

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 326  
3038851

BETWEEN                    DION HALSE  
   Applicant  
  
A N D                        FONTERRA COOPERATIVE  
   GROUP LIMITED  
   Respondent

Member of Authority:    T G Tetitaha  
  
Representatives:         A Halse, Advocate for Applicant  
   R Rendle/K Jens, Counsel for Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions Received:    9 October 2018 from Applicant  
   16 October 2018 from Respondent  
  
Date of Determination:    18 October 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment Relationship Problem**

[1]    The applicant was dismissed on 21 February 2017 following an incident involving him hanging Christmas lights at the Te Awamutu Milk Supply Depot in December 2016.

[2]    He raised a personal grievance of unjustified dismissal on 3 March 2017 by letter. He also seeks to bring on for hearing a personal grievance of unjustified disadvantage for bullying by a manager MR that occurred in 2012 to 2015. There is a legal issue about whether the unjustified disadvantage of bullying was raised within 90 days with his employer.

### **Hearing on papers**

[3] The Authority held a telephone conference with the parties to seek to set this matter down for an early hearing on 15 to 16 November. The only basis upon which the respondent was prepared to accept an early hearing was if the preliminary issue about whether the bullying grievance had been raised was dealt with in advance of hearing.

[4] During the conference Allan Halse confirmed the applicant had not raised the personal grievance within 90 days and that his client was not seeking leave. This is because he believed there is dicta in an Authority decision *Jane Barnes v Canterbury Kindergarten Limited* [2018] NZERA Christchurch 31 (the *Barnes* determination) that allows personal grievances of bullying to be raised outside of the 90 days. He also referred generically to the Health and Safety at Work Act 2015 (HSWA) as providing another legislative override to the requirement for raising a grievance of bullying within 90 days. Given these were narrow legal points to be determined in order to resolve the issue of the requirement for leave, the parties agreed the preliminary issue could be dealt with upon the papers.

[5] A Minute from the Authority was issued following the telephone conference.<sup>1</sup> It set out the agreed preliminary issue “does the personal grievance of unjustified disadvantage for bullying have to be raised within 90 days?” It noted the parties agreement to determine this preliminary issue upon the papers. The second issue “Was [the applicant] unjustifiably dismissed by Fonterra?” does not require leave. It has been set down to be heard on 15 to 16 November in Hamilton. The parties were directed to file submissions about the preliminary issue and evidence for the hearing on 15 to 16 November.

### **Parties submissions**

[6] The applicant submits:

- a) there is dicta in an Authority decision *Jane Barnes v Canterbury Kindergarten Limited* [2018] NZERA Christchurch 31 that allows personal grievances to be raised outside of the 90 days;

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<sup>1</sup> Minute of the Authority dated 8 October 2018.

- b) On 23 December 2016 during a disciplinary meeting Allan Halse and the applicant referred to a previous personal grievance and made “explicit references to bullying and mismanagement.”
- c) Complains about bullying can often fall outside of the 90 day period because of the complex and covert nature of workplace bullying;
- d) The Authority ought to exercise discretion to accept evidence that sits outside of the 90 day period in cases of workplace bullying;
- e) It is a breach of natural justice not to do so;
- f) The Authority has accepted post-dismissal correspondence that did not explicitly use the term personal grievance to be used as evidence of a personal grievance refer *Kaye Gillian v Birchleigh Management Limited* [2018] NZERA Christchurch 142.

[7] The respondent submits:

- a) Section 114(1) Employment Relations Act 2000 (Act) states “every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer within the period of 90 days ...” (emphasis added)
- b) In *Barnes* the Authority clearly acknowledged the 90 day time limit for raising a personal grievance;
- c) *Barnes* provides no exception to the clear requirement in s114(1) that an employee must raise a personal grievance within 90 days;
- d) There is no provision in the HSWA that provides an exception to s114(1) of the Act;
- e) The Authority derives its jurisdiction from the Act;
- f) Any issues raised by the applicant that were outside of the Minute have not been addressed and the respondent seeks the opportunity to do so.

## **Determination**

[8] Section 114(1) of the Act requires a personal grievance to be raised with the employer within the 90 day period beginning with the date on which the action amounting to a personal grievance occurred or came to the notice of the employee whichever is later.<sup>2</sup>

[9] *Barnes* applied s114 of the Act. It does not create new law that overrides the s114(1) of the Act. It specifically referred to s114 of the Act at paragraph [27] when the Member makes the finding that Ms Barnes letter to the employer on 26 June 2015 “raised a personal grievance within the statutory timeframe in s114 of the Act.”

[10] There is no provision in the HSWA that overrides the application of s114(1) of the Act to cases of bullying.

[11] Although complains about bullying can often fall outside of the 90 day period because of the complex and covert nature of workplace bullying, this does not override s114. In those cases applicants may seek leave to raise the grievance. Allan Halse confirmed to the Authority at the telephone conference the applicant does not seek leave.

The Authority is a creature of statute. It cannot act outside of the jurisdiction conferred by the Act.

### ***Oral personal grievance?***

[12] Despite the advice of his representative at the telephone conference that his client did not raise a personal grievance within 90 days, it is now alleged in submissions that this may have occurred orally at a meeting on 23 December 2016 by reference to an earlier personal grievance.

[13] Without determining whether this in fact occurred, it still does not meet the requirements of s114(1) of the Act. This is because the alleged bullying set out in the applicants statement of problem at paragraphs 2.3, 2.10 to 2.13 occurred in 2013 to 2015. The last bullying event set out in the statement of problem at paragraph 2.13 occurred on 8 December 2015 when MR required the applicant to attend a disciplinary meeting pertaining to an earlier complaint by another staff member.

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<sup>2</sup> Section 114(1) of the Act.

Raising a grievance even orally on 23 December 2016 would still be just under 9 months outside of the time for raising a personal grievance.

[14] Even if leave had been sought, there is little or no evidence that meets the legal requirements for leave to raise a personal grievance out of time. The applicant must show the 9 month delay was occasioned by exceptional circumstances and it is in the interests of justice to grant leave.<sup>3</sup>

[15] At the time the bullying had occurred in 2013 to 2015, the applicant had instructed an advocate known litigating for bullying claims, Allan Halse and his firm Culturesafe. He instructed Allan Halse to raise a personal grievance on 14 January 2016.

[16] The letter dated 14 January 2016 attached to the statement of problem does not refer to bullying at all. It states the grievance was “for unjustified disadvantage caused by unwarranted written warnings received 19 October 2015 and 24 December 2015 respectively”. While I understand the applicant may be submitting his failure to refer to bullying does not mean it was not implied is not evidenced.

[17] The law requires that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.<sup>4</sup> I accept no formality is required to raise a personal grievance.<sup>5</sup> However the circumstances as pleaded by the applicant do not indicate any awareness by the employer that bullying was being raised at all.

[18] More importantly the parties then resolved the grievance by a memorandum of understanding signed by the applicant and MR on 11 February 2016 appended to the statement of problem. The memorandum sets out amongst other things, an agreement that:

The employer has (following Dion’s representation) agreed to reduce the term of the warning issued on 15 October 2015 to expire on 15 February 2016. The original position was for a six month period.

The employer confirms the warning issued on 24 December 2015 expires on 24 December 2016.

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<sup>3</sup> Section 114(3) of the Act.

<sup>4</sup> *Creedy v. Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

<sup>5</sup> *Twentyman v The Warehouse Limited* [2016] NZEmpC 172 at [42].

[19] Other matters were included in the memorandum of understanding including the appointment of a mentor for the applicant, an agreement to review the working relationship on a regular basis, and an apology by MR for the communication over the Christmas on-call arrangements.

[20] The delay in raising a personal grievance cannot have been occasioned by any ongoing behaviour by MR because no action after 8 December is referred to in the statement of problem. The memorandum also appears to have resolved his grievance about MR breaking any link to behaviour that is alleged to have occurred in December 2016. He had taken positive steps to resolve these issues by instructing an advocate and presumably upon his advocate's advice, reaching an agreement to resolve matters.

[21] Bullied employees frequently raise grievances within the statutory timeframe of 90 days or seek leave when they are raised outside of the time limitation. Given the applicant has confirmed he does not seek leave, I have no choice other than to dismiss the personal grievance of bullying.

***Evidence about bullying***

[22] The applicant appears to believe he cannot raise evidence of bullying at all as a consequence of any dismissal of his personal grievance of bullying. This is incorrect.

[23] This determination does not prevent the applicant's evidence referring to matters that occurred leading up to the dismissal on 21 February 2017. There are allegations in the personal grievance letter dated 17 May 2017 that the dismissal process itself was bullying starting with the decision to instigate a disciplinary process on or about 19 December 2016. Evidence about the fairness of the disciplinary process from 19 December 2016 to 21 February 2017 is admissible.

[24] In the circumstances the personal grievance of unjustified disadvantage due to bullying by MR in 2013 to 2015 is dismissed. Costs are reserved.