

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 6
3076992

BETWEEN

RAQUEL SKINNER
Applicant

AND

RESIDENTIAL MANAGEMENT
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Andrea Kelleher, Advocate for the Applicant
Peter Elder, Advocate for the Respondent

Investigation Meeting: On the papers

Submissions and/or further evidence 19 November 2019 from the Applicant
31 December 2019 from the Respondent

Determination: 9 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Raquel Skinner, claims that she has been constructively dismissed and unjustifiably disadvantaged by the Respondent, Residential Management Limited trading as Terence Kennedy House (RML).

[2] Ms Skinner claims that she was unjustifiably disadvantaged in respect of (i) a complaint of workplace bullying and (ii) by the issuing of a verbal warning on 19 September 2018.

[3] Ms Skinner further claims that RML has breached the employment agreement by failing to pay for hours worked and designating the first periods of work as 'voluntary'.

[4] RML denies that Ms Skinner was constructively dismissed and claims that she resigned of her own free will.

[5] RML denies that Ms Skinner was unjustifiably disadvantaged in respect of the one formal claim of workplace bullying which it claims was fully investigated.

[6] RML denies that a verbal warning was issued to Ms Skinner on 19 September 2018.

[7] RML further denies that there has been any breach of the employment agreement between it and Ms Skinner.

[8] Ms Skinner claims that she was unaware that she had a personal grievance in relation to the verbal warning issued on 19 September 2018 until she had met with Ms Kelleher to discuss her constructive dismissal issue. Consequently she had not been aware that she had a personal grievance claim until 3 September 2019 when the matter came to her notice.

[9] Ms Skinner seeks to have the personal grievance heard on the basis that it was raised within time.

[10] RML opposes the personal grievance time being raised on the basis that it has been raised outside of the 90 day statutory time frame and it does not consent to it being raised out of time.

Issue

[11] This determination addresses the preliminary issue as to whether or not Ms Skinner raised the unjustifiable disadvantage personal grievance based on the issuing of a warning to her by RML on 19 September 2018 within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievance before the Authority.

[12] The issues for determination are whether or not :

- Ms Skinner raised her personal grievance within the statutory time frame for so doing.
- Ms Skinner's delay in raising her personal grievance within the 90 day statutory time period as set out in s 114 of the Act was occasioned by exceptional circumstances pursuant to s 115 of the Act.;
- If so, whether it is just to grant leave pursuant to section 114(4)(b) of the Act.

Note

[13] The parties agreed to the Authority determining this preliminary 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.

Brief Background

[14] Ms Skinner commenced employment with RML as a Healthcare Assistant (HCA) on 27 July 2017.

[15] Ms Skinner was issued with an individual employment agreement (the Employment Agreement) which she signed on 27 July 2017 above and below a Declaration which confirmed that she:

- (a) ... had read and understood the terms and conditions and received a copy of the agreement.
- (b) ... was informed of my right to seek advice and I was given the opportunity to seek independent advice and/or explanations of any term or condition that I did not understand prior to signing the agreement.

[16] The Employment Agreement contained the following clause:

32 RESOLUTION OF EMPLOYMENT RELATIONSHIP PROBLEMS

All employment relationship problems which include a personal grievance matters will be dealt with in accordance with following procedures.

...

The employee shall raise a personal grievance with the employer within 90 days of the grievance arising or coming to the employee's notice.

[17] Ms Skinner was invited by letter dated 17 September 2018 to attend a disciplinary meeting to be held on 19 September 2018 following the receipt of a complaint from two HCA's on 13 September 2018, which concerned the actions of Ms Skinner in relation to the care of a resident,.

[18] The letter dated 17 September 2018 set out the allegation that Ms Skinner had not completed turn charts for the named resident on 12 September 2018. She was invited to bring a support person of her choice to the meeting.

[19] Attached to the letter were the relevant incident forms and incomplete documents.

[20] Ms Skinner was accompanied to the meeting held on 19 September 2018 by a support person of her choice, and although initially the meeting commenced with Ms Skinner and one

other employee, the other employee left the meeting which continued to address the issue with Ms Skinner alone.

[21] RML states that there was no further action to be taken against Ms Skinner and she was informed of this at the end of the meeting.

Did Ms Skinner raise her personal grievance claim within the statutory time frame?

[22] Personal grievances are to be raised with an 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 unless the employer consents to the grievance being raised outside of that time.¹

[23] In this case RML does not consent to Ms Skinner raising the grievance outside the 90 day statutory time frame.

[24] Ms Skinner claims that she was unaware that she had a personal grievance until she met with Ms Kelleher on 3 September 2019 because she did not understand her rights in regard to a disciplinary meeting until that time, therefore the claim should be admitted as having been raised within 90 days of it having come to her notice.

[25] It is a requirement of the Employment Relations Act 2000 (the Act) that individual employment agreements contain :

A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised

[26] I find that clause 32 of the Employment Agreement complies with the requirements of the Act.

[27] Moreover Ms Skinner had signed in acknowledgement the Declaration in the Employment Agreement to indicate that she had read and understood the terms contained therein. Further that she had been given the opportunity to seek independent advice on it, and more significantly, to seek an explanation of any terms or conditions which she did not understand prior to signing it.

[28] There is no evidence that Ms Skinner sought such an explanation prior to signing the Employment Agreement.

¹ Employment Relations Act 2000 s 114(1)

[29] Ms Skinner claims that she did not understand her rights in regard to being the subject of a disciplinary meeting because she was not provided with a copy of RML's Disciplinary and Dismissal Policy..

[1] In accordance with s 103A (3) of the Act, RML was required to carry out a fair investigation and follow a fair procedure. Natural justice and good fair requires that an employee involved in a disciplinary matter is made aware or:

- The allegations against him or her;
- Any supporting documentary evidence;
- His or her 's right to have a support person present;
- That he or she will have the opportunity to offer an explanation which will be considered prior to any disciplinary action being taken; and
- That the matter might affect his or her employment.

[30] There is no evidence that supports RML not having adhered to these requirements and in fact these requirements are set out in the letter to Ms Skinner dated 17 September 2018.

[31] I therefore find no disadvantage to Ms Skinner in her not having received a copy of RML's Disciplinary and Dismissal Policy.

[32] Whilst it is submitted for Ms Skinner that her support person at the disciplinary meeting was not qualified to advise Ms Skinner of her rights, Ms Skinner was advised in the letter dated 17 September 2018 that she had the right to: "bring a support person of your choice" and she did so.

[33] Ms Skinner is claiming unjustifiable disadvantage due to the issuing of a verbal warning arising from the disciplinary meeting held on 19 September 2018. RML denies that there was any formal disciplinary outcome from that meeting.

[34] On that basis I find that there has been no adverse effect on Ms Skinner's terms and conditions arising from the disciplinary meeting held on 19 September 2018.

[35] I determine that Ms Skinner did not raise her personal grievance claim within the statutory time frame.

Should Ms Skinner be allowed to raise her personal grievance outside the 90 day statutory time period as set out in s 114 of the Act on the basis of exceptional circumstances pursuant to s 115 of the Act?

[36] Section 114 (3) of the Act states:

Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

[37] Section (4) of the Act states that:

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.

[38] The basis for claiming exceptional circumstances are set out in s 115 (b) of the Act which states:

115 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 11(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.

[39] I find none of the exceptional circumstances set out in s 115 of the Act apply in Ms Skinner's case and consequently I find no basis for granting such leave on the basis of exceptional circumstances pursuant to s 115(b) of the Act.

Overall justice

[40] Accordingly I do not consider that it is just to grant Ms Skinner leave to proceed with her unjustifiable disadvantage personal grievance in respect of a verbal warning.

[41] I determine that Ms Skinner did not raise her unjustifiable disadvantage personal grievance in respect of a verbal warning within the 90 day statutory limitation period and as such, she is outside the statutory time limit for doing so.

Costs

[42] Costs are reserved pending the conclusion of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority