

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 84
3240459

BETWEEN KAVYA SHARMA
Applicant

AND PROLIFE FOODS LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Applicant in person
Lisa Nicholson for the Respondent

Investigation Meeting: On the papers

Submissions received: 13 November and 1 December 2023 from Applicant
17 November and 18 December 2023 from Respondent

Determination: 14 February 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Under the Employment Relations Act 2000 (the Act) an employee generally has 90 days to raise a personal grievance with their employer with time starting to run from the event occurring, or when it came to the employee's notice, whichever is the later.¹ Where a personal grievance is raised outside the 90-day limit and an employer does not consent to an extension of time, leave from the Authority to investigate the grievance further must be granted, otherwise matters end there.²

[2] This is an application for leave by Kavya Sharma, a citizen of India and a former work visa holder, to raise a personal grievance some five years after the event. Her employer, (PLF, the company or the employer), a global food company, does not consent to the personal grievance being raised now.

¹ The Act, s 114(1).

² The Act, s 114(3).

How did the Authority investigate?

[3] Ms Sharma's statement of problem was lodged with the Authority on 12 July 2023. This was seven days after she had been served with a deportation order that required her to depart New Zealand because she had been living unlawfully in the country since her interim visa expired on 23 October 2018.

[4] The statement of problem included a request for an urgent investigation meeting because of Ms Sharma's impending deportation. However, the request was declined because she had failed to take any steps against her employer until commencing proceedings in the Authority. The parties were referred to mediation but matters did not resolve there.

[5] By second minute of the Authority (27 October 2023), it was agreed that I could determine the 90-day issue 'on the papers' as is normally the case with such applications. The parties also agreed to provide written submissions which I have received and considered. 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.

What is the issue?

[6] The essential issue is whether, under s 114(4) of the Act, it has been established that Ms Sharma's delay in raising her personal grievance was occasioned by exceptional circumstances. For the reasons that follow, the application is declined.

What happened with Ms Sharma's employment?

[7] It is not known when Ms Sharma first arrived in New Zealand, but she completed a Level 6 New Zealand Diploma in Business in May 2014. In July 2016, she completed a Level 7 Diploma in Management. In between these qualifications, Ms Sharma commenced employment with PFL presumably while on a student visa that would have enabled her to work a maximum of 20 hours per week during term time.

[8] A copy of Ms Sharma's individual employment agreement relevantly records that her employment with the company commenced on 9 September 2015, her role was that of 'bulk foods merchandiser', her initial hourly rate was \$15.50, and there was a

plain language explanation of the services available for resolving employment relationship problems including a reference to the 90-day period under s 114 of the Act to raise a personal grievance with PFL. Ms Sharma signed her employment agreement which confirmed that she had been given a reasonable opportunity to seek independent advice about its contents.

[9] By letter of 23 June 2016, PFL and Ms Sharma agreed to an ‘addendum’ to her employment agreement which required her to work a minimum of 38 hours per week at various New World stores in Glen Innes, Eastridge, Clendon and Papatoetoe. Ms Sharma’s role changed to that of bulk foods manager and her hourly rate was increased to \$17 per hour.

[10] On 3 August 2016, Immigration New Zealand (INZ) issued Ms Sharma a work visa valid to 3 August 2018. The visa stipulated that she could only work as a bulk foods manager for PFL in Auckland.

[11] On 9 May 2018, a second addendum to Ms Sharma’s individual employment agreement was made, the effect of which was to increase her work hours to 47 hours per week and to change her location of work to New World Botany, Pak n Save Botany, Pak n Save Glen Innes and Fresh Choice Otahuhu.

[12] In mid-May 2018, Ms Sharma messaged HR coordinator for PFL, Whitney Williams, for documents to support her application for a further work visa as her current visa was valid to 3 August 2018. In another message to Ms Williams, Ms Sharma asked that she advertise her position of bulk foods manager on Trade me and Seek in order to demonstrate to INZ that PFL had advertised the position to other New Zealand citizens or residents as required by immigration instructions.

[13] On 29 May 2018, Ms Sharma was informed that her role would not be advertised straight away as there was still time before her visa expired. Ms Williams explained that the advertisement needed to be delayed because if the role went to another candidate, it was unlikely they would be willing to wait until 3 August 2018 to commence employment.

[14] Ms Sharma messaged Ms Williams that the advertisement needed to be advertised for at least 15 to 20 days and that leaving it to the last moment would not help as INZ needed enough time to process her visa application.

[15] On 17 July 2018, PFL placed its advertisement for a bulk foods manager for its Botany store only. While the position was described as permanent and requiring the successful candidate to work a total of 43 hours per week from Monday to Saturday, the role was described as being “part-time”.

[16] On 31 July 2018, Ms Sharma signed a new individual employment agreement with PFL which stated that she was employed as the bulk food manager for the Auckland area and that she would be required to work in New World Botany, Pak n Save Botany, Pak n Save Glen Innes and Fresh Choice Otahuhu. Her new flat hourly rate was \$17.43 and she was required to work a minimum of 42 hours per week.

[17] The new employment agreement provided an identical explanation of the services available for resolving relationship problems (see [8] above) especially the requirement for Ms Sharma to raise a personal grievance with her employer within 90 days beginning on the date on which the action alleged to amount to the personal grievance occurred or came to her notice, whichever was the later.

[18] Ms Sharma made her application for an Essential Skills work visa on 2 August 2018. On 4 August, she was issued with an interim visa that enabled her to live and work in New Zealand for six months or until a decision on her application was made, whichever was the earlier.

[19] By INZ letter of 12 September 2018, Ms Sharma was advised of the following concerns with her application: that her position of bulk food manager did not substantially match the Australian and New Zealand Standard Classification of Occupations (ANZSCO) description of Retail Manager (ANZSCO 142111), Ms Sharma’s role was closer to that of a Visual Merchandiser (ANZSCO 639511) for which a Skills Match Report (SMR) was required, and there was a discrepancy with PFL’s advertisements in that the role was advertised as “part-time” or temporary on Trade Me and as “permanent” on Seek which appeared to indicate that the company

had not made adequate and genuine attempts to recruit New Zealand citizens or residents into the role.

[20] Ms Sharma provided a copy of INZ's letter of concern to Ms Williams who asked who had selected the ANZSCO code of Retail Manager in the employer's supplementary form (ESF) because she had not done so herself. A text message between Ms Sharma and her then immigration advisor (12 September 2018) records the immigration advisor admitting to selecting Retail Manager in Ms Sharma's visa application (and not the ESF) as a "submission" or as a "suggestion" to INZ.

[21] From 17 to 19 September 2018, Ms Sharma sent several messages to Ms Williams about the SMR. An SMR required PFL to liaise with Work and Income to ascertain whether there were any suitable New Zealanders who could do the job. Ms Sharma was required to provide INZ with the SMR by 24 September 2018 although it was possible for her to have requested an extension.

[22] Although Ms Williams did not immediately respond, she advised Ms Sharma on 19 September 2018 that PFL was only able to do an SMR if it was unable to find suitable New Zealanders for the role. However, there had been a number of applicants for Ms Sharma's position and an SMR would not be provided as a result.

[23] On the advice of her immigration advisor, Ms Sharma withdrew her work visa application on 2 October 2018 so as to avoid it being declined by INZ for want of an SMR. In line with the withdrawal of her visa application, INZ advised Ms Sharma by letter of 2 October that her interim visa would expire on 23 October 2018.

[24] On 11 October 2018, Ms Sharma advised her sales manager by email that she would be resigning from PFL and that the 23rd would be her last day at work in New World Botany and all other stores including Fresh Choice Otahuhu and Pak n Save Botany.

[25] There was no mention in Ms Sharma's letter of resignation of a personal grievance.

[26] Ms Sharma explains in her written submissions to the Authority that after she withdrew her work visa application, she was guided by her immigration advisor to apply for a student visa or to apply for another job. Ms Sharma says that she applied for a student visa but because her interim visa expired on 23 October 2018, she was now unlawfully in New Zealand. To regularise her visa status, she required a special visa under s 61 of the Immigration Act 2009 (IA). However, this was a matter of absolute discretion for the Minister of Immigration.

[27] Ms Sharma appears not to have obtained a further visa since she became unlawfully in New Zealand on 25 October 2018. In late July 2023, she voluntarily returned to India after being served with a deportation order. She is prohibited from re-entering the country for the next five years.

What is Ms Sharma's personal grievance about?

[28] Ms Sharma accepts that she did not raise her personal grievance with PFL within the 90-day period. That being said, she says that PFL and Ms Williams let her down through delaying the advertising of her role which prejudiced her visa application, advertising the position incorrectly as being part-time when it was full-time and permanent, and by failing to provide her with an SMR. Having worked hard for the company, Ms Sharma feels particularly aggrieved about these errors which resulted in the loss of ongoing visa status for her.

What are Ms Sharma's reasons for the delay in raising her personal grievance?

[29] Ms Sharma says that she has spent several thousands of dollars and consulted immigration advisors and lawyers to regularise her visa status in New Zealand. Ms Sharma states that her advisors did not guide her down the path of raising a personal grievance with PFL. She was instead advised to apply for a special visa under s 61 of the IA which appears to have been unsuccessful.

What is the relevant law?

[30] Section 114 of the Act sets out what is required of an employee to raise a personal grievance. A personal grievance must be raised within 90 days of the relevant event occurring or coming to the notice of the employee (whichever is later) unless the employer consents to a later date, or with leave of the Authority.

[31] The Authority may only grant an application for leave under section 114(4) of the Act, if the delay in raising the personal grievance is occasioned by exceptional circumstances and that it would be just to do so. Section 115 sets out four exceptional circumstances which, if established, must be accepted as exceptional such that a personal grievance may be raised out of time. While s 115 does not purport to constitute an exhaustive list, the section refers to the following four circumstances specifically:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the applicable employee notification period under s 114; or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised in time within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s 54 or s 65 of the Act as the case may be; or
- (d) where the employer has failed to comply with the obligation under s 120(1) of the Act to provide a statement of reasons for dismissal.

Discussion

[32] None of the above four exceptional circumstances apply to Ms Sharma. It has not been advanced and neither is there evidence of the kind of trauma envisaged by s 115(a), of a representative's failure to raise the grievance in time under s 115(b), of an employment agreement that does not contain the explanation mandated by s 115(c), or that s 115(d) applied and it does not because Ms Sharma was not dismissed but rather resigned.

[33] It is acknowledged that the categories of exceptional circumstances are not closed. However, even so, Ms Sharma's statement of problem comes close to asking the Authority to step into the shoes of her employer and to substitute its own decision for that of her employer. However, the statutory test of justification is whether the employer's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This

envisages multiple justifiable outcomes and a range of justifiable manners of proceeding.

[34] It is noted that Ms Sharma's resignation letter did not disclose to PFL or to Ms Williams that she was dissatisfied with the support she received regarding her work visa application to INZ. Ms Williams may not have responded in a timely manner to Ms Sharma's requests but she did respond and the role was advertised. Ms Sharma is to understand that there was never a guarantee that the job would go to her once it was advertised to the public and in the event that it did not, it was unreasonable for a successful candidate to have to wait several weeks before commencing their employment hence the delay in advertising.

[35] Further, because Ms Sharma's role as bulk food manager was not skilled in terms of immigration instructions, there would have been other New Zealand citizens and residents available to do that work especially as the role was modestly remunerated and no formal qualifications were required. While food handling experience was preferred, it was "not required" by the employer indicating that the position did not require a high level of skill or recognised work experience.³

[36] Ms Williams' decision not to provide an SMR therefore had merit and was not a deliberate attempt to deny Ms Sharma a pathway to a work visa. In any case, Ms Sharma had no reasonable expectation or automatic entitlement to an SMR which was a matter between the employer and Work and Income.

[37] The first time PFL became aware of Ms Sharma's personal grievance was shortly after it was lodged in the Authority on 12 July 2023. The timing is not random, for seven days earlier Ms Sharma had been served with a deportation order that required her to depart New Zealand. The present proceedings therefore have more to do with the inevitability of Ms Sharma's deportation than an employment relationship problem which was never pursued with any impetus.

[38] Although Ms Sharma has attributed her delay in raising her personal grievance to the failure of her lawyers and immigration advisors to guide her down the personal

³ ESF completed by Ms Williams (1 August 2018), pg. 3.

grievance path, no supporting evidence of this has been provided from the representatives involved. However, even if I were to give Ms Sharma the benefit of the doubt that none of her previous advisors had told her about raising a personal grievance, her various individual employment agreements with PFL provided a plain-English explanation of the employment dispute process and the 90-day requirement to raise a personal grievance.

Conclusion

[39] I find that Ms Sharma's delay in raising her personal grievance some five years after the event is not occasioned by exceptional circumstances. In the absence of exceptional circumstances, and there being only inordinate delay, it would not be just to grant Ms Sharma leave to raise her personal grievance now. The application is declined.

What about costs?

[40] The Authority's Practice Direction (effective 1 February 2024) sets out in one document various aspects of its investigatory process, including the steps normally taken and how costs arising out of the process are dealt with by the Authority. Because neither party has incurred costs in having a lawyer or an employment advocate represent them in this case, costs shall lie where they fall with each party carrying their own costs.

Peter Fuiava
Member of the Employment Relations Authority