Employment Court of New Zealand

Ceres New Zealand LLC v DJK [2020] NZEmpC 153 (25 September 2020)

Last Updated: 30 September 2020

ORDER PROHIBITING PUBLICATION OF PARTY'S NAME, IDENTIFYING DETAILS AND MEDICAL DETAILS

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2020] NZEmpC 153
EMPC 427/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CERES NEW ZEALAND LLC Plaintiff
AND	DJK Defendant

Hearing:	11 August 2020 (Heard at Christchurch) And further submissions filed on 4 September 2020
Appearances:	S Townsend, counsel for plaintiff Defendant in person
Judgment:	25 September 2020

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff company has challenged a determination of the Employment Relations Authority, finding that the defendant (who I shall refer to as DJK) raised a personal grievance for unjustified dismissal within the 90-day timeframe contained in s 114 of the Employment Relations Act 2000 (the Act).1

1 *TKG v OEN* [2019] NZERA 629 (Member van Keulen)

[2] There is no dispute that DJK was advised of the termination of her employment, with immediate effect, on 16 January 2019. Nor is there any dispute that the only step that DJK took to raise a grievance of unjustified dismissal was via a statement of problem filed with the Authority on 15 April 2019. The Authority served the statement of problem on the address the plaintiff had provided for service some four days later. If it had been served on the day it was filed, there would have been no issue that the grievance was raised within time.

[3] The Authority held that the timeframe did not run from the date on which DJK received the letter advising her that her employment had been terminated, namely on 16 January 2019. That is because the Authority found that from 16 January to 28 January 2019, DJK had been confused. Time ran, it was held, from the date on which DJK realised that her employment had been terminated. That meant that the 90-day timeframe for raising a personal grievance relating to her dismissal came to a close on 27 April 2019.

Non-publication orders appropriate?

[4] Non-publication orders were made in respect of DJK in the Authority on the basis of concerns about her health. The company initially opposed similar orders being made in this Court. I made interim orders on 2 March 2020 and said that I would revisit the issue in relation to permanent orders at the hearing. Counsel for the company has advised that it is now content to abide the decision of the Court.

[5] It is apparent that the ground has not shifted from the time orders were made in the Authority in terms DJK's health. There is no broader public interest in these proceedings beyond the immediate parties. I am satisfied that permanent orders are appropriate and they are accordingly made.

Background

[6] DJK was employed by Ceres New Zealand LLC in a senior management position for two years and five months. During the course of 2018, she raised a number of concerns with her employer. She was represented at the time by a lawyer

who communicated with the company on her behalf. In June 2018 DJK's lawyer sent a letter raising issues in respect of alleged bullying in the workplace. The letter made it plain that DJK wanted her employer to address the concerns she had raised.

[7] Mr McIntyre, the company's sole director and shareholder, decided that consideration ought to be given to restructuring the company. DJK was advised of the proposal to make her position redundant by way of letter dated 29 October 2018. She was invited to provide feedback on the proposal, which she did through her then lawyer.

[8] On 16 January 2019 Mr McIntyre wrote to DJK via her lawyer. DJK had, by this time, decided to represent herself. She said that she had already paid $10,000 in legal fees and could not afford to pay any more. The lawyer forwarded the letter to DJK the day he received it. The letter advised DJK that she was being given formal notice of termination for redundancy; that Mr McIntyre was not requiring her to work out her notice period and that instead the company would make a payment to her in lieu of notice. The letter said that DJK's last day of employment with the company would therefore be 16 January 2019. She was advised that her final pay would be calculated and paid to her and she was asked for the prompt return of any company property in her possession. DJK accepts that she read the letter on 16 January 2019.

[9] Does all of this mean that the 90-day timeframe ran from 16 January 2019 and the last day for raising a grievance was 16 April 2019? Not necessarily.

[10] Consider *Poverty Bay Electric Power Board v Atkinson*.2 In that case, the employee was advised that their position had been made redundant and was given three months' pay in lieu of notice. The Employment Court found that the 90-day limitation period3 did not start running until the end of the notice period, so the employee was within time when raising his grievance one month after that date. The conclusion in that case turned on the fact that payment in lieu of notice was a choice made by the employee, leading to the inference that the company was willing to

2 *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC).

3 Under, at the time, Employment Contracts Act 1991, s 33.

employ him until the end of the notice period and, thus, that dismissal did not occur until that date.4

[11] The issue came back before the Court in *Gibson v GFW Agri-Products Ltd*.5

There Chief Judge Goddard observed:6

As is suggested by *Poverty Bay Electric Power Board v Atkinson*, the giving of a notice is not always permanent and terminal. If the employee protests, there is often a possibility that the employer may relent and change its mind and withdraw the notice, particularly if the notice given is objected to as being shorter than that to which the employee is entitled, but also in other situations. That is one of the many reasons for saying that the employment does not end when notice is given, but only when it has run its course. *In the present case it is true that Mrs Gibson was required to leave her place of work at once but she was told at the same time that she would continue to be paid for a further few weeks ... this kept the employment in force until the end of the notice period, notwithstanding that she was not required to work during that period.* It was not the respondent's stated intention to dismiss her summarily, and nor did it purport to do so.

[12] The Court of Appeal upheld the Court's decision, agreeing with the overall point that where a dismissal is on notice, the limitation period starts at the end of the notice period.7 The dismissal in that case was found to be on notice. Where the

Court of Appeal differed was on whether payment in lieu of notice always meant that notice was given. The Court of Appeal concluded that sometimes it may amount to "damages for breach by failure to give proper notice". It was a mixed question of fact and law as to which type of dismissal had occurred in a particular case.

[13] The letter of dismissal (dated 16 January 2019) asserted that DJK's final day of employment was 16 January 2019. The assertion as to the last day of employment appears to be linked back to the earlier statement that the company was not requiring DJK to continue to work during the notice period. Not being required to work out a notice period differs from being summarily dismissed. Following receipt of the letter, DJK promptly returned items of company property, as the letter had asked her to do; she picked up her personal belongings from work and said goodbye to a colleague; she subsequently constructed an automatic email response, which specifically referred

4 At 419.

5 *Gibson v GFW Agri-Products Ltd* [1994] NZEmpC 219; [1994] 2 ERNZ 309 (EmpC).

6 At 315–316 (emphasis added).

7 At 329.

to her having finished with the company on 16 January 2019; and it appears that she stopped sending work emails from that date.

[14] I accept that DJK was confused about what the position was. This is reflected in DJK speaking to her manager and asking for clarification as to what was happening. Her confusion was compounded by the way in which her final pay was dealt with. While it was paid into her bank account the following week, she was unaware of it until sometime later.

[15] I am satisfied the dismissal was on notice; DJK was not being required to work out her notice period, but that does not mean that she was not employed during that period. Her employment ended at the expiration of her notice. That means that the 90-day timeframe ran from the date on which her notice period came to an end. It follows that the grievance was raised within time.

[16] For completeness, I address one of the submissions advanced by the company, namely that the date on which DJK raised the grievance with the company was the date on which the company's director opened the courier package containing a copy of the statement of problem and read it (the package having sat, unopened, on his desk for some time beforehand). This cannot be correct. The focus of s 114(2) is on reasonable steps taken by the employee. That cannot include having to second-guess the timeframes within which an employer may or may not get around to opening an email or a letter, particularly where they may be disinclined to do so.

[17] I have reached the same conclusion as the Authority, although for different reasons. The company's challenge is dismissed. The Authority's determination is set aside and this judgment stands in its place.

Final comments

[18] I have concluded that the grievance for unjustified dismissal was raised within the 90-day timeframe for raising the grievance. Even if I am wrong about that, and the grievance was not raised within time, it would not necessarily be an end of the matter, as Ms Townsend (counsel for the company) readily accepted.

[19] First, the Act provides that an employee may apply to the Authority for leave to pursue a grievance out of time.8 It does not appear that this option was drawn to DJK's attention at the time the matter first came before the Authority, which may have enabled both the company's out-of-time opposition, DJK's defence to the opposition and an alternative application to be dealt with at the same time.

[20] Second, there is correspondence before the Court (dated June and November 2019) identifying a number of concerns from DJK's perspective and requesting that the company work to resolve those concerns. The statement of problem, which DJK drafted (having concluded that she could no longer afford to engage a lawyer), makes reference to these concerns. Ultimately, only a claim of unjustified dismissal was pleaded by DJK. It was this pleading that led to the company's claim that the grievance (the claim of unjustified dismissal) was out of time. And it is that which subsequently led to the company's challenge to the Authority's finding that the claim of unjustified dismissal was within time. Other issues appear not to have been raised or dealt with in the Authority and were not before the Court on this challenge.

[21] The Court is required to consider mediation throughout the life cycle of proceedings.9 Given the particular circumstances, I have decided that the parties ought to be directed to mediation. That seems to me to present a useful opportunity to look at tying up any loose ends in a supported setting and with the assistance of a specialist employment law mediator. If either party has a difficulty with this proposal, they should file and serve memoranda within five working days. If not, counsel for the company is to liaise with Mediation Services to arrange a suitable date. It is hoped that, given the fact that matters have been outstanding for a considerable period of time, an early mediation can be accommodated. Mediation

Services is to be provided with a copy of this judgment.

8. Employment Relations Act 2000, s 114(3). In order to do so, the Authority must be satisfied that exceptional circumstances exist.

9 Employment Relations Act 2000, s 188(2)(c).

[22] I do not understand any issue of costs to arise but if it does I will receive memoranda.

Christina Inglis Chief Judge

Judgment signed at 10 am on 25 September 2020
