

Note: This determination includes an order prohibiting publication of some information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 484
3162981

BETWEEN	RDJ Applicant
AND	SGF Respondent

Member of Authority:	Robin Arthur
Representatives:	Scott McKenna and Jessica Heinstman, counsel for the Applicant Rachel Webster, counsel for the Respondent
Investigation:	On the papers
Submissions received:	From the Applicant on 30 August 2022 and from the Respondent on 30 August 2022 and 1 September 2022
Determination:	23 September 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Order prohibiting publication of names

[1] Some evidence about the employment relationship problem in this matter may touch on aspects of proceedings in the Family Court between the applicant and the director of the respondent company about their child and her care arrangements. To protect the confidentiality of the child in respect of those proceedings, publication of the names of the applicant, the company and the director are prohibited from publication until further order of the Authority. This order, made under clause 10 of the Schedule

2 of the Employment Relations Act 2000 (the Act), will be reviewed if the Authority proceeds with an investigation of the employment relationship problem.

[2] This determination, using following randomly selected letters not associated with their actual names, identifies the applicant as RDJ, the respondent company as SGF and its director as ZEL.

Employment relationship problem

[3] RDJ wants to pursue personal grievances for constructive dismissal and unjustified disadvantage over how his employment with SGF came to end. RDJ resigned from his role with SGF on 2 March 2021, giving four weeks' notice. During the notice period he applied to his direct manager for domestic violence leave, said to be needed due to ZEL's conduct towards him. The leave request was said to have been granted by the direct manager but later revoked by ZEL who advised RDJ that the final two weeks of his notice period were to be treated as unpaid sick leave.

[4] On 24 June 2021 RDJ's counsel sent SGF a letter raising "a formal personal grievance claim for unjustified dismissal by constructive dismissal and unjustified disadvantage". The letter recounted events from November 2020 onwards where discussions occurred in the workplace between RDJ and ZEL about childcare arrangements. It described those events as incidents of bullying and inappropriate behaviour that resulted in RDJ feeling uncomfortable and with no option but to resign from his employment. It also described RDJ receiving an email from ZEL telling him that the manager who had approved his domestic violence leave request had been removed from that position and the final two weeks of RDJ's notice period would be coded as unpaid sick leave.

[5] The letter then stated that RDJ "acknowledges this personal grievance is being raised around 26 days out of time". It said this delay was because RDJ was not aware of the strict timeframes to raise a grievance and was not able to get legal advice on his grievance while he was looking for new employment and dealing with Family Court matters. It ended with a statement that his counsel was confident that the time for raising the grievance would be extended if the matter went to the Authority.

[6] RDJ's amended statement of problem sought leave to raise a grievance out of time but his submissions on the preliminary issue said his position "in the first instance"

was that grievance was in fact raised in time. It said the application for leave to raise the grievance out of time was “a fall-back position”.

[7] SGF denies RDJ has grounds to pursue those personal grievances but says he was out of time to do so anyway. It says RDJ was not unjustifiably disadvantaged and alleges he resigned after a client complained about his work and he learned SGF was going to investigate that complaint. It says there are no adequate reasons that he should be permitted to raise and pursue his grievances now.

Investigation of preliminary jurisdictional issue

[8] If the grievances were not raised in time or, if out of time, RDJ is not granted leave to raise them now, the Authority will not have jurisdiction to investigate and determine his grievances.

[9] By agreement with the parties, this preliminary issue has been investigated and determined ‘on the papers’. Those papers comprise an amended statement of problem, a statement in reply, an affidavit from RDJ dated 9 August 2022, an affidavit from ZEL dated 19 August 2022 and written submissions from counsel for RDJ and SGF.

[10] As advised in directions issued on 25 July 2022, the questions for resolution in this preliminary determination were:

- (a) Did RDJ raise personal grievances about how his employment came to end (either as matters of unjustified disadvantage or constructive dismissal) within the required 90-day period?
- (b) If not, were there exceptional circumstances such that he should be granted leave to raise and pursue those grievances outside the 90-day period?

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The statutory requirements

[12] An employee who wishes to raise a personal grievance must raise the grievance with his or her employer within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to the employee’s

notice, whichever is the later, unless the employer consents to the personal grievance being raised later than that 90-day period. A grievance is treated as 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.¹

[13] Where an employer does not agree to a grievance being raised later than 90 days, the employee may apply to the Authority for leave to raise the grievance on the grounds of “exceptional circumstances”. Some categories or instances of exceptional circumstances are described in the Act but the Authority is not limited to those examples if there were other unusual circumstances that caused the delay in raising the grievance.² If satisfied exceptional circumstances truly caused the delay and if the Authority then considers it just to do so, the Authority may grant leave for the employee to raise their grievance. Where leave is granted, the Authority must then direct the employer and the employee to use mediation to seek to resolve their grievance.³

RDJ raised his personal grievances in time

[14] For the following reasons it is clear that RDJ did raise his grievances within the required period of 90 days, not outside of it as his counsel had stated in the letter of 24 June 2021 raising those grievances.

[15] RDJ’s employment agreement required him to give “1 Month’s notice”. There is no dispute that RDJ resigned on 2 March 2021. His affidavit describes the notice period as running “to the end of the month (being 31st March 2021)”. Technically the month’s notice, given the wording of his employment agreement with SGF, ran to 2 April but nothing ultimately turned on that difference.

[16] ZEL said in her affidavit that RDJ’s last day of work was, in fact, 17 March 2021 and not 31 March 2021 as he claimed. This was the last date he attended the workplace, seeking domestic violence leave for the remainder of the notice period.

¹ Employment Relations Act 2000, s 114(1) and (2).

² *Creedy v Commissioner of Police* [2008] NZSC 31 at [31]-[32].

³ Employment Relations Act 2000, s 114(4) and (5).

[17] SGF's statement in reply accepted ZEL had sent RDJ an email telling him the final two weeks of his notice period would be coded in the company's pay records as "unpaid sick leave".

[18] Contrary to the view expressed in ZEL's affidavit, RDJ's employment did not end on 17 March. It concluded with the period of unpaid sick leave which ZEL imposed as the basis on which the remainder of RDJ's notice period was to be served.

[19] Her affidavit attached the medical certificate RDJ provided for that period. It stated he was unfit for work from 19 March and would be able to resume work on 2 April.

[20] During that period RDJ was on unpaid leave. It was however, on the employer's own description, still leave. The employment relationship had not yet ended. His notice period was still running. RDJ's evidence suggests the notice, and therefore his employment, ended on 31 March. The technical reading of the employment agreement suggests the end of the notice period, and of the employment, was really 2 April. But whether 31 March or 2 April is taken as the relevant date, "the action alleged to amount to a personal grievance" was the actual ending of the employment at the expiry of the notice period. The employment had ended by notice, by a resignation said to have been induced by some breach of duty by the employer and therefore really a constructive dismissal. It was not a direct and summary dismissal by the employer. So, in this case, time for submitting a personal grievance ran from the expiry of the notice.⁴ The 24 June letter raising the personal grievances was therefore sent well within the required 90 days.

[21] This conclusion is not disturbed by the acknowledgment within the letter that the grievances were being raised out of time. The concession in the letter was subjective and incorrect. It cannot displace an objective assessment and application of the facts against the statutory criteria.

[22] The contents of the letter were however sufficiently specific to enable SGF to address RDJ's claim that his resignation really amounted to a constructive dismissal. Arguably the basis for the unjustified disadvantage claim was not so clear. From context, the alleged disadvantage appears to be the requirement made to serve the

⁴ *Para Franchising v Whyte* [2002] 2 ERNZ 120 at [32].

remainder of the notice period on unpaid sick leave. Some of those days fell outside the 90-day period by the time that the grievances were raised but at least the last few days (29, 30 and 31 March) fell within it. On that basis the disadvantage grievance was also raised within time.

Exceptional circumstances not established

[23] Having concluded the grievances were raised within time, it was not necessary to consider RDJ's "fall-back position" that leave should be granted due to exceptional circumstances. If considered, it would have been on the basis that the employment had, in fact and law, ended on 2 March or 17 March 2021. However RDJ's evidence would not have been sufficient to support granting the leave request if determination of that request had been required.

[24] RDJ sought leave on the basis that his experience up to and following the end of his employment was within one of the categories of exceptional circumstances – that he had "been so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance" within 90 days.⁵

[25] For the following reasons, his evidence did not establish his experience met the particular criterion set by this category.

[26] Firstly, evidence of upset or other feelings of distress that might ordinarily be felt about the employment ending badly is not enough on its own. The criterion refers to the employee being "so" affected or traumatised. The use of that adverb requires an effect or trauma of an extent that then causes a loss of ability to properly consider the process of raising the grievance. The employee's experience of this effect needs to be established by some reliable evidence.

[27] In his affidavit evidence RDJ described feeling under "serious strain" and being distracted by looking for another job and by litigation on the family matters. More would have been needed from him and preferably also an independent source, typically a health professional, to establish he was so deeply distressed throughout the whole 90-day period that he could not have properly considered raising the grievance.

⁵ Employment Relations Act 2000, s 115(a).

[28] Secondly, ZEL's evidence established that RDJ had been able to attend to legal and other matters, including seeking legal advice, during the relevant period. A legal aid application form showed he had instructed a lawyer on 31 March and, as referred to on that form, had arranged new employment to start in the following week.

Summary and next step

[29] For the reasons given, RDJ has established he raised personal grievances within the required 90-day period. The Authority therefore has jurisdiction to investigate those grievances.

[30] The Authority's directions, mentioned earlier, had contemplated a direction to further mediation only in the event that leave was granted to pursue the grievances for exceptional circumstances. The Act requires such a direction where leave is granted.

[31] However, in light of the conclusion reached, I have also considered whether a direction to further mediation should be made anyway. Timetable directions set earlier have scheduled an investigation meeting, if needed, in December. Witness statements are due to be lodged from late October. Before incurring the time and expense of preparing for an Authority investigation, it is practical and appropriate for the parties to consider again whether they could still resolve their differences about this employment relationship problem between themselves. The outcome of this determination, clarifying a point in dispute when the parties met earlier in mediation, may contribute constructively to them doing so. Accordingly, under s 159 of the Act, the parties are directed to attend further mediation by no later than 21 October 2022. Under s 159(2) the parties must comply with this direction and attempt in good faith to reach an agreement settlement of their differences.

Costs

[32] Costs are reserved pending any further investigation and determination that may be required.

Robin Arthur
Member of the Employment Relations Authority