

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 31
3158981

BETWEEN	SEULBI GANG Applicant
AND	KNCC LIMITED (First Respondent)
AND	JAEHO HEO (Second Respondent)
AND	JAE JEONG JANG (Third Respondent)

Member of Authority:	Eleanor Robinson
Representatives:	Seungmin Kang, counsel for the Applicant Eugene McLaren and Alex Jung, representing the First Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence	13 October 2022 from the Applicant 30 September 2022 from the First Respondent None from the Second and Third Respondents
Determination:	23 January 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Seulbi Gang, claims that she has personal grievances against the First Respondent, KNCC Limited, in respect of constructive dismissal and unjustifiable disadvantage in her employment.

[2] Ms Gang also claims that the Second Respondent, Jaeho Heo, and Third Respondent, Jae Jeong Jang, aided and abetted the personal grievances.

[3] The First Respondent denies that Ms Gang was constructively dismissed and unjustifiably disadvantaged and claims that she voluntarily resigned her employment by resignation.

[4] The First Respondent further claims that Ms Gang has not raised her personal grievance claims within the 90 day time limit as set out in s 114 of the Employment Relations Act 2000 (the Act). The First Respondent not does not consent to the grievances being raised after the expiry of the statutory 90 day timeframe.

[5] This determination addresses the preliminary issue of whether or not Ms Gang raised any or all of her personal grievance claims with the First Respondent within 90 days of the grievance occurring or coming to its notice, whichever is the later in accordance with the requirements of s 114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievances before the Authority.

Note

[6] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem, the Statement in Reply from the First and Second Respondents, documents submitted by the parties, and submissions from the Applicant and the former representative of First Respondent.

[7] The Authority required the relevant documents to be identified and provided to the Authority in order to determine this matter. This information was clarified and provided on 20 January 2023.

[8] The evidence has as a consequence not been tested by questioning under oath or affirmation at this preliminary stage.

Issue

[9] The issue for determination is whether or not Ms Gang raised any, or all, of her personal grievance claims within the statutory 90 day time period.

Brief Background Details

[10] Ms Gang was employed as an Assistant to the Sales Manager and Office Manager of the First Respondent pursuant to an individual employment agreement signed on or about 12 October 2020.

[11] On 15 April 2021 Ms Gang submitted her first notice of resignation to the HR Manager of the First Respondent.

[12] On 16 April 2021 Ms Gang talked to other employees of the First Respondent including the Second Respondent and, being concerned that the First Respondent would not respond to her letter dated 15 April 2021, submitted a letter to the First Respondent, entitled: “Resignation Report and Written Statement” on 19 April 2021.

[13] The First Respondent took no steps in relation to the resignation letter dated 19 April 2021 and did not process Ms Gang’s resignation.

[14] On 24 May 2021 Ms Gang submitted her second resignation which was processed and her last day at work with the First Respondent was 21 June 2021.

[15] On 6 July 2021 a letter was written by the lawyers acting for Ms Gang in which it referred to Ms Gang’s letter dated 19 April 2021. That letter stated that Ms Gang’s letter dated 19 April 2021 had raised a personal grievance and specified these as being for : “Unjustifiable Constructive Dismissal or Disadvantage”.

[16] The 6 July 2021 letter further set out the remedies Ms Gang was seeking and enquired if the First Respondent was prepared to attend mediation.

[17] On 14 December 2021 a Statement of Problem was lodged with the Authority.

[18] A Statement in Reply was filed by the First Respondent on 9 February 2022. In that Statement in Reply the First Respondent denied that Ms Gang’s letter dated 19 April 2021 was a letter raising a personal grievance and claimed it was a letter of complaint about bullying by the Third Respondent.

[19] The Statement of Problem also claimed that Ms Gang’s claim for unjustifiable disadvantage and constructive dismissal were raised for the first time in the Statement of Problem dated 14 December 2021 and therefore the claims of personal grievance were being raised after the expiry of the statutory 90 day timeframe.

Raising of a Personal Grievance

[20] Section 114(1) of the Employment Relations Act 2000 (the Act) states:

- (1) 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;

[21] 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.”

[22] In *Creedy v Commissioner of Police* Chief Judge Colgan stated:

[36] ...for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. 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.¹

[23] In *Panapa v Spotless Facility Services Limited* the Employment Court stated:

[23] 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. The raising of a grievance is the first recognised step in the problem solving process.

[24] In order for a communication to constitute the raising of a personal grievance, it must make the employer sufficiently aware of the grievance to be able to respond to it.²

[24] I find that the language of s 114(2) of the Act as applied by the Employment Court in *Panapa v Spotless Facility Services Limited* makes it clear that it is necessary that:

- (i) there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised;
- (ii) the employee has taken reasonable steps to advise the employer that he/she is alleging a personal grievance it wants the employer to address; and
- (iii) the communication about the personal grievance made the employer sufficiently aware of what it had to address.

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517

² *Panapa v Spotless Facility Services Limited* [2021] NZEmpC 88

[25] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer³.

Did the letter dated 19 April 2021 raise Ms Gang's personal grievances within the statutory limitation period pursuant to s 114(1) of the Act?

[26] The letter dated 19 April 2021 March 2022 set out the grounds at some length for Ms Gang's resignation, being sexual harassment by the Third Respondent.

[27] In the letter Ms Gang specifically details the incidents which gave rise to her concerns.

[28] The letter sets out particulars of the incidents which upset her and gave rise to her personal grievance in the letter, although there are no specific dates of the incidents provided.

[29] Ms Gang states at the conclusion of the letter for the First Respondent: "I would like to request special measures at the company level".

[30] I find that the letter dated 19 April 2021 sets out the action which gave rise to Ms Gang's personal grievance, sets out that she brought her concerns to the attention of directors of the First Respondent, and made the First Respondent sufficiently aware of what it had to address.

[31] I determine that the letter dated 19 April 2021 raised a personal grievance of unjustifiable disadvantage.

Did the letter dated 6 July 2021 raise Ms Gang's personal grievances within the statutory limitation period pursuant to s 114(1) of the Act?

[32] Ms Gang did not leave the employment of the First Respondent until 21 June 2021, following her second letter of resignation dated 24 May 2021. On 6 July 2021 after she had instructed lawyers, Mr Kang wrote to the First Respondent raising a personal grievance on behalf of Ms Gang.

[33] The grounds for her resignation were based on the First Respondent having taken no steps to address the claims of sexual harassment by the Third Respondent which she had raised in her letter dated 19 April 2021.

³ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

[34] A grievance may be about behaviour that is continuous in nature. As stated by the Employment Court in *Premier Events Group Ltd v Beattie (no 3)*:

One raising of a personal grievance should be sufficient to cover one related and continuous cause of action, provided the events complained of outside the 90 days all relate to events contained within the 90 day period and form a course of related conduct.⁴

[35] The First Respondent was made aware of the grounds of Ms Gang's personal grievance in the letter dated 19 April 2021. It is set out clearly in paragraph [6] of the letter dated 6 July 2021 that the First Respondent had taken no action in relation to the personal grievance.

[36] I find that at the date of letter dated 6 July 2021, the events referred to in the letter dated 19 April 2021 having not been resolved, there was a continuous cause of action.

[37] As a result of the First Respondent's inaction, Ms Gang had again resigned, and this time the First Respondent processed that resignation. This gave rise to a further claim of constructive dismissal.

[38] I determine that the letter dated 6 July 2021 raised a personal grievance claim for constructive dismissal and unjustifiable disadvantage.

[39] I determine that Ms Gang raised her personal grievances within the statutory 90 day time period

Next Steps

[40] Ms Gang's personal grievance claims are set down for investigation in the period 7 to 10 March 2023.

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [20]