New Zealand Employment Relations Authority Decisions

Foote v Progressive Reality Limited (Christchurch) [2018] NZERA 1060; [2018] NZERA Christchurch 60 (3 May 2018)

Last Updated: 18 May 2018

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 60
3024112

BETWEEN LEEANNE FOOTE Applicant

A N D PROGRESSIVE REALTY LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Applicant in person

Dean Kilpatrick, Advocate for Respondent

Investigation Meeting: 27 April 2018 at Christchurch

Submissions Received: 27 April 2018 from Applicant

27 April 2018 from Respondent

Date of Determination: 3 May 2018

DETERMINATION OF THE

EMPLOYMENT RELATIONS AUTHORITY ON TWO PRELIMINARY ISSUES

A. Ms Foote was an employee of the respondent from 23 November

2013.

B. I decline to grant Ms Foote leave to raise her personal grievance for unjustified constructive dismissal outside of the statutory 90
day time period.

C. Ms Foote may pursue claims for arrears of pay which she says are due from February 2014, subject to her confirmation as directed. Ms Foote may also pursue a claim of unjustified dismissal and/or unjustified disadvantage arising from being put
on 'garden leave' outside of the terms of her employment

agreement, subject to confirmation of her intentions in

that

regard.

D. Once Ms Foote has confirmed her intentions, the parties are

directed to mediation.

E. Costs are reserved.

Prohibition from publication order

[1] Amongst the evidence tendered by the respondent was a table of earnings relating to another former employee, which contained confidential information. That employee did not take part in the proceedings, and I prohibit from publication the earnings information contained in that evidence.

Employment relationship problem

[2] Ms Foote claims that she was unjustifiably constructively dismissed from her employment following alleged unfair treatment by her employer. She also claims that she is owed commission which has been unlawfully withheld from her.

[3] The respondent denies that Ms Foote was unjustifiably constructively dismissed but raises two jurisdictional objections to her claims. The first is that the respondent says that Ms Foote was engaged as an independent contractor up until 1

August 2016 (when she entered into an independent employment agreement) and so is unable to bring any claims before the Authority which relate to the period prior to that date.

[4] In addition, the respondent says that Ms Foote failed to raise a personal grievance in relation to her alleged constructive dismissal within 90 days. The respondent says that no exceptional circumstances exist which will justify the Authority granting her leave to raise her grievance out of time pursuant to s.114 of the Employment Relations Act 2000 (the Act). Furthermore, the respondent does not consent to the grievance being raised out of time.

[5] The purpose of the Authority's investigation meeting was therefore to

determine whether the Authority had jurisdiction to consider Ms Foote's claims.

The material facts

[6] The respondent operates a real estate agency business in Christchurch. Ms Foote entered into an agreement with the respondent entitled "Agreement for Services for a Property Manager Engaged as an Independent Contractor" on

25 November 2013. Ms Foote's role, pursuant to this agreement, was to supervise and manage the property management activities of the respondent, which included procuring listings for properties for rent, securing tenants, seeking approval from landlords for work to be carried out, inspecting let premises and providing written reports, pursuing tenants for arrears of rent and keeping familiar and up to date with all relevant legislation.

[7] Ms Foote and the respondent entered into an individual employment agreement with effect from 1 August 2016 but Ms Foote carried out the same role as Property Manager.

[8] The respondent company is owned and operated by Joseph Mullins and his wife, Susan Mullins. Ms Foote accuses Mr Mullins of breaching multiple terms of both the independent contractor's contract and the individual employment agreement, as well as subjecting her to bullying behaviour causing her physical and emotional stress. According to Ms Foote, the problems she encountered started in February 2014 and continued until her resignation on 22 February 2017.

The issues

[9] The following jurisdictional issues need to be determined by the Authority:

(a) Whether Ms Foote was employed or engaged as an independent contractor prior to 1 August 2016;

(b) Whether Ms Foote raised a personal grievance in respect of her claim for unjustified constructive dismissal within the statutory 90 day timeframe;

(c) If Ms Foote did not raise her personal grievance within time, whether exceptional circumstances exist to justify the Authority granting leave for her to raise her grievance out of time.

Was Ms Foote an employee or independent contractor prior to 1 August 2016? [10] The meaning of an "employee" is defined in s.6 of the Act. The relevant subsections of s.6 for the purposes of this investigation are as follows:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of

service;

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority— (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

(4) Subsections (2) and (3) do not limit or affect the Real Estate

Agents Act 2008 or the Sharemilking Agreements Act 1937.

[11] The reference to the Real Estate Agents Act 2008 in s 6(4) presumably refers to s 51(2) of that Act, which states that any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor. However, it is agreed between the parties that Ms Foote was not a 'salesperson' for the purposes of the 2008 Act. Therefore, the general position under s 6 of the Act is not overridden by s 51(2) of the 2008 Act.

[12] The established methodology for assessing whether an individual is an employee or an independent contractor was confirmed by the Supreme Court in the case of *Bryson v Three Foot Six Limited*1. The starting point is to examine the terms and conditions of the contract between the parties and the way that it operated in practice, and then to apply the three traditional tests known commonly as the control test, the integration test and the fundamental or economic reality test.

[13] In *Franix Construction Ltd v Tozer2*, the Employment Court said that, where there is evidence that suggests both an employment relationship and engagement as a contractor, it must conduct an "intensely factual" analysis when determining the real

nature of the relationship between the parties.

1 [2005] NZSC 34; [2005] ERNZ 372

2 [2014] NZEmpC 159

[14] The Authority must consider all relevant matters, which include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of the relationship. They also include divergences from, or supplementations of those terms and conditions which are apparent in the way in which the relationship has operated in practice. Industry or sector practice is also a relevant factor.

The contractor's agreement

[15] The contractor's agreement between the parties entered into on 25 November

2013 declares that the engagement is as an independent contractor, that no sick pay or holiday pay is due, and that Ms Foote was responsible for payment of all ACC levies and all other taxes, duties and payments incurred as a result of any commission or other income paid to her.

[16] In consideration of the services rendered by Ms Foote under the agreement, she was to receive commission as set out in Schedule A of the agreement. This commission was initially made up of the following elements:

• 28% of commission received into the office from all landlords with respect to their properties and the rentals collected each month;

• 45% of letting fees received into the office from all tenants at the time a tenant rents a property;

• 50% of inspection fees received into the office from all landlords with respect to their properties;

• $100 per property that is signed up for at least 12 months either secured by Ms Foote, or as a result of a lead given to the Business Development Manager; and

• 10% referral fee on any sale resulting from a lead from Ms Foote, except where the property management was first referred to her by a salesperson.

[17] The agreement also obliged Ms Foote to ensure that:

a. she was at all times registered pursuant to the provisions of the Real

Estate Agents Act 2008 (the 2008 Act);

b. she was solely responsible for her continuing education;

c. she would provide a suitable motor vehicle to be used in the performance of her duties;

d. she would maintain an after-hours telephone connection and an email connection; and

e. she would be responsible for insurance cover which she considered necessary in connection with her engagement, apart from professional indemnity insurance, which the respondent was responsible for maintaining.

[18] Under the terms of the contractor's agreement Ms Foote was also obliged to comply with:

a. a comprehensive confidential information clause; and

b. a post-termination restraint of trade clause preventing her, for one month from the date of cessation of engagement, and within a radius of

15 kilometres of the principal office of the respondent, from:

i. setting herself up or engaging in private business; or

ii. undertaking "other employment" which is directly or indirectly in competition with the respondent; or

iii. copying, preparing, acquiring or memorising any list of customers or clients of the respondent; or

iv. undertaking any duty, role or employment involving the performance of her tasks.

[19] The contractor's agreement also contained a termination clause which enabled the respondent to terminate the agreement without notice for various reasons, including:

a. substantial misconduct or neglect, failure or negligence in the performance of her duties;

b. substantial breach of her contractual duties;

c. failing to maintain a target income;

d. becoming bankrupt, of unsound mind, or convicted of certain criminal offences; or

e. being guilty of any incident or conduct, whether singular or continuous, tending to bring herself or the respondent into disrepute.

[20] Despite the terms of the contractor's agreement, certain aspects of the relationship were different in reality from those specified in the agreement, as I will examine below.

[21] Mr Mullins said that the decision to change the nature of the relationship between Ms Foote and the company in 2016 came about because the property management division had expanded, requiring a greater emphasis on customer experience. In order to improve customer experience the company wished to refine its standards of service, which required greater control over how and when the property managers worked. Mr Mullins said that he believed that this would give the company a competitive edge in the market.

[22] Therefore, the company felt it was better off employing property managers so as to provide greater control over the hours of attendance, performance and quality of work. All of the property managers were offered employment agreements, and all accepted.

[23] Mr Mullins said that Ms Foote's only concern was that she would not be paid less and that, although the salary offered was slightly less, this was to account for the other benefits that came from being an employee, such as sick leave. He says that Ms Foote happily signed the agreement.

[24] Ms Foote's evidence is that the respondent had to change to an employment arrangement with its property managers after it had been told that it could not continue engaging them as independent contractors. It is not clear on what basis that advice was given.

[25] Ms Foote was clearly aware of the difference between an independent contractor's agreement and an employment agreement at the time she joined the respondent, and in my view would have turned her mind to the difference between the two types of status when entering into the independent contractor's agreement with the respondent, because she stated in her

evidence that, prior to joining the respondent, she had worked for another firm which had her enter into an agreement which was part employment agreement and part independent contractor's agreement. She was therefore not unsophisticated in understanding the difference between the two types of status.

[26] From that, I conclude that Ms Foote had the intention of entering into an independent contractor's agreement with the respondent when she signed the document which identified itself as such.

[27] However, in *Koia v Carlyon Holdings Ltd3*, the full Court stated that, whilst intention is still relevant, it is no longer decisive, and that intention is only one of the relevant matters that the Court (and, it follows, the Authority) must consider. As is made clear in s.6(3) of the Act, the Authority must consider all relevant matters, and is not to treat as a determining matter any statement by the persons that describe the nature of the relationship.

[28] Therefore, the fact that the parties had entered into an agreement which declared the relationship to be that of an independent contractor is not determinative alone in the question of whether or not Ms Foote was an employee or an independent contractor prior to 1 August 2016. It is therefore necessary to go on to consider the relevant factors by reference to the three tests referred to above.

The control test

[29] This test examines the extent to which the activities of Ms Foote were controlled by the respondent.

[30] Ms Foote's evidence in relation to how much control she came under was that she was strictly controlled and micro-managed, including in relation to the location of the work she carried out, the times of the work (being instructed to be on call 24/7)

and how to carry out the work.

3 [2001] NZEmpC 130; [2001] ERNZ 585 (EmpC)

[31] Ms Foote says that, for example, when she was recovering from an arm operation in May 2016, she was told that she could not receive sick leave but was given instructions to work remotely from home, for which she was paid, and that she was ordered to answer all calls during that time.

[32] Ms Foote says that she had to seek consent to take leave at any time, and had to be available every day unless she had prior consent to take leave.

[33] Ms Foote says that she had to attend meetings on a weekly basis to prove that key performance indicators (KPIs) were being met. These meetings were primarily held with the Property Management Team Leader, Rebecca Royal. Property management team meetings were also held weekly with all property managers and the Business Development Manager, as well as Mr Mullins, to discuss targets and practice procedures that they were to follow.

[34] According to Mr Mullins, overall, the property managers, including Ms Foote, had a lot of flexibility and could basically come and go as they wanted. The only requirement was that they completed their tasks and responsibilities. He said that, although the company offered to pay 50% of the costs of their property managers attending REINZ conferences and other property management related courses, they

were never required or directed to do so4. He said that it was different with an

employee.

[35] Mr Mullins denies that Ms Foote had to request time off prior to 1 August

2016. He said that Ms Foote would simply notify him when she was planning to take leave, and that the property managers organised their own leave whenever they felt like it. Mr Mullins put into evidence a copy of an email from Ms Foote to him dated

18 February 2015 in which she stated "I will be away from the office from 7 August to 17 August". Ms Foote says that the email was simply confirming the dates of leave which she had already had to seek permission to take.

[36] Mr Mullins said that the only requirement for property managers to take leave was that their portfolio was up to date so that another property manager could manage

any urgent issues that might arise during their absence. For the employees, they were

4 Ms Foote disagreed with that evidence, saying that she was required to attend a conference in

Auckland when she was under the contractor's agreement.

required to apply for annual leave, and were also required to inform the company if they were taking sick leave.

[37] Mr Mullins also said that, apart from working for a competitor, the independent contractor property managers could do other work if they wished. As an employee, that was not permitted. However, I note that clause 18 of the employment agreement between Ms Foote and the company stated as follows:

18. **Conflict of Interest**

You shall not, without our written consent, undertake any other paid employment which might conflict with our interests, or which may impair your ability to complete your normal work.

[38] That is not a complete ban on employees carrying out other work. In any event, Ms Foote says she did not work for anyone else while she was working for the respondent.

[39] Mr Kilpatrick submits that, where control is exercised over an employee in accordance with best practice and regulation, that level of control is not inconsistent with a contractor's relationship. I agree with this statement of principle. Ms Foote was required to follow 'Best Practice Procedures' contained in a 28 page Residential Property Management Manual. Some of these best practice procedures are based on legislative requirements, such as the Residential Tenancies Act 1986. Others, though, were detailed instructions which appear to be particular to the respondent's business.

[40] However, I accept that the very nature of a busy property management business requires detailed procedures to ensure that an effective service is provided to both landlords and tenants within the law. In that sense, the level of control imposed by the best practice procedures is not especially indicative of an employment relationship.

[41] My conclusion with respect to the control test is that it is not particularly helpful in this case in guiding the Authority as to the status of the relationship prior to

1 August 2016. Whilst I agree with Ms Foote that she was subject to a fairly high level of control, including how she was to carry out her role, that was largely a function of being a property manager in a highly regulated industry.

The integration test

[42] This test examines the extent to which Ms Foote was integrated into the respondent's business. Ms Foote says that she was provided with all the tools and equipment that were required to carry out all of the tasks for the position. These included a permanent desk, an email account, a liveried car, a fully paid mobile telephone, petrol, car registration and maintenance, a desktop computer, an iPad, stationery and printing. She said that she had no expenses to claim back.

[43] Mr Mullins says that, as part of its normal practice, it provided office space and support to all of its contractors, which is the same in every real estate agency. Mr Mullins said that, although the contractor's contract with Ms Foote provided that she would have an after-hours number for emergencies and be provided with an allowance of $75 per month to cover her mobile telephone costs, around eight months into the contract the company found that the contractors were reluctant to hand out their personal phone numbers to clients. The company therefore provided a business phone for the contractors at roughly the same cost.

[44] Mr Mullins said that no-one was expected to be available 24/7 and that they could use their mobile phones to indicate when they were available. The phone contract they were provided included unlimited calls.

[45] Mr Mullins said that, although the contract also required Ms Foote to provide her own vehicle, the company had purchased vehicles for the business, and it was advantageous for Ms Foote and the other property managers to use those vehicles as they were sign-written and professional looking. The company was relaxed about property managers using these vehicles for their personal use so long as they did not abuse the privilege. This was because it was good to have the vehicles out in the community as they promoted the respondent's business as well as the company's.

[46] Mr Kilpatrick concedes on behalf of the respondent that Ms Foote would have outwardly appeared to have been part of the respondent's business, but submits that case law has shown that, despite that, an individual can still be found to be a contractor. By way of example, Mr Kilpatrick refers to paragraph [80] of the

Employment Court case of *Curlew v Harvey Norman Stores (NZ) Pty Ltd5* which cites

many factors about the engagement which would have led a customer to conclude that

5 [2002] 1ERNZ 114.

Mr Curlew was an employee of Harvey Norman, even though he was, nevertheless, found by the Court to be an independent contractor.

[47] However, with respect, all this shows is that the integration test alone is not determinative. In *Curlew*, the plaintiff became the proprietor of a computer department in one of the defendant's stores. The stores were structured so that consulting companies, in a trustee capacity, were contracted to provide management services to the defendant. A consulting company and a trading trust were established to allow the plaintiff to accept the management position. The plaintiff, who was the sole

director and shareholder of the company, was an employee of the trust. The plaintiff was responsible for hiring and firing employees and bore the personal responsibility for any liability to such employees. The plaintiff's hours of work were discretionary, and he had a substantial degree of autonomy about the department's layout. The plaintiff's trust was responsible for meeting tax and accident compensation obligations. This is a completely different situation to that of Ms Foote.

[48] I accept that the integration test shows strongly that Ms Foote was an employee rather than an independent contractor, as she was embedded into the operational structure of the respondent's business.

The fundamental/economic test

[49] This test examines the extent to which Ms Foote took on financial risk herself in providing her services.

[50] Ms Foote said that she was not paid specifically for results but was paid twice monthly, and then again at the beginning of each new month, by reference to income brought in to the company by her efforts over and above guaranteed earnings of

$50,000. She says that she did not charge fees or invoice the company in any way at any time, and was paid at the sole discretion of the company and at a rate of earnings chosen by the company. She was paid the base payment of $50,000 even when she was away on leave.

[51] Ms Foote says that the company paid her income tax to the IRD and that she had payslips stating that she was taxed under the PAYE system. Ms Foote says that the payslips also stated, however, that she was a sales agent, which she was not at any point during her relationship with the company.

[52] Ms Foote said that she never had the option of negotiating her rate of pay, and never had the ability to decide on any charges for third parties for the work she carried out. She also had to carry out her own work and only worked for the respondent. She says that she did not advertise individual services and never operated as a sole trader.

[53] Ms Foote says that she does not believe that the agreement between herself and the company that was in force between 25 November 2013 and 1 August 2016 accurately reflected how the relationship worked in practice.

[54] Mr Mullins confirmed that the company guaranteed Ms Foote a minimum payment of $50,000 a year in fees, but said that this was easily obtained and that Ms Foote generally earned $65,000 per year. He said that other property managers also earned more than the minimum fee, between $65,000 and $95,000 per year.

[55] Mr Mullins said that the payments made to Ms Foote were all plus GST, and that he understood she was claiming GST as well as other expense claims. He said that the company deducted withholding tax of 20% from Ms Foote's earnings, but that the system they used to manage payment could not be called withholding tax so it was recorded as PAYE. Ms Foote said in evidence that she had been investigated by the IRD but they had determined that she was not liable to account for GST because she was likely to have been an employee rather than a contractor.

[56] The economic reality test indicates a mixed picture. Whilst Ms Foote was taxed at a 'withholding rate' of 20%, she received a guaranteed annual payment of

$50,000, and did not have to submit invoices. She was deemed by the IRD not to have to account for GST. She could not fix the rate of commission, and depended on the respondent to ensure she was paid the correct commission by reference to the fees the respondent received. She could not recover any fees directly from the tenants and landlords.

[57] On balance, I believe that the economic reality test indicates that Ms Foote was not operating on her own account. The picture suggests strongly that she was an employee with a guaranteed salary which she could top up by way of commissions earned (which the respondent called 'bonuses'). The taxation arrangements are likely to have reflected the parties' understanding of the status of the relationship and are not determinative of that relationship.

The industry practice

[58] No cogent evidence was presented by either party about this. It appears that there is no clear industry practice. For example, Ms Foote has worked for three firms. In the first, the agreement she entered into was a mixture of an independent contractor's and an employment agreement; in the second (the respondent) she was first engaged on an independent contractor's agreement and then employed under an employment agreement without any change in duties; in her third firm, she says she was employed under an employment agreement.

[59] It appears that 'industry practice' is not helpful in determining this issue.

Conclusion

[60] The overall evidence suggests a mixed picture, as is often the case. However, what is particularly instructive is that there appeared to be little difference in the day to day activities of Ms Foote when she entered into the employment agreement compared to when she was working under the contractor's agreement. It seems that annual leave and sick leave were more formally recorded and kept track of, and she was paid under the PAYE system after she signed the employment agreement.

[61] Otherwise, Ms Foote's day to day activities, and the way she carried out her work, were exactly the same. I suspect that the change made by the respondent to treating the property management staff as employees meant it could more openly control them, rather than having to be careful how its control of them appeared, in case that control would undermine the independent contractor status it was trying to maintain.

[62] The Authority has a significant amount of experience in what an employment relationship looks like. A detailed tallying up of the different factors by reference to the contractual documentation and the different tests is helpful, but when the picture is reasonably finely balanced, as it is here, it is necessary to stand back and look at the bigger picture too.

[63] In doing so, I am satisfied, on balance, that Ms Foote's relationship with the

respondent prior to 1 August 2016 was that of an employee. Ms Foote lacked the

fundamental independence of an independent contractor, and her relationship with the respondent had many significant hallmarks of an employee.

Did Ms Foote raise a personal grievance within the statutory time limit?

[64] Ms Foote resigned from her employment by way of a written communication dated 22 February 2017 which stated the following:

Hi Joe and Sue

After some drawn out thoughtful consideration I have decided it is in my best interest to terminate my employment with progressive Realty.

Please accept this as my written four weeks notice.

At this time I wish to thank you of the opportunity to be a part of your team for the past three years.

Kind regards

Leeanne Foote

[65] In reply, Mr Mullins wrote a letter dated 28 February 2017 which stated the following:

Dear Leeanne,

This is just to confirm acceptance of your resignation from Progressive Realty Ltd on 23 February 2017. You are now on "garden leave" and are not required back in the office as such. It goes without saying you are not to have any contact with clients of Progressive Realty Ltd.

In terms of payment, we will continue to pay you weekly until the

23rd March your last day and of course your final pay will take into account any accrued leave and other payments you may be due.

Finally I wish you well in your future endeavours and hope everything works out for you.

Kind regards

Joe Mullins (Director).

[66] Ms Foote says that, when she resigned, Mr Mullins verbally acknowledged receipt of her resignation on 23 February but that she worked that day. On

24 February, Ms Royal and Mr James Mullins (the Business Development Manager) took her into a conference room and asked for a summary update on any properties she was working on. When she had provided that information, Mr James Mullins said to her "No hard feelings, but as you know this is property management so now we need you to leave".

[67] Ms Foote said she was given 15 minutes to gather her belongings and leave the office. She said she was granted the use of the company car until Monday

27 February, even though her notice period did not cease until 23 March 2017.

[68] Ms Foote says that, although she was purportedly placed on garden leave by

Mr Mullins, there was no right to do so in her employment agreement. On 2 March

2017 Ms Foote instructed a firm of advocates in Christchurch6 and advised them of her grievances with the company. On 17 March the advocacy firm contacted Mr Mullins by email, attaching a letter. As this letter arguably raises a personal grievance, it

is important to set it out in full. It reads as follows:

Dear Mr Mullins

LEEANNE FOOTE

We act for Ms Foote and as you are aware our client provided her resignation on 23 February 2017.

Following our client's resignation our client was put on "garden leave". Our client was prohibited from returning to the office and contacting any clients.

We note that the employment agreement signed between the parties does not allow for garden leave to be provided. It is clear from the agreement that the employer can pay notice in lieu of but not garden leave. Accordingly it is our view that our client was unjustifiably dismissed on this date.

Our client further advises that during the term of the employment relationship our client was subject to substantial unfair treatment. Our client instructs that she was subject to workplace bullying and had unreasonable and unlawful deductions made from her income. On this note, please forward to us a full copy of our client's wage and time records whilst she was an employee and at the time that she was an independent contractor please also forward to us a full copies [sic] of any payments made to our client and/or any deductions.

Please also confirm that you have made payment to our client for the one months' [sic] notice along with all payments from commissions and bonuses up to and including this period. Again, we note that if payment has not been made and you are relying on the last day of employment as at 23 March, this is unreasonable and unlawful and would be viewed as an unlawful deduction. Payment for our client's wage entitlements must be made immediately.

Further, our client has notified us that since the employment relationship has come to an end that you have made disparaging and

6 Ms Foote claims this firm acted negligently. However, no-one from the firm was called to give evidence, and it would not be just to identify this firm when it has not had the chance to put its own side of the story. I therefore choose not to identify the firm, or its advocates, in this determination.

negative comments regarding our client. We put you on notice that these comments should cease and desist immediately and that any further breaches will be regarded as a breach of the terms and conditions of the employment relationship. You have an obligation of good faith that does survive termination of employment as outlined in the contractual obligations between the parties.

Furthermore, please be advised that our client is not covered by any restraint of trade or any other terms at the end of the employment relationship. However our client will maintain the confidentiality provisions contained within the agreement and we accept that this remains enforce [sic] following termination.

Please provide the information that we have requested as a matter of urgency. If we have not heard from you by 22 March 2017 we intend to file this matter on the Employment Relations Authority on behalf of our client.

[69] According to Ms Foote, she asked the advocacy firm on more than one occasion to raise a personal grievance on her behalf. For example, on 22 March 2017

Ms Foote wrote to the advocacy firm which included the following sentence:

Can you please let me know if I should be filing a Personal Grievance with the Employment Relations Office of [sic] is everything best left with you only? I have never had to take such an approach against an employer and again am quite disappointed and over whelmed by it all.

[70] Ms Foote said that she did not get a response to that question. On 3 May 2017

Ms Foote emailed the advocacy firm again, asking for an urgent update. She included the following sentence in the email:

I am adamant about taking a PG out against him for the way I was treated within his workplace and the continued way I have been treated and thrown out the door from giving my notice as required without any ill feelings at that time.

I look forward to hearing from you.

[71] Ninety days from the date when the respondent received Ms Foote's resignation (23 February 2017) is 24 May 2017. However, the company treated Ms Foote's employment as ceasing on 23 March 2017. Ninety days from that date expired on 21 June 2017.

[72] On 19 May 2017 Ms Foote again emailed the advocacy firm, asking again for an update "as soon as possible as to what next step can be taken". In this email Ms Foote also states " ... it is 4 days shy of being 3 months from the day they kicked me out".

[73] The advocacy firm engaged with Ms Foote during May and June about payments that she said were owed to her by the respondent, and the advocacy firm wrote to the respondent's representatives on 14 June 2017, seeking information under a number of headings. No reference to a personal grievance was made in that letter. On 7 July 2017 Ms Foote sent a long email to the advocacy firm, commenting on a letter of denial from the respondent with respect to payments Ms Foote said were owed to her, and in her email to the advocacy firm Ms Foote said:

I want what is owed and compensation for constructive dismissal (forcing me through constant bullying to resign). (I can give examples of bullying if need be and quite happy to).

[74] In late July the advocacy firm requested mediation on behalf of Ms Foote, although this was turned down by the respondent.

[75] On 8 August 2017 Ms Foote emailed the advocacy firm, asking for an update, saying that she needed to have it dealt with urgently because of financial difficulties. On 10 August 2017 Ms Foote again emailed the advocacy firm, setting out what she called her claims against Mr Mullins and the respondent. This email contained three headings, the second being "Constructive and wrongful dismissal". Under that heading Ms Foote referred to bullying, being put on garden leave without there being the right to do so in the employment agreement and insinuations being made to her clients about the reason for her departure.

[76] On 22 August 2017 the advocacy firm wrote to the Labour Inspectorate on behalf of Ms Foote, seeking its assistance in recovering moneys that she says are due to her. Ms Foote's evidence is that she "came to the end of her fuse" with the advocacy firm in November 2017 and terminated her retainer with them.

[77] Ms Foote says that she then attempted to retain the services of another lawyer who advised her to make her own claim to the Authority in the New Year. Ms Foote states in her written evidence:

... [the advocacy firm] had not followed through with my instructions on claiming for any loss of earnings or for constructive dismissal. Her [the other lawyer's] concern was that their negligence in not filing this within the 90 day period could penalise me in some way and have affect [sic] on any hearing or outcome of claim made.

[78] Ms Foote's statement of problem was lodged with the Authority on 26 January

2018.

Analysis

[79] Section 114 of the Act provides as follows:

114 Raising personal grievance

(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.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on

which the personal grievance was raised in accordance with this section.

[80] Section 115 provides examples of exceptional circumstances under s.114. these are as follows:

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances

include—

(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); or

(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; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

Did the letter of 17 March 2017 raise a personal grievance on behalf of Ms Foote?

[81] The letter sent by the advocacy firm was sent prior to Ms Foote's notice period expiring, on 23 March 2017. Subject to what follows below, the personal grievance therefore cannot have been raised in relation to the alleged constructive dismissal, as Ms Foote was still employed, on notice. In the Employment Court case of *New Zealand Automobile Association Inc v McKay*[7], Judge Colgan, as he was then, held that, where an employee has been dismissed on notice, he or she can only submit an unjustified disadvantage grievance during the period of notice. This is because the

dismissal does not actually occur until the period of notice expires.

[82] Judge Colgan went on to hold that, a claim for unjustified disadvantage raised prior to dismissal may be treated as a claim of unjustified dismissal subsequent to dismissal, so long as the issues raised are the same as the employer must respond to for the claim of unjustified disadvantage. Whilst *McKay* was decided under the Employment Contracts Act 1991, which has been replaced by the Act, the section dealing with the raising of a personal grievance under the 1991 Act was materially the same as the section in the Act (s 114) save that the employee had to 'submit' the personal grievance under the 1991 Act rather than 'raise' it.

[83] Does the 17 March 2017 letter from the advocacy firm raise a personal grievance which Ms Foote can rely upon in relation to her constructive dismissal allegation? The letter states clearly that Ms Foote was unjustifiably dismissed from the date when Ms Foote was placed on garden leave. This therefore appears to be a statement either that there was a sending away of Ms Foote by the respondent on 24

February 2017, or that the actions of the respondent in putting Ms Foote on garden leave without having the contractual right to do so amounted to a constructive dismissal. Either way, it is clear that the advocacy firm did raise a personal grievance

on behalf of Ms Foote about being put on garden leave.

7 [1996] 2 ERNZ 622

[84] However, it does not raise a personal grievance about the constructive dismissal that Ms Foote claims arose from the alleged bullying and other unfair treatment she says she was subjected to over a space of three years. The letter of 17

March states:

Our client further advises that during the term of the employment relationship our client was subject to substantial unfair treatment. Our client instructs that she was subject to workplace bullying and had unreasonable and unlawful deductions

made from her income.

[85] The letter therefore makes reference to bullying and unfair treatment. However, there are no details at all given about the bullying and unfair treatment which Ms Foote was allegedly subjected to. It is now well established that a personal grievance must contain enough detail to enable the employer to address it. As the Employment Court said in *Creedy v Commissioner of Police8* the grievance "..should be specified sufficiently to enable the employer to address it."

[86] I am satisfied that, merely saying that Ms Foote was subject to "substantial unfair treatment" and "workplace bullying" does not satisfy the specificity test of *Creedy*. That letter of 17 March cannot, therefore, be relied upon to enable Ms Foote to say she raised a personal grievance within 90 days of the alleged constructive dismissal.

[87] The Authority does have the jurisdiction to investigate whether Ms Foote was dismissed by the respondent's action of putting her on garden leave, but in order to argue that it has the jurisdiction to investigate whether she was unjustifiably constructively dismissed by the alleged bullying and unfair treatment, she must rely on s 115 of the Act.

Were there exceptional circumstances which occasioned the delay in raising the personal grievance for constructive dismissal?

[88] Ms Foote relies upon s.115(b) of the Act, asserting that she made reasonable arrangements to have her grievance raised on her behalf by the advocacy firm and that the advocacy firm unreasonably failed to ensure that the grievance was raised within

the required time.

8 [2006] NZEmpC 43; [2006] ERNZ 517

[89] It does appear that the advocacy firm was clearly made aware by Ms Foote, both before and after the expiry of the 90 days following the end of her notice period, that she wished to raise a grievance about her constructive dismissal allegation. The email of 3 May, for example, clearly indicates a desire to raise a personal grievance about "the way [she] was treated within the workplace". Whilst no email prior to the expiry of the 90 days states unequivocally that she wished to raise a personal grievance for constructive dismissal, Ms Foote says she had conversations with the advocates at the firm which made that clear. I accept that evidence as likely to be true.

[90] It is completely unclear why the advocacy firm failed to raise a personal grievance for Ms Foote. However, on the evidence presented, I accept that Ms Foote did make reasonable arrangements to have her personal grievance raised on her behalf by the advocacy firm and that that firm unreasonably failed to ensure that the grievance was raised within the required time.

[91] However, there are two impediments which prevent Ms Foote relying on s 115 of the Act to enable the Authority to grant leave to raise her personal grievance for unjustified constructive dismissal out of time. Section 114(4)(a) of the Act makes clear that the delay in raising a personal grievance must have been "occasioned by exceptional circumstances". This indicates that exceptional circumstances must have been responsible for the entire delay, and not just part of it. Depending on when Ms Foote's employment ended, the 90 days expired either on 25 May 2017 (if her employment ended when she was put on garden leave without any contractual right to do so) or on 21 June 2017 (if her employment ended on 23 March 2017, when her one month's notice from resignation ended).

[92] Ms Foote did not raise a personal grievance for constructive dismissal with the respondent until the statement of problem, which she originally lodged on 24 January

2018, was received by the respondent on 12 February 2018. This delay is because there were problems with the documentation lodged by Ms Foote, which were corrected on 7 February.

[93] In any event, Ms Foote said in her oral evidence to the Authority that she had already known about the concept of constructive dismissal when she resigned from the respondent, and that she had known about the requirement to raise a personal

grievance within 90 days "for years". She also said that she had had no intention of raising a personal grievance when she resigned, but that she changed her mind later. It is evident that she had formed the intention of doing so by 22 March 2017, when she emailed the advocacy firm about doing so.

[94] Ms Foote said that she terminated her retainer with the advocacy firm in November 2017, and then tried to see another 'lawyer' but could not do so until January. She lodged her statement of problem shortly afterwards when this lawyer said she was better off pursuing the claim herself.

[95] This factual scenario shows that, by November 2017, Ms Foote had decided that the advocacy firm was not going to raise her personal grievance for her, but took no active steps to lodge her statement of problem (which was the only way she has raised her personal grievance for constructive dismissal) until 24 January 2018. This is even though she already knew that she should have raised the personal grievance with 90 days of the dismissal.

[96] Therefore, the delay has not been entirely occasioned by Ms Foote being let down by the advocacy firm, but has also been occasioned by her not raising the grievance, for a reason she has not satisfactorily explained. Even if Ms Foote had believed

(wrongly) that only a legal representative could raise a grievance for her, she did not have to wait from November 2017 until 24 January 2018 to find a representative willing to do it for her, given that she knew of the 90 day requirement. Therefore, I cannot find that the delay was occasioned by exceptional circumstances. It is well established that ignorance of the law in regard to the raising of a grievance is not an exceptional circumstance.

[97] In addition, I find that it would not be just (pursuant to s 114(4)(b) of the Act) to grant leave to Ms Foote to raise the grievance out of time in circumstances where Ms Foote was not ignorant of the legal requirement to raise a personal grievance within 90 days of the dismissal complained about but failed herself to raise the grievance. Ms Foote is obviously intelligent and articulate and, I conclude, could easily have raised the grievance herself when she had reached the conclusion that the

90 days was close to expiry, as her email of 19 May 2017 shows she did, and that the advocacy firm was failing her.

[98] I conclude that Ms Foote should not be granted leave to raise her personal grievance for constructive dismissal outside of the statutory 90 days period, as the delay in doing so was not entirely occasioned by exceptional circumstances, and because it would not be just to do so when she knew of the 90 day requirement but took no steps to raise the personal grievance herself.

Conclusion

[99] I find that Ms Foote was an employee in the period prior to 1 August 2016. This means that, if she is owed any arrears of pay or commission in relation to that period, or the period from 1 August to the termination of her employment, she can pursue recovery of those arrears in the Authority, either pursuant to the Wages Protection Act 1983, and/or by way of an action for breach of contract.

[100] However, Ms Foote cannot pursue any claims of unjustified disadvantage relating to alleged unfair treatment in relation to the period prior to 24 February 2017 as there is no evidence that she raised personal grievances in relation to each alleged incident of unfair treatment. In addition, Ms Foote did not raise a personal grievance in relation to unjustified constructive dismissal within the statutory 90 day timeframe, and I decline to grant leave for her to do so outside of that timeframe for the reasons given.

[101] Prior to the Authority's investigation meeting Ms Foote prepared a time line which, amongst other things, set out the sums which she says she is owed by the respondent. I understand from this document that Ms Foote claims the following sums in respect of alleged non-payment of commission and/or salary/and or holiday pay:

a. February 2014 - $110;

b. October 2014 to 1 August 2016 - $48,000;

c. 12/15 December 2015 - $1,200;

d. 1 August 2016 to 23 March 2017 - $2,000;

e. September to November 2016 - $300;

f. 28 February 2017 - $1,700;

g. 23 March 2017 - $1,700 and $2,769.60 holiday pay.

[102] Ms Foote is to confirm in writing to the Authority and Mr Kilpatrick within 14 days after the date of this determination whether this summary accurately reflects her claims for arrears. It should be noted, though, that the alleged loss referred to under the heading "June 2014" in her timeline is not recoverable in the Authority because it relates to an alleged loss arising out of Ms Foote's tenancy agreement, and so is not a matter arising from an employment relationship problem.

[103] The difference in pay claimed from 23 March 2017 "to now (2018)" is also not recoverable because it relates to lost wages that may only have been recoverable had Ms Foote been able to have pursued her unjustified constructive dismissal claim. Similarly, the $20,000 claimed for "unjustifiable and constructive dismissal' (which I assume is a claim for compensation under s 123(1)(c)(i) of the Act) is not recoverable.

[104] I understand from her statement of problem and her oral evidence that Ms Foote regards herself as having been dismissed with effect from 24 March 2017, when she was put on 'garden leave' outside of the terms of her employment agreement. A valid personal grievance was raised on her behalf in relation to her being put on garden leave unlawfully, and in relation to that being an unjustified dismissal.

[105] If Ms Foote intends to pursue a claim for unjustified dismissal and/or unjustified disadvantage resulting from being put on garden leave, she is to confirm that in writing to the Authority and the respondent within 14 days after the date of this determination. If she ultimately succeeds in such a claim she may be eligible for an award of remedies.

Direction to mediation

[106] I direct the parties to attend mediation in good faith to seek to agree how those claims may be resolved. Mediation is to

take place after Ms Foote has provided her confirmation as directed.

Costs

[107] I reserve the costs of this preliminary investigation until after any substantive investigation is held, unless matters are resolved at mediation. However, I will say that, at this stage, I am not minded to award any costs to the respondent given that

both parties have been partially successful. I am, however, open to submissions from the parties on this if they become relevant.

David Appleton

Member of the Employment Relations Authority
