

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 140  
EMPC 84/2024**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      KAVYA SHARMA  
   Plaintiff

AND                              PROLIFE FOODS LIMITED  
   Defendant

Hearing:                      12 July 2024  
   (Heard at Wellington (by VMR))

Appearances:                K Sharma, plaintiff in person  
   L Nicholson, agent for defendant

Judgment:                    2 August 2024

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1]      Kavya Sharma resigned from her employment with Prolife Foods Ltd by letter dated 11 October 2018. Her last day of work was 23 October 2018.

[2]      On 12 July 2023, Ms Sharma lodged a statement of problem with the Employment Relations Authority, raising a personal grievance against Prolife Foods. It was only on receipt of that statement of problem that Prolife Foods became aware of Ms Sharma's personal grievance. She had not communicated with Prolife Foods between when she left its employment and her lodging her claim in the Authority.

[3]      The personal grievance was, therefore, raised outside the 90-day period within which personal grievances generally are to be raised, as required by s 114 of the

Employment Relations Act 2000.<sup>1</sup> Prolife Foods did not consent to the personal grievance being raised after the expiration of the 90-day period. Accordingly, Ms Sharma sought leave from the Authority to raise the personal grievance after the expiration of that period.<sup>2</sup>

[4] The Authority declined leave.<sup>3</sup> Ms Sharma has challenged the determination of the Authority. For the reasons explained in this judgment, Ms Sharma’s challenge is unsuccessful.

### **Ms Sharma worked for Prolife Foods Ltd in several supermarkets**

[5] Ms Sharma commenced employment with Prolife Foods in September 2015. Her role was of a “bulk foods merchandiser” and later amended to “bulk foods manager”. Essentially, her duties were cleaning and filling bulk foods bins in designated supermarkets, ordering product, and stocktakes. Ms Sharma worked at several different supermarkets in Auckland. The evidence was that this was an entry-level position; no previous work experience or qualifications were required for it. By 2018, Ms Sharma’s rate of pay was \$19 per hour.

[6] Ms Sharma’s employment agreement included a detailed provision covering the resolution of employment relationship problems, which included that an employee who considers that they have grounds for a personal grievance must raise the grievance with the employer or a representative of the employer within 90 days, beginning on 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.

[7] One of her complaints about Prolife Foods is that it changed her hours of work without consultation or prior notice. This claim is denied by Prolife Foods. It says that under the employment agreement it was entitled to change Ms Sharma’s hours of work on 5 days’ notice and that it had always complied with that obligation.

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<sup>1</sup> Employment Relations Act 2000, s 114(7)(b).

<sup>2</sup> Section 114(3).

<sup>3</sup> *Sharma v Prolife Foods Ltd* [2024] NZERA 84 (Member Fuiava).

## **Ms Sharma worked under a visa**

[8] Ms Sharma is a citizen of India. From August 2016 to August 2018, Ms Sharma had a student visa that allowed her to work as a bulk food manager for Prolife Foods in Auckland.

[9] In May 2018, Ms Sharma was looking to apply for a further work visa and engaged an immigration consultant for that purpose. Ms Sharma sought Prolife Foods's assistance with her application. In particular, she asked Prolife Foods to advertise her position, as required by Immigration New Zealand instructions, and to complete the Employer Supplementary Form. At this time, Prolife Foods informed Ms Sharma that its view was that her role did not meet the Essential Skills work visa criteria.

[10] Prolife Foods advertised the role but not immediately. This was because the position was not becoming available until Ms Sharma's work visa expired on 3 August 2018 and it did not make sense operationally for Prolife Foods to advertise it so far in advance. Prolife Foods completed the Employer Supplementary Form in July 2018, although it seems the form was amended by Ms Sharma's immigration consultant to a different position classification, which Prolife Foods says did not match the role being performed by Ms Sharma.

[11] Ms Sharma applied for an Essential Skills work visa on 2 August 2018 and was issued with an interim visa that enabled her to live and work in New Zealand for six months or until a decision on her application was made, whichever was the earlier.

[12] There were a number of difficulties with the application. Immigration New Zealand did not accept the position classification in the application. Immigration New Zealand also raised issues with the advertising, including because of discrepancies in the way in which the role was described across different websites and the position that was offered to Ms Sharma which meant that Immigration New Zealand was concerned that genuine attempts had not been made by Prolife Foods to recruit New Zealand citizens or residents into the role before offering employment to a foreign worker. Immigration New Zealand required a skills match

report to be completed, to demonstrate that the role met the Essential Skills work visa criteria. Prolife Foods declined to provide that report because it considered that the role Ms Sharma held did not meet that criteria and it did not wish to mislead Immigration New Zealand.

[13] In sum, it became apparent that an Essential Skills work visa was unlikely to be an appropriate visa for the role that Ms Sharma held. It was a role that could probably be filled by a New Zealander; indeed, when the job was advertised Prolife Foods received over 60 applications. Most importantly, the rate of pay and duties were not such that it met the criteria for an Essential Skills visa.

[14] On the advice of Ms Sharma's immigration advisor, she withdrew her application for an Essential Skills visa. Immigration New Zealand then advised her that her interim visa would expire on 23 October 2018.

[15] As noted, Ms Sharma resigned from Prolife Foods effective on that date.

[16] From 23 October 2018 until July 2023, Ms Sharma remained in New Zealand but without a visa. In late July 2023, she returned to India, where she now lives.

### **Ms Sharma's personal grievance is focused on a perceived lack of support from Prolife Foods**

[17] Ms Sharma's personal grievance is mainly based on what she says was a lack of support from Prolife Foods when it came to her applying for the Essential Skills visa. She points to what she says were delays in advertising the position and providing the skills match report, and the description in the advertisements being for two part-time roles rather than one full-time role, which she says affected her visa application.

[18] Also, as noted, Ms Sharma has a concern about alleged changes in her hours of work.

### **Ms Sharma's focus was her immigration status**

[19] Between October 2018 and July 2023, Ms Sharma made considerable efforts to rectify her immigration status. Her evidence details the many steps she took. These

steps included an attempt to visit the Minister of Immigration at the New Zealand Parliament in Wellington, a visit to the electorate offices of the Hon Grant Robertson, emailing other ministers and members of Parliament, engaging with media and with several immigration consultants, one of whom applied on her behalf for a ministerial intervention, which was unsuccessful.

[20] At no point did her immigration advisors suggest that she take any steps against Prolife Foods, and she did not seek or obtain employment advice. It was only in June 2023, after she had unsuccessfully appealed her deportation order, that she understood that she could take action against Prolife Foods.

### **Two requirements for leave to be granted**

[21] Under s 114 of the Act, leave may be granted to raise a personal grievance outside the prescribed period if the application meets two criteria:<sup>4</sup>

- (a) the delay in raising the personal grievance was occasioned by exceptional circumstances; and
- (b) it is just to allow leave.

[22] Section 115 of the Act provides a non-exhaustive list of exceptional circumstances:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that they were unable to properly consider raising the grievance within the applicable employee notification period under s 114; or
- (b) where the employee made reasonable arrangements to have the grievance raised on their behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

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<sup>4</sup> Employment Relations Act 2000, s 114(4).

- (c) where the employee's employment agreement does not contain the required explanation concerning the resolution of employment relationship problems; or
- (d) where the employer has failed to comply with the obligation to provide a statement of reasons for dismissal.

### **Delay not occasioned by exceptional circumstances**

[23] Although Ms Sharma raises that she was depressed and had some physical pain issues in the period following her resignation from Prolife Foods, she does not suggest, nor is it credible, that either of those matters were caused by the matters that she says gave rise to her personal grievance, or that they were what led (in whole or in substantial part) to her not lodging a personal grievance within the prescribed time.

[24] She made no arrangements within the 90-day period to have a personal grievance raised and did not suggest she wished to do so to any of her agents.

[25] Ms Sharma's employment agreement contains an explanation concerning resolution of employment relationship problems, which included that any personal grievance would need to be raised within 90 days of the action alleged to amount to a personal grievance occurring or coming to Ms Sharma's notice.

[26] Ms Sharma was not dismissed so there was no obligation on Prolife Foods to provide a statement of reasons for a dismissal.

[27] Accordingly, none of the exceptional circumstances identified in s 115 apply to these proceedings.

[28] It remained open to Ms Sharma to raise some other exceptional circumstances that precluded her raising a personal grievance. While I acknowledge that her focus was with respect to her immigration status, there was nothing that prevented her from pursuing her personal grievance in parallel with that matter. Nothing she has raised in these proceedings amounts to exceptional circumstances that would have prevented her from raising a personal grievance within the 90-day period.

[29] For this reason, Ms Sharma's challenge is unsuccessful.

### **Not just to grant leave**

[30] Apart from this barrier, it would not be just to grant leave for Ms Sharma to pursue a personal grievance at this stage.

[31] A delay of almost five years is extraordinary. The requirement that personal grievances be raised generally within 90 days is so that employment relationship problems can be dealt with expeditiously for the benefit of both parties to the relationship. It would not be just for Prolife Foods to have to respond to a personal grievance so long after the events that Ms Sharma says gave rise to her personal grievance.

[32] While it is not necessary to consider in any detail the merits of Ms Sharma's personal grievance, I also note that, based on the evidence that has been submitted, her personal grievance does not appear to have any obvious merit. Nor is it clear what remedies would flow from any personal grievance that Ms Sharma established. Her failure to obtain an Essential Skills visa was based principally on the merits of her application and her decision to withdraw that application. Prolife Foods took some steps to support her visa application, but it became apparent that the role it could offer Ms Sharma was incompatible with the visa she sought.

### **Costs and expenses**

[33] Neither party instructed representatives for this matter. Nevertheless, if Prolife Foods seeks reimbursement of any expenses, and that cannot be agreed with Ms Sharma, Prolife Foods may, within 14 days of this judgment, file and serve a memorandum setting out those expenses.

J C Holden  
Judge

Judgment signed at 12.30 pm on Friday 2 August 2024