

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 97
5445032

BETWEEN KIRSTY HUTCHINSON
 Applicant

A N D GLACIER HOT POOLS
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Autumn Servatkova, Counsel for Applicant
 Raewyn Gibson, Advocate for Respondent

Investigation Meeting: 24 June 2014 at Christchurch

Submissions Received: At the investigation

Date of Determination: 3 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Kirsty Hutchinson, claims she was unjustifiably dismissed, albeit constructively, by the respondent, Glacier Hot Pools Limited (Glacier), on or about 21 April 2013. She also contends she was unjustifiably disadvantaged in her employment.

[2] Glacier denies the claims have validity but adds the personal grievances were not raised within the 90 days required by s.114(1) of the Employment Relations Act 2000 (the Act).

[3] Ms Hutchinson's contends her grievance was properly raised. In the alternate, and should that not be the case, she seeks leave to proceed in accordance with s.114(3) of the Act.

[4] The parties agreed the question of whether the grievance may proceed be decided as a separate and preliminary issue.

Background

[5] Glacier employed Ms Hutchinson in a customer service role at Franz Joseph Glacier.

[6] On 29 January 2013 she told the owners (Ngai Tahu Tourism Limited via another wholly owned company) West Coast Regional General Manager, Mr Fraser Leddie, she was being bullied. The following day she sent an email giving Mr Leddie examples of the bullying. A further example followed on 2 February 2013.

[7] On 14 February a meeting was held. It was attended by Ms Hutchinson, Mr Leddie and another manager, Ms Rana Tinirau, along with the alleged bully, Ms Dorrell Reihana. Following the meeting Mr Leddie sent an email to the participants with his understanding of what occurred. It advises that should Ms Hutchinson have further concerns she raise them with Ms Tinirau in the first instance. It then records:

I asked Kirsty if she wished to take this matter any further and she indicated that she did not, and Rana further asked that she was happy to continue to work and felt safe and secure. Kirsty confirmed both instances.

In closing I said I would call Kirsty next week to ensure she was fine and that she still was comfortable with this resolution. Please let me know if there was anything in this you do not agree with.

[8] Ms Hutchinson accepts she said she did not wish to take the matter further and was happy to continue working. She also accepts she did not raise any concerns with Ms Tinirau (or anyone else) between 14 February and the day on which she tendered her resignation. She does, however, say Mr Leddie did not telephone as promised.

[9] Mr Leddie accepts that but says he approached Ms Hutchinson and spoke to her the following week. Ms Hutchinson does not recollect the approach but, initially at least, did not deny it occurred when asked. That changed and there was express denial when the issue was raised again. Given the initial and then differing responses I conclude he did speak to Ms Hutchinson though, as he concedes, very informally.

[10] Ms Hutchinson says notwithstanding the outcome of the meeting her concerns remained and culminated in the decision to resign. She told Ms Tinirau on 24 March

2013 and written confirmation followed some twenty minutes later. Her note, addressed to Ms Tinirau, reads:

Resignation:

This is my official notice of resignation. I will respectfully give four weeks notice and my last day will be the 21st April 2013.

I am no longer feel able to work with the current management team. I however thank you for opportunity to work at the Glacier Hot Pools.

Yours sincerely...

[11] On being advised of the resignation and concerned about the alleged inability to work with local management Mr Leddie arranged a meeting with Ms Hutchinson. It occurred on 27 March. About the meeting Ms Hutchinson says:

Fraser requested that I take out the second paragraph of the resignation letter. I refused and told him that I was resigning, as the issues of bullying had not been resolved.

Fraser refused to acknowledge the issue with Dorrell and was defensive. He stated there had been complaint by my colleagues that I never worked. I requested specific examples of this. He responded that, 'You just don't know how to do your job'.

[12] Mr Leddie denies Ms Hutchinson's claim she indicated the bullying had not been resolved. He thought she said the resignation was attributable a desire to return to study.

[13] As it transpired Ms Hutchinson recorded the meeting though Glacier was not aware of that until after the briefs of evidence had been exchanged. The transcript shows Ms Hutchinson did not, as Mr Leddie claims, state the bullying had not been resolved. It confirms she acknowledged her acceptance of the February resolution and had not raised further concerns but also shows she made no mention of a return to study, though it is accepted she had previously told Ms Tinirau this was a possibility. The transcript would suggest the meeting concentrated on performance issues and whether or not that which Ms Hutchinson perceived as bullying was in fact a legitimate attempt to get her to perform at the required level.

[14] The meeting resulted in confirmation of the resignation and Ms Hutchinson worked out the notice period. She then went directly to another job in Franz Josef, though subsequently left to continue her studies.

[15] Following cessation she also sought medical treatment for anxiety and depression which she attributes to her treatment at Glacier Hot Pools.

[16] Having thought further about the situation, she sought legal assistance on 3 September 2013. That led to a letter being sent to Glacier on 13 September 2013. It states its purpose *is to formally notify you that Ms Hutchinson's has raised a personal grievance*. It goes on to say:

Miss Hutchinson advises she was subjected to significant bullying from August 2012 until her resignation. The issue was raised with management who failed to remedy the problem. Miss Hutchinson felt she had no other choice but to resign. As a result the employer has breached their duty of good faith and has failed to provide a safe workplace.

[17] Glacier responded that the grievance was raised beyond the 90 days specified in the Act and it was not agreeing the matter could proceed. Further correspondence followed and ultimately a statement of problem was filed in the Authority in January 2014. It seeks to address *the unjustified disadvantage [bullying], constructive dismissal, failure to provide a safe workplace, breach of good faith ...* .

Determination

[18] As already said the statement of problem filed with the Authority mentions both constructive dismissal and unjustified disadvantage (bullying and an unsafe workplace). However, and in pursuing the argument it was raised within the 90 days specified in the Act, Ms Hutchinson claims she notified Glacier of her grievance on three occasions; 29 January, 30 January and 2 February 2013. Those are the days on which she made her initial verbal complaint and provided the subsequent emails specifying details.

[19] This created some confusion as to what the grievance was as the dismissal could not have been raised on those days. It had not occurred and there is no evidence Ms Hutchinson was even contemplating resignation at that time. There is then the fact a grievance cannot be lodged in respect to either a known or even anticipated future event (*Creedy v Commissioner of Police* [2006] ERNZ 517 at [29]). When questioned about this Ms Servatkova advised the claims were now confined to the alleged disadvantages.

[20] For the sake of completeness, and if the dismissal claim was to arise again, I would find it was not raised within the 90 day period. The claim was first mentioned in the letter of 13 September 2013 and Ms Hutchinson accepts there was no prior indication of the claim. She also conceded, when questioned, Mr Leddie (nor any other manager at Glacier) would have had no idea it was coming prior to the letter. 13 September 2013 is well beyond the expiry of the 90 day period.

[21] Turning to the alleged disadvantages. As already said, the dates upon which Ms Hutchinson contends she raised the grievance were those upon which she outlined her complaints. Her actions at that time do not, in my view, constitute the raising of a grievance.

[22] I conclude the situation is similar to that considered by the Authority in *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 150. Ms Hutchinson was raising a complaint and while that may be a grievance according to a dictionary definition it does not necessarily fall within the categories specified in s.103(1) of the Act. None are mentioned and there is no evidence Ms Hutchinson made it clear, or even indicated, her complaints were intended as grievances in accordance with the Act.

[23] Even if that was not the case, the complaint was subsequently addressed and Ms Hutchinson accepts she told Glacier she was happy with the outcome. In other words the grievance, if there was one, was resolved and had ceased to exist as such.

[24] Any further action would have to constitute a new grievance yet Ms Hutchinson accepts there was no further mention of dissatisfaction until her resignation and even then she gave no indication she intended pursuing the matter formally. Ms Hutchinson concedes neither Mr Leddie nor any other manager would have any reason to suspect a grievance was being pursued until the letter of 13 September.

[25] The purpose of the grievance process is to allow the employer an opportunity to address an employee's concerns by clearly notifying the problem and the rectification sought. This clearly did not happen until well after the expiry of the 90 day period Ms Hutchinson had to raise her new grievance under the Act.

[26] I conclude the grievance was not raised as required.

[27] Turning to the application Ms Hutchinson be given leave to proceed (s.114(3)). That requires the existence of exceptional circumstances which precluded raising the grievance in time, though the threshold of what constitutes *exceptional* is relatively low. Examples are given in s.115 and Ms Hutchinson relies on one of those – she was so affected and traumatised by that which gave rise to the grievance she that was unable to properly consider raising it (s.115(a)).

[28] I do not accept this claim given the evidence.

[29] Ms Hutchinson initially indicated she was going to call a medical practitioner as a witness but subsequently chose not to. Instead she supported her claim with documentation but I conclude that proffered fell well short of supporting the argument Ms Hutchinson was incapable of pursuing the claim.

[30] Indeed it contradicts the assertion with one report dated 13 June 2013 (and well within 90 days of her departure) indicating considerable improvement in Ms Hutchinson's condition and recording she was more capable of making decisions than would usually be the case. It further records she felt no more strain than usual and could face up to her problems and overcome them. Add to that the fact she was capable of working and the claim that she was incapable of pursuing a grievance is, I conclude, totally undermined.

Conclusion

[31] For the above reasons I conclude Ms Hutchinson's grievance was not raised in the 90 days required by the Act and the alternate application she be given leave to proceed should not be allowed. Ms Hutchinson's claims are dismissed.

[32] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority