

March, and subsequently getting a letter from her immediate manager, dated 27 March, alleging two instances of serious misconduct by Ms Slabbert. One instance involved the co-worker Ms Slabbert had complained about. The other instance was about whether Ms Slabbert had followed ISL's transport and handover protocol during an outing with a particular service user.

[4] The next relevant event was not expressly mentioned in the 12 November letter. After getting the 27 March letter alleging she had committed serious misconduct, Ms Slabbert made a written complaint, by email on 31 March, to two more senior local managers about how her immediate manager treated her. The email was headed: "This is a formal complaint about bullying at work". The 12 November letter said Ms Slabbert had also made "a formal complaint about bullying" during a disciplinary meeting held on 4 April. The complaint was made about the co-worker already referred to and about Ms Slabbert's immediate manager.

[5] The letter then referred to various events from 18 July onwards alleging ISL managers inadequately investigated Ms Slabbert's complaint, made unreasonable changes to her working arrangements and spread "a lot of negative gossip about her" by ISL managers.

[6] It also canvassed the circumstances in which Ms Slabbert was asked to stop work on 4 September because an ISL manager understood Ms Slabbert no longer had a current work visa. Ms Slabbert's work visa expired on 29 August. On that day she had responded to an earlier query from an ISL payroll officer and provided a copy of correspondence confirming she had been granted permanent residency. By letter dated 22 July 2014 the Associate Minister of Immigration had advised she had decided to grant Ms Slabbert and her daughter resident visas on exceptional grounds. The Associate Minister's letter said Ms Slabbert must apply for those visas before 29 August 2014.

[7] A further concern raised in the 12 November letter was that ISL had not agreed to provide Ms Slabbert with a work reference. Ms Slabbert said she asked a former manager for such a reference. By text the manager had replied that she was told she could give a personal reference only, not a "work reference".

[8] ISL's counsel responded to the 12 November letter on 27 November 2014. ISL's response said some of the alleged events were outside the 90-day period during

which s 114(1) of the Employment Relations Act 2000 (the Act) required a grievance to be raised. Events identified as being out of time to pursue a grievance included the claim of bullying from an early and unspecified stage, the complaints made in February and March 2014 about the co-worker, the letter alleging serious misconduct sent on 2 April 2014, the disciplinary meeting of 4 April, changes made to Ms Slabbert's work location and complaints about a draft investigation report dated 15 April 2014 prepared by an ISL human resources advisor.

[9] ISL's 27 November letter also set out its disagreement with the substance of Ms Slabbert's claims. It referred to meetings held in July and August about ISL's investigation, events up to her resignation and inquiries made and action taken over her immigration status. ISL denied it had acted unjustifiably over her immigration status and entitlement to work. It noted that by 8 September 2014 her immigration position "had been regularised" and she was paid for "hours she had not worked pending regularisation of her immigration situation".

[10] For reasons not currently known to the Authority a 30-month delay then followed before Ms Slabbert's advocate lodged an application to the Authority about her grievance on 6 June 2017. The application said her notice of resignation on 2 September 2014 was due to ISL failing to provide a safe working environment. It said the problem she wanted the Authority to resolve was a personal grievance for unjustified disadvantage under s 103(1)(b) of the Act. It recounted the events set out in the 12 November 2014 letter and sought remedies including reimbursement of lost remuneration, compensation for hurt and humiliation and her costs of representation.

[11] ISL responded with a statement in reply on 14 June 2017 alleging the proceedings were statute barred on two grounds. Firstly, some of her contended grievances concerned events prior to 6 June 2014, so were outside the three year limitation period on taking action in the Authority once a grievance has been raised. Secondly, other contended matters were said not to have been raised as grievances within 90 days of their occurrence so could not, without ISL's consent, be raised now. And ISL did not consent.

[12] The parties were then directed to mediation on those preliminary jurisdictional issues. The matter was not resolved there. In the following months the Authority attempted to establish whether Ms Slabbert wanted to proceed with an Authority

investigation. An investigation would first require resolution of ISL's protest as to what part, if any, of Ms Slabbert's claim had either been raised in time or, once raised, was pursued in time. The Authority's inquiries eventually drew this response from Ms Slabbert's advocate by email on 21 December 2017:

"Deidre Slabbert's matter is unresolved and an attempt to get some form of justice will continue until Deidre has achieved resolution.

[The advocate's company] is looking for a forum to take Deidre Slabbert's case where it can be dealt with as a health and safety concern and is awaiting to hear from Iain Lees-Galloway, the Minister of Workplace Relations and Safety as to what jurisdiction that might [b]e. ...

[The advocate's company] will continue to pursue Deidre's case in the public arena if Idea Services lawyer and the ERA try to deny Deidre access to justice. ..."

[13] By August 2018 Ms Slabbert's advocate had given no indication whether she wished to have the matter proceed in the Authority, rather than pursuing what he considered to be other possible avenues. The Authority then gave Ms Slabbert the options of withdrawing her application, having the jurisdictional issue determined or the Authority moving to consider whether the matter should be dismissed because an investigation of it could not be completed. This eventually resulted in Ms Slabbert's advocate opting for a determination of the jurisdictional issue. At a case management conference held by telephone on 12 October 2018 the representatives agreed this issue would be determined on the papers. They lodged written submissions on an agreed timetable. Those jurisdictional issues have been determined after considering those submissions, the statement of problem and background documents attached to it, and ISL's statement in reply.

[14] 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.

The issues

[15] The factual and legal issues for determination included the following:

- (i) Had Ms Slabbert raised personal grievances in the period from February to April 2014?
- (ii) If so, was Ms Slabbert statute-barred from pursuing those grievances now?

- (iii) Did the 12 November 2014 letter raise further grievances relating to actions by the employer occurring within 90 days of that letter?
- (iv) If so, were those grievances now tenable in law?
- (v) Were there any other grounds on which Ms Slabbert's out of time personal grievance claims could be permitted to progress or be widened?

The law

[16] Section 114 of the Act sets out the requirements for raising a grievance and the limits on pursuing such a grievance:

114 Raising personal grievance

- (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.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) ...
- (5) ...
- (6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[17] The Employment Court's decision in *Creedy v Commissioner of Police* considered the meaning of the phrase "raise the grievance" in s 114(1).¹ The Court held this phrase referred to:²

... the notion of the employee wanting the employer to address the grievance ... means ... 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

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517.

² *Creedy*, above n 1, at [36].

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 ...

[18] A grievance may be raised orally or in writing. It requires no particular form of words. However an employer “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”.³

[19] The Court’s decision in *Clark v Nelson Marlborough Institute of Technology* considered whether correspondence from an employee detailing her complaints and seeking remedies was sufficient to raise a grievance.⁴ In that case the argument concerned whether a concluding paragraph in the employee’s letter was intended by her to trigger the personal grievance process under the Act. She said it had but the employer said it had not and said she had not properly sought to raise her grievance until after the 90-day period to do so had run out. The judge rejected a submission that there was a difference between presenting an employment relationship problem for resolution and formally raising a grievance and demanding redress. He described that as adding unnecessary complexity to a straightforward statutory scheme. Whether a particular complaint made by an employee was a “personal grievance” depended solely on whether it fell within the definition in s 103 of the Act:

103 Personal grievance

(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee’s employer or former employer because of a claim—

(a) that the employee has been unjustifiably dismissed; or

(b) that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee’s disadvantage by some unjustifiable action by the employer; or

...

[20] An applicant seeking findings by the Authority that his or her employer acted unjustifiably is not entitled claim events or actions occurring more than 90 days before the applicant raised his or her grievance also amount to independent

³ *Creedy*, above n 1, at [37].

⁴ *Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99,483, (2008) 5 NZELR 628.

disadvantage grievances.⁵ Only grievances raised properly within the required period are justiciable, that is open to be investigated and determined by the Authority. However this application of the law, about the period in which grievances must be raised or pursued, does not necessarily prevent the applicant adducing evidence about those prior events or actions to support her or his justiciable grievances (that is the ones raised in time). The limit on evidence about those prior events is whether or not it is relevant to the grievances that remain alive.⁶ The Employment Court has summarised this principle regarding contextual evidence, where a separate disadvantage grievance about a prior event was out of time, in this way:⁷

... [A]lthough the legislation places time limits on what events may be actionable by an employee bringing a personal grievance, earlier events may nevertheless inform the Court of relevant background to those which are sued on. So there is a balance to be struck between not permitting every complaint or grievance that may have occurred over sometimes very lengthy employment [to be] litigated or re-litigated, on the one hand, and, on the other, allowing the Court to understand the context in which the justiciable grievances occurred by reference to earlier events.

[21] In Ms Slabbert's case the statutory provisions and case law cited established two particular dates were relevant to assessment of whether some or all of her claim may proceed.

[22] Firstly, the personal grievance for unjustified disadvantage raised in her 12 November 2014 letter could only apply to actions by her employer that occurred in the previous 90 days – that is from 14 August 2014 onwards.⁸ Actions by her employer prior to that date could not be the basis of independent disadvantage grievances.

[23] Secondly, the application lodged in the Authority on 6 June 2017 could only pursue grievances she had raised within three years of that date – that is from 6 June 2014 onwards.⁹

⁵ *Coy v Commissioner of Police* (unreported, EC Christchurch, 19 November 2007, CC 23/07).

⁶ *Coy*, above n 5, at [6].

⁷ *Coy v Commissioner of Police (No 3)* [2010] NZEmpC 103 at [4].

⁸ Employment Relations Act 2000, s 114(1).

⁹ Employment Relations Act 2000, s 114(6).

Did Ms Slabbert raise personal grievances in February-April 2014?

[24] ISL's submissions accepted Ms Slabbert had raised complaints with ISL before 6 June 2014 that could be regarded as raising personal grievances, applying what it called the low threshold set by the Court in the *Creedy* case.

[25] On that basis I have accepted Ms Slabbert's submission that complaints laid by her in the period from 14 February to April 2014 constituted a personal grievance for unjustified disadvantage. Her statement of problem referred to three specific examples of those complaints as having been made "well within the 90 days", with her making it clear at the time that she wanted ISL to address them. The examples given were written complaints of February and March 2014, a "formal written complaint" of 31 March and a "formal complaint in the meeting" on 4 April.

[26] Ms Slabbert's submission drew a parallel between the circumstances of her case on this point, about whether a particular complaint met the statutory criteria of raising a grievance, and those in an earlier determination of the Authority: *Barnes v Canterbury Westland Kindergarten Association Limited*.¹⁰ While Ms Slabbert's advocate has reportedly referred elsewhere to the *Barnes* determination as setting a "history-making precedent" to allow a bullying claim to be heard as a personal grievance, the Authority's determination in Ms Barnes' case was no more than an orthodox application of the statutory provisions and longstanding case law referred to earlier in this present determination.¹¹ In Ms Barnes' case the question of whether the applicant had raised her personal grievance within time was resolved in her favour because she had delivered a written complaint to her employer in June 2015. Correspondence sent much later in 2015 and in 2016 by Ms Barnes' advocate (who incidentally was Ms Slabbert's advocate in the present case) would have been too late to properly raise a grievance about allegedly unjustified actions of Ms Barnes' employer.

[27] The consequence is the same result is reached on this particular point, on the same well-established legal principles, in both cases. As with Ms Barnes' case, the complaints made by Ms Slabbert herself on and up to 4 April 2014 were made with sufficient specificity to amount to raising a personal grievance for unjustified

¹⁰ *Barnes v Canterbury Westland Kindergarten Association Limited* [2018] NZERA Christchurch 31.

¹¹ <http://business.scoop.co.nz/2018/03/18/a-first-bullying-to-be-heard-as-a-personal-grievance> (retrieved 31 January 2019).

disadvantage. However an important distinction between their two cases, that has affected the ultimate outcome for Ms Slabbert, is noted in the next section of this determination.

Are any grievances raised prior to 6 June 2014 statute-barred?

[28] Accepting Ms Slabbert's complaints up to 4 April 2014 had raised grievances, the question turned to whether she had then pursued those grievances within the three year period required by s 114(6) of the Act.

[29] As confirmed by the Employment Court's recent decision in *Blue Water Hotel Limited v VBS*, s 114(6) is intended to provide an end point for commencement of proceedings and, thereby, provide certainty for a potentially liable employer.¹²

[30] Taking Ms Slabbert's 4 April 2014 complaint as the latest example, she was permitted by s 114(6) to commence an action about that grievance by no later than 4 April 2017. Put another way, and as already noted earlier in this determination, her proceedings in the Authority were not commenced until 6 June 2017 so the Authority could only consider grievances she had raised after 6 June 2014.

[31] She was therefore out of time to pursue those grievances raised before 6 June 2014. The Authority does not have jurisdiction to investigate and determine grievances about the complaints she made in February, March and April of 2014.

[32] This differs from the outcome in the *Barnes* case referred to earlier because Ms Barnes was found, through her own written complaint, to have raised a grievance in June 2015. She then lodged an application in the Authority in July 2017 – that is a little over two years later, and well within the three year period.

Were further grievances properly raised in 12 November 2014 letter?

[33] I have not accepted the characterisation given in ISL's submissions as to what matters referred to in the 12 November letter were within the relevant date range and amounted to unjustified actions comprising part of the disadvantage grievance raised by the letter. ISL's submissions identified five "matters" but said only the last three were raised and asserted to be actionable:

¹² *Blue Water Hotel Limited v VBS* [2018] NZEmpC 128 at [56].

- (i) a meeting between Ms Slabbert, her advocate and ISL representatives on 22 August 2014 about prior complaints;
- (ii) Ms Slabbert's resignation on 2 September;
- (iii) measures to observe immigration work visa requires on 4 September,
- (iv) not providing a "work reference"; and
- (v) not providing Ms Slabbert's advocate a copy of her personal file when requested.

[34] Rather, considering only actions of the employer from 14 August 2014 onwards, I have concluded that a fair reading of the letter showed the following four allegedly unjustified actions were raised in a manner sufficient to form part of her unjustified disadvantage grievance.

[35] Firstly, a draft investigation report discussed in the 22 August meeting was alleged not to have fairly and reasonably reached its stated conclusions. An ISL manager declared the draft report to be "final" on 28 August 2014. The report concerned Ms Slabbert's March and April complaints about her immediate manager and a co-worker. While those complaints have been found to be out of time to pursue as independent disadvantage grievances, the behaviour of others alleged to have given rise to those complaints, comprise the sort of prior events or actions that the case law referred to earlier has accepted may be considered as part of the context for a later grievance that an employee has raised within time. The action of the employer, for consideration under the statutory test of justification, includes whether it acted fairly and reasonably in reaching the conclusions set out in the draft investigation report and fairly considered Ms Slabbert's concerns about it before concluding the draft was final.

[36] Secondly, Ms Slabbert alleged the investigation of her complaint was "meant to be confidential" but she was subject to criticism by a team leader "on one occasion" for "being a trouble maker". She said this distressed her. The date of this occasion is not specified. Neither the 12 November 2014 letter nor the 6 June 2017 statement of problem specifies the date of that alleged occasion but the context suggests it was within the post-14 August window that could comprise an action of a representative of her employer that could form part of her disadvantage grievance.

[37] Thirdly, the 12 November 2014 letter recounts events between 29 August and 4 September concerning Ms Slabbert's immigration status and whether she could at that time work legally. This resulted in some days ISL managers asked Ms Slabbert not to come to work but she was, later, paid for those days. There was clearly a justiciable issue of whether ISL acted fairly and reasonably in making inquiries about her immigration status and its subsequent action on the situation as the relevant managers understood it to be. The evidence, ultimately, might conclude ISL acted lawfully in the circumstances, but her allegation about its actions were sufficiently specific to form part of her disadvantage grievance.

[38] Fourthly, Ms Slabbert alleged ISL had failed to provide her with a reference or to approve a former manager, who she asked, giving her what she called a "work reference" rather than only a "personal reference". The relevant actions appeared to have occurred, at least in part, while Ms Slabbert was working out her two weeks' notice so were during the employment relationship. Whether or not it was an allegation with or without merit, it was clearly raised at the time as part of her unjustified disadvantage grievance.

[39] Excluded from this list of four matters is the complaint made in the November 2014 grievance letter about whether ISL had provided a requested copy of Ms Slabbert's personal file. The complaint was not repeated in the 2017 statement of problem and ISL's letter of 27 November 2014 noted the file had been provided.

[40] The last point for consideration under this heading concerned Ms Slabbert's notice of resignation given on 2 September 2014. It is one of the five matters listed by ISL as referred to in paragraph [33] above.

[41] ISL's submissions rightly objected to what was an entirely new reference in Ms Slabbert's submissions to her claim being not only about an unjustified disadvantage but also "constructive dismissal". The 12 November letter had said Ms Slabbert gave notice of resignation "due to" ISL failing to provide a safe working environment. However that phrase alone in the 12 November letter was entirely insufficient to found a claim of constructive dismissal at this belated stage, particularly as both that letter and Ms Slabbert's 2017 statement of problem had referred expressly and only to a personal grievance for disadvantage, not dismissal. Her resignation, as a matter of fact, was her deed rather than an action of her

employer. While her case is that she gave notice of resignation in the context of other actions of her employer that were to her disadvantage, the resignation in itself did not form part of the actions of her employer to be examined in considering her grievance.

Were the grievances raised within 90 days tenable?

[42] ISL submitted that any parts of Ms Slabbert's claim that was not time-barred should nevertheless be dismissed as "not tenable". It submitted the following three-step test needed to be applied to establish that any surviving allegations of unjustified disadvantage involved:¹³

- (i) some retrograde step in her employment or conditions of employment; and
- (ii) that retrograde step actually adversely affected her 'on the job'; and
- (iii) the action was unjustifiable.

[43] I considered that test in relation to the following four matters that this determination has found were not time-barred and remained open for investigation by the Authority of Ms Slabbert's disadvantage grievance alleging ISL representatives had not acted justifiably, after 14 August 2014, in:

- (i) the extent of their inquiries about her complaint and addressing concerns raised about their draft investigation report; and
- (ii) maintaining confidentiality of their investigation, if that was legitimately expected, and not unfairly criticising her; and
- (iii) queries about and any action taken on her immigration status; and
- (iv) responding to her request for a reference.

[44] It is important to note conclusions on this point are not about the merits of the allegations or the likely outcome following investigation by the Authority. Rather they concern the prospect that the allegations could be found to meet those steps.

[45] Firstly, if found to be inadequate as alleged, what was done in preparing the investigation report and considering concerns about it, would amount to a retrograde step in Ms Slabbert's employment. She would have been adversely affected by that

¹³ *Henderson v Nelson Marlborough District Health Board* [2016] NZEmpC 123 at [77].

‘on the job’ situation and ISL’s failings would be less than what a fair and reasonable employer could have done, so therefore unjustifiable.

[46] Secondly, if her allegations about confidentiality and criticism were found to be substantiated, the effect on her ‘on the job’ would have been adverse and retrograde.

[47] Thirdly, if ISL were found not to have acted fairly in how it went about inquiring into and deciding Ms Slabbert needed to be ‘stood down’ from work due to her immigration status, the effects would have been similarly adverse and retrograde.

[48] Fourthly, if ISL had treated Ms Slabbert differently from other employees in respect of whether a ‘work reference’ would be provided, that would comprise an adverse and retrograde step, up to the point that the employment relationship ended two weeks after the end of the notice she gave on 2 September 2014.

Any other grounds?

[49] This last issue was not specifically identified when arrangements were made for written submissions about the preliminary issue. However one element of the submissions made on Ms Slabbert’s behalf included a reference that ISL objected to in its submission and needed to be addressed in this determination.

[50] Ms Slabbert’s submissions suggested determination of the preliminary jurisdictional issues could be made on the basis of what the Authority “considers just to do so” and then referred specifically to s 114(4)(b) of the Act. That subsection is part of the Act that provides the Authority with discretion to grant leave in “exceptional circumstances” for an employee to raise a personal grievance outside the 90 day period in. However those provisions require a specific application to be made seeking such leave.¹⁴ For leave to be granted, the application must meet statutory criteria about what any alleged exceptional circumstances were.

[51] No such application was made in this case. From some familiarity with the facts of this case as they appear from the documents already lodged, even if such an application had been made, it was unlikely the circumstances would fit those exceptional criteria.

¹⁴ Employment Relations Act 2000, s 114(3) and (4).

[52] The Court's recent decision in the *Blue Water Hotel* case has also resolved the question of whether other powers of the Authority under s 219 and s 221 of the Act to extend the time within which certain things must be done can be applied to extend the three year limitation set by s 114(6) of the Act.¹⁵ They cannot.

Outcome

[53] For the reasons given, Ms Slabbert may pursue her personal grievance for unjustified disadvantage only in relation to the matters identified at paragraph [34] - [38] and [43] of this determination. Her other alleged grievances were either not raised within 90 days of the relevant action of the employer or were not then pursued within the required three year period.

Costs and a direction to mediation

[54] Costs are reserved pending the outcome of Ms Slabbert's application.

[55] Having reached a conclusion about what aspects of her claim Ms Slabbert may pursue, and having regard to the long delay in reaching this point, the parties are directed, under s 159 of the Act, to attend further mediation by no later than 40 days from the date of this determination. It is an opportunity for the parties to consider whether they can now resolve this matter between themselves. Under s 159(2) of the Act the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences. The proceedings are suspended until they have done so or the Authority otherwise directs. Following mediation, Ms Slabbert is further directed to promptly advise the Authority whether the matter has been resolved and, if not, whether she wishes to proceed with an Authority investigation.

[56] If this matter does return to the Authority for investigation, I note and agree with ISL's submission that such an investigation should be subject to stringent timetabling and "unless orders" in light of the extensive delays to date.

Robin Arthur
Member of the Employment Relations Authority

¹⁵ *Blue Water*, above n 12, at [57] and [99].