

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 21
3060452

BETWEEN VANESSA MACLEOD
Applicant
AND NGA RINGAWERA OTARAUUA
LIMITED
Respondent

Member of Authority: Trish MacKinnon
Representatives: William Simpson, counsel for the Applicant
Philip McCarthy, counsel for the Respondent
Investigation Meeting: On the papers
Submissions, Affidavits and Further Information Received: 5 March and 15 May 2020 from the Applicant
17 April 2020 from the Respondent
Date of Determination: 19 January 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Vanessa MacLeod claims to have been unjustifiably disadvantaged and unjustifiably dismissed by Nga Ringawera Otaraua Limited. She says she raised a personal grievance with her employer in accordance with the provisions of the Employment Relations Act 2000 (the Act).

[2] Nga Ringawera Otaraua Limited (NROL) denies Ms MacLeod's claims and denies that she raised a personal grievance within 90 days as required by the Act. It does not consent to her raising personal grievances out of time.

[3] In the course of a telephone conference with the parties it was agreed the preliminary matter of whether a grievance was raised in time would be determined on the papers following affidavits and submissions from the parties.

[4] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

Relevant law

[5] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days from the date on which the action alleged to amount to a personal grievance occurred, or came to the employee's attention, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.¹

[6] The grievance is raised with the 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.²

[7] Where the employer does not consent to the grievance being raised after the expiration of the 90 day period, the employee may apply to the Authority for leave to raise his or her personal grievance out of time and the Authority has the discretion to grant that in certain circumstances. Ms MacLeod has not made such an application to the Authority.

Was a personal grievance raised?

[8] NROL has raised two issues with respect to the raising of a personal grievance by Ms MacLeod. Firstly, NROL claims it did not receive the letter Mr Simpson asserts he sent raising Ms MacLeod's personal grievance within the 90 day period. The second issue concerns the adequacy of the information conveyed by that letter and whether it satisfies the requirements of the Act for raising a personal grievance. I will consider each of these issues after outlining the affidavit evidence and submissions of the parties.

¹ Employment Relations Act 2000 at s 114(1).

² N1, s 114(2).

[9] Ms MacLeod has deposed that her employment complaint began from 28 December 2018 and continued until she was dismissed from her employment. She says she met with her legal representative, Mr Simpson, on 17 January 2019 and explained her employment issues to him. She said he informed her of the need to lodge a personal grievance within 90 days of her employment complaint arising. Mr Simpson, who also provided an affidavit, confirmed he had advised her of this.

[10] Ms MacLeod has deposed she met with Mr Simpson again on 19 January 2019 when she reviewed and approved a letter he had drafted to her former employer raising a personal grievance in relation to her dismissal. She and Mr Simpson discussed whether to deliver the letter or post it, and agreed Mr Simpson would post it on Monday 21 January 2019 at the Waitara Post Office. Mr Simpson said he had advised against hand delivering the letter directly to NROL, whose registered office was not far from the post office, on the grounds that it would be unsafe and unprofessional to do so.

[11] It was Mr Simpson's affidavit evidence that he posted Ms MacLeod's personal grievance letter at or around 12.39 pm on Monday 21 January 2019. The letter was addressed to Mr John Doorbar, a Director of NROL, at NROL's registered address of 8 Warre Street Waitara 4320. Mr Simpson deposed that the letter was never returned to him or to Ms MacLeod advising that the address was incorrect. He surmised, therefore, that NROL had received his letter.

[12] Donna Eriwata, an employee and director of NROL, deposed that the Respondent did not receive, by post or any other means, Mr Simpson's letter dated 19 January 2019. Nor did NROL receive any follow-up communication from the Applicant or her representative, despite Mr Doorbar having provided his email address as a means of contact.

[13] Ms Eriwata's affidavit evidence is that NROL first received correspondence about an employment issue involving Ms MacLeod on 5 April 2019 by way of an email from the Ministry of Business, Innovation and Employment (MBIE) regarding the scheduling of mediation with Ms MacLeod. Ms Eriwata said the email did not contain sufficient information for NROL to understand what the employment relationship problem was "and in any event was well outside the 90 day time frame."

[14] NROL, through its legal representatives, declined mediation on 10 April 2019 on the basis that it had no knowledge of what Ms MacLeod wished to mediate. It included Mr

Simpson in its email to the Mediation Service. On 24 April 2019 Mr Simpson emailed NROL unsigned electronic versions of his 19 January 2019 letter and a document Mr Simpson referred to as a statement of problem, dated 28 March 2019. The latter document had not been lodged in the Authority and is a different document from the statement of problem Ms MacLeod lodged in the Authority on 3 May 2019.

[15] NROL responded through its legal representatives by letter dated 1 May 2019 denying that it had received either the 19 January 2019 letter or the 28 March 2019 statement of problem before receiving Mr Simpson's email and attachments of 24 April 2019. It stated that, even if it had received the letter of 19 January 2019, there were inadequate particulars of Ms MacLeod's claims to sufficiently inform NROL of the grievance being raised.

[16] Mr McCarthy submits on behalf of NROL that Ms MacLeod had a responsibility to take reasonable steps to ensure the grievance had been brought to the attention of her employer within the statutory timeframe. He notes there is no independent verification, for example by way of tracking and delivery confirmation, that the letter of 19 January 2019 was actually delivered.

[17] NROL submits the Authority should give little weight to Mr Simpson's affidavit evidence. Mr McCarthy observes it is unusual for a representative provide evidence, as Mr Simpson did by way of an affidavit to the Authority, and continue to act for the client as it raises issues of a conflict of interest. He submits that, even if Ms MacLeod could demonstrate the 19 January 2019 letter was received in time, the content was insufficient to provide NROL with the substance of her complaint.

[18] In reply submissions for Ms MacLeod, Mr Simpson asserts that, on 30 or 31 December 2018, Ms MacLeod and her husband, Simon MacLeod, orally raised a personal grievance in relation to Ms MacLeod's dismissal. Mr Simpson submits that Ms MacLeod gave notice of her personal grievance to the Respondent after she was advised on 31 December 2018 that her position had gone.

[19] Mr Simpson refers to documents attached to Ms MacLeod's statement of problem, or to affidavits. These include a timeline and the content of texts between Ms MacLeod and/or Mr MacLeod and Ms Eriwata, Mr John Doorbar, and Mr David Doorbar.

Discussion

Delivery

[20] As noted in paragraph 6 above, the Act requires an applicant to make, or take reasonable steps to make, the employer, or a representative of the employer, aware that the employee alleges a personal grievance that s/he wishes the employer to address. In this instance, Ms MacLeod says she and Mr Simpson agreed that Mr Simpson would post the letter to NROL at the local Waitara Post Office, using the company's registered address. Mr Simpson's evidence is that he posted it as agreed with his client on 21 January 2019.

[21] I accept that using standard post as a method of delivery was reasonable. There is no doubt that if Mr Simpson had sent the letter of 19 January 2019 to NROL by courier or by registered post, its progress and delivery could have been traced, leaving no room for debate over whether the item had been delivered to NROL. I note, however, there is no requirement under s 114 for courier or registered mail to be used when raising a personal grievance in writing. I also accept Mr Simpson posted the letter as he had agreed with his client.

[22] Ms Eriwata deposed that "No such letter was ever received by the Respondent (by postal delivery or otherwise)". She provided no information regarding NROL's registered office, for example whether it was staffed permanently or intermittently and, if so, by whom. Nor was any information provided regarding the collection of mail from the office. As stated previously, the letter was addressed to Mr John Doorbar, who did not provide an affidavit on the matter.

[23] Whether the Respondent did or did not receive the letter of 19 January 2019 concerning Ms MacLeod's personal grievance after Mr Simpson had mailed it on 21 January 2019 is a matter on which I cannot make a definitive finding on the information available to me. I do, however, accept it was reasonable for Mr Simpson to conclude his letter had been received by the employer as it was not returned to him, or to Ms MacLeod.

[24] I have considered NROL's submission about the appropriateness of Mr Simpson providing affidavit evidence while continuing to act for Ms MacLeod. In some circumstances I would find such a submission compelling but in this situation I do not. Given the circumstances, where Ms MacLeod's evidence is that she discussed and agreed with Mr Simpson over the method and timing of sending the letter, no person other than Mr Simpson

could have given evidence of the time and place of posting it. Additionally, as will become clear shortly, I have made findings that diminish the significance of the letter.

Content

[25] The 19 January 2019 letter drafted by Mr Simpson and approved by Ms MacLeod was written under the letterhead of the advocacy and support service with which Mr Simpson was associated. It was headed “Letter of Engagement and Introduction”. After itemising the date, Mr Simpson’s name and contact details, followed by Mr John Doorbar’s name, role (Chairman) and address of NROL, the letter had a secondary heading: “Re: Vanessa MacLeod- Personal Grievance.”

[26] The letter informed Mr Doorbar that Mr Simpson was acting for Ms MacLeod and that he “would like to treat this correspondence and the following matters raised as my clients personal grievance in regards to section 114 of the Employment Relations Act 2000.” It continued:

“Our client has advised this office that she (has) been dismissed from her employment with your organisation.

As a result of these allegations we are compelled and instructed by our client to pursue a personal grievance on her behalf that she has been dismissed.

This office looks forward to discuss this case with you and would like a formal response in writing to this personal grievance.”

[27] The next paragraphs of the letter contained a request for itemised information made pursuant to the Privacy Act 1993 and a list of the remedies Ms MacLeod would be seeking from NROL if she were successful in her personal grievance. Those remedies comprised lost income, compensation and costs.

[28] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*³, Judge Holden summarised key principles applicable to the raising of a personal grievance, and cited the authorities for these, which I have not included:

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might

³ [2019] NZEmpC 132.

constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[29] The letter of 19 January 2019 did not provide the employer with any information about the nature of Ms MacLeod's grievance other than identifying she had been dismissed, and wished to pursue a personal grievance. It may be inferred from those facts that Ms MacLeod was unhappy about her dismissal but, on its own, the letter contained insufficient information for the employer to address the matter.

[30] That is not the end of the matter, however. Attached to the statement of problem Ms MacLeod lodged in the Authority were documents including text messages and emailed letters sent between the parties from late December 2018 to 9 January 2019. The text messages show there was sometimes confusion between sender and recipient over exactly who the writer was. This arose from Ms MacLeod having sent texts from the same identifying address as her husband, Simon MacLeod. Mr MacLeod engaged in a robust exchange with Ms Eriwata about her treatment of his wife, and also sent messages about Ms Eriwata to Mr John Doorbar and Mr David Doorbar.

[31] The pertinent messages for the purpose of determining the preliminary issue are the exchanges between Ms MacLeod and Ms Eriwata and Ms MacLeod and Mr Doorbar. On 27 December 2018 Ms Eriwata texted Ms MacLeod that she had emailed her the contract which was being offered for the kitchen hand position. Ms MacLeod responded that she had received two contracts, both of which were for people other than herself. Ms Eriwata apologised but did not send the correct contract. Ms MacLeod texted Ms Eriwata again on 28 December 2018 noting she still did not have her contract. Ms Eriwata responded on 29 December 2018 acknowledging she had not sent the contract yet and telling Ms MacLeod not to panic because

she knew Ms MacLeod was coming back. Ms MacLeod responded that she was not panicking but needed to know what was in the contract for her.

[32] It seems that Ms Eriwata then sent Ms MacLeod the correct employment agreement as Ms MacLeod's next text to Ms Eriwata, still on 29 December, queried why she was on the same rate of pay as new employees and expressed her unhappiness at this. Ms Eriwata responded with a long text the same day, justifying the pay rate, and informing Ms MacLeod she would love her to accept the job. She said, however, Ms MacLeod should not accept it if she felt she could not be happy or work loyally for Ms Eriwata "without bringing down the happy friendly atmosphere that we want to create". She advised Ms MacLeod she needed an answer by 31 December 2018.

[33] There followed a further exchange between Ms MacLeod, who clearly wished to negotiate a pay rate that better reflected what she perceived as her value to NROL, and Ms Eriwata, who responded again to that issue and introduced some new ones regarding what duties Ms MacLeod was happy to undertake and what Ms Eriwata's expectations were around loyalty.

[34] Texts continued on 30 December 2018, this time originating from Mr MacLeod who engaged with Ms Eriwata in a vigorous and aggressive series of exchanges. He identified himself as Simon at the outset and, in the course of the exchanges, made threats, and told Ms Eriwata Ms MacLeod would not be coming back. He did not claim in those exchanges to be speaking on behalf of Ms MacLeod.

[35] A text message from Ms Eriwata to Ms MacLeod then informed her, amongst other things, that the position had now been filled. A series of text exchanges then took place between Mr MacLeod and Mr David Doorbar, and then Mr MacLeod and Mr John Doorbar, in which Mr MacLeod made allegations against Ms Eriwata and asked that she be stood down and inquiries be conducted into her. Those texts occurred from 1 January 2019.

[36] In some of the texts Mr MacLeod made serious allegations against Ms Eriwata that were not concerned with Ms MacLeod. He also referred to "workplace bullying" and sought attendance by himself and Ms MacLeod at a meeting of directors scheduled for 6 January where the matters he had raised were to be discussed. He and Ms MacLeod were not permitted to attend.

[37] A text from Mr John Doorbar to Mr MacLeod on 8 January 2019 informed him that a meeting had been held on Sunday (6 January) at which a statement from Ms MacLeod had been discussed and that Mr Doorbar would be responding to her. The statement, which was dated as having been emailed on 5 January 2019, formed part of the documentation attached to Ms MacLeod's statement of problem.

[38] I will not reproduce the statement, which was headed "Contract cancellation", but will describe its contents. It informed the directors that, although she had not been happy with the rate of pay offered to her, Ms MacLeod had advised Ms Eriwata she still wished to be employed under the new contract. The statement recorded that Ms Eriwata's response was to inform her she (Ms MacLeod) had lost her job and that Ms Eriwata did not want people like Ms MacLeod working for her.

[39] Ms MacLeod's statement included some matters relating to other unnamed employees, and made certain allegations about Ms Eriwata's actions which Ms MacLeod may have perceived as being linked or as indicating a pattern of behaviour. However, while those matters may have been extraneous to Ms MacLeod's complaint, and while her statement did not refer to a personal grievance, I am satisfied the statement's contents were sufficient to make it clear to the NROL directors that Ms MacLeod was unhappy over Ms Eriwata's treatment of her.

[40] I find the directors would have known from their consideration of Ms MacLeod's statement of 5 January 2019 that she was upset over the loss of her employment and the manner in which she had lost it. The letter Mr Simpson wrote to NROL following his meeting with Ms MacLeod on 17 January 2019 was formal confirmation that Ms MacLeod intended to pursue the matter. I find that, regardless of that letter, Ms MacLeod had raised a grievance with her employer in the statement the directors considered on 6 January 2019. That she did not describe her complaint as a personal grievance, and the employer may not at the time have recognised it as a personal grievance at the time, does not matter: she conveyed well enough to the employer the substance of her complaint.⁴

Conclusion

[41] Ms MacLeod raised a personal grievance within the statutory timeframe.

⁴ N3 at [37]

[42] The Authority will contact the parties shortly to discuss how Ms MacLeod's claims will be progressed. This will include a discussion of the benefit of further mediation.

Costs

[43] Costs are reserved. If an investigation meeting is held, costs will be considered at that time.

Trish MacKinnon
Member of the Employment Relations Authority