

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2023] NZERA 266
3190839

BETWEEN GLENDA REES
 Applicant

AND PACIFIC RADIOLOGY GROUP
 LIMITED
 Respondent

Member of Authority: Antoinette Baker

Representatives: Mary Jane Thomas, counsel for the Applicant
 Janet Copeland, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 16 February 2023 from the Applicant
 7 March 2023 from the Respondent

Determination: 25 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Rees was employed by the respondent (PRG) as a manager until she was made redundant because of a restructuring. PRG communicated its decision to Ms Rees on 30 September 2021. She raised a personal grievance with PRG on 8 October 2021. Her final day of employment was 29 November 2021.

[2] Ms Rees lodged a claim in the Authority on 20 September 2022 for unjustified dismissal saying PRG's decision to terminate her employment by redundancy was not genuine and was based on performance issues never raised with her or put to her during the redundancy restructuring process.

[3] PRG rejects Ms Rees' claim of unjustified dismissal but raises a preliminary issue that she has not raised her grievance within the 90-day statutory timeframe under s 114(1) of the Act. It says an unjustified dismissal grievance cannot be raised until after the actual dismissal has occurred and Ms Rees raised her personal grievance before her employment ended. PRG does not consent to the grievance being raised out of time.

[4] Ms Rees does not apply to have her grievance raised out of time but says that either:

- a. She has raised her grievance before her employment ended but that if taken as one for disadvantage it should be treated now by the Authority as one of unjustified dismissal relying on s 122 of the Act; or
- b. if not, the claim should proceed on the basis that a personal grievance was raised within time for unjustified action causing disadvantage.

[5] A telephone conference was held. The parties through their representatives agreed that I should determine this preliminary matter on the papers before investigating the substantive claim. Submissions were received. I will now consider the issue of whether this matter can progress based on whether Ms Rees has raised her personal grievance within the statutory timeframe.

Background

[6] In June 2021 PRG proposed to restructure. The proposal included disestablishing the manager roles in Gore (Ms Rees' role) and Balclutha (vacant at the time) and establishing a new branch manager role covering Gore and Balclutha (the GB role). Ms Rees had the assistance of her union representative during the consultation process. She asked for more information, provided feedback and when a decision was made by PRG about its restructuring proposal (the decision document) it wrote to Ms Rees confirming that her role had been disestablished. PRG invited her to meet to discuss options. Ms Rees with her union representative met with PRG to do this.

[7] Following these discussions, PRG sent Ms Rees a letter with two options for her to consider. One was to be redeployed into a radiologist role which was less hours and on a lower rate of pay, but with a 12-week equalisation payment; or to accept

redundancy with compensation, as provided by her individual employment agreement (IEA). Ms Rees sought and was granted further time to consider this letter.

[8] Ms Rees instructed a lawyer and raised an issue about not being deployed to the GB role saying she would raise a personal grievance if not immediately redeployed to the GB role.

[9] Ms Rees raised a further challenge with PRG through her lawyer saying that staff feedback that was included as a 'summary' in the decision document referred to 'dissatisfaction with the current management' and that the decision maker's response was to say that this was a 'reason for the change.' On this, Ms Rees challenged the genuineness of the decision to disestablish her role and asked for the actual staff feedback upon which the summary was given. Ms Rees went on sick leave from this time. There are lawyer's letters relating to the reason for this (Ms Rees said it related to the redundancy process issues) and the sufficiency of medical certificates to support this. The correspondence also includes a dispute about the basis on which PRG should provide the employee submission feedback requested by Ms Rees.

[10] PRG responded to both issues raised by Ms Rees' lawyer about redeployment and genuineness and disagreed.

[11] Ms Rees communicated she did not want to be redeployed to the radiologist role.

[12] On 30 September 2021 PRG terminated Ms Rees' employment by redundancy with her termination date to be advised pending the filling of newly established positions (GB role and radiologist roles).

[13] On 8 October 2021 through her lawyer Ms Rees raised a personal grievance based on the two issues raised earlier, expanding on both in detail. The opening wording in the raising of the grievance included:

...we raise a personal grievance on behalf of our client on the basis that the employers ("Pacific Radiology Group Limited PRG) failure to automatically

redeploy our client was substantively unjustified and the process that lead to her position being made redundant was carried out in a procedurally unfair manner.

[14] On 4 November 2021 Ms Rees' lawyer wrote to PRG's lawyer including that Ms Rees remained on sick leave without pay (her paid sick leave had expired), that she had no way of knowing when she would be terminated and asked for clarity and notice of a termination date.

[15] On 11 November 2021 PRG responded to the personal grievance raised by not accepting Ms Rees had been 'unjustifiably disadvantaged or unjustifiably dismissed for the reasons' already provided and expanded on its position; that the GB role had been advertised but there were no applicants.

[16] On 26 November 2021 PRG gave notice of termination. After a further dispute about paid or unpaid notice involving the issue of Ms Rees continuing to be on unpaid sick leave, Ms Rees waived a notice period and finished her employment on 29 December 2021.

[17] In May 2022 PRG provided the employee submissions (from the decision document) to Ms Rees' lawyer with employee identifiers redacted. Ms Rees' lawyer emailed PRG's lawyer with issues arising from the employee submission feedback received saying this supported Ms Rees' position, made offers to settle referring to compensation under s 123 of the Act, and that if not settled then Ms Rees would proceed to the Authority. The parties agreed to go to mediation. Mediation was not successful.

[18] On 20 September 2022 Ms Rees lodged a claim for unjustified dismissal because of redundancy in the Authority

The law

[19] Section 114 (1) of the Employment Relations Act 2000 ("the Act") includes that an employee must raise a personal grievance within 90 days beginning with the date when the action that the grievance is based on occurred or came to their notice.

[20] Section 114 (2) of the Act includes that:

“...a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.”

Issues

[21] The issues to determine are:

- a. Was a personal grievance raised on 8 October 2021 that can now be regarded as one raised within the statutory 90 days for unjustified dismissal?
- b. If not is Ms Rees able to continue with a claim in the Authority under the head of unjustified action causing her disadvantage in her employment?

Was a personal grievance raised on 8 October 2021 that can now be regarded as one raised within the statutory 90 days for unjustified dismissal?

[22] For Ms Rees it is submitted that while she raised a personal grievance before she ended her employment this should be treated as one of unjustified dismissal relying on a case where the Employment Court considered that a disadvantage grievance raised before the employment ended could then be considered to be an unjustified dismissal grievance after the dismissal had occurred without raising a fresh grievance for the latter.¹ The Court used the predecessor to the current s 122 of the Act that provides the Authority the discretion to find a personal grievance to be one of a different type from that alleged. I am further referred to support for this approach in an Authority determination.²

[23] PRG submits that case law does not support that an employee can raise a personal grievance for unjustified dismissal until the employment is ended.³ If that be the case, then Ms Rees’ last day of employment was 29 November 2021 and she did not raise a grievance within 90-days after that date.

[24] When explaining the principle that an employee cannot raise a grievance for unjustified dismissal until the dismissal has occurred, the Employment Court has

¹ *New Zealand Automobile Association v McKay* [1996] 2 ERNZ 622.

² *Mark Karena v Recreational Holdings Limited t/a Fish City Hamilton* [2018] NZERA Auckland 249.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517; *Underhill v Coca-Cola Amatil (NZ) Limited* [2017] NZEmpC 117; *Barry Dunn v Waitamata District Health Board* [2012] NZERA Auckland 464.

explained that ‘it would be a nonsense to permit the notification of an event that might or might not occur.’⁴ That case involved a situation where the details of the grievance had not been raised but were predicted when at the time an internal investigation had not concluded.

[25] In other cases brought to my attention by PRG there was a lack of certainty as to the decision made by the employer or as to what the employer needed to address.

[26] I find that Ms Rees raised issues clearly enough for the employer to respond to when she raised her grievance on 8 October 2021. The response in PRG’s letter dated 11 November 2021 shows this. I note this difference because it points away from the submission for PRG that the raising of the personal grievance on 8 October 2021 was ‘crystal ball’ gazing as had been the concern of the Employment Court in *Creedy*.⁵

[27] I refer again to section 114(2) of the Act that says a grievance is raised ‘when the employer is aware that the employee alleges a personal grievance that the employee wants the employer to address.’ The Employment Court summarised principles arising from earlier cases about raising a personal grievance within 90 days.

The grievance process is designed to be informal and accessible. A grievance may be raised orally or in writing with no formula of words that must be used. What matters is that the employee’s communications convey the substance of the complaint to the employer to enable it to respond, “with a view to resolving it soon and informally, at least in the first instance.”⁶

[28] PRG disputed in detail the grounds of the grievance soon after it was raised. Given that the issues that have been lodged in the Authority for investigation are consistent with those raised in the personal grievance on 8 October 2021 it is difficult to see what further could have been raised for the employer to respond to after Ms Rees finished her employment. I do not accept in these circumstances the submission for PRG that Ms Rees’ situation falls into the category of a ‘crystal ball’ notice of grievance where PRG did not know what to address when the grievance was raised on the 8 October 2022.

⁴ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [30]

⁵ See above.

⁶ *Chief Executive of Manukau institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

[29] For Ms Rees I am asked to consider that the Employment Court in *Automobile Association*⁷ has taken an approach which supports me finding that Ms Rees's grievance raised on 8 October 2021 can retrospectively be treated as one of unjustified dismissal relying on s122 of the Act.

[30] Section 122 of the Act provides:

Nature of personal grievance may be found to be of different type from that alleged

Nothing in this Part [Part 9 which includes s14] or in any employment agreement prevents a finding that a personal grievance is of a type other than that alleged.

[31] In *Automobile Association* the employee had been asked to resign, he refused. The employer advertised and soon after filled his position. The Court found that he challenged this with enough detail for a grievance before he left his employment. The issues had not changed after he left his employment. He did not raise them again. The Court utilised its discretion to then treat what he did raise as a grievance during his employment as one of unjustified dismissal. The Court relied on a predecessor provision to s122 of the Act⁸.

[32] The Court explained the reason for its approach in *Automobile Association* as:

It certainly appears contrary to the scheme of the legislation to say that an employee such as McKay having been given notice of dismissal and knowing that his replacement had been appointed and announced, had to wait for the inevitable expiry of the notice period and the inevitable cessation of work before the law entitled him to submit his challenge to dismissal by personal grievance.⁹

[33] It is submitted for PRG that *Automobile Association* relies on the same issues being raised throughout. I do find the same issues raised on 8 October 2021 to which PRG responded are the same issues I will need to investigate as part of the employment relationship problem that has been lodged. To that extent I find *Automobile Association* applicable.

⁷ See note 1 above.

⁸ Now repealed Employment Contracts Act 1991, s34.

⁹ *New Zealand Automobile Association v McKay* [1996] 2 ERNZ 622 at p 14.

[34] The issues I find the same are the non-deployment to the GB role, and the genuineness of the decision linked to the employee feedback submissions and the decision maker's alleged reliance on this. Both could potentially support the raising of a grievance of disadvantage or unjustified dismissal in my view. More sensibly however the wording as set out at [13] above indicates a challenge to the decision to end Ms Rees' employment. I note that PRG when responding to the 8 October 2021 letter used both terms (disadvantage and unjustified dismissal) to say that its actions were justified.¹⁰

[35] It is submitted for PRG that *Automobile Association* involved a different situation where there was no certainty for the employee as to when he would finish in his employment. I do not agree. Ms Rees was faced with a decision made by her employer that her role was disestablished and that there was a recruitment process for the newly established GB role already on foot when she raised her grievance that she should have been deployed to it or that the decision was not genuine. The only reason for Ms Rees having to wait for her termination date was that PRG wanted to fill newly established positions first. It is difficult then to see why Ms Rees should have to have waited to raise her grievance until the indeterminate date that this happened. I find this likely because Ms Rees had her lawyer seek clarity about when she would receive notice of termination and that by this time PRG had advertised and not received any candidate applications. It is difficult to see how this was not an uncertain situation for Ms Rees as to her termination date.

[36] Considering the above I find this is a situation where I should use my discretion to treat the grievance as one other than what was alleged under s122 of the Act. To not do so would seem to put Ms Rees in the same sort of situation that concerned the Employment Court in *Automobile Association*. I note in doing this I make the same observation made in the Authority previously that there is nothing in Part 9 of the Act that does not allow the use of s122 in this way.¹¹

[37] I do not need to deal with the alternative submission for Ms Rees that her claim could be treated as one of unjustified action causing disadvantage in her employment

¹⁰ Letter J Copeland to K McDonald dated 11 November 2021.

¹¹ As above at note 2, at [22].

on the common ground that it was raised within time. I will proceed based on what is in front of me. What is in front of me in the current Statement of Problem claims remedies for Ms Rees because of unjustified dismissal through redundancy.

[38] Accordingly, based on the above, I find that Ms Rees can proceed with her claim having found that she has raised her grievance on 8 October 2021 and that under s 122 of the Act I consider that the grievance should be treated as one of unjustified dismissal.

[39] The investigation meeting to hear the substantive matter is set down for 18 and 19 July 2023 as directed previously. A telephone conference call will be convened as soon as possible to clarify this and to discuss evidence and the dates for provision of evidence.

Antoinette Baker
Member of the Employment Relations Authority