

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 131
3069732

BETWEEN RACHEL ROGERS
Applicant
AND WELLINGTON CITY COUNCIL
Respondent

Member of Authority: Michele Ryan
Representatives: Allan Halse, advocate for the Applicant
Peter Chemis and Louise Grey, counsel for the
Respondent
Investigation Meeting: 4 February 2020 at Wellington
Submissions [and further Information] Received: 11 February 2020 and 8 October 2020 from the Applicant
14 February 2020 and 29 October 2020 from the
Respondent, and 16 November 2020 from both parties
Date of Determination: 6 April 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination concerns a preliminary issue as to:

- (a) Whether Ms Rachel Rogers raised an unjustified disadvantage personal grievance in accordance the Employment Relations Act 2000 (the Act) during her employment with Wellington City Council (WCC); or
- (b) If Ms Rogers did not raise a grievance, whether there are exceptional circumstances that occasioned the delay, and if so, whether it is just to grant leave to allow Ms Rogers to raise the grievance.

Background to the Authority's investigation

[2] Ms Rachel Rogers worked for Wellington City Council (WCC) for approximately 3 years until she was given notice in late July 2017 that her employment would end on grounds of redundancy. Less than 10 days later she raised a personal grievance regarding the dismissal. The Authority will investigate that matter in due course.

[3] Ms Roger's statement of problem was lodged on 8 August 2019. Alongside the claim concerning her dismissal, it is alleged she was unjustifiably disadvantaged by WCC's failure to investigate (alleged) bullying by her manager. The statement of problem said Ms Rogers had "*raised her concerns (lodged a personal grievance) regarding how she was being treated at every stage [of her employment]*".¹ No details about when the personal grievance was said to have been raised were recorded.

[4] WCC says Ms Rogers' claim of an unjustified disadvantage was not raised with it until it received her statement of problem, more than two years after Ms Rogers' employment finished. It does not consent to the grievance responded by way of memorandum.² It does not consent to the grievance being raised out of time.

[5] In a case management conference call held on 3 September 2019 it was agreed the Authority would hold an investigation meeting in respect of the preliminary issue. A timetable for the exchange of evidence was arranged, and Ms Rogers was to provide details as to when she raised a personal grievance about the alleged bullying. Unfortunately, a brief of evidence was not lodged on Ms Rogers' behalf, rather, the statement of problem was resubmitted.

[6] A telephone conference was convened. Given the investigation meeting was due to begin in 5 days, it was decided Ms Rogers would answer questions put to her during its investigation meeting. If new information emerged WCC would be given an opportunity to consider those matters to which it was required to respond.

[7] Ultimately I was not satisfied that the evidence provided by Ms Rogers during the investigation meeting was sufficiently clear.

¹ Ms Roger's Statement of Problem, at para. 4
² Dated 21 August 2019

[8] Via her representative, Ms Rogers was asked to provide a file note said to be relevant to her claim. She was also given an opportunity to provide additional detail concerning her interaction with four individuals.

[9] A number of documents were subsequently furnished. No documents were specifically identified albeit the content of a significant portion relate to the restructure and are not relevant to this claim. Further, it is not clear whether various statements referred to in the handwritten notes were all items under discussion with others or, alternatively, were Ms Rogers' personal view on a matter. I shall return to these matters.

[10] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), in circumstances where the Chief of the Authority has decided exceptional circumstances exist.³

Did Ms Rogers raise a personal grievance in accordance with the Act?

[11] Section 114(1) and (2) of the Act prescribe how and when a personal grievance may be raised.

- (a) Section 114(1) requires an employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or came to the employees notice.
- (b) Section 114(2) provides that a grievance is raised when the employee has taken reasonable steps to make the employer or a representative of the employer aware that the employee alleges a personal grievance.

[12] The legal principles in establishing whether a personal grievance has been raised in accordance with s 114(2), are now well established. The grievance process is designed to be informal and accessible.⁴ A personal grievance does not need to be in writing and may be raised orally. There are no particular formula of words that must be used.⁵

[13] Relevant to this matter, case law accepts it is not necessary for all the details of the grievance to be disclosed when raising the complaint, but for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. The

³ Pursuant to s 174C(4) Employment Relations Act 2000

⁴ *Idea Services Ltd (in Statutory Management) v Barker* [2012] EmpC 112mp

⁵ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

employer must be given sufficient information so as to be able to respond to it on its merits.⁶ At issue under s 114(2) is whether the employee's communications conveyed the substance of the complaint to the employer.⁷

[14] Ms Rogers says early on in her employment she formed a view that she was being treated unfairly by her manager. She says her the manager excluded her from aspects of work or projects for which she was skilled for no apparent reason, or work would be re-allocated away from her without explanation. She further says her manager would criticise her publicly in respect to work issues. Ms Rogers was placed on two separate personal improvement plans over the course of 2016.

[15] In answer to the Authority's inquiry as to when she raised concerns about her manager, Ms Rogers' said that at different junctures over the course of her employment she spoke to five individuals, (including her manager), about the way she was treated by her. She acknowledges she never used the word "bullying" to describe her concerns. I accept an employee does not necessarily need to use that word to describe behaviour of that nature. The interactions Ms Rogers referred to are as follows:

- (a) THE MANAGER: Ms Rogers said she raised with her manager on several occasions that she was being treated unfairly. Ms Rogers acknowledged the manager's criticisms were solely about work issues. As noted a number of handwritten and typed documents which appear to relate to meetings Ms Rogers had with her manager were provided, but I have been unable to identify a particular note or record to indicate an unjustified disadvantage personal grievance was raised. Ms Rogers acknowledged the manager's criticisms were solely about work issues and were not personalised but says she felt the way her manager criticised her work was personal.
- (b) COLLEAGUE #1: Ms Rogers says she spoke to a colleague who I have referred to as TS. TS worked in Health and Safety. She says she initially had a conversation with TS around her manager's "*management style*". Ms Rogers agrees the discussion was not prompted by a Health and Safety incident notification. She said following this discussion she spoke to a Community based

⁶ Above, at [36]-[37] and paraphrased.

⁷ *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]

Health and Safety representative. Ms Rogers says she later spoke to TS several times about the manager but I understand these conversations were casual and collegial.

- (c) A THIRD PARTY: Ms Roger's said she spoke to the Community based Health and Safety representative in 2015 and sought some advice. This person was not an employee of WCC.
- (d) COLLEAGUE #2: Ms Rogers says she spoke to another colleague in 2017 who "acted-up" into the manager's role for a brief period of time. She says she talked to him about "*not being able to do anything right for the manager*". A diary note indicates she asked for advice on the matter and her colleague advised he was unsure what to do.
- (e) A MANAGER: Ms Rogers referred also to speaking with another manager at the time of the restructure, who was at the same level as her manager. They discussed a position. Ms Rogers says she told the manager why she wanted to get out of her [current] department because of her manager's treatment of her, but could not recall exactly what was said.
- (f) Submissions lodged by Ms Rogers' representative referred to an additional interaction whereby Ms Rogers is said to have advised her manager's manager also during the restructure that she was uncomfortable being interviewed by the manager for redeployment roles where she thought she would be unfairly treated.⁸ An email with a handwritten comment presumably written by Ms Rogers after the event records the above position,⁹ but I note the matter was not referred to in later email sent by Ms Rogers to that person.¹⁰

[16] As should be apparent, Ms Rogers' testimony about what was communicated with each of the individuals was generalised. She properly conceded that she was unable to remember precise details of the conversations she had with others. This is perhaps understandable given some discussions happened up to 4 years previously, but the lack of specificity is problematic where, at issue in this determination is whether her communication with WCC provided sufficient information for it to be aware there was a problem that needed to be addressed.

⁸ Submissions from the Representative for the Applicant, dated 11 February 2020.

⁹ On page 6 of documents sent to the Authority on 8 October 2020

¹⁰ Above at page 7, email dated 20 June 2017.

[17] Having assessed the interactions referred to by Ms Rogers I find:

- (a) In three of the identified instances I am not persuaded Ms Rogers communicated her concerns to WCC as her employer. I have already found one individual was not employed by of WCC. It follows that this conversation cannot constitute an action that would make the employer or a representative of the employer aware she was raising a personal grievance. Nor do I consider the two colleagues she spoke with could be properly regarded as representatives of the employer in the sense they were able to address a personal grievance.
- (b) In the instances Ms Rogers says she spoke to managers (not including her own) I am not persuaded she raised a grievance in accordance with s 114(2). In respect to the instance said to have occurred with her manager's manager I have some doubts about the information provided after the investigation meeting. Ms Rogers' affirmed evidence before the Authority's meeting did not mention this instance and the submission is in contrast to her clear testimony that she did not speak to the senior manager about her situation.

[18] During the Authority's meeting Ms Rogers' said she had not felt emotionally strong enough to raise her concerns whilst employed by WCC,¹¹ and said had not felt safe to do so. She further said she says she didn't really know what she wanted [from WCC in relation to these matters]. These concessions are telling. I consider it more likely than not that Ms Rogers' inability to detail what she conveyed to others about how her manager treated her is because very little was said or what was said was insufficiently direct.

[19] I am not persuaded the conversations Ms Rogers' had with various individuals were ever framed in such a way that a recipient could be fairly taken to understand there was a problem that needed to be addressed. It follows I am not satisfied Ms Rogers took reasonable steps to make WCC aware she alleged an unjustified disadvantage personal grievance regarding her manager's conduct towards her.

Are there exceptional circumstances?

[20] Section 114(4) of the Act allows the Authority to grant leave for an applicant to raise a personal grievance out of time if two conditions are met. First, the Authority must be satisfied

¹¹ This view is affirmed in a letter drafted by a coach (paid for by WCC) who provided professional services to Ms Rogers.

the delay in raising the personal grievance was occasioned by exceptional circumstances. If this test is met, the Authority must then consider whether it is just to allow the grievance to be raised out of time.

[21] In *Creedy v Commissioner of Police* the Supreme Court assessed the phrase “exceptional circumstances” as meaning circumstances which are unusual or out of the ordinary.¹² As already noted, the exceptional circumstances must be the cause of the delay in raising the grievance. Section 115 of the Act illustrates a range of circumstances which might be regarded as exceptional but the examples are not exhaustive.

[22] Ms Rogers did not refer to any of the examples set out in s 115 of the Act as reason for delay in bringing her grievance but these are not exhaustive in any event.

[23] In answer to a question during the Authority’s investigation as to why she did not raise her personal grievance before the statement of problem was lodged Ms Rogers said she “*wasn’t emotionally ready to raise the grievance*”.

[24] I am not persuaded this explanation in itself describes truly “exceptional circumstances”. To the extent Ms Rogers’ explanation infers she was unable to raise the claim due to the impact the actions leading to this claim had on her, no evidence was provided to demonstrate she was affected in such a significant way that she was prevented her from raising her claim for almost two years.¹³ It remains unclear why Ms Rogers had no difficulty in raising, in some detail, an unjustified dismissal grievance (through a solicitor) shortly after becoming aware of her redundancy but did not raise her claim of an unjustified disadvantage by the same means at the same time. I note there no suggestion that Ms Rogers instructed her solicitor to raise the disadvantage matters but her direction was not followed.

[25] Ms Rogers has not been able to establish that the delay in raising her personal grievance within the 90 day statutory time limit pursuant to s 114 of the Act was occasioned by exceptional circumstances.

[26] Having not met the first requirement on which the Authority may grant leave to raise a grievance, I am unable to determine whether it would have been just to grant Ms Rogers’ leave

¹² *Creedy v Commissioner of Police* [2008] NZSC 31 at [31]-[32]

¹³ From a health professional for example.

to raise her unjustified disadvantage for investigation by the Authority. Ms Rogers' application for leave to raise a personal grievance with WCC is declined.

Next Steps

[27] The Authority will convene a case management conference to set timetable directions for the investigation of Ms Rogers' claim of an unjustified dismissal.

Costs

[28] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority