

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 181
5625673

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| BETWEEN | ANDREW CORBIN First Applicant |
| A N D | GAIL FOSTER-BOHM Second Applicant |
| A N D | IHC NEW ZEALAND INCORPORATED Respondent |

Member of Authority: Peter van Keulen

Representatives: Anjela Sharma, Counsel for Applicants
Paul McBride, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 2 September 2016, from the Applicants
2 September 2016, from the Respondent

Date of Determination: 6 October 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

- A. The applicants, Andrew Corbin and Gail Foster-Bohm, did not raise their personal grievances for unjustified dismissal within the requisite 90-day period.**
- B. Mr Corbin and Ms Foster-Bohm did raise personal grievances for unjustified action causing disadvantage within the requisite 90-day period.**
- C. Accordingly, the Authority does not have jurisdiction to investigate the personal grievances for unjustified dismissal but it**

does have jurisdiction to investigate the personal grievances for unjustified action causing disadvantage.

D. Costs are reserved.

Employment relationship problem

[1] In their statement of problem dated 18 May 2016, Mr Corbin and Ms Foster-Bohm identify four claims for the Authority to investigate:

- a. Unjustified action causing disadvantage to a term or condition of employment;
- b. Unjustified dismissal arising out of their redundancy, such dismissals being both procedurally and substantively unjustified;
- c. Breach of contract and employer policies;
- d. Breach of the statutory duty of good faith.

[2] In its statement in reply, the respondent, IHC New Zealand Incorporated (IHC), states:

- a. Mr Corbin and Ms Foster-Bohm's personal grievances relate to alleged events that occurred earlier than 90 days prior to the date of their solicitor's personal grievance letter and are therefore not actionable;
- b. There are no exceptional circumstances justifying the late raising of any personal grievance;
- c. In any event, the restructuring which gave rise to the personal grievances was procedurally and substantively justified;
- d. There is no basis for any penalty, whether that is for any alleged breach of contract or code of conduct or for an alleged breach of any statutory duty of good faith.

[3] In response to IHC's allegation that the personal grievances were not raised within 90 days, Mr Corbin and Ms Foster-Bohm state that their respective personal grievances for unjustified disadvantage and unjustified dismissal were raised with IHC during the employment relationship, with the letter of personal grievance dated 25 November 2015 representing a formal reiteration of their position.

[4] In a case management telephone conference on 24 June 2016, the parties agreed that I would consider the question of whether the personal grievances were raised outside of the statutory 90-day timeframe as a preliminary matter. The parties also agreed that I would make that determination on the papers with submissions being filed by both parties on 2 September 2016.

The issues

[5] The issues for determination are:

- a. On what date did the action or actions, which constitute any unjustified disadvantage grievance, occur or on what date did Mr Corbin and Ms Foster-Bohm become aware of this;
- b. When did Mr Corbin and Ms Foster-Bohm raise their personal grievances for unjustified action and was this 90 days after the date in sub paragraph 5 (a) above;
- c. On what date did the actions, which constitute Mr Corbin and Ms Foster-Bohm's unjustified dismissal grievance, occur or on what date did they become aware of this;
- d. When did Mr Corbin and Ms Foster-Bohm raise their personal grievances for unjustified dismissal and was this 90 days after the date in sub paragraph 5 (c) above;
- e. If either personal grievance was raised outside the 90-day timeframe, are there exceptional circumstances such that I should allow the personal grievances to be raised out of time?

Facts

[6] IHC employed Mr Corbin from 1 October 2007. At the time of his dismissal, he was employed as IHC's Centre for Learning Programme Developer.

[7] IHC employed Ms Foster-Bohm from 26 May 2014. At the time of her dismissal, she was employed as IHC's Learning and Development Consultant – Quality.

[8] In 2015, IHC undertook consultation of a proposed restructuring, which affected both Mr Corbin and Ms Foster-Bohm's roles with IHC. The detail of the proposed restructure is of no relevance to the preliminary matter that I determine other than that the personal grievances arise out of the restructure.

[9] There are five key events that are not disputed, which are relevant to the preliminary issue:

- a. Two meetings took place by telephone conference on 17 July 2015 between IHC representatives and Mr Corbin and Ms Foster-Bohm to discuss the proposed restructuring;
- b. A meeting between IHC representatives and Mr Corbin and Ms Foster-Bohm took place on 4 August 2015, when a decision to proceed with the proposed restructure and disestablish both roles was confirmed and a discussion was held regarding redeployment;
- c. Notice of termination was served on Mr Corbin and Ms Foster-Bohm by IHC in a letter dated 6 August 2015;
- d. Mr Corbin and Ms Foster-Bohm's last day of work was on 7 August 2015;
- e. Mr Corbin and Ms Foster-Bohm raised personal grievances through a letter from their counsel, Ms Sharma, dated 25 November 2015.

On what date did the action or actions, which constitute any unjustified disadvantage grievance, occur or on what date did Mr Corbin and Ms Foster-Bohm become aware of this?

[10] Counsel for IHC, Mr McBride, says Mr Corbin and Ms Foster-Bohm have not raised a separate claim of unjustified disadvantage before the Authority. He says this is so because, on the face of the personal grievance letter (Ms Sharma's letter of 25 November 2015) and their statement of problem, all issues said to be in contention relate to unjustified dismissal.

[11] I do not accept this. The statement of problem clearly states that Mr Corbin and Ms Foster-Bohm want the Authority to resolve a claim for unjustified disadvantage in employment.

[12] Whilst the unjustified disadvantage grievance is not particularised in the statement of problem, I take from the short account of facts that Mr Corbin and Ms Foster-Bohm's grievance pertains to the process of consultation over the proposed restructuring and the substantive decision to implement the restructure.

[13] Because Mr Corbin and Ms Foster-Bohm were involved in the consultation and the preliminary decision regarding proceeding with the restructure they were aware of any grounds that gave rise to a complaint of unjustified action causing disadvantage as it pertained to that consultation during the consultation process. Therefore, there is a continuum of dates that apply for the commencement of the 90-day period, from the commencement of the consultation process by IHC until its completion on 6 August 2015. The latest date that Mr Corbin and Ms Foster-Bohm could have been aware of the unjustified actions that they complain of was 6 August 2015.

When did Mr Corbin and Ms Foster-Bohm raise their personal grievances for unjustified action and was this within 90 days of 6 August 2015?

[14] The next question then is whether the unjustified disadvantage grievances were raised within 90 days of 6 August 2015.

[15] Clearly, the letter dated 25 November 2015, which sets out in writing the personal grievances, is not within the 90-day timeframe.

[16] I must therefore look to consider whether Mr Corbin and Ms Foster-Bohm raised the unjustified disadvantage grievances by some other means within that 90-day timeframe.

[17] Ms Sharma submits on behalf of Mr Corbin and Ms Foster-Bohm that the unjustified disadvantage grievance was raised in the course of consultation and in particular the telephone calls of 17 July 2015 and the meeting on 4 August 2015.

[18] I accept it is possible for a personal grievance to be raised orally in a meeting or a series of meetings and communications¹, and I accept that the personal grievance need not raise precisely the remedies sought².

[19] The question is whether the communications in July and August, in the telephone calls and the meeting, were sufficient to say that the unjustified disadvantage grievance was particularised such that IHC could address it.

[20] In *Creedy v Commissioner of Police*³ the Court held that:

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient and therefore not raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance without specifying the statutory type of the grievance as, for example, unjustified disadvantage in employment ... For an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer has been aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[21] Put simply the question is, did Mr Corbin and Ms Foster-Bohm sufficiently inform IHC of their grievances so IHC knew what to respond to? I am satisfied that Mr Corbin and Ms Foster-Bohm sufficiently particularised their concerns about the consultation process and the decision to proceed with the restructure, in the telephone calls and the meeting for IHC to know that there was a grievance to be addressed.

[22] Mr Corbin and Ms Foster-Bohm complained clearly about only being given a brief opportunity to read and digest a final report before being engaged in

¹ *Liumaihetau v Altherm East Auckland* [1994] 1 ERNZ 958 and *The Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* (AC14/08) and *Phillips v Nettel Communications* [2002] 2 ERNZ 340

² *Idea Services Ltd v Barker* [2012] NZEmpC 112

³ [2006] 3 NZELR 293 at para.[37]

consultation. They also stated that they disagreed strongly with IHC's rationale, that they thought that IHC had not handled the matter in good faith, that the process had been poor and that they believed that IHC was going about the restructure the wrong way.

[23] Based on these statements and others made by Mr Corbin and Ms Foster-Bohm in the telephone calls and the meeting, IHC should have known that both Mr Corbin and Ms Foster-Bohm considered that IHC had not handled the consultation adequately or fairly and that the decision to proceed with the restructure was not justified.

[24] Therefore, personal grievances for unjustified action causing disadvantage were raised during the consultation process and within the 90-day period.

On what date did the actions, which constitute Mr Corbin and Ms Foster-Bohm's unjustified dismissal grievance, occur or on what date did they become aware of this?

[25] The action complained of is dismissal so the date this occurs is the date of termination of employment. Therefore, the question to answer is when did IHC terminate Mr Corbin and Ms Foster-Bohm's employment?

[26] Dismissal occurs where there is a permanent and terminal sending away of the employee⁴, and dismissal occurs when the employment actually ceases not when the employer gives notice that it will end⁵. The date of termination is a factual assessment that is informed by the notice given but this is not decisive particularly in cases where there is payment in lieu of notice.

[27] In the 4 August 2015 meeting, IHC confirmed its decision to proceed with the proposed restructure and that both Mr Corbin and Ms Foster-Bohm's roles would be disestablished. In response Mr Corbin and Ms Foster-Bohm expressed their concern with the process, that they believed the restructure was the wrong path for IHC and that it was upsetting to have their roles disestablished. At one point Mr Corbin stated "I don't think you have handled this in good faith. The process has been poor but we accept you've made your decision so you just need to talk through the options I guess."

⁴ *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413

⁵ *Gibson v GFW Agri-Products Ltd* [1992] 2 ERNZ 309

[28] During this meeting the IHC representative discussed in general terms redeployment within IHC, committing to speak to another IHC employee about options that might be available.

[29] The meeting concluded with a discussion about the notice period and payment in lieu of notice. Ms Foster-Bohm raised the issue of contributing to a textbook on the Kirkpatrick training and evaluation model using her experiences at IHC, as she had been asked to write a chapter for the latest version. This led through to a proposal based on both Mr Corbin and Ms Foster-Bohm not having to work their notice period and being paid up, including holiday pay and any redundancy entitlement, up to 7 August 2015 with payment being made on 7 August. Ms Foster-Bohm expressed the rationale for leaving as “because we may as well finish up, there’s no point in staying, I’d like to do that work I want to and some other evaluation work I want to look at and some contract work so there’s no real point in staying on.”

[30] On 6 August 2015, IHC confirmed that there were no suitable roles for redeployment and IHC was prepared to waive the notice period so Mr Corbin and Ms Foster-Bohm could both finish on 7 August 2015.

[31] The result was that neither Mr Corbin nor Ms Foster-Bohm was required to work their notice period and IHC paid them both in lieu of working that notice period. They received their final pay on 7 August 2015 which included holiday pay calculated up until 7 August. Mr Corbin and Ms Foster-Bohm were effectively discharged from their employment obligations and free to take up other opportunities from 7 August 2015, which was their last day of work. On this basis, I am satisfied that their employment terminated on 7 August 2015 as this was the day that Mr Corbin and Ms Foster-Bohm’s employment actually ceased.

When did Mr Corbin and Ms Foster-Bohm raise their personal grievances for unjustified dismissal and was this within 90 days of 7 August 2015?

[32] What follows is that the letter of 25 November 2015 is outside the statutory 90-day period so the letter did not raise the unjustified dismissal grievance within the requisite 90-day period.

[33] Ms Sharma submits the possibility that Mr Corbin and Ms Foster-Bohm raised the unjustified dismissal grievances prior to 7 August 2015 in the consultation process. As with the unjustified disadvantage grievance, the relevant consultation

events were the telephone calls on 17 July 2015 and the meeting on 4 August 2015. These events took place before IHC gave notice of termination and the 4 August meeting involved discussion of redeployment, there was still a possibility that IHC would not terminate their employment at that time.

[34] I do not accept that this is possible to raise a grievance in advance of the event complained of occurring. That is, a grievance for unjustified dismissal cannot be raised prior to at least notice of termination being given.

[35] In *Poverty Bay Electric Power Board* the Employment Court held that discussions of a grievance which predated dismissal cannot constitute a submission of a grievance.

[36] In *New Zealand Automobile Assoc Inc v McKay*⁶, the Employment Court confirmed that an employee could only raise a grievance for unjustified disadvantage during the notice period. The Court did go on to say that the Tribunal may use s 34 of the Employment Contracts Act 1991 (now s 122 of the Employment Relations Act 2000) to allow an employee to submit a grievance in the notice period and for the Tribunal to then consider it subsequently as an unjustified dismissal grievance.

[37] I do not consider it appropriate to address the unjustified dismissal grievance in this way. First, the unjustified disadvantage grievance was raised before notice was given and at a time when it was still possible that both Mr Corbin and Ms Foster-Bohm could have been redeployed within IHC. Second, whilst I am satisfied that the unjustified action grievance was raised in the telephone calls of 17 July 2015 and the meeting of 4 August 2015 I am not satisfied that Mr Corbin and Ms Foster-Bohm raised dissatisfaction with pending or possible dismissal. In fact, it is arguable that Mr Corbin accepted possible dismissal as an outcome of the disestablishment when he said “we accept you’ve made your decision so you just need to talk through the options”.

[38] For these reasons, it is not appropriate to allow the unjustified disadvantage grievance to be subsequently treated as an unjustified dismissal grievance.

[39] Therefore, I conclude that Mr Corbin and Ms Foster-Bohm have failed to raise their grievances for unjustified dismissal within the requisite 90-day period.

⁶ [1996] 2 ERNZ 622

Are there special circumstances that mean I should allow the unjustified dismissal grievance to be raised outside of the 90-day period?

[40] Ms Sharma has not made any submission requesting the Authority to grant leave for the unjustified dismissal grievance to be raised outside of the 90-day period nor has she outlined a basis on which I can find exceptional circumstances. So there has not been an application for leave for me to consider. And, in any event, there is no evidence led to support the suggestion that there have been exceptional circumstances, so even if I was minded to consider the issue, there is no evidential basis for me to grant leave for the unjustified dismissal grievances to be raised out of time.

Determination

[41] I do not have jurisdiction to hear and determine Mr Corbin and Ms Foster-Bohm's personal grievances for unjustified dismissal. However, I do have jurisdiction to hear and determine the personal grievances for unjustified action causing disadvantage.

Costs

[42] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority