

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 629
3059152

BETWEEN

TKG
Applicant

A N D

OEN
Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
Sarah Townsend, counsel for Respondent

Investigation Meeting: 23 July 2019

Information Received: 23 July 2019, 29 July 2019, 20 August 2019
and 23 October 2019 from the Applicant
23 July 2019, 13 August 2019 and 1 November
2019 from the Respondent

Date of Determination: 4 November 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] OEN employed TKG from 1 August 2016. In October 2018, OEN commenced consultation over a proposed restructuring of its business, which included the potential disestablishment of TKG's role.

[2] In a letter dated 19 December 2018, OEN advised TKG that it had decided to disestablish her role. In a subsequent letter dated 16 January 2019, OEN gave TKG notice of termination of her employment.

[3] On 16 April 2019, TKG lodged a statement of problem with the Authority, alleging that OEN had unjustifiably dismissed her. That statement of problem was served on OEN on 24 April 2019.

[4] TKG had not raised a personal grievance for unjustified dismissal with OEN prior to lodging her statement of problem, so the grievance was raised when the statement of problem was served on OEN.¹

[5] OEN says the personal grievance was not raised within the requisite period and therefore I do not have jurisdiction to determine the personal grievance. It applied to have this issue resolved as a preliminary matter. This determination deals with that issue.

Non-publication

[6] Given the nature of this claim, particularly the impact of the dismissal on TKG's health, it is appropriate that I prohibit from publication TKG's identity, any information that may identify TKG and any information about TKG's health as it relates to the claim.

[7] Therefore, pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) the name and identity of TKG, the applicant, and any information which may lead to her identification - she is referred to as TKG in this determination;
- (b) the name and identity of OEN, the respondent - it is referred to as OEN in this determination; and
- (c) the details of TKG's health which have been disclosed as part of the claim and the investigation into this preliminary matter, except for the limited references made in this determination.

¹ *Premier Events Group Limited & Ors v Beattie & Ors (No 3)* [2012] NZEmpC 79.

Discussion

The 90 day time frame

[8] Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[9] In this case, the action giving rise to TKG's grievance is the allegedly unjustified dismissal. So the question is whether TKG raised her grievance within 90 days of her dismissal or when the dismissal came to her notice.

[10] OEN says it dismissed TKG on 16 January 2019 when, in its letter of that date, it gave TKG notice that it was terminating her employment and paying her in lieu of her four weeks' notice so that her last day of employment would be 16 January 2019. And, it says the grievance was not raised until 24 April 2019, which is outside the 90-day period.

[11] TKG says she was dismissed on 24 January 2019, when she received the payment from OEN in lieu of her notice, or 13 February 2019, which was the expiry of the four week notice period. She says OEN received her statement of problem within 90 days of both of these dates.

[12] So the first issue for me to resolve is, what was the date of TKG's dismissal and what was the date that this came to TKG's notice. Once I have established these dates I can then calculate the period of 90 days, from the later date (if they differ) to ascertain if TKG raised her personal grievance within that period.

Termination of employment – date of dismissal

[13] In the normal course of terminating an employee's employment there are four alternative outcomes in terms of the date of dismissal:

- (a) Summary dismissal, where the employee is dismissed immediately without notice and without any payment for notice and is sent away - the dismissal is the day the employee is notified that he/she is summarily dismissed.

- (b) Dismissal on notice but where, rather than working a notice period, the employee is sent away and is paid a lump sum for the period of notice not worked – this is the traditional payment in lieu of notice dismissal, where the employee is dismissed when the notice is given so long as the notice is effective.
- (c) Dismissal where an employee is given notice but is not required to attend work during this notice period yet he/she continues to be paid during the notice period – the effect being the employee is not dismissed immediately but remains employed during the notice period and is on what is commonly known as “garden leave”.
- (d) Dismissal on notice where the employee works, and is paid for, the notice period – the effect being that he/she is not dismissed until the end of the notice period.

[14] The difficulties that arise in determining the date of dismissal can occur where an employee is given notice but not required to work it yet it is not clear if the employee is being paid in lieu of working the notice period or is being put on garden leave. This creates the possibility that the date of dismissal is not until the end of the notice period or some hybrid situation where the date of dismissal becomes the date when any payment in lieu of the balance of notice is paid.

[15] In this case, OEN gave TKG notice of the termination of her employment in the letter of 16 January 2019. In that letter OEN stated:

... As a result, this letter now serves as formal notice of termination of your employment by reason of redundancy.

Pursuant to the terms of your employment agreement you are entitled to four weeks' notice of termination for redundancy. In the circumstances, we do not require you to work out your notice period and will instead make a payment to you in lieu of notice. Your last day of employment with [OEN] will therefore be 16 January 2019. We will arrange for your final pay to be calculated and paid to you. Please arrange for the prompt return of any company property in your possession.

[16] The question raised in respect of this notice of termination is, is the date of dismissal:

- (a) The day notice is given; in this case, 16 January 2019 in line with the letter because it is a clear and effective notice of termination based upon a payment in lieu of notice?
- (b) The day OEN made the payment in lieu of notice; in this case, 24 January 2019, because TKG's status was not clear until the payment was made?
- (c) At the expiry of the notice period, despite it not being worked; in this case, 13 February 2019, because despite the payment being made TKG's status was not clear and she continued to be under notice, albeit that she did not attend work?

[17] In answering this question, I have considered the guidance provided by Judge Holden in *Ioan v Scott Technology NZ Ltd*² regarding an effective notice of termination relying on a payment in lieu of notice. Judge Holden referred to relevant case law and concluded:

[51] The principles to be drawn from these cases are that:

- Notice must be given and must be in accordance with the employment agreement.
- It must be clear and unambiguous, and explain how and when the employment is to be terminated.
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[18] In this case the letter of 16 January 2019 constituted notice in accordance with TKG's employment agreement and it was, on the face of it, unambiguous and clear explaining that TKG's employment ended on that day. So, this was an effective notice of termination and the date of TKG's dismissal was 16 January 2019.

When TKG's dismissal came to her attention

[19] In *Silver Fern Farms Ltd v. North*³, when considering the application of when the event "came to the notice of the employee",⁴ the Employment Court said that the 90 day

² *Ioan v Scott Technology NZ Ltd* [2018] NZEmpC 4

³ *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79

⁴ Section 114 of the Employment Relations Act 2000.

period will begin when the employee becomes aware of circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[20] In terms of the event coming to TKG's attention it is not simply that TKG was aware that she had been dismissed, rather it is when she formed a reasonable belief that the dismissal was unjustifiable.

[21] My conclusion that the letter of 16 January 2019 was effective notice and clear on when TKG's employment ended does not mean TKG knew that she had been dismissed on that day, let alone that the dismissal was unjustified or might be the basis of a claim.

[22] The circumstances surrounding TKG receiving the 16 January 2019 letter and her reaction to it created a great deal of confusion and denial on her part as to what was happening.

[23] TKG said that she received the letter of 16 January 2019 by email and she did not understand what it meant or what was happening. She said she went to a colleague to ask him if he knew what was going on but he was not aware of what was happening. TKG recalled telling her colleague that the letter said she had to leave that day, but she was confused by the reference to notice and payment.

[24] TKG said she was in shock and thought "this can't be it." Despite this confusion and being unsure of what the letter meant TKG left that day, handing in her work mobile phone as she left.

[25] On the day after, 17 January 2019, TKG did not return to work; she said she was too scared to return to work. TKG remembers seeing that OEN had paid her regular pay that day, and said that it felt like normal.

[26] On the day after that, 18 January 2019, TKG went to the office and dropped off her office keys and work credit card.

[27] Despite leaving work and only going back to return work items two days later, TKG said she still thought she was going back to work. She said it did not feel like she had lost her job, there had been no farewell and it had not felt like her last day.

[28] Then TKG received a payment from OEN on 24 January 2019, which was not her regular pay. OEN did not notify TKG of the payment when it was made and TKG did not receive a pay slip at the time. In fact, TKG only received her final pay slip in the course of progressing this claim.

[29] TKG said she only saw that the payment had been made on 28 January 2019 when she logged into her banking app to make a payment to a friend. She assumed this was her final pay and she said it was then she thought things were not right.

[30] TKG then spoke to a friend, who had some prior legal experience, on 6 February 2019 about what had happened and after discussion with her she decided she would raise a claim for unjustified dismissal.

[31] Reflecting on TKG's evidence I accept that she was confused about when she was dismissed:

- (a) TKG was shocked when she received the 16 January 2019 letter by email; the email appeared without any warning almost four weeks after the last communication had been sent on the restructuring and proposed redundancy. This shock and denial that followed caused what appeared to be a decline in TKG's mental health.⁵
- (b) No one from OEN who knew what was happening in respect of the decision to terminate TKG's employment contacted her or was available for TKG to speak to about the letter.
- (c) TKG became confused by what the letter was saying and simply took from it that she had to leave and hand back her company property, which she did. This was TKG falling into denial.
- (d) TKG's confusion was compounded when she received her normal pay the day after the 16 January letter.
- (e) There was then a delay of a week before TKG received the payment in lieu of notice, which was paid directly into her account without any payslip or

⁵ I note there was no medical evidence to support this and I rely on TKG's evidence and inferences I have drawn from that evidence in terms of her reaction and behaviour at the time.

notification confirming what the payment was for and how it had been calculated.

[32] So, up until the payment in lieu of notice was made I find that TKG did not know she had been dismissed as of 16 January 2019. It is not clear that she knew she had been dismissed at all, but if she did, she did not appear to know when any dismissal was effective from and whether she might return to work either for some notice period or because the dismissal might be rescinded.

[33] TKG's evidence was that on 28 January 2019 she realised she had received the 24 January payment, and she assumed that this was her final pay; it was then that she knew something was not right. TKG then sought some advice. Based on this I conclude that it was on 28 January 2019 that TKG knew she had been dismissed. As TKG also knew at that point that the dismissal was not right, prompting her to speak to her friend about it, this is the date that the alleged action giving rise to her unjustified dismissal grievance was brought to her attention.

Was the personal grievance raised within 90 days of 28 January 2018?

[34] 28 January 2019 is clearly the later date from which the 90-day period is to be calculated. The period of 90 days, including 28 January 2019, is up to 27 April 2019. TKG raised her personal grievance on 24 April 2019, within the 90-day period.

Conclusion

[35] TKG did raise her personal grievance within the 90-day time frame and the Authority has jurisdiction to determine it.

[36] As the parties have not yet attended mediation, pending the outcome of this preliminary matter, I now direct them to attend mediation.

[37] The Authority will forward a copy of the statement of problem and statement in reply to the mediation team of the Ministry of Business, Innovation and Employment for their information. A dispute resolution coordinator will contact the parties to arrange mediation in due course.

[38] In the interim, my investigation is suspended. It is TKG's responsibility to advise the Authority, following mediation, whether the matter has been resolved or whether I am required to continue my investigation.

Costs

[39] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority