

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 176/09  
5130858

BETWEEN PRUDENCE STEWART  
Applicant  
AND WHITIREIA COMMUNITY  
POLYTECHNIC  
Respondent

Member of Authority: G J Wood  
Representatives: Graeme Ogilvie for the Applicant  
Jaesen Sumner and Kirsty Berry for the Respondent  
Investigation Meeting: 28 October 2009 at Wellington  
Submissions Received: On 28 October 2009  
Determination: 11 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The respondent (Whitireia/the Polytech) claims that the applicant's (Ms Prudence Stewart) personal grievances should be dismissed because they are out of time. By contrast, Ms Stewart claims that both she and her representative, the Whitireia Community Law Centre (the Law Centre) separately raised her grievances for unjustified constructive dismissal and unjustified actions within time, and if not, that exceptional circumstances applied because the Law Centre had failed to act on Ms Stewart's instructions.

## The Facts

[2] Ms Stewart used to work as a faculty administrator at Whitireia. In the last year of her employment she had a significant number of difficulties with the Dean to whom she reported. She took some of these matters up with the Human Resources (HR) Manager, who tried to assist her, and went so far as to look for alternative positions for her.

[3] On 16 April 2008 Ms Stewart decided that she had had enough of her treatment, which she believed had caused the stress which led her to becoming too unwell to work. Prior to leaving that day she went to the HR Manager and told him that she could not take it any more and was leaving. She then called a friend, who came to her home to discuss what to do about the situation. They discussed the possibility of commencing a personal grievance.

[4] Ms Stewart then telephoned the HR Manager and explained to him that she was going to the Community Law Centre and would be taking a personal grievance against Whitireia. Ms Stewart attended the Law Centre to get advice. The solicitors at the Law Centre were told that she had already told the HR Manager that she was going to raise a personal grievance. She was asked to set out her story in writing, which she did soon thereafter. At the commencement of that document, not provided to Whitireia until the investigation meeting, she stated:

*I would like to put forward a personal grievance against the Dean,  
Faculty of Arts and Communications, Whitireia Community  
Polytechnic.*

[5] The Law Centre's policy is that it attempts to settle matters by negotiation before taking any further steps. Two of its solicitors therefore arranged a meeting in mid May 2008 with the HR Manager, at which the Dean was also to attend. The solicitors' approach was that if discussions were to prove unsuccessful then there would be a need to move into the more formal system, with the next step being mediation. The solicitor who continued to be involved was aware of the 90 day period for raising grievances, but thought it needed to be done within 90 working days rather than 90 calendar days (as is in fact the law), and that Ms Stewart had already raised them in any event.

[6] The Law Centre's primary objective for the meeting was to negotiate Ms Stewart's return to work. I accept the consistent evidence of the Dean and the HR Manager that at that meeting there was no advice as to the nature or particulars of any potential personal grievance or any remedies sought, although the need for a safe working environment for Ms Stewart was discussed. This was consistent with the Law Centre's low key, non-threatening approach. Furthermore, I do not accept, on the balance of probabilities, that there was any mention of reinstatement or a new job at the meeting.

[7] On 18 July a Law Centre solicitor wrote to the Department of Labour's mediation services seeking mediation of the *personal grievance*. The HR Manager was notified of that and agreed to attend mediation in August 2008.

[8] On 1 August however, the HR Manager wrote, stating:

*A subsequent review of the file has revealed that your correspondence to Mediation Services was received on 21 July 2008 and is therefore outside the 90 day period for raising a personal grievance pursuant to s.114 of the Employment Relations Act 2000. Further, Ms Stewart has failed to notify Whitireia of the existence or content of her alleged personal grievance (as required by s.114 of the Employment Relations Act) at any time. We are not aware of any exceptional circumstances that should warrant the submission of a personal grievance out of the statutory timeframe.*

*Accordingly, I have notified Mediation Services that Whitireia will not be attending the mediation set down for 8 August.*

[9] Significantly, because it shows that the Law Centre saw Ms Stewart's actions at the time as displaying an intention as opposed to an action, the solicitor wrote back on 29 August stating:

*I have consulted Ms Prudence Stewart who was as shocked as my colleagues and I, that you would deny being made aware of Ms Stewart's intention to bring a personal grievance against Whitireia ... for her forced resignation from her employment ...*

*Ms Stewart informs me that she told you explicitly that she would be pursuing a personal grievance when she resigned.*

*When my colleague and I called you in May, as we made clear, it was to discuss Ms Stewart's personal grievance.*

[10] In response Whitireia's lawyers wrote that:

*Ms Stewart resigned from her employment with the Polytechnic on 16 April 2008. Contrary to your assertion, no particulars of an alleged personal grievance have been provided to date.*

*Our client accepts that a meeting occurred between a staff member of Whitireia Community Law Centre, [name deleted] and [name deleted] in May 2008; however the particulars of Ms Stewart's alleged personal grievance were not provided.*

*It appears that the next communication in respect of Ms Stewart came via Mediation Services following a request for mediation assistance. Again, our client was not made aware of the alleged nature of the personal grievance or the issues which Ms Stewart requires our client to address. In fact as at today's date no such matters have been put forward.*

[11] It then sought further particulars before it would reconsider whether it would consent to a grievance being raised out of time.

[12] It was not until 9 January 2009 that the Law Centre came back with a statement from Ms Stewart's friend about what she heard on the telephone and further detail about the meeting in May 2008, but no particulars on the matters giving rise to the grievance. Subsequently a personal grievance alleging unjustified dismissal and actions was lodged with the Authority, but again it gave no details of the alleged bullying and harassment by the Dean.

[13] Whitireia declined to change its view that the matter was out of time, although the parties did attend mediation. That was unsuccessful and a determination of the Authority is required.

### **The Law**

[14] Section 114 makes it clear that a grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. If that is not done within 90 days then an applicant wishing to pursue a personal grievance must apply to the Authority for leave to raise the grievance out of time. The Authority must be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and that it considers it just to do so, before granting such an application.

[15] One of the statutory grounds for exceptional circumstances is where the employee has 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 (s.115B).

### **Determination**

[16] Ms Stewart's advice on the date she left from the Human Resources Manager was prospective. For all Whitireia knew Ms Stewart could have been advised against taking such action by the Law Centre. At the time she advised the HR Manager no details of Ms Stewart's reasons for claiming she had been forced to leave Whitireia had been given, nor had any remedies been sought.

[17] It is insufficient for an employee to advise an employer that the employee simply considers that he or she has a personal grievance. An employer must know what to address (*Creedy v. Commissioner of Police* [2006] 1 ERNZ 517 applied). For instance, in *Coy v. Commissioner of Police* unreported Colgan CJ 19 November 2007 CC 23/07 the Court concluded that an oral statement by the employee to the employer that *I can tell you now I am going ahead with a personal grievance as I think I have been personally treated very badly* did not meet the test of raising a grievance.

[18] It therefore follows that Ms Stewart did not raise a grievance with the HR Manager of Whitireia on the day she left.

[19] I accept, given the Law Centre's practice of not raising grievances formally before negotiations have failed and the primary objective being to get Ms Stewart a job back at Whitireia, that the solicitors did not go so far as to raise a grievance at that time, particularly as it was wrongly assumed by them that a grievance had already been raised by Ms Stewart on the day.

[20] Again, maybe for the sound strategic reason of getting the Polytech onside, the details given of particulars concerns that Ms Stewart had were minimal, perhaps also because the Dean was in attendance. However, as was held in *BOT of Te Kura Kaupapa Motuhake O Tawhiuau v. Edmonds* [2008] ERNZ 139 at 152, the employer needs to be aware that the employee considers their dismissal was unjustified and that the employer had sufficient knowledge of relevant events to deal with that allegation,

either in an attempt to settle the grievance or, if that was not possible, to take steps to defend its position if the applicant was to refer his grievance to the Employment Relations Authority for settlement.

[21] It could be said that Whitireia must have been aware by the end of the meeting that Ms Stewart considered that the ending of her employment was unjustified. Because of the lack of detail provided, however, Whitireia had insufficient knowledge of relevant events to deal with the allegation in an attempt to settle the grievance or otherwise defend its position. This is because of the focus of the meeting was quite different. It therefore follows that the Law Centre failed to raise a grievance on Ms Stewart's behalf.

[22] I turn to the application for exceptional circumstances. Ms Stewart had, as is clear from her written instructions to the Law Centre provided very soon after she left her employment, made reasonable arrangements to have the grievance raised on her behalf by her agent, The Law Centre. Nothing could be clearer from the very first few sentences of her *version of events*. For whatever reason the Law Centre, no doubt by mistake or pressure of work, unreasonably failed to ensure that Ms Stewart's grievance was raised within the required time. It could have done so at the meeting but for the reasons referred to above, failed to do so. That is not to criticise the Law Centre for its strategy, as it can often be counterproductive to raise a grievance at a meeting when it is trying to gain the support of the employer, in this case for Ms Stewart to be able to go back to work at Whitireia.

[23] Once it was clear that there did not appear to be any realistic way forward for Ms Stewart to return to work at Whitireia, it was then incumbent on the Law Centre to raise a grievance on Ms Stewart's behalf, if only to protect her position. As it unreasonably failed to do so, exceptional circumstances have been made out.

[24] There is no prejudice to Whitireia if Ms Stewart's application were granted, as acknowledged by its witnesses, and therefore there are no reasons why it would not be just to grant leave.

[25] Mr Ogilvie also claims that Ms Stewart has disadvantage claims for various actions that took place during the course of her employment, which appear to relate to alleged acts of bullying by the Dean. Details of these alleged acts of bullying and harassment were never provided to Whitireia until Mr Ogilvie filed her personal

grievances in the Authority, and even then they are generalised accusations, with no specifics whatsoever. Until the investigation meeting and the tabling of Ms Stewart's narrative provided to the Law Centre therefore, there was no evidence of any of these separate claims for disadvantage ever being formally raised as personal grievances in their own right in a way in which Whitireia could be expected to respond. Furthermore, those matters relates to events well before the 90 day period that applies to the constructive dismissal claim, and to events of between eighteen and twenty-four months ago and any exceptional circumstances did not occasion those delays, because Ms Stewart did not seek advice from the Law Centre until after she had left her employment.

[26] I therefore decline to grant leave for her to pursue personal grievances for unjustified disadvantage relating specifically to incidents of alleged bullying and harassment that occurred during Ms Stewart's employment. However, they may have of course be raised as part of the background circumstances to support her claim for unjustified constructive dismissal, as exceptional circumstances do apply there.

#### **Direction**

[27] I direct the parties to attend mediation, as required under s.114(5), to seek to mutually resolve the unjustified constructive dismissal grievance - such mediation to take place as soon as possible.

#### **Costs**

[28] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**