

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 44/08

File Number: 5101797

BETWEEN Roslyn Machon
Applicant

AND Vice Chancellor of Massey University
Respondent

Member of Authority: Denis Asher

Representatives: Alan Millar for Ms Machon
Hamish Kynaston for the University

Investigation Meeting Palmerston North, 1 April 2008

Submissions Received 11 April 2008

Determination: 18 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Machon says the substantive employment relationship problem she wants resolved is one of unjustified disadvantage actions. She claims unspecified lost earnings, compensation of \$10,000 for humiliation, etc, costs and a written apology from a University professor.

- [2] In its statement in reply received on 25 October the University said Ms Machon had failed to raise a grievance in respect of either the alleged disadvantage or her resignation within 90-days. It asked the Authority to deal with the 90-day issue as a preliminary matter.
- [3] In any case the respondent denied the applicant was unjustifiably disadvantaged by any of its actions or that it unjustifiably constructively dismissed Ms Machon.
- [4] During a telephone conference of the parties on 5 November, during which the matter of a 90-days exceptional circumstances application was discussed, the parties agreed to undertake mediation. Mediation on 16 January 2008 did not settle this problem.
- [5] It was subsequently agreed that the 90-day matter (but not the substantive issue) would proceed to a one-day investigation in Palmerston North on Tuesday 1 April 2008.

Background

- [6] From the evidence before the Authority (by way of the statements of problem and in reply and witness statements) I understand the key events in respect of the 90-day issue are as follows.
- [7] Ms Machon was employed by the University as a lecturer on 28 September 1994. On 1 January 2002 the applicant was promoted to the position of senior lecturer.
- [8] On 11 September 2006 the University met with Ms Machon to undertake her annual performance review and planning (PRP) meeting. The University raised some concerns in that meeting but did not issue any warnings.
- [9] Without notice, on 27 September Ms Machon submitted a letter of resignation. It did not provide any reasons for the resignation decision. It did attach an authorisation of agent form identifying Alan Millar as the applicant's representative in respect of any matters in relation to Ms Machon's employment with the University.

- [10] The following day the University emailed the applicant advising it was sorry to have received her resignation letter and advised it would hold the notice for a week before formally accepting the resignation in case Ms Machon reconsidered her position. An invitation was also extended to the applicant to meet to discuss the reasons for the resignation.
- [11] On 29 September Ms Machon advised the University her decision was final and that she did not wish to meet to discuss the matter further. The University was invited to contact Mr Millar if it wished.
- [12] Ms Machon then worked out her three-month notice period and her employment terminated on 22 December 2006.
- [13] By letter dated 17 November 2006 Mr Millar advised that the applicant considered she had a grievance in terms of ss. 103 (a) & (b) of the Employment Relations Act 2000. The letter contained no further information but promised further details shortly.
- [14] The University replied later the same day saying it would await the detail of the grievance before responding further.
- [15] The next advice from the applicant was by letter from Mr Millar dated 18 July 2007 enclosing a file note from Ms Machon said to have been created on 9 November 2006.
- [16] On 27 July 2007 the University wrote to the applicant advising that it did not consider her grievance to have been raised within the 90-days required by s. 114 of the Act, and that it did not consent to a grievance being raised outside of that timeframe.
- [17] Further correspondence was exchanged by the parties effectively reiterating their competing claims that a grievance had/had not been properly raised.
- [18] Ms Machon filed her statement of problem with the Authority on 4 October 2007.

- [19] The parties undertook mediation on 16 January 2008 but the employment relationship problem was not resolved.
- [20] Following mediation the University wrote to Ms Machon in a letter dated 18 January offering to reinstate her: the offer was stated to be without prejudice to the respondent's position on the 90-day issue. Ms Machon did not accept the offer.

Parties' Positions

Applicant's Argument

- [21] In submissions received on 4 February 2008 Mr Millar, on behalf of his client, said – amongst other things – that the communications between the parties set out above meant proper notice of his client's grievance had been lodged within the statutory 90- day period, in particular via his letter of 17 November 2006.
- [22] I understood Mr Millar to put up an alternate argument, namely the applicant relies on the letter of 18 January 2008 (attached to the submissions received on 4 February) and faxed to Ms Machon from the University: it is headed "*On the Record Offer of Settlement*". The claim is made, consistent with Palmer J's finding in *Jacobsen Creative Surfaces v Findlater* [1994] 1 ERNZ 35, that an employer purposefully seeking to resolve a contended grievance amounts to consent to the submission of that grievance (see pages 53-55 inclusive). Reiteration of that approach is found in *Phillips v Net Tel Communications* [2002] 2 ERNZ 240.

Respondent's Argument

- [23] Extensive submissions were made by the respondent dated 19 March 2008. They said amongst other things that despite the opportunity to set out her concerns in, first, her letter of resignation dated 27 September 2006, and – second – the grievance notification dated 17 November, the applicant provided no details or other information about her grievances until well outside of the 90-day period.
- [24] The University responded to Ms Machon's resignation by inviting her to discuss her concerns with it, and advising that it would respond to her grievance advice of 17 November when she provided the necessary details. No effort was made

by the applicant to resolve her grievances or to particularise them until 18 July 2007, some 7 months after she had left her employment. The grievance is therefore well outside of the statutory time limit imposed by s. 114 (1) of the Act.

- [25] The leading case in respect of s. 114 is *Creedy v Commissioner of Police* [2006] 1 ERNZ 517. The University also relies on *Hawkins v Commissioner of Police*, unreported, WRC 38/05, Shaw J, 30 November 2007. Both of those cases make it clear an employer must be made sufficiently aware of the grievance such that they are able to respond, i.e. it is not sufficient only to advise a grievance exists, even when the statutory type is specified.
- [26] The cases cited by the applicant, *Jacobson* etc and *Phillips* (above), are distinguishable from the facts of this case which do not extend to the respondent indicating no opposition to the lateness of Ms Machon's submission. The University cannot be taken, unlike *Jacobson* etc and *Phillips*, to have consented to the grievances being raised out of time.

Investigation Developments

Late Exceptional Circumstances Application

- [27] During the investigation on 1 April, after hearing the evidence of the parties and elaboration of their submissions summarised above, I expressed a preliminary view that Ms Machon's personal grievance had not been raised within 90-days, essentially for the reasons set out in the University's submissions (i.e. it had not been sufficiently particularised in time).
- [28] However, after reflecting on the applicant's evidence while bearing in mind her ss. 114 (3) application on the day for the granting of leave of exceptional circumstances, I also expressed a preliminary view that Ms Machon had seemingly made reasonable arrangements to raise her grievance in time but her agent had failed unreasonably to do so. In that event, but subject to further submissions from the parties, I expressed the likelihood leave would be granted for the grievance to be raised out of time in terms of ss 114 (3) & (4) and 115 (b).

[29] I also noted that this gave rise to an issue of costs as the exceptional circumstances ground had not been raised until the investigation meeting despite an invitation to the applicant's representative to do so as early as an Authority teleconference on 5 November 2007, when Mr Millar had advised no such application would be made. As a result the University was obliged to continue to argue its original 90-day position.

Attempted Facilitation

[30] During the investigation the parties agreed that I would attempt to facilitate a resolution of the substantive employment relationship problem, but that if the effort was unsuccessful the substantive matter would be investigated by another Authority Member. As this determination makes clear, resolution was not achieved and another investigation will be convened by a separate Member in respect of this problem.

Exceptional Circumstances

Respondent's Position

[31] In submissions received on 11 April 2008 the University reiterated its view that Ms Machon did not raise her grievance in time. However, in light of her evidence and the Authority's preliminary view, the respondent (fairly and reasonably) advised it no longer opposed the applicant's application for leave to raise her grievance out of time.

Applicant's Position

[32] In response the applicant submitted that, as a result of the University's stance, the interlocutory issue was now disposed of without the need for the Authority to make a determination. Mr Miller also observed that while Ms Machon is eager to progress to a substantive investigation, she was open to further mediation.

[33] I note here that a finding of exceptional circumstances under ss. 114 (4) mandates the Authority to direct the parties to mediation: ss. 114 (5) of the Act.

Discussion and Findings

General Comment

[34] The Authority has no statutory ability to direct a party to an employment relationship to apologise to another party to that same relationship.

[35] I note here the University's letter of 18 January that, amongst other things, constructively offered Ms Machon reinstatement to her old position, including her previous salary and any general increases that occurred in her absence and advised the respondent would produce it at any investigation as evidence of good faith endeavours to resolve her grievance. It also offered the applicant a different direct report and – should she accept the offer – an apology from her previous direct report that the applicant was distressed at the meeting on 11 September 2006. The University was not prepared, however, to offer payment for lost earnings, compensation for humiliation, etc or costs. The University advised that if its on the record offer was declined by the applicant then it would seek indemnity solicitor/client costs. Ms Machon continues to refuse that offer. No doubt the offer and the applicant's response will be taken into account by the Authority Member investigating the substantive employment relationship problem and I need comment no further about it.

[36] I also note here the requirement set out in s. 4 of the Act that parties to an employment relationship (including one coming to an end) be active and constructive in maintaining a productive relationship and be responsive and communicative.

Exceptional Circumstances Application

[37] I do not accept Mr Millar's claim that the University accepts, "*the legitimacy of the applicant's claim*" that the Authority grant leave for an exceptional circumstances finding (par iii, page 3 of his submissions of 14 April 2008). The University's submission on this point is clear: "*the respondent does not oppose the applicant's **application for leave** to raise her grievance out of time*" (emphasis added, par 5, respondent's submissions of 11 April).

[38] It is therefore necessary for the Authority to satisfy itself that ***the delay in raising the personal grievance was occasioned by exceptional***

circumstances (which may include 1 or more of the circumstances set out in section 115) and that it is **just to do so** – ss. 114 (4) (a) & (b) of the Act (emphasis added).

- [39] Section 115 of the Act provides for the purposes of ss 14 (4) (a) that exceptional circumstances include the situation where an **employee made reasonable arrangements to have a grievance raised** on their behalf by their agent and their **agent unreasonably failed to ensure the grievance was raised within the required time** (ss 115 (b)).
- [40] The evidence presented by Ms Machon at the 1 April investigation was clear and compelling: she engaged her agent in good time and authorised him to file a personal grievance on her behalf. Ms Machon provided her agent with details of her concerns such that they could readily have been particularised to the University. Ms Machon regularly approached her agent in respect of the lack of progress of her grievance, and sought updates.
- [41] The University properly acknowledge the force of the applicant's evidence and its consequences, that Ms Machon clearly qualifies for the Authority's discretionary application of ss. 114 (4) of the Act on the ground that, having made reasonable arrangements to have the grievance pursued on her behalf her agent unreasonably failed to ensure the grievance was raised within the required time frame: s. 115 of the Act.
- [42] I am therefore satisfied that the delay in raising Ms Machon's grievance was occasioned by exceptional circumstances and that it is just for the Authority to exercise its discretion in favour of Ms Machon so that her grievance is heard.
- [43] I am supported in this conclusion by the finding of the Court of Appeal in *Commissioner of Police v Creedy*, CA234/06 [2007] NZCA 311, 24 July 2007, at par 26, that

Obviously if a case is within s 115, the Wilkins & Field test does not have to be independently satisfied.

Costs

Respondent's Position

- [44] The University seeks an order for a reasonable contribution to its costs in preparing for and attending the investigation meeting of 1 April 2008.
- [45] In the circumstances the University would ideally seek an order for costs directly from Ms Machon's agent: however, that is not possible under the Employment Relations Act 2000.
- [46] Bearing in mind the Full Court's cost decision in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, and its observation that costs awards are to be made in accordance with equity and good conscience on a case by case basis, the fact that the respondent's actual costs on 5 November 2007 to date are \$11,948, that it unnecessarily incurred similar costs in relation to undertaking mediation on a 90-day issue that need not have been incurred, the University seeks a contribution to its costs of \$6,000.

Applicant's Position

- [47] The applicant submitted, effectively, that the costs incurred were as a result of the position adopted by the University, the respondent had then conceded the legitimacy of the applicant's 90-day claim, the Authority was not therefore not required to make a decision and – as Ms Machon had been successful – costs should follow the event, i.e. be made in her favour.
- [48] However, Ms Machon proposed in good faith the each party should bear its own costs. In the event that was not the view of the Authority evidence of the respondent's claim was required to which a "counter-claim" (Mr Millar's submissions of 14 April) should be invited from the applicant.

Discussion and Findings

- [49] I do not accept the applicant's costs submissions. I am satisfied the University has been subjected wholly unnecessarily to extensive preparation for a mediation and an investigation when the issue at stake could have been, and should have been, resolved as early as November 2007.

[50] After regard to this, *Da Cruz* (above) and recent costs decisions of the Employment Court in respect of Authority hearings where \$3,000 for a day's investigation was identified as a 'starting point', I am satisfied the University's claim for a contribution to its fair and reasonable costs of \$6,000 is fully made out.

Determination

[51] Leave is granted to Ms Machon for her grievance to be heard.

[52] The parties are directed to undertake mediation.

[53] I am satisfied that it is just for costs of \$6,000 to be awarded in favour of the University.

[54] The substantive matter will now proceed to an investigation by another Authority Member.

Denis Asher

Member of the Employment Relations Authority