

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 65  
5441601

BETWEEN                      TERESA WALKER  
Applicant

A N D                              COOKIE TIME  
LIMITED  
Respondent

Member of Authority:      David Appleton  
Investigation meeting      Determined on the papers by consent  
Representatives:            Peter Moore, Advocate for Applicant  
   Robert Thompson, Advocate for Respondent  
Date of Determination:    22 April 2014

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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**Employment relationship problem**

[1]      Ms Walker has raised personal grievances in respect of alleged unjustified disadvantage in her employment and unjustified constructive dismissal. She also alleges a breach of good faith.

[2]      The respondent seeks that Ms Walker's claims be struck out as having been commenced in the Authority more than three years after the date on which the personal grievances were raised in accordance with s.114 of the Employment Relations Act 2000 (the Act).

[3]      This determination addresses that jurisdictional point.

## **Background**

[4] Ms Walker worked as a cleaner in the respondent's factory between February 2008 and 25 November 2010, when she resigned. Shortly before her resignation, she had been issued with a final written warning for absenting herself without authorisation. This followed an investigation into allegations of harassment by her against her supervisor Mr Filipo, which found that there had been no harassment.

[5] Ms Walker's statement of problem raises a number of issues relating to alleged treatment of her by Mr Filipo, some of which pre-date the investigation into harassment and some of which post-date it.

## **The issues**

[6] Ms Walker must, subject to the Authority's statutory discretion, satisfy two jurisdictional requirements:

- a. that she raised personal grievances in respect of her alleged unjustified constructive dismissal and of each alleged action of the respondent that she says gives rise to unjustified disadvantage in her employment within the period of 90 days beginning with the date on which each action alleged to amount to a personal grievance occurred or came to her notice, whichever is the later (s.114(1) of the Act); and
- b. that she commenced her action in the Authority in relation to each personal grievance no more than three years after the date on which each personal grievance was raised in accordance with s.114 of the Act (s.114(6)).

## **Determination**

### *Alleged unjustified disadvantage - issues pre-dating the harassment investigation*

[7] Mr Moore submits that the personal grievances of Ms Walker were first raised in a letter dated 1 December 2010, addressed to the respondent from his predecessor, Carla Jones of Phil Butler & Associates. However, it is clear from the wording of that letter that each of the alleged actions complained of in sub paragraphs 4(c) to (r) of that letter, which all appear to predate the harassment investigation, were first raised

as personal grievances by Ms Jones on behalf of Ms Walker at the investigation meeting on 15 November 2010. The letter states:

*On 15 November, Teresa attended an investigation meeting with a support person, a representative(the writer) and you. Teresa, through the writer, raised the following concerns at the meeting:*

There then followed a list of numbered sub-paragraphs, from 4(a) to 4(t), which include the issues predating the harassment investigation, and relied upon by Ms Walker to amount to alleged actions giving rise to unjustified disadvantage.

[8] The statement of problem was received by the Authority on 2 December 2013. Accordingly, it appears that, in respect of each of the alleged actions referred to in paragraphs 4(c) to (r) of the 1 December 2010 letter, proceedings have been commenced in the Authority more than three years after a personal grievance was raised in respect of each of them.

[9] I must now consider whether the Authority has a discretion to extend time to allow Ms Walker to commence her proceedings more than three years after her personal grievances were raised. It is clear that no such power exists in this matter under s. 221 of the Act, as that power to extend time depends upon the matter being before the Authority. This was confirmed by His Honour Chief Judge Colgan in *Roberts v Commissioner of Police EmpC Auckland AC33/06*, 27 June 2006.

[10] However, s.219 (1) of the Act provides as follows:

***219 Validation of informal proceedings, etc***

*(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the Court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.*

[11] In *Roberts*, the Chief Judge expressed the view, obiter, that s.219 of the Act allowed the Authority to exercise its discretion to extend the time limit referred to in s.114(6). No application has been made to extend time under s.219 but, even if it had been, I would not have exercised a discretion to do so in respect of these pre harassment investigation issues alleged to amount to an unjustified disadvantage. This is because, when considering whether the interests of justice warrant an extension of time, I take into account the following:

- a. The issues had been already investigated by the respondent, and no harassment found;
- b. It is not clear that valid personal grievances have been raised within 90 days of each issue complained of in any event;
- c. Some of the alleged incidents appear to have occurred some considerable time ago, and memories will have faded significantly, or memories become distorted, as a result;
- d. Public policy considerations lead me to consider that it would not be just to require the respondent to answer in detail to allegations arising from actions which are alleged to have taken place a considerable time ago; and
- e. The limited circumstances set out in the Limitation Act 2010 do not appear to apply in this case.

[12] In conclusion, I decline to allow Ms Walker to pursue a personal grievance in respect of the matters raised on her behalf in the letter dated 1 December 2010 at paragraph 4(c) to (r).

*Alleged constructive dismissal and issues post-dating the harassment investigation*

[13] With respect to the constructive dismissal allegation, the respondent states that this was first raised in an email from Ms Jones to Mr Jonny Sanders of IR Thompson Associates dated 25 November 2010. If this is the case, the action in respect of this constructive dismissal would also have been commenced more than three years after the personal grievance was first raised.

[14] The email in question reads as follows:

*Dear Jonny  
Teresa Walker has asked me to convey to you this morning that she is resigning from her position with Cookie Time effective immediately. She is onsite this morning. She is currently collecting her personal belongings and leaving.  
She has advised me that she intends to raise a personal grievance for constructive dismissal, the details of which you should receive next week. Could you please pass this onto your client? She has not advised them directly because she is too upset.  
If you would like to discuss the matter directly, please call me.  
Regards*

*Carla Jones.*

[15] The language used in the email of 25 November 2010 refers to an intention to raise a personal grievance for constructive dismissal, the details of which would be received by the respondent's advocate the following week. The letter from Ms Jones to Mr Sanders dated 1 December 2010 contained those details.

[16] It is my finding that the email of 25 November 2010 did not raise a personal grievance as it was not specific enough to enable the respondent to understand it. This preliminary view is supported by the response from Mr Sanders dated 25 November 2010, addressed to Ms Jones, in which he said that his client was *unaware of the specific reasons behind your client's resignation or her view that she has been constructively dismissed.*

[17] It is my finding that Ms Walker's personal grievance in respect of her constructive dismissal was first raised in Ms Jones' letter dated 1 December 2010.

[18] It would also appear from the text of the letter of 1 December 2010 that a number of other complaints (in relation to alleged issues post-dating the respondent's harassment investigation) were raised which could amount to a personal grievance. These allegations can be summarised as follows:

- (a) Mr Filippo singling Ms Walker out after the investigation into her complaints that bullying took place;
- (b) An increase in the meetings between Ms Walker and Ms Filippo;
- (c) The issuing of a final written warning;
- (d) Making Ms Walker take breaks at exact times; and
- (e) A requirement upon Ms Walker to talk to Mr Filippo before she took a *stress break.*

[19] It appears that the letter of 1 December 2010 was the first time in which personal grievances were raised in respect of these alleged actions (and these personal grievances appear to have been raised within 90 days of each alleged action). Therefore, personal grievances in respect of these alleged actions amounting to an unjustified disadvantage in Ms Walker's employment, together with a personal grievance in respect of an alleged unjustified constructive dismissal have been

commenced in the Authority no more than three years after the personal grievances were first raised.

[20] In reaching this finding, I take into account the wording of s.114(6) of the Act, which provides:

*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.*

[21] Section 35 of the Interpretation Act 1999 provides, at subsection (2) that:

*A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.*

[22] Subsection (6) of s.35 of the Interpretation Act provides:

*A thing that, under an enactment, must or may be done on a particular day or within a limited period of time, may, if that day or the last day of that period is not a working day, be done on the next working day.*

[23] In applying s.35(2) of the Interpretation Act, I believe that s.114(6) of the Act requires that the day on which a personal grievance is raised is not included when calculating when the period of three years starts. Therefore, I calculate that the last day by which action should have been commenced in the Authority in relation to the issues raised in the letter of 1 December 2010 to be 2 December 2013. If this is wrong, as 1 December 2013 was a Sunday, again I calculate that the last day on which the action could have commenced was Monday 2 December 2013, pursuant to s35(6) of the Interpretation Act. Monday 2 December 2013 was the day on which the applicant's statement of problem was received by the Authority.

[24] Furthermore, it is my view that the lodging of a statement of problem in the Authority constitutes *commencing* an action in the Authority.

### **Conclusion and directions**

[25] It is my finding that the Authority has the jurisdiction to consider a personal grievance in respect of alleged unjustified constructive dismissal, together with a personal grievance for unjustified disadvantage in employment in respect of the five alleged actions referred to in paragraph 18 above.

[26] I now direct the parties to attend a further mediation. If the mediation is unsuccessful, then Ms Walker's representative is to inform the Authority, which will then arrange a case management conference call so that an investigation of the personal grievances can be set down, and other steps timetabled.

### **Costs**

[27] I have not been addressed on costs. It is my preliminary view that the costs incurred by the parties in respect of this preliminary issue should lie where they fall, although either party may make submissions to the Authority within 28 days of the date of this determination if they disagree.

David Appleton  
Member of the Employment Relations Authority