

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 239  
3194819

BETWEEN ROSEANNE SHERIDAN  
Applicant

AND PACT GROUP  
Respondent

Member of Authority: Peter van Keulen

Representatives: Emily Griffin, counsel for Applicant  
Fiona McMillan, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 27 April 2023 from the Applicant  
6 April 2023 and 5 May 2023 from the Respondent

Date of Determination: 12 May 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Roseanne Sheridan was employed by Pact Group as a community support worker. In January 2021 there was an incident at work, which caused Ms Sheridan to suffer from PTSD. Whilst Ms Sheridan returned to work in the days following the incident after a short period of time she took time off. Ms Sheridan was subsequently approved for ACC coverage and received ACC related compensation whilst she remained off work.

[2] As time progressed in 2021, there were some discussions between Pact and Ms Sheridan about a return-to-work programme. Ultimately a return to work never eventuated as later in 2021 Pact undertook a process with Ms Sheridan to ascertain her fitness for work and as a result of that process Pact terminated Ms Sheridan's employment.

[3] Ms Sheridan was unhappy with the process and the decision to terminate her employment and she says, that as a result, she raised a personal grievance for unjustifiable dismissal through her union, E Tū (the Union).

[4] Ms Sheridan's personal grievance was not resolved and she lodged a statement of problem in the Authority claiming unjustifiable dismissal.

[5] Pact responded to Ms Sheridan's statement of problem with a statement in reply claiming that Ms Sheridan did not raise a personal grievance for unjustifiable dismissal within the necessary time frame and therefore I do not have jurisdiction to deal with Ms Sheridan's claim.<sup>1</sup>

### **The Authority's investigation**

[6] The parties agreed that I would resolve the issue over whether a personal grievance for unjustifiable dismissal was raised within the necessary time frame as a preliminary matter.

[7] I investigated this preliminary issue by receiving affidavit evidence from the parties and written submissions from the parties' representatives.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. I have set out the relevant facts and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

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<sup>1</sup> Section 114 of the Employment Relations Act 2000.

## **Issues for resolution of the preliminary matter**

[9] 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.

[10] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

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.

[11] Pact's argument is that Ms Sheridan failed to raise her unjustifiable dismissal personal grievance within the 90-day time period because:

- (a) Her employment was terminated on 10 August 2021 and the 90-day period from that date requires the personal grievance to be raised by 7 November 2021. And the email that purports to raise her grievance was sent by the Union on 8 November 2021 i.e., she has not met the requirements of s114(1) of the Act.
- (b) In any event, the Union's email of 8 November 2021 purporting to raise a personal grievance does not adequately set out the basis of that grievance and, even if it was sent in time, it does not raise a grievance therefore the 90-day time frame has not been met, i.e., she has not met the requirements of s 114(2) of the Act.

[12] Ms Sheridan says her employment was terminated on 11 August 2021 and the 90-day period from that date means the personal grievance had to be raised by 8 November 2021, which it was. And she says the 8 November 2021 email adequately sets out her grievance, including because she had raised concerns about her dismissal previously.

[13] So the two issues for me to resolve are:

(a) When was Ms Sheridan dismissed and therefore what is the timeframe for raising a personal grievance? And, was the Union's email of 8 November 2021 sent within this timeframe?

(b) Did the Union's letter of 8 November 2021 raise a personal grievance for Ms Sheridan?

**When was Ms Sheridan dismissed and therefore what is the timeframe for raising a personal grievance? And, was the Union's email of 8 November 2021 sent within this timeframe?**

[14] After conducting a process with Ms Sheridan relating to her capacity to work, Pact gave her written notice of the termination of her employment on Wednesday 28 July 2021. In that notice Pact stated:

Therefore, this letter is notice that your employment with Pact will end two weeks from today, which will be Tuesday 10 August 2021. ....

[15] The terms of Ms Sheridan's employment required Pact to provide her with two weeks' written notice of the termination of her employment. Specifically, the relevant term states "(t)wo weeks written notice of employment shall be given by the employee or the employer." The terms did not provide for Pact being able to pay Ms Sheridan in lieu of working her notice but the terms included that a lesser period of notice could be negotiated.

[16] Whilst the notice of termination given by Pact appears to be clear in terms of notice and the actual termination date, Ms Sheridan says it is not right and does not meet the requirement set out in her terms of employment. She says two weeks' from Wednesday 28 July 2021 is Wednesday 11 August 2021 not Tuesday 10 August 2021.

[17] Pact says two weeks' notice has been correctly calculated by starting with the day notice is given, particularly in this case where it is clear that Pact has included the day notice was given by using the words "... two weeks from today".

[18] In assessing these conflicting positions, the first point to note is the notice provision in Ms Sheridan's terms of employment does not state that the two weeks' is to be calculated from the day notice is given or including the day notice is given.

[19] Further it is not open to an employer to predate any notice of termination i.e. say that notice runs from an earlier day in order to shorten the period of actual notice.

[20] So, the calculation of the notice period for Ms Sheridan therefore falls to normal interpretation and application of time frames. In this regard there are three points to note:

- (a) The Legislation Act 2019 states that if a period of time is to be calculated from or after a specific date the calculation does not include that day. In contrast, if the period of time is to be calculated starting with or on a particular date then that day is included in the calculation.<sup>2</sup> Whilst the Legislation Act does not apply to the interpretation and application of terms of employment it is, in my view, persuasive.
- (b) There are examples from case law where periods of time are calculated by starting with the day following the commencement event.<sup>3</sup>
- (c) It seems logical that a period of notice would be calculated with the day following notice being given as the first day. The purpose of a notice period is

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<sup>2</sup> Section 54 of the Legislation Act 2019.

<sup>3</sup> *Drake Personnel (NZ) Ltd v Blair* BC199770502; *N/B v Accident Compensation Corporation* [2014] NZACC 135; and *Mi v Awataha Corporate Ltd* 29 June 2007 AA 197/07. I note here that counsel for Pact referred to *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490 as an example where notice was calculated with the day notice was given being counted as the first day – however, in this case the Court did not make a finding in relation to the calculation of the notice but merely stated as a fact that the employee had calculated notice this way. As the notice period was not in issue the Court did not decide if the calculation was correct or not, so this is not a precedent for the proposition that notice should be calculated by including the day notice was given in the calculation.

to give the employee or the employer the period specified as notice of the end of the employment relationship. If the day notice is given is the first day then effectively one day of the notice period is lost. For example, if notice had been given to Ms Sheridan at the end of her working day on 28 July 2021, then that day is already finished and she has not had the benefit of notice during that day (this also applies for the purposes of pay, thereby also depriving Ms Sheridan of a day's pay in her notice period).

[21] Based on this I conclude that two weeks' notice given on 28 July 2021 runs through to and includes 11 August 2021.

[22] This conclusion does not resolve the conflict entirely. Pact says even if 11 August 2021 is the day two weeks' notice expired the actual date of termination was specified as 10 August 2021 and both parties treated this day as the last day of Ms Sheridan's employment so this is the termination date.

[23] I reject this submission. First, it was not open to Pact to reduce the notice period by making a payment in lieu of working or giving notice, nor was it open to Pact to decide to shorten the period of notice as this could only be done by agreement. Second, even where an employer specifies a termination date if that is incorrect in law then the actual termination date prevails. The Employment Court made this point clearly in *Ceres New Zealand LLC v DJK*.<sup>4</sup> In this case the employer had paid the employee in lieu of notice and stated as a result the last day of work would be on a specified date. The Court held that notwithstanding these two things the actual date of termination was at the expiry of the notice period. So, it does not matter what date the employer puts as being the termination date, that date is the actual date the notice period expires.

[24] I conclude that the termination date for Ms Sheridan's employment was 11 August 2021.

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<sup>4</sup> *Ceres New Zealand LLC v DJK* [2020] NZEmpC 153.

[25] Ironically the period of 90 days running from this date, in which Ms Sheridan's personal grievance had to be lodged, includes the termination date as the first day. This is because s 114(1) of the Act specifically requires the calculation to begin with the termination date i.e., s 114(1) refers to 90 days beginning with the date on which the event occurred (the termination date) and s 54 of the Legislation Act provides that this means the day on which the event occurred is included.

[26] Applying this, the 90-day period for raising a personal grievance runs to and includes 8 November 2021 – the day on which the Union sent the email purporting to raise a personal grievance for Ms Sheridan.

**Did the Union's email of 8 November 2021 raise a personal grievance for Ms Sheridan?**

[27] So, I must now decide if the Union's email of 8 November 2021 raised a personal grievance for Ms Sheridan.

[28] Pact says the 8 November 2021 did not specify the grounds for Ms Sheridan's personal grievance nor did it set out the remedies sought. In short Pact was not able to address the personal grievance as it did not know what to address.

[29] The key principles for establishing if a grievance has been raised pursuant to s 114(2) of the Act have been addressed in various court decisions.<sup>5</sup>

[30] As I have set out in other cases, applying the relevant case law and the words of s 114(2) I believe the key principles for raising a personal grievance are:

- (a) The personal grievance process is informal and accessible.

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<sup>5</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; and *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.
- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.<sup>6</sup>

[31] The Union's email of 8 November 2021 included the following:

As you are aware we have taken the position throughout the process leading up to the termination of [Ms Sheridan's] employment that the point had not been reached whereby it was fair and reasonable for [Pact] to terminate [Ms Sheridan's] employment at the point that [Pact] was indicating their intention to terminate.

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<sup>6</sup> *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14 at [21].

... We have explained the options open to [Ms Sheridan] and she has asked us to formally raise a personal grievance with [Pact] in relation to the process leading up to and her eventual dismissal.

We believe we have already advised [Pact] of the issues that give rise to the grievance and we hereby invite [Pact] to consider attending a mediation service meeting to hear from [Ms Sheridan] and look for remedies to the grievances.

[32] This email sets out the nature of the grievance alleged – it relates to the process leading up to Ms Sheridan’s dismissal and the dismissal, i.e., it is an unjustifiable dismissal personal grievance based on process and the substantive decision.

[33] The email also sets out that the substance of the grievance includes that Ms Sheridan’s employment was not at a point where Pact could terminate her employment. The second and third paragraphs of the Union’s email, which I have elected not to publish as they contain sensitive medical information, convey that there had been delays with ACC and Ms Sheridan’s rehabilitation process.

[34] In the context of a capability process and a complaint about a dismissal being unjustifiable, it is clear that the substance of the grievance was that because Ms Sheridan’s rehabilitation through ACC had been delayed, she believed matters were not sufficiently advanced such that Pact could make decisions about her fitness for work or capability. And that relates to both process and substance in terms of her dismissal, i.e., Pact had not sufficiently explored all of the information or it needed to wait for more information (in terms of process) and it had insufficient information to form a view on capability and therefore termination of her employment (substance).

[35] It is also clear from the Union’s email that it wanted Pact to respond through attending mediation. And whilst the email does not specify the remedies sought it is clear that Ms Sheridan wants to discuss remedies – this is sufficient to indicate that Ms Sheridan is looking to resolve her grievance by some agreement, in mediation, about remedies for how she has been treated.

[36] In these circumstances I am satisfied that the Union's email of 8 November 2021 does raise a personal grievance for Ms Sheridan.

### **Conclusion**

[37] Ms Sheridan's personal grievance for unjustifiable dismissal was raised within the required time frame and I do have jurisdiction to investigate and determine her claim.

[38] An Authority officer will now contact the parties' representatives to schedule a case management conference so that directions can be set for the investigation of Ms Sheridan's claim.

### **Costs**

[39] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority