

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 308
5429629

BETWEEN SANDRA MARX
Applicant

AND SOUTHERN CROSS CAMPUS
BOARD OF TRUSTEES
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Christine Chilwell, Counsel for the Respondent

Investigation: On the papers

Submissions: 29 June 2015 and 24 August 2015 from the Respondent
and 5, 10 and 28 August 2015 from the Applicant

Determination: 1 October 2015

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The Authority does not have jurisdiction to investigate claims by Sandra Marx that she was unjustifiably suspended on 29 January 2013; that the Southern Cross Campus Board of Trustees (the Board) failed to investigate a complaint of bullying made by her; and that (before 4 May 2013) she was subject to unjustified discriminatory acts.**
- B. Mrs Marx's claim for a penalty for breach of good faith by the Board was lodged too late to be considered.**
- C. The Authority has jurisdiction to investigate:**
- (i) Mrs Marx's personal grievance for unjustified dismissal raised on 2 August 2013; and**
 - (ii) whether she had, within the required statutory period, also**

earlier raised a personal grievance about alleged bullying.

D. Costs are reserved.

Employment Relationship Problem

[1] Sandra Marx was dismissed on 7 May 2013 from her role as a trainee Resource Teacher for Learning and Behaviour (RTLB) based at Southern Cross Campus (SCC), a year 1 to 13 composite school in Mangere East. In an application to the Authority lodged on 16 April 2015 Mrs Marx sought an investigation of what she said was “unjustifiable dismissal, unjustifiable disadvantage and discrimination of myself by the Southern Cross Campus Board of Trustees” (the Board). The remedies sought in Mrs Marx’s claim included a penalty for breaches of good faith by the Board. The breaches were alleged to have occurred through various actions or inactions by Board representatives during the latter part of 2012 through to May 2013.

[2] In its reply to Mrs Marx’s claim the Board denied her dismissal was unjustified. It challenged whether she had raised personal grievances about her unjustified disadvantage and discrimination claims within the required statutory period of 90 days. It also said the penalty claim was time-barred because it was not made within 12 months of Mrs Marx becoming aware of the events which she said warranted such a penalty.

[3] The Board accepted Mrs Marx had raised a personal grievance about her dismissal within the required period so the Authority could continue to investigate its actions. It also proposed that the issue of whether one of the alleged disadvantage grievances was raised in time should be left until the substantive investigation meeting. That grievance concerned Mrs Marx’s claim she was bullied by SCC principal Robin Staples and the local RTLB cluster manager Cheryl Harvey.

[4] In light of the Board’s reply, the Authority had to consider as a preliminary matter how much of Mrs Marx’s claim it had jurisdiction to investigate. This involved two questions:

- (i) Was Mrs Marx’s claim for a penalty raised within the required 12 month period?

- (ii) Did Mrs Marx properly raise personal grievances on various disadvantage and discrimination grounds within the statutory period of 90 days of the relevant alleged events occurring?

The penalty claim

[5] Section 135(5) of the Employment Relations Act 2000 (the Act) sets the following time limit for seeking a penalty:

An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

- (a) the date when the cause of action first became known to the person bringing the action; or
- (b) the date when the cause of action should reasonably have become known to the person bringing the action.

[6] The time limit set by s 135(5) covers the penalty that may be awarded under s4A of the Act for certain breaches of the duty of good faith.

[7] Mrs Marx's application to the Authority, lodged in April 2015, included her penalty claim and so amounted to what the Act describes as 'an action for recovery of a penalty'. However she began that action for recovery around one year and 11 months after the last action of the Board that was said to have amounted to one of the alleged breaches of good faith.

[8] That last event or action concerned information being given to the Board about the dismissal of Mrs Marx (which she said was a breach of the duty of good faith). Minutes of a Board meeting held on 28 May 2013 recorded the information was imparted by a Board member at the meeting. At her request Mrs Marx was sent a copy of those Minutes by email on 5 July 2013. The email noted that a copy was also posted to her.

[9] From her receipt of those Minutes, on or around 5 July 2013, Mrs Marx knew the information on which her cause of action for the claimed penalty was based. The 12 month time limit set by s 135(5) of the Act meant she then had to start her action for a penalty by no later than July 2014. The penalty claim included in her April 2015 application to the Authority was therefore more than eight months out of time. It cannot be considered by the Authority and is dismissed.

The other disadvantage and discrimination grievances

[10] The Board's submissions on the preliminary jurisdictional issue gave this useful summary, based on Mrs Marx's statement of problem, of the disadvantage and discrimination grievances she sought to pursue:

- (1) The suspension, which was proposed in a letter dated 22 January 2013 ...
- (2) Failing to provide a safe workplace, in that Mrs Marx was allegedly exposed to bullying by ... [Ms] Harvey and ... [Mr] Staples. Much of this claim appears to relate to conduct in 2012. ...
- (3) Failing to investigate the bullying issues ...
- (4) Discrimination on various grounds.

[11] The discrimination grievance was based on what Mrs Marx called "a series of discriminatory acts" set out over four pages in her statement of problem. It included allegations that she was subject to discrimination in her employment because:

- (i) She was treated differently, on apparently racial grounds, by being investigated over returning late from leave (unlike one Maori and one Indian RTLB) and had not received "customary condolences" from SCC and the RTLB service when a family member died (unlike Maori and Pacifica RTLBs); and
- (ii) She was treated differently (on unidentified grounds) by not getting enough referrals to meet her university practicum requirements, not getting use of a working computer for her studies, and being criticised for not attending a powhiri for a new RTLB; and
- (iii) She was treated differently on religious grounds because she had, as a result of making what she called "a conscience and faith call", criticised the principal of another school over allocation of RTLB funds and Mrs Marx considered Mr Staples had "persecuted" her as a result; and
- (iv) Being "a woman with European values system of freedom and democracy" was "held against" her by the two Board members who investigated the disciplinary matters that led to her dismissal; and
- (v) The Board knew she had a disabled husband and would not be able to provide for herself because of the "hideous label" of serious misconduct given to her behaviour and which she considered was "deliberately done to

make [her] gaining a teaching position in New Zealand or overseas impossible”.

[12] I have accepted the Board’s proposal that consideration of whether Mrs Marx properly raised a disadvantage grievance over alleged bullying of her by Mr Staples and Ms Harvey should occur as part of an Authority investigation held to consider Mrs Marx’s dismissal grievance. On the issue of whether she had raised a grievance within 90 days of the events said to have amounted to bullying, the Board’s submission noted much of that claim appeared to relate to alleged conduct during 2012. Mrs Marx’s statement of problem said her evidence would show she sent Mr Staples letters “in regard to his bullying me” on 29 June 2012 and that she had “involved NZEI to help sort out the question of bullying” which led to a meeting with him on 14 September 2012. Mrs Marx’s submission on the preliminary issues stated that “the idea of a Personal Grievance was initially raised” at the 14 September meeting. Significantly she referred to the ‘idea’ of a grievance – which suggested the possibility of raising one may have been discussed rather than claiming one was raised, in fact, at the time. However that is a matter for evidence in due course.

[13] What remained for consideration in this determination was whether the other three identified grievances (numbered (1), (3) and (4) in the summary given of them in paragraph [10] above) were raised within 90 days of the later of *either* when the actions giving rise to the grievance happened *or* when Mrs Marx came to know about those actions.¹

[14] The Act requires an employee to have made, or have taken reasonable steps to make, the employer aware that the employee alleged a personal grievance that the employee wanted the employer to address.² It is not enough for an employee simply to have advised that she or he considered she or he had a grievance or just to specify a type of grievance, such as a disadvantage grievance.³ For a grievance to have been validly raised, the employer must have been given sufficient information at the time to be able to respond to the grievance on its merits.⁴

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

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

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [35].

⁴ Above, at [37].

The suspension grievance

[15] Mrs Marx was suspended on pay from 29 January 2013. She was notified of the Board's proposal to do so by letter on 22 January 2013.

[16] An email Mrs Marx sent to the chairperson of the Board's disciplinary committee on 8 February 2013 referred to questions she had asked him about the disciplinary process. It ended with this paragraph:

We consider the current 'suspension of my duties' by the Principal is not consistent to Employment Law and all aspects of the decision made by the discipline committee need to be scrutinized by professional lawyers, which is why we need the response by the chairperson of the discipline committee in regard to the questions posed. We note that you, the chair of the BoT Discipline Committee, are not prepared to answer the questions we posed, so will leave this here. If you change your mind I will be happy to receive answers concerning my questions.

[17] Mrs Marx's declaration that she did not accept the legal foundation for the suspension and believed it needed to be thoroughly examined by lawyers did not amount to raising a grievance for response from the employer. Rather she referred to leaving the matter on the basis that the committee chair would not respond to her earlier requests for information.

[18] Some eight months later – in an email dated 2 August 2013 – Mrs Marx did notify the Board of a personal grievance for unjustified dismissal and unjustified disadvantage. The email did not provide any specific information about the basis for the grievance. In a letter sent to the Board on Mrs Marx's behalf, also dated 2 August 2013, an NZEI Te Riu Roa representative gave what he described as "formal notification of the existence of a personal grievance" for unjustified dismissal and unjustified disadvantage. The letter said "the personal grievance arose as a result of the process which culminated in her dismissal on 7 May 2013". Neither that letter nor Mrs Marx's email identified the suspension as part of the basis for the alleged disadvantage grievance. Even if either item of correspondence on 2 August had done so, both were well outside the permitted 90-day period from the event of her suspension on 29 January.

The grievance for failure to investigate bullying

[19] Mrs Marx's statement of problem alleged she had written to the Board about Mr Staples having called her to a meeting on 26 June 2012 where he and Ms Harvey, "bullied" her about her workload (referring to how many clients she worked with). She said the Board "ignored my letters".

[20] The Board's submission disagreed with the allegation that it had failed to investigate a complaint from Mrs Marx about bullying. Minutes of a disciplinary meeting held on 12 April 2013 recorded that Mrs Marx referred to being bullied by Mr Staples and Ms Harvey. She was asked during the meeting to put her complaint in writing and the Minutes recorded that the discipline committee chair told her the Board would then investigate her complaint. According to the Board she did not do so. From the information presently available that observation appeared to be correct.

[21] The 2 August 2013 correspondence from Mrs Marx and her NZEI representative that referred, without details, to an unjustified disadvantage was insufficient to amount to the raising of a grievance about a supposed failure to investigate the bullying allegation.

The discrimination grievances

[22] In response to the Board's position that Mrs Marx had never raised a personal grievance for discrimination, Mrs Marx submitted that "the topic of discrimination was voiced at mediation". She also submitted that "all three aspects of our claim was [sic] discussed at the Mediation process, within 90 days". The mediation to which she referred appears to have been held on 9 October 2013.

[23] Two points rose from her response. Firstly, the content of any discussion between the parties during mediation was subject to the statutory obligation of confidentiality.⁵ Without the Board's consent Mrs Marx could not give evidence that she had raised those grievances there either orally or in writing (even if that had been what happened). While some parts of Mrs Marx's submission acknowledged her understanding of the confidentiality obligations, other parts gave her account of what

⁵ Employment Relations Act 2000, s148(1).

happened at mediation. None of that assisted on the relevant points in any event but nevertheless has been put aside from further consideration in either this determination or for what remains to be investigated by the Authority. In doing so I also note that I did not consider any prejudice arose for either party from Mrs Marx's account.

[24] Secondly, even if there were admissible evidence that Mrs Marx had raised the discrimination or other grievances in the 9 October 2013 mediation (which there was not), raising those grievances in that forum would not have been done in time anyway. The mediation was held 155 days after she was dismissed, well outside the statutory 90-day period for raising a grievance. As her employment was terminated with immediate effect on 7 May 2013, relevant events or actions about which she could have raised an employment-related grievance had to have occurred on that day or before. The grievance about her dismissal was validly raised on 2 August 2013, some 87 days after the dismissal and so within the 90-day period. The 2 August correspondence, as already noted, also included a reference to unjustified disadvantage but lacked sufficient information to have raised additional grievances, including those of alleged discrimination.

[25] There was however a narrow window of time during which allegedly discriminatory action could be considered as part of the dismissal grievance (that Mrs Marx had raised in time). The Board's submission noted many of her discrimination allegations related to events in 2012 and prior to 4 May 2013. The latter date was 90 days before when the dismissal grievance was raised on 2 August 2013 so time had run out to raise grievances over events before then. However any allegedly discriminatory acts by the Board that occurred between 4 and 7 May 2013 and related to Mrs Marx's dismissal and the process leading to it could still be considered as part of the dismissal grievance.

Other arguments

[26] Mrs Marx provided two other sources that might have established whether all her alleged grievances were raised within the statutory period. One was what appeared to be the text of a letter which Mrs Marx submitted (in her 28 August 2015 letter to the Authority) was sent to the Board on 9 May 2013. As far as I can tell from the Authority file this document was not provided with her application to the

Authority on 16 April 2015. Her application included many tables and lists of what Mrs Marx said were relevant documents. The Board submitted that the letter supposedly sent on 9 May 2013 had only appeared as an attachment to an email from Mrs Marx to the Authority on 13 August 2015 and the Board's chair was unable to identify it as ever having been received by the Board at or around its purported date. I was not satisfied the provenance of the document provided on 13 August 2015 (and said by Mrs Marx to be a copy of a letter sent on 9 May 2013) was sufficient to accept it as evidence of having been sent to the Board in May 2013.

[27] The second further potential source was a document bearing the date 24 July 2013 and headed: "Renamed as ERA Cornerstone Historical Submission for Personal Grievance". The Board raised a similar objection that no copy of such a letter could be found in its files and disputed it was ever received. In a submission responding to that objection Mrs Marx (by letter of 28 August 2015) described the document as background information for agencies, including the Authority, the Ombudsman and the Privacy Commissioner. She did not appear to assert it was sent to the Board or amounted to having raised the disputed grievances within the necessary timeframe. Even if she had I was not satisfied the document as presented was sufficient evidence it was sent as drafted on 24 July 2013. Rather, the sufficiently reliable evidence was that Mrs Marx's grievance was first raised in the 2 August 2013 correspondence.

Conclusion

[28] The Board had not consented to Mrs Marx raising grievances out of time. Mrs Marx had not sought leave to do so on the grounds of any exceptional circumstances. For the reasons given in this determination the Authority only has jurisdiction to consider Mrs Marx's personal grievance for unjustified dismissal (raised 2 August 2013) and the evidence about whether she had validly raised a grievance in 2012 about alleged bullying of her.

Costs

[29] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority