

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 16
3170826

BETWEEN VIRAF TODYWALLA
Applicant

AND THE WAREHOUSE GROUP
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, advocate for the Applicant
David France, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or 24 November 2022 from the Applicant
further evidence 21 November 2022 from the Respondent

Determination: 16 January 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Viraf Todywalla, raised personal grievances in relation to a number of unjustifiable disadvantage claims with the Respondent, The Warehouse Group Limited (TWG), in a letter dated 1 March 2022. The claims and associated claims were subsequently raised in the Statement of Problem lodged with the Authority on 22 April 2022.

[2] TWG denies that Mr Todywalla has been unjustifiably disadvantaged and claims that he has not raised all of his unjustifiable disadvantage claims within the 90 day time limit as set out in s 114 of the Employment Relations Act 2000 (the Act).

[3] TWG does not consent to the grievances being raised after the expiry of the statutory 90 day timeframe.

[4] This determination addresses the preliminary issue of whether or not Mr Todywalla raised any or all of his unjustifiable disadvantage claims with TWG within 90 days of the grievance occurring or coming to his notice, whichever is the later in accordance with the requirements of s 114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

Note

[5] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Statement of Problem, the Statement in Reply, documents submitted by the parties, and submissions from the parties.

[6] The evidence has as a consequence not been tested at this preliminary stage.

Issue

[7] The issue for determination is whether or not Mr Todywalla raised any, or all, of his unjustifiable disadvantage grievances within the statutory 90 day time period?

Brief Background Details

[8] Mr Todywalla is employed as a Sales Consultant with TWG in Auckland at its Sylvia Park Store. He commenced working with TWG in 4 August 2014 pursuant to an individual employment agreement which he had signed and dated on 29 July 2014.

[9] Mr Todywalla was absent from work on ACC during the period from 17 November 2021 until 7 March 2022.

[10] By email dated 30 November 2021 Mr Todywalla raised a complaint of: “Bullying, threatening, breach of privacy, discriminating and personal harassment” which included allegations of incidents which involved other employees of TWG.

[11] Mr Matthew Piper, Head of Employment Relations, received the complaint and contacted Mr Todywalla to discuss his complaints. This discussion took place during a telephone call on 20 December 2021. The one hour duration of the telephone call was insufficient to cover all of Mr Todywalla’s concerns and therefore Mr Piper told him he would call him again within the following few days.

[12] Mr Piper called Mr Todywalla again on 24 December 2021, but Mr Todywalla was unavailable to take the call.

[13] In early January 2022 TWG was contacted by the Ministry of Business, Innovation, and Employment (MBIE) and invited to attend mediation which had been requested by Mr Todywalla. TWG agreed to attend.

[14] Mr Todywalla engaged a lawyer to represent him. In an email dated 3 February 2022 the lawyer requested copies of the specific information on behalf of Mr Todywalla which was provided by TWG on 20 February 2022.

[15] Mediation took place on 23 February 2022.

[16] Following the mediation Mr Piper contacted Mr Todywalla and asking if he wished for any further steps to be taken in relations to the concerns set out in the email dated 30 November 2021.

[17] On 1 March 2022 TWG received a letter from Mr Halse advising that all future correspondence should be directed to CultureSafe NZ Ltd which was now representing Mr Todywalla, and raising a personal grievance for unjustifiable disadvantage on behalf of Mr Todywalla.

Raising of a Personal Grievance

[18] Section 114(1) of the Employment Relations Act 2000 the Act) states:

- (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;

[19] In *Panapa v Spotless Facility Services Limited* the Employment Court stated:

[22] An employee who wishes to raise a personal grievance generally must raise the grievance with their 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. That time can be extended if the employer consents to the personal grievance being raised after the expiration of the 90-day period or by the Authority if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and the Authority considers it just to do so.

[23] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employer wants the employer to address. The raising of a grievance is the first recognised step in the problem solving process.

[24] In order for a communication to constitute the raising of a personal grievance, it must make the employer sufficiently aware of the grievance to be able to respond to it.¹

[20] Section 114(2) of the Act states:

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.”

[21] In *Creedy v Commissioner of Police* Chief Judge Colgan stated:

[36]for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.²

[22] I find that the language of s 114(2) as applied by the Employment Court in *Panapa v Spotless Facility Services Limited* makes it clear that it is necessary that:

- (i) there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised;
- (ii) the employee has taken reasonable steps to advise the employer that he/she is alleging a personal grievance it wants the employer to address; and
- (iii) the communication about the personal grievance made the employer sufficiently aware of what it had to address.

[23] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer³.

Did Mr Todywalla raise his unjustifiable personal disadvantage grievances within the statutory limitation period pursuant to s 114(1) of the Act?

[24] The letter dated 1 March 2022 set out the grounds for Mr Todywalla’s personal grievance as being TWG’s failure to:

¹ *Panapa v Spotless Facility Services Limited* [2021] NZEmpC 88

² *Creedy v Commissioner of Police* [2006] ERNZ 517

³ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

- Properly investigate the bullying allegations that he brought to the attention of his [line manager] in accordance with workplace health and safety guidelines and legislation.
- Provide a safe work environment.

[25] The Statement of Problem reiterated the grounds as a failure to “justly and correctly investigate allegations of bullying and racism.” It was also claimed that TWG had failed to act in good faith and as a reasonable employer.

[26] The identified unjustifiable dismissal claims as set out in the two communications are:

- i. The failure by TWG to properly investigate Mr Todywalla’s complaints as set out in his 30 November 2021 email;
- ii. The failure by TWG to properly investigate Mr Todywalla’s 3 February 2021 complaint;
- iii. Direct and indirect attacks towards Mr Todywalla by TWG;
- iv. Mr Todywalla’s “list of complaints” set out as Addendum B to the Statement of Problem; and
- v. Other miscellaneous claims raised on behalf of Mr Todywalla in the Statement of Problem.

[27] I shall address each ground to identify whether or not it has been raised with sufficient information for TWG to be able to address it and/or raised within the 90 day statutory time limit. In so doing, I acknowledge that a grievance may be about behaviour that is continuous in nature. As stated by the Employment Court in *Premier Events Group Ltd v Beattie (no 3)*:

One raising of a personal grievance should be sufficient to cover one related and continuous cause of action, provided the events complained of outside the 90 days all relate to events contained within the 90 day period and form a course of related conduct.⁴

⁴ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [20]

i. *Failure to investigate the 30 November 2021 email complaint*

[28] The 30 November 2021 email raised concerns by Mr Todywalla that he had been bullied, harassed, and subject to discrimination. Based on the letter of 1 March 2022 it appears that the period during which these events occurred includes the period December 2021 to February 2022.

[29] The Statement of Problem lodged on 22 April 2022 clearly claims that TWG failed to properly investigate these ongoing concerns of bullying and racism.

[30] I determine that this claim has been raised within the statutory 90 day time period.

ii. *Failure to investigate the 3 February 2021 Complaint*

[31] The 1 March 2022 Letter and the Statement of Problem referenced the failure by TWG to investigate a complaint of bullying which had been made by Mr Todywalla about a former Sylvia Park Store Manager in a letter dated 3 February 2021. The 1 March 2022 letter states that the investigation was not: “dealt with professionally or ethically” due to having been investigated by “indirectly concerned people”.

[32] TWG completed an internal investigation into this complaint, with Mr Todywalla being provided with a response and outcome in a detailed letter dated 1 March 2021. In a meeting held on 24 March 2021 the Store Manager provided Mr Todywalla with an apology for certain actions which had been raised in the complaint.

[33] Following the outcome letter on 1 March 2021 Mr Todywalla did not raise a personal grievance in respect of either the investigation process or the outcome of the investigation process in either of the 90 days following the 1 March 2021 letter or the meeting held on 24 March 2021.

[34] The raising of the 3 February 2021 complaint in the letter dated 1 March 2022 I find is outside of the 90 day statutory time limit. The issue is not related to events contained within the 90 day period.

[35] I determine that the claim that TWG failed to properly investigate the 3 February 2021 complaint is outside of the statutory 90 day time period.

iii. *Claim of Direct and Indirect Attacks.*

[36] The letter dated 1 March 2022 sets out 17 alleged “Direct attacks” (listed A. to Q. under the heading ‘Direct attacks’) and 16 alleged ‘Indirect attacks’ (listed A. to P. under the heading ‘Indirect attacks’).

[37] As noted in *Creedy*, and in the later case of *Chief Executive of Manukau Institute of Technology v Zivaljevic* in which the Employment Court summarised the relevant principles applicable to raising a personal grievance under s 144 of the Act:

It is insufficient for an employee simply to advise an employer that the employee considers that he or she 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.⁵

[38] I find that there is a lack of information provided in regard to these complaints, there are no details provided regarding such matters as the dates when the incidents occurred, or who was involved in them. This would mean that TWG would not know what it was meant to be addressing and thus to be able to respond appropriately.

[39] It is also not possible to determine whether or not these complaints relate to events which fell within the 90 day period prior to 1 March 2022.

[40] On that basis I determine that the claims of ‘Direct’ and ‘Indirect’ attacks have not been properly raised.

iv. *List of complaints*

[41] Attached to the 1 March 2022 Letter is a list of 14 allegations which were attached as Addendum B. A number of these allegations are repeated in the Statement of Problem.

a. Complaint 1: Regional Manager holding a grudge about a petition

[42] This complaint relates to alleged actions which took place in 2019. It is not related to incidents in the time period dating back from 1 March 2022, and I find it has been raised outside the statutory 90 day time period.

⁵ *Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [38]

b. Complaints 2 – 7

[43] These complaints relate to the 3 February 2021 complaint which was investigated and dealt with, finalising in an outcome letter sent to Mr Todywalla on 1 March 2021. As already observed there was no challenge to that investigative outcome, and I find these complaints, like that complaint, are being raised outside the statutory 90 day time period.

c. Complaint 8: Financial loss

[44] There are no particulars provided in this complaint as to dates and times. However TWG submits that dates and times can be deduced from circumstantial indications.

[45] It is submitted that complaint 8a) refers to working at Christmas. Mr Todywalla was absent from work on ACC during Christmas 2021 therefore the relevant period must be the Christmas 2020 period. This is outside of the 90 day period prior to the 1 March 2022 letter.

[46] Complaint 8b) refers to an “Annual Increment” which Mr Todywalla claims he was entitled to receive but did not. No details are provided as to when the entitlement or payment of the annual increment referred to occurred, and therefore the complaint lacks sufficient information for the employer to be able to respond.

[47] Complaint 8c) refers to discontinuance of suppliers during Covid level 4. There are no dates provided however I consider that Mr Todywalla can be taken to be referring to the Auckland Alert Level 4 lockdown periods. Auckland was in Alert Level 4 lockdowns on the following dates: 25 March to 27 April 2020 and 17 August to 21 September 2021. These periods are all outside of the statutory 90 day time period.

d. Complaints 9 to 12

[48] These complaints all relate to the 30 November 2021 complaint and disadvantage claim which allege that TWG did not investigate the complaint properly.

[49] As such, since I have determined the 30 November 2021 complaint has been raised within the statutory 90 day time limit, these will form part of the Authority’s investigation.

e. Complaint 13: Unpaid ACC claim

[50] This claim relates to Mr Todywalla's workplace injury which he suffered on 18 November 2021 and was then absent from work on ACC until 7 March 2021. Mr Todywalla claims that the Store Manager at Sylvia Park failed to process a work-related injury with ACC which meant he did not initially receive ACC payments.

[51] TWG denies the claim on the basis that it discovered the delay had been caused by an independent entity to TWG. The Store Manager wrote to Mr Todywalla on 13 December 2021 proposing a solution.

[52] A personal grievance must be raised within 90 days of the action occurring or coming to the notice of the employee.

[53] On the basis that the grounds for a personal grievance can be held to have come to Mr Todywalla's notice when he received the email dated 13 December 2021, I determine that this complaint has been raised within the statutory 90 day time limit.

f. Complaint 14: Concerning [other employee]

[54] It is not clear to what this complaint relates but it appears to relate to a period when a former Sylvia Park Store Manager was employed in that position. That period was before November 2021.

[55] I determine that this complaint is outside of the statutory 90 day time period.

vi. Miscellaneous Complaints

[56] In the Statement of Problem Mr Todywalla raised his having been required to use sick leave for a period when he was not at work, being from 3 to 7 November 2021, although he claims he was entitled to be paid his normal pay due to his absence being caused by his having Covid. This is the first time the claim is raised.

[57] In the email sent on 13 December 2021 by the Store Manager at Sylvia Park it was explained to Mr Todywalla that his absence was being treated in accordance with TWG's procedures.

[58] Although the absence period ended on 7 November 2021, I accept that Mr Todywalla may have only become aware of the grounds for a disadvantage grievance when he received the email on 13 December 2021.

[59] However even accepting the later date, I determine that this grievance is outside of the statutory 90 day time period.

[60] Finally, various allegations are raised in the 1 March 2022 letter and the Statement of Problem which raise general allegations of various types of fraudulent behaviour by TWG employees, including theft and manipulation of stock by managers.

[61] There is no information as to how such alleged actions affected the applicant to his disadvantage, nor do they provide grounds for a personal grievance. Nor does an alleged misconduct by another employee constitute an employment relationship problem between the applicant and the employer.

Summary of claims to be investigated

[62] As set out on the preceding paragraphs and analysis I identify the following unjustifiable disadvantage claims by Mr Todywalla as correctly raised for investigation by the Authority:

1. The alleged failure by TWG to “properly investigate” Mr Todywalla’s 30 November 2021 complaint of bullying, harassment and discrimination; and
2. The processing of Mr Todywalla’s ACC issue in a manner which disadvantaged the applicant’s employment and TWG’s actions were unjustified.

Should Mr Todywalla be granted leave to raise the (excluded) personal grievances out of time pursuant to s 114(4) and s 115 of the Act?

[63] TWG does not consent to Mr Todywalla raising his unjustifiable disadvantage grievances (other than those determined to have been properly raised) outside the statutory 90 day timeframe.

[64] As set out in s 114(3) of the Act where an employer does not consent to a personal grievance being raised after the 90 day statutory time frame an employee may apply to the Authority for leave to raise it outside of that frame pursuant to s 114(4) of the Act which states.

On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –

- (a) Is satisfied that the delay, in raising the personal grievance was occasioned by exceptional circumstance (which may include any 1 or more of the circumstances set out in section 115); and
- (b) Considers it just to do so.

[65] Examining the criteria which must be fulfilled I note firstly that Mr Todywalla has made no specific application to raise the (excluded) personal grievance claims outside the statutory 90 day time period.

[66] I find no evidence supporting the conclusion that there was an exceptional circumstance basis for the delay in Mr Todywalla raising these personal grievances outside of the statutory 90 day time period.

[67] Mr Todywalla is able to proceed on the identified claims for the personal grievance, and I consider it would not be in the interests of justice to allow him to raise the other grievances given the delay in raising them and the lack of exceptional circumstances.

Next Steps

[68] The personal grievance claims set out at paragraph [62] are set down for investigation in the period 9 to 12 May 2023.

Costs

[69] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority