NOTE: This determination contains an interim order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 479
3131956

	BETWEEN	ANA First Applicant
		IHS Second Applicant
	AND	RRG Respondent

Member of Authority:	Peter Fuiava
Representatives:	Gerrard Brimble, counsel for the Applicants Tracy Atiga for the Respondent
Investigation Meeting:	On the papers
Submissions received:	1 April 2022 and 22 June 2022 from the Applicants 17 May 2022 from the Respondent
Determination:	22 September 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. ANA and IHS raised their personal grievances of unjustified disadvantage and unjustified dismissal with RRG well within the time required under s 114 of the Employment Relations Act 2000 (the Act).

B. The Authority recognises Warren Alcock as a representative for ANA and IHS whose appointment is made pursuant to s 236 of the Act.

C. Costs are reserved.

Interim non-publication order continues

[1] In a determination dated 18 June 2021, the Authority granted an interim non-publication order that prohibited the names of the parties and any other information that could lead to the parties being identified from being published.[1] That interim non-publication continues to have effect.

Employment relationship problem

[2] ANA and IHS were both respectively employed by RRG as head coach and director of strength and conditioning for an offshore rugby franchise from July/August 2020 until their employment ended on 2 November 2020. The applicants have raised personal grievances of unjustified disadvantage and unjustified dismissal which RRG contends were made out of time. For the reasons that follow, the Authority finds that the personal grievances were made well within the 90-day timeframe requirement of s 114 of the Act. As will also be seen, the Authority further confirms Warren Alcock's status as an additional representative for the applicants under s 236.

The Authority's investigation

[3] On 1 April 2022, a case management conference was held to discuss the 90-day s 114 issue. Timetabling directions for the filing of written submissions were made by agreement with Mr Brimble and Ms Atiga. While a date to hear further oral submissions was later set down, the submissions hearing did not take place as Ms Atiga advised one day before the scheduled meeting (17 June 2022) that she was no longer available until mid-July 2022.

[4] To delay matters until Ms Atiga became available was too long an adjournment in my view. In substitution for a submissions hearing, the Authority directed that any additional written submissions either party wished to make could be lodged and served by 4 pm Wednesday 22 June 2022. Additional submissions from Mr Brimble were received on 22 June 2022. No further submissions from Ms Atiga were provided.

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[1] *ANA & IHS v RRG* [2021] NZERA 264 at [14].

[5] As permitted by s 174E of 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

[6] The preliminary issues for determination are:

(a) Did ANA and IHS raise their personal grievances of unjustified disadvantage and unjustified dismissal in time?

(b) Can Mr Alcock represent ANA and IHS in this proceeding?

Relevant facts

[7] On 10 August 2020, ANA accepted an offer of fixed-term employment from RRG as the head coach of its rugby team. The team was situated outside New Zealand and was expected to compete in an offshore professional rugby competition starting the following year in 2021. For agreeing to sign on for the franchise, ANA was to be paid a sign-on payment valued at US$21,666.67. In addition to employing ANA, RRG employed IHS in late July 2020 as director of strength and conditioning for the club.

[8] However, on 5 September 2020, Tracy Atiga, RRG's chief executive officer (CEO) sent an email to several people connected with the rugby club, including ANA and IHS, advising that the organisers of the competition had not included the franchise in the 2021 competition. The reasons for this are somewhat unclear.

[9] On 1 October 2020, ANA and IHS were advised in an email from Ms Atiga that RRG had insufficient funds to make its payroll payments. In spite of this however she stated that she would find a solution to compensate the applicants as she had given them her word.

[10] In the early hours of 4 October 2020, ANA was copied into an email from Ms Atiga which was sent to her now former director. Ms Atiga's email stated that the director had been summarily dismissed for serious misconduct for carrying on business on behalf of RRG without the consent of its CEO or the board of directors. It appears that the director may have tried to take over the rugby franchise.

[11] ANA's name was mentioned in Ms Atiga's email as a party to the director's actions which came as a surprise to ANA because he had not previously been advised by RRG that there were any concerns about his actions or behaviour.

[12] Several hours later after her initial email of 4 October 2020, Ms Atiga emailed ANA and another individual that she was formally retracting her earlier comments which gave ANA the impression that the matter had been resolved.

[13] By late October 2020 the applicants had not received any payments from RRG. They contacted their sports agent, Mr Alcock, who emailed Ms Atiga on 23 October 2020 to ask when the payments would be made. There then followed a series of emails where Ms Atiga questioned Mr Alcock's status as representative and asked him to advise if he had been instructed in a legal capacity to represent ANA and IHS. Mr Alcock responded by way of email on 26 October 2020 which stated:

> I am an accredited agent and a barrister and solicitor of the high court. I'd like to think the answer to the question about when [ANA] and [IHS] were to be paid would be the same irrespective of the capacity in which I represent them.

[14] On 29 October 2020 Mr Alcock emailed Ms Atiga raising a personal grievance on behalf of the applicants. The email stated:

> Please take this email as formal notice of a personal grievance for a failure to pay money owing in terms of the Agreements for both [ANA] and [IHS] and for unpaid sign on money agreed to be paid to [ANA].

[15] Without notice, on 2 November 2020, Mr Alcock received letters from Ms Atiga addressed to ANA and IHS which stated that their employment with RRG had been terminated for serious misconduct. The letters alleged that they had colluded with the former director to form a new entity under new leadership without the knowledge or approval of the CEO or the board. It was further alleged that "critical information" had been withheld by the director concerning his involvement with ANA and IHS's previous employer which had resulted in their endorsement as head coach and director of strength and conditioning. The termination letters further stated:

> Given the circumstances surrounding your dismissal and the impact that your collusion with [the director] and his associates have had on the company's future, we do not believe we are obligated to compensate you in any way. It is our position that the losses we have accumulated as a direct result of your misconduct and that of your former professional peers far outweighs any real or perceived compensation due.

> We acknowledge that your legal representative (Mr Warren Alcock) had raised a personal grievance on your behalf. However, our investigation into your serious misconduct supersedes any grievance matter raised by you.

[16] The termination letters referred to emails that Ms Atiga had purportedly sent on 1 October and 5 October 2020 confirming ANA and IHS's earlier suspension. However, neither apparently knew of those emails and nor were they aware that they had been suspended. By email of 12 November 2020, Mr Alcock requested a copy of the emails but Ms Atiga advised that RRG was under "no obligation to continue dialogue." A copy of the emails were never provided.

[17] Mr Alcock emailed Ms Atiga again on 12 November 2020 and referred to RRG's good faith obligations to provide ANA and IHS with information relevant to the decision to terminate their employment as well as being given the opportunity to respond to that information. Mr Alcock's email noted that RRG had not carried out an appropriate investigation process, that its decision to terminate the applicants' employment was not consistent with their individual employment agreements, that if Ms Atiga continued to say that RRG did not need to respond to the applicants they would be left with no alternative but to file proceedings in the Authority, and Mr Alcock requested RRG to attend mediation. Ms Atiga's response was that RRG did not agree to mediation.

[18] On 5 February 2021, ANA and IHS lodged their statement of problem in the Authority alleging that they had both been unjustifiably disadvantaged (the non-payment of their salaries and of ANA's sign-on payment) and unjustifiably dismissed from their employment.

[19] On 1 March 2021, RRG filed its statement in reply which states that Mr Alcock failed to prepare a formal personal grievance letter that set out the following:

(a) the name of the person or entity that prepared the letter;
(b) the purpose of the letter;
(c) the name of the person or persons whose views are being represented;
(d) the personal grievance that is being raised;
(e) what caused the employee(s) to feel personally aggrieved;
(f) what the employer did that was in breach of New Zealand employment law; and
(g) what remedies are sought to resolve the personal grievance.

[20] Ms Atiga submits that, to date, no formal letter outlining the above details was provided. All that has been sent by Mr Alcock is a one sentence email on 29 October 2020 (see [14] above) which is not acceptable because it does not provide any context, details or remedies.

Relevant law

[21] Section 114 of the Act sets out what is required of an employee to raise a personal grievance. A personal grievance must be raised within 90 days of the relevant event occurring or coming to the notice of the employee (whichever is later) unless the employer consents to a later date, or with leave from the Authority.

[22] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* the Employment Court summarised the applicable principles:[2]

> [33] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
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> [34] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
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> [35] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it 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.

The personal grievances were raised in time

[23] Ms Atiga's submissions for RRG were received by the Authority on 17 May 2022 and in broad terms it repeats the company's stated position that neither the

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[2] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

applicants nor their representatives have taken up the opportunity to submit a formal letter to RRG outlining their personal grievance.

[24] For good reason s 114 of the Act does not require an employee to set out a formal letter particularly one that captures all of Ms Atiga's points at [19] above. Requiring a grievance to be put in a formal letter would make the grievance process unduly technical and rigid when the process is intended to be informal and accessible. In any case, an email is the equivalent of an electronic letter and the contents of those sent by Mr Alcock sufficiently put RRG on notice of the applicants' personal grievances.

[25] The Authority finds that it is somewhat disingenuous of RRG to require a formal personal grievance letter from the applicants when its termination of employment letters to ANA and IHS clearly acknowledge Mr Alcock having raised a personal grievance on their behalf (see [15] above). The letter also recognises Mr Alcock's role as the applicants' "legal representative".

[26] It is observed that the non-payment of ANA and IHS's salaries have been pleaded as an unjustified disadvantage in the statement of problem. However, in essence, the cause of action is for wage arrears. A claim for wage arrears under s 131 is not a recognised personal grievance under s 103 but a cause of action in and of itself that is not subject to the 90-day time limit of s 114. For wage arrears, there is only the six-year limitation on money claims which does not apply here.[3]

[27] As for the applicants' unjustified dismissal claims, the email correspondence between Mr Alcock and Ms Atiga in mid-November 2020 makes very clear that ANA and IHS did not regard their dismissal as a decision that a fair and reasonable employer could have made in terms of justification and proper process. It is also clear from Ms Atiga's responses that she clearly understood that the applicants were concerned about not being provided with information relevant to the decision to dismiss and not being offered the opportunity to respond to that information.

[3] Limitation Act 2010, s 11.

[28] On its face, the post-termination email exchange between Mr Alcock and Ms Atiga from early-to-mid November 2020, some 10 to 11 days after the applicants' dismissal, demonstrates that RRG had sufficient knowledge of ANA and IHS' personal grievances of unjustified dismissal.

Conclusion

[29] Instead of resolving a clearly communicated personal grievance of unjustified disadvantage and unjustified dismissal, RRG insisted that the applicants first provide a formal letter. However, in this modern age, an email is the equivalent of a letter and when the relevant emails are individually and cumulatively considered, the Authority is satisfied that Mr Alcock provided RRG with sufficient information of the applicants' personal grievances.

[30] It follows that a reasonable employer would have concluded from the email communications, particularly those of 29 October 2020 and 12-13 November 2020, that ANA and IHS had sufficiently raised personal grievances of unjustified disadvantage and unjustified dismissal with RRG. For completeness, the applicants filed their statement of problem with the Authority within the three-year statutory time limit.[4]

Mr Alcock confirmed as representative

[31] As a supplementary issue to this preliminary determination, Mr Alcock's status as ANA and IHS's representative was challenged by Ms Atiga on the ground that, in his role as sports agent, Mr Alcock was privy to without prejudice information.

[32] The objection is misconceived. While without prejudice material may be excluded from being admitted as evidence, it is not a basis to exclude a person from acting as a representative. I will deal with any evidential challenges based on without prejudice communication as and when they arise. However, I find no good reason under s 236 or clause 2 of the Second Schedule of the Act to exclude Mr Alcock as the applicants' representative especially when they wish him to act for them in this capacity together with Mr Brimble.

[33] The challenge to Mr Alcock's status as representative is dismissed.

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[4] Employment Relations Act 2000, s 114(6).

Costs

[34] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority