

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 80
5444138

BETWEEN NATASHA CONNOLLY
 Applicant

A N D AE MANAGEMENT LIMITED
 Respondent

Member of Authority: Rachel Lamer

Representatives: Applicant in person
 Bradley Watson, Corporate Legal Consultant for
 Respondent

Information filed: 21 February 2014 affidavit of Applicant

Submissions Received: No submissions from Applicant
 24 February 2014 from Respondent

Investigation Meeting: On the papers

Date of Determination: 06 March 2014

DETERMINATION OF THE AUTHORITY

- A. Ms Connolly's personal grievance claim for unjustified disadvantage was not raised within 90 days so the Authority does not have jurisdiction to investigate that claim. Accordingly her disadvantage grievance is struck out.**
- B. The Authority has jurisdiction to investigate Ms Connolly's breach of contract claim.**
- C. It is not clear from the information currently before the Authority as to when Ms Connolly's employment actually ended. Evidence on this issue needs to be tested in order to enable the Authority to determine whether Ms Connolly's personal grievance claim for**

unjustified dismissal was raised within 90 days of her employment ending.

D. The parties are directed to attend mediation within 28 days of the date of this determination.

Employment relationship problem

[1] In the Statement of Problem filed with the Authority on 20 December 2013 Ms Connolly identifies the following specific three claims for the Authority to investigate:

- (a) Breach of her employment agreement;
- (b) Personal grievance for unjustified disadvantage;
- (c) Personal grievance for unjustified dismissal.

[2] There is information before the Authority which suggests that Ms Connolly may be intending for the Authority to also investigate an alleged breach of good faith claim despite that not being specifically identified as a separate claim in her Statement of Problem. Ms Connolly has 14 days from the date of this determination to clarify her position on that issue.

[3] Ms Connolly's Statement of Problem was served on AE Management Limited (AE Management) on 24 December 2013.

[4] On 24 January 2014 the Authority directed the parties to attend mediation. AE Management strongly resists this direction on the basis the Authority does not have jurisdiction to investigate Ms Connolly's claims. That in itself is not sufficient to avoid a direction to mediation as jurisdiction is an appropriate issue for parties to mediate on. However the parties agreed the Authority should resolve the jurisdiction issue on the papers prior to any mediation.

[5] Mr Watson says AE Management does not consent to Ms Connolly raising a personal grievance outside the 90 day time limit and he note the requirement under s.114(3) of the Employment Relations Act 2000 (the Act) which requires Ms Connolly to apply for leave to raise her personal grievances out of time if they were not raised within the 90 days timeframe.

[6] Ms Connolly's breach of contract and unjustified disadvantage claims arise from what she alleges was the unilateral removal by AE Management of the "regular shifts" she worked on Tuesdays and Thursdays.

[7] Ms Connolly consulted the Waitakere Community Law Centre (the Law Centre) about these matters in June 2013 which resulted in a letter being sent to her employer from the Law Centre dated 24 June 2013 which records "[Ms Connolly] is aware of her rights to bring a personal grievance, however she has chosen not to at this stage as she simply wants to return to working two days a week at a job she enjoys."

[8] AE Management's Corporate Legal Consultant Mr Watson replied to the Law Centre stating that "the matters raised in your correspondence have been noted and are being investigated." However AE Management did not respond subsequent to that letter so the Law Centre wrote again on 12 July and 22 October 2013 pressing for a response about how AE Management intended to resolve Ms Connolly's concerns.

[9] These communications resulted in a letter from Mr Watson to the Law Centre dated 31 October 2013 which states, among other things:

"As it stands, Natasha Connolly abandoned her employment on 10 July 2013." [...] It is clear from your correspondence that the employment relationship between Natasha and AE Management Limited is at an end, and Natasha is now precluded from attempting to raise any personal grievance."

[10] The Law Centre replied by letter dated 05 November 2013 reiterating Ms Connolly's issue with AE Management's unilateral reduction her hours of work and its failure to follow the procedure for changing her hours of work as set out in clause 5 of her employment agreement. The Law Centre further states:

"Ms Connolly is now raising a personal grievance against AE on the grounds of unjustified action causing disadvantage in the workplace. As the matter is continuing will AE be carrying out their investigation and Ms Connolly is still awaiting a response the 90 days have not yet begun."

[11] The Law Centre also identifies that AE Management's failure to comply with the consultation and seven day written notice period to change shifts in Ms Connolly's employment agreement amounts to a breach of good faith.

[12] The Law Centre states “*Ms Connolly has not abandoned her employment with AE*” and it referred to clause 3.1 of her employment agreement which covered abandonment which it says obviously did not apply to her situation.

[13] The Law Centre set out its view that Ms Connolly’s employment relationship was continuing and it pointed to various facts which Ms Connolly relied on to support her view that she was still an employee. The Law Centre says:

“To reiterate, Ms Connolly’s employment has not been terminated in a procedurally fair manner and neither has Ms Connolly resigned pursuant to the employment agreement. Therefore, given the above facts it is preposterous to suggest Ms Connolly has abandoned her employment.”

Issues

[14] The following issues are to be determined:

- a. What date did Ms Connolly’s unjustified disadvantage grievance arise or when did she become aware of it, whichever is the later?
- b. What date did Ms Connolly raise her unjustified disadvantage grievance?
- c. Does the Authority have jurisdiction to investigate Ms Connolly’s unjustified disadvantage claim?
- d. What date did Ms Connolly’s employment end?
- e. What date did Ms Connolly raise her unjustified dismissal grievance?
- f. Does the Authority have jurisdiction to investigate Ms Connolly’s dismissal grievance?
- g. Does the Authority have jurisdiction to investigate Ms Connolly’s breach of contract claim?
- h. Should the direction to meditation stand?
- i. What if any costs should be awarded?

What date did Ms Connolly’s unjustified disadvantage grievance arise or when did she become aware of it, whichever is the later?

[15] Ms Connolly filed an affidavit in support of her belief that she had raised her personal grievances within 90 days of them arising or coming to her attention, whichever was the later.

[16] Ms Connolly was assisted by the Law Centre in preparing her affidavit on the jurisdiction issue. In it she states *“I first became aware of my personal grievance claim for unjustified action resulting in disadvantage based on the lack of proper provision of shifts on or about June 2013.”*

[17] It is also clear from the Law Centre’s letter of 24 June 2013 Ms Connolly was aware at least by that date of her right to bring a disadvantage grievance but had at that point elected not to do so. I therefore find that the latest date from which the 90 days runs is 24 June but acknowledge that it may in fact be prior to that.

What date did Ms Connolly raise her unjustified disadvantage grievance?

[18] The Law Centre’s letter of 05 November 2013 raises Ms Connolly’s unjustified disadvantage claim.

Does the Authority have jurisdiction to investigate Ms Connolly’s unjustified disadvantage claim?

[19] The evidence provided to the Authority by Ms Connolly establishes that she did not raise her disadvantage grievance with AE Management within 90 days of it arising or coming to her attention, whichever was the later. Accordingly the Authority does not have jurisdiction to investigate her disadvantage grievance so that claim is struck out of her Statement of Problem.

What date did Ms Connolly’s employment end?

[20] Ms Connolly in her affidavit states:

“With regard to the personal grievance claim for unjustified dismissal, I first became aware of this by way of correspondence from Bradley Watson dated 31 October 2013. In this letter Mr Watson advised that I had abandoned my employment with AE. Given I had not abandoned my employment and this was the first such claim I’d

heard, it was my understanding that I had been dismissed as of 31 November 2013.”

[21] However I do not consider that resolves the issue of when her employment ended because it conflicts with the information in the Law Centre’s letter of 05 November which states that her employment had not ended and that as at that date Ms Connolly believes she is still employed. This apparent conflict cannot be resolved on the papers.

[22] I find that it is unclear from the information currently before the Authority as to when Ms Connolly’s employment actually did end. AE Management’s position appears to be that her employment ended as a result of abandonment on 10 July 2013 whilst the letter sent on Ms Connolly’s behalf by the Law Centre on 05 November 2013 records Ms Connolly’s belief that she was “*still an employee*”.

[23] The apparent contradiction between Ms Connolly’s affidavit which says she believes her employment ended on 31 October and the Law Centre letter that says she believes her employment was continuing as at 31 October is an issue which will need to be explored and properly tested during a substantive investigation meeting.

[24] I therefore find that I am unable to determine solely on the papers when Ms Connolly’s employment actually ended.

What date did Ms Connolly raise her unjustified dismissal grievance?

[25] Ms Connolly considers that the letter from the Law Centre dated 05 November raises her personal grievance claims for unjustified dismissal and unjustified disadvantage. I find that it did raise her unjustified disadvantage grievance but it did not raise her dismissal grievance. Rather it merely disputes AE Management’s claim that Ms Connolly had abandoned her employment and it set out why Ms Connolly believes she was still employed.

[26] I find that Ms Connolly’s dismissal grievance was not raised until her Statement of Problem was served on AE Management on 24 December 2013.

Does the Authority have jurisdiction to investigate Ms Connolly's dismissal grievance?

[27] Because I have been unable to determine on the papers the date on which Ms Connolly's employment actually ended I am also unable to determine whether her dismissal grievance was raised within 90 days of her employment ending. This is an issue that needs to be determined at a substantive investigation meeting.

Does the Authority have jurisdiction to investigate Ms Connolly's breach of contract claim?

[28] Ms Connolly says her breach of contract claim arose on or around June 2013. This claim is not a personal grievance so is not subject to the 90 day time limit. The Authority has jurisdiction to investigate Ms Connolly's breach of contract claim.

Should the direction to mediation stand?

[29] The Authority's direction to mediation issued on 24 January 2014 stands. The parties are required to attend mediation within 28 days of the date of this determination. Mediation arrangements are to be made by the parties directly with Mediation Services.

[30] Mediation may cover all and any matters the parties wish to address. However, without limiting that in any way mediation must also occur in relation to all matters currently before the Authority. This includes but is not limited to, Ms Connolly's breach of contract claim, any good faith claim that may be made together with any issues/other claims that may arise out of any good faith claim, the date on which Ms Connolly's employment actually ended, how and why it ended, the 90 day issue as it relates to her dismissal grievance and the substance of her dismissal grievance.

What if any costs should be awarded?

[31] Ms Connolly is not represented so a costs award is not appropriate.

Rachel Larmer
Member of the Employment Relations Authority

