

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 236
3248139

BETWEEN TRUDY WILLIAMSON
Applicant
AND IDEA SERVICES LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Lynda Mathieson, advocate for the Applicant
Guido Ballara and Saadi Radcliffe, counsel for the
Respondent
Investigation Meeting: On the papers
Memorandum Received: 8 January 2024 from the Applicant
12 February 2024 from the Respondent
Date of Determination: 23 April 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A substantive investigation meeting for this matter is set for 20 and 21 June 2024. The Authority has been asked in anticipation of that meeting to resolve some preliminary issues.

[2] The preliminary issues are the name of the respondent, whether unjustified disadvantage claims were raised within the 90-day statutory timeframe in the Employment Relations Act 2000 (the Act) and what conduct the application for a penalty for a breach of good faith relates to. There is an issue about whether the action

for a penalty was commenced within 12 months after the earlier of the date when the cause of action first became known or should reasonably be known.

The Authority's investigation

[3] Ms Mathieson and Mr Ballara agreed the preliminary matters could be resolved by the Authority on the basis of memoranda lodged.

The issues

[4] The Authority needs to consider the following issues:

- (a) What is the name of the respondent?
- (b) What is required for raising a personal grievance?
- (c) Was an unjustified constructive dismissal raised within the statutory time frame?
- (d) What unjustified actions/omissions causing disadvantage are said to have been raised in the statutory timeframe and were these raised?
- (e) Was the application for a penalty commenced within 12-months after the earlier of the date when the cause of action first became known or when it should reasonably have become known.¹

What is the name of the respondent?

[5] Ms Mathieson confirmed that the name of the respondent can be amended to Idea Services Limited. Mr Ballara agrees that is the correct identity of the respondent.

[6] The name of the respondent is amended to Idea Services Limited (Idea Services).

¹ Employment Relations Act 2000 s 135.

What is required for raising a personal grievance?

[7] Section 114(1) of the Act provides that an employee who wishes to raise a personal grievance must raise the grievance within a 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. Idea Services does not consent to a personal grievance being raised outside of the statutory timeframe.

[8] Section 114(2) provides that a grievance is raised with an employer as soon as the employee had made or has taken reasonable steps to make the employer or a representative of the employer aware they alleged a personal grievance that they want addressed.

Was a personal grievance alleging unjustified constructive dismissal raised within the timeframe in s 114 of the Act.

[9] It is accepted by Idea Services that a personal grievance alleging unjustified constructive dismissal was raised within the the 90-day statutory timeframe period. The focus for this determination is whether alleged unjustified disadvantage actions/omissions were raised within the statutory timeframe.

[10] The broad context of this matter is about the completion of a Level 5 qualification and a request for a variation of the individual employment agreement to remove that requirement.

What unjustified actions causing disadvantage claims are said to have been raised within the 90-day statutory timeframe period?

Conversation on 17 March 2022 and presentation of undated letter

[11] Ms Mathieson accepts that an alleged grievance with respect to a conversation and an undated letter given to her by a manager at Idea Services on 17 March 2022 was raised outside of the 90-day timeframe.

[12] This will not be treated as a separate grievance for the purposes of the substantive investigation meeting. The Authority can hear evidence about this as

background to the alleged unjustified constructive dismissal claim. Ms Mathieson says in her memorandum that this was the timeframe in which the claim commenced.

[13] This matter is relied on for an alleged breach of good faith.

Request for information on 1 April 2022 which was not received before a meeting on 6 April 2022

[14] An unjustified disadvantage action is alleged in respect of the failure to provide information requested in a letter from Ms Mathieson dated 1 April 2022 for a meeting on 6 April 2022. Ms Mathieson sets out in her memorandum that Ms Williamson was disadvantaged because she did not receive the information requested prior to the meeting. She goes on to state “(Albeit) At the meeting, she [Ms Williamson] was agreeable to discuss the points.” That is reflected in some of the written communications that followed the meeting on 6 April 2022 meeting about understandings from the meeting and seeking confirmation from Idea Services about these understandings.²

[15] Ms Mathieson says that the request for information was made 91 days before the personal grievance was raised and as it would have taken more than one day for Idea Services to compile and send the information, this falls within the 90 days deadline.

[16] There is a letter from Ms Mathieson to Idea Services raising personal grievances including unjustified disadvantage grievances dated 11 July 2022. That letter is outside of the statutory timeframe if starting from 5 April by eight days. I accept Mr Ballara’s submission that this letter did not specifically raise a grievance about provision of information. I do not conclude from a perusal of letters before this date that Idea Services was given sufficient information to be able to respond to a grievance about a failure to provide information. This was in circumstances where Ms Williamson had been agreeable to respond to some points and there was ongoing request and provision of some information. It was not until a letter that was referred to as notice of personal

² For example letter from Ms Mathieson to Idea Services 28 April 2022.

grievance and substantial claim details dated 9 September 2022 was provided to Idea Services that it was specifically referred to. That was outside of the statutory timeframe.

[17] This alleged grievance will not be treated as a separate grievance for the purposes of the substantive investigation meeting. The Authority can hear evidence about supply of information as background to the alleged unjustified constructive dismissal claim.

[18] This matter is relied on as an alleged breach of good faith.

Proposed solution in a letter from Ms Mathieson to Idea Services dated 11 April 2022 declined in a response from Idea Services dated 22 April 2022

[19] Ms Mathieson sets out in her memorandum the following about the proposed solution and the fact it was declined:

“7] In anticipation of a fair and constructive approach by the; Respondent, including the Regional Manager, Chief Operating Office, HR and Learning and Development Leads, the Applicant proposed a solution to complement her request to change her Individual Employment Agreement as described in 6.2]. Refer to letter 11 April 2022, Mathiesons Employment Relations to Idea Services;

7.1]The Respondent replied via email on 22 April 2022 with the following points:

The Applicant’s proposal was declined.”

[20] Ms Mathieson submits that Idea Services declined to consider Ms Williamson’s request on an individual basis in accordance with her individual employment agreement but treated the request under a collective umbrella. She says there was a predetermined decision that was unfair and caused disadvantage.

[21] Mr Ballara submits the specific purported grievance of declining the proposal on 22 April 2022 was not complained of by way of personal grievance until 9 September 2022 and accordingly is out of time.

[22] The letter of resignation from Ms Williamson is dated 19 May 2022. It was provided by email from Ms Mathieson to the General Manager of Idea Services for Ms Williamson's area on 20 May 2022.

[23] The resignation letter provided that Ms Williamson had asked for flexibility because of her service, skills, expertise and as she was nearing retirement. She refers to her request being "unfairly declined", on an "inflexible principle" and not with any "real consideration." She describes the unfairness as follows:

1. That Idea Services have not strictly adhered to the terms and conditions of the Employment Agreement.
2. Idea Services are asserting their power to control my future and do not recognise their failure to meet the obligations of the Employment Agreement.

[24] The letter of 11 July 2022 from Ms Mathieson that notified unjustified disadvantage grievances and provided an overview provided as follows:

- 1] Ms Williamson has tried to resolve the matter prior to reaching this stage, including providing proposals to reach a resolution. However, it was made clear from the outset, that IDEA Services would not change their stance.
- 2] Ms Williamson's proposal was not thoroughly and fairly considered.

[25] These communications made it clear that there were concerns about the proposal being declined. There was enough detail provided so that Idea Services were aware of a complaint about the declining of the proposal and maintaining the expectation that Ms Williamson complete the Level 5 qualification. Both communications by and on behalf of Ms Williamson were within the 90-time statutory timeframe.

[26] An unjustified disadvantage grievance was raised with Idea Services within the statutory timeframe about the unfairness of the declining of the proposal and raising concerns about the obligations in the employment agreement.

[27] This alleged grievance can be considered separately and as part of the evidence about the alleged unjustified constructive dismissal claim.

[28] A good faith breach is also alleged about this matter.

Performance reviews

[29] Ms Mathieson refers to unjustifiable disadvantage about an alleged failure by Idea Services to carry out performance reviews annually for Ms Williamson as provided for in the employment agreement in clause 7.1 for the previous ten years in her memorandum.

[30] Ms Mathieson puts in her memorandum that Ms Williamson was pressured to comply with a specific clause in her employment agreement while Idea Services was in breach of the specific and relevant performance review clause.

[31] Mr Ballara submits that a specific alleged disadvantage, if there was one about performance reviews, was not raised until the 9 September 2022 grievance letter. He submits that asserting the comparison as at that date with the events in April 2022 is therefore out of time.

[32] In the letter dated 1 April 2022 Ms Mathieson asked amongst other matters for copies of annual performance reviews since 3 July 2018. In an email from Idea Services dated 5 May 2022 there is reference amongst other matters to performance being taken into account when salary is reviewed annually. Ms Mathieson responded to that email in a letter to Idea Services dated 5 May 2022 which is largely directed to performance. For current purposes she notes the following

2] A salary review is not a performance review.

There are no records to demonstrate a proper performance review has taken place; nor records to demonstrate performance feedback, expectations, acknowledgments from either party.

Therefore, IDEA Services are in breach of the Individual Employment Agreement and have not complied with their contractual obligations. Clause 7.1 The Employee's performance will be reviewed at least annually.

[33] A complaint that there was a failure to comply with an obligation in the employment agreement could be a personal grievance within the meaning in s103 of the Act.

[34] The letter of 1 April read with the letter of 5 May 2022 provided the substance of the concern about non-compliance with the performance review obligation to Idea Services. These communications satisfied the requirements of s 114 (1) and (2) of the Act for the raising of a personal grievance about the performance reviews related to the events in the relevant 90-day period.

[35] This alleged grievance can be considered separately and as part of the evidence about the alleged unjustified constructive dismissal claim.

[36] This matter is relied on as an alleged breach of good faith.

20 May 2022 summary

[37] A summary was lodged by Ms Williamson at the time she resigned. It refers to interactions that Ms Mathieson says refer to how Ms Williamson felt bullied within the work environment and the culture of the work environment.

[38] Mr Ballara submits that the 20 May 2022 summary is not a discrete alleged grievance claim but was provided with Ms Williamson's resignation and the alleged events in the summary are outside of the 90-day period.

[39] It is not clear on the face of the document when the events described are said to have occurred. Unless the matters referred in that document occurred within the 90-day period before 20 May 2022 then they cannot support discrete alleged unjustified actions or omissions.

[40] That is a matter for the substantive investigation.

Was the application for a penalty for an alleged breach of good faith commenced within the 12 months' timeframe?

[41] There is an overarching statutory requirement that parties to an employment relationship deal with each other in good faith.³

³ Employment Relations Act 2000 s 4.

[42] Ms Mathieson has referred to a number of alleged breaches of good faith on the part of Idea Services.

[43] The Authority has been asked to determine whether an action for the recovery of a penalty under the Act for the alleged breaches of good faith was commenced within 12 months of the date the action became or should reasonably have become known to the person bringing the action.⁴

[44] The action for recovery is commenced with the lodging of a statement of problem.

[45] The statement of problem was lodged on 30 August 2023.

[46] I accept Mr Ballara's submission that this is after the period of twelve months for all of the matters considered to be breaches of good faith.

[47] The application for penalties for breaches of good faith was not commenced within the twelve-month period and the Authority does not have jurisdiction to consider the penalty action in these circumstances.

Summary of findings

[48] The name of the respondent is Idea Services Limited.

[49] An alleged unjustified constructive dismissal was raised within the statutory timeframe.

[50] The conversation and undated letter provided to Ms Williamson on 17 March 2022 is not to be progressed as a separate unjustified action claim. In any event it was raised outside of the statutory timeframe. Evidence can be provided as background to the alleged unjustified constructive dismissal claim about the events of 17 March 2022.

[51] The request for information made in the 1 April 2022 letter and the alleged failure to provide information was not raised as a personal grievance within the

⁴ Employment Relations Act s 135 (5)(a) and (b).

statutory timeframe. Evidence can be provided as background to the alleged unjustified constructive dismissal claim about the events of 17 March 2022.

[52] An alleged personal grievance about the fairness of the action of Idea Services in declining Ms Williamson's proposal of 11 April 2022 was raised within the statutory timeframe and can be pursued as a separate unjustified action claim.

[53] A personal grievance about an alleged failure to consider performance reviews was raised within the statutory timeframe and can be pursued as a separate unjustified action claim.

[54] It will be a matter for the substantive investigation meeting whether any of the events referred to in the summary of 20 May 2022 occurred within the 90 days immediately preceding the provision of that summary.

[55] The application for a penalty for alleged breaches of good faith was not commenced within a twelve-month period and the Authority does not have jurisdiction to consider the penalty action in these circumstances.

Costs

[56] Costs are reserved and will be dealt with after the substantive determination.

Helen Doyle
Member of the Employment Relations Authority