of the employee.

[6] Mr Collins says that he was unjustifiably disadvantaged by a written warning contained in a letter dated 15 January 2019. The evidence established that letter was provided to Mr Collins at a meeting with Mr Gerring on 22 January 2019. The 90 day period runs from 22 January 2019 and ends on 22 April 2019.

[7] Mr Bennett submitted that the grievance for unjustified constructive dismissal together with notice of resignation was first notified by way of a statement of problem lodged with the Authority on 4 June 2019. Mr Gerring said in his evidence that he received the statement of problem a few days after that date. The 90 days in those circumstances within which to raise a personal grievance of unjustified constructive dismissal would run from 4 June 2019.

**How does Mr Collins say he raised the grievances?**

[8] Mr Collins commenced his employment with Parks Garage on 4 January 2017 as a driver.

[9] In November 2018 he had an accident at home and suffered serious damage to his arm. Mr Collins has been on ACC since that accident.

[10] In December 2018 Mr Collins attended a Parks Garage staff Christmas party.

[11] There was an incident at the party and Mr Collins spoke to a vehicle recovery operator, David Gerring, at Parks Garage about it.

[12] A health and safety advisor was instructed by Parks Garage to investigate what had occurred.

[13] Following the investigation carried out by the health and safety advisor, Mr Collins was issued with a written warning dated 15 January 2019.

[14] Mr Bennett submitted the unjustified disadvantage grievance was raised in a letter from Mr Collins to Mr Gerring dated 23 January 2019. When considering that letter it is useful to set out the key aspects of the warning.

*The warning letter dated 15 January 2019*

[15] The warning letter provided that the investigation undertaken had identified Mr Collins had played a key role in starting the initial confrontation with a fellow colleague and this had escalated into a standoff between Mr Collins and that staff member as well as other staff members. It was stated that a phone call in which Mr Collins alleged that he had been physically assaulted “escalated a separate series of unfortunate events.” Further that although Mr Collins played no part in the actual events the phone call would “seem to be inaccurate in that you were not actually physically assaulted.”

[16] It was stated that Mr Collins’ behaviour in the situation was not acceptable and will not be tolerated and that his employment may be terminated if his conduct, behaviour and actions regarding his fellow workers do not improve immediately. Further that there was an expectation that any personal difference resulting from actions outside of work do not impact in his relationships at work. The warning was to be placed on the personal file but was to be disregarded for disciplinary purposes after a period of twelve months if there was no repeat of the behaviour. There was advice that if Mr Collins wished to respond to the formal warning letter he could do so by contacting Mr Gerring or replying in writing.

[17] Mr Collins did reply in writing on 23 January 2019 recording at the outset that his letter was in reply to the written warning received on 22 January 2019. He wrote that it was upsetting for him to read that the assault has been dismissed as an allegation with the blame on him for the call made. He referred to being shocked and disheartened to hear there was no camera footage available. He numbered the next four paragraphs in his letter and in each made separate points. It is useful to set these out.

- 1- The letter states that I played a key part in starting the initial confrontation, I strongly disagree with this. I said “Hello” to S whom is another employee at a work function, I would like to know and understand how this is playing a “key role in starting confrontation”?
- 2- I made a phone call to David stating a fact – not an “allegation” as stated. I was physically assaulted by another employee so left the venue. The letter states that I was not physically assaulted – this is not true and would like to know how you came to this conclusion? I was injured with my arm in a sling and was pushed and held by my throat,

this is definitely an assault. The events that happened after that phone call are not my fault at all – I was not there so I am not aware how my factual statement could create unfortunate events upon my leaving the venue? My contract states I must report all incidents immediately, so please advise how you came to the conclusion that by reporting an incident is then my fault for the later events?

- 3- You state I bring personal differences to the workplace. I have not and try my hardest to be professional at all times, I do not feel I bring personal issues into the work atmosphere. If other employees have issues with myself and what goes on outside of work this is not my issue. I am polite and professional in the working environment – on this occasion yes I reacted to a situation that was bullying but did not physically assault nor start any of this and proceeded to leave the premise when assaulted.
- 4- “Leave him he’s mine I’ll get him later” these are words told to me from S whilst I was being pushed by another employee, it was a threat that needs to be addressed, I would like to be able to come to work and do my job in a safe environment moving forward.

Please advise how you would like to proceed from here.

Yours Sincerely  
Glen Collins

[18] The health and safety advisor who had conducted the investigation was asked by Mr Gerring to respond to Mr Collins’ letter and did respond by letter dated 7 February 2019. His letter worked through the items listed in Mr Collins’ letter. He additionally referred to a matter about the nature of the disciplinary meeting “not warranting the need for Mr Collins to seek advice”, and a reference to a written warning being at the lower end of the disciplinary spectrum. I questioned Mr Collins whether there had been other interactions between him and the health and safety advisor after he had sent the 23 January letter to Mr Gerring. Mr Collins recalled a discussion but not the nature of the discussion.

[19] In response to the question Mr Collins had asked about where to from here, the health and safety advisor wrote that evidence had been presented at the investigation that Mr Collins was now contradicting, and that was not ideal. Further if he wished to take it further he had a right to do so and that it would be treated within the parameters set out in the employment contract. The investigator advised that such a communication should be addressed to Mr Gerring directly.

[20] After the 22 January meeting Mr Gerring in his evidence recalled three phone calls he had from Mr Collins. He recalled that the calls took place before a further meeting on 22

March 2019. One of the calls was to arrange the March meeting. During the other two calls Mr Gerring recalled Mr Collins wanting to know what happened to the others involved in the Christmas incident. Further that he wanted to know that he would be safe if he returned to work and that he wanted an apology letter written by other staff in the Christmas incident.

[21] On 22 March 2019 there was a meeting with David Gerring, Mr Gerring and Mr Collins. The evidence was that there was some dispute about what was discussed. There was agreement that there was some discussion about a branch in a different centre and the possibility of Mr Collins working there. Mr Gerring said that nothing was discussed about the incident at that meeting. Mr Collins said that he told David Gerring and Mr Gerring that he didn't want to go back to work with "those boys".

[22] Mr Collins remained off work on ACC.

[23] On 9 May 2019, Mr Collins sent an email to the human resources person at Parks Garage after a meeting at Southern Rehabilitation about a return to work programme. Amongst other matters he referred to his concerns about returning to work and that he was very uncomfortable to work anywhere near the two individuals [involved in the December incident]. He further wrote that he was told the statement he gave was false which doesn't make him secure, safe or supported in the workplace and asked where to from here and how to move forward.

[24] Mr Gerring responded to that by a letter dated 14 May 2019. Amongst other matters he stated that he was aware of the responsibility as employer to provide a safe working environment and has taken a very stringent approach to deal with the event that took place at the Christmas function. He said the message that he had been giving to Mr Collins since December was that they had all moved on and it was dealt with at the time with an independent third party conducting the interviews to ensure a fair process and a fair outcome. He wrote that he would like to see Mr Collins fully fit and back at work as his skillset had been missed and that in the unlikely event something does happen to make him feel unsafe, that he report that immediately to Mr Gerring. Mr Gerring wrote that the back to work programme had been received and it was noted that he had been cleared to come back on light duties.

[25] The next communication appears to be the lodging of the statement of problem.

**Were the grievances specified sufficiently to enable Parks Garage to address them as the Act contemplates?**

[26] Section 114(2) of the Act provides as follows:

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.

*Unjustified action causing disadvantage*

[27] Mr Gerring in his evidence said that he considered Mr Collins was seeking further information in the 23 January 2019 letter. In answer to a question from Mr Bennett about the letter he said that he considered Mr Collins was responding to the content of the warning, seeking further information and that he was upset that there were no cameras. When asked how he could tell if it was a personal grievance he said that it would usually have the words personal grievance. He did not think it was a personal grievance otherwise he would have handed it onto the legal representatives.

[28] Ms Taylor submitted that other than saying he was responding to the written warning at the start of the letter Mr Collins did not say anything else about the warning being unjust or unfair. Further that whilst he showed some disappointment relating to the investigation of his allegations about another employee he did not object to the warning itself or state why he considered it to be unjust.

[29] I accept Ms Taylor's submission that Mr Collins' letter of 23 January 2019 does not specifically state that he considers the warning to be unfair. What he does do is raise concerns about the findings some of which formed the basis for a warning. For example he writes that he strongly disagrees that he played a key part in starting the initial confrontation. He also states that contrary to the warning letter he was in fact physically assaulted and that the events after the phone call were not his fault.

[30] Mr Gerring forwarded the letter to the health and safety advisor who had undertaken the investigation to respond to Mr Collins. In the response to Mr Collins there was reference to the written warning including that it is at the lower end of the disciplinary spectrum and confirmation that the written warning was for the involvement in the incident [with two named others] not the escalation that was stated to be an observation. The response was quite comprehensive and aligned to the detail in Mr Collins' letter with some additional comments

about the warning including that the nature of the disciplinary meeting did not warrant the need for Mr Collins to seek advice.

[31] As Judge Holden observed in a recent Employment Court judgment in *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic*<sup>1</sup> what amounts to raising a personal grievance has been dealt with by the Court on many occasions and there are some key principles.<sup>2</sup> These include that the grievance process is designed to be informal and accessible.<sup>3</sup> No particular formula of words must be used. The employer must know what it is responding to and must be given sufficient information to address the grievance to respond to it on its merits with a view to resolving it soon and informally at least in the first instance.<sup>4</sup>

[32] I find that the response by the health and safety advisor showed he understood that he was responding to matters that he had investigated including those findings that formed the basis of the warning. He confirms in his response the basis for the warning. There was some recognition that the matter may be taken further and Mr Collins was referred to his employment agreement. I find that there was sufficient information about Mr Collins' concerns in his response for Parks Garage to respond to it with an understanding that the concerns related to the investigation outcome/findings that gave rise to the imposition of the written warning.

[33] There are similarities between *Zivaljevic* and this matter. The employer in that case also argued that communications from Mr Zivaljevic were merely seeking information with a view to at some later date potentially submitting a personal grievance. Further it was said by the plaintiff there were no remedies specified and no request to attend mediation and no clear explanation as to what ground that grievance was based on.<sup>5</sup> It was held in that case that the concerns of Mr Zivaljevic were clear and there was sufficient detail to respond to the complaints and that the communications raised a personal grievance of unjustified dismissal.

[34] As was stated in *Clark v Nelson Marlborough Institute of Technology*<sup>6</sup> it does not matter what an employee intended his or her complaint to be or the preferred process of

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<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132

<sup>2</sup> Above n1 at [35]

<sup>3</sup> Above n1 at [36] with reference to *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40]

<sup>4</sup> Above n1 at [36] and [38] with reference to *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36]–[37]

<sup>5</sup> Above n1 at [27]–[32]

<sup>6</sup> *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]

dealing with it in the first instance. It does not matter whether the employer recognised the complaint as a personal grievance. The issue is whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and whether the substance of the complaint was conveyed.

[35] I find that the contents of Mr Collins' letter, particularly the first two numbered paragraphs, go beyond simply seeking information but rather they express concerns about the findings from the investigation that formed the basis for a written warning. It is clearly stated in the first paragraph of the letter that it is written in reply to the written warning. The nature of Mr Collins' concerns as raised fall within the definition of a personal grievance in s 103 of the Act that Mr Collins' employment had been affected by an unjustified action of Parks Garage. There was sufficient information for a response from Parks Garage and one was forthcoming addressing not only the contents of the 23 January letter but with some additional comment about the warning.

[36] I find that Mr Collins' letter of 23 January 2019 raised an unjustified disadvantage claim within the statutory timeframe of 90 days from the date of the written warning.

#### *Unjustified constructive dismissal*

[37] A constructive dismissal grievance was raised for the first time in the statement of problem.

[38] The statement of problem provided in clause 2.26 as follows about the constructive dismissal:

It is for the above reasons that Mr Collins had no other option but to resign citing constructive dismissal.

[39] Ms Taylor submits that the paragraph suggests that Mr Collins resigned before the statement of problem was lodged but it was unclear when.

[40] In *Creedy v Commissioner of Police*<sup>7</sup> under a heading "crystal ball" grievance notice there was consideration given to a submission that a letter raised not only an unjustified disadvantage grievance but also any subsequent grievance including an allegation of unjustified dismissal some eight months after notice of the grievance was given. The then

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<sup>7</sup> *Creedy v Commissioner of Police* [2006] ERNZ at [28] and [29]

Chief Judge Colgan confirmed that the relevant words and phrases contemplate the raising of a grievance about an event that has occurred or is occurring.

[41] Ms Taylor submits that Mr Collins cannot raise a personal grievance of constructive dismissal where he has not resigned. Mr Collins when asked by the Authority did not recall having ever resigned. The statement in reply provided that Mr Collins continued to be employed.

[42] Mr Collins was on ACC. He did not return to work after the December event. It was not a situation where Mr Collins was at work and then resigned at a later time than when the statement of problem was lodged. This matter is not as straightforward as that in *Creedy*<sup>8</sup>.

[43] After the statement of problem was lodged Parks Garage wrote to Mr Collins and suggested a return to work. On 5 August 2019 Mr Bennet sent an email asking that Parks Garage cease contacting his client and referred to the statement of problem and claim of constructive dismissal. Some weight was placed on an email from Mr Collins on 16 August 2019 where he queried a payment of holiday pay saying he had never requested that. I cannot discount a degree of confusion on the part of Mr Collins about holiday pay and resignation. It has to be recognised Mr Collins is a not an employment law expert.

[44] I do not find evidence to support Mr Collins was raising in the statement of problem a grievance of constructive dismissal about an anticipated future event. There is no evidence to support that Mr Collins continued with his employment after 4 June or resigned at a date after 4 June 2019.

[45] Ms Taylor accepts that a grievance can be raised in a statement of problem<sup>9</sup> but says that the content did not adequately raise the grievance. Ms Taylor refers to the fact that the last communication Mr Gerring had with Mr Collins was on 14 May 2019 and then nothing further was heard for three weeks until 4 June 2019. She submits it was not clear when Mr Collins resigned after 14 May, what caused that and submits there was insufficient information.

[46] Notice was given to Parks Garage for the first time of Mr Collins' resignation in the statement of problem lodged 4 June 2019 with the Authority in clause 2.26. It is the notice of

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<sup>8</sup> Above n 8

<sup>9</sup> *Premier Events Group Ltd V Beattie (No 3)* [2012] NZEmpC 79, (2012) 10 NZELC 79-011

resignation coming to the attention of the employer, the other party to the employment agreement that is important.

[47] The statement of problem refers to the events of the December party, the investigation that followed, the warning and a failure to deal with concerns. Clause 2.25 provides:

Mr Collins says that the respondent did not respond to his concerns that he raised with the respondent in any meaningful manner that when coupled with everything else has made Mr Collins lose complete trust and confidence in the respondent and their ability to ensure his safety.

[48] Later in clause 2.28 there is reference to panic attacks about returning to work and concerns about what could occur if Mr Collins did return.

[49] There was sufficient detail of the grievance of unjustified constructive dismissal in the statement of problem for Parks Garage to respond to.

[50] I find that the statement of problem raised an unjustified constructive dismissal grievance within the 90 days prescribed by s 114(1) of the Act.

### **Next Steps**

[51] Parks Garage reserved its rights in the statement in reply to provide further information if the matter was not struck out. I reserve leave for the respondent to lodge an amended statement in reply by 30 January 2019.

[52] The parties are thereafter directed to attend mediation.

### **Costs**

[53] Costs are reserved until the substantive matter has been determined.

**Helen Doyle**  
**Member of the Employment Relations Authority**