

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 393
3176967

BETWEEN

STEPHEN KNIGHT
Applicant

AND

COMMARC CONSULTING
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Ashleigh Fechney, advocate for Applicant
Abi Burrows, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 30 May 2023, 14 June 2023 and 19 July 2023 from the
Applicant
7 June 2023 and 19 July 2023 from the Respondent

Date of Determination: 25 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stephen Knight was employed by CommArc Consulting Limited as a Senior Systems Engineer.

[2] In early 2022 CommArc commenced a restructuring process with Mr Knight. After various consultation meetings and discussions Mr Knight's employment was terminated by CommArc based on redundancy.

[3] Mr Knight was unhappy with the decision to dismiss him and through his representative at the time he applied for mediation. CommArc refused to attend mediation, so Mr Knight lodged a statement of problem in the Authority.

[4] CommArc responded to Mr Knight's statement of problem with a statement in reply claiming that Mr Knight had not raised a personal grievance within the necessary time frame and therefore I do not have jurisdiction to deal with his claim.¹

[5] Mr Knight says his grievance was raised within the 90-day period through any one of three communications with CommArc about the issues he had with the termination of his employment. He also says if I find that he failed to raise a grievance within the 90-day period then I should permit the grievance to be raised outside of the 90-day period as there are exceptional circumstances.

The Authority's investigation

[6] The parties agreed that I would resolve the issue over whether a personal grievance was raised within the necessary time frame as a preliminary matter.

[7] I investigated this preliminary issue by receiving written submissions from the parties' representatives.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all of the evidence and submissions received, in this determination. I have set out the relevant facts and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

¹ Section 114 of the Employment Relations Act 2000.

Mr Knight's employment agreement

[9] Mr Knight was employed by CommArc pursuant to an employment agreement dated 15 February 2019. The employment agreement has two clauses that are relevant to redundancy:

- (a) Clause 12.2.2 in the agreement sets out redundancy compensation payable for employees with more than 12 months service, of one month's salary.
- (b) Clause 18.1 of the agreement provides that either party must give one month's notice of termination of employment. The clause also specified that CommArc could require Mr Knight to do such duties as it saw fit in the notice period or it could require Mr Knight not to attend work during the notice period or it could terminate Mr Knight's employment earlier than the expiry of the notice period by making a payment in lieu of Mr Knight's salary for the unexpired period of notice.

What happened

[10] On 14 March 2022 CommArc wrote to Mr Knight advising him of a proposed restructuring to his role which might lead to his role being disestablished (described in the letter as the role being made redundant) and his employment being terminated. Mr Knight was invited to a consultation meeting on 17 March 2022 with David de Cuevas, CommArc's managing director, who was leading the restructure process.

[11] In the March 2022 meeting various matters were discussed including an alternative role that Mr Knight could accept. A position description for the alternative role was provided to Mr Knight for him to consider on 18 March 2022.

[12] Mr Knight responded to Mr de Cuevas on 23 March 2022 querying the necessity to disestablish his current role given some recent changes in relevant circumstances and asking questions about the new role.

[13] On 24 March 2022 Mr de Cuevas provided CommArc's decision on the proposed restructure. The result being that Mr Knight's role would be disestablished and that the new role remained open for him to accept. In the decision, Mr de Cuevas stated:

If you do not wish to take up this offer, or we do not hear from you by close of business 28 March 2022, we will proceed with the proposal and your employment will be terminated by reason of redundancy. We reiterate that this decision is not a reflection on your performance. Should we proceed with this redundancy, your last day of work will be 25 April 2022, being four weeks from 28 March 2022. However, if you do not wish to work out your notice period, this can take effect from 28 March at your request.

[14] Mr Knight responded to the 24 March 2022 decision in an email of 26 March 2022. Mr Knight acknowledged what had been stated in the 24 March decision about the termination of his employment and he sought clarity on the notice payment and a redundancy payment, as follows:

... Could you please clarify that should I not wish to work out my notice period, this will be deemed as "Garden Leave" and that I will still be paid out my full month's salary in lieu of notice?

As per my section 12.2.2 of my Current Employment Contract, it states that I may be entitled to redundancy compensation of 1 month's salary, as I have more than 12 months continuous service to CommArc. I would appreciate if you could please clarify I can expect receive this redundancy compensation as per my Employment Contract?

[15] Mr de Cuevas responded to Mr Knight's questions on 28 March 2022. In an email it stated:

Under the redundancy option, if you do not wish to work out your notice we will pay you in lieu, in line with clause 12.2.2 in your contract. For clarity you would receive 1 month's salary paid out, or you would work four weeks.

[16] Mr Knight responded to this answer advising Mr de Cuevas that CommArc was required to give him one month's notice not four weeks, so if he was given notice of redundancy on 28 March 2022 then his last working day would be 28 April 2022. He also

advised that in addition to one month's notice he would also be entitled to one month's salary as redundancy compensation pursuant to clause 12.2.2 of his employment agreement.

[17] Mr de Cuevas replied to Mr Knight advising him that CommArc was happy to accept his interpretation of clause 12 of the agreement. And therefore, if Mr Knight was made redundant, he would receive four weeks' notice either worked or paid in lieu plus one month's pay as compensation.

[18] Mr Knight then advised Mr de Cuevas that he would "accept you are terminating my employment by way of redundancy". And that he would accept the offer of "Garden leave" and he would be paid his full salary in lieu of notice.

[19] Mr de Cuevas responded with a text message on 28 March 2022 stating "if you don't mind I'll line up tomorrow as official last day of that's ok?"

[20] CommArc then gave Mr Knight notice of termination on 29 March 2022, stating:

As confirmed with you via email, your employment is terminated by way of redundancy with effect 29 March 2022. As per your email you would like to receive payment in lieu of your four weeks' notice and you will receive redundancy compensation of one month's salary.

[21] Mr Knight was paid his final pay from CommArc on 29 March 2022. This was made up of:

- (a) Ordinary fortnightly salary and allowances.
- (b) An annual leave termination payment, i.e., accrued but untaken annual leave entitlement.
- (c) A payment for two public holidays.
- (d) A redundancy payment.
- (e) KiwiSaver contributions.

[22] Mr Knight did not return to work at CommArc from 29 March 2022

[23] On 29 March 2022 Mr Knight's advocate, at the time, wrote to CommArc advising it that she acted for Mr Knight and requesting a copy of his personnel file. In that correspondence the advocate also stated, that once she had received the files she would be requesting a mediation date to resolve the employment issues.

[24] Mr Knight then applied for mediation, sending through relevant information to mediation services. Mediation services wrote to CommArc on 15 June 2022 with a request for mediation. However, this communication from mediation services was just a request to attend mediation with Mr Knight it did not set out any detail of Mr Knight's complaint against CommArc.

[25] CommArc did not agree to attend mediation so Mr Knight lodged a statement of problem in the Authority and served on CommArc on 5 July 2022.

Issues for resolution of the preliminary matter

Was there a grievance raised within 90 days of the termination of Mr Knight's employment?

[26] Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[27] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

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.

[28] CommArc says Mr Knight failed to raise a personal grievance within the 90-day time period because:

- (a) His employment was terminated on 29 March 2022.
- (b) Neither the correspondence nor the request for mediation, which were sent within the 90-day period from the termination of employment, raised a grievance.
- (c) The statement of problem was lodged and served outside of the 90-day period.
- (d) In any event, the statement of problem does not adequately set out the basis of that grievance and, even if it was in time, it does not raise a grievance therefore the 90-day time frame has not been met.

[29] Mr Knight says he did raise a personal grievance in time:

- (a) His termination date was 29 April 2022, at the expiry of the one month notice period.
- (b) The relevant correspondence, the request for mediation and the statement of problem were all sent to CommArc within the 90-day period. Through this material he adequately informed CommArc of his employment dispute and therefore all of these communications raise a personal grievance.

[30] It is clear that Mr Knight's complaint is about the termination of his employment so the event that commences the 90-day time frame is the termination date.

[31] So, the questions for me to answer are:

- (a) When was Mr Knight dismissed i.e., what is the termination date and therefore what is the timeframe for raising a personal grievance?

(b) What was sent by Mr Knight to CommArc, in connection with any employment relationship problem, within this time frame?

(c) If anything was sent within timeframe did it raise a personal grievance?

If a grievance was not raised within 90 days of the termination of Mr Knight's employment are there special circumstances such that I should allow the grievance to be raised out of time?

[32] Section 114 of the Act sets out that if a grievance has been raised after the expiration of the 90-day period then the employee may apply for leave to raise the grievance out of time. The Authority may grant leave if it considers there are exceptional circumstances and it is just to do so. Special circumstances are set out in s 115 of the Act.

[33] So, the issue for me to resolve, if Mr Knight failed to raise a grievance within the 90-day period, is:

(a) Are there special circumstances relating to Mr Knight's failure to raise his grievance within the 90-day period; and

(b) Is it just for me to grant leave for the grievance to be raised outside of the 90-day period?

When was Mr Knight dismissed and therefore what is the timeframe for raising a personal grievance?

[34] The terms of Mr Knight's employment required CommArc to give one month's written notice of the termination of employment.

[35] CommArc gave Mr Knight notice of termination of employment on 29 March 2022. Mr Knight and CommArc disagree about the effect of that notice.

[36] The question that arises out of the notice of termination that CommArc gave Mr Knight is:

- (a) Was Mr Knight's termination on notice so that it ended one month after the notice was given, so the termination date was 29 April 2022; or
- (b) Was Mr Knight's termination without notice because Mr Knight was paid in lieu, so the termination date was the day of payment being 29 March 2022?

[37] This question is a mixed one of fact and law.² And in this regard the facts in this case are highly relevant.

[38] The first key thing to note from the facts is that in discussions between Mr Knight and CommArc, prior to notice of termination being given, is that both had different views about what was required and what would happen. Mr Knight said in correspondence with CommArc:

- (a) He was to be given one month's notice so, if he was given notice on 28 March 2022 his employment would end on 28 April 2022.
- (b) He would not work his notice period and instead he would be placed on garden leave but would be paid in any event. This indicates he believed he would still be employed during the notice period but not required to work.

[39] In correspondence with Mr Knight, CommArc said:

- (a) Mr Knight would be given four weeks notice, with the last day of work being 25 April 2022.
- (b) It could pay Mr Knight in lieu if he did not want to work notice period.

² *Ceres New Zealand LLC v DJK* [2020] NZEmpC 153 at [12].

[40] The next point is not only did the parties have differing views about notice and payment for the notice period, there was never any agreement about what both would be. The simple point being, that as a result, there was never an agreement between them as to what day Mr Knight's employment would end. It appears that discussions on this point were confused by two things – Mr de Cuevas referring to the notice period as four weeks and Mr Knight believing any payment in lieu was effecting a garden leave period.

[41] The text message from Mr de Cuevas on 28 March 2022 came close to clarifying when Mr Knight's employment would end. The problem however was the use of the term "official last day" – this could be seen as officially you will stop working on 29 March 2022 as you are not required to do any work, but you will still be employed for the notice period i.e., it could be interpreted as applying to a garden leave situation, which is what Mr Knight appears to have had in mind.

[42] What then follows is that the notice of termination is ambiguous about what the last day of employment will be. There is no actual statement of what the end date of Mr Knight's employment would be.

[43] Finally, this position is then compounded by the fact that the payment made to Mr Knight on 29 March 2022 does not make any reference to a payment for notice. It appears that CommArc included one months' notice period in the redundancy payment but did not tell Mr Knight this. So, on the face of it, it appears Mr Knight was not paid notice or if he realised he had been paid for the notice period he would not know how much was to be attributed to notice – this is particularly so because Mr de Cuevas always referred to notice as being four weeks.

[44] The end result is the parties never agreed what would happen regarding notice, other than Mr Knight would not work during it. They never agreed what the final day of work would be and neither the notice of termination nor Mr Knight's final payment made this clear.

[45] So in this case:

- (a) The ambiguity about the end date of employment and no agreement means it cannot be identified as an earlier date than the end of the actual notice period.
- (b) Because it is not clear that CommArc had correctly paid the notice period it cannot rely on a payment in lieu of notice to bring Mr Knight's employment to an end.

[46] My conclusion is Mr Knight was dismissed on notice and his last day of employment was at the expiry of the one month notice period being 29 April 2022.

[47] Calculating 90 days from this date means any grievance needed to be raised by 25 July 2022.

What communications were issued in the time period?

[48] There were three relevant communications in this time that may have raised a grievance for Mr Knight:

- (a) The letter from Mr Knight's advocate advising CommArc she was acting and requesting the file.
- (b) Mr Knight's request for mediation.
- (c) The statement of problem.

Do any of the correspondence, referral to mediation or the statement of problem amount to raising a personal grievance?

[49] The key principles for establishing if a grievance has been raised pursuant to s 114(2) of the Act have been addressed in various court decisions.³

[50] As I have set out in other cases, applying the relevant case law and the words of s 114(2) I believe the key principles for raising a personal grievance are:

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.
- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; and *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.⁴

[51] A personal grievance was not raised by the letter sent by Mr Knight's advocate nor by Mr Knight's request for mediation:

- (a) The letter from Mr Knight's advocate of 29 March 2022 was sent before the termination of Mr Knight's employment so it cannot raise a grievance in relation to his dismissal. Further, and in any event, I am not satisfied that the correspondence alleges a complaint that is in the nature of a personal grievance nor does it convey the substance of Mr Knight's complaint with sufficient information so that CommArc knows what it is that Mr Knight wants it to respond to.
- (b) The request for information simply advises CommArc that Mr Knight believes he has an employment relationship problem but there is insufficient detail to identify what the complaint actually is and again, CommArc would not be able to identify what it is that Mr Knight wants it to address.

[52] In contrast, the statement of problem has more information and does set out some detail of Mr Knight's complaint. The question is whether there is sufficient detail to raise a personal grievance. In this regard the statement of problem includes the following statements:

- (a) Mr Knight has been terminated from his job due to particular requirements introduced for his role. CommArc themselves did not introduce these requirements; the issue arose when a third-party client implemented a policy

⁴ *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14 at [21].

which imposed those requirements (paragraph one of the statement of problem).

- (b) CommArc had staff who could have covered the relevant part of Mr Knight's role until the third-party client changed their requirements, which would have been only a short period of time (paragraph two of the statement of problem).
- (c) Mr Knight was offered a lower position within CommArc but was unable to accept it when CommArc declined to negotiate the terms and conditions of that potential new role (paragraph one of the statement of problem).
- (d) Not everything was done to prevent the termination of Mr Knight's employment; was the termination of Mr Knight's employment done in good faith and in a fair and reasonable manner (paragraph three of the statement of problem)?
- (e) Mr Knight seeks compensation for the stress and mental anguish caused by the process, which was difficult and upsetting for Mr Knight (paragraph three of the statement of problem).

[53] Based on these various statements, Mr Knight's statement of problem:

- (a) Alleges a complaint that is in the nature of a personal grievance. The statement of problem alleges that Mr Knight was dismissed in a way that was procedurally unfair and unreasonable, his dismissal was not substantively justified and he seeks compensation for hurt and humiliation. This is clearly alleging a personal grievance for unjustifiable dismissal.
- (b) Indicates that Mr Knight wanted CommArc to respond to his complaint. By lodging and serving a statement of problem Mr Knight is clearly advising CommArc that he has a complaint that it needs to respond to including through the process of the Authority or mediation.

(c) Conveys the substance of Mr Knight's complaint with sufficient information so that the CommArc must have known what it was to respond to. This includes that the process of dismissal was unfair and unreasonable including in relation to redeployment as CommArc would not negotiate the new role offered, that the decision was not substantively justified as another employee could have covered Mr Knight's role until the new requirement was removed by the client and that Mr Knight should be paid compensation for these things.

[54] Therefore, I find that the statement of problem does raise a personal grievance for unjustifiable dismissal.

[55] I am satisfied that Mr Knight's statement of problem was lodged and served within the requisite 90-day period and it does raise a personal grievance for unjustifiable dismissal.

[56] Given this conclusion I do not need to consider Mr Knight's application for leave to raise a personal grievance outside of the 90-day period.

Conclusion

[57] Mr Knight's personal grievance for unjustifiable dismissal was raised within the required time frame and I do have jurisdiction to investigate and determine the claim.

[58] An Authority officer will now contact the parties' representatives to schedule a case management conference so that directions can be set for the investigation of Mr Knight's claim.

Costs

[59] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority