

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 127
3200019

BETWEEN CHRISTOPHE THEVENOT
Applicant

AND NELSPRAY LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Heather Collins, counsel for the Applicant
Stephen Sansom, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 1 December 2023 from the Applicant
21 December 2023 from the Respondent

Date of Determination: 4 March 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has been asked to determine a preliminary matter whether Christophe Thevenot raised personal grievances for unjustified disadvantage and unjustified dismissal within the statutory 90-day timeframe set out in s 114(1) of the Employment Relations Act 2000 (the Act).

The Authority's investigation

[2] Ms Collins and Mr Sansom agreed that these preliminary matters could be determined on the papers with timetabled submissions in a joint memorandum dated 13 October 2023. It was accepted by counsel depending on the resolution of issues at a preliminary stage that the

Authority may be required to hear evidence about whether one grievance was raised orally and that this could take place at the substantive investigation.

[3] The Authority received written submissions and a supplementary bundle of documents from counsel on 1, 14 and 21 December 2023.

[4] As permitted by s 174E of the Act this determination expresses conclusions on issues necessary to dispose of the matter. It has not recorded all submissions received.

The issues

[5] The issues for determination are:

- (a) When did the actions alleged to have amounted to personal grievances occur or come to the notice of Mr Thevenot under s 114(1) and s 114(2) of the Act:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the 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 later, unless the employer consents to the personal grievance being raised after the expiration of that period.

(b) For the purposes of subsection (1), 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.

- (b) Was a personal grievance raised for unjustified disadvantage pertaining to the missed travel opportunities within the statutory timeframe orally or by virtue of a letter from Stallard Law dated 19 August 2020?
- (c) If raised orally was the statement of problem lodged in the Authority within the three years after it was raised under s 114(6) of the Act?
- (d) Was the personal grievance for unjustified disadvantage in relation to the redundancy process raised within the statutory timeframe?
- (e) Was the personal grievance for unjustified dismissal raised within the statutory timeframe?

When did the actions alleged to have amounted to a personal grievance occur or come to the notice of the employee?

[6] The statement of problem was lodged on 17 November 2022 with the Employment Relations Authority. It refers to three problems broadly.

[7] One is not a personal grievance although it does have some relevancy; that is that Nelspray Limited (Nelspray) misrepresented the terms and conditions of Mr Thevenot's employment about travel opportunities. There are two alleged unjustified disadvantage grievances. One is related to travel and the other to the redundancy process. There is an alleged unjustified dismissal relating to a dismissal for reasons of redundancy on 17 July 2020.

The overseas travel personal grievance

[8] The employment relationship commenced on 12 March 2018 when Mr Thevenot started his employment as a mechanical design engineer. The employment agreement that was provided and signed by both parties at the outset provided allowances for international and domestic travel. The job description referred to assisting and supervising assembly and installations locally and overseas.

[9] Mr Thevenot did not undertake overseas instalments during his employment. He claims that if he had been involved in these instalments then he would have received \$20,250 for the duration of his employment which is a loss of about \$10,000 per year. It is anticipated there will be matters for substantive investigation about pre-contractual negotiations.

[10] In or about August 2019 others from the Nelspray team travelled overseas for a system installation. At or about that time there was a performance review with Mr Thevenot. Mr Thevenot advised his employer that he was frustrated at not being included on the overseas travel and that he hoped he would as part of the future installations. The statement of problem provides this frustration was discussed in September 2019. Nelspray said they had performance concerns that resulted in overseas opportunities not being offered. Mr Thevenot does not accept the concerns were justified.

[11] Mr Sansom submits that the time for raising a personal grievance about missed travel opportunities runs from this time in 2019. It was at this time he submits Mr Thevenot was presented with a variation to his employment agreement. The terms were the same except for

a change to the job description attached as schedule 3 which removed the reference to assisting with assembly and installations overseas and only referred to assembly and installations locally. There was also a pay increase of 4.7% reflected in the variation which was backdated to March 2019. Mr Sansom submits the pay increase and back pay was to address concerns that it was unlikely Mr Thevenot would receive additional pay from overseas installations in the future. It is unclear if this is Mr Thevenot's understanding. The backpay was actioned on 11 September 2019 but Mr Thevenot did not sign any variation to his employment agreement.

[12] Mr Thevenot knew from August or September 2019 that it was unlikely that he would be given the opportunity to undertake overseas installations in the future. The statement of problem refers to him asking between October and November 2019 for compensation given travel was not being offered to him and to work from home when the team was overseas. It provides that these requests were declined although that may not be the view of Nelspray.

[13] Ms Collins submits that the breach about travel was an ongoing one and that Mr Thevenot did not understand that he may have a claim against Nelspray until he sought legal advice on 1 July 2020. She submits that the relevant timeframe is 90 days from that date and that Mr Thevenot had 90 days from the date of dismissal to raise the grievance for missed travel opportunities.

[14] On 20 August 2020 Mr Stallard from Stallard Law wrote to Nelspray on behalf of Mr Thevenot and said the following about overseas installations having set out the background to the relationship:

(7) As it happened, he did not undertake any overseas installation. The salary calculation was based upon what was promised to him to be five installations each year that would add to the base salary of \$65,520 per year (based on a 40 hour week), taking it up to around \$79,000.00.

(8) Christophe's estimate in terms of the period that he worked for the firm which is just over two years, is a loss of at least \$10,000 per year which is recoverable from the firm as a result of the misrepresentation.

(9) This is not an issue of a personal grievance or disadvantage in the workplace. It is simply a question of misrepresentation as to the nature of the contract and the remuneration (see Section 12 of the Fair Trading Act directly applies).

(10) Please advise if you would be prepared to accept mediation upon the basis the matters raised in this letter. The other alternative is a set of proceedings in the Employment Relations Authority.

[15] Mr Sansom comprehensively responded to that letter in a letter dated 6 October 2020. Amongst other matters he wrote in paragraph 18 that although it was written that the allegations are a misrepresentation they are nevertheless a grievance as defined by s 103(1) of the Act and must be raised within 90 days. I accept that although Mr Stallard referred to the travel for overseas installations as a misrepresentation it could also be a personal grievance within s 103(b) of the Act.

[16] I am not persuaded however that the 90-day period runs from a later date than August or September 2019. Mr Thevenot knew at that time in 2019 that it was unlikely that he would undertake overseas installations and therefore the action that caused concern had come to his knowledge at or about that time. The statement of problem refers to concerns being raised by him about this between October and November 2019.

[17] The date of the raising of this grievance is particularly important because of s 114(6) of the Act that provides no action may be commenced in the Authority in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised. The Authority has dated the receipt of the statement of problem as 17 November 2022.

[18] The Authority will need to hear oral evidence about this matter in order to be able to properly determine when the grievance was raised in relation to the lodging of the grievance and can do so at the substantive investigation.

The disadvantage and dismissal grievance in respect of the redundancy

[19] The redundancy process commenced in or about 29 April/early May 2020. Mr Thevenot was advised on 16 June 2020 that Nelspray proposed to disestablish the mechanical engineer position he held on 19 July 2020. His final day was in fact 17 July 2020.

[20] The 90-day period therefore runs from 17 July 2020 for the unjustified dismissal personal grievance. The statement of problem refers to a number of instances during the redundancy process as unjustified disadvantages. These include holding a meeting in June 2020 whilst Mr Thevenot was on sick leave, failure to provide relevant information, not being advised of the right to seek legal advice, the failure to consider alternatives to redundancy, mixed motives for redundancy and limited time for feedback.

Were personal grievances of unjustified disadvantage and dismissal relating to the redundancy raised within the statutory timeframe?

[21] Ms Collins submits that the grievances for unjustified disadvantage during the process for redundancy and unjustified dismissal for redundancy were raised in the 19 August 2020 letter in addition to the missed travel opportunities:

- (3) While there are issues that arise in terms of the redundancy and whether it was a genuine redundancy given that the job, at least in part, is now being done by a hired contractor. The reason given was that the director would take on Christophe's responsibilities. Christophe has also been carrying on the project management before another project manager arrived to support him, it seems unfair that Christophe was the one to be made redundant first. However, there are issues that still remain in relation to wages and salary matters associated with the carrying out of the employment contract between you as the employer and Christophe as the employee.

[22] Mr Sansom does not accept that a claim for unjustified disadvantage or dismissal is raised by virtue of the letter from Mr Stallard. He submits that the letter which also referred to the loss of travel opportunities as set out above confirmed that the complaint was not a personal grievance but was only in respect of remuneration. Mr Sansom submits no personal grievance was raised until the statement of problem was served on Nelspray on 17 November 2022.

[23] I am not satisfied that the letter of 19 August 2020 was limited to the travel opportunities and remuneration. The letter conveyed the substance of the complaint of a procedurally unfair redundancy process with the concern the redundancy was not genuine. Further that there were issues with understanding the outcome and its fairness. The content of the letter has to be considered in light of the fact that process and substance often overlap and can be intertwined.

[24] I am satisfied that grievances were raised about unjustified disadvantage and dismissal as it pertained to the redundancy within the statutory timeframe in the letter of 19 August 2020.

Summary of outcome

[25] The time for raising the unjustified disadvantage personal grievance pertaining to travel runs from August or September 2019.

[26] The Authority will hear oral evidence at the substantive investigation meeting about when a personal grievance was raised in relation to the date the action was commenced in the Authority.

[27] Grievances for unjustified disadvantage and dismissal were raised in Mr Stallard's letter of 19 August 2020 within the 90-day timeframe for doing so.

Next steps

[28] A case management call will be scheduled to discuss progression to a substantive investigation meeting.

Costs

[29] Costs are reserved until after the substantive matter had been determined.

Helen Doyle
Member of the Employment Relations Authority