

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 145
5608726

BETWEEN ZARA-MARIE GILLARD
 Applicant

A N D DIVJOT SANDHU
 ENTERPRISES LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Catriona Doyle, Counsel for Applicant
 Wayne Todd, Counsel for Respondent

Submissions Received: 15 April 2016, from the Applicant
 8 April and 27 May 2016, from the Respondent

Date of Determination: 25 August 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment relationship problem

[1] The substantive employment relationship problem was lodged with the Authority on 18 February 2016. Ms Gillard claims that she was unjustifiably dismissed or constructively dismissed by a number of the respondent's actions on or around 9 August 2015.

[2] On 1 March 2016 in a letter to the Authority, Mr Todd wrote that his client instructed him not to file a statement in reply, unless the Authority directed him to do so. He wrote:

The personal grievance claim was not raised in accordance with Section 114 of the Employment Relations Act 2000 as the notice that the applicant seeks to rely on dated 2nd September 2015 is on a "without prejudice save as to costs" basis.

[3] Before the Authority officer gave the file to me, she folded shut a section of a letter attached to the statement of problems because it was headed “without prejudice save as to costs”. That letter is the letter that Mr Todd referred to.

[4] I held a telephone conference on 24 March 2016 with the representatives to discuss how matters should progress. The following was agreed:

- (a) The question whether the grievances were raised within 90 days would be dealt with as a preliminary issue on the papers.
- (b) Ms Doyle was to lodge and serve an application to raise the grievances out of time, in the alternative to the claim that the grievances had been raised within the 90-day period. She has done that.
- (c) Written submissions were timetabled. They have now been received.
- (d) If I found that the personal grievances were lodged within 90 days, or gave leave to raise the grievances out of time, the substantive matter would be allocated to a different Authority Member.
- (e) I would make no reference to any detail of offers of settlement in this preliminary determination.

[5] Ms Gillard’s application for leave to raise the grievances out of time was lodged in the Authority on 31 March 2016. Both parties have made written submissions to that application as well as on the issue of whether the grievances were adequately raised within 90 days.

Issues

[6] The issues for determination are:

- (a) Were the grievances raised within 90 days of Ms Gillard being dismissed?
- (b) If not, is it just to allow the grievances to be raised after the 90-day period?

Were the grievances raised within 90 days?

[7] The letter of 2 September 2015 set out a number of claims related to what was termed an unjustifiable dismissal and a constructive dismissal arising from the termination of Ms Gillard's employment as a chef/barista. Specific concerns about Mr Sandhu's behaviour towards Ms Gillard were set out in detail. Compensation was sought, although I have not read that part of the letter.

[8] On 5 October 2015, Ms Doyle again wrote to Mr Todd asking him if he had instructions in respect of the matter. She wrote that her letter of 2 September 2015 had been sent to the respondent and his response was that his lawyer would be dealing with it. The letter also included an invitation to mediation.

[9] The respondent declined to attend mediation.

[10] In a letter dated 11 November 2015, Ms Doyle again wrote to Mr Todd. This letter is also entitled "*without prejudice save as to costs*" and refers to a settlement offer made by the respondent, which Ms Gillard rejected.

The law

[11] Section 114(1) of the Employment Relations Act 2000 (the Act) provides an employee must raise the grievance with her employer within 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to the notice of the employee.

Respondent's submissions

[12] The respondent says that the grievance was not raised within 90 days because the first letter of 2 September 2015 which the applicant relies on as raising a grievance was clearly marked as privileged correspondence as indicated by the wording "*without prejudice basis save as to costs*". Therefore, the letter has privilege status and it is not appropriate for the Authority to see or take into account the contents of the letter.

[13] The further letter dated 5 October 2015 that was forwarded by the applicant did not adequately raise the grievance because it did not outline the employment issues to be resolved between the parties.

[14] The letter dated 11 November 2015 from the applicant does not meet the requirements set out in s 114(1) of the Act because it was sent to the respondent outside the 90-day prescribed period.

[15] Although the Authority is able to admit evidence not admissible in a Court, the Authority generally does follow the principles set out in the Evidence Act and it is not appropriate for the Authority to override privilege. The privileged status of correspondence could be waived but would need to be waived by both parties to the dispute. The respondent does not agree to waive the privileged status of the without prejudice save as to costs correspondence dated 2 September 2015 which the applicant seeks to rely on.

Applicant's submissions

[16] The applicant submits that the entire letter is not privileged despite the use of the words “*without prejudice*” at the top of the letter. The applicant’s submissions do not consider the effect of the Employment Court decision of Judge Inglis in *Idea Services Ltd (in statutory management) v Barker*.¹ This case clarified that the Authority (and the Court) should be guided by the principles of the Evidence Act 2006 to protect:

... a broader public interest in a consistency of approach and of lawyers being in a position to advise their clients with a degree of certainty.²

[17] Judge Inglis emphasised the public policy of “*encouraging litigants to settle their differences rather than litigate them to a conclusion*”³. She referred to s 57(1) of the Evidence Act which provides:

A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who was a party to the dispute if the communication –

- (a) was intended to be confidential; and
- (b) was made in connection with an attempt to settle or mediate the dispute between the persons.

¹ [2012] NZEmpC 112

² Ibid at [31], with reference to *Miller v Fonterra Cooperative Group Ltd* [2012] NZEmpC 49 at [15]

³ Ibid at [29]

Determination of whether grievances raised within 90 days

[18] I have considered the applicant's submissions that I should ignore the part of the 2 September 2015 letter directly under the "*without prejudice save as to costs*" heading but above the "*compensation*" heading because the first part of the letter was not privileged. However, I consider that the purpose of the entire letter was to put the respondent on notice that the applicant had concerns about the way her employment ended and wished to enter into negotiations to settle a dispute between the parties. Therefore, the entire letter is privileged and cannot be relied on as evidence that personal grievances were raised by way of that letter. I also note that unjustified disadvantage grievances have been pleaded in the statement of problem, but were not referred to in the letter.

Should I grant leave to allow the grievance to be raised outside of 90 days?

[19] The date of the alleged dismissal was 9 August 2015. The 90-day period expired on 6 November 2015.

[20] The applicant has made an application under s 114(4) of the Act that I should grant leave to raise her grievance outside of 90 days. That section of the Act provides:

- On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –
- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.

[21] That is a two-part test. I need to determine whether the delay in raising the personal grievances was occasioned by exceptional circumstances before I consider whether it is just to grant leave to raise the grievances outside of the 90-day limit.

Applicant's submissions

[22] The applicant says that if she failed to raise her grievance(s) within 90 days, that was occasioned by the fact that she made reasonable arrangements to have the grievances raised on her behalf by her agent, Ms Doyle. However, her agent

unreasonably failed to ensure that the grievances were adequately raised within the required time, because they were raised in “*without prejudice*” correspondence.

[23] The applicant relies on s 115(b) of the Act:

... where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time;

[24] The applicant further submits that it is just to grant leave for her grievances to be raised out of time as:

- (a) The failure to raise the grievances within the statutory timeframe is a failure of a purely technical nature;
- (b) Despite the way in which the grievances were attempted to be raised, the respondent was given full details of the basis of her personal grievances within the statutory timeframe. Therefore, there is no prejudice to the respondent if leave is granted.
- (c) However, there would be significant prejudice to her if she was not granted leave to raise her personal grievances as she had done everything she understood was required of her and any failure was not of her making. She further says that she has suffered significant financial losses and costs because of the respondent’s treatment of her.

Respondent’s submissions

[25] The respondent submits that there were no unusual or exceptional circumstances. It submits that the applicant engaged Ms Doyle’s services to resolve employment issues. They are outlined in the 2 September 2015 letter only in order to invite the respondent to discuss issues in an informal manner without the need for formal legal action. Therefore, the applicant instructed her counsel to invite the respondent to enter into negotiations. That is quite normal and cannot amount to circumstances.

[26] The applicant has failed to establish that her agent unreasonably failed to ensure the grievance was raised within the 90-day period.

[27] The respondent submits that the applicant engaged the services of Ms Doyle, who is qualified, knowledgeable and experienced. She used her knowledge and experience to invite the respondent to engage in “without prejudice” informal discussions. It cannot be said that Ms Doyle was under a mistaken belief that the personal grievance had been raised because the “without prejudice” correspondence was a deliberate attempt to resolve matters informally rather than to put the respondent on notice of the personal grievance.

[28] The respondent further submits that the *Creedy* test⁴ requires more than just a mistaken belief. A mistaken belief that a personal grievance has been raised is not enough to amount exceptional circumstances.

[29] The applicant claims that to disallow Ms Gillard’s right to bring a personal grievance because it was not raised within the statutory timeframe is a failure of a “*purely technical nature*”. On the other hand, the respondent submits that in the *Creedy* case, the Court said:

... we also emphasise that Parliament has imposed a 90-day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and in addition, the overall justice of the case (which includes taking account of the position of an employer facing a later claim) so requires.

[30] The respondent submits that the passage of time between the expiry of the 90-day period, 6 November 2015, and when the applicant filed her statement of problem on 16 February 2016, makes it unjust to grant her application for leave to file a personal grievance out of time.

Determination of whether to grant leave to raise the grievances out of time

[31] I need to determine if exceptional circumstances exist in this case.

[32] The Supreme Court case of *Commissioner of Police v Creedy* is the leading case in defining “exceptional circumstances”. The Court held that exceptional circumstances in s 115 of the Act are, as the Court of appeal had decided in *Wilkins & Field Ltd v Fortune*:⁵

⁴ From *Commissioner of Police v Creedy* [2008] ERNZ 109, at [33], the leading decision in this area.

⁵ [1998] 2 ERNZ 70

Circumstances which are unusual, outside the common run, perhaps something more than special and less than extraordinary.

[33] In the Employment Court case of *Davies v Dove Hawkes Bay Inc*⁶ Chief Judge Colgan said:

If a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps⁷.

[34] I am satisfied that Ms Gillard made reasonable arrangements to have a personal grievance of unjustified dismissal and/or constructive dismissal raised with the respondent within 90 days. She gave sufficient and detailed information to Ms Doyle before 2 September 2015 to allow Ms Doyle to draft and send the detailed letter of that date. She reasonably expected Ms Doyle to protect her position and allow personal grievance proceedings to proceed if negotiation and mediation did not resolve her dispute with the respondent.

[35] Ms Doyle is suitably qualified and she is, no doubt, a knowledgeable and experienced lawyer. Her approach in the first instance to seek to negotiate a settlement between the parties is a standard step in employment disputes. However, Ms Doyle relied solely on "without prejudice" correspondence to raise her clients personal grievance or grievances.

[36] I consider it to be unusual, and outside the common run, that a lawyer who sought to resolve things by way of negotiation or mediation between the parties did not also secure her client's position by writing separately to raise the grievances that were clearly in her client's and her contemplation as early as 2 September 2015.

[37] Therefore, I consider that the applicant's circumstances fall within the s 115(b) category of exceptional circumstances.

[38] I now need to consider whether it is just to grant leave to raise the grievances out of time.

⁶ [2013] ERNZ 191

⁷ Ibid, at [29]

[39] If the grievances were not raised within 90 days, when were they raised? It can only be that they were raised when the statement of problem was lodged. That is just over three months after the 90-day period ended.

[40] Despite the letter of 2 September 2015 not adequately raising the grievances now claimed, the letter contained sufficient details of the applicant's dissatisfaction with the respondent's actions to notify it of what are now claimed as personal grievances. There is no evidence that the passage of time will prejudice the respondent other than it being disappointed that the matters had not gone away. The delay was consequent on the fact that Ms Doyle wrongly relied on the 2 September letter to adequately raise the applicant's grievances.

[41] It is almost impossible to address the true merits of Ms Gillard's claim and to assess the likelihood of its success. However, if Ms Gillard is able to establish the facts she pleads in her statement of problem there are prospects of success. Of course, I am making this assessment in the absence of a statement in reply from the respondent and in the absence of an ability to test any evidence.

[42] The statement of problem pleads unjustifiable actions of the respondent leading to Ms Gillard's disadvantage. Ms Doyle did not within the 90 days attempt to raise any grievance of unjustified disadvantage. However, the same facts are relied on to establish unjustified disadvantages as for the constructive dismissal claim. The respondent is not prejudiced by facing claims of unjustified disadvantage as well as claims of unjustified and constructive dismissal. However, some disadvantage claims may only be able to be considered as part of the constructive dismissal claim, as opposed to separate disadvantage claims in their own right, depending on when during the employment they occurred.

[43] I consider that a greater injustice would occur to Ms Gillard if her claims could not be heard on their merits, than will be faced by the respondent in having to defend the claims.

[44] I grant leave to the applicant to raise her grievances outside of the 90-day period and consider that she has done so by lodging her application with the Authority. I note that the respondent has not filed a statement in reply. As required under s 114(5) of the Act, I direct the parties to mediation to attempt to settle the matters. However, the respondent must provide a letter to Ms Doyle outlining its

response to Ms Gillard's claims within 14 days of this determination and before mediation takes place.

Costs

[45] Costs are reserved. I encourage the parties to include them in mediation discussions. The Authority will deal with costs as part of an investigation meeting, if that step becomes necessary to deal with the substantive matters.

Christine Hickey
Member of the Employment Relations Authority