

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 388
3038056**

BETWEEN KAREN CURRIE
 Applicant

AND BAY OF PLENTY SEXUAL
 ASSAULT SERVICES TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, Advocate for Applicant
 Jeremy Sparrow, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: No submissions from Applicant: Application for leave lodged
 5 November 2018
 22 November 2018 from Respondent

Determination: 05 December 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Karen Currie, claims in the Statement of Problem lodged on 3 September 2018 that she was constructively dismissed and unjustifiably disadvantaged by the Respondent, Bay of Plenty Sexual Assault Services Trust (BOPSASS).

[2] Ms Currie further claims that as a result BOPSASS breached s 110A of the Employment Relations Act 2000 (the Act) and s 85 of the Health and Safety at Work Act 2015 (HASAW)

[3] BOPSASS denies it has breached the Employment Relations Act 2000 (the Act) or the Health and Safety at Work Act 2015, or that Ms Currie was constructively dismissed, unjustifiably disadvantaged or that it breached the duty of good faith it owed to Ms Currie.

[4] This determination addresses the preliminary issue of whether or not Ms Currie raised any personal grievances and if so, of what nature, with BOPSASS within 90 days of the

grievance occurring or coming to her notice, whichever is the later in accordance with the requirements of s114 (1) of the Act, such that she is entitled to pursue her grievances before the Authority.

[5] Mr Halse, on behalf of Ms Currie, applied for leave to raise the personal grievance claims outlined in the Statement of Problem dated 3 September 2018 outside the statutory 90 day timeframe pursuant to s114(3) of the Act.

[6] BOPSASS does not consent to, and strongly opposes Ms Currie being granted leave to raise her grievances outlined in the Statement of Problem dated 3 September 2018 after the expiry of the 90 day timeframe.

Note

[7] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Issues

[8] The issues for determination are:

- whether or not Ms Currie raised personal grievance claims with BOPSASS within the statutory 90 day time period:
 - in the letter dated 18 July 2017
 - in the Statement of Problem filed 3 September 2018
- In the event that it is determined Ms Currie did not raise her personal grievance claims outlined in the Statement of Problem dated 3 September 2018 within the 90 day statutory limitation period, whether or not she should be granted leave pursuant to s.114(4) and s 115 of the Act to raise a personal grievance outside the statutory 90 day time period

Brief Background Details

[9] Ms Currie was employed as an ACC Administrator in January 2016.

[10] In July 2016 BOPSASS engaged a consultant to undertake a climate and culture survey to identify areas of issues of concern to management. Ms Currie participated in this survey.

[11] In or about September 2016 BOPSASS advertised the position of ACC ISSC Contract Coordinator for which Ms Currie applied. This management role entailed overall responsibility for the smooth running of the ACC contract.

[12] Ms Currie was not the successful applicant for the position which was filled by Ms Julie Wilson. Subsequent to the appointment of Ms Wilson, their respective positions necessitated that she and Ms Currie had frequent interactions with each other.

[13] During the period from 21 November 2016 to 12 December 2016 Ms Currie took sick leave which she alleged was due to stress. The medical certificate provided to BOPSASS by Ms Currie provides no details of the reason for the sick leave.

[14] On 30 November 2016 Ms Currie emailed Mr Sonny Williams, Business Manager, and Ms Alicia Adler, Regional Clinical Operations Manager, requesting to meet with them to discuss her return to work. Ms Currie also requested that the meeting take place off site and advised that she would be accompanied by a support person.

Meeting 6 December 2016

[15] At the meeting held off site on 6 November 2016 between Ms Currie, Mr Williams and Ms Adler, Ms Currie raised concerns regarding Ms Wilson's management style in relation to the ACC contract and supplied a list of her needs for consideration immediately following the meeting.

[16] Following the meeting Ms Currie sent an email to Mr Williams and Ms Adler dated that same day, 6 December 2018, in which she stated:

Again, thank you very much for providing me the opportunity to discuss the plan moving forward with regard to my return to work.

As promised, please find my list of needs as discussed earlier attached.

After speaking with Kim regarding mediation, I feel more confident about BOPSASS requesting a mediator to work with us, in order to guide our communication to a positive and transparent relationship.

[17] Attached to the email was the list of Ms Currie's needs. At the first paragraph the list refers to the reasons for Ms Currie's concerns and anxiousness in regard to the survival of the ACC contract. She commented: "I am passionate and dedicated to the ACC contract, and have struggled with seeing the slow decline of our services to the TPs."

[18] In the following part of the list the concerns are itemised as:

- Training a manager, with the expectations of, at some point they take the lead as appropriate.
- Frustration with, after reiterating the importance of understanding the basics of the ACC treatment process, nor the payment structure.
- Put my hand up when I'm at fault, but I take it personally when it has been inferred I or the team have made an error.
- Procedures and office layout changed with my objection, and which later proved not to work.

[19] The requirements specified by Ms Currie for her return to work are set out under five headings:

- (i) Office Layout;
- (ii) Teamwork;
- (iii) Training;
- (iv) Contract Manager; and
- (v) Operational needs.

[20] BOPSASS submits that it was agreed at the meeting that a plan would be implemented to assist the parties to discuss and resolve any issues between them.

[21] Mr Williams telephoned Ms Currie on 9 December 2016 to discuss her proposed return to work at BOPSASS, and it was agreed that Ms Currie would return to work on 12 December 2017.

[22] Ms Currie returned to work on 12 December 2016 until March 2017 when she went on holiday.

[23] On the date of her expected return from holiday to work, 31 March 2017, Ms Currie sent an email to the Regional Clinical Services Manager advising that she would not attend for work that day and notifying of her resignation from BOPSASS also effective that day (31 March 2017).

[24] Ms Currie subsequently clarified in a text message that she would work out her four weeks' notice period but notified BOPSASS that she did not want to complete the last two days of the notice period. Her last day at BOPSASS was 26 April 2017.

[25] Ms Currie was invited to attend an exit interview but declined to do so, explaining in an email dated 26 April 2017 that:

I have voiced my concerns many times before, and again in the 'Culture and Climate Survey' last July I also raised my concerns in a meeting on 6th December last year with Sonny and Alicia, where we discussed issues that had arisen and how best to move forward ...
I therefore have no confidence that further comments will be utilised at any beneficial level.

[26] Attached to that email was the list of needs which Ms Currie had submitted to BOPSASS on 6 December 2016.

[27] BOPSASS responded by email dated 26 April 2017 acknowledging Ms Currie's email which would be added to her file: "in place of an exit interview document" and stated that the return to work document was appreciated.

Letter dated 18 July 2017

[28] On 18 July 2017 Mr Halse, on behalf of Ms Currie, raised a personal grievance in respect of constructive dismissal and unjustifiable disadvantage. In the letter it specified that the unjustifiable disadvantage was attributable to BOPSASS's failure to:

A Properly investigate the allegations of excessive workload and stress that was brought to the attention of her manager in accordance with workplace health and safety guidelines and legislation.

B. Provide a safe workplace.

[29] In regard to the constructive dismissal claim the letter specified:

As result of the unaddressed issues Karen has become unwell, which led to a detrimental effect on her engagement and job satisfaction and led to her having to resign and find new employment, which has also resulted in a loss of income.

Statement of Problem 3 September 2017

[30] In the Statement of Problem dated 3 September 2018 bullying is raised as the basis for the personal grievances specified as being:

1.1 constructive dismissal arising the BOPSASS's failure to follow process and justly and correctly investigate allegations of bullying by and against the Applicant ...

- 1.2 unjustified disadvantage ... In particular, the Respondent's failure to follow process and justly and correctly investigate allegations of bullying by and against the Applicant.

[31] The Statement of Problem also raised a personal grievance in respect of a breach of good faith in respect of BOPSASS's failure: "to protect the applicant despite him [sic] raising his [sic] concerns with the Respondent".

Did Ms Currie raise personal grievance claims with BOPSASS within the statutory 90 day time period?

[32] Ms Currie has raised personal grievances. Section 114(1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[33] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[34] Section 114(2) of the Act states:

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."

[35] The Employment Court in *Wyatt v Simpson Grierson (A Partnership)* makes it clear that it is necessary that there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised.¹

[36] Ms Currie raised personal grievances in two separate documents. The first of these is a letter dated 18 July 2017 which raises a claim of unjustifiable disadvantage and constructive dismissal. The second is a Statement of Problem dated 3 September 2018 which raises claims of unjustifiable disadvantage, constructive dismissal and a breach of good faith.

[37] The personal grievance claims in the letter dated 18 July 2017 are based upon an excessive workload and stress; those raised in the Statement of Problem dated 3 September 2018 are based upon BOPSASS's failure to: "justly and correctly investigate allegations of bullying".

¹ *Wyatt v Simpson Grierson* [2007] ERN 489 at [29]

[38] Ms Currie resigned on 31 March 2017, and her employment with BOPSASS ceased on 26 April 2017. These are the relevant dates for assessing whether or not Ms Currie raised her personal grievances within time.

(i) *Personal grievance raised in the letter dated 18 July 2017*

[39] The letter dated 18 July 2017 which raises personal grievance claims on behalf of Ms Currie was received by BOPSASS 109 days after Ms Currie's resignation and 81 days after the termination of her employment with BOPSASS.

[40] I have considered whether or not the date of the employment terminating on 26 April 2018 should be the effective date for the purposes of the statutory 90 day time limit for both the disadvantage claim and the constructive dismissal claim.

[41] Considering the resignation and Ms Currie's email dated 26 April 2017, I conclude that Ms Currie's belief that the employer's actions were unjustifiable had arisen prior to, and crystallised, by the date of her resignation on 31 March 2017.

[42] Consequently I find that the unjustifiable disadvantage part of the claim arose on 31 March 2017 and was not raised until 18 July 2017, 109 days later.

[43] I determine that the disadvantage grievance raised in the letter dated 18 July 2017 is outside the statutory time limit.

[44] Ms Currie did not leave her employment with BOPSASS until 26 April 2018. The email dated that same day indicates that the reasons that had prompted her resignation remained unchanged during the period between the resignation and her last day of working for BOPSASS.

[45] Further the letter dated 18 July 2017 states that Ms Currie had lost all faith in BOPSASS and decided to resign which view: "... was confirmed when she received a response to her decline to interview". The response from BOPSASS to Ms Currie's email declining an exit interview was received on 26 April 2017

[46] Whilst I consider based on these statements that Ms Currie's decision to resign due to the alleged unjustifiable actions of BOPSASS on 31 March 2017 indicate that should be treated as the effective date for the commencement of the 90 day time limit, the employment did not come to an end until 26 April 2017.

[47] On that basis, and to be determined based upon the evidence, it is possible that the constructive dismissal claim might be within the 90 day statutory time limit because the letter

dated 18 July 2018 was sent 81 days from the date of Ms Currie's last day of employment at BOPSASS.

(ii) *Personal grievance raised in the Statement of Problem dated 3 September 2018*

[48] The Statement of Problem dated 3 September 2018 raises personal grievance claims of unjustifiable disadvantage, constructive dismissal and a breach of good faith, all based upon allegations of bullying.

[49] These claims have been raised a significant length of time after Ms Currie's employment with BOPSASS ended and I determine that they have not been raised within the 90 day time limit.

Ms Currie did not raise her personal grievance claims contained in the Statement of Problem dated 3 September 2018 within the 90 day statutory limitation period. Should she be granted leave pursuant to s.114(4) and s 115 of the Act to raise a personal grievance outside the statutory 90 day time period?

[50] The Statement of Problem dated 3 September 2018 is significantly outside the 90 days statutory time limit set out in s 114(1) of the Act. Accordingly Mr Halse has filed an Application for Leave to be granted in respect of Ms Currie being able to raise the personal grievances outside of the 90 day statutory time limit.

[51] The policy that underpins s 114(1) of the Act is in order that personal grievances can be addressed and resolved speedily.² To that end personal grievances should be raised within the statutory time frame for so doing. However if an employee fails to do so, the law provides that leave may be granted if the reason for failing to meet the statutory time limit is due to 'exceptional circumstances', pursuant to s 115 (a) and (b) of the Act which state that the Authority may grant leave if it is:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances ... and
- (b) considers it is just to do so.

[52] Mr Halse suggests two grounds as the basis for the Authority granting leave is based in the Application for leave: (i) that of exceptional circumstances; and (ii) that Ms Currie raised the personal grievances related to bullying verbally at the meeting held with BOPSASS on 6 December 2016.

² *Blue Water Hotel Limited c VBS* [2018] NZEmpC 128 at [28]: "It has long been recognised that the policy of the provisions relating to personal grievances requires them to be dealt with expeditiously

(i) *Exceptional Circumstances:: The 'dynamics of workplace*

[53] The threshold for raising a personal grievance outside the statutory time limits is high.³ There are examples of the type of circumstances which could constitute 'exceptional' set out in s 115 of the Act. I accept that the examples of exceptional circumstances provided in s 115 of the Act are examples only and: "*not an exhaustive or closed list of 'exceptional circumstances'*".⁴

[54] As set out in s 115(a) of the Act, the exceptional circumstances must have occasioned the delay in raising the personal grievance claims.

[55] The meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune* as being those which are "*unusual, outside the common run, perhaps something more than special and less than extraordinary*".⁵

[56] The exceptional ground submitted by Mr Halse is that of the: "dynamics of workplace" specifically of the: "dynamics of workplace bullying".

[57] I accept that, as submitted by Mr Sparrow, all personal grievances occur in the workplace. Accordingly I do not find the fact that Ms Currie's personal grievance has its origins in the workplace to be an exceptional circumstance.

[58] Mr Halse refers in paragraph 2.4 of his Application for Leave to: "The dynamics of workplace bullying are essential background and context to the Applicant's unjustified disadvantage and constructive dismissal."

[59] In considering whether or not the 'dynamics of workplace bullying' constitute an exceptional circumstance I note that workplace bullying as observed above also occurs in the workplace and that 'bullying' refers to the nature of the personal grievance claims.

[60] An applicant seeking leave on the basis of exceptional circumstances must be able to establish that during the whole of the 90 statutory time period he or she was unable to consider raising a personal grievance.

³ In *Telecom New Zealand Limited v Morgan*³. the Court in addressing the application of s115(a) considered that Parliament had not intended to relax the tests for extending the limitation period when enacting ss 114 and 115 of the Act, and went on to observe that: "Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals or other matters giving rise to grievances

⁴ *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30 at [34]

⁵ [1998] 2 ERNZ 70

[61] Mr Halse in his Application for Leave provides no basis or explanation for Ms Currie not having been able to submit her personal grievances within the statutory 90 day time limit.

[62] I do not find an ‘exceptional circumstance’ or that it occasioned the delay in Ms Currie raising her personal grievances based on allegations of bullying as set out in the Statement of Problem dated 3 September 2018.

(ii) *Did Ms Currie raise a personal grievance on 6 December 2016?*

[63] As set out in *Creedy v Commissioner of Police* an employee may raise a personal grievance orally and no particular form of words need be used.⁶ However the employer does need to know what to address.⁷

[64] Mr Sparrow has submitted on behalf of BOPSASS that whilst it accepts that there was discussion about the ACC contract and how it was being handled, it does not accept that there was any discussion about workplace stress or that Ms Currie used the words ‘personal grievance’ during the meeting.

[65] There are no minutes of the meeting to clarify what had been discussed at the meeting on 6 December 2016. Therefore the circumstances that led to the meeting and the correspondence and events before and following the meeting are pertinent to the enquiry.

[66] Ms Currie had been away on sick leave prior to 6 December 2016. On 30 November 2016 she emailed Mr Williams and Ms Adler requesting a meeting with them. After the meeting Ms Currie sent an email to Mr Williams and Ms Adler dated that same day, 6 December 2018, in which she thanked them for providing the opportunity to discuss the: “plan moving forward”. Ms Currie provided the list of needs which had been discussed at the meeting.

[67] Mr Halse referred me to the Authority case of *Barnes v Canterbury Westland Kindergarten Association Inc.* . I find that this case can be distinguished from this case noting that in that case the Member observed:

I find that the letter provided on 26 June 2015 raised a personal grievance that Ms Barnes was unjustifiably disadvantaged in her employment. The key elements were that she alleged she had been subject to bullying and harassment and had become unwell and could not return to the workplace.⁸

⁶ *Creedy v Commissioner of Police* [2006] ERNZ 517

⁷ That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates: *Creedy at [36]*

⁸ *Barnes*[2018] NZERA Christchurch 31 at [23]
s Above n11 at [23]

[68] In this case I find no reference to a personal grievance having been, or being raised, in the email dated 6 December 2016. A personal grievance has not been raised in the list of needs submitted to BOPSASS by Ms Currie

[69] In addition I observe that the Statement of Problem dated 3 September 2018 refers to: “allegations of bullying” however I find no reference to bullying in either of the email dated 30 November and 6 December 2016, or in the list of needs document.

[70] During the period 6 December 2016 until Ms Currie resigned on 31 March 2017 there is no evidence in any correspondence between the parties supporting the claim that Ms Currie raised a personal grievance which she wanted BOPSASS to address on 6 December 2016.

[71] I determine that Ms Currie did not raise a personal grievance on 6 December 2016.

Is it just to grant Ms Currie leave pursuant to section 114(4)(b)?

[72] On the basis that I have not found the delay in Ms Currie in making an personal grievance application to have been caused by exceptional circumstances pursuant to s 114 (4) and s 115(a) of the Act, I do not have to determine whether it would have been just to grant Ms Currie leave to proceed with her personal grievances based upon allegations of bullying.

Summary of Orders

[73] The following provides a summary of the orders:

- The disadvantage grievance raised in the letter of 18 July 2017 is outside of the 90 day statutory time frame
- The constructive dismissal claim based on allegations of excessive workload and stress raised in the letter of 18 July 2017 is within the 90 day statutory time frame
- The disadvantage claim, constructive dismissal claim and breach of good faith claim based on allegations of bullying raised in the Statement of Problem dated 3 September 2018 are outside the 90 day statutory time frame.

Next Steps

[74] A case conference call will be arranged to progress the personal grievance claim of constructive dismissal based on allegations of excessive workload and stress.

Costs

[75] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority