

[3] If Mr Saptu's claim was made out of time and no exceptional circumstances applied, the Authority would not have the necessary statutory power to investigate and determine his allegations.

The Authority's investigation

[4] By agreement with the parties this preliminary jurisdictional issue was investigated 'on the papers'. Those papers comprised Mr Saptu's statement of problem, BGL's statement in reply, various documents lodged by the parties and written submissions lodged by BGL's counsel and by Mr Saptu. The documents included an affidavit from Mr Saptu, dated 1 February 2024, and copies of various text messages and emails sent or received by him during this employment.

[5] 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.

How this issue arose

[6] Mr Saptu worked as a tow truck and vehicle recovery operator from July 2020 to June 2022. On 17 June 2022 he gave Ms Bartle notice of resignation by email. In his email Mr Saptu expressed dissatisfaction with his conditions and his work environment. He said another employee had made his life "miserable" and he felt it was unfair he had not been given hours of work he had asked for. He did not, however, ask Ms Bartle to address those issues. Rather, he said he would not complain about the fellow employee and asked Ms Bartle to "respect my wishes" and accept his resignation as "my final decision".

[7] Mr Saptu finished work at the end of his notice period on 20 June 2022. A fortnight later he lodged a statement of problem in the Authority alleging he was underpaid for annual leave and days in lieu owed for public holidays.

[8] An Authority member investigated and determined Mr Saptu's application. An investigation meeting was held on 24 May 2023. A determination issued on 18 August 2023 found Mr Saptu had been paid all entitlements due to him under his employment agreement and the Holidays Act 2003.¹

¹ *Saptu v Bartle Group Limited* [2023] NZERA 460.

[9] During preparatory steps for that investigation Mr Saptu told a lawyer acting for BGL that he wanted the Authority to look at documents about him being “bullied at work”. The company’s lawyer responded, by email on 8 December 2022, that Mr Saptu would need to apply to the Authority to add that issue to his claim.

[10] Mr Saptu did not seek to amend the content of the application before the Authority at that stage. In a witness statement he lodged on 20 December 2022, however, Mr Saptu wrote that Ms Bartle had bullied and humiliated him and that supervisors and managers at the company had not taken action on reports that he and other workers were bullied by a named fellow employee.

[11] According to BGL’s statement in reply to Mr Saptu’s current application, he did also mention his allegations of bullying during the 24 May 2023 investigation meeting. The investigating member, again according to BGL, told Mr Saptu those issues were not set out in his statement of problem for that investigation and would not be determined.

[12] The determination subsequently issued by the Authority member did not mention any bullying allegations made by Mr Saptu.

[13] Soon after that determination was issued Mr Saptu wrote to the Authority complaining that the bullying issue was not discussed. He said he had asked for that issue to be added to his application.

[14] At the direction of the Authority member, an Authority Officer sent the parties an email responding to Mr Saptu’s complaint. The email said Mr Saptu’s statement of problem had not referred to allegations about job scope, mistreatment or bullying. It said the determination had addressed the claims about pay for lieu days and annual leave that were in his statement of problem.

[15] The email said Mr Saptu’s witness statement, lodged on 20 December 2022, had not provided details about his references to mistreatment and bullying. It also said Mr Saptu’s witness statement had not asked to amend his statement of problem to include those matters as a personal grievance claim.

[16] It then advised that the wage claims resolved by the Authority’s 18 August 2023 determination would not be reinvestigated but if Mr Saptu had raised a grievance within

90 days of the actions he complained about, he would still be in time to have that grievance investigated and determined. This was a reference to a provision in the Act that allows an employee up to three years to pursue a grievance, provided the employee had first raised the grievance with the employer with 90 days of the cause of that grievance occurring.²

[17] On 9 September 2023 Mr Saptu lodged a statement of problem which said he was submitting a new application as he had “missed adding the bullies incident”. He said Ms Bartle humiliated him in front of other employees, got him to do work outside the scope of his position as a truck driver and BGL had not taken action on bullying incidents he had reported to Ms Bartle and his supervisors.

[18] BGL’s statement in reply denied Ms Bartle had bullied or mistreated Mr Saptu and said he had not raised any valid grievance for unjustified disadvantage within time. It also said Mr Saptu was “estopped”, that is legally barred, from pursuing those grievances because he should have done more to have them considered in his earlier application to the Authority. BGL’s proposition regarding estoppel is inconsistent with rights set by the Act to pursue a grievance within prescribed time limits or where exceptional circumstances are established. It is rejected.

[19] The remainder of this determination addresses the jurisdictional issue of whether Mr Saptu could be permitted to pursue his personal grievance.

The relevant provisions in the Act and the collective agreement

[20] Every employee who wishes to raise a personal grievance must raise the grievance within 90 days. This period begins with the date on which the action alleged to amount to a personal grievance occurred or when it came to the employee’s notice, whichever is the later, unless the employer agrees to the grievance being raised after 90 days.³ The Act describes what must be done to raise a grievance in this way:⁴

... [A] grievance is 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.

² Employment Relations Act 2000, s 114(6).

³ Section 8i 114(1).

⁴ Section 114(2).

[21] The Act defines 12 categories of claims that may be a personal grievance. The relevant category in this case is any grievance that an employee may have against their employer because of a claim:⁵

that the employee's employment, or 1 or more conditions of the employee's employment ... is or are or was ... affected to the employee's disadvantage by some unjustifiable action by the employer.

[22] Mr Saptu's written employment agreement included the following clause about the time limit for raising a personal grievance:

If the employment relationship problem is a personal grievance, the Employee must raise the grievance with the Employer within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the Employee, whichever is the latter.

[23] A grievance may be pursued outside the 90-day period where an employee is given leave to do so because some exceptional circumstance prevented them from raising their grievance within that period.⁶ Those circumstances include where an employee has been too traumatised to raise the grievance earlier, where a representative has failed to raise a grievance in time or where the employment agreement does not give notice of the required 90-day time period for raising grievances.

Relevant principles on raising a grievance

[24] The following principles summarise what amounts to raising a grievance:⁷

- The grievance process is designed to be informal and accessible.
- A personal grievance may be raised orally or in writing.
- No particular formula of words must be used.
- Where there has been a series of communications, each communication may be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.
- It does not matter what an employee intended her or his complaint to be, or her or his preferred process for dealing with it in the first instance.
- It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was

⁵ Employment Relations Act 2000, s 103(1)(b).

⁶ Section 114(3) and (4) and s 115.

⁷ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36]-[38]. Footnotes omitted.

a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

- It is insufficient for an employee simply to advise an employer that the employee considers that she or he has a personal grievance, or even specifying the statutory type of personal grievance.
- The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Questions for determination

[25] Against that background, the questions of fact and law to be determined were:

- (i) Had Mr Saptu, within the required 90-day period, raised a personal grievance with BGL over his concerns about the conduct of another employee towards him?
- (ii) Had Mr Saptu, within the required 90-day period, raised a personal grievance over work instructions given to him by Ms Bartle and how she spoke to him?
- (iii) If no grievance was raised within those periods, did some exceptional circumstance cause a delay such that it would be just to grant Mr Saptu leave to pursue his grievance now?
- (iv) Should either party contribute to any costs of representation incurred by the other party?

No outstanding grievance over conduct of another employee

[26] BGL's statement in reply appropriately acknowledged the statutory period for Mr Saptu to have raised a personal grievance could have run as late as 28 September 2022, that is 90 days after his employment came to an end on 30 June 2022.

[27] Also, if he raised a grievance anytime during his employment, provided it had been done within 90 days of whatever had happened to cause him to do so, he would still have been within the three-year statutory period to pursue that grievance.

[28] Mr Saptu provided copies of text messages he sent to a supervisor in February and April 2021. Those messages confirmed he had raised concerns about the conduct of another employee who he described as threatening and scaring a dispatcher. He also

provided a copy of a text message he sent Ms Bartle describing an incident where he said that employee had wanted a fight outside the yard with the dispatcher. Mr Saptu said in that text that he was “just worried I will be next”.

[29] He provided a copy of a text message from a BGL human resources and safety advisor who arranged to meet to talk to him about his concerns. In his written submission to the Authority on this issue Mr Saptu also referred to Ms Bartle making arrangements to change his shifts to avoid the employee he was concerned about.

[30] While Mr Saptu was not satisfied by his discussion with the advisor in 2021 and said he sometimes still crossed over shifts with the employee he was worried about, his evidence showed BGL had taken steps at that time to address the concerns he raised.

[31] The question of whether those concerns amounted to an unaddressed or unresolved personal grievance by the time that his employment ended with the company on 30 June 2022 is answered by reference to the words of Mr Saptu’s notice of resignation. In that email he referred to that employee having made his life “miserable” but continued with the following words: “I will let this rest and won’t complaint (sic) against [name]. I just want to leave the company nicely.” His words unequivocally establish he was not making a further complaint or identifying any unresolved grievance he wanted the company to address about the actions of that other employee.

[32] While Mr Saptu later sought to pursue that issue as part of his earlier application to the Authority, he did not so until well after 28 September 2022. He was out of time to do so.

No grievance about Ms Bartle’s conduct raised in time

[33] As already noted, the statement of problem Mr Saptu lodged for his earlier application on 15 July 2022 did not make any allegations of bullying or mistreatment of him by Ms Bartle.

[34] BGL’s statement in reply to Mr Saptu’s present application referred to some documents he sent to the company’s lawyer on 5 December 2022 attached to an email in which he referred to “getting bullied at work”. The company’s lawyer’s reply email, sent on 8 December, said that complaint was “not in the statement of problem that you filed with the Authority.” The reply continued: “You will need to apply to the Authority to add these and until the Authority agrees, the documents are not relevant”.

[35] Mr Saptu made no change to his statement of problem. His witness statement, lodged on 20 December 2022, made more specific allegations about Ms Bartle. He alleged she had bullied him by:

- instructing him to carry out tasks outside his “job scope” by gardening, cleaning the toilet and cleaning the yard;
- yelling at him over an error made while gardening, making him feel humiliated and insulted in front of two other employees; and
- instructing him to clear weeds in front of the office, making him feel humiliated in front of the office staff.

[36] His statement provided no details of when those instances occurred or indicating that he had at the time, or at any time later, raised a personal grievance with the company about what he said Ms Bartle had done or told him to do.

[37] Those instances, denied by Ms Bartle as amounting to bullying or mistreatment, occurred at some unspecified time before Mr Saptu gave notice of resignation. Even taking 28 September 2022 as the last date that he could have raised a grievance about those allegations, his communication to the company lawyer in December 2022 and what he said in his December 2022 witness statement were both outside the 90-day period from the end of his employment on 30 June 2022. Mr Saptu was out of time to raise a grievance on the grounds of those allegations.

[38] Lacking any evidence that he had done so at any earlier point, no grievance was shown to have been raised within the time that would give the Authority jurisdiction to investigate or determine.

No exceptional circumstances

[39] Mr Saptu’s evidence did not establish any grounds on which he could have been granted to leave to, nevertheless, pursue a grievance over his allegations about Ms Bartle. He had been able to lodge his initial application about his wage arrears claim in the Authority well within the 90-day period that applied to raising a grievance. If he had included a grievance claim in that application, it would (once served on BGL) have been raised in time. Lodging the arrears claim indicated he was not affected in any way that would have prevented him also lodging a grievance claim.

[40] Neither had there been any failure by an instructed representative to raise a grievance on his behalf within the required time. And, as noted above, Mr Saptu's employment agreement included the necessary information about the time period.

Outcome

[41] For the reasons given, Mr Saptu was out of time to pursue a personal grievance of unjustified disadvantage. Accordingly, the Authority does not have jurisdiction to investigate his application.

Costs

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[43] If the parties are unable to resolve costs, and an Authority determination on costs is needed, BGL may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Saptu would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

Robin Arthur
Member of the Employment Relations Authority