

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 668
3061574
3063132

BETWEEN CHRIS KELLY
Applicant

AND CONCEPT INTERIORS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Emma Moss, Advocate for the Applicant
Aishleen Sluiters, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further
evidence 8 November 2019 from the Applicant
22 October and 18 November 2019 from the Respondent

Determination: 20 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Chris Kelly, claims that he was unjustifiably dismissed from his employment with the Respondent, Concept Interiors Limited (Concept).

[2] Mr Kelly also claims that he was unjustifiably disadvantaged by:

- (i) Concept failing to provide him with a safe workplace resulting in him being allegedly assaulted;
- (ii) his having to work a significant amount of overtime;
- (iii) Concept failing to pay him overtime in accordance with the provisions of his employment agreement; and
- (iv) by Concept 'cashing-up' his accrued leave without his authorisation.

[3] Concept denies that Mr Kelly was unjustifiably dismissed and claims that the unjustifiable disadvantage claims have been raised outside of the statutory limitation period pursuant to s 114(1) of the Employment Relations Act 2000 (the Act).

[4] Concept does not consent to Mr Kelly raising his unjustifiable disadvantage claims outside of the statutory limitation period.

[5] This determination addresses the preliminary issue as to whether or not Mr Kelly raised the unjustifiable disadvantage personal grievances with Concept within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievance before the Authority.

Note

[6] The parties agreed to the Authority determining this preliminary issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Issues

[7] The preliminary issue to be determined by the Authority is whether or not Mr Kelly raised the unjustifiable disadvantage personal grievances within the statutory limitation period.

Brief Background

[8] Mr Kelly commenced employment with Concept as a Senior Spray Painter- Paint Shop Manager on 18 May 2017. He was issued with an individual employment agreement which he signed on 18 May 2017 (the Employment Agreement).

[9] Mr Kelly was dismissed on 26 March 2018.

[10] Following his dismissal Mr Kelly instructed an employment advocate, Mr Allan Silberstein, to raise a personal grievance on his behalf with Concept. Mr Silberstein sent a letter on 24 April 2018, which was erroneously dated 23 February 2017, to Concept (the 24 April 2018 Letter).

[11] The main body of the 24 April 2018 Letter which was headed: “**Re CHRISTOPHER KELLY – PERSONAL GRIEVANCE**” set out in some detail the unjustifiable dismissal claim, but it also included the statement that:

For the said reasons my client maintains that he has a valid claim for unjustified dismissal and an unjustified disadvantage. He is seeking remedies under Section 123 of the Employment Relations Act 2000. ...

[12] The 24 April 2018 Letter concludes:

My failure to deal with each and every allegation relating to client's personal grievance in this letter will not preclude me from raising such allegations at a later stage.

[13] Mr Kelly filed a Statement of Problem with the Authority on 20 May 2019 claiming unjustifiable dismissal and unjustifiable disadvantages as set out in paragraph [2] above.

[14] Concept denied the claims made by Mr Kelly in relation to unjustifiable dismissal and claimed that the unjustifiable disadvantage claims were out of time.

[15] On 6 June 2019 Concept filed a Statement of Problem raising a counterclaim (the Counterclaim) against Mr Kelly for breaching the provisions of the Employment Agreement.

[16] Mr Kelly denies the counterclaim.

Raising of a Personal Grievance

[17] Mr Kelly claims that he raised the unjustifiable disadvantage personal grievance claims with Concept within the statutory limitation period. 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;

[18] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, 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 *Creedy v Commissioner of Police*[2006] ERNZ 517

[19] Concept denies that Mr Kelly raised the unjustifiable disadvantage personal grievances within the statutory limitation period pursuant to s 114(1) of the Act.

Did Mr Kelly raise his unjustifiable personal disadvantage grievances within the statutory limitation period pursuant to s 114(1) of the Act?

[20] Mr Kelly raised the unjustifiable disadvantage claims in respect of Concept's alleged failure to provide a safe workplace resulting in the alleged assault, the working of a significant amount of overtime, failure to be paid for the overtime worked according to the provisions of the Employment Agreement, and the 'cashing up' of the accrued holiday pay in the Statement of Problem filed on 20 May 2019.

[21] Mr Kelly was dismissed on 26 March 2018. Accordingly I find that the raising of the unjustifiable disadvantage personal grievances in the Statement of Problem has been raised outside the statutory limitation period pursuant to s 114(1) of the Act.

[22] Mr Kelly submits that the 24 April 2018 Letter raised the unjustifiable personal disadvantage grievances on the basis that although these are not specifically identified, Mr Silberstein states this : "will not preclude me from raising such allegations at a later stage".

[23] The issue therefore is whether or not the reference to unjustifiable disadvantage claims in the 24 April 2018 Letter is sufficient for Mr Kelly to be deemed to have raised them within the statutory limitation period.

[24] The purpose of raising a personal grievance is to notify the employer that an employee has a concern which he or she wishes the employer to address. As stated in *Creedy v Commissioner of Police* the employer must know what it is that the employee requires it to respond to and this requires the employee to set out the personal grievance in sufficient detail.

[25] The 24 April 2018 Letter statement refers to 'such allegations' but does not specify to what they relate. As stated in *Creedy v Commissioner of Police* : "So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance".

[26] I find that the 24 April 2018 Letter raises the future possibility of specific unjustifiable disadvantage personal grievances being raised but this is insufficient to constitute the raising of the disadvantage grievances with Concept.

[27] Moreover in *Creedy v Commissioner of Police* the Employment Court observed” “The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.”²

[28] I determine that Mr Kelly did not raise his unjustifiable disadvantage personal grievances within the 90 day statutory framework period.

Should Mr Kelly be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[29] Concept does not consent to Mr Kelly raising his unjustifiable disadvantage grievances outside the statutory 90 day timeframe.

[30] Mr Kelly submits he has a basis for claiming ‘exceptional circumstances’ in accordance with s 115 of the Act such that he be allowed to raise his unjustifiable disadvantage personal grievances outside of the 90 day statutory limitation period pursuant to s 114(1) of the Act .

[31] Section 114 (3) of the Act states:

Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

[32] Section (4) of the Act states that:

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 circumstance (which may include any 1 or more of the circumstances set out in section 115); and
- (b) Considers it just to do so.

[33] No application has been made pursuant to s 114(3) of the Act, either in the Statement of Problem or in the Applicant’s submissions, although the basis for claiming exceptional circumstances is set out in the Applicant’s submissions.

[34] The basis for claiming exceptional circumstances arises from s 115 (b) of the Act which states:

² *Creedy c Commissioner of Police* at [29]

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;

[35] Although Mr Kelly submits that he raised all matters with his original representative on the understanding that Mr Silberstein was to raise all the unjustifiable disadvantage grievances in an appropriate way, there is no evidence that Mr Kelly instructed Mr Silberstein to raise each or any of the unjustifiable disadvantage personal grievances which were subsequently set out in the Statement of Problem.

[36] I find that not only has leave not been applied for to raise a personal grievance out of time, but significantly I find no basis for granting such leave on the basis of exceptional circumstances pursuant to s 115(b) of the Act.

Overall justice

[37] Accordingly I do not consider that it is just to grant Mr Kelly leave to proceed with his unjustifiable personal grievance.

[38] I determine that Mr Kelly did not raise his unjustifiable personal grievances within the 90 day statutory limitation period and as such, he is outside the statutory time limit for doing so.

Next Steps

[39] The timetable for filing of evidence in the substantive issues to be determined is set down in the Authority's Minute dated 12 August 2019.

Costs

[40] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority