IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2015] NZERA Wellington 37
5448795

	BETWEEN	MAREE MANLEY Applicant
	AND	JACKSON FLOORING DESIGN NAPIER LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Piers Hunt and Amanda Currie, Advocates for Applicant Gary Tayler, Advocate for Respondent
Investigation Meeting:	On the papers
Submissions received:	16 October and 17 November 2014 from Applicant 3 November 2014 from Respondent
Determination:	10 April 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Manley was dismissed on two weeks' notice by letter from her employer dated 18 October 2013. She raised a personal grievance for unjustifiable dismissal through her representative, the late Mr Hunt, by letter dated 22 October 2013. Ms Manley also claimed a breach of good faith and a breach of her employment agreement.

[2] Jackson Flooring Design Napier Limited (Jacksons) responded through its advocate, Mr Tayler, by letter dated 7 November 2013, denying the breaches of contract and good faith and stating that the claim of unjustified dismissal was "*misconceived in law and* (was) *in any event, denied*".

[3] Ms Manley's statement of problem was lodged in the Authority on 17 February 2014. In its statement in reply Jacksons stated Ms Manley had not raised her personal grievance within the requirements of the Employment Relations Act 2000 (the Act). It said she was now time barred from proceeding and it did not consent to her grievance being raised out of time.

[4] Ms Manley subsequently raised her personal grievance for unjustifiable dismissal again, by letter to Jacksons from Mr Hunt dated 28 August 2014. She asked the Authority to determine whether her personal grievance had been raised lawfully in October 2013. If not, she sought leave to raise her grievance out of time on the basis of Mr Hunt's 28 August 2014 letter to the respondent.

[5] It was agreed the Authority would determine these matters on the papers following submissions by the parties. There is no dispute over Ms Manley's entitlement to have her claims for breach of good faith and breach of employment agreement investigated.

Background facts

[6] Ms Manley was employed as a salesperson by Jackson Flooring Design Napier Limited from August 2013. Before that she had been employed by Jacksons Flooring Havelock North Limited since March 2012. The facts surrounding the change of employer have not been made entirely clear to me but it is evident she was required to sign a new employment agreement with Jacksons in August 2013.

[7] The new employment agreement, which was almost identical to her March 2012 agreement, contained a probationary period clause that provided for a review at or about the end of the first 90 days of employment. There was a specified process to be followed before any decision could be made about the future or otherwise of the employment at that time.

[8] The respondent's 18 October 2013 letter of dismissal made no mention of the process required before termination of employment could occur. It is reproduced below:

> *Dear Maree*
>
> *As you are aware, the Probationary Period of our Employment Agreement finishes after 3 months, on 31 October 2013.*

> *I wish to advise that your Employment Agreement is not going to be made permanent. From the date of this letter I am giving you two weeks notice of this decision, as per the Employment Agreement.*
>
> *Your pay will continue until the end of the Probationary Period but you are not required to come to work during that time, with your work finishing at 5pm on Friday 18 October 2013.*
>
> *After many meetings and discussions, I feel confident that this is the best outcome for both parties. I am happy to discuss this further with you if you wish.*
>
> *We appreciate the time and effort you have made during the last months and we wish you every success in your future employment.*
>
> *Yours sincerely*
>
> *..*

[9] Ms Manley took advice from Mr Hunt and instructed him to raise a personal grievance for unjustified dismissal and actions for breach of good faith and breach of contract. As noted earlier, Mr Hunt acted on those instructions promptly, by letter to Jacksons of 22 October 2013.

Issues

[10] The issues for the Authority to determine are:

(i) Whether Ms Manley's personal grievance was validly raised on 22 October 2013; and, if not

(ii) Whether leave should be granted for her personal grievance to be raised out of time.

The Law

[11] Section 114 (1) and (2) of the Act provide that:

> *(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 grievance being raised after the expiration of that period.*
>
> *(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[12] Subsections 3 and 4 provide that if the employer does not consent to the grievance being raised after 90 days, the employee may apply to the Authority for leave to do so. The Authority has the discretion to grant leave, after giving the employer an opportunity to be heard, if it considers the delay in raising the grievance was occasioned by exceptional circumstances and if it considers it just to do so.

[13] The Act provides examples of exceptional circumstances at section 115:

> *For the purposes of section 114(4)(a), exceptional circumstances include-*
> *(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*
> *(b) 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; or*
> *(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or*
> *(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

Discussion

[14] Ms Manley's personal grievance was raised four days after the day specified in the letter of termination as her last day at work. She was to continue receiving remuneration for the two week notice period which ended on 31 October 2013. The letter of dismissal made it clear she was not required to attend the workplace after 18 October 2013. This was permitted by the terms of her employment agreement.

[15] Jacksons submits that Ms Manley's personal grievance for unjustifiable dismissal was not raised in accordance with legal requirements as it was raised during the notice period, and before the dismissal had taken effect. Mr Tayler relies on case law including *Melville v Air New Zealand Limited*[1] and *Creedy v Commissioner of Police*.[2]

[16] I find Ms Manley's case can be distinguished from those cases. In *Melville* a letter was written to the employer by Ms Melville's representative on 19 March 2009,

[1] [2010] NZEmpC 87
[2] [2006] ERNZ 517

five days before she was summarily dismissed. She had been suspended for seven months before this. The letter included reference to a personal grievance, and stated that Ms Melville's suspension was an unjustifiable action. It invited the employer to revise its view of the situation "*and to conclude that it would be unjustifiable to dismiss Lynette for the employment*".

[17] Five days later when Ms Melville and her representative attended a meeting with the employer, she was dismissed. Her representative's immediate response was to say to Ms Melville's manager "*See you in Court*". The Employment Court found that the letter, written in anticipation of the likelihood of dismissal, could not in itself amount to the raising of a dismissal grievance. It did not satisfy the requirements of s. 114(2) of the Act. The Court found the letter did raise a disadvantage grievance.

[18] Judge Travis, referring to Chief Judge Colgan's observation in *Creedy*, said that "*the wording of the section clearly referred to the raising of a grievance about an event that has occurred or is occurring. It does not allow for a known or even anticipated future event, let alone a speculative future event, such as a dismissal, to be raised prior to the event occurring*"[3].

[19] The Court also found that the actions of 24 March, when Ms Melville's dismissal was notified, taken in the context of the letter of 19 March, were insufficient to raise a personal grievance for unjustifiable dismissal. The words used by Ms Melville's representative were equivocal and could have applied to the Court, or Authority, determining the disadvantage grievance that had already been raised. The Judge noted that those words "*do not on their face raise a new grievance based on the dismissal, sufficiently clearly to have enabled the defendant to address it*."[4]

[20] In the *Creedy* situation, the applicant had, through his legal representative, notified his employer that he was raising a personal grievance for unjustified disadvantage relating to a disciplinary process that had been commenced against him. He also "*reserved his rights*" to pursue a personal grievance pending the outcome of the disciplinary process. As noted above, Chief Judge Colgan found against such prospective notification of a grievance for constructive unjustifiable dismissal.

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[3] n1 at [14]
[4] ibid at [25]

[21] In Ms Manley's case, the alleged defect in the raising of the personal grievance was that it had been effected during the period of notice and therefore before the employment had terminated. Unlike in the *Melville* and *Creedy* cases, Ms Manley had received clear notice that her employment was not to continue. She was informed that the date on the letter of termination, 18 October, was also her last day at work, although she would continue to be paid until the expiry of her probationary period which was two weeks later. This was also the minimum period of notice payable under her employment agreement.

[22] Mr Hunt's letter of 22 October 2013 informed the employer unequivocally that Ms Manley considered her dismissal to be unjustifiable, a breach of good faith and a breach of her employment agreement. The letter referred to the process required by the probationary provisions of Ms Manley's employment agreement. It put the employer on notice of the defects in its procedure in terminating her employment, stating that none of the actions required before the employer could dismiss the employee during the probationary period had been undertaken. The letter specifically noted that the probationary period was "*not a 90 day clause provided by the Act that allows for dismissal without cause*".

[23] If the employer had a different view, for example if it believed it had the right to ignore the process contained in the employment agreement, or if it believed it had followed that process, it was obliged by the good faith obligations of s. 4 of the Act to make that clear to Ms Manley through her representative. Jacksons cannot argue its obligation to be responsive and communicative no longer existed on 22 October given its assertion the employment relationship was extant up to and including 31 October. That being so, good faith required it to respond to Ms Manley before that date.

[24] When it did respond, on 7 November 2013, after the expiry of the notice period, it did so through Mr Tayler, whose communication was both brief and cryptic. I have already noted his response above and will not repeat it here.

[25] In *New Zealand Automobile Association Inc v McKay*[5] the Court considered a situation where the totality of communications between the parties during Mr McKay's notice period had been found by the Employment Tribunal to be sufficient to amount to the submission of a personal grievance. The Tribunal concluded an

[5] [1996] 2 ERNZ 622

unjustified dismissal grievance could not have arisen until the expiry of the notice period, and was what had been submitted, therefore, was a grievance for disadvantage.

[26] The Court, on appeal by the employer, considered the Tribunal's decision and the cases upon which it relied in coming to its decision. The Court found that a personal grievance had been submitted during Mr McKay's period of notice, which he worked out. It did not disagree that a grievance submitted during a period of notice that was worked out could only have been for disadvantage and not dismissal. However, in the following paragraph the Judge said:

> "*It seems to me that the issues to be determined by the Tribunal would not be greatly if at all different whether it was required to consider a grievance under s 27(1)(b) concerning the giving of notice of dismissal or whether it addressed a claim to unjustified dismissal under s. 27(1)(a) being the dismissal based on the notice given. The principal difference would only be the maturation …or the metamorphosis …. of the notice of dismissal to the dismissal itself.*
>
> *Had Mr McKay and his adviser been aware of the subtleties of the law as they have now sharply emerged into focus, and had he complained of a s 27(1)(b) disadvantage grievance rather than, as he did, complain of his unjustified dismissal, it would have been open to the Tribunal to have applied s 34 and dealt with the grievance as one of unjustified dismissal.…*
>
> *It is illogical that the Tribunal should be not entitled to employ s 34 to the converse effect. In this way what are arguably the twin rigours of the wording of s 33(2) as to the commencement of the 90- day period and the statements of law contained in* Gibson *may be justly ameliorated to accommodate the common sense of allowing an employee such as Mr McKay to submit a claim of grievance within the notice period, and for this to be considered by the Tribunal subsequently and realistically as an unjustified dismissal grievance.*"[6]

[27] While *McKay* was decided under previous employment legislation, the provisions referred to remain under the current Act, with some differences in wording but not intent. Section 122 of the Act is the current legislative equivalent of the s. 34 referred to in *McKay*. It provides that:

> *Nothing in this Part or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.*

[6] n4 at 632 and 634

[28] Applying the law as articulated by the Court in that case, I find a grievance was raised by Mr Hunt in his letter to Jacksons of 22 October 2013. Jacksons had made no attempt to address the issues raised by Mr Hunt, or withdrawn its notification of termination to Ms Manley, by 31 October, when her period of notice expired.

[29] Adopting the pragmatic approach of the Court in *McKay*, and applying s. 122 of the Act, I find it accords with common sense and reason for the Authority to treat the personal grievance notified on behalf of Ms Manley as a grievance for unjustifiable dismissal after the termination of her employment had occurred on 31 October 2013. That being so, I am not required to consider the alternative application for leave for Ms Manley to raise her grievance after the expiry of the 90-day period.

Determination

[30] Ms Manley's personal grievance for unjustifiable dismissal may be heard.

[31] In the circumstances I believe the parties would benefit from further mediation. I direct them to attempt to resolve the employment relationship problems Ms Manley has raised through mediation. If they are unable to resolve the matters, an investigation meeting will be scheduled for that purpose.

Costs

[28] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority