

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 56
3144682

BETWEEN

TIRA PEHI
Applicant

AND

METALLIC SWEEPING (1998)
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Gerardus Elwell, counsel for the Applicant
Tim McGinn, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 20 December 2021 from the Respondent
22 December 2021 from the Applicant

Date of Determination: 25 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Applicant's claims

[1] Ms Pehi was employed by the respondent as a cashier in March 2009. She says her employment ended on or around 31 May 2020.

[2] The applicant's statement of problem alleged she had been unjustifiably disadvantaged and unjustifiably dismissed from her employment and that the respondent had breached the Wages Protection Act 1983 (WPA) by withholding her notice pay and the Holidays Act 2003 (HA03) by failing to pay her annual holiday entitlements upon termination of her employment.

Jurisdiction dispute

[3] The respondent says the Authority does not have jurisdiction to investigate the applicant's personal grievance claims because they were not raised within 90 days of them occurring or coming to the applicant's attention, whichever was the latest. The respondent does not consent to the applicant's personal grievances being raised out of time.

31 May 2020 incident

[4] On 31 May 2020 the respondent's site supervisor checked the site at which the applicant was working. He found that there was nobody in the kiosk serving customers or collecting cash. When he asked where the applicant was the supervisor was told she had gone into town with her sisters, leaving the kiosk unmanned.

[5] The site supervisor waited there until the applicant returned about 20 minutes later. Upon her return the applicant and site supervisor engaged in a heated exchange, which resulted in both of them making adverse allegations about the other's conduct.

[6] During this altercation the applicant asked the site supervisor "Am I sacked?" And he said "Okay". This response apparently caused the applicant and her two sisters to allegedly collectively abuse the site supervisor in front of the waiting customers. This resulted in him calling the Police, who instructed the applicant and her sisters to leave the work site.

Notification of personal grievance

[7] On 28 July 2020 the Turangi Community Law Centre (CLAW) emailed the respondent claiming that the applicant had been dismissed on 31 May 2020. The respondent replied by email dated 4 August 2020 saying the applicant had not been dismissed and was still an employee. CLAW acknowledged receipt of this email on 4 August 2020.

[8] On 5 August 2020 CLAW sent a further email to the respondent asserting that the applicant had been dismissed. The email purported to raise personal grievances for unjustified dismissal and unjustified disadvantage, but failed to provide specifics, other than asserting a dismissal had occurred.

[9] The respondent says the lack of detail in CLAW's emails meant there was nothing for the respondent to address. The respondent therefore says CLAW's emails were insufficient to have raised personal grievance claims.

[10] The respondent says it did not get sufficient information to enable it to respond to the applicant's claims until it was served with a copy of the applicant's statement of problem on 12 July 2021, over a year after her alleged dismissal.

Relevant legislation

[11] Section 114(1) of the Employment Relations Act 2000 (the Act) requires an employee to raise a personal grievance with their employer within 90 days beginning with the date on which the alleged grievance occurred or came to the employee's attention, whichever is the later, unless the employer consents to the personal grievance being raised out of time.

[12] The onus is on the employee to establish that the grievance was raised within the 90 day time period. Failing that, an employee may seek leave from the Authority under s 114(3) of the Act for leave to raise a personal grievance out of time.

[13] Section 114(4) of the Act enables the Authority to grant an employee leave to raise a personal grievance out of time if the Authority is satisfied the delay in raising the grievance was caused by "*exceptional circumstances*" and that it would be just to grant leave.

[14] Section 115 of the Act sets out various exceptional circumstances that can be recognised by the Authority under s 114(4)(a) of the Act. Section 115(c) of the Act states that an exceptional circumstance will arise if the employee's employment agreement does not contain a problem resolution clause that sets out the 90 day deadline for raising a personal grievance.

Written employment agreement

[15] The parties agree that there is no signed employment agreement. About ten months after Ms Pehi started working for the respondent it provided her with a written employment agreement, but she was not required to sign it.

[16] The Authority was satisfied that the applicant received a written employment agreement that contained a problem resolution clause that specifically referred to the need for her to raise any personal grievance claims within 90 days.

Was the delay due to exceptional circumstances?

[17] Although the applicant did not sign the employment agreement, she still received it and was able to read the clause that informed her of the 90 day time limit for raising personal grievances. Section 115(c) of the Act is therefore not applicable.

Were the applicant's personal grievances raised within 90 days?

[18] The issue is whether the email dated 5 August 2020 from CLAW to the respondent was sufficient to have raised the applicant's personal grievance claims. The material parts of that letter state:

[,,], the Turangi Community Law Centre gives formal notice of the submission of a personal grievance against Metallic Sweeping (1998) Limited, pursuant to the provisions of the Employment Relations Act 2000.

The personal grievance is one of unjustified dismissal and disadvantage.

We await your acknowledgement of our letter. We will then provide a comprehensive report to substantiate her personal grievance.

[19] No subsequent "*comprehensive report*" was provided to the respondent that substantiated the applicant's grievance claims. Further details of her grievance were not provided until she lodged her statement of problem with the Authority.

Findings

Disadvantage grievance

[20] It is insufficient for an employee to merely advise that they have a personal grievance, even if they have identified the type of grievance alleged. In order to properly raise a personal grievance an employee must convey sufficient information to the employer to put it in a position to be able to address (respond to) the merits of the alleged grievance so that there is a genuine opportunity to resolve it at an early stage.

[21] The limited information provided in CLAW's email of 5 August 202 to the respondent was insufficient to have raised an unjustified disadvantage personal grievance.

[22] No facts were set out in support of the alleged unjustified disadvantage claim. There was no information about who was involved in the alleged grievance, when or where it occurred or what it related to. Nor did the applicant explain why she believed she had been disadvantaged or why any disadvantage she may have suffered was unjustified.

[23] There was also no way to know what the alleged disadvantage grievance related to or arose from. The respondent therefore had insufficient details to enable it to address the applicant's concerns relating to the disadvantage grievance.

[24] The applicant therefore failed to raise her disadvantage grievance until her statement of problem was served on the respondent. Accordingly, she is out time to pursue her disadvantage grievance.

Dismissal grievance

[25] A grievance may be raised as a result of a series of interactions between the parties. No particular form of words are needed to raise a grievance, nor does it need to be raised in writing.

[26] The Authority may take into account the totality of the communications between the parties. CLAW's 5 August 2020 email has to be viewed and assessed in light of what the respondent had already been told by CLAW in its 4 August 2020 email.

[27] CLAW responded to the respondent's assertion in its email of 4 August 2020 that Ms Pehi had not been dismissed by saying:

[...] Ms Pehi understood that she had been verbally dismissed by Mandeep, effective from 31st May 2020. That would be the reason that she has not presented herself for work at the Turangi transfer station since then.

Once Ms Pehi has received this email, we anticipate further instruction.

[28] CLAW's 5 August 2020 emails that raises a dismissal grievance must be read alongside the details already provided to the respondent in the 4 August 2020 email. The 4 August email identified the date the applicant claimed she had been dismissed (31 May 2020), who had dismissed her (Mandeep), why she believed she had been dismissed (Mandeep had verbally told her to go).

[29] At the time it received these communications the respondent also had knowledge that an incident had occurred at the work site on 31 May 2020 involving Ms Pehi and the site supervisor, that they had both been involved in an altercation had occurred, the site supervisor had been abused and had called Police, who had instructed the applicant and her sisters to leave the worksite.

[30] These details provided the respondent with sufficient information to understand and address the applicant's dismissal claim.

[31] Although Ms Pehi did not set out what remedies she sought, that is not fatal to the raising of her dismissal grievance, because s 114(2) of the Act does not state that remedies must be particularised in order for a personal grievance claim to have been raised.

Outcome

[32] The Authority finds that the applicant's dismissal grievance was raised with the respondent within the 90 day time limit required by s 114(1) of the Act, so it is satisfied it has jurisdiction to investigate and determine the applicant's unjustified dismissal claim.

[33] The Authority does not have jurisdiction to investigate or determine the applicant's unjustified disadvantage claim, because she failed to raise her alleged disadvantage grievance within the required 90 day statutory timeframe.

What if any costs should be awarded?

[34] Both parties have had an equal measure of success. The Authority therefore considers that this is an appropriate case for costs to lie where they fall. Accordingly, the Authority declines to award either party costs on this jurisdiction application.

Rachel Larmer
Member of the Employment Relations Authority