

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 167
3080433

BETWEEN ANDREAS JOE
 Applicant

AND JUKEN NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: John Farrow, counsel for the Applicant
 Stephen Corlett, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further 16 December 2019 from the Applicant
Information Received: 20 January 2020 from the Respondent
 27 January 2020 from the Applicant

Date of Determination: 28 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Preliminary jurisdiction determination

[1] This determination solely addresses the preliminary issues of whether or not the Authority:

- (a) Has jurisdiction to investigate Mr Joe's claims; and
- (b) Should exercise its discretion to dismiss these proceedings on the grounds that they are frivolous and vexatious.

[2] By agreement, these preliminary issues have been determined 'on the papers'. Both parties filed affidavit evidence and submissions.

Background

[3] Throughout 2015 Mr Andreas Joe worked at Juken New Zealand Limited's (Juken's) Northland Mill as a casual employee. He undertook stacking, wrapping and strapping of manufactured wood products.

[4] In 2017 Mr Joe was studying at Otago University. In 2017 Mr Joe became aware that Juken was seeking a casual employee to work during the university holidays, so he applied for and got the role.

[5] Mr Joe told Juken at the outset that he was able to work full-time over the university holidays between his first and second years of study at the University of Otago in Dunedin, but he would be returning to his studies in Dunedin at the end of February 2018.

[6] That timing worked well for Juken, because it needed a temporary employee to cover on a short term basis for another employee who was injured and on accident compensation, until that employee could return to work. The other employee was originally expected to return to work at the end of December 2017, but as it turned out that other employee had not recovered from his injury by then.

[7] Mr Joe described his work for Juken in 2017/2018 as "*a holiday job*" because he had expected to return to his university studies in Otago on 22 February 2018.¹ As it turned out Mr Joe did not actually return to Otago until 26 February 2018.

Fixed term engagement

[8] Accordingly, from 28 November 2017 Juken employed Mr Joe at its TriBoard Mill in Kaitaia on a fixed term basis, undertaking wrapping and strapping duties similar to the work that he had previously done at the Northland Mill in 2015. Mr Joe was employed to work four-day weeks, rostered from 7am until 5pm.

[9] Initially the period of Mr Joe's fixed term of employment was until 22 December 2017, to cover the other Juken employee's absence, with the possibility that the fixed term could be extended if that was required to continue to provide cover for the injured employee.

¹ Statement by Mr Joe to Mr Perry on 20 February 2018.

[10] When the other employee Mr Joe was covering for was unable to return to work in December 2017 or January 2018 Juken offered Mr Joe extensions to his initial fixed term. The extensions are discussed later.

[11] There is a dispute between the parties as to if/when Mr Joe's employment ended. Mr Joe claimed he was still employed by Juken, while Juken said his employment ended by mutual agreement on 25 February 2018. Juken said Mr Joe could not have continued working for it in its Kaitaia Mill because he had returned to his university studies in Dundee on 26 February 2018.

Extension(s) of original fixed term employment

[12] There were two extensions to the original fixed term that had been due to end on 22 December 2017.

[13] One extension Mr Joe signed, the other he did not because he suffered an intervening work injury that prevented him from returning to work. Neither of these two extensions to the expiry date of the fixed term complied with the prescriptive requirements of s 66 of the Employment Relations Act 2000 (the Act).

[14] Mr Joe claimed these deficiencies in the two extensions he was given meant he was a permanent employee who was still employed by Juken. This is discussed in more detail later.

[15] On 12 December 2017 Juken gave Mr Joe a memorandum that recorded his "*period of engagement*" as being from 23 December 2017 to 21 January 2018. Mr Joe signed that.

[16] Although Juken prepared a second memorandum dated 11 January 2018 that extended Mr Joe's "*period of employment*" from 22 January to 25 February 2018, that memorandum was never given to Mr Joe, so he did not sign it, because his accident on 17 January 2018 intervened.

[17] Juken nevertheless treated 25 February 2018 as Mr Joe's last day of work, even though he had been unable to attend work, due to his injuries, after the 17 January accident.

Termination documentation

[18] Juken produced a “*Termination of Employment Form*” that recorded 25 February 2018 as being Mr Joe’s “*date of termination*” on the basis he was a “*temp*” whose “*contract had ended.*” On 21 February 2018 Juken paid Mr Joe his final pay and holiday entitlements.

Work accident

[19] Mr Joe was run over by a forklift while at work on 17 January 2018. He never returned to the workplace after that. He received accident compensation payments for his work related personal injury under the Accident Compensation Act 2001 (the ACA) until 13 December 2018.

Involvement of WorkSafe

[20] WorkSafe New Zealand investigated Mr Joe’s workplace accident to determine whether Juken should be prosecuted for breaches of the Health and Safety at Work Act 2015 (the HSWA).

[21] WorkSafe decided not to prosecute or take other action against Juken and Mr Joe was advised of that decision in writing on 25 January 2019. WorkSafe also informed Mr Joe that he had the right to undertake a private prosecution of Juken for breaches of HSWA if he wanted to pursue matters. Mr Joe has not done that.

‘Restorative justice’ meeting?

[22] Mr Joe had informed WorkSafe during its investigation that he wanted Juken to personally address with him the fact that he had suffered injuries while working for it. Based on that, WorkSafe informed Mr Joe that it had recommended to Juken that it hold a “*restorative justice*” meeting with him.

[23] Restorative justice is provided for by s 24A of the Sentencing Act 2002 and strictly relates to court ordered meetings between offenders and victims where the offender has plead guilty to a criminal charge.

[24] WorkSafe had no power or jurisdiction to direct Juken to attend a restorative justice meeting with Mr Joe. Juken had not been prosecuted or sentenced in respect of the accident, so was not obliged to make any payment of reparation to Mr Joe.

[25] The Authority does not have any jurisdiction under the Employment Relations Act or the Sentencing Act over restorative justice meetings.

[26] Although Juken had two in person meetings with Mr Joe, the first on 22 February 2019 and the second on 24 April 2019 after the WorkSafe recommendation, these were not “*restorative justice*” meetings under the Sentencing Act, because Juken had not been charged with, or plead guilty to, any criminal offence.

Mr Joe’s claims

[27] In his Statement of Problem Mr Joe claimed that Juken:

- (a) Failed to meet its contractual and legislative duties to provide him with a safe workplace;
- (b) Unjustifiably disadvantaged him:
 - (i) In January 2018 as a result of the injuries and losses he suffered due to his accident (“*the 2018 disadvantages*”); and
 - (ii) Over the period 25 January 2019 to 24 April 2019 relating to failures that involved ‘restorative justice’ related issues (“*the 2019 disadvantages*”).
- (c) Breached its good faith obligations to him regarding the ‘restorative justice’ meeting that occurred on 24 April 2019.

[28] In terms of remedies, Mr Joe sought:

- (a) A penalty for breaches of his employment agreement;
- (b) Damages for breaches of Juken’s contractual obligations to provide him with a safe workplace;
- (c) Distress compensation;
- (d) Lost remuneration from date of his accident until the date his employment ended;
- (e) Interest;
- (f) Legal costs.

Jurisdiction dispute

[29] Juken disputed the Authority's jurisdiction on the basis that:

- (a) The 2018 alleged disadvantage grievances were not raised within the 90 day timelimit specified in s 114(1) of the Act and it did not consent to these being raised out of time;
- (b) The 2019 alleged disadvantage grievances occurred after the parties' employment relationship had ended, so could not have been employment relationship problems in terms of the Authority's powers that are set out in s 161 of the Act;
- (c) The breach of good faith claims related to the 2019 disadvantages, meaning there was no employment relationship in existence at the material times, which was a prerequisite for the s 4 good faith obligations in the Act;
- (d) Mr Joe had not commenced his penalty action within 12 months of the alleged breaches of his employment agreement occurring, as required by s 135(5) of the Act;
- (e) The damages Mr Joe sought for the alleged breach of contract (failure to provide safe workplace) were barred by s 317(1)-(3) of the ACA because they related to losses that arose directly or indirectly out of his personal injury, and he had already received coverage and accident compensation for his injury.

[30] Juken further claimed that these jurisdictional problems, meant that Mr Joe's proceedings were frivolous and/or vexatious, and should be dismissed by the Authority.

[31] Mr Joe was not seeking to pursue a tort claim, because the Authority does not have jurisdiction over torts. Mr Joe recognised that the Authority does not have jurisdiction to determine whether Juken breached the HSWA or related legislation as that was a matter for WorkSafe. However Mr Joe said that the Authority did have jurisdiction to investigate all of his other claims.

No mediation

[32] The parties have not attended mediation. It was agreed by all involved that the preliminary jurisdiction issues, and the claim that these proceedings were frivolous and vexatious so should be struck out, should be determined before mediation occurred.

Issues

[33] The following issues are to be determined:

- (a) Does the Authority have jurisdiction to investigate Mr Joe's alleged 2018 disadvantage grievances?
- (b) Does the Authority have jurisdiction to investigate Mr Joe's alleged 2019 disadvantage grievances?
- (c) If Mr Joe did not raise disadvantage grievances within the 90 day time limit required by s 114(1) of the Act, should he now be granted leave under s 114(4) of the Act to raise disadvantage grievances out of time?
- (d) Does the Authority have jurisdiction to investigate Mr Joe's breach of good faith claims?
- (e) Does the Authority have jurisdiction over Mr Joe's claim that Juken breached its contractual and legislative duties to provide him with a safe workplace?
- (f) If so, does s 317(1)-(3) of the ACA bar damages from being awarded to Mr Joe if his breach of contract claim succeeds?
- (g) Is Mr Joe's penalty claim, for the alleged breaches of his employment agreement, time barred?
- (h) Can Mr Joe be awarded any of the other remedies he has sought in his SoP?
- (i) Should these proceedings be dismissed on the grounds they are frivolous and/or vexatious?
- (j) Should the parties be directed to attend mediation?
- (k) What, if any, costs and disbursements should be awarded?

Does the Authority have jurisdiction to investigate Mr Joe's alleged 2018 disadvantage grievances?

90 day time limit

[34] Section 114(1) of the Act requires an employee to raise a personal grievance claim within 90 days of it occurring, or coming to the notice of the employee, whichever is the later, unless the employer consents to it being raised out of time.

What did the 2018 disadvantage grievances relate to?

[35] According to paragraph 2.32 Mr Joe's alleged 2018 disadvantage grievances related to the "*injuries and losses he suffered*" due to the accident that occurred on 17 January 2018. That was the same form of words used by Mr Joe's lawyer in the letter to Juken, dated 21 June 2019 that raised his disadvantage grievances.

[36] Mr Joe therefore had until 18 April 2018 to raise disadvantage grievances relating to his accident. The first written record of Mr Joe having raised disadvantage grievances was his lawyer's letter dated 21 June 2019. That was more than 17 months after his 2018 accident, which was outside the 90 day time limit.

Did Mr Joe raise disadvantage grievances before 21 June 2019?

[37] Mr Joe said that although the 21 June 2019 letter from his lawyer was the first "*formal*" notification of his disadvantage grievances, he had previously verbally raised "*grievances*" with Juken's "*Site Manager*" when he was "*interviewed after the accident*".

[38] Mr Joe had two post accident interviews with Juken managers. The first interview with Mr Joe was conducted by Juken's Maintenance Manager, Mr Peter Clarke, on 31 January 2018. Mr Clarke took handwritten notes that he typed into a statement that was given to Mr Joe to review and sign. Mr Joe added some additional handwritten comments to the statement before he signed it.

[39] The second interview with Mr Joe was conducted by Juken's (then) Project Manager, Mr Jason Perry, on 20 February 2018. It was a much more detailed interview that followed up on matters that had arisen after the original interview and investigation had taken place. Mr Perry also addressed with Mr Joe rumours that had been circulating about the accident.

[40] Mr Perry left Juken's employ in April 2018. Before working for Juken Mr Perry had worked as a Police Officer with the Rank of Detective Sergeant 23 years. He had extensive experience in taking statements and recording information given to him, including from people who had been involved in incidents/accidents.

[41] Mr Perry took very detailed notes of what Mr Joe had told him. Mr Perry then typed his notes up into a draft witness statement, which he gave Mr Joe to review. The draft statement was then placed on the original investigation file.

[42] If Mr Joe had raised verbal grievances then he must have done so on either 31 January or 22 February 2018. However both managers who interviewed him disputed that Mr Joe had raised grievances with them. None of the contemporaneous notes/written statements recorded that a grievance had been raised.

Assessment of credibility

[43] Mr Joe's evidence about raising disadvantage grievances in January 2018 was not accepted by the Authority for the following reasons:

- (a) Mr Joe's evidence about verbally raising a grievance in 2018 was minimal and nowhere near sufficient to have met the legal test for raising a grievance. Even on Mr Joe's own account the information he claimed to have conveyed failed to put Juken on notice of the type of grievance, the facts associated with it or the remedy sought. The inadequate information Mr Joe claimed to have conveyed would not have enabled Juken to have addressed or responded to the alleged grievance;
- (b) Mr Joe did not act consistently with having raised a personal grievance within 90 days of the accident occurring or of his employment ending. He did not refer to it in his 4 November 2018 letter to Juken, or in his 21 December 2018, 22 February 2019 or 14 April 2019 meetings with Juken, or in his WorkSafe interview. These omissions undermine the credibility of his claim;
- (c) Mr Joe's lawyer's letter dated 21 June 2019, which specifically raised personal grievances on his behalf, never stated or acknowledged that any of the alleged grievances had previously already been raised by Mr Joe with Juken;
- (d) Mr Joe's lawyer's letter of 13 August 2019, that responded to Juken's claim that grievances had not been raised within 90 days, was the first time Mr Joe claimed he had already raised grievances with Juken. The letter stated "*It could be argued (if necessary) that Mr Joe raised grievances shortly following the incident. Mr Joe was injured at work, and after being injured he entered into*

discussions with Juken about the incident. In our view, he raised grievances at that time that he wanted Juken to address.”

- (e) The 13 August 2019 letter was non-specific in terms of what Mr Joe claimed he had actually said when raising the grievance, to who and when he had done that, the type of grievance raised, the facts relied on or the remedies sought. This lack of detail undermined the credibility of Mr Joe’s claim;
- (f) The information Mr Joe gave Mr Clarke on 31 January 2018 and Mr Perry on 20 February 2018 about the accident did not align with the evidence Mr Joe has now put into his 13 December 2019 affidavit. His perception of events has therefore fundamentally changed over time. This conflict is material and undermines his December 2019 evidence;
- (g) Neither the handwritten or the typed notes prepared in early 2018 support Mr Joe’s claim that he had raised a grievance. The statement Mr Joe amended in his own handwriting then signed on 31 January 2018, and his typed statement dated 20 February are more likely to be correct because they occurred within a month or so of the accident. His December 2019 affidavit was prepared almost 23 months after the accident;
- (h) Mr Perry was an independent, experienced and credible witness. He had no personal interest in this matter. That can be contrasted with Mr Joe who had considerable self interest in establishing that he had already raised grievances in 2018;
- (i) Mr Joe’s counsel claimed in submissions that Mr Joe had not “*formally notified a grievance*” until 21 June 2019 because Mr Joe “*believed he was legally and morally not able to do so.*” That submission undercut Mr Joe’s claim that he had already raised grievances in 2018. If Mr Joe didn’t believe he could raise a grievance why did he claim that he had done so in early 2018?

[44] The Authority concluded that it was more likely than not that Mr Joe did not raise any personal grievances with Juken in 2018.

Did any of the alleged 2018 disadvantage grievances first come to Mr Joe’s notice in 2019?

[45] The s 114(1) 90 day time limit in the Act runs from the later of either the date the grievance occurred or the date on which it came to the employee’s notice. The Authority has determined that he did not raise any of the 2018 grievances within 90 days of the grievances

occurring The Authority therefore now needs to determine whether any of the 2018 disadvantage grievances came to Mr Joe's notice for the first time in 2019.

[46] Mr Joe claimed that he did not know he had disadvantage grievances until after:

- (a) He was told by WorkSafe on 25 January 2019 that it would not be prosecuting Juken; and
- (b) He saw WorkSafe's report in October 2019.

[47] These alternative timeframes Mr Joe has put forward do not stand up to analysis, because it contradicts his previous evidence, namely that:

- (a) He knew in January 2018 that he had grievances against Juken;
- (b) He raised grievances with Juken in January 2018;
- (c) He deliberately decided not to pursue his dispute or grievance claims in 2018 based on an unidentified "*contact*" at WorkSafe telling him "*not to do anything*".

[48] Even if the Authority had accepted Mr Joe's claims that he did not know he had disadvantage grievances until 25 February 2019, he was still out of time because his grievances were not raised until the letter of 21 June 2019.

[49] In terms of the October 2019 WorkSafe report, Mr Joe attached an unsigned undated report from WorkSafe to his affidavit. He failed to explain why he had not seen this report until October 2019 when WorkSafe's decision was made in January 2019.

[50] Mr Joe's claim that he did not know that Juken had disadvantaged him until he read that report in October also did not withstand scrutiny. The 21 June 2019 letter Mr Joe's lawyer sent Juken raising his disadvantage grievances set out at paragraph 14 the specific failings that were said to have resulted in an unsafe workplace. These are the same items that appear in the report, strongly suggesting that Mr Joe's lawyer had seen the WorkSafe report before drafting the letter on Mr Joe's behalf that raised the grievances.

[51] Mr Joe also failed to set out in his affidavit what specific alleged disadvantage grievances did not come to his attention until 2019 or why he could now have reasonably been expected to have known about such matters when they had occurred in 2018.

[52] Mr Joe's claim that his disadvantage grievances did not come to his notice until 2019 did not succeed.

Outcome

[53] Mr Joe failed to raise his 2018 disadvantage grievances within 90 days of the grievances occurring or coming to his attention, whichever was the later contrary to the time limit specified in s 114(1) of the Act.

[54] Accordingly, the Authority does not have jurisdiction to investigate Mr Joe's 2018 disadvantage grievances, unless it granted him leave to raise these grievances out of time (this is discussed later).

Does the Authority have jurisdiction to investigate Mr Joe's alleged 2019 disadvantage grievances?

Requirement for parties to be in an employment relationship

[55] Section 161 of the Act gives the Authority exclusive jurisdiction to make determinations about employment relationship problems generally.

[56] Section 114 of the Act deals with the raising of personal grievance claims and it refers throughout that section to "*the employee*" and "*the employer*". An employee is defined in s 6 of the Act. That definition does not include parties who are not in an employment relationship, as defined by s 4(2) of the Act.

[57] Section 5 of the Act defines an "*employment relationship problem*" as including a personal grievance, dispute or other problem "*relating to or arising out of an employment relationship.*"

[58] Section 103(1)(b) of the Act expressly provides that a disadvantage grievance may relate to a condition of employment that survives termination of the employment.

[59] These sections in the Act indicate that the parties must be in an employment relationship at the time the disadvantage grievance claim occurred, unless it related to a condition of employment that continued to apply even after the employment had ended.

When did the 2019 disadvantage grievances occur or come to Mr Joe's notice?

[60] Paragraphs 1.2 - 1.5 of Mr Joe's Statement of Problem (SoP) lodged with the Authority on 6 November 2019 sets out the specific claims he has made against Juken.

[61] Paragraph 1.3 (a)-(g) of the SoP identified the specific alleged unjustified disadvantage grievances. These all related to the so-called "*restorative justice meeting*", that occurred on April 2019, so must have related actions/omissions by Juken over the period 25 January 2019 (advice from WorkSafe it would not be prosecuting Juken but it had recommended a "*restorative justice meeting*") to the 24 April 2019 meeting with Juken, that Mr Joe has incorrectly described as a "*restorative justice meeting*".

[62] Paragraph 1.4 of the SoP identified a breach of good faith claim, that related to the alleged disadvantages identified in paragraph 1.3 of the SoP, which was also alleged to have disadvantaged him.

[63] Paragraph 1.5 of the SoP identified that the actions identified in paragraphs 1.3 and 1.4 had unjustifiably disadvantaged Mr Joe in his employment, because "*he should have been afforded a fair and reasonable restorative justice process as an employee of JNL [Juken].*" He therefore claimed that failure also amounted to an unjustified disadvantage.

[64] Paragraphs 2.18 – 2.24 of the SoP provided more information about Mr Joe's disadvantage grievances. Paragraph 2.19 related to details of the April 2019 meeting while paragraph 2.20 set out alleged comments made during the April 2019 meeting, that Mr Joe claimed showed Juken had not acted as a reasonable employer.

[65] While Mr Joe was not clear about when each of his 2019 disadvantage grievances came to his attention, the timeframe they relate to benchmark the period as being from 25 January 2019 at the earliest (this was the date WorkSafe advised him in writing it would not be prosecuting Juken) to 24 April 2019, being the date he claimed to have had a "*restorative justice*" meeting with Juken.

When did Mr Joe's employment end, if at all?

[66] Mr Joe's claim that his employment had not ended, and so was still continuing was not credible and did not succeed.

[67] Such a claim was contrary to what the parties had expressly agreed at the outset of their 2017 employment relationship. Mr Joe's WorkSafe interview recorded that he was "*undertaking a Christmas holiday job*" with Juken so had "*temporary employment at the TriBorad Mill.*"

[68] Mr Joe responded to an offer of "*casual work*" over his university holidays only, on the basis he would be returning to Otago University to continue his second year of university studies at the end of February 2018. Mr Joe also told Mr Perry during their 20 February 2018 interview that he (Mr Joe) was due to restart university on 22 February 2018.

[69] The parties shared a mutual intention that Mr Joe would only be available to work for Juken until his university holidays ended in February 2018. Both parties acted consistently with that mutual intention.

[70] Mr Joe's claim that he was still employed by Juken was also contrary to the way in which both parties actually conducted themselves. Mr Joe returned to Otago University as planned on 26 February 2018 and Juken paid him out his final pay including all holiday entitlements on 21 February 2018, which had included pay for the period up to and including 25 February 2018.

[71] Mr Joe did not allege to WorkSafe that he was still employed by Juken, even though he had returned to Otago University. Mr Joe's letter to Juken dated 4 November 2018 did not claim he was still employed. Mr Joe did not claim to still be employed when he met with Juken on 21 December 2018, 22 February 2019 or on 24 April 2019.

[72] The letter that Mr Joe's lawyer sent Juken on 21 June 2019 raising grievances did not claim he was still employed at that time. The 21 June letter expressly stated that Mr Joe "*had previously worked [at Juken] over the summer,*" thereby indicating that the temporary work he had agreed to do for Juken during his summer university holidays had ended. There was no suggestion that Mr Joe's employment had continued past the end of his 2017/2018 university holidays or that it was still ongoing.

[73] Nor did Mr Joe's lawyer's letter dated 13 August 2019 make any such claims. The 13 August 2019 letter was prepared in response to Juken's lawyer's letter of 27 June 2019 that stated Mr Joe's claim related "*to a timeframe when no employment relationship existed*". It was significant that Mr Joe's lawyer did not dispute that assertion. Quite the contrary, Mr Joe's

lawyer's letter of 13 August 2019 said the alleged disadvantage to Mr Joe arose "*after the end of the employment relationship*".

[74] Juken's lawyer wrote to Mr Joe again on 16 August 2019 reiterating that the 24 April 2019 meeting occurred after Mr Joe's employment had ended, so it could not have been an employment relationship problem because there was no employment relationship in existence at the time. Mr Joe's lawyer did not dispute Juken's assertion that his employment had ended well before the 24 April 2019 meeting.

[75] Mr Joe's SoP filed on 6 November 2019 also did not claim that he was still employed by Juken or that his employment had continued after he had returned to Otago University on 26 February 2018.

[76] The first time Mr Joe claimed to still be employed by Juken, or that his employment had continued past 25 February 2018, was in his affidavit dated 13 December 2019. Mr Joe filed that affidavit in response to Juken's challenge to the Authority's jurisdiction to investigate his claims. The lateness of Mr Joe's claim that he was still employed by Juken and the circumstances of that claim undermined the credibility of such an assertion.

[77] The Authority was satisfied on the balance of probabilities that it was more likely than not that Mr Joe's employment ended by mutual agreement on 25 February 2018.

[78] That was the last date that Mr Joe had agreed to be available to work for Juken, because the parties had always intended that he would return to his university studies at the end of his summer university holidays. The parties always acted consistently with that arrangement, and Mr Joe did in fact return to Dunedin on 26 February 2018.

What if any relevance does s 66 of the Act have to the date Mr Joe's employment ended?

[79] Having established that Mr Joe's employment ended on 25 February 2018, the Authority now has to deal with Mr Joe's claim that s 66 of the Act enabled him in December 2019 (yes, that date is correct 2019!) to elect (as at December 2019) to be a permanent employee of Juken's. On that basis he therefore claimed he was still an employee when the 2019 disadvantage grievances occurred.

[80] This argument does not succeed. It flies in the face of reality and is inconsistent with what s 66 of the Act actually says.

[81] Mr Joe is correct in that Juken failed to comply with the prescriptive requirements of s 66 of the Act. The extensions that were made to his fixed term employment did not meet the requirements of s 66(4) of the Act because they didn't record the way in which his employment would end or the reasons for his employment ending.

[82] The validity of the fixed term was only relevant to the issue of whether or not a dismissal had occurred. Section 66 of the Act is not relevant to these proceedings, because there was no dismissal and no dismissal grievance has ever been raised.

[83] Juken's operations are based entirely in the North Island and Mr Joe's former role was based in Kaitaia. From 26 February 2018 Mr Joe was studying in Dunedin. He was never in a geographical position to be able to maintain ongoing employment, nor did he ever express a wish to do so.

[84] Mr Joe cannot now purport to revive a former employment relationship that ended by mutual agreement on 25 February 2018, for the purposes of pursuing alleged grievances that arose after his employment had ended.

[85] The outcome of an employer's failure to comply with all of the requirements set out in s 66 of the Act, is set out in s 66(6) of the Act, namely the employer is unable to rely on the fixed term to end the employment relationship. That gives the affected employee the right to pursue a dismissal grievance against the employer that if it has not complied with all of the requirements of s 66 cannot then claim the employment ended by operation of a valid fixed term.

[86] The ending of a valid fixed term engagement is not a dismissal, because the employment ends by operation of the expiry of the fixed term. However the ending by an employer of fixed term employment in reliance on an invalid fixed term is a dismissal, as it is a sending away at the employer's initiative, if the employee did not want their employment to end.

[87] If Mr Joe had issues with the fixed term nature of his employment then he needed to have raised those issues, at the latest, within 90 days of his employment ending. He did not do so.

[88] Nor did his SoP identify a dismissal grievance as one of the employment relationship problems he wants resolved. Mr Joe's lawyers have also never raised or referred to a dismissal

grievance on his behalf. This entirely new argument was raised for the first time by his counsel, on 16 December, in submissions.

[89] Section 66 of the Act is irrelevant to the claims currently before the Authority.

[90] The right that s 66 confers on an employee is to bring a dismissal grievance if the employer relies on an invalid fixed term clause to end the employment relationship. It is not the right to retrospectively recreate a permanent and ongoing employment relationship months or years after the employment had already ended.

Did any conditions of Mr Joe's employment continue after his employment had ended?

[91] Mr Joe's claim that the 2019 disadvantage grievances related to the following conditions that survived the end of his employment relationship with Juken does not succeed:

- (a) Statutory duties under HSWA;
- (b) Duty to provide a safe workplace;
- (c) Good faith obligations in s 4 of the Act.

[92] These conditions relate to obligations that arise during the employment relationship. Mr Joe's employment agreement did not expressly provide that any such conditions would continue past the end of the employment relationship. Nor did the HSWA or s 4 of the Act impose unlimited and ongoing statutory obligations on a former employer, after an employment relationship had ended.

Outcome

[93] The employment relationship ended on 25 February 2018. The parties were therefore not in an employment relationship at the time the 2019 disadvantage grievances occurred and/or came to Mr Joe's notice.

[94] Because the parties were not in an employment relationship in 2019, and the alleged grievances that occurred in 2019 did not relate to any conditions that had survived the end of the employment relationship, the Authority does not have jurisdiction to investigate any of the alleged 2019 disadvantage grievances.

Should Mr Joe be granted leave under s 114(4) of the Act to raise disadvantage grievances out of time?

2019 disadvantage grievances

[95] Because there were no disadvantage grievances that occurred in 2019 over which the Authority had jurisdiction, there was no need to consider the 90-day issue and/or Mr Joe's application for leave to raise grievances relating to 2019 disadvantage grievances out of time.

[96] The application for leave under s 114(4) of the Act is therefore confined to the 2018 disadvantage grievances.

Section 114(4) of the Act

[97] Section 114(4) of the Act allows the Authority to grant leave to raise a personal grievance out of time if:

- (a) The delay in raising it was caused by exceptional circumstances; and
- (b) The Authority considers it just to grant leave.

2018 disadvantage grievances

[98] The disadvantage grievance was first raised out of time in June 2019. The accident occurred on 17 January 2018 and Mr Joe's employment ended on 25 February 2018.

[99] Mr Joe's affidavit indicates that he was aware of his alleged 2018 disadvantage grievance by 31 January 2018 at the latest, when he was interviewed by Mr Clarke about the accident.

Mr Joe's explanation for the delay in raising his disadvantage grievance(s)

[100] Mr Joe says that he did not pursue a dispute or other resolutions with Juken at the time of his injury or within 90 days of it occurring because he expected to be compensated for his suffering as part of the WorkSafe process.

[101] He said that he believed he was not legally allowed to take steps outside of WorkSafe's processes and he did not want to risk prejudicing himself, WorkSafe or Juken by bringing up matters about the investigation and accident in other forums.

[102] This evidence shows that Mr Joe made a deliberate decision not to raise a personal grievance, knowing that his employment agreement had specified that personal grievances had to be raised within 90 days of occurring or coming to his attention, whichever was the later.

[103] Mr Joe said that he had put his faith in a restorative justice meeting and believed that he would resolve all of his disputes and grievances with Juken at that meeting. That was a deliberate but also high risk strategy, because there was no certainty that a resolution would be arrived at.

[104] That evidence was also surprising because in the months after his accident no decision had been made about whether or not Juken would be prosecuted or if it was prosecuted that there would ever be a restorative justice meeting.

[105] Mr Joe was interviewed by two Juken investigators regarding the accident and by WorkSafe investigators who also independently investigated the accident. He therefore had opportunities to raise concerns about Juken's actions.

[106] Mr Joe said that he "*believed*" that a "*contact*" at WorkSafe told him not to do anything else while WorkSafe was involved. Mr Joe did not name his contact. He did not describe what position at WorkSafe his contact held or what the context of the conversation he alleged they had was, or why that person was giving Mr Joe advice on his employment agreement. Mr Joe did not explain why advice his "*contact*" supposedly gave him should be relied on over the express terms of Mr Joe's employment agreement.

[107] This unnamed, unidentified "*contact*" at WorkSafe did not provide evidence to the Authority. It seemed highly unlikely that someone from WorkSafe would be giving legal advice to Mr Joe not to exercise his employment rights, when it is the Authority and not WorkSafe that is the institution responsible for investigating employment relationship problems.

[108] Mr Joe's claim that he was told by his "*contact*" not to "*do anything else*" does not meet the exceptional circumstances test.

[109] Mr Joe did not explain why he believed this person was well placed to give him advice on his potential personal grievance claims. Nor did Mr Joe explain what the advice not to "*do anything else*" specifically related to, or why such a vague comment led him to believe that he

would prejudice the WorkSafe investigation by raising personal grievances within the 90 day timeframe.

[110] These explanations Mr Joe gave for the almost 17 month delay were unsatisfactory.

[111] It is more likely than not that Mr Joe believed that WorkSafe would resolve his issues because he expected to receive compensation as a result of its investigation. However, when WorkSafe decided not to take any action and when Juken did not offer him any compensation at the 24 April 2019 meeting Mr Joe decided to initiate these proceedings.

[112] The Authority noted that Juken had made two ex-gratia payments without admission of liability to Mr Joe totalling \$2,000. The first payment of \$1,000 was made by Juken to Mr Joe on 12 December 2018 and the second \$1,000 payment Juken made to Mr Joe on 22 February 2019.

Are there exceptional circumstances for the delay?

[113] In *Creedy v Commissioner of Police* the Supreme Court held that “*exceptional circumstances*” means unusual, in that it is the exception to the rule.²

[114] In *McCullough v AFFCO New Zealand Limited* the Employment Court rejected a claim of exceptional circumstances for the late submission of a grievance.³ The employee in that case had lost a thumb at work and decided not to file a personal grievance because he expected the employer to be prosecuted by the Department of Labour, and that it would likely receive a fine as a result of that prosecution.

[115] However, the prosecution was dismissed by the District Court when both parties failed to appear, and the Court subsequently refused to reinstate the prosecution. In *McCullough* the employee did not raise a personal grievance until 477 days after the accident.

[116] The Employment Court held that that delay was not occasioned by exceptional circumstances, as the dismissal of a prosecution was not an exceptional event. The Employment Court also noted that the delay was not caused by the employee’s belief that the employer would be prosecuted, but rather his choice not to exercise his right to file a grievance.

² [2008] NZSC 31.

³ [1998] 2 ERNZ 367.

[117] The Employment Court observed that there was no guarantee that the employer would be prosecuted, that the prosecution would result in a conviction or that a fine payable to the employee would be imposed. As such, the prospect of a prosecution was the reason why the employee had chosen not to file a grievance, but it was not in itself the cause of any delay, or an exceptional circumstance.

[118] That analysis is comparable to this case.

[119] Mr Joe elected not to pursue a dispute or other matters/grievances with Juken in early 2018 “*because I expected to be compensated for everything ... as part of the WorkSafe process ... because I was sure WorkSafe would prosecute JNL as my employer*”.

[120] While that is the reason why Mr Joe chose not to raise a grievance, in accordance with the timeframe advised in Schedule 2 his employment agreement, that choice did not mean that WorkSafe’s election not to prosecute Juken was an exceptional circumstance for the purposes of s 114(4) of the Act.

[121] In *Bruce v Rio Beverages Limited* the Authority held that a mistaken belief that a personal grievance could not be brought until criminal proceedings in the District Court were completed did not amount to exceptional circumstances.⁴

[122] As in *McCullough* and *Bruce*, ignorance of the law and/or an incorrect belief as to a person’s personal grievance rights, do not constitute exceptional circumstances for the purposes of the Act.

[123] The Authority considers that the delay was not caused by Mr Joe’s mistaken belief as to his rights but rather an intentional election not to raise a grievance based on his mistaken expectation that he would be receiving compensation as a result of the WorkSafe investigation.

Would it be just to grant leave?

[124] The Authority was also not satisfied that it would be just to grant leave, even if there had been exceptional circumstances.

[125] Schedule 2 of Mr Joe’s employment agreement clearly informed him of his right to raise a personal grievance against Juken and in particular it outlined the 90-day period for

⁴ ERA Auckland AA105/02 16 April 2002.

raising it. It also informed Mr Joe that he had the ability to lodge a claim with the Authority and identified who he could seek assistance from, including an advocate and/or lawyer.

[126] Mr Joe has a contractual damages claim for Juken's alleged failure to provide a safe workplace. That breach of contract claim is within time, and will traverse the circumstances that he now says also amount to disadvantage grievances. He can also pursue a private prosecution of Juken under HSWA.

[127] This indicates that Mr Joe has some other options currently available to him to address his concerns about Juken's actions that do not require him to be granted leave under s 114(4) of the Act.

[128] It has been well over two years since the accident occurred. At least one of Juken's witnesses is no longer employed by Juken. Statutory limitation periods are imposed to ensure that claimants pursue claims with reasonable diligence and to enable parties to move on without the threat of potential future litigation hanging over them indefinitely.

Outcome

[129] Mr Joe's application under s 114(4) of the Act for leave to raise disadvantage grievances out of time does not succeed.

Does the Authority have jurisdiction to investigate Mr Joe's breach of good faith claim?

[130] Section 4 of the Act expressly requires an "*employment relationship*" as a condition precedent to the existence of the obligation of good faith.

[131] Mr Joe's claim that Juken breached its good faith obligations regarding "*restorative justice*" meeting related to issues that arose from 25 January 2019 to 24 April 2019. Issues that arose over this period do not fall within the Authority's jurisdiction, because there was no employment relationship in existence at that time.

Does the Authority have jurisdiction to investigate Mr Joe's claim that Juken breached its contractual and legislative duties to provide him with a safe workplace?

[132] Clause 1.2 of Mr Joe's SoP identified both contractual and legislative breaches by Juken to provide him with a safe workplace.

[133] However legislative breaches of the HSWA are outside the Authority's jurisdiction. Breaches of an employer's implied contractual duty to provide a safe workplace is within the Authority's exclusive jurisdiction.

[134] Juken accepted that the Authority has jurisdiction to determine workplace safety claims by virtue of health and safety obligations being contained in Mr Joe's employment agreement and/or implied into the employment relationship.

[135] It is important to point out that this is a breach of contract claim, not an unjustified disadvantage grievance. Mr Joe was out of time for raising an unjustified disadvantage grievance regarding alleged failures by Juken to provide a safe workplace and he was not granted leave to raise such grievances out of time.

[136] The specific alleged breach of contract claims that the Authority has jurisdiction to investigate are those set out in paragraphs 2.15(a) – (h) of the SoP.

Outcome

[137] Mr Joe is not out of time to pursue his breach of contract claim, even though he was out of time to pursue these same concerns as discrete disadvantage grievances.

Does s 317(1)-(3) of the ACA bar damages from being awarded to Mr Joe if his breach of contract claim succeeds?

[138] Mr Joe's injury on 17 January 2018 was accepted. Accident Compensation Corporation gave him accident compensation coverage from 18 January 2018 and he received compensation payments up until 13 December 2018.

[139] Section 317 of the ACA prevents Mr Joe from issuing proceedings and seeking compensation/financial sums for the personal injury he suffered, that was covered by the ACA.

[140] The Employment Court in *Robinson v Pacific Seals New Zealand Limited* confirmed that compensation under the ACA is only available where the cause of the hurt, humiliation and/or injury to feelings is entirely disjunctive of the personal injury.⁵

⁵ [2014] NZEmpC 99 at [46].

[141] Section 317(1) of the ACA expressly states that a person may not bring proceedings for damages arising “*directly or indirectly*” out of a personal injury that is covered by the ACA or its former legislation.

[142] Mr Joe’s physical injuries are clearly covered by s 26(1)(b) of the ACA and his mental injuries (emotional suffering, hurt and humiliation) appear to be covered by s 26(1)(c), being mental injury as a result of the physical injuries he suffered, or by s 26(1)(da), being work-related mental injury arising from a sudden event suffered in the workplace and which is not required to be casually linked to his physical injury.

[143] A work-related personal injury under s 28(1)(a) of the ACA includes a personal injury the person suffers while at any place for the purposes of their employment. An “*event*” includes an event that is sudden or a direct outcome of a sudden event, and includes a series of events that arise from the same cause or circumstance and together comprise a single incident or occasion, see s 21B(7) of the ACA.

[144] The loss and injuries that Mr Joe set out in paragraphs 2.25 to 2.32 and paragraph 3.1 of his SoP all appear to arise “*directly or indirectly*” from, and specifically relate to, the physical and mental harm he suffered arising from his work related accident.

[145] The damages Mr Joe has claimed, as currently pleaded in his SoP (see paragraph 2.25 for physical injuries and paragraph 2.27 for emotional effects on him), therefore do not appear to be disjunctive of the personal injury he suffered.

[146] The Employment Court in *Mitchell v Bluestar Print (NZ) Limited* examined the operation of s 317 of the Injury Prevention Rehabilitation and Compensation Act 2001 (IPRCA), which was the predecessor legislation to the ACA.⁶

[147] In *Bluestar* the employee had a number of work-related injuries and subsequently suffered post-traumatic stress disorder symptoms and had a “*major emotional response*” to his injuries.

[148] The Employment Court held that the employee could not be compensated for lost wages or benefits because that was covered by the IPRCA compensation, but that he could recover

⁶ [2008] ERNZ 594.

distress compensation for a personal grievance, because that compensation was unrelated to the personal injury.

[149] Section 317(2)(c) of the ACA confirms that it does not prevent any person bringing proceedings relating to any personal grievance. However, the actual ACA restrictions on damages that Mr Joe could potentially be awarded does not need to be finally determined now. It will only need to be determined if Mr Joe established Juken's liability for breaching its implied contractual duty to provide him with a safe workplace.

Is Mr Joe's penalty claim, for alleged breaches of his employment agreement, time barred?

Penalty claim

[150] Section 135(5) of the Act requires penalty claims to be commenced within 12 months of the date when the cause of action first became known, or should reasonably have become known, to the person bringing the action.

[151] Mr Joe should have known, or ought reasonably to have known, as at 17 January 2018 that he had a claim for a penalty arising from an alleged breach of an employment agreement. He therefore had to have commenced his penalty claim by 17 January 2019. He did not do so until 9 November 2019, so he is therefore out of time to pursue a penalty for an alleged breach of his employment agreement.

[152] The Authority does not have jurisdiction to investigate Mr Joe's penalty claim.

Can the Authority award Mr Joe any of the other remedies he has sought in his SoP?

Distress compensation

[153] Mr Joe cannot claim distress compensation under s 123(1)(c)(i) of the Act. That remedy is limited to personal grievance claims, and Mr Joe is unable to pursue any of his alleged disadvantage grievance claims.

Lost remuneration

[154] Mr Joe cannot recover lost remuneration because he has received accident compensation for his injury. Section 317(1)-(3) of the ACA prohibits the Authority from topping up Mr Joe's accident compensation payments.

Should this matter be dismissed on the grounds it is frivolous and/or vexatious?

[155] Clause 12A of Schedule 2 of the Act gives the Authority power to dismiss frivolous and/or vexatious proceedings.

[156] The Employment Court in *Lumsden v Sky City Management Limited* recognised that the Authority's power to dismiss proceedings on the grounds that they are frivolous and/or vexatious is limited and the threshold for establishing that is high.⁷ Dismissing a claim is a serious step, not one to be taken lightly.

[157] As Juken acknowledged, Mr Joe has a legitimate breach of duty claim. On that basis, this matter cannot be said to be frivolous and/or vexatious to the extent that it warrants dismissal at this early stage.

[158] The restrictions on the contractual damages that would potentially be available to Mr Joe, should his breach of duty claim succeed, is a matter for him and his advisor to assess when weighing up whether to continue with this claim if the matter does not settle at mediation.

[159] It does not in itself make the claim frivolous and/or vexatious because he can claim damages for loss that is not related (disjunctive) to his personal injury and he has the ability to amend his SoP to better reflect that is what he is in fact claiming.

[160] The Authority declines to exercise its discretion to dismiss Mr Joe's breach of duty claim on the basis it is a clearly arguable claim, so it cannot meet the frivolous or vexatious test.

Should the parties be directed to mediation?

[161] The parties are directed to mediation to occur within 30 days of the date of this determination.

[162] In person mediation is not required. Instead, mediation is to occur in the manner chosen by the mediator, after consultation with the parties. That may include mediation being conducted by telephone and/or video link or any other method that has been selected by the mediator.

⁷ [2015] ERNZ 389.

Summary

[163] The Authority makes the following findings:

- (a) Mr Joe's employment ended by mutual agreement on 25 February 2018, so Mr Joe could return to Otago University for his second year of study, as agreed at the outset of their relationship;
- (b) Mr Joe did not raise any personal grievance claims within 90 days of his employment ending on 25 February 2018, so his 2018 grievance claims are out of time;
- (c) Mr Joe's application for leave to raise 2018 disadvantage grievances out of time does not succeed;
- (d) The Authority does not have jurisdiction over any of the alleged personal grievance claims that arose in 2019 because:
 - (i) The parties were not in an employment relationship in 2019; and
 - (ii) None of the 2019 claims related to conditions that had survived the termination of the parties' employment relationship;
- (e) The Authority does not have jurisdiction to investigate Mr Joe's alleged breach of good faith claims, because the parties were not in an employment relationship when these claim allegedly arose;
- (f) The Authority does not have jurisdiction to investigate alleged breaches of the HSWA, as that is WorkSafe's role;
- (g) The Authority does have jurisdiction to investigate Mr Joe's claim that Juken breached its implied contractual duty to provide him with a safe workplace;
- (h) In terms of the remedies Mr Joe has claimed, the Authority may award contractual damages, subject to:
 - (i) Section 137(1)-(3) of the Accident Compensation Act 2001 barring an award of damages arising "*directly or indirectly*" out of the personal injury that Mr Joe has received accident compensation for;

- (ii) A contractual damages claim for psychological stress being disjunctive of the personal injury that was covered by the ACA.⁸
- (i) Mr Joe's penalty claim for a breach of his employment agreement is time barred under s 135(5) of the Act, because it was not commenced within 12 months of the alleged breach occurring;
- (j) Juken failed to establish that the Authority should exercise its discretion to dismiss these proceedings on the grounds that they were frivolous and/or vexatious;
- (k) The parties are directed to mediation to occur within 30 days; and
- (l) Costs will be dealt with by the Authority, if that becomes necessary, once the substantive matter has been resolved

Rachel Larmer
Member of the Employment Relations Authority