

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 91
3206939

BETWEEN YIPING CHEN
Applicant

AND ARMSTRONG PRESTIGE LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
Laura Briffett, counsel for Respondent

Investigation Meeting: 26 October 2023 by AVL

Submissions received: 14 November 2023 from Applicant
26 October 2023, 21 November 2023 from Respondent

Determination: 16 February 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] The Applicant, Ms Chen was employed by the respondent AP to sell cars. She received a salary and commission. She signed an individual employment agreement (IEA). She commenced her employment on 3 December 2018 and resigned on 14 September 2019. Her final day of employment was 11 October 2019. Ms Chen lodged claims in the Authority against AP on 22 December 2022. She claims she was unjustifiably constructively dismissed and disadvantaged in her employment.

[2] AP says that Ms Chen is outside of the 90 day time to raise the constructive dismissal grievance because it was not raised at all or was not raised within 90 days in enough detail

for the employer to respond to; that any other grievances were raised out of time because they were not raised until Ms Chen lodged her claim in the Authority over three years after her employment ended and it does not consent to her raising these grievances outside of the 90-day statutory time frame.

[3] Ms Chen says she raised her grievances within time or if not asks that I find there are ‘exceptional circumstances¹’ that mean that I should grant leave for her grievances to be heard. AP opposes the application that I grant this leave.

[4] Ms Chen’s claim also includes that she did not receive statutory break entitlements; that she be reimbursed for a short fall of the statutory minimum wage due to the alleged long hours she worked on salary; breaches of good faith; breaches of her IEA in relation to payment of commission and ‘potential earnings’ promised to her. Ms Chen also claims breaches of the Wages Protection Act 1983. These are matters not caught by issues of the 90-day rule to raise grievances. The above continue to be investigated albeit the breaches of good faith and the Wages Protection Act 1983 may require some further clarification as part of that investigation. An investigation meeting date has already been set. This matter determines whether Ms Chen may also include any or all the above personal grievances in that investigation.

The Authority’s investigation

[5] I held an investigation meeting about this preliminary matter on 26 October 2023 and asked questions about the evidence of Ms Chen, and Ms Wilkins, the human resources manager for AP. I part heard oral submissions, asked questions and then allowed Ms Chen as an unrepresented party to respond in writing beyond the meeting given she appeared unprepared for the extensive submissions provided by AP’s counsel. AP was given an opportunity to strictly reply which it did. That reply included an objection to further evidence that Ms Chen provided in her submissions. I have been asked to disregard this evidence. That evidence relates to the issue of whether there are exceptional circumstances to allow Ms Chen to bring grievances out of time. I will deal with this issue under that heading below.

¹ Employment Relations Act 2000, s114(3) and (4); s115.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings and conclusions necessary to resolve this preliminary matter.

The issues

[7] The issues are:

- (a) Did Ms Chen raise her personal grievances for unjustified constructive dismissal and disadvantage in her employment within 90 days?
- (b) If Ms Chen did not raise her grievance(s) within time are there 'exceptional circumstances' that caused the delay and if so is it just to grant leave for Ms Chen to raise her grievance(s) out of time?
- (c) Is there to be an award of costs?
- (d) What are the next steps in the investigation?

Did Ms Chen raise her personal grievances for unjustified constructive dismissal and disadvantage in her employment within 90 days?

[9] Section 114(1) of the Employment Relations Act 2000 ('the Act') includes that an employee must raise a personal grievance within 90 days beginning with the date when the action that the grievance is based on occurred or came to their notice.

[10] Section 114 (2) of the Act includes that:

...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[11] The Employment Court has said that the grievance process is designed to be informal and accessible. A grievance may be raised orally or in writing with no formula of words that must be used. What matters is that the employee's communications convey the substance of the complaint to the employer to enable it to respond, 'with a view to resolving it soon and informally, at least in the first instance.'²

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

Resignation and seeking representation

[12] Ms Chen resigned from her employment on Saturday 14 September 2019. Her last day of work was on 11 October 2019.³ It is agreed that 8 January 2020 was the 90th day for her to raise any personal grievances.

[13] Ms Chen says that she sought assistance from a lawyer friend in relation to her employment issues with AP.

[14] On 5 December 2019 a representative who worked with Ms Chen's friend and was an Employment Relations Advisor sent a letter to Ms Chen's manager, Mr Mearns. Ms Chen has not involved this person in these proceedings. I will from now refer to this person as the 'representative'. The 5 December 2019 letter on law firm letterhead included that, 'We act for Ms Chen' and then asked for the provision of time and wage records, a record of all rest and meal breaks, Ms Chen's response to the 'Staff Satisfaction Survey' that she had participated in, and 'all communications held by [APL] that refer to Ms Chen, including any that refer in any way to her performance or conduct.'

[15] The 5 December 2019 letter concluded with:

In accordance with section 37 of the [Privacy Act 1993] we ask that this request be treated with urgency as Ms Chen is contemplating raising a personal grievance against APL, a matter that is time dependant.

Responses by AP to 5 December 2019 letter

[16] On 16 December 2019 Ms Wilkins, the Human Resources manager for AP, responded to the 5 December 2019 letter attaching copies of records and communications held by AP that referred to Ms Chen. She explained that because Ms Chen's role was salaried there was no record of start, finish or break times that could be provided. She indicated that the survey information had been requested from the survey provider. An internal AP email shows that this involved accessing the material from the controller of the survey which first needed

³ I take the reference in the Respondents Closing Submissions dated 26 October 2023 to be an obvious mistake when it refers to 11 October 2020.

Ms Chen's permission to release the material. AP requested that permission and through Ms Chen's representative it was provided.

[17] At this stage I do not find any grievance had been raised. There were no details sufficient to respond to in the 5 December 2019 letter, the reference only included that Ms Chen was contemplating this step.

8 January 2020 letter

[18] I find that the first potential raising of any personal grievance was not until a letter dated 8 January 2020. Ms Chen's evidence is consistent with this. She says, 'on 8 January 2020, [her above mentioned lawyer friend] 'instructed' [the representative] to help me log a personal grievance – Unjustified Constructive Dismissal against [AP].'

[19] The 8 January 2020 letter was sent by the representative to Mr Mearns at APL on a legal firm's letterhead and was as follows:

Dear Mr Mearns

Re Yiping (Sarah) Chen

We act for Ms Chen.

Personal Grievance – Unjustified Constructive Dismissal

On 5 December 2019 we made a request under the provisions of the Privacy Act 1993 seeking information regarding our client, including that contained in a staff satisfaction survey. While we have received some information we have not received the information related to the survey. This was requested under urgency as it may be material to the claim of constructive dismissal.

We now raise a personal grievance in accordance with section 114 of the Employment Relations Act 2000 on the basis of unjustified constructive dismissal.

The reasons for dismissal include that:

- Ms Chen was incorrectly and consistently paid commission on sales, and was not provided with accurate information related to sales in a manner which fundamentally breached the terms of her employment agreement;
- Her employer set out a course of action which induced Ms Chen to resign; and
- Her employer subsequently provided misleading information to others regarding the reasons for Ms Chen's departure.

Further to the information already requested, we seek a monthly breakdown of the sales made by our client to 23 April 2019 and the commission paid for those sales, and full details of the sales made by our client post 23 April, including the sum on which commission was to be calculated.

Once we have , including that related to the staff satisfaction survey, we will be in a position to provide more detail, including remedies.

Please acknowledge receipt of this request by return mail.

Yours sincerely

[Ms Chen's representative]

Employment Relations Advisor

[20] AP says that the 8 January 2020 letter included insufficient specificity to raise a personal grievance for it to respond to. Ms Wilkin's evidence is that 'we never responded to this as a grievance. I actioned this as a claim that Yiping's commission had been incorrectly paid. [The representative] had not given us enough information about the unspecified 'course of action' for me to investigate and respond to on behalf of APL. I also didn't know what the allegedly 'misleading information' about her departure was, or who Yiping claimed had been speaking this information and when'. In her oral evidence I found Ms Wilkins straight forward. She accepted that she did not reply to the 'commission' issues as a grievance but rather sent the information requested including details of 'all the cars Yiping had sold with APL and payments received.' Emails at the time support this.

[21] Ms Chen says that APL consented to the grievance⁴ by which I take it she suggests that in responding to the 8 January 2020 letter APL engaged with the grievance details beyond that date and could not later be able to reasonably argue that it had not. I do not find these responses support this may constitute consent to raise the grievances outside of time beyond responding to the specified details reading the commission payments. The only thing specified as a reason for the ‘dismissal’ (which I read as a reason for Ms Chen to have resigned in relation to her unjustified constructive dismissal claim) was that she ‘was incorrectly and consistently paid commission on sales, and was not provided with accurate information related to sales in a manner which fundamentally breached the terms of her employment agreement’. To that extent I find there was at the very least sufficient detail to reply to.

[22] Further details were promised in the 8 January 2020 letter for AP to respond to about the constructive dismissal grievance. Any further details were not provided by Ms Chen until 22 January 2022 when she lodged her grievance in the Authority. By that time, her reasons for saying she was constructively dismissed, or by then also disadvantaged in her employment, had expanded beyond just the stated issue about her commission payments as a reason for the dismissal to include issues she had with her manager and or AP relating to her working long hours with no breaks, being required to work when she had childcare issues, having a suggestion made to her to resign in relation to specific circumstances connected to a survey she completed and being discriminated against in relation to family status, ethnicity and gender. While these things may potentially fit within details to explain a constructive dismissal claim or unjustified actions I accept the submission for APL that there was none of this detail provided to AP to respond to any of these things until Ms Chen lodged her claim in the Authority.

[23] Even if I accept Ms Chen did not receive the survey information that she requested through her representative on 5 December 2019 from APL, there was no detail given to APL in the 5 December 2019 about the reason for this information. Even if I then consider the reference in the 8 January 2020 letter to wanting the survey information urgently because ‘it

⁴ Applicant’s Closing Submissions dated 14 November 2023, paragraph 6 referencing emails exchanged regarding the commission payments and provision of information.

may be material to the claim of constructive dismissal' this was never followed up by Ms Chen with any further details until Ms Chen lodged her claim in the Authority.

[24] I further note that Ms Chen claims that the Authority gave her permission to raise further disadvantage claims in her Amended Statement of Problem. However, I agree with the submission from AP that she is mistaken about this 'permission'. She was asked to clarify her original claims.

[25] Accordingly, considering the above I find that Ms Chen raised a personal grievance within the 90-day timeframe for unjustified constructive dismissal but only in relation to saying that this was based on her not receiving commission payments throughout her employment and not receiving information about them. I find she has not raised any other grievances within time and will now consider whether there are exceptional circumstances for her to do so and then whether it would be just to grant this leave.

[26] I note that AP submits that if I were to reach the above conclusion that Ms Chen has raised a constructive dismissal grievance linked to her commission payments (which I have) I should consider s103(3) of the Act. That section says that an 'unjustified action' relating to a disadvantage personal grievance that derives solely from a contractual dispute cannot be treated as a grievance but as a dispute.

[27] I am not persuaded that I should consider this issue at this preliminary stage. It is obviously for Ms Chen to provide her evidence to support her grievance. I note for now that Ms Chen's grievance was raised under the head of unjustified dismissal and not as disadvantage in employment which is what s103(3) of the Act relates to.

If Ms Chen did not raise her grievance(s) within time are there 'exceptional circumstances' that caused the delay and if so is it just to grant leave for Ms Chen to raise her grievance(s) out of time?

[28] The Supreme Court⁵ has affirmed⁶ a definition of 'exceptional circumstances' under s 115 of the Act as 'unusual, outside of the common run, perhaps something more than special

⁵ *Creedy v Commissioner of Police* [2008]NZSC 31 at [31]

⁶ Quoting *Wilkins & Field Ltd v Fortune* [1998] ERNZ (CA) at [76].

and less than extraordinary.’ It found this definition accorded with ordinary English usage. However, it also noted that the ‘short time limit of 90 days, and the potential serious consequences for employees if not being able to bring a personal grievance, support an interpretation [of ‘exceptional circumstances’ under s 115] which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.’⁷

[29] However, the Court in the above matter also said at [33]:

we also emphasise that Parliament has imposed a 90-day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if *exceptional circumstances are truly established* and, in addition, the overall justice of the case (which includes taking account of the position of an employer facing a later claim) so requires. [my italicised emphasis added].

[30] Ms Chen says there were ‘exceptional circumstances’ under two subsections of s 115 being:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1) [90-day period to raise a grievance];
- and
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[31] If I am satisfied that the delay in raising her grievance was caused by one or both of these ‘exceptional circumstances’ I must then consider if it is just to grant leave for Ms Chen to bring her grievance out of time. If I do, I must then direct the parties to mediation ‘to seek to mutually resolve the grievances’ allowed then to be brought.⁸

⁷ *Creedy v Commissioner of Police* [2008] NZSC 31 at [32]

⁸ Employment Relations Act 2000, s 114(3) to (6).

Was Ms Chen so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within 90 days?

[32] AP submits that I do not have sufficient evidence on which to make a finding that Ms Chen was traumatised and could not bring her grievance within time. I agree. I accept AP's submission that there is guidance from the Employment Court that there is a 'high standard of proof' to meet this test and it would require 'very substantial injury' suffered by the employee for the entire 90-day period.⁹ Ms Chen refers to her friend having passed away and the representative she used leaving the firm. Both events I take to have been in the second part of 2020. The last communications from Ms Chen's representative to AP about calculation of commissions owed were in August 2020. These things occurred after the 90th day for her to have raised her personal grievances that I have found are out of time. They could not then be linked to her being so traumatised by the matter giving rise to the grievance that she was unable because of the impact to raise her grievance within the 90-day period.

[33] I do not find 'exceptional circumstances' under this part of Ms Chen's application.

Did Ms Chen make reasonable arrangements to have the grievances raised on her behalf by an agent and then did the agent unreasonably fail to ensure that the grievance was raised within time?

[34] It is submitted for AP that Ms Chen did not make any reasonable arrangements to raise her grievances in a way that specified what they were so that AP could respond to them on 8 January 2020. For me to make that sort of finding I would need to hear from the agent involved or have some evidence beyond what I have before me. As noted above Ms Chen has not involved the representative in these proceedings. Ms Chen unexpectedly provided new evidence of emails between herself and the representative after the investigation meeting. AP's reply was to say that I should not consider this evidence. I have considered this evidence which amounts to three brief emails between Ms Chen and the representative in December 2019 around the time she first met with that person. My findings below will show that my consideration of this evidence here does not work unfairly against AP's right to be heard.

⁹ *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9.

[35] The first email dated 4 December 2019 from Ms Chen to the representative shows Ms Chen had previously met the representative the day before for the first time. She refers to having sent the representative emails but not what they were or what they related to. She explains that she thinks she filled out two 'employee satisfaction' surveys, one before and one after she says it was 'suggested' to her that she resign.

[36] The second email from the representative to Ms Chen is dated 5 December and attaches for Ms Chen the 5 December 2019 letter sent to AP. The cover email is only two lines and includes 'we will see what reply I get' [from the 5 December 2019 letter] followed by a question asking, 'When he suggested you resign, what exactly did he say?'.

[37] The third email dated 6 December 2019 is from Ms Chen to the representative and appears to include Ms Chen's reply to the above email in six sentences stating things she says were said to her by her manager in August 2019 that seem to reflect some of the allegations that Ms Chen has put before the Authority now but were not raised for response by AP in relation to her grievance claims within 90-days.

[38] I find the content of these emails lack sufficient detail for me to form the view that Ms Chen wants me to take from them which is that she took reasonable steps to ensure her grievance was raised through her representative and her representative failed to do this. This is because I have no information about what Ms Chen's instructions were that led to her sometime later instruct the representative to send the content of the 8 January 2020.

[39] I further note that I have nothing to satisfy me that Ms Chen did anything to ensure she took reasonable steps to follow up on the 'further details' that were referred to in the 8 January 2020 letter that may then have enabled AP to respond or make sense of the claims about Ms Chen saying that the employer set out on a 'course of action' that induced her to resign; or that her employer provided misleading information to others about the reason she left her employment. That detail has taken a long time for Ms Chen to bring forward. After 8 January 2020 the only communications that Ms Chen instructed her representative to make focused solely on Ms Chen wanting further details about how her commission was calculated and putting forward what she considered it should be. The representative ceased

communicating about this from August 2020 and Ms Chen did nothing further to communicate with AP after this (until she lodged her claim in the Authority).

[40] I have paused to consider whether Ms Chen was unlikely to have had the ability to understand the timeframe to raise her grievance with more detail than the 8 January 2020 letter. I accept the submission for AP that Ms Chen is not without ability. She has submitted formal written applications and written submissions with case references. She has explained to me she her studies involve learning about the law.

[41] Standing back from the above I am not satisfied Ms Chen has shown I should find that an exceptional circumstance exists whereby she took reasonable steps to raise her grievances in time and that her agent did not do this. That is a serious finding to make in the absence of sufficient evidence and the participation of the agent. Even if I had found exceptional circumstances under this heading, I would have had to still then consider whether it would be just to allow Ms Chen to bring the grievances. I accept the submission from AP that this would be difficult to defend as they relate to conversations had and the meanings taken from them over three years ago. I would also have likely concluded as part of considering whether it would be just to allow leave to be granted that Ms Chen is not without the opportunity to seek remedies by continuing to have her claims heard within the category of breaches of her IEA and or statute. Much of that material crosses over with the things she says support the grievance claims that I find have been raised too late. In that sense I would have considered it may not have been just to allow leave especially given the length of time passed without any further details provided for AP to respond to.

Summary of findings

[42] I find Ms Chen raised her personal grievance for unjustified dismissal by constructive dismissal against AP within the statutory 90-day timeframe but only in relation to her allegation that a reason for the ‘dismissal’ was that Ms Chen was ‘incorrectly and consistently paid commission on sales and was not provided with accurate information related to sales in a manner which fundamentally breached the terms of her employment agreement.’

[43] I do not find Ms Chen raised any other personal grievances within the 90-day time frame as contained in her Amended Statement of Problem dated 31 July 2023.

[44] I find there are no ‘exceptional circumstances’ to support granting leave for Ms Chen to bring the grievances referred to in [43] above outside of the 90-day time frame to do so.

Costs

[45] Costs are reserved and will be dealt with as part of the substantive investigation process.

Next steps

[46] The Authority will continue as scheduled to hear Ms Chen’s other claims as they relate to either statutory or contractual entitlements or breaches as set out in her Amended Statement of Problem dated 31 July 2023 and in relation to her unjustified constructive dismissal claim as it is referred to above at [42].

[47] The Authority will arrange a brief phone conference call as soon as possible to schedule the provision of any further evidence for the scheduled investigation meeting which is currently set down to occur in April 2024.

Antoinette Baker
Member of the Employment Relations Authority