

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 134/08
5114763

BETWEEN

NGAWHETU VIOLET
DICKSON
Applicant

AND

UNILEVER NEW ZEALAND
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Michael Smith for the Applicant
Katie Elkin and Jennifer Jones for the Respondent

Investigation Meeting: 4 September 2008 at Wellington

Determination: 2 October 2008

DETERMINATION OF THE AUTHORITY

[1] Ms Dickson was employed by Unilever New Zealand Limited from September 1994 until 2 March 2007. She was employed under the Unilever Collective Agreement dated 19 October 2006 to 19 October 2009.

[2] From 1994 until August 2005 Ms Dickson worked at Unilever's Petone factory primarily in a stores-person role, but also carried out packing duties at times. During her time with Unilever Ms Dickson had a number of non-work-related and work-related injury claims with ACC. Those claims included injuries to her neck, back, arm, hand, ankle and shoulder.

[3] As a consequence arrangements were made and agreement reached in August 2005 with Ms Dickson for her rehabilitation with a transfer to a role on the packing line within the factory.

[4] However, after one night's work, she took sick leave, due to pains in her foot, ankle, back and shoulder and then worked reduced hours from the end of August 2005 until the end of September 2005. She worked full time from October 2005 until December 2005 performing the packing duties. During this period, Ms Dickson and Mr Bernard Pedersen (her partner and union delegate) requested that Ms Dickson be made redundant and paid redundancy. No agreement was reached, because Unilever were committed to Ms Dickson's rehabilitation. There was no redundancy situation.

[5] In December 2005 Ms Dickson began a period of sick leave on ACC for sore hands and elbows and returned to work on light duties packing on reduced hours in early March 2006.

[6] On 4 July 2006, Ms Dickson was advised that the role she was in was a temporary solution that met Unilever's output needs and Ms Dickson's rehabilitation programme, but she was informed that: *"Although we do not have a great deal of flexibility and opportunities suitable to your current needs we are committed to doing our best to ensure that you are able to return to work in full capacity at some stage in the near future."*

[7] On 5 October 2006, Ms Dickson was given an indication that there was a possibility that she would be found to be unfit to return to a process worker position, i.e. in stores or packing. On 24 October 2006, Unilever advised Ms Dickson that she was unfit for her temporary role, and that Unilever's intention was to support her in regaining full capability to return to the process worker position. She was given until 27 November 2006 to advise Unilever if she disagreed with the conclusion. Ms Dickson did not respond.

[8] On 4 November 2006, Ms Dickson underwent *"lateral epicondylar release"* (elbow) surgery. She never returned to full time employment with Unilever after that surgery.

[9] Medical opinions after that were unanimous that Ms Dickson was not fit for any roles involving repetitive lifting and gripping. Unilever formed a view that her medical restrictions were such that there were no roles in the factory suitable for her. It was also concluded that it was not possible to modify any of the existing roles to take account of Ms Dickson's restrictions on being able to work.

[10] Unilever decided to terminate Ms Dickson's employment for medical reasons. That conclusion was confirmed to Ms Dickson during a meeting on 31 January 2007. On 16 February Mr Pedersen met with Keri Anne Mooney, now Keri Anne Moana Tane, Human Resources Manager and they had a discussion that is now in dispute.

[11] On 2 March 2007, Unilever wrote to Ms Dickson confirming its advice of 31 January 2007, terminating her employment.

[12] On 19 April 2007, Mr Pedersen gave Unilever a notice raising a personal grievance (the first personal grievance) with the particulars to follow. Details were subsequently provided in a letter dated 11 July from Ms Dickson's representative.

The Issues

[13] The employment relationship problem has three preliminary matters. The three issues are:

- (i) Whether or not Mr Pedersen properly raised a personal grievance (the first personal grievance) in the 90 day timeframe under s.114 of the Employment Relations Act 2000;
- (ii) Whether or not Ms Dickson's claim for damages arises directly or indirectly out of a personal injury and therefore her claim for damages is barred by s.317 or s.318 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 (IPRC Act);
- (iii) Whether or not Ms Dickson's breach of contract claim for damages arises out of the dismissal and is therefore barred by s.113 of the Employment Relations Act 2000.

[14] Ms Dickson contended that she is able to proceed in respect of her claims because her personal grievance was raised in the timeframe by the letter that was handed to the employer on 19 April 2007. If that letter is not satisfactory to put the employer on notice of the claim, and how to resolve it, Ms Dickson has relied on the employer's knowledge of the background of the matter for the employer to have been put on reasonable notice of her claims.

[15] An application for exceptional circumstances has been raised in submissions during the Authority's investigation meeting and has been opposed by Unilever.

[16] Also, belatedly, another personal grievance (the second personal grievance) was referred to in Ms Dickson's representative's submissions that related to Mr Pedersen's evidence. Unilever denied that it was raised as a personal grievance at the time. It was not

included in the statement of problem and was not referred to in the letter dated 11 July from Ms Dickson's representative.

Was the First Personal Grievance Raised in Time?

[17] The issue surrounding the raising of the personal grievance related to the letter that Mr Pedersen sent to Unilever on 19 April. That letter briefly said: *"Please treat this letter as the submission of my personal grievance based on unjustified dismissal. Particulars of my grievance will be provided presently."*

[18] The issue is whether or not this notice was sufficient to raise Ms Dickson's personal grievance with her employer? The parties have a difference of opinion on whether or not that notice contained sufficient or insufficient details for Unilever to respond. It did not put the employer on notice of what the complaint was, given that the parties had been previously involved in discussions on an exist for Ms Dickson purportedly for redundancy. She had also been put on notice on 31 January of her termination of employment for medical reasons and that was confirmed on 2 March. Therefore there could have been at least two issues, and now it emerges there is a third issue in respect of the second personal grievance referred to during the Authority's investigation meeting relating to a meeting between Mr Pedersen and Ms Tane on 16 February 2007.

[19] It was unreasonable to expect the employer to understand what the grievance was when there were no remedies sought and no proposals made on how to resolve the problem, or indeed, to identify the problem. I am supported in this conclusion by the time lapse after 31 January when nothing more formal was done until the brief note was sent on 19 April, and the letter dated 11 July 2007 was provided, some 130 days after Ms Dickson's employment ended.

[20] Unilever did not reply to Mr Pedersen's note of 19 April, which is consistent with waiting to see whether or not Ms Dickson would decide to provide any particulars, given that there were at least two issues.

[21] I am also supported in my conclusion by Mr Pedersen's note dated 19 April which did not put Unilever on proper notice of the particulars raising Ms Dickson's personal grievance, despite referring to a personal grievance and unjustified dismissal.

[22] I have also rejected Ms Dickson's claim that the background meant that the employer would have known what was being claimed. This was because there was the background

involving Ms Dickson's injury, discussions on redundancy and a discussion on the amount payable to Ms Dickson on the termination of her employment. The content of the latter discussion is in dispute and I am satisfied that it did not relate to raising a personal grievance at the time. This is because Ms Dickson has relied on Mr Pedersen's 19 April note and Mr Smith's letter dated 11 July that did not refer to Mr Pedersen's discussion with Ms Tane on 16 February. The employer is not required to follow the matter up or to try and second guess what an employee might want when it reasonably could have expected the particulars to have been provided if a personal grievance was being pursued. The responsibility rested with Ms Dickson to get advice or to proceed and provide the particulars in 90 days, especially as her employment agreement provided access to the dispute resolution procedure and her partner was a union delegate.

[23] Also I am supported in my conclusion by Mr Smith's letter dated 11 July 2007 where the grounds and some of the details of the personal grievance were outlined for the first time. At the very least an employer could have expected in the 90 days to have been put on notice of the claims referred to in that letter and how to resolve the personal grievance.

[24] It is my conclusion that Ms Dickson and Mr Pedersen did not raise the personal grievance in 90 days.

Are there exceptional circumstances?

[25] The grounds for exceptional circumstances have not been established. The application relies on Ms Dickson's employment agreement requiring no more than for her to raise "a personal grievance" and that there has been a profound change in the law that she was not aware of. I do not accept that either of these propositions constitutes exceptional circumstances considering Mr Pedersen gave an indication that particulars would follow and that Ms Dickson had time to get further advice on the terms of her employment agreement and any changes in the law. Mr Pedersen was a union delegate and it is reasonable to expect he would have known of the requirements or at least been able to reasonably check what was required. Furthermore I do not accept that there has been a profound change in the law. No proper notice of exceptional circumstances was given before the 28 August 2008 when submissions were received in the Authority prior to the investigation meeting. Moreover Ms Dickson has not satisfied me that the delay was occasioned by exceptional circumstances. The application is dismissed.

Was there any breach action by Unilever?

[26] Unilever is an accredited employer under the ACC Partnership Programme. All leave, treatment and rehabilitation relating to the work-related claims submitted by Ms Dickson were fully funded by Unilever and Unilever contracted the management of all claims to Catalyst Risk Management (CRM).

[27] Ms Dickson has relied on clause 15 of her collective agreement and alleged that Unilever has breached the clause by requiring her to work on the packing line against her will from 21 August 2005 on a continuing basis.

[28] Ms Dickson says she neither received the skills training relating to the packing line and was not trained in any module relating to the packing line prior to or following her transfer to the packing line. She further relied on her injury caused by the defects relating to the employer's breach of the provision. She says she was incapable of working on the packing line.

[29] On 20 June 2005, Ms Dickson advised Unilever that she did not want to transfer to packing. This was due to neck and back problems from earlier injuries. A transfer, however, did occur on 6 July 2005. Because there were concerns that Ms Dickson had about her neck and back, Unilever arranged a functional capacity assessment. A physiotherapist and a doctor both concluded that Ms Dickson was physically fit to work in packing (but not in direct contact with powders).

[30] During Ms Dickson's employment, her respiratory health was regularly monitored as part of Unilever's occupational health and safety programme. She was found not to be sensitised to the enzymes (in powders) used in the factory. She was however designated as "restricted" due to her low normal lung function test results. This meant that Ms Dickson was prohibited from working directly with powders.

[31] On 28 July 2005, Ms Dickson withdrew her agreement to transfer to packing. She indicated that she would like to take redundancy if it was available.

[32] Unilever met with Ms Dickson on 19 August 2005 to discuss her concerns. The concern related entirely to Ms Dickson's health status, particularly her lung function.

[33] There was never a formal suggestion made by Ms Dickson that a transfer would constitute a breach of her contract at that time. Attending that meeting with Ms Dickson was

her representative (and partner and union delegate) Mr Pedersen. They produced two documents setting out the assurances that Ms Dickson sought in transferring to packing. Unilever agreed to provide, and take steps to meet, the assurances sought by Ms Dickson. Ms Dickson again agreed to transfer to packing. The outcome of that meeting was recorded in an email dated 19 August 2005 from the Operations Manager, Neil Robinson. That email included the following comment:

I am pleased that Whetu is now taking on this role positively and look forward to her continued contribution to the success of Petone Powders.

[34] The remedies are a clue to this matter and I am satisfied the claim for the breach arises out of Ms Dickson's attempt to obtain damages for person injury that allegedly resulted from a transfer to packing duties and then led to her termination of employment. Such damages are barred by s 317 (1) of the IPRC Act. The cause of action relied upon by Ms Dickson to allege that there had been a breach of her employment agreement relates directly to the personal injury matter, and the Authority would not have jurisdiction to provide the remedies sought.

[35] In any event, this issue was resolved when Ms Dickson agreed to transfer. There is also evidence that Unilever responded that it could not ignore her further complaints and needed to continue with the rehabilitation plan.

[36] Another claim has been for a breach of contract in part on Ms Dickson's termination of employment for lost income and superannuation benefits. S 113 (1) of the ER Act prevents an employee bringing a breach of contract claim in relation to the termination of employment, and that in essence is what Ms Dickson's claim is about. The damages claimed would fall outside the Authority's jurisdiction.

The second personal grievance claim: unjustified action and disadvantage

[37] In the Authority's investigation meeting the submission was made that Ms Dickson also has a personal grievance that related to an unjustified action and disadvantage when Mr Pedersen told Ms Tane that Ms Dickson "*would fight to keep her job*" when he received Ms Tane's advice of the sum the respondent would pay on the termination of Ms Dickson's employment. This was not included in the statement of problem and Mr Smith's letter dated 11 July 2007 providing the details of the personal grievance for the first time. Mr Pedersen deposed that his conversation with Ms Tane occurred on 16 February 2007 when they had a discussion about the amount of a payment and that he conveyed Ms Dickson's instructions to

Ms Tane that if that was the money on offer, then Ms Dickson would fight to keep her job. He says these were the actual words he used and that he disputed Ms Tane's response that the termination had been accepted. He says that he replied that it had not.

[38] Ms Tane has deposed that she and Mr Pedersen talked about a sum of money upon the termination of employment given Ms Dickson's length of service, but in the end no sum other than the contractual entitlement was paid.

[39] Ms Tane deposed that at no point during the meetings held on 31 January 2007 and 16 February did either Ms Dickson or Mr Pedersen challenge the decision that had been taken on medical grounds. She denied that a personal grievance was ever raised.

[40] I accept Ms Tane's position because in context it is probable that she and Mr Pedersen were discussing termination arrangements and payment that was not about a personal grievance. I am supported by the earlier discussions that had been held when Mr Pedersen requested redundancy and the letter dated 19 April that subsequently followed and referred to providing particulars later. The comments Mr Pedersen says he made on 16 February were not included in the statement of problem when the application was lodged in the Authority. And they were not included in Mr Smith's letter dated 11 July. Unilever was not put on sufficient notice of what it was that Ms Dickson was requesting to resolve that matter. Therefore I am not prepared to link Mr Pedersen's comments to establish that Ms Tane would have reasonably concluded there was a personal grievance arising out of their discussion on 16 February.

[41] Alternatively, the comment, if it was made, could have related to the background of Ms Dickson's personal grievance. As such it can not be taken any further because Ms Dickson's grievance was not raised properly in time and the delay was not occasioned by exceptional circumstances.

[42] Ms Dickson's claims are dismissed.

[43] Costs are reserved.