

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 94  
3082472  
3121634

BETWEEN VANESSA MCDONALD  
Applicant

AND WAIKATO REGIONAL  
COUNCIL  
Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person  
Andrea Dunseath, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 18 January 2021 from the Applicant  
2 February 2021 from the Respondent  
4 March 'in reply' from the Applicant

Case Management Conference 20 April 2021 with the parties

Date of Determination: March 17 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Vanessa McDonald seeks to have the Authority determine personal grievance claims alleging she was unjustifiably disadvantaged and ultimately constructively dismissed by her previous employer, Waikato Regional Council (“WRC”).

[2] Those claims cannot be progressed until it is determined whether Ms McDonald commenced her actions in relation to the personal grievances in the Authority within the

timeframe required by the Employment Relations Act 2000 (the Act). This determination decides that matter only.

## **Background**

[3] Ms McDonald began working for the Waikato Regional Council (“WRC”) in September 2016. Over time the employment relationship between the parties became increasingly difficult.

[4] In a letter dated 18 July 2017, Ms McDonald’s representative, CultureSafe NZ Ltd, sent a letter to WRC. The letter referred to a number of incidents said to give rise to a personal grievance. WRC was advised Ms McDonald had been unjustifiably disadvantaged by its failure to properly investigate those matters including her complaint of bullying. It was further alleged WRC had failed to provide a safe work environment.

[5] The parties attended mediation in early August 2017. The differences between them were not resolved.

[6] In a letter dated 10 August 2017 Ms McDonald expressed her dissatisfaction with WRC’s actions and advised of her immediate resignation (the “letter of resignation”). I shall return to this matter.

[7] Nothing further was exchanged between the parties until WRC received several emails in quick succession, ostensibly from Ms McDonald, more than two years later in early October 2019. The content of the messages led WRC to contact Ms McDonald’s mother.

[8] On 31 October 2019 CultureSafe asked WRC to provide copies of the material it had received, where it was suggested Ms McDonald was not the author of the correspondence. A dispute as to whether CultureSafe NZ Ltd had authority to act for Ms McDonald on this particular matter emerged.

[9] The conflict appears to have prompted CultureSafe to lodge an application with the Authority on 26 November 2019 (“the first application”). The stated purpose of the first application was to have the Authority order WRC to “provid[e] the Applicant with a copy of the information ... requested under the Privacy Act 1993 on 31 October 2019.”<sup>1</sup>

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<sup>1</sup> ‘Application to the Authority’ dated 25 November 2019 at para. 1.1.

[10] The Authority responded by letter on 27 November 2019 and advised it was:

- ... unable to accept [the application] for lodgement for the following reason(s):
- The ERA has no jurisdiction to deal with claims under the Privacy Act 1993.

[11] The letter requested CultureSafe furnish its bank account number and other details so as to allow the Authority to refund the filing fee.

[12] The following day (28 November 2019) CultureSafe lodged another application (“the second application”). The content of the second application was the same as the first and sought again to have the Authority order WRC to provide Ms McDonald with the documentation requested on 31 October 2019. The only difference between the first and second applications is that the reference to the Privacy Act 1993 was omitted from the second. The Authority did not process the second application.

[13] No further contact with the Authority was made by, or on behalf of, the applicant until 5 October 2020 (10 months later or thereabouts), when the director of CultureSafe, Allan Halse, enquired, by email, as to whether an outcome associated with the 28 November 2019 application had been made. The Authority replied to the 5 October 2020 email.

[14] The second application was subsequently served on WRC. In reply, WRC said the Authority therefore had no jurisdiction on the issue where the subject matter of the application was unrelated to the parties’ employment relationship.<sup>2</sup>

[15] On Ms McDonald’s behalf, on 12 October 2020 CultureSafe filed a third application, entitled “Amended Statement of Problem”, with the Authority. This was the third application to the Authority which involved the parties.<sup>3</sup> The “Amended Statement of Problem” detailed Ms McDonald’s disadvantage grievance as well as a constructive dismissal personal grievance. The Authority was asked to investigate those matters.

[16] On 27 October 2020 WRC lodged its response to the personal grievance claims set out in the “Amended Statement of Problem”. It said Ms McDonald had not commenced proceedings in the Authority for the unjustified disadvantage claim within the statutory timeframe. WRC further asserted that a personal grievance claim of constructive dismissal had

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<sup>2</sup> Statement in Reply received by the ERA on 21 October 2020.

<sup>3</sup> The intituling wrongly recorded the date of the document as 12 October 2019.

not been raised with it; that it did not consent to one being raised out of time, and; there were no exceptional circumstances on which a personal grievance could now be raised.

[17] As foreshadowed, the Authority must now determine, as a preliminary matter, whether Ms McDonald may progress her the personal grievance claims.

### **The Authority's investigation**

[18] During a case management conference with Ms McDonald's (then) representative, and counsel for WRC, it was agreed the matters raised in the application dated 28 November 2019 and the "Amended Statement of Problem" dated 12 October 2020 would be consolidated, so as to allow the Authority to more effectively dispose of the issues that have arisen as preliminary matters. The parties further agreed it was appropriate for the Authority to determine the preliminary matters on the papers.

[19] There were several events which caused the provision of information to the Authority to be delayed. For Ms McDonald there were difficulties in complying with timetable for the exchange of information, and at the point in which Ms McDonald had an opportunity to provide submissions in reply she was not represented.

[20] Further time was allowed for Ms McDonald to respond to the preliminary issue, and further information was provided to Ms McDonald including a conference call with the parties to ensure Ms McDonald understood the Authority's procedure and to provide an opportunity to provide any further information she wished the Authority to consider.

### **The legislation**

[21] Section 114 of the Employment Relations Act (the Act) governs what must be done to raise and pursue a personal grievance.

[22] Section 114 includes:

- what constitutes the raising of a personal grievance (at s114(2));
- the timeframes by which a personal grievance may be raised (at s114(1));  
and;
- when proceedings regarding a raised grievance must be commenced in the Authority (at s 114(6)).

- there are also several provisions which detail what may occur if a personal grievance is raised out of time if the delay is due to exceptional circumstances (at s 114(3)-(4)).

[23] Because each of above matters is important to this determination, it is helpful to set out the material provisions of s 114 of the Act, as below.

**114 Raising personal grievance:**

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
  - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
  - (b) considers it just to do so.
- (5) ...
- (6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with the section.

[24] Section 115 sets out a range of circumstances which, if established, must be accepted as exceptional such that a personal grievance may be raised with an employer out of time.

**The issues**

[25] The overarching issue in this application is whether Ms McDonald's claims alleging personal grievances can be heard and determined by the Authority. To determine that matter, and taking into account the submissions furnished by both parties, the Authority must decide:

- (a) Whether Ms McDonald raised a personal grievance for actions causing an unjustified disadvantage during her employment with WRC?
- (b) Whether the content of Ms McDonald's resignation letter raised a personal grievance for an unjustified constructive dismissal?
- (c) Can either the first or second applications lodged with the Authority in November 2019 be treated as commencing an action in relation to a personal grievance?
- (d) Does the third application (the "Amended Statement of Problem") lodged on 12 October 2020 satisfy the requirements of s 114(6).
- (e) If none of the applications satisfy the requirements of s 114(6), can Ms McDonald rely on the "exceptional circumstances" provisions to extend the time to bring an action in the Authority.

**Did Ms McDonald progress the personal grievances in accordance with s 114?**

***Whether the letter of 18 July 2017 raises a personal grievance?***

[26] There is no real dispute that the letter of 18 July 2017, written on Ms McDonald's behalf, constituted a unjustified disadvantage personal grievance claim in accordance with s 114(2). Nor does the WRC argue that the grievance was not raised within the 90 day time limit specified at s 114(1). At issue is whether the personal grievance claim was commenced within the statutory time frame at s 114(6). I shall return to this matter.

***Did the resignation letter raise a personal grievance?***

[27] In its reply to the "Amended Statement of Problem" WRC said the letter of resignation did not raise a grievance and it was unaware Ms McDonald considered she was unjustifiably dismissed until it received the third application in October 2020. It said the constructive dismissal personal grievance was therefore raised out of time and the Authority had no jurisdiction to determine the matter.

[28] WRC has since withdrawn its opposition as to whether Ms McDonald raised a personal grievance alleging a constructive dismissal. This change in position does not dispose of the matter however.

[29] To determine whether Ms McDonald commenced proceedings in the Authority in respect of a constructive dismissal personal grievance claim within the statutory timeframe stipulations under the Act, I must first determine when the grievance was raised. This is because s 114(6) requires an applicant to commence a personal grievance claim at the Authority within 3 years of having raised the grievance with the employer.

[30] In relation to how a grievance is raised, in *Creedy v Commissioner of Police* the Employment Court said:<sup>4</sup>

It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it.

[31] The starting point in determining whether and when a personal grievance was raised requires me to examine Ms McDonald's communications with WRC at the time her employment ended and assess whether sufficient information about the substance of the grievance was conveyed such that WRC (as the employer) was able to meaningfully respond to it.

[32] I accept Ms McDonald's letter of resignation did not expressly use the phrase "personal grievance". But s 114(2) of the Act does not necessitate a particular formula of words to be used when raising a personal grievance,<sup>5</sup> nor is an employee required to specify the remedies sought.<sup>6</sup> WRC further suggests Ms McDonald did not follow up with WRC to obtain a response to her letter of resignation because she did not intend to raise a personal grievance by it.

[33] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*<sup>7</sup> Judge Holden observed:

The grievance process is designed to be informal and accessible. ... Where there has been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising a grievance.

It does not matter what an employee intended his or her complaint to be... . It also does not matter whether the employer recognised the complaint as a personal

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<sup>4</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]-[37].

<sup>5</sup> See also *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36], and referred to in *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36].

<sup>6</sup> See *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112 at [40].

<sup>7</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [37].

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 s114(2) of the Act by conveying the substance of the complaint to the employer.<sup>8</sup>

[34] I find the letter of resignation must also be viewed as a continuation of the concerns Ms McDonald had raised as grievances on 18 July 2017, and of which the employer was aware.

[35] I have not replicated the entirety of the resignation letter but the key elements are summarised as follows.

- Ms McDonald referred to her work environment as being the worst she had experienced and referred to conversations she had had with the recipient.
- She said her bullying complaint has not been taken seriously, or properly investigated by WRC, and said the inquiry had been predetermined unfairly.
- Ms McDonald questioned why senior management had not supported or assisted her despite being aware of the circumstances in which her complaint arose.
- Penultimately, she observed the parties had very recently attended yet another mediation, which was described as “unproductive”.
- The letter was concluded with the notice of her immediate resignation and advise as to how WRC property would be returned.

[36] The way in which the letter was constructed allows for a clear inference that Ms McDonald's resignation was prompted by WRC's failure (as perceived by Ms McDonald) to properly address her concerns. The concerns were sufficient information to enable WRC to respond and address those matters.

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<sup>8</sup> Above at n7

[37] On balance I am satisfied a reasonable employer would have concluded from the content of the correspondence, that Ms McDonald had raised a personal grievance in the nature of a constructive dismissal.

***Summary of findings as to when the grievances were raised***

[38] I am satisfied Ms McDonald raised a personal grievance with WRC:

- (a) on 18 July 2017, alleging she had been unjustifiably disadvantaged; and an
- (b) on 10 August 2017 alleging, in effect, a forced and constructive dismissal.

***Do either of the applications lodged with the Authority on 26 and/or 28 November 2019 commence an action in relation to one or other of Ms McDonald's personal grievances?***

[39] Having decided Ms McDonald raised her grievances in accordance with s 114(1) and (2), I must examine whether, pursuant to s 114(6) she commenced an action in the Authority in relation to one or both of the grievances within 3 years of the date on which the material grievance was raised.

[40] As noted, on 26 November 2017, and again on 28 November 2017, Ms McDonald's representative lodged applications with the Authority. Each application was solely concerned with obtaining the emails said to have been sent in October 2019 to WRC, and any other documentation in relation to those emails. The only difference between the two is that the first cited the Privacy Act 1993 as the basis on which documents should be provided. That reference was omitted in the second application.

[41] In initial submissions Ms McDonald's (then) representative acknowledged the limited scope of the applications,<sup>9</sup> but asserted the applications sought determinations on matters preliminary to the advancement of her grievances. By this means it is said Ms McDonald "acted" on her case within the 3-year statutory time-limit.<sup>10</sup>

[42] I am not persuaded that the first and/or second applications lodged at the Authority (albeit they cited the same parties) is sufficient to meet the requirements of s 114(6). A critical feature of s 114(6) is that the action (or claim) commenced in the Authority must relate to a personal grievance. In this case, the first and second applications exclusively focussed on the

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<sup>9</sup> Submissions from the Representative for the Applicant, at para, 17.

<sup>10</sup> Above, at para. 20

email correspondence sent to WRC in October 2019 - those events occurred more than two years after the employment relationship ended. Each application sought an intervention that solely concerned the provision of information. Neither application referred at all to the existence of a personal grievance (or grievances) or that these were matters that need to be addressed by the Authority. Further, neither application sought remedies corresponding to a personal grievance claim.

[43] I am not persuaded the first and/or second applications of November 2019 can objectively be characterised as commencing an action that relates in any way to either of the personal grievances raised by Ms McDonald in 2017, and nothing was produced by Ms McDonald or her then representative to demonstrate otherwise. Notably, an email sent by Ms McDonald's representative to WRC on 26 November 2019 tends to undermine any suggestion that the first and second applications related to either grievance where the content of email informed WRC that proceedings in relation to the grievances would likely be lodged in two weeks. As it transpires the "Amended Statement of Problem" in relation to the personal grievances (the third application) was not lodged until almost a year later on 12 October 2020.

[44] It follows that the first and second applications did not commence actions in the Authority in relation to a personal grievance, and do not meet the statutory test at s 114(6).

[45] For completion I do not consider either application demonstrates a matter for which the Authority has jurisdiction to determine, where both applications sought orders for information governed by the Privacy Act, and for which the Authority does not have jurisdiction.

**Does the "Amended Statement of Problem" lodged with the Authority in October 2020 satisfy the requirements of s 114**

[46] There is a suggestion contained in Ms McDonald's submission to the Authority that the "Amended Statement of Problem" lodged with the Authority on 12 October 2020 may have been lodged in 2019.

[47] No evidence was produced to support that proposition and I do not accept it. The Authority's file system reveals Ms McDonald's "Amended Statement of Problem" was uploaded to it by Ms McDonald's representative on 12 October 2020. It is further telling that several days after Ms McDonald's representative sent an email seeking an urgent telephone conference with the Authority "to discuss the technicalities (alleged no jurisdiction)" [regarding the time-barred limitation] and went onto to advise "There are genuine reasons why

the substantive Statement of Problem has been delayed and I am happy to discuss those”.<sup>11</sup> There would be no reason to refer to causes that delayed the lodging of the Statement of Problem if the application had been lodged within the statutory timeframe.

[48] It is apparent from the content of the “Amended Statement of Problem” that it relates to the personal grievances raised over the course of July and August 2017. But to satisfy the requirements of s 114(6) that actions in relation to personal grievances must be commenced within 3 years of the date on which the personal grievance was raised, the grievance alleging a disadvantage was required to be lodged in the Authority before 18 July 2020. Similarly, the claim concerning the dismissal grievance needed to be lodged before 10 August 2020.

[49] I am bound to find the “Amended Statement of Problem” setting detailing Ms McDonald’s personal grievance claims was not commenced in the Authority within the statutory timeframe.

***Are the provisions regarding exceptional circumstances at s 114(4) and s115 relevant to the 3 year limitation (at s 114(6)) to bring an action***

[50] In submissions Ms McDonald refers to a range of circumstances which are said to have prevented her from lodging her claims in the Authority earlier, for which she says are exceptional.

[51] However, the provisions at s 114 which allow the Authority to grant leave to hear a personal grievance claim where the delay in raising the grievance within the required 90-day timeframe was occasioned by exceptional circumstances, does not apply to a delay in commencing an action relating to a personal grievance in the Authority. *In Blue Water Hotel Ltd*<sup>12</sup> the full Court observed the Act deliberately allowed for the Authority (or the Court) to extend the time frame to raise a personal grievance if exceptional circumstances were found to have caused the delay in raising the grievance, and it was just to do so. But the Act does not provide a parallel extension to the time limit for commencing a personal grievance action in the Authority. In this regard the time limit at s 114(6) is regarded as absolute.

[52] While I have no reason to believe Ms McDonald’s explanations concerning the delay in lodging her personal grievance claims were not genuine, there is nothing in the Act which permits the Authority to allow an applicant to commence an action in relation to a personal

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<sup>11</sup> Email dated 21 November 2020

<sup>12</sup> *Blue Water Hotel Ltd* [2018] NZEmpC 128

grievance more than 3 years after the personal grievance was raised. I make no comment on whether or not these circumstances meet the test of being “exceptional” as I am neither required to nor would a finding on those matters alter the outcome of this determination.

[53] Ms McDonald’s personal grievances are not able to be determined by the Authority and her claims are dismissed.

### **Costs**

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed,<sup>13</sup> the Waikato Regional Council may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms McDonald would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>13</sup> For further information about the factors considered in assessing costs, see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)