

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 300
5522543

BETWEEN CATRIONA MADAY
 Applicant

A N D AVONDALE COLLEGE
 BOARD OF TRUSTEES
 Respondent

Member of Authority: T G Tetitaha

Representatives: V Ammundsen, Counsel for the Applicant
 P Robertson, Counsel for the Respondent

Date of Meeting: 1 September 2016 at Auckland

Submissions received: 29 June and 1 September 2016 from Applicant
 14 June and 1 September 2016 from Respondent

Date of Oral
Determination: 1 September 2016

Date Written
Determination: 2 September 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. Catriona Maday is granted leave extending the time for raising the personal grievance of unjustified dismissal to 24 October 2014 pursuant to s.114(3) of the Employment Relations Act 2000.**
- B. Costs are reserved.**

Employment relationship problem

[1] Catriona Maday alleges she was unjustifiably disadvantaged and unjustifiably dismissed by the Avondale College Board of Trustees.

[2] A preliminary issue has arisen about whether the unjustified dismissal personal grievance was raised within 90 days; or whether consent was given to raise it out of time; or if not, whether leave is granted to raise it out of time due to exceptional circumstances.

Relevant Facts

[3] Ms Maday has been employed as a teacher at Avondale College since 2003. Her dismissal occurred on 20 July 2014 for alleged failures to remedy competency issues.

[4] In early September 2014, Ms Maday instructed Vicki Ammundsen to instruct Eska Hartdegen to raise a personal grievance on her behalf of unjustified dismissal. Ms Maday was mindful of the time limitation of 90 days and knew that deadline was fast approaching. She was overseas at the time until 8 October 2014.

[5] Ms Maday's husband and son met with Ms Hartdegen on or around 16 September 2014. They gave her all of the information Ms Maday had at the time about her grievance.

[6] Unfortunately on 30 September 2014, Ms Hartdegen suffered a personal bereavement. As a consequence, she had to depart for South Africa within a very short period of time.

[7] On 1 October 2014, Ms Hartdegen wrote to Deb Collis. Ms Collis was the chairperson of the Board of Trustees for the respondent. The 1 October letter stated:

Please be advised that pursuant to s.114 of the Employment Relations Act 2000 Ms Maday raises a personal grievance claim against Avondale College for unjustified dismissal, breach of good faith and breach of contract and failure on the part of the College to keep her safe from hazards in the workplace as required by the Health and Safety in Employment Act.

[8] The letter did not give any particulars of the personal grievance of unjustified dismissal nor did it set out any of the remedies sought.

[9] By email on 5 October 2014, Ms Collis emailed Ms Hartdegen. She sought further information about the grievance by 10 October 2014, including:

The grounds for the various grievances and the information relied upon as well as the remedies that are being sought.

[10] Ms Hartdegen replied by email on 6 October 2014. She stated:

I am currently in South Africa for [personal bereavement]. I am only back on 13 October so will get further detail to you as soon as possible after that.

Regards,
Eska Hartdegen

[11] Ms Collis replied by email again on 7 October 2014:

I am very sorry to hear of your loss and appreciate this is a difficult time. I will await to hear from you on your return.

[12] Both parties accept that the deadline for raising a personal grievance of unjustified dismissal was 18 October 2014.

[13] On 24 October 2014, Ms Hartdegen wrote a letter particularising the claim:

... founded on disadvantage in employment, unjustified dismissal, breach of good faith and breach of contract and failure on the part of the College to keep Ms Maday safe from hazards in the workplace as required by the Health and Safety in Employment Act.

[14] At a teleconference on 29 April 2016, Ms Hartdegen advised that her client was no longer pursuing the application for penalties for breaches of good faith and the express and implied terms of the employment agreement.

Issues

[15] At the teleconference on 16 August 2016, the issues for hearing today were identified as follows:

- (a) Whether the grievance was sufficiently raised prior to the expiry of 90 days;
- (b) If not, whether consent was given pursuant to s.114(1) of the Employment Relations Act 2000 (the Act);
- (c) If not, whether there are exceptional circumstances under s.115(1)(b) of the Act arising from Ms Hartdegen's personal bereavement.

The law

[16] A grievance is raised with an employer as soon as the employee has made or has taken reasonable steps to make the employer aware that the employee alleges a personal grievance that they want the employer to address.¹ What is important is that the employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates.²

[17] I may, after giving the employer an opportunity to be heard, grant leave subject to any conditions as I think fit if I am satisfied that the delay in raising a personal grievance was occasioned by exceptional circumstances and consider that it is just to do so.³

[18] Exceptional circumstances are unusual. It describes a circumstance which is out of the ordinary course or unusual or special or uncommon. To be exceptional a circumstance needs not be unique or unprecedented or very rare but it cannot be one that is regularly or routinely or normally encountered.⁴

[19] Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should only be extended if there are exceptional circumstances and they have been truly established and in addition whether the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.⁵

[20] In terms of consent, the issue is not whether the employer turned its mind to the extension but whether it so conducted itself that it can reasonably be taken to have consented to an extension of time. That is a matter of fact and degree.⁶

Was the personal grievance of unjustified dismissal sufficiently raised by the letter of 1 October 2014?

[21] Ms Maday relies upon the decision of the Court in *Coy v Commissioner of Police*⁷. That case turned upon its specific facts. The Court accepted the letter raised

¹ Section 114(2) Employment Relations Act 2000 (Act).

² *Creedy v. Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

³ Section 114(4) of the Act.

⁴ *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [31] to [32] Supreme Court applied the definition of “exceptional circumstances” per Lord Bingham of Cornhill in *R v Kelly* [2000] QB 198; [1999] 2 All ER 13.

⁵ See above at [33].

⁶ *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [23] - [24].

⁷ [2011] NZEmpC 142

the grievance in time because of prior oral advice about the basis for the unjustified disadvantage. No such evidence of that type of advice exists here. The 1 October 2014 letter on its face is a bare assertion of a personal grievance without more. That letter does not meet the tests of sufficiency.

[22] In my view, the 1 October 2014 letter does not sufficiently raise a personal grievance of unjustified dismissal.

Was there consent to the late raising of a personal grievance?

[23] The second issue is whether there was consent to the late raising of a personal grievance by the email from Ms Collis to Ms Hartdegen on 7 October 2014.

[24] In my view there was not. There is no express reference to consent or the 90 day time limitation throughout the email exchange. Ms Collis gave evidence that she was unsure when the time limitation ended but believed Ms Hartdegen would know. Ms Hartdegen believed that Ms Collis would be okay with her late submission of the grievance but said nothing more.

[25] It is reasonable for me to infer Ms Hartdegen could not have known she would be unable to make the 18 October 2014 deadline until after she returned on 13 October 2014 from South Africa. If that is the case, she should then have acted to ensure missing the deadline on 18 October 2014 would not compromise Ms Maday's legal rights. Explicit consent sought or advice for Ms Maday to see another lawyer would have been the sensible action. Relying upon presumed consent was not.

[26] In my view the emails between Ms Collis and Ms Hartdegen were equivocal about consent. I am not convinced on the balance of probabilities that consent by this employer was actually given, either implied or express.

Should leave be granted to raise the personal grievance of unjustified dismissal out of time?

[27] I accept, and I think it is accepted by both parties, that Ms Maday made reasonable arrangements on 16 September 2014 and 14 October 2014 to raise her personal grievance through Ms Hartdegen.

[28] I also accept there was an unreasonable failure by Ms Hartdegen to raise the grievance with the employer. This is because the instructions were given by Ms Maday well ahead of the deadline. Ms Hartdegen had the full information

pertaining to the personal grievance by 16 September 2014. The intervening event of her personal bereavement was finished by 13 October 2014 when she returned to New Zealand. If there had been lingering issues of personal trauma, Ms Maday should have been advised to instruct another lawyer but was not. Ms Hartdegen erroneously believed consent had been given. These circumstances meet the test for exceptional circumstances in s.115(1)(b) of the Act.

[29] I still need to consider whether it is just to grant leave. The time limitation was only breached by six days. I cannot see the prejudice to the respondent as a consequence. Ms Collis assured me the information relevant to the personal grievance still existed and she was available as one of the persons on the committee who made the dismissal decision to give evidence about that process. It is therefore just to grant leave.

Orders

[30] Catriona Maday is granted leave extending the time for raising the personal grievance of unjustified dismissal to 24 October 2014 pursuant to s.114(3) of the Employment Relations Act 2000.

[31] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority