

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKURAU

[2021] NZEmpC 14
EMPC 430/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DISABILITIES RESOURCE CENTRE TRUST Plaintiff
AND	SONIA MOANA MAXWELL Defendant

Hearing: 30 November 2020
(Heard at Tauranga)

Appearances: D Jacobson, counsel for plaintiff
S Austin, advocate for defendant

Judgment: 18 February 2021

JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves the preliminary issue of whether the defendant, Ms Maxwell, may pursue a personal grievance against the plaintiff, Disabilities Resource Centre Trust (Disabilities Resources), for unjustifiable dismissal.

[2] There are two questions:

(a) Did Ms Maxwell raise her personal grievance within the prescribed period of 90 days?¹

¹ Employment Relations Act 2000, s 114(1)-(2).

(b) If not, should she be granted leave to bring her grievance after the expiration of the 90-day period?²

[3] The Employment Relations Authority (the Authority) found that Ms Maxwell raised her grievance within 90 days of her dismissal.³ The case therefore comes to the Court as a challenge brought by Disabilities Resources.

Ms Maxwell dismissed for providing false timesheets

[4] Disabilities Resources provides home help and personal care support to elderly people and to people with disabilities. Ms Maxwell was employed by Disabilities Resources as a support worker.

[5] In February 2018 Disabilities Resources learned that the main person for whom Ms Maxwell had been claiming time for personal care and household management services had been overseas for the preceding three months. Disabilities Resources conducted a disciplinary process, which led to Ms Maxwell's dismissal on 20 February 2018, essentially for providing false timesheets.

[6] In the course of the disciplinary meeting, Ms Maxwell's primary point was that she understood the family of the person to whom she provided care had advised Disabilities Resources that he would be away and had sorted everything out for her to continue to come to his home and attend to matters for his household. She said she did not intend to deceive Disabilities Resources.

Ms Maxwell took steps to raise her grievance

[7] Ms Maxwell wished to challenge her dismissal and Mr Austin agreed to act as her advocate. He said, however, that he was not in a position to write to Disabilities Resources immediately and that Ms Maxwell should submit her grievance herself so as to be within the 90-day period.

² Employment Relations Act 2000, s 114(3)–(4).

³ *Maxwell v Disability Resource Centre Trust* [2019] NZERA 646 (Member Larmer).

[8] He provided Ms Maxwell with a draft letter, which she adopted in its entirety. She gave this letter to Disabilities Resources on 17 May 2018, being day 87 from her dismissal. It reads:

17th May 2018

Bronwyn Foxx
Manager
Disability Resource Centre

Dear Bronwyn

I refer to your recent decision to dismiss me from my employment with D.R.C.T.

I consider that your decision in that regard was unfair and was unjustifiable and I will want remedies in accordance with the Employment Relations Act 2000.

Please advise how you would wish to proceed to resolving my concern.

Yours Sincerely

Sonia Maxwell

...

[9] When Disabilities Resources received the letter, it was surprised and says it had no idea as to the basis on which Ms Maxwell claimed to have been unjustifiably dismissed. It did not respond to the letter as it considered it to be insufficient to raise a grievance.

[10] By letter dated 20 June 2018, Mr Austin followed up with Disabilities Resources and provided detail of Ms Maxwell's claim of unjustifiable dismissal. Disabilities Resources accepts that this letter would have been sufficient to raise a personal grievance but says it was out of time. Disabilities Resources did not consent to the personal grievance being raised out of time.

Employment Relations Act 2000 covers the raising of a personal grievance

[11] Grievances generally must be raised by employees with their employers 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.⁴ A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.⁵ The raising of a grievance marks the first step to resolving it.

[12] Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period. The Authority may grant leave if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it considers it just to do so.⁶

[13] Section 115(b) of the Act provides that exceptional circumstances include, amongst other things, where the employee made reasonable arrangements to have the grievance raised on their behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

The parties had opposing submissions

[14] In summary, Ms Maxwell says that her letter of 17 May 2018 was sufficient to raise her personal grievance, particularly in view of the prior communications between her and Disabilities Resources in the course of the disciplinary process.

[15] She says that, if the letter was not sufficient, there were exceptional circumstances, being her full reliance on her representative as to the form the grievance letter should take, and that it is just for her to be permitted to pursue her grievance.

[16] Disabilities Resources says that the letter of 17 May was insufficient to raise a personal grievance and that there were no exceptional circumstances that justified allowing her to raise her grievance out of time. In particular, it says, as Ms Maxwell

⁴ Employment Relations Act 2000, s 114(1).

⁵ Section 114(2).

⁶ Section 114(4).

wrote the letter herself, it was not an action or default of her advocate and therefore s 115(b) did not apply.

Letter of 17 May 2018 sufficient to raise grievance for unjustifiable dismissal

[17] The first question is whether Ms Maxwell's letter of 17 May 2018 was sufficient to make Disabilities Resources aware that she alleged a personal grievance that she wanted Disabilities Resources to address.⁷ For an employer to be able to address a grievance as the legislation contemplates, the employer must know what it is addressing.⁸ It is important that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.⁹

[18] In *Creedy*, the Employment Court recognised that specifying the statutory type of the grievance as, for example, unjustifiable disadvantage in employment, may not be sufficient.¹⁰ Where, as there, the employee is simply alleging unjustifiable disadvantage, the employer may have no idea what actions it has taken that are being complained of. But an explicit dismissal is different; the action the employee is complaining about is the dismissal by the employer.¹¹

[19] The Court recognises that the totality of the communications between the employee and employer might constitute raising a grievance.¹² This was the basis upon which the Authority found Ms Maxwell's personal grievance was raised within time, pointing to her statements in the disciplinary meeting. However, while it is true that Ms Maxwell raised matters in the context of the disciplinary meeting, she did so to explain her actions in an effort to convince Disabilities Resources not to dismiss her; she did not claim the dismissal was unjustifiable. Her response to the suggestion of dismissal was to acknowledge her work arrangement "wasn't right" and to offer to try and compensate Disabilities Resources for the moneys she received. There also was nothing in her letter of 17 May that could be said to incorporate by reference

⁷ Section 114(2).

⁸ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

⁹ At [36].

¹⁰ At [36].

¹¹ Recognising that, where the claim is of constructive dismissal, the position may be different.

¹² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36].

anything she had said in the disciplinary meeting. The statements made in the context of the disciplinary process are not part of the communication of the grievance.

[20] For this reason, as there was no other communication between the dismissal and the letter, the question of whether Ms Maxwell raised a personal grievance within 90 days rests entirely on the letter of 17 May 2018.

[21] That letter was certainly sparse. I recognise comments the Court has previously made about the need for an employee to provide the grounds on which the dismissal was claimed to be unjustifiable, so that an employer can respond on its merits.¹³ Ms Maxwell's claim of the dismissal being "unfair" certainly was not ideal in that regard.

[22] Nevertheless, when comparing the letter Ms Maxwell sent against the requirements of the Act, it is clear that she made Disabilities Resources aware that she had a personal grievance for unjustifiable dismissal that she wanted it to address, which is what s 114(2) requires. The letter was not equivocal. She invited Disabilities Resources to respond. Through this letter, Ms Maxwell raised her personal grievance within the prescribed 90-day period.

[23] The Authority ought now proceed with this matter.

There are exceptional circumstances

[24] If Ms Maxwell had not raised her grievance within 90 days of her dismissal, she would have needed leave to raise it out of time. That would require her to show exceptional circumstances and, if those exist, for the Court to consider it just for her to raise her grievance out of time. Although the Court's finding on the first question resolves the challenge, these issues are nevertheless addressed.

[25] While the exceptional circumstances identified in s 115 are not exhaustive, they assist in determining when such circumstances exist and when they do not. More

¹³ *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117, ERNZ 693 at [40]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [46]-[47].

particularly, Parliament has specified in s 115(b) that reliance on an agent will result in “exceptional circumstances” if the requirements of that paragraph are met. When *Creedy* went to the Supreme Court, the Court said it would tend to negate the purpose of that paragraph if other situations where an employee has mistakenly relied on an agent to ensure that a grievance was notified in time, were readily treated as establishing “exceptional circumstances”.¹⁴

[26] The Court noted that, where none of the s 115 categories applies, either directly or by parity of reasoning, the question of whether the circumstances are “exceptional” remains of practical significance.¹⁵

[27] Here, Ms Maxwell wanted Mr Austin to raise a personal grievance for her and gave him details of her concerns. Had he then sent Disabilities Resources a deficient letter, the exception identified in s 115(b) would apply. The parity of reasoning referred to by the Supreme Court applies. There is no reason in principle for finding that, because Ms Maxwell adopted Mr Austin’s draft letter and sent it herself, rather than him sending it direct to Disabilities Resources, the circumstances would not be similarly exceptional.

[28] Justice then would have required that Ms Maxwell be able to proceed with her grievance. It would not be just for her to be deprived of that opportunity because of the failing of her representative. Even if the letter of 17 May did not constitute the raising of a grievance, it did mean the letter of 20 June 2018 was not a bolt out of the blue to Disabilities Resources. I also take into account that Disabilities Resources chose not to respond to Ms Maxwell’s 17 May letter, despite her invitation that it do so. A delay of just over a month is significant but Disabilities Resources does not suggest it would be prejudiced by the delay.

[29] Accordingly, if the letter of 17 May 2018 did not raise a personal grievance for unjustifiable dismissal, the delay in raising Ms Maxwell’s personal grievance was occasioned by exceptional circumstances and it would be just to grant Ms Maxwell leave to pursue it.

¹⁴ *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [28].
¹⁵ At [30].

Costs

[30] It is unclear whether, in the circumstances, Mr Austin is charging Ms Maxwell for his services on this preliminary matter. However, if she has incurred costs and the parties cannot agree on the appropriate contribution from Disabilities Resources, Ms Maxwell may apply for an order for costs by way of memorandum. This memorandum is to be filed in the Court and served on Disabilities Resources within 20 working days of this judgment. Disabilities Resources has 15 working days from service of the memorandum within which to respond. The application then will be dealt with on the papers.

J C Holden
Judge

Judgment signed at 3 pm on 18 February 2021