

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 451
3100152

BETWEEN SUSAN REIHANA
Applicant

A N D TURUKI HEALTHCARE
CHARITABLE TRUST
Respondent

Member of Authority: Peter van Keulen

Representatives: Allan Halse, advocate for the Applicant
Anthony Drake and Dylan Pine, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 31 August 2020 and 15 September 2020 from the Applicant
4 September 2020 and 16 September 2020 from the
Respondent

Date of Determination: 2 November 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Susan Reihana worked for Turuki Healthcare Charitable Trust for 13 years. Ms Reihana resigned on 5 August 2019, giving one month's notice so that her last day of work was 5 September 2019.

[2] On 2 December 2019, Mr Halse, acting for Ms Reihana, sent an email to Turuki and stated:

This email is to give notice of [Ms Reihana] raising a personal grievance for unjustified disadvantage and unjustified dismissal. In order for us to complete the personal grievance, we urgently need a copy of [Ms Reihana's] personnel file and all documentation relating to her employment with Turuki Healthcare.

[3] On 27 February 2020 Mr Halse then sent a further letter setting out the detailed grounds for Ms Reihana's personal grievances.

[4] On 5 March 2020, Mr Drake and Mr Pine, acting for Turuki, wrote to Mr Halse and advised him that his email of 4 December 2019 did not raise personal grievances for Ms Reihana and his subsequent letter of 27 February 2020 was outside the 90-day period for raising personal grievances.¹ And, they stated, Turuki did not consent to the grievances being raised outside of the 90-day timeframe, particularly as there were no exceptional circumstances for the delay.²

[5] Ms Reihana subsequently lodged a statement of problem with the Authority based on her alleged personal grievances and she lodged an application for leave to extend time to submit a personal grievance.³

[6] Turuki lodged a statement in reply asserting that the personal grievances were not raised within the requisite 90-day period, that Turuki did not consent (and had not consented) to the grievances being raised out of time and that there were no exceptional circumstances to support leave being granted for the grievances to be raised after the expiration of the 90-day period.

[7] In a case management conference, based on submissions from both Mr Halse and Mr Pine I accepted that I would determine as a preliminary issue whether Ms Reihana had raised personal grievances within the requisite 90-day period and if not, whether I should grant leave for the grievances to be raised after the 90-day period.

[8] I made directions for evidence to be lodged and served addressing amongst other things, the circumstances of when and how the personal grievances had been raised and any matters relevant to exceptional circumstances as set out in s 115 of the Employment Relations Act 2000 (the Act); this being the basis for which I would consider the application for leave to raise the grievances after the 90-day period, if I determined that the grievances were not raised within the 90-day period.

¹ Section 114 of the Employment Relations Act 2000 requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

² Section 114 of the Employment Relations Act 2000 enables the Authority to grant leave for a personal grievance to be raised outside of the 90-day period if there are exceptional circumstances and if it is just to grant leave.

³ Relying on sections 114 and 115 of the Employment Relations Act 2000.

[9] That evidence and written submissions were lodged and served and this determination resolves the preliminary issues on the basis of that material.

[10] So, there are two parts to this preliminary matter:

(a) Were personal grievances raised by Ms Reihana within the 90-day period?

(b) If not should I grant leave for Ms Reihana's personal grievances to be raised outside of the 90-day period?

[11] The starting point for the question of whether personal grievances were raised in time is sections 114(1) and 114(2) of the Act:

(a) Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

(b) Section 114(2) of the Act sets out what constitutes the raising of a personal grievance. It provides that a grievance is raised when the employee has taken reasonable steps to make the employer or a representative of the employer aware that the employee alleges a personal grievance.

[12] Applying s 114(1) of the Act, I need to identify the actions giving rise to the personal grievances and the date they occurred or came to Ms Reihana's notice so that the 90-day period can be calculated.

[13] The actions Ms Reihana complains of in terms of her personal grievance for unjustified action appear to be in two parts – general and unspecified allegations of bullying toward her by managers and a specific incident that occurred on 17 July 2019, which includes events following that incident.

[14] The difficulty I have in assessing whether Ms Reihana's personal grievance for unjustified action was raised in time is that there is little or no evidence provided relating to what is alleged to have occurred and when, and no evidence about any steps taken by Ms Reihana to raise her grievance for unjustified action. I have Mr Halse's letter of 27 February 2020 setting out the allegations of bullying generally and the 17 July 2019 incident, and I have Mr Halse's email of 2 December 2019 attempting to raise the grievance. Based on

this the grievance has not been raised in time as the 27 February letter records that the last events giving rise to the grievance concluded about one week after the 17 July 2019 incident; 90 days from this date would be 21 October 2019 – and there is no evidence of a grievance being raised by this date, only an attempt to raise the grievance through the 2 December email.

[15] However, I do not believe I should dispose of Ms Reihana’s claim based on a personal grievance for unjustified action so easily – I will return to this after my analysis of Ms Reihana’s unjustified dismissal personal grievance.

[16] The position in respect of the unjustified dismissal personal grievance is clearer. The action Ms Reihana relies on for her unjustified dismissal grievance is her resignation, which she says was in response to Turuki’s failure to investigate her complaints of bullying (arising from the 17 July 2019 incident) and Turuki’s failure to provide her with a safe work environment.

[17] Whilst Ms Reihana advised Turuki of her resignation in a letter dated 5 August 2019, she gave one month’s notice of her resignation, so the event giving rise to her grievance, being her resignation, occurred on 5 September 2019; 90 days from this date is 3 December 2019. This means Mr Halse’s email of 2 December 2019 purporting to raise a grievance for unjustified dismissal is within the 90-day period.

[18] Applying s 114(2) of the Act I need to determine if Mr Halse’s email of 2 December 2019 actually raises the unjustified dismissal personal grievance.

[19] In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic*⁴ the Employment Court summarised the key principles for establishing if a grievance has been raised pursuant to s 114(2). Judge Holden said:

[36] The grievance process is designed to be informal and accessible.⁵ A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used.⁶ Where there had been a series of communications, not only would each be examined as to whether it might

⁴ *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

⁵ *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].

⁶ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.⁷

[37] 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.⁸

[38] 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, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.⁹

[20] So a personal grievance can be raised in writing or orally and by a series of communications. The communication must convey the substance of the complaint such that the employer knows what it is responding to and can address the merits with a view to resolving the complaint.

[21] Of particular note though is Judge Holden's reference in paragraph [38] to simply advising an employer that the employee has a personal grievance being insufficient. That reflects exactly what occurred with Mr Halse's email of 2 December 2018; it contained simply a bland statement purporting to raise a grievance with no explanation. So, I conclude that Ms Reihana did not raise her unjustified dismissal grievance within the requisite 90-day period.

[22] In contrast, Ms Reihana's unjustified dismissal personal grievance was raised in Mr Halse's letter of 27 February 2020 but this is clearly outside of the 90-day period prescribed under s 114 of the Act.

[23] So, I now turn to consider whether I should grant Ms Reihana leave to raise her grievance outside of the 90-day period, pursuant to ss 4(3) and 114(4) of the Act.

⁷ *Liunaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958 (EmpC) at 963; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC) at [45]; *Idea Services Ltd (In Statutory Management) v Barker*, above n 4, at [41].

⁸ *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].

⁹ *Creedy v Commissioner of Police*, above n 5, at [36]-[37].

[24] In order to succeed with an application for leave Ms Reihana needs to show that the delay in raising her personal grievance was occasioned by exceptional circumstances and it is just for me to grant leave as requested.¹⁰

[25] Exceptional circumstances for the purposes of an application under s 114 of the Act include specific examples of exceptional circumstances listed in s 115 of the Act. Ms Reihana relies on ss 115(a) and 115(b) of the Act. In this case I believe s 115(b) is relevant.

[26] Section 115(b) of the Act specifies that exceptional circumstances includes where an employee has made reasonable arrangements to have her personal grievance raised by an agent on her behalf and that agent has unreasonably failed to ensure the personal grievance was raised within the 90 day period.

[27] In *Lynette Melville v Air New Zealand Limited*¹¹ the Court of Appeal made it clear that my assessment of exceptional circumstances under s 115(b) of the Act, is a factual enquiry to assess if “reasonable arrangements” were made to have a personal grievance raised, but reasonable arrangements does not mean there must always be an express instruction.

[28] Whilst there is no direct evidence from Ms Reihana about the arrangements she made with Mr Halse for him to raise her unjustified dismissal personal grievance, I infer arrangements were made because Mr Halse purported to raise the grievance on 2 December 2018 and this included an authorisation for Mr Halse to act on Ms Reihana’s behalf, which had been signed by Ms Reihana.

[29] And, I also conclude that Mr Halse failing to raise Ms Reihana’s unjustified dismissal personal grievance because he did not adequately set out the details of that grievance is an unreasonable failure on his part.

[30] So, in terms of s 114(4) of the Act the first part of the application for leave has been met in that I am satisfied that the delay in raising the personal grievance was caused by exceptional circumstances; the exceptional circumstances being the unreasonable failure by Mr Halse to raise the grievance in time after Ms Reihana had made arrangements with him for him to do so.

¹⁰ Section 114(4) of the Employment Relations Act 2000.

¹¹ *Lynette Melville v Air New Zealand Limited* [2010] NZCA 563.

[31] Turning to the second part of the application under s 114(4) of the Act, I now need to decide if I consider it just to grant leave. The question of whether it is just or not is answered by balancing the justices and injustices to the parties of allowing the grievance to proceed¹² and involves an assessment of the merits insofar as the merits can be ascertained at the preliminary stage.¹³

[32] I am not satisfied that there is any injustice to Turuki in allowing the personal grievance to proceed. It was aware that Ms Reihana was alleging she had an unjustified dismissal personal grievance within the 90-day time frame and it has not pointed to any prejudice that might be occasioned by the delay. In contrast there is some justice in allowing Ms Reihana's grievance to proceed when it appears that she is not at fault for the grievance not being raised in time.

[33] In terms of assessing the merits of Ms Reihana's claim I am guided by the approach Judge Travis took in two cases; *McMillan v Waikanae Holdings (Gisborne) Limited*¹⁴ and *Maynard v Bay of Plenty District Health Board*.¹⁵ In *McMillan* Judge Travis was persuaded by evidence that showed that the case was unlikely to succeed. In contrast in *Maynard*, Judge Travis noted that the evidence did not indicate that the case was unlikely to succeed. It seems clear to me then, that in terms of the merits of Ms Reihana's personal grievance, I am looking for evidence that shows that she is unlikely to succeed rather than the opposite – looking for evidence to show the grievance is likely to succeed or has merit. In my view this approach sits more comfortably with the two step test for leave to be granted; where there are exceptional circumstances leave should be granted unless the injustice to the employer outweighs the justice to the employee and the evidence that is available at this stage of the investigation, shows that the grievance is unlikely to succeed. And in this case whilst there is some doubt cast on Ms Reihana's grievance by Turuki it does not, in my view, reach the threshold of showing that she is unlikely to succeed.

[34] For these reasons I consider it just to allow Ms Reihana to raise her personal grievance for unjustified dismissal outside of the 90-day period. And because there are exceptional circumstances I grant her leave to do so.

¹² *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30.

¹³ *Creedy v Commissioner of Police* (2006) 3 NZELR 293.

¹⁴ *McMillan v Waikanae Holdings (Gisborne) Limited* (2005) NZELR 402.

¹⁵ *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175.

[35] Turning back to Ms Reihana's personal grievance for unjustified action causing disadvantage, it follows that given the nature of the unjustified dismissal allegations that a large portion of the factual matrix that may inform this also informs the unjustified action personal grievance. And part of the factual matrix will include not only understanding what occurred in the course of Ms Reihana's employment but what she did about her various concerns.

[36] So there will be evidence available to me as part of my investigation into the unjustified dismissal grievance that will enable me to properly determine if the unjustified disadvantage grievance was raised in time. If the grievance has been raised in time I will then also be able to determine the grievance as I will have investigated the necessary evidence as part of my investigation into the unjustified dismissal grievance.

[37] Based on this, I defer any decision on whether Ms Reihana's unjustified disadvantage personal grievance was raised within the 90-day time frame; this issue will be addressed again in the investigation of the unjustified dismissal grievance.

Conclusion

[38] Ms Reihana's unjustified dismissal personal grievance was not raised within 90 days but special circumstances exist so I consider it just to grant leave for that grievance to be raised out of time. I defer my determination on whether Ms Reihana's personal grievance for unjustified action causing disadvantage has been raised within 90 days to the investigation of the unjustified dismissal grievance.

Next steps

[39] As I have given Ms Reihana leave to raise her unjustified dismissal personal grievance outside of the 90-day timeframe, I must now direct the parties to attend mediation and do so pursuant to s 114(5) of the Act.

Costs

[40] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority