

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 406
3124014

BETWEEN	PHILLIP PAGE Applicant
AND	TEDDY AND FRIENDS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Applicant, in person Andrew Schirnack and Tanya Preston, counsel for the Respondent
Investigation Meeting:	On the papers
Information and submissions received:	25 August 2021, from the Applicant 1 July 2021 and 7 September 2021, from the Respondent
Determination:	15 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Phillip Page was employed by Teddy and Friends Limited (TFL) as a Lodging and Daycare Supervisor from 17 July 2020 until his employment ended on 7 August 2020. He says he raised personal grievances for unjustified actions and/or unjustified dismissal within the 90-day statutory timeframe. Or, if necessary, he seeks leave from the Authority to raise these personal grievances out of time.

[2] TFL does not accept Mr Page raised any personal grievances within the statutory 90 day time frame and does not consent to the personal grievances being raised out of time. TFL opposes leave to raise the grievances out of time.

[3] This determination deals only with the preliminary jurisdictional issue of whether Mr Page has raised personal grievances within the statutory 90-day timeframe.

The Authority's investigation

[4] By consent the preliminary issue is determined on the papers. The Authority has received information from the parties filed in accordance with timetabling directions.¹

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

Issues

[6] The issues requiring investigation and determination are:

- (i) Did Mr Phillips raise personal grievances for unjustified dismissal and/or unjustified action within 90 days of his employment with HHL ending?
- (ii) If Mr Phillips' personal grievances are out of time, are there any grounds on which his claim could be permitted to progress?

Relevant law

[7] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the

¹ Timetable in minute 2 June 2021 subsequently varied by consent.

employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[8] The grievance is raised with the 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 the employee wants the employer to address.²

[9] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:³

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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 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.”

[10] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:⁴

The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance,

² Section 114(2) of the Act.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

⁴ [2019] NZEmpC 132, at [36]–[38].

that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[11] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) considers it just to do so.

[12] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

- (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

[13] TFL's lawyers wrote to Mr Page terminating his employment on 7 August 2020 with immediate effect. The letter sets out the circumstances leading to Mr Page's employment ending and reminds him of the restraints surviving the end of his employment. Mr Page had 90 days from this date to raise a personal grievance for unjustified dismissal, the expiration date being 5 November.

[14] On 8 August Mr Page wrote to TFL responding to the dismissal letter. He set out his view of recent events at work, states he would like an exit plan and concludes “My Legal Advisor will be in contact with you regarding the plan forward.”

[15] On 9 August Mr Page provided a further response to TFL’s solicitors detailing his view of recent events which resulted in his dismissal, concerns about the work place, restated his expectation of an exit plan and ends “my legal advisor is copied into this mail and will be in contact with you regarding the exit plan moving forward”. On 11 August Mr Page’s then solicitor contacted TFL’s solicitor. The file note of that conversation has been provided to the Authority and records he (Mr Page’s solicitor) would respond to the restraint of trade issue raised in the 7 August letter and propose a solution going forward or advise TFL of his intentions and “find out what is acceptable”.

[16] On 17 August TFL’s solicitors emailed Mr Page’s solicitor who replied on 21 August asking TFL to stop communicating directly with Mr Page and his wife, refers to text messages sent to Mr Page’s wife “in an apparent escalation of hostility relating to the circumstances which led to my client’s wrongful termination” and that he would take further instructions “concerning a way forward” including in respect of the restraint issue. This was the last communication TFL received from Mr Page or his solicitor prior to being served on 10 November with Mr Page’s statement of problem.

[17] To determine whether Mr Page has raised a personal grievance within the statutory 90 days the Authority must examine the written communications between the parties for the period 8 August to 21 August 2020 and consider whether individually or in total they would constitute raising a grievance.

[18] Reading the communications in totality it is clear Mr Page was dissatisfied with the circumstances in which his employment ended and sought to negotiate a resolution of those concerns. This is not a situation where an employee advises of their intention to raise a personal grievance. Mr Page narrates his detailed concerns about the workplace, how that has impacted on him and that he wants a resolution. He has raised a personal grievance for unjustified dismissal. In respect of the unjustified action claims, the issues are likely folded into the unjustified dismissal personal grievance. In any event, they have not been raised with sufficient specificity in the information before

the Authority to have raised as separate personal grievances to that of unjustified dismissal.

Outcome

[19] Mr Page has raised a personal grievance for unjustified dismissal within the 90-day statutory timeframe.

[20] The investigation meeting of Mr Page's personal grievance is to proceed as scheduled.

Costs

[21] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority