

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 445
3082902

BETWEEN CHARLES AKUBUO
Applicant
AND GENERAL DISTRIBUTORS
LIMITED
Respondent

Member of Authority: Nicola Craig
Representatives: John Maio, advocate for the applicant
Kylie Dunn and Rachel Carter, counsel for the respondent
Investigation Meeting: On the papers
Submissions received: 17 February, 13 March and 1 July 2020 from the applicant
6 March and 27 July 2020 from the respondent
Date of determination: 28 October 2020

DETERMINATION OF THE AUTHORITY

- A. Charles Akubuo did not raise personal grievances claims for discrimination, racial harassment or sexual harassment with General Distributors Limited trading as Countdown in 2017 and January to November 2018.**
- B. The question of whether grievances were raised in December 2018 will be considered as part of the substantive investigation and is limited to events occurring or coming to Mr Akubuo's notice within the 90 days prior to any raising in December 2018.**
- C. Mr Akubuo raised in time a racial harassment complaint or grievance regarding an event on 15 December 2018.**

D. Mr Akubuo raised a grievance about his resignation in time.

E. Costs are reserved.

Employment Relationship Problem

[1] From 2016 Charles Akubuo worked as a checkout operator for General Distributors Limited trading as Countdown (Countdown or the company) at the Countdown Supermarket in Quay St, Auckland.

[2] Mr Akubuo brings several personal grievance claims but an issue arises about whether some of those claims were raised within the 90 day time limit in s 114 of the Employment Relations Act 2000 (the Act). Countdown applied to have the question of whether grievances were raised heard as a preliminary issue.

[3] Countdown accepts that an unjustified action claim regarding a 13 February 2019 warning was raised in time. Mr Akubuo's claim that the employment agreement's disciplinary process was breached may also proceed as it is not a grievance claim and s 114 of the Act therefore does not apply.

[4] The claims which Countdown says were not raised in time are:

- (i) discrimination on the basis of sex, sexual orientation, colour/race, ethnic or national origin;
- (ii) sexual harassment;
- (ii) racial harassment; and
- (iii) unjustified (constructive) dismissal.

[5] The parties agreed that the 90 day issue could be dealt with on the papers. Initially neither wished to file affidavits but submissions were lodged. No application for leave to raise grievances out of time was received. Countdown's position was that it had not consented to any grievances being raised out of time.

[6] A second case management conference was held on 26 June 2020 to clarify when it was alleged that personal grievances were raised and whether all relevant documents had been lodged. This led to affidavits being lodged from Mr Akubuo and from Countdown's Ahmed Khayat and Jennilee Baker. Further submissions were also received.

[7] This determination examines the 90 day issues. As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

The last months of Mr Akubuo's employment and subsequent events

[8] On 15 December 2018 an issue arose regarding Mr Akubuo's conduct and Countdown began a disciplinary process. Mr Akubuo was also unhappy about the 15 December behaviour of the supervisor to him. He received a first written warning on 13 February 2019 for misconduct, namely using obscene language and disrespecting the supervisor who was giving instructions.

[9] On 21 February 2019 Mr Akubuo raised a person grievance regarding the warning. This was done through a letter from Mr Akubuo's representative John Maio. The letter specified several "grounds" for Mr Akubuo's personal grievances including discrimination by the employer that caused disadvantage as well as sexual and racial harassment.

[10] On 19 March 2019 Mr Akubuo provided a resignation letter to Countdown. His last date of work was 31 March 2019.

[11] Mediation was set to occur in April 2019 but was postponed due to the illness of Mr Akubuo's representative. It occurred on 30 August 2019.

[12] Mr Akubuo's statement of problem was filed in the Authority on 2 December 2019, well outside a 90 day period from the end of his employment.

The raising of grievances

[13] Employees are required to raise grievances with their employer within 90 days of the grievances occurring or coming to the notice of the employee, whichever is later.¹ In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* Judge Holden summarised the principles:

...A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. ... [t]he totality of communications ...might also constitute raising the grievance.

¹ The Act, s 114.

... 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) ... by conveying the substance of the complaint to the employer.

...The employer must know what it is responding to; it must be given sufficient information to address the grievance.²

Discrimination and harassment grievances

[14] I examine the discrimination and harassment grievance claims together as they appear to relate to the same or overlapping events. I have had some difficulty assessing the period when events establishing these grievances supposedly occurred and when it is said that they were raised.

[15] The headings of discrimination, sexual harassment and racial harassment were mentioned in Mr Maio's letter of 21 February 2019. The fairly lengthy letter does not clearly identify the events on which those grievance claims are based. There is reference to historic sexual harassment from 2017 and "further on-going sexual references". Also, to Mr Akubuo facing:

... bullying and harassment with perceived ideological and racial dominance and he has been treated in a discriminatory and condescending manner.

[16] Events in 2017 are clearly well outside the 90 day limit if not raised until 2019.

[17] Countdown's email to Mr Maio on 6 August 2019 includes the following:

Again, we struggle to see the basis on which you have made these allegations [including discrimination and harassment].

To clarify, Charles has not raised any other complaint about being racially discriminated against or sexually harassed. We are therefore unable to respond to this without additional information.

[18] I accepted the submission on behalf of Countdown that, rather than amounting to acceptance of additional personal grievance claims, in accordance with *Creedy v Commissioner of Police*, this amounts to a response from an employer requesting further information when the employer was not clear what the grievance was.³

² *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132 at [36] – [38] (footnotes omitted).

³ *Creedy v Commissioner of Police* [2006] ERNZ 517.

[19] The case management conference on 26 June 2020 included a detailed and lengthy discussion about the timing of the alleged events on which these grievances were based, as well as what discussions or correspondence occurred with Countdown that may have included a raising of personal grievances.

[20] At the conference Mr Maio referred to events from February to June 2017 but concluded that no personal grievance was raised verbally or in writing in 2017 relating to those events. Mr Maio said that the first time a grievance was raised was on 27 November 2018 when Mr Akubuo spoke to Mr Khayyat about bullying and comments made by other employees about his sexuality. The issues were claimed to be further discussed with Ms Baker on 1 December 2018.

[21] I now examine evidence from various time periods to consider whether a grievance was raised.

2017

[22] In his affidavit Mr Akubuo refers to animosity from a supervisor which he believes stemmed from her own tertiary studies which appeared to be completed in 2013. The suggestion is that she saw him as a rival. Mr Akubuo goes on to describe several complaints to a manager about various hours of work issues, career stagnation, a culture of favouritism and being publicly humiliated. The timeframe is not indicated other than a reference to a January 2014 event in his country of origin. No reference is made to when Mr Akubuo complained to the manager nor whether he regards this as the raising of one or more grievances. That manager appears to have been the person he reported to from when he started work in 2016.

[23] Aside from the issue of whether what Mr Akubuo may have said in complaints was sufficient to amount to the raising of a grievance, I cannot be satisfied that any raising occurred within the period of three years prior to the filing of this claim on 2 December 2019. Under s 114(6) of the Act no action may be commenced in relation to personal grievances raised more than three years before.

[24] Mr Akubuo goes on to refer to complaining to a service administration manager about “a level of indifference, intimidation and an antagonistic attitude towards me”. This appears to have been in 2017. Mr Akubuo does not assert that he raised a personal grievance at this time. A Countdown file note of 22 February 2017 concludes that there was no outcome to an investigation into allegations of inappropriate behaviour by Mr

Akubuo. The note includes a reference to Mr Akubuo feeling he was treated badly. He was told that if he wanted to pursue this he needed to give specific examples and names to the appropriate manager. On the basis of the evidence I am unable to find that Mr Akubuo raise a personal grievance at this time.

[25] Mr Akubuo goes on to refer to approaching a human resources manager, a group manager and a head office representative but it is unclear when he says these events occurred. No documentation is provided regarding any of these approaches. Mr Akubuo acknowledges that these approaches did not result in interviews. I am unable to conclude on the evidence provided that a grievance was raised at this point.

[26] Even looking at the totality of communications from 2017 and possibly earlier I agree with Mr Maio that, on the evidence I have seen, no grievance was raised in 2017.

November and December 2018

[27] Mr Maio asserts that Mr Akubuo raised discrimination and harassment grievances with Countdown via discussions with Mr Khayyat and Ms Baker in late 2018. However, Mr Akubuo's affidavit of 10 July 2020 does not actually specifically assert that a grievance was raised at either of those times. Mr Akubuo says that he complained to Mr Khayyat that he was "being incessantly bullied, racially vilified and sexually harassed" by the supervisor. No more details are provided in the affidavit.

[28] Mr Khayyat's affidavit covers his recall of the discussion with Mr Akubuo on 27 November 2018. Mr Akubuo approached Mr Khayyat when the latter was making a purchase at the self-service checkout. Mr Akubuo said he wanted to talk about another employee but made no reference to "personal grievance" or what the concern about the other employee was. Given the environment, Mr Khayyat told him it was not the time and he should raise any issue with Ms Baker.

[29] Although there is no requirement to use the words "personal grievance" when raising a grievance, I do not consider the reference to an issue about another employee in itself to be sufficient to raise a grievance. I find Mr Khayyat's evidence more reliable than that of Mr Akubuo regarding 27 November 2018. Mr Khayyat refers to the situation in which the discussion occurred and what he recalls himself and Mr Akubuo saying.

[30] As regards Ms Baker, Mr Akubuo in his affidavit refers to her talking him out of proceeding with a complaint.

[31] Ms Baker's affidavit refers to a meeting with Mr Akubuo on 1 December 2018. He named an employee whom he described as treating him differently from other team members. Mr Akubuo was asked about meeting with that employee and responded that he did not want to meet with her or take the issue any further. Ms Baker says that she repeated these events at a 16 January 2019 meeting and Mr Akubuo agreed with her account.

[32] The notes of the meeting clearly reflect that discussion with Ms Baker saying that Mr Akubuo had not wanted to meet those involved "or take this further". Mr Akubuo replies "[y]es I don't want to be a complainer".

[33] Had that been all, I would have doubted whether a grievance was effectively raised. Section 114(2) of the Act specifies that a grievance is raised when the employer is made aware that the employee alleges a grievance that "the employee wants the employer to address". Likewise in *Creedy* the Court emphasised the employer getting sufficient information to "address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance".⁴ Here it seems Mr Akubuo did not want Countdown to address his concerns.

[34] However, there is also an email from Ms Baker on 14 January 2019 to Mr Maio where she states:

Charles did come to discuss some concerns he had in December 2018 and raised some concerns regarding the behaviour of a colleague and how he was feeling. I took notes of this conversation and dealt with it appropriately by discussing the concerns with the Supervisor involved. At no time, did Charles raise a complaint regarding bullying and harassment from this or any other staff member, nor did Charles raise any issues with how his concerns were dealt with.

[35] This hints at more of a process in December 2018 than the affidavit evidence suggested. Rather than seek a further round of evidence and/or submissions, I will consider the prospect of a grievance being raised with Ms Baker in December 2018 at the substantive investigation meeting. This will only be in so far as the events on which

⁴ *Creedy v Commissioner of Police*, above n 4 at [37].

any possible grievance is founded occurred or came to Mr Akubuo's notice within 90 days prior to his discussion with Ms Baker.

15 December 2018 incident

[36] Mr Maio referred at the 26 June 2020 case management conference to the incident on 15 December 2019 between Mr Akubuo and another Countdown staff member which lead to the 21 February 2019 warning given to Mr Akubuo.

[37] Mr Akubuo says in his affidavit that the staff member swore at him and used racially offensive language.

[38] He quoted the language at Countdown's investigation meeting on 16 January 2019. Mr Maio referred, in written material provided at the meeting and copied into Countdown's notes to:

... overtones of racial prejudice...

Actions... racially ... motivated and prejudicial to a safe working environment under which my client has been unfairly treated. ...

It is a simple fix by way of the employer dealing thoroughly with the complaints as tabled by Charles. The seriousness of the racial vilification needs addressing either through intervention...

[39] Mr Maio also referred verbally to the use of language spoken to Mr Akubuo (on 15 December) as having an effect on him and to "racial vilification".

[40] I conclude that at the meeting of 16 January 2019 a complaint of racial harassment was made regarding events on 15 December 2018. There remains a question about whether a personal grievance for racial harassment could be pursued immediately or whether this was a situation falling into s 117 of the Act, namely alleged harassment by someone other than the employer. That issue can be left for the substantive investigation.

Conclusion on discrimination and harassment

[41] I cannot find that Mr Akubuo raised a grievance in 2017 or from January to November 2018. Mr Akubuo cannot pursue the discrimination and harassment grievances regarding that period.

[42] The prospect of a grievance being raised in December 2018 with Ms Baker will be considered as part of the substantive investigation but must relate to events which occurred or came to Mr Akubuo's notice within 90 days prior to any raising with Ms Baker.

[43] A racial harassment complaint or grievance was raised about the 15 December 2018 incident and that can be pursued.

[44] I issue this caution for the substantive investigation. Events which are not the subject of a grievance claim may form a factual background to a claim regarding a grievance which was raised in time. However, as Chief Judge Inglis noted in *Ale v Kids at Home Limited*, events which were not raised in time cannot "morph into in-time grievances because they form part of the background context" as there is no "separate liability of an employer based on out of time actions or events".⁵

Constructive dismissal grievance

[45] Countdown objects that Mr Akubuo did not raise a constructive unjustifiable dismissal claim within the required 90 days.

[46] Mr Akubuo's last day of work was 31 March 2019, so the last day for him to raise his dismissal personal grievance was 29 June 2019.

[47] At the 26 June 2020 case management conference Mr Akubuo's representative specified that the constructive dismissal personal grievance was raised for Mr Akubuo:

- (a) At meetings on 16 January 2019 and 13 February 2019, which I note were before Mr Akubuo resigned, via statements that a personal grievance would be raised; and/or
- (b) In Mr Akubuo's resignation letter.

[48] I will consider each of these possibilities.

Meetings before resignation

⁵ *Ale v Kids at Home Limited* [2015] NZEmpC 209 at [26].

[49] The 16 January 2019 meeting was set up to investigate Mr Akubuo's behaviour towards team members. Specifically it was alleged that he uses obscene language and disrespected a supervisor who was giving him instructions.

[50] Countdown's notes from the 16 January 2019 meeting include copies of documents provided from Mr Akubuo and Mr Maio. Although the meeting was set up as an investigation into Mr Akubuo's conduct, dissatisfaction on Mr Akubuo's part is also expressed. A comment is included in the written material that in the alternative to actions requested from the employer, Mr Akubuo could file a personal grievance.

[51] Another written document mentioned an Employment Court decision identifying bullying as a breach of the implied term of trust and confidence. Reference is made to a conclusion in that case that a resulting resignation amounted to a constructive dismissal. Various aspects of behaviour towards Mr Akubuo are identified.

[52] At the next meeting on 13 February 2019 Mr Maio states that any findings of misconduct "will result in a personal grievance being filed". The company acknowledges that:

You have informed us of your intention to file a personal grievance if we make a finding of misconduct.

[53] In the context of a warning being issued regarding misconduct, one could take the grievance reference to be to that, namely an unjustified disadvantage grievance. However, there was earlier reference in the documents filed at the January meeting to constructive dismissal in bullying situations.

[54] The difficulty is that cases such as *Creedy v Commissioner of Police* clearly establish that a grievance cannot be raised in advance, that is before the grievance occurs.⁶ Any references to constructive dismissal in January or February could be considered as part of information the employer had when the resignation and subsequent events occurred, but cannot amount to a raising of the grievance itself. The

⁶ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [28]-[30]. Other aspects overturned on appeal, but not this point (*Commissioner of Police v Creedy* [2007] NZCA 311 and *Creedy v Commissioner of Police* [2008] NZSC 31).

resignation letter is dated 19 March 2019. Previous references to possible grievances or even constructive dismissal are not sufficient.

Resignation letter

[55] Mr Akubuo's letter of resignation dated 19 March 2019 records that the parties are currently in mediation with respect to his personal grievance filed with the company on 21 February 2019. The letter continues:

I have been treated unfairly, which has continued to propagate in the workplace, causing me embarrassment and humiliation. And in that I was issued with a warning letter, even when I'm clearly the victim of conspiracy, hate and bullying.

This culture of prejudice and disadvantage has been extremely distressing to the extent that the trust and confidence, which is in all employment relationships, has been destroyed.

Among the allegations I have made against you... was that you had committed serious breaches of our employment contract.

I felt forced to resign, because of that breach of the employment contract and have applied for alternative employment ...

It is my intention to proceed with the mediation to protect my reputation and seek compensation for the breach of our employment agreement.

[56] The principles summarised in *Chief Executive of Manukau Institute of Technology v Zivaljevic* included that:

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it was in the first instance. ... The issues are whether the nature of the complaint was a personal grievance under 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.⁷

[57] Most grievances are founded on an action of the employer, whereas with constructive dismissal the immediate event is the employee resigning albeit due to actions of the employer. I consider that a constructive dismissal grievance could be raised at the same time as the employer is informed of the resignation.

⁷ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [37].

[58] The failure to refer to constructive dismissal or unjustified dismissal is not fatal to Mr Akubuo's raising of a grievance. No particular form of words are needed.

[59] Mr Akubuo's resignation letter expressly states that he feels forced to resign and that that is because there was a breach of the employment agreement by Countdown. These are aspects of a constructive dismissal claim. Breach of the employment agreement is one of the three categories of constructive dismissal outlined in by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited*.⁸

[60] I do not consider the fact that Mr Akubuo had already raised a grievance, along with pursuing mediation, regarding the warning to mean that the warning cannot also become the basis on which he says he was forced to resign. Such a double reaction to one employer action may impact on a constructive dismissal claim but does not prevent the employee from raising the claim.

[61] I have considered later correspondence. The company's email of 6 August 2019 refers to no constructive dismissal grievance having been formally raised but notes that reference has been made to constructive dismissal in previous correspondence. Mr Maio's response of the same day on behalf of Mr Akubuo does not dispute this or otherwise suggest that a constructive dismissal grievance had been raised. Rather he states:

Because my client did not suffer a loss, as a result of the constructive dismissal. The threshold for plenary [*presumably pecuniary*] compensation would thereby be a moot point, for which we would waste the opportunity to resolve the actionable issues.

[62] However, it is clear from *Chief Executive of Manukau Institute of Technology v Zivaljevic* that it is not what either party actually thinks was intended that is important.

[63] I have considered whether the fact the resignation letter was given at the start of the notice period is problematic. The resignation was not in effect until Mr Akubuo's employment finished. The claim may be better seen as an unjustifiable disadvantage claim.

⁸ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372 (CA) at 374-375.

[64] I conclude that Mr Akubuo made it sufficiently clear in his resignation letter that he was being forced to resign by Countdown's acts or omissions and he therefore raised a grievance about his resignation.

Further action

[65] Costs are reserved and will be dealt with, if necessary, as part of the consideration of costs after the substantive issues have been determined.

[66] An Authority Officer will be in touch with the parties to let them know about the next step in the proceeding.

Nicola Craig

Member of the Employment Relations Authority