

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 145
3139843

BETWEEN SUSAN PRICE
 Applicant

AND PATHWAYS HEALTH
 LIMITED
 First Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Andrea Twaddle, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 11 March 2022 from the Applicant
evidence 12 March 2022 from the Respondent

Determination: 14 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Susan Price, has raised a personal grievance for unjustifiable disadvantage and/or constructive dismissal. Ms Price claims that the Respondent, Pathways Health Limited (Pathways) told her on or about August or September 2020 that she had lied on her employment application because she had a criminal conviction, which she did not accept she had.

[2] Following that conversation, Ms Price claims that she considered she was treated unfairly in her employment by being micromanaged and treated with suspicion. As a result she found it difficult to continue working for Pathways and resigned from her employment on 28 October 2020.

[3] Pathways claims that Ms Price resigned from her employment on 28 October 2020 but failed to raise a personal grievance until the Statement of Problem was filed on 26 May 2021, and on that basis she is outside the statutory time limit of 90 days to file a personal grievance.

[4] Pathways does not consent to the personal grievance being raised outside of the statutory time limit and notes that no application for leave to raise a claim outside of the statutory timeframe has been made by Ms Price.

The Authority's investigation

[5] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

[6] 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.

Issues

[7] The issues requiring investigation are whether or not:

- Ms Price raised a personal grievance within the statutory time frame?
- If Ms Price failed to raise her personal grievance within the statutory time limit, should she be granted leave to raise it out of time?
- If so, whether it is just to grant leave pursuant to section 114(4)(b) of the Act?
- If leave is granted: did Pathways' actions in respect of unjustifiable disadvantage result in a disadvantage to Ms Price?
- Did Pathways constructively dismiss Ms Price?

Background

[8] Pathways is a national provider of community-based health, addiction and well-being services. In Auckland it operates Hamlin Road Organic Farm, a certified organic farm that provides people with lived experience of mental health challenges, employment and education opportunities.

[9] On or about 10 August 2020 Ms Price commenced permanent employment with Pathways as a Support Worker working at Hamlin Organic Farm.

[10] Pathways wrote to Ms Price by letter dated 7 August 2020 attaching an individual employment agreement. The letter advised that once the terms and conditions of employment were accepted, Ms Price would be asked to complete the employee onboarding forms which included a Ministry of Justice criminal convictions check and/or Police vetting record.

[11] The letter noted that if Ms Price had not disclosed any information about any criminal convictions, Pathways reserved the right to terminate her employment.

[12] As part of its recruitment process and with Ms Price's consent, Pathways undertook a pre-employment check which included a New Zealand Police Vetting Report and Conviction Check (the Report).

[13] The Report disclosed a November 2006 Conviction and Discharge relating to Ms Price.

[14] On 15 October 2020 Pathways met with Ms Price and advised her of the Report which had formed part of her pre-employment checks.

[15] Pathways claims that the issue was raised informally and in good faith because Ms Price had not disclosed it in her pre-employment application process. However it did not have an impact on her ongoing employment.

[16] On 16 October 2022 Ms Price spoke to Pathways and said she had felt 'blind-sided' by the previous conversation. On 19 October 2022 Pathways said it offered Ms Price facilitation to discuss her relationship with her Team Coach. Ms Price declined the offer.

[17] Ms Price claims that following the meeting she considered that her employment with Pathways became untenable in that she was regarded with distrust and suspicion, and was micromanaged.

[18] On or about 28 October 2020 Ms Price resigned from her employment with Pathways by email dated 28 October 2020 which stated:

This serves as my resignation from the permanent employment contract at Hamlin Road Organic Farm. Thank you for this opportunity and unfortunately the role was not suited for me.

[19] Pathways offered Ms Price casual employment and provided her with an employment agreement. However Ms Price did not sign it and as a result was not offered any work by Pathways.

[20] Following her resignation Ms Price endeavoured to obtain information on the alleged conviction. In her submissions she sets out that:

- i. On 18 September 2020 she had emailed and telephoned NZ Police Vetting to seeking further information;
- ii. On 22 September 2020 the Police had replied advising that the information was held by the Ministry of Justice;
- iii. On 17 March 2021 she appeared in the High Court to appeal the conviction she did not accept she had;
- iv. On 22 March 2021 she engaged legal representation in relation to the Report;
- v. On 14 April 2021 she emails Pathways requesting information about the Report, but is advised it has been destroyed;
- vi. On 24 April 2021 she and her legal representative received the Police Vetting information;
- vii. On 14 May 2021 the Ministry of Justice confirmed that she does not have a conviction; and
- viii. on 16 May 2021 she emailed Pathways and advises that she was lodging an application with the Authority.

[21] Ms Price lodged a personal grievance claim with the Authority on 26 May 2021.

Did Ms Price raised a personal grievance within the statutory time frame?

[22] Ms Price has raised personal grievances for unjustifiable disadvantage and/or constructive dismissal. Section 114 (1) and (2) of the Act state:

- (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 personal 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.

[23] The personal grievance must be raised within 90 days of the action occurring or coming to the notice of the employee.

[24] If the action which gave rise to Ms Price's concern was the conversation with Pathways on 15 October 2020 i.e. an unjustifiable disadvantage claim, she had 90 days from that date to raise her personal grievance with Pathways, but she did not do so.

[25] If the action was her alleged inappropriate treatment by Pathways management which resulted in her resignation on 28 October 2020 i.e. a constructive dismissal claim, she had 90 days from that date to raise her personal grievance with Pathways, but she did not do so.

[26] There is no evidence that Ms Price raised her personal grievance with Pathways prior to the lodging of the Statement of Problem with the Authority on 26 May 2020. As noted, the email to Pathways confirming her resignation contains no indication that she had any concern with her employment.

[27] I also observe that if Pathways had any concern of having Ms Price as an employee, it had no obligation to offer her ongoing employment after her resignation. The fact that it did so supports its submission that the Report had no impact on Ms Price's ongoing employment with Pathways.

[28] If the grievance arose from the raising of the Report on 15 October 2020, Ms Price should have raised a personal grievance within 90 days of that date.

[29] If the grievance arose from her perceived inappropriate treatment by Pathways after that date, the date which would start the 90 day time frame would be the date of her resignation i.e. 28 October 2020.

[30] In either scenario I find that Ms Price raised her personal grievance significantly outside of 90 days and she is therefore outside of the statutory time limit pursuant to s 114 (1) of the Act.

Should Ms Price be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[31] Pathways does not consent to Ms Price raising her unjustifiable dismissal grievances outside the statutory 90 day timeframe.

[32] As set out in s 114(3) of the Act where an employer does not consent to a personal grievance being raised after the 90 day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(4) of the Act which states.

On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

- (a) Is satisfied that the delay, in raising the personal grievance was occasioned by exceptional circumstance (which may include any 1 or more of the circumstances set out in section 115); and
- (b) Considers it just to do so.

[33] Examining the criteria which must be fulfilled I note firstly that Ms Price has made no specific application to raise the personal grievance outside the 90 day statutory time frame.

[34] The submissions made by Ms Price are headed: “This is my submission on the events which led to the time delay in raising an application.” From that statement I infer that Ms Price accepts she raised the personal grievance out of time and is seeking leave based on the time delay while Ms Price was carrying out her search for information

[35] The delay must have arisen due to exceptional circumstances.

[36] Section 115 of the Act sets out the circumstances in which exceptional circumstances may be found:

(5) Further provision regarding exceptional circumstances under section 114
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.

[37] Ms Price has not argued, and there is no evidence to establish, that she was so traumatised that she was unable to properly consider raising a personal grievance pursuant to s 115 (a) of the Act.

[38] There is no evidence in the communications between the legal representatives Ms Price engaged that she had requested them to raise a personal grievance on her behalf, or that they failed to do so.

[39] Ms Price had been provided with a written employment agreement which set out the time limit for raising a personal grievance.

[40] The existence of the exceptional circumstance is not sufficient alone to satisfy the requirements, the exceptional circumstance must have given rise to the delay in raising the personal grievance.

[41] I find no evidence supporting the conclusion that there was an exceptional circumstance basis for the delay in Ms Price raising the personal grievance outside of the 90 day statutory time frame.

[42] In considering whether or not it is just to allow Ms Price to bring her personal grievance claim out of time I find that given the fact that I have determined there were no exceptional circumstances, and a substantial period of time has passed since the events said to give rise to a grievance arose, it would not be in the interests of justice to allow her to do so now.

[43] I determine that Ms Price should not be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act.

Costs

[44] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ that costs are modest. Principles also include that costs are reasonable and that they normally follow the event. It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[45] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This matter was determined 'on the papers'. Costs normally follow the event and the Respondent is entitled to a contribution towards its costs.

[46] The Respondent is seeking an uplift in costs of \$500.00 on the basis that counsel for the Respondent set out the legal basis for opposing Ms Price's claim during the Authority's case management conference.

¹ [2005] 1 ERNZ 808

[47] While costs are not to be used as a punishment, I nonetheless accept that the pursuance of her claim by Ms Price after she was advised of the legal basis for a successful claim resulted in additional costs for Pathways as set out in its submissions.

[48] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a half day investigation meeting as the starting point. From that point I accept that a small uplift is appropriate.

[49] Accordingly Ms Price is ordered to pay Pathways the sum of \$2,500.00 towards its legal costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority