IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 29
5380074

	BETWEEN	ADEBIMPE GEORGE Applicant
	A N D	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Oladeinde George, for Applicant Tim Cleary, Counsel for Respondent
Investigation meeting:	On the papers by consent
Submissions Received:	Various dates
Date of Determination:	11 February 2013

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

A. The Authority has jurisdiction to investigate a personal grievance of unjustified disadvantage with respect to alleged events on 15 April 2010. The Authority does not have jurisdiction to investigate the Applicant's personal grievances of discrimination by reason of her race, employment status or family status.

B. Costs are reserved.

Employment relationship problem

[1] Mrs George originally brought claims in the Employment Relations Authority for unjustified dismissal and a failure to maintain her health and safety. An investigation meeting to consider the substantive claims was held on 23 October 2013.

A brief of evidence submitted by Mrs George shortly before the investigation meeting raised further serious allegations which the Authority believed should be investigated, subject to jurisdiction. These matters were as follows:

(a) That Mrs George had been subjected to an unjustified disadvantage in her employment by virtue of the actions of a manager of the respondent on 15 April 2010 when that manager allegedly told Mrs George that she was dismissed;

(b) That those actions by the manager were unlawfully discriminatory on the grounds that they occurred by reason of Mrs George's race and/or her employment status;

(c) That the reason that Mrs George was dismissed by the respondent in August 2012 was by reason of her family status because she had had *too many babies.*

[2] Before the Authority can investigate the substance of these allegations, it must be satisfied that it has the jurisdiction to do so. All of these allegations would need to be raised as personal grievances (in respect of the disadvantage claim, pursuant to s.103(1)(b) of the Employment Relations Act 2000 (the Act) and in relation to the allegations of discrimination, pursuant to s.103(1)(c) of the Act).

[3] The respondent asserts that, contrary to the requirements of s.114 of the Act, Mrs George failed to raise the personal grievances with 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 Mrs George, whichever is the later. The respondent does not consent to the personal grievances being raised after the expiration of that period.

[4] In respect of the allegations in relation to the actions of the manager which are said to have occurred on 15 April 2010, Mrs George asserts that she did raise a grievance in respect of her complaints in a letter. With respect to the allegation that she was dismissed by reason of her family status because she had, as she asserts her husband was told, *too many babies*, she accepts that no personal grievance was raised within the time limit but seeks leave to do so under s.114(3).

[5] The purpose of this preliminary determination is to determine whether or not Mrs George raised her personal grievances pursuant to s.114 of the Act within the required 90 day period, and if she did not, whether she should be granted leave to do so outside of that 90 day time period.

[6] The parties have submitted a number of documents to the Authority and, by consent, the Authority makes its determination on the papers.

The statutory provisions

[7] Sections 114(1) to (4) of the Act state the following:

> *(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 one or more of the circumstances set out in s.115); and*
>
> *(b) considers it just to do so.*

[8] Section 115 sets out the exceptional circumstances referred to under s.114(4). These are as follows:

> *(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 obligations under section 120(1) to provide a statement of reasons for dismissal.*

The alleged actions on 15 April 2010

[9] Mrs George referred the Authority to a letter that she relies upon to argue that she raised grievances in respect of the alleged actions of the respondent's manager on 15 April 2010. The contents of this letter are as follows:

> *To Hariata Simes*
>
> *I am writing this letter to express my discontent with the discussion Silver Ferns Farm* [sic] *made concerning my employment with the plant. I was to resume work today on a graduated return to work rehabilitation plan when my case officer Myra informed me that I had been terminated from work and that my return to work was a temporary one.*
>
> *I do not understand how that came into being, I was later told that Warren the foreman had alleged that he had called me and because he could not get in contact with me I was terminated. When I moved to Lincoln I received my pay slips and my letters from my case officer Hariata at my new address.*
>
> *Warren the foreman made an allegation that he called me several times and I did not pick my call* [sic] *and that I had called him late last year that I was coming back to work.*
>
> *Late in June 2009 I called warren* [sic] *and asked him when the season was going to start and if it was possible for me to join the day shift, he carefully explained to me why I could not join the day shift and I reasoned with him and he said that the season was going to start in July. He did not ask me if and when I would be back. I left for my maternity leave late October 2008 and before I left for my leave I asked Francis Renner how long my job will be on hold for me to return to. He told me that my job would be there till October 2009.*
>
> *During this period my plan was to go back to work but I was still feeling sour* [sic], *I spoke to one of the nurses at the Lincoln clinic and explained to her that I had a wrist injury that I acquired while I worked for Silver fern farms some months back and she advised me to talk to the doctor about it.*
>
> *To my surprise the doctor told me to draft a letter to the plant and I did and immediately I received a reply and was told to see the specialist and that was when I got in contact with my first case officer who I believed would have got in contact with the plant to make*

> *enquiries there was no time during this period was I informed that my placement in Silver Fern Farms was a temporary one.*
>
> *Now I am humiliated, deprived from my freedom and left with a severe injury on my right wrist and only God knows when the injury will ever get healed. Myra would have handled things much more professionally and not to the way she did, she addressed me in an unjustly manner, and I felt humiliated.*
>
> *Psychologically I am zapped, I came into this country on the 1st of march 2008 to get a break from my country, Silver fern farms was my first ever place of employment and I started work there on the 10th of march 2008 and was promised an enjoyable working environment. Now am dreading ever working for the company. I had my first child December 2008 and I never enjoyed my motherhood I had to endure this same wrist injury bearing in mind that I am totally dependent on my right hand because of a wrist injury that could have been avoided if I was taught how to sharpen a knife during my cause* [sic] *of training. I had my operation done just 8 weeks ago and am still going through pain. Now I that I was told I was terminated, who in their right mind will employ a woman with an ACC injury that is still recovering. I think this is the height of injustice and intimidation.*
>
> *Yours faithfully,*
> *Ade*

[10] I must consider whether this letter, which was undated, constituted the raising of a personal grievance in respect of Mrs George's claims that she was subjected to an unjustified disadvantage in her employment and, furthermore, that she was subjected to discrimination by reason of her race and/or her employment status.

[11] Although the letter was undated, Mrs George did provide a copy of an email from herself to Ms Simes dated 15 April 2010, with the heading *Letter of discontent*, which appears to confirm that this letter had been sent to Ms Simes by email. The respondent has not challenged that the letter was sent to Ms Simes on the date in question, and so I accept this occurred.

[12] The Employment Court case of *Creedy v. Commissioner of Police* [2006] ERNZ 517 examined how specific a person raising a personal grievance needed to be in order to satisfy s.114(2) of the Act. The Employment Court stated the following (at para.[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 the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the 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.*

[13] Although Mrs George's letter to Ms Simes complains about her wrist injury, she is clearly also complaining about being told that she was terminated. This is clear, in my view, from the penultimate sentence of Mrs George's letter. Her reference to being told that she was being terminated tops and tails her letter and it is also clear from the subject heading of the email (*Letter of discontent*) that she was unhappy.

[14] Mrs George does not state specifically in her letter what the nature of the disadvantage that she is claiming was, but this is easily inferred from the content of the letter; namely, having sustained an injury, and now being on ACC, being terminated would put her in a position of not being able to find new work.

[15] I am satisfied that this letter gives enough information to the respondent to enable it to understand that Mrs George was complaining about being told that she had been terminated. It so happens that Mrs George was not ultimately treated as having been terminated at that point (her termination not happening until August 2012), but I am satisfied that Mrs George did raise a personal grievance in respect of the action of her employer.

[16] Accordingly, I believe that the Authority has jurisdiction to consider Mrs George's personal grievance of unjustified disadvantage.

Does the letter of discontent raise a personal grievance with respect to being discriminated against by reason of her race and her employment status?

[17] There is absolutely no reference whatsoever in the letter, either direct or indirect, of Mrs George being discriminated against by reason of her race. No matter how hard one may search, and putting the most creative interpretation on the contents of the letter, I am unable to discern any hint that Mrs George expressed a belief that she had been discriminated against on the grounds of her race in this letter.

[18] Similarly, I can see no reference in this letter to Mrs George believing that she had been discriminated against on the grounds of her employment status. Naturally, to be told that one has been dismissed has an impact on one's employment status.

However, it is the action of being told that she had been terminated that Mrs George is complaining about and Mrs George must show that she raised a personal grievance that the action of being terminated by the respondent (or being told that she had been terminated) was by reason of her employment status.

[19] Mrs George might argue that her employment status was being in receipt of ACC. However, I do not see anything in the letter relied upon by Mrs George to show that she was complaining that Myra had told her that she had been terminated by reason of her being on ACC. On the contrary, Mrs George appears to be saying in her letter that she was told that she had been terminated because the foreman, Warren, had tried to get in contact with her and that she had been terminated because he could not do so.

[20] Mrs George contends that the determining factor is not whether the word "discrimination" was specifically used in the letter but whether the facts of the case considered as a whole lead to an inference of discrimination and that the Authority is empowered by s.103A of the Act to take into account all the surrounding circumstances that it may consider relevant. I do not disagree with this submission as a general statement. However, one must come back to the words of the Employment Court in *Creedy*. I do not accept that it would be reasonable, even in all the circumstances that prevailed at the time, for the respondent to have inferred from the contents of the letter that Mrs George was raising a personal grievance in respect of discrimination against her. Indeed, no evidence has been put forward to say that Mrs George complained that she had raised a personal grievance of discrimination and it had not been dealt with. Merely because Mrs George happens to be of African descent or happened to be in receipt of an ACC entitlement is not sufficient, in my view, to expect the respondent to somehow intuit that Mrs George believed that she had been discriminated against on the grounds of her race or of being in receipt of ACC entitlements.

[21] Therefore, I do not accept that the letter of discontent raises a valid personal grievance by Mrs George that she had been discriminated against by reason of her race or her employment status. I therefore do not believe that Mrs George has raised personal grievances in relation to these allegations within 90 days of the alleged action by the respondent. The Authority therefore does not have jurisdiction to investigate these allegations.

Should Mrs George be allowed to raise a personal grievance outside of the 90 day time limit in respect of alleged discrimination on family status?

[22] Mrs George argues that she did not raise a personal grievance in respect of being told that she was dismissed or to be dismissed on the basis of *having had too many babies* because she was so affected and traumatised by the sequence of events giving rise to her personal grievance that she was unable to properly consider raising the grievance within the 90 day statutory time period.

[23] Mrs George also argues that she was not made to understand in the course of her employment her *full rights and privileges as an employee* and that the respondent did not explain to her at any time in the course of her employment of various mechanisms for resolving employment relationship problems as required by s.54 of the Act.

[24] The only evidence that Mrs George has submitted to the Authority of her being too traumatised to raise her grievance within the 90 day statutory time period is what she calls written evidence of Mr Bill Watt, the secretary of the Canterbury Branch of the New Zealand Meatworkers' Union (the Union). I believe that the evidence Mrs George is referring to is in the form of two letters that Mr Watt wrote to the Authority when it emerged that Mrs George was asserting that it was through the Union that she had learned that the respondent was intending to dismiss her because she had had too many babies. Having examined the content of these letters, it should first be noted that Mr Watt reports that he spoke to the individual who Mrs George states made the comment about having too many babies and that this individual *flatly denied telling* [Mr George] *that his wife had been dismissed because of the number of pregnancies that she had*.

[25] I also note that reference is made in the letters to Mr George in particular becoming agitated. It also does suggest that Mrs George became agitated. However, it really does not give any detail at all of the nature of the effect on Mrs George of her dismissal or the events leading up to it and so I do not find the letters referred to by Mrs George from Mr Watt as being particularly helpful in this regard.

[26] It appears from email correspondence disclosed by the Union that the conversation Mrs George relies upon took place on 27 April 2012, several months before her dismissal took effect, whereas the agitation referred to by Mr Watt in his letter occurred during a conversation between him and Mr and Mrs George on

9 November 2012. Given that Mr and Mrs George were still talking to the Union in November 2012, I simply do not accept that Mrs George was in such a state of trauma that she was unable to properly consider raising the personal grievance in time.

[27] With respect to the submission that the respondent did not make clear to Mrs George her full rights and privileges as an employee and the various mechanisms for resolving employment relationship problems, s.115(c) of the Act refers, as an example of an exceptional circumstance, to the employee's employment agreement not containing the explanation concerning the resolution of employment relationship problems required by s.54 or s.65. Mrs George was employed pursuant to a collective agreement between Silver Fern Farms Limited and the New Zealand Meatworkers' & Related Trades Union Inc. Therefore, s.54 is relevant.

[28] Section 54(3) states that a collective agreement must contain:

> *(iii) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised.*

[29] Clause 51 of the collective agreement states as follows:

> ***Disputes resolution***
>
> *(a) The meaning of the term Personal Grievance and the procedure for settling personal grievances shall be as provided for* [sic] *the Employment Relations Act 2000.*
>
> *(b) Any disputes over the interpretation, application or operation of this contract shall be settled using the procedure provided for in the Employment Relations Act 2000.*

[30] There appears to be no other reference in the lengthy collective agreement to the resolution of employment relationship problems. Section 10 of the Fairton Induction Handbook for the 2012/2013 season, which was disclosed by the respondent, is headed up *Employment relations issues*, and sets out the complaint procedures. However, although the various stages are detailed (employee grievance, department supervisor and delegate, union secretary and site management, Mediation Services, Employment Relations Authority and Employment Court), again no reference is made to the period of 90 days. Reference is made to the ability of an employee to apply, within three months, for an independent review hearing with respect to a decision made in relation to an ACC claim, but this does not satisfy s.54(3)(a)(iii).

[31] Counsel for the respondent submits that Mrs George's application for an extension of time does not satisfy the requirements of exceptional circumstances under ss.115(a) or (c) or any other ground. He does not, however, explain why s.115(c) is not satisfied. It would appear to me that, expressly, Mrs George's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s.54.

[32] Accordingly, given that s.114(4) states that the Authority may grant leave if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances, that s.115(c) states that an exceptional circumstance includes a failure of the employment agreement to comply with s.54 of the Act, and that there was such a failure in respect of Mrs George's employment agreement, I must now consider whether that failure *occasioned* Mrs George's delay in raising a personal grievance in respect of discrimination.

[33] Although neither Mrs George, nor her husband who represents her, are legally qualified I believe, the documentation that they have submitted to the Authority shows a good understanding of the law relating to the raising of employment relationship problems. In particular, I note the personal grievance letter dated 12 April 2012 had been raised by Mrs George when she believed that she was going to be dismissed. She raised this well within the period of 90 days from the date when she believed at that point that she had been dismissed in accordance with a letter from the respondent dated 9 March 2012. In this letter, she makes specific reference to s.103(a) and (b) of the Act. Unusually for an applicant who was not legally represented, Mrs George (and/or her husband) demonstrated an extremely good knowledge of the pertinent legislation. Therefore, I cannot find that Mrs George's delay in raising a personal grievance in respect of the allegation that she was dismissed for having too many babies *was occasioned* by a failure of the respondent's employment agreement to contain a s.54 explanation.

[34] Mrs George does not raise any other ground to explain why she failed to raise a personal grievance in respect of an allegation of discrimination on the grounds of family status outside of the 90 day time limit.

[35] Having found that s.114(4)(a) has not been satisfied, I do not need to go on to consider whether s.114(4)(b) is satisfied as the test set out in s.114(4) requires both limbs to be satisfied.

[36] Therefore, in summary, I decline to allow Mrs George to raise her personal grievance in respect of having allegedly been discriminated against on the grounds of her family status outside of the 90 day time period.

Summary

[37] Mrs George is allowed to pursue her personal grievance that she suffered an unjustified disadvantage in her employment in relation to alleged actions by Myra on 15 April 2010.

[38] Mrs George may not pursue her personal grievance of discrimination in respect of the same allegation; nor may she pursue a personal grievance in respect of alleged discrimination by reason of family status in relation to her dismissal in August 2012.

[39] Directions shall be given separately with respect to the hearing of evidence in relation to the unjustified disadvantage allegation.

Costs

[40] Costs are reserved until the conclusion of the substantive matter.

David Appleton
Member of the Employment Relations Authority