IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 77
5405795

	BETWEEN	CATHERINE EMMA CHILTON Applicant
	A N D	RUTHERFORD STREET KINDERGARTEN COMMITTEE Respondent

Member of Authority:	Christine Hickey
Representatives:	John Levenbach, Counsel for Applicant Anjela Sharma, Counsel for Respondent
Investigation Meeting:	On the papers and after telephone conferences the last of which was on 4 March 2014
Date of Determination:	16 May 2014

DETERMINATION OF THE AUTHORITY

A. The personal grievance of unjustified dismissal was raised within 90 days of Ms Chilton's dismissal.

B. The parties are directed to mediation.

C. Costs are reserved.

Employment relationship problem

[1] Catherine Chilton began work for the Rutherford Street Kindergarten Committee (RSKC) as a financial administrator/administration assistant on 15 March 2008. She was summarily dismissed on 11 July 2011 for serious misconduct.

[2] Ms Chilton considers that she has a personal grievance of unjustified dismissal. In December 2012 Ms Chilton lodged an application in the Authority for leave to raise a personal grievance out of time. Ms Chilton claimed that the delay in raising her personal grievance fell into the realm of exceptional circumstances as set out in s.115(b) of the Employment Relations Act 2000 (the Act) in that her advocate failed to raise her grievance in time.

[3] Ms Chilton says that she made reasonable arrangements to have her grievance raised by her union, NZEI Te Riu Roa, through John Robson, the NZEI Director, Legal and Compliance, but that he failed to adequately raise the grievance within 90 days.

[4] RSKC filed a Notice of Opposition to the Application to Raise a Personal Grievance out of Time. RSKC has not granted its consent to raising the personal grievance out of time and opposes Ms Chilton's application for leave to do so. It also says that Ms Chilton's application is entirely without merit and states that the Authority has jurisdiction to dismiss a matter as being vexatious and frivolous.

[5] The parties agreed in the interests of limiting legal costs this application should be dealt with on the papers.

[6] Further evidence supplied includes affidavits from Mr Robson and Ms Sharma. On 4 March 2014 at a telephone directions conference the parties agreed that no more evidence or submissions were required and also consented to the Authority considering the preliminary issue of whether or not the unjustified dismissal personal grievance was adequately raised within 90 days of Ms Chilton's dismissal.

[7] I am not in a position to decide any substantive matters such as whether Ms Chilton's dismissal was justifiable or any issues about Ms Chilton's performance at this stage because I have not conducted an investigation. I first need to establish whether the Authority has jurisdiction to consider Ms Chilton's personal grievance. However, I will consider the issue of whether the claim of unjustified dismissal has some merit in determining whether it is just to grant leave to file the grievance out of time.

Issues

[8] The issues the Authority needs to determine are:

(a) Whether Ms Chilton's personal grievance of unjustified dismissal was raised within 90 days of her dismissal; and

(b) If not, whether Ms Chilton made reasonable arrangements to ensure that her personal grievance of unjustified dismissal was raised within 90 days but Mr Robson unreasonably failed to raise the grievance on her behalf; and

(c) If so, whether the remainder of the delay in raising the personal grievance was also occasioned by exceptional circumstances; and

(d) If so, whether it is just to grant Ms Chilton leave to raise the personal grievance out of time.

Sequence of events

[9] This determination is based on affidavit and other evidence which is untested and therefore the outline of the sequence of events is only for the purposes of this preliminary determination. I have not made final findings of fact because they can only be made after a substantive hearing.

[10] Ms Chilton was dismissed for serious misconduct. After an investigation and disciplinary process RSKC found that Ms Chilton made an error or errors and then failed to follow a reasonable instruction by not following measures it put in place aimed at preventing any further errors in pay and fee calculations. RSKC also made other findings but these were not of serious misconduct and do not appear to have been reasons for her dismissal.

[11] Ms Chilton had been dissatisfied with RSKC's failure to pay her a salary increment as of 31 March 2011. RSKC was made aware of that prior to the disciplinary process. Ms Chilton and her union considered that under the relevant collective agreement RSKC was unable to refuse to apply an increment to Ms Chilton's pay as it sought to do.

[12] Ms Chilton was supported during the disciplinary process by Una McNair from the union and continued to liaise with her union after her dismissal on 11 July 2011. Mr Robson became involved after Ms Chilton's dismissal.

[13] On 24 August 2011 Mr Robson and Ms Sharma had a telephone conversation after which Mr Robson sent Ms Sharma an email which he labelled *without prejudice*. The email was sent to the Authority to support Ms Chilton's claim[1]. That email should not have been put before the Authority. Although Mr Robson and Mr Levenbach, on behalf of Ms Chilton, waived privilege Ms Sharma did not do so on behalf of RSKC. Privilege cannot be unilaterally waived[2] and therefore I have not taken the content of the email into consideration when making this determination.

[14] On 21 September 2011, Mr Robson sent a letter to Sarah Drozdowski-Mant, the president of the RSKC. He wrote:

> *NZEI is authorised to represent the above member with respect to her employment at – and subsequent dismissal from - the Rutherford Street Kindergarten.*

[15] He carried on to say that Ms Chilton had two concerns. First, the denial of Ms Chilton's salary increment:

> *Secondly, notwithstanding the fact that processes were put in place (and recorded by signed minute) whereby alleged shortcomings would be addressed, no adequate time was ever afforded to allow improvements to occur.*
>
> *…*
>
> *With respect to the second (and more important) issue, I have reviewed a significant amount of paper and have concluded that there is a compelling argument to the effect that the processes that were put in place were never seriously expected to work. I note for instance, that the senior teacher wrote a note questioning the very need for the job, (let alone its grading or whether Catherine could improve).*
>
> *Accordingly, please regard this letter as notice that the NZEI considers that Catherine Chilton has suffered personal grievance* [sic] *within the meaning of sub-sections 103(1)(a) and 103(1)(b) Employment Relations Act 2000.*
>
> *… If in fact Ms Sharma should be the correct recipient of this letter, then I apologise for this direct approach to you.*

[1] Annexed to John Robson's affidavit.
[2] *Idea Services (in statutory management) v Barker* [2012] NZ EmpC 112, Judge Inglis

[16] The letter was also delivered to Ms Sharma although perhaps a few days after RSKC received it.

[17] Ms Chilton was dismissed on 11 July 2011 so the 90-day period to raise a personal grievance of unjustified dismissal expired on 8 October 2011.

[18] On 7 November 2011 Ms Sharma wrote to Mr Robson responding to his 21 September 2011 letter and stating:

> *The nature of your client's grievance was not specified sufficiently until your letter of 21 September last. It follows that any grievance that your client has, which is denied, is outside the statutory 90 day period. My instructions are that my client does not consent to the grievance being raised out of time.*

The statutory tests

[19] Section 114 of the Act sets out the requirements for raising a personal grievance and for an employee to apply to the Authority for leave to raise a personal grievance outside of the 90 day period:

> *(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with 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, unless the employer consents to the personal grievance being raised after the expiration of that period.*
>
> *(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*
>
> *(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*
>
> *(4)* ***On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—***
>
> *(a)* ***is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and***

(b) ***considers it just to do so.*** [emphasis added]

[20] The relevant part of s.115 of the Act provides:

> *For the purposes of section 114(4)(a), exceptional circumstances include—*
>
> *(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.*

Determination

Was a personal grievance of unjustified dismissal adequately raised within 90 days after Ms Chilton's dismissal?

[21] Ms Chilton's position is that Mr Robson's letter of 21 September 2011 raised two personal grievances; one of unjustified dismissal and one of unjustified disadvantage and therefore the unjustified dismissal grievance was raised within 90 days of her dismissal. Alternatively, Mr Robson should have adequately raised the unjustified dismissal grievance in that letter or in some other way but failed to do so in time.

[22] Ms Sharma submits that an unjustified dismissal grievance was not raised within 90 days of Ms Chilton's dismissal because the letter of 21 September 2011 failed to raise it.

[23] The purpose of raising a grievance is to ensure that the employer is able to address the grievance, which means the grievance must be sufficiently specified. In the Employment Court case of *Creedy v Commissioner of Police*[3] the Court held:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable to employer to address it. So it is insufficient, and therefore not the raising of a grievance, for an employee to advise an employer that an employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance, as for example, unjustified disadvantage in employment … As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address, I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[3] [2006] 1 ERNZ 517

> *[37] … It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given 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.*

[24] On 7 November 2011 Ms Sharma responded to Mr Robson's 21 September 2011 letter. She wrote that a grievance was not raised within 90 days and that *the nature of your client's grievance was not sufficiently specified* until in the letter of 21 September 2011. However, Ms Sharma did not refer directly to an unjustified dismissal grievance. She concentrated only on the unjustified disadvantage grievance related to the refusal of the RSKC to pay Ms Chilton's increment. Ms Sharma stated that Ms Chilton's raising of a personal grievance of unjustified disadvantage as at 21 September 2011 was outside of the 90-day period which began to run on 31 March 2011 when Ms Chilton was advised that the RSKC would not pay the increment.

[25] On 8 November 2011 Mr Robson responded to Ms Sharma's letter arguing that the unjustified dismissal claim was adequately raised in time.

[26] Mr Levenbach submits that I should favour Mr Robson's view expressed in his affidavit. That is, that the totality of communications he had with Ms Sharma meant that the dismissal grievance was adequately raised within 90 days. Mr Robson refers specifically to his email to Ms Sharma of 24 August 2011 as the beginning of those communications. That is the privileged email and I do not make reference to the content of that. However, that does not mean I should ignore the fact that Ms Sharma and the union were involved throughout the disciplinary and dismissal processes and that Mr Robson and Ms Sharma talked after the dismissal, as evidenced by Mr Robson's file notes. RSKC and Ms Sharma would have been aware before receiving the 21 September 2011 letter that Ms Chilton was unhappy about her treatment and/or her dismissal. The letter must be read in the light of that knowledge.

[27] I need to consider whether the 21 September 2011 letter sufficiently informed RSKC of Ms Chilton's unjustified dismissal grievance in order to allow it to address the grievance *soon and informally at least in the first instance*[4].

[4] Ibid., paragraph [37].

[28] The letter set out two issues. First, that the employer could not have legally denied Ms Chilton her increment. It is clear that relates to a claimed unjustified disadvantage having taken place.

[29] Therefore, it must be the second issue that Ms Chilton relies on as the raising of an unjustified dismissal grievance; that was:

> *…the processes that were put in place were never seriously expected to work. I note for instance, that the senior teacher wrote a note questioning the very need for the job, (let alone its grading or whether Catherine could improve).*

[30] In *Hutchison v Nelson City Council*[5] Judge Couch of the Employment Court held:

> *The threshold for raising a personal grievance, explained in s 114(2) of the Act, is not particularly high. There is certainly no need to provide detailed particulars*[6].

[31] In *Hutchison* Judge Couch decided that by the time the Council had received a letter written by Ms Hutchison's solicitor on 1 March 2012 the Council was sufficiently aware of the grievance to enable it to address it. He took into account that the parties' previous *correspondence in both directions was voluminous and detailed*[7]. That together with the letter was sufficient to adequately raise the grievance.

[32] The *threshold for raising a personal grievance … is not particularly high*. The letter:

- Mentions Ms Chilton's union is representing her in relation to her *subsequent dismissal* from her employment,

- Separates the issues in two and it would have been obvious to the employer that the first issue related to a claimed unjustified disadvantage and the second issue to a claimed unjustified dismissal. That is particularly the case as the Ms Drozdowski-Mant was involved in the disciplinary process leading to Ms Chilton's dismissal.

- Clearly stated that Mr Robson was raising personal grievances under s.103(1)(a) – unjustified dismissal – and s.103(1)(b) – unjustified disadvantage.

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[5] [2013] NZEmpC 184
[6] Ibid at paragraph [37]
[7] Ibid at paragraph [35]

[33] Even setting aside the content of Mr Robson's privileged email of 24 August 2011, RSKC would have known when it received the 21 September 2011 letter that Ms Chilton was raising a grievance of unjustified dismissal. RSKC would also have been sufficiently aware of at least one or some of the reasons Ms Chilton was doing so thus enabling it to address her grievance *soon and informally*. Therefore Ms Chilton had a period of three years after that date to commence an action in the Authority or the court in relation to her personal grievance[8] as she has now done.

[34] That means that I do not need to go on to decide whether the failure to raise the grievance within 90 days was occasioned by exceptional circumstances and whether it is just to grant leave to raise it outside of 90 days. However, had I been required to do so I would also have decided in Ms Chilton's favour for the following reasons.

Was any delay in raising the grievance within 90 days occasioned by exceptional circumstances?

[35] The Supreme Court in the case of *Creedy*[9] considered the meaning of the word 'exceptional circumstances' in s.114(4) of the Act and preferred the meaning *those which are "unusual, outside the common run…"*[10]. So I need to consider whether Ms Chilton's circumstances were unusual or outside the common run.

[36] There are a number of features that mean Ms Chilton's circumstances are unusual or outside the common run. The first is that Ms Chilton was supported by the NZEI throughout the process that ended in her dismissal and once she was dismissed her case was handed over to Mr Robson, who is legally qualified and has extensive employment law experience.

[37] On 20 September 2011 Mr Robson sent an email to Ms Chilton:

> *I am growing increasingly frustrated by my failure to engage Anjela Sharma in a conversation. …*
>
> *In order to keep things moving therefore, I think there is little choice but to write to the employer directly. I attach a draft letter for your comments.*

[38] That draft letter was the one of 21 September. It is clear that Ms Chilton made reasonable arrangements to have her unjustified dismissal grievance raised within 90

[8] Section 114(6) of the Act.
[9] [2008] 2 NZLR 7; [2008] ERNZ 109 (SC)
[10] Ibid at paragraph [31]

days of her dismissal and understood that Mr Robson was raising an unjustified dismissal grievance in the 21 September letter.

[39] Ms Chilton deposes that during November 2011 she and Mr Robson were waiting for Ms Sharma to respond to Mr Robson's email of 8 November 2011 and:

> *I did not consciously make a decision to not proceed with the Personal Grievance Claim. That occurred partly because I understood from John Robson that the Personal Grievance Claim had been lodged, and I had to do nothing further for some time, but also because I felt completely traumatised and intimidated … and was not able to be proactive.*

[40] Mr Robson deposes that he is certain he would not have told Ms Chilton that a personal grievance *had been lodged* as set out by Ms Chilton in the above paragraph. He says that Ms Chilton:

> *…never grasped the distinction between raising a grievance (with the employer) and lodging a Statement of Problem (with the Authority).*

[41] I consider that likely to have been the case and that Ms Chilton most likely understood from her dealings with Mr Robson that he had raised her personal grievance of unjustified dismissal within the 90-day time limit and that she had no great time pressure to bring a claim in the Authority.

[42] In addition, although the 90-day period expired on 8 October 2011 it is unusual that the 21 September letter was not responded to until 7 November 2011; a month after the 90-day period expired. I appreciate that Ms Sharma was no doubt busy at the time and that initially the letter went directly to RSKC and not to Ms Sharma. However, the late response to the 21 September letter taking it beyond the 90-day limit is unusual enough to amount to exceptional circumstances in that it is out of the ordinary or unusual that it would take so long to respond to correspondence, especially when a time-critical matter is involved.

Is it just to grant leave to allow Ms Chilton to raise her personal grievance after the 90-day period?

[43] The 7 November 2011 response from Ms Sharma being beyond the 90-day period contributes to the justice of granting Ms Chilton leave to raise her grievance out of time.

[44] RSKC considers that Ms Chilton's grievance is an unmeritorious claim as it has no substantive basis. The first reason given is that there were *significant contributory factors on her behalf.*

[45] An employer will often argue that the former employee contributed to the situation giving rise to their personal grievance but that does not necessarily mean that the personal grievance claim is without merit.

[46] There is no evidence supporting Ms Sharma's suggestion that the claim is frivolous or vexatious in nature or has a complete lack of merit. Indeed, RSKC had *serious performance concerns*[11] and in Mr Robson's 21 September 2011 letter Mr Robson clearly signalled that Ms Chilton claimed that the processes that were put in place to address the performance concerns *were never seriously expected to work*. These considerations remain to be tested and the unjustified dismissal claim cannot be said to be without merit.

[47] The only other factor that Ms Sharma raises In the Notice of Opposition is that the *respondent does not have the financial resources to defend the applicant's unmeritorious claim.*

[48] An employer's apparent lack of financial resources to defend a claim is not a consideration the Authority can take into account in deciding whether it is just to allow an employee to raise her grievance out of time. Instead, it is a matter for the employer to consider when it decides how to respond to a claim.

[49] In the absence of any submissions that the delay in raising a personal grievance causes prejudice to RSKC I am reluctant to deny Ms Chilton a hearing on the merits of her claim.

Orders

[50] My overall assessment is that it is just Ms Chilton be permitted to pursue her dismissal grievance in the Authority. Ms Chilton's unjustified dismissal grievance was raised within 90 days of her dismissal. If it was not, the delay in raising it was occasioned by exceptional circumstances and leave is granted to allow Ms Chilton to raise her personal grievance outside of the 90 day period.

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[11] Ms Sharma's 7 November 2011 letter.

[51] Section 114(5) of the Act requires that when leave is granted under s.114(4) of the Act to raise a grievance out of time the Authority must direct the parties to mediation to seek to resolve the grievance. In this case the grievance was raised within 90 days but it is in the parties' interests to use their best efforts to try in good faith to reach a resolution of the grievance and therefore I order the parties to mediation under s.159(1)(b) of the Act.

[52] If mediation does not fully resolve matters the Authority will set up a directions teleconference as soon as possible once mediation is concluded to schedule an investigation meeting.

Costs

[53] Costs are reserved. The parties are invited to make the issue of costs a part of their mediation discussions. Ms Chilton would usually be entitled to a reasonable contribution to her costs on the basis of her success in this preliminary determination. Any costs submissions on Ms Chilton's behalf should be made within 28 days of a settlement being concluded with submissions in reply 14 days later.

[54] If costs are not agreed and the matter is not resolved at mediation the Authority will deal with costs after the determination of the substantive matter.

Christine Hickey
Member of the Employment Relations Authority