

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 281
5363996

BETWEEN ROSITA O'CONNOR
Applicant

A N D AUCKLAND
KINDERGARTEN
ASSOCIATION
Respondent

Member of Authority: Rachel Larmer

Representatives: Ian Gibson, Counsel for Applicant
Michael McFadden/Dean Organ, Advocates for
Respondent

Investigation Meeting: On the papers

Affidavit evidence: 05 July 2012 from Applicant
23 July 2012 from Respondent

Submissions Received: 06 July 2012 from Applicant
01 August 2012 from Respondent
08 August 2012 from Applicant
13 August 2012 from Respondent

Date of Determination: 17 August 2012

DETERMINATION OF THE AUTHORITY

- A. The Authority does not have jurisdiction to hear Rosita O'Connor's personal grievance claim for unjustified dismissal because she did not raise a personal grievance with her employer within 90 days of her dismissal. She therefore cannot meet the requirements of s.114(1) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Ms Rosita O'Connor was employed by Auckland Kindergarten Association (AKA) in August 1999. She was dismissed from her position as Head Teacher at the Kotiri Kindergarten on 24 January 2011. Ms O'Connor claims that her dismissal was unjustified.

[2] AKA says Ms O'Connor did not raise a personal grievance within 90 days of her dismissal, as required by s 114 of the Employment Relations Act 2000 (the Act). It says the Authority does not have jurisdiction to hear her personal grievance claim because it is out of time. AKA does not consent to Ms O'Connor raising her dismissal grievance claim out of time.

Investigation

[3] The parties agreed the 90 day issue would be dealt with on the papers as a preliminary issue. The parties filed affidavit evidence. Ms O'Connor and her lawyer Mr Ian Gibson of Blomkamp Cox filed affidavits in support of Ms O'Connor. Ms Tanya Harvey and Ms Kerry Ross filed affidavits on behalf of AKA. Both parties also subsequently filed written submissions.

Issues

[4] The issues that require determination include:

- (a) What is required to raise a personal grievance?
- (b) What did Ms O'Connor do to raise her dismissal grievance?
- (c) Did Ms O'Connor properly raise a personal grievance with AKA?
- (d) If not, did AKA impliedly consent to Ms O'Connor raising a personal grievance out of time?
- (e) Does the Authority have jurisdiction to hear Ms O'Connor's dismissal grievance?

What is required to raise a personal grievance?

[5] Whether an employee has raised a grievance within 90 days depends on whether they made their employer aware that they had a grievance which they wanted the employer to address. The leading case on what is required to constitute the raising of the personal grievance claim is the Employment Court's decision in *Creedy v Commissioner of Police*¹.

[6] The Court in *Creedy* made it clear that an aggrieved employee must provide their employer with sufficient information to enable the employer to address the alleged grievance. The grievance must therefore be sufficiently specified to enable the employer to address it. It is insufficient for an employee to merely advise that they believe they have a personal grievance, even if they have identified the type of grievance alleged.

[7] In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information so the employer is in a position where it is able to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.

[8] No particular form of words is needed, nor does a grievance have to be raised in writing. A grievance may also be raised by way of a series of interactions between the parties.² For example, an employee may rely on the employer's prior knowledge of events or disputes to supplement the employee's notification about the raising of a personal grievance.³

[9] Whether the employee has presented enough information about the alleged grievance to their employer to enable the employer to address or resolve it is to be objectively determined. The employee bears the onus, on the balance of probabilities, of establishing that they raised their personal grievance with the employer within the 90 day time limit specified in s.114(1) of the Act.

¹ [2006] ERNZ 517.

² *Ovation New Zealand Limited (formerly Bernard Matthews New Zealand Limited v Puhia* [2011] NZEmpC 11.

³ *Dickson v Unilever New Zealand Limited* (2009) 6 NZELR 463

What did Ms O'Connor do to raise her dismissal grievance?

[10] Ms O'Connor's affidavit says she instructed Blomkamp Cox to *review her dismissal* and on 14 April 2011 Mr Gibson, wrote to AKA which she says *gave notice of her grievance and raised numerous questions about the lack of procedure*. This letter was sent 79 days after her dismissal so it was within the 90 day time limit.

[11] Mr Gibson's letter asked AKA to respond to four specific questions involving process issues connected with Ms O'Connor's dismissal. It then also made three points under the heading *General Points*. The final sentence states:

We have raised this matter within the prescribed 90 day period and look forward to receiving your reply in due course.

[12] AKA says the first reference to unjustified dismissal made on Ms O'Connor's behalf was in Mr Gibson's letter dated 22 June⁴ which stated in the final paragraph:

Please reply and provide any supporting detail in support of the AKA's actions as given the circumstances at present, our client will be looking to lodge a claim against the AKA for unjustified dismissal.

[13] Mr Gibson says this statement is not related to Ms O'Connor's raising of her personal grievance because it referred to the lodging of a Statement of Problem with the Authority.

[14] In submissions Mr Gibson says AKA was aware of Ms O'Connor's concerns *due to the nature of the allegations made against Rose⁵ and her refusal to resign⁶* so he submits AKA must have been aware she would be aggrieved if she was dismissed.

[15] There are a number of problems with such a submission, namely:

- a. Being aware an employee may be aggrieved if dismissed is entirely different than being aware that an employee has actually raised a personal grievance about their dismissal;

⁴ This was sent outside the 90 day time limit.

⁵ He was referring to the disciplinary letter to her dated 17 December 2010.

⁶ He was referring to information conveyed at a without prejudice meeting held on 19 January 2011.

- b. The nature of a disciplinary letter is such that it cannot possibly have reasonably put AKA on notice that Ms O'Connor believed she had a personal grievance;
- c. The alleged refusal to resign occurred during the without prejudice part of a meeting held on 19 January 2011 and the respondent has not waived privilege;
- d. There is no evidence before the Authority to support Mr Gibson's submissions. Ms O'Connor does not refer to the disciplinary letter at all although her affidavit records that on 19 January 2011 she refused an offer of money in return for her resignation. Ms Harvey's affidavit says Ms O'Connor's claim she was asked to resign is false.

[16] I do not accept Mr Gibson's submission which I consider speculative and unsupported by evidence.

[17] I gather from Mr Gibson's reply submissions that the meeting on 19 January apparently started as a disciplinary meeting but moved into without prejudice discussions when Ms O'Connor's then representative tabled a without prejudice proposal.

[18] The 19 January meeting occurred five days prior to Ms O'Connor's dismissal which meant she could not have raised a dismissal grievance in that meeting because a grievance cannot be raised in advance of it actually occurring.⁷

[19] I find that the 14 April letter was Ms O'Connor's sole means of raising her personal grievance.

Did Ms O'Connor properly raise her personal grievance with AKA?

[20] I find that Mr Gibson's 14 April letter did not meet the test imposed by *Creedy*. It was therefore insufficient to constitute the raising of a dismissal grievance for the following reasons:

- (a) There was no reference to Ms O'Connor's belief that she had a personal grievance;

⁷ Ibid 1.

- (b) There was no reference to Ms O'Connor's dismissal having been unjustified;
- (c) No mention was made of the nature of the alleged grievance;
- (d) There is no indication that Ms O'Connor considered herself to be aggrieved or contemplating legal action;
- (e) Ms O'Connor did not provide any indication in that letter of what she believed had given rise to her personal grievance;
- (f) There was insufficient information for AKA to have addressed the alleged grievance;
- (g) There was insufficient information to have enabled AKA to have responded to the merits of an alleged grievance;
- (h) It did not refer to any previous events, communications, or interactions or link those to a personal grievance;
- (i) Ms O'Connor did not identify what she was seeking in order to resolve her complaint/concerns or explain how she wanted her issues to be addressed by AKA. She also never identified what her specific concerns or complaints were;
- (j) The reference to the 90 day time period was unclear and ambiguous. It was not linked to the requirements of s.114 of the Act or to the fact that it was supposed to relate to the raising of a personal grievance;
- (k) Because AKA was not informed that Ms O'Connor believed she had a personal grievance it had no opportunity to address it or to resolve the matter in a speedy or informal manner prior to proceedings being issued.

[21] I find that the true purpose of the 14 April letter appears to be the seeking out of further information because the correspondence consists predominantly of eight or possibly nine questions. The tone of the letter is enquiring throughout.

[22] I also note that Ms O'Connor's evidence was that she instructed her solicitors to *review* her dismissal, not that she instructed them to raise a dismissal grievance on her behalf.

[23] The 14 April letter suggests Mr Gibson was writing to AKA to obtain information, presumably so he would then be better placed to be able to provide Ms O'Connor with advice regarding her dismissal. His letter of 14 April is consistent with a new representative commencing a review of Ms O'Connor's situation by obtaining further information from AKA.

Did AKA impliedly consent to Ms O'Connor raising a personal grievance out of time?

[24] Ms O'Connor's affidavit says Mr Gibson telephoned her on 06 May 2011 to say he had spoken to Ms Ross, Human Resources Manager of AKA, who told him his letter had been received and explained the General Manager, Ms Harvey, was away and would respond when she returned. Mr Gibson also told Ms O'Connor that Ms Ross commented they *had been hoping Rose would not raise a grievance within the 90 day period*.

[25] Ms Ross emphatically denies making the comments attributed to her in Mr Gibson's affidavit. She says she is an experienced HR Manager who is experienced in dealing with letters which raise personal grievance claims. She says she would not have made such comments because she did not believe the 14 April letter had raised a grievance. Ms Ross says she saw the letter as an attempt by a new representative to obtain further information about Ms O'Connor's dismissal, and she notes it was responded to in a manner which was consistent with that view.

[26] I am not satisfied on the balance of probabilities that Ms Ross made the comments Mr Gibson attributed to her in his affidavit. However, even if those comments were made they do not amount to implied consent to a grievance being raised. AKA's actions immediately after that conversation were inconsistent with it having acknowledged the raising of a grievance but were consistent with Ms Ross' affidavit evidence that she believed Mr Gibson had merely been seeking information about his client's dismissal.

[27] On 16 May Ms Harvey wrote to Mr Gibson setting out a timeline of events and key issues that had arisen since December 2010 as they related to Ms O'Connor's employment and she enclosed copies of the documentation referred to. Ms Harvey responded to the queries posed in the 14 April letter. Her response appeared to be a summary of events rather than a defence of, or response to, a personal grievance.

[28] After receiving Mr Gibson's letter dated 22 June, which was the first time *unjustified dismissal* had been referred to, AKA instructed Mr Dean Organ to reply with its view that Ms O'Connor had not raised a personal grievance claim within the 90 day period so was out of time to do so and it did not consent to her raising her grievance out of time.

[29] I find that AKA did not impliedly consent to Ms O'Connor raising her personal grievance out of time.

Does the Authority have jurisdiction to hear Ms O'Connor's dismissal grievance?

[30] Section 114(1) of the Act requires every employee who wishes to raise a personal grievance to have raised the grievance with their employer within 90 days of it occurring or coming to the employee's notice, whichever is the latest.

[31] I find that Ms O'Connor is unable to discharge the burden on her to establish that she raised her dismissal grievance with AKA within 90 days of her dismissal. She therefore is unable to meet the requirements of s114(1) of the Act.

[32] I find the Authority does not have jurisdiction to hear Ms O'Connor's dismissal grievance because AKA does not consent to it being raised out of time so she cannot bring herself within s114(3) of the Act. Nor has Ms O'Connor sought leave to raise her dismissal grievance out of time under s114(4) of the Act.

Outcome

[33] The Authority does not have jurisdiction to hear Ms O'Connor's personal grievance claim for unjustified dismissal because she did not raise a personal grievance with AKA within 90 days of her dismissal, so she does not meet the requirements of s.114(1) of the Act.

Costs

[34] AKA as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to agree on costs. If that is not possible AKA has 14 days within which to file a costs memorandum, Ms O'Connor has 14 days within which to respond, and AKA has a further 7 days within which to file any reply. This timetable will be strictly enforced.

Rachel Larmer
Member of the Employment Relations Authority