Employment Court of New Zealand

UQE v TBN [2022] NZEmpC 46 (16 March 2022)

Last Updated: 21 March 2022

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 46
EMPC 206/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	UQE Plaintiff
AND	TBN Defendant

Hearing:	13 October 2021
Appearances:	P Cranney, counsel for TBN D Grindle, counsel for UQE
Judgment:	16 March 2022

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] This proceeding arises out of a settlement agreement between a company, UQE, and several of its employees. One of those employees, TBN, filed a grievance in the Employment Relations Authority claiming that UQE had breached the settlement agreement and that they had been discriminated against on the basis of union involvement. UQE contended that TBN's grievance had been raised out of time; TBN claimed that UQE had consented to the late raising of the grievance.

[2] The Authority concluded that UQE had consented to TBN pursuing their grievance out of time, that there had been no breach of the settlement agreement, and

that UQE had discriminated against TBN on the basis of union involvement.[1] It then determined that TBN had suffered limited detriment as a result of UQE's unjustified actions and awarded TBN compensation of $3,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[3] Two challenges to the determination were filed. TBN filed a challenge to the quantum of compensation awarded in their favour and against the Authority's finding that no breach of a settlement agreement between the two parties had occurred, and declining to award a penalty against the company. UQE filed a parallel challenge. Its challenge was focussed on the question as to whether the Authority was incorrect in finding that the plaintiff acquiesced or consented to the personal grievance of the defendant being raised out of time. Counsel were agreed that UQE's challenge ought to be dealt with first.

[4] UQE did not elect to pursue its challenge by way of de novo hearing,[2] and no evidence was called in support of the challenge. In these circumstances the task for the Court is not to decide the consent issue afresh, reaching its own conclusion on the matter, but to decide whether the Authority made an error of fact and/or law in determining that the company consented to the grievance being pursued out of time and, if so, whether that part of the determination ought to be set aside.[3]

The facts

[5] UQE was party to a collective agreement with a union. TBN was a member of the union and a delegate. February 2019 was marked by a period of industrial unrest. TBN and a number of other employees were invited to attend a disciplinary meeting, held on 5 April 2019. A settlement agreement was entered into as a result of that meeting, which included non-disparagement and confidentiality clauses.

[6] TBN had earlier applied for a position at another workplace and was subsequently interviewed. A relative of TBN's (ZUD) was on the interview panel.

1 *TBN v UQE* [2021] NZERA 219 (Member Eleanor Robinson).

2 Employment Relations Act 2000, s 179(4).

3 *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [13]- [17].

ZUD knew a team leader at UQE, DHD.[4] DHD had not been involved in the settlement discussions.

[7] ZUD's potential conflict of interest in sitting on the interview panel was drawn to the prospective employer's attention, and the prospective employer was happy for ZUD to remain involved.

[8] ZUD had a conversation with DHD. The conversation involved TBN's attributes as an employee. There was a dispute about what was said. The Authority found that during the course of the conversation DHD gave feedback to ZUD that TBN was "disruptive" and "very union-orientated", that UQE was "in the process of terminating [TBN's] employment at a cost of around $100,000" and that "if it were not for the threat of strike action, [TBN] would no longer be employed."[5]

[9] The comments were subsequently relayed to TBN. TBN was not appointed to the position they had applied for (it appears that TBN was interviewed on 4 July 2019, and the position was filled that month). TBN raised concerns about the comments with their union, enclosing a "to whom it may concern" email from ZUD (dated 2 October 2019). The email set out the alleged comments in detail. It did not specify the date of the conversation. Nor did the email specify the date on which the conversation had been brought to TBN's attention. The union met with SIO, the regional manager of UQE, on 7 October 2019.

[10] At the meeting of 7 October 2019 the union provided SIO with a copy of ZUD's email of 2 October.[6] The Authority recorded that SIO gave evidence that he had noticed that the email did not state when the conversation between ZUD and DHD had taken place; that he had asked the union when the email had been sent but had not received a reply; and that he thought that the union was being evasive. SIO gave evidence that he told the union that he saw the potential seriousness of the claims made in the email and that he wanted to investigate the claims further. He said that he would speak to ZUD - that never transpired.

4 DHD became branch manager at UQE from 15 April 2019.

5 *TBN v UQE*, above n 1, at [24].

6 At [34]-[36].

[11] I pause to note that the evidential focus for the Authority was on the date on which the conversation between ZUD and DHD had taken place, and resolving the confusion that arose in respect of that date. I regard the date of the conversation as something of a red herring, for reasons I will come to. At this point it is sufficient to note that while the Authority found that TBN had become aware of the conversation on 5 June 2019, no findings were made as to if and when SIO became aware of that.

[12] A further meeting took place between the union and SIO on 10 October 2019. While there was some dispute about what occurred during the course of the meeting in terms of who said what, the Authority found that the union had "set out TBN's view that he was being penalised for being a union member and gave details of the financial remedy sought."[7] The Authority went on to find that SIO wrote to the union later on 10 October 2019 setting out UQE's response to concerns about the discussion between DHD and ZUD. The Authority found that TBN was not satisfied with what UQE had to say.[8]

[13] TBN wrote to SIO through their lawyer (not current counsel) on 6 November 2019 stating that a personal grievance was being raised in relation to a breach of the record of settlement by the comments made by DHD to ZUD, as well as for

discrimination on the grounds of involvement in the activities of a union and union membership. The letter claimed that the conversation had taken place in September or October 2019.

[14] UQE replied through its lawyer advising that:

We acknowledge your client's personal grievance and are currently conducting our own enquiry and hope to be in a position to respond more formally to the grievance next week.

[15] A substantive response to the concerns raised on behalf of TBN, including as to its view of the discussion between DHD and ZUD followed. Essentially the allegations of breach were denied. TBN was dissatisfied with the response and a personal grievance was filed on their behalf on 6 November 2019. A statement of

7 At [62].

8 At [63]-[64].

problem was filed with the Authority on 27 November 2019. The statement of problem again referred to the alleged conversation between ZUD and DHD as having taken place in September or early October 2019. That date was subsequently revised to July 2019 after communication between the parties' lawyers in December 2019. The date was later amended, via correspondence to the Authority, to refer to the conversation allegedly taking place in May or early June 2019.

[16] While the above factual context emerges from the Authority's determination, a number of specific factual findings are of particular relevance, including that:

- The conversation between ZUD and DHD gave rise to a personal grievance.
- TBN did not know that they had a personal grievance until 5 June 2019 (the date on which the conversation was relayed to them).
- TBN had 90 days from 5 June 2019 to raise a personal grievance.
- TBN failed to raise a personal grievance with UQE within the 90-day timeframe.
- At a meeting on 7 October 2019 there was a degree of confusion about when the conversation between ZUD and DHD had taken place. SIO had asked when the conversation had taken place; SIO had not received an answer; SIO considered that the union was being evasive. (No finding was made that the union was being evasive).
- On 10 October 2019 TBN (through their union) advised UQE (through SIO) that TBN had a personal grievance arising out of the conversation between ZUD and DHD.
- It was more likely than not that SIO had sufficient information at the time of the 10 October 2019 meeting to conclude that the conversation between ZUD and DHD had occurred on or before April 2019. (No finding was

made as to whether SIO knew the date on which TBN had become aware of the conversation).

- Immediately after the 10 October 2019 meeting UQE (through SIO) took steps to resolve the personal grievance.
- The steps taken to resolve TBN's grievance reflected the steps for the resolution of personal grievances contained within the collective agreement.
- UQE had consented to the late pursuit of the grievance.

Raising a grievance and consent to pursue out of time: the legal framework

[17] An employee who wishes to raise a personal grievance must do so 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 later), unless the employer consents to the personal grievance being raised after the expiration of that period.9

[18] In this case the Authority found that the action alleged to amounted to a personal grievance (the conversation between ZUD and DHD); had occurred sometime in April 2019 and came to the notice of the employee on 5 June 2019. The 90-day period ran from 5 June 2019.

[19] Whether an employer has consented to a grievance being raised after the expiration of the 90-day period is a question of fact and degree.10 Consent does not need to be express; it can be implied.11 As the Court of Appeal has observed: 12

9 Employment Relations Act 2000, s 114(1).

10 See *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [23] (emphasis added) endorsing the approach adopted by the Employment Court in *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35 and *Phillips v Net Tel Communications* [2002] NZEmpC 138; [2002] 2 ERNZ 340.

11 *Hawkins v Commissioner of Police* [2007] ERNZ 762 (EmpC) at [17]-[19]. This finding was not disturbed on appeal.

12 See for example *Commissioner of Police v Hawkins*, above n 10, at [24]. Emphasis added.

The real issue is not whether, in formal terms, the Commissioner 'turned his mind' to the extension, but rather *whether he so conducted himself that he can reasonably be taken to have consented* to an extension of time.

Analysis

> [20] The Authority member did not set out the legal test to be applied in determining whether UQE had consented to the grievance being pursued out of time. That is not fatal. The approach adopted by the Authority, and the factors it considered relevant in assessing whether consent had been given, emerge from a reading of the determination as a whole. The correctness of that approach must, however, be assessed against the applicable legal framework. The applicable legal framework requires consideration of all of the relevant circumstances.
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> [21] The key point which I understood the plaintiff to be arguing was that, as at 10 October 2019, SIO could not have known the date on which the 90-day period had started to run. In these circumstances (and having regard to the failure to clarify the timing issue in response to SIO's question), it is unsurprising that events unfolded as they did. The steps UQE took, through SIO, to resolve TBN's concerns via the processes contained within the collective agreement could not objectively be taken to reflect consent to the late raising of a grievance, and the Authority erred in finding that they did and in failing to have regard to other relevant factors to inform its assessment.
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> [22] I have already referred to the evidential focus adopted by the Authority, directed at the date on which SIO became aware of the conversation between ZUD and DHD. This underscored the Authority's finding that as at the October 10 meeting it was more likely than not that SIO knew that the conversation had taken place by early April 2019 at the latest.13 In reaching this finding the Authority member recorded that SIO was questioned about his knowledge of when the conversation giving rise to the grievance took place; that SIO had stated that when he spoke to DHD in October 2019, DHD told him he had not spoken to ZUD since some building work had ended; and that the building work in question ended at the end of March or beginning of April 2019.14

13 *TBN v UQE*, above n 1, at [61].

14 At [60].

> [23] It is difficult to reconcile the Authority's finding that SIO knew of the date of the conversation with the fact that the date relied on by TBN was initially not advised and was then subject to ongoing revision. In this regard, no response was provided when the question was asked at the meeting of 7 October 2019 and the date of the conversation was variously described as having occurred in September or October 2019 (by way of correspondence dated 6 November 2019); July 2019 (by way of correspondence dated 19 December 2019); and then May or June 2019 (by way of correspondence to the Authority).
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> [24] It may be noted that the waters are muddied further by the formulation of TBN's own challenge (which has yet to be dealt with) which presently claims that the conversation breached a settlement agreement dated 18 April 2019, and asserts the conversation post-dated this agreement, taking place "approximately one month before the Plaintiff's interview with [ZUD's employer] on 4 July".
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> [25] In any event, the finding as to SIO's awareness of the date of the conversation is of limited relevance to whether he subsequently consented on UQE's behalf to TBN's grievance being raised out of time. That is because, as I have said, the time ran from the date TBN became aware that the conversation had occurred or, to put it another way, became aware that he had a personal grievance. The Authority made no factual finding about whether SIO had this knowledge as at the time he took steps to resolve the matters. The result was an erroneous emphasis on SIO's knowledge of the date of DHD and ZUD's conversation, rather than SIO's knowledge of the date on which those comments were relayed to TBN.
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> [26] There is nothing to support an inference that UQE or SIO knew (or ought to have known) the date TBN became aware of his grievance. It is apparent that irrespective of the finding that SIO had sufficient information to conclude DHD and ZUD had spoken in March or early April 2019, UQE continued to be provided with information that reasonably suggested that TBN's awareness of the grievance had arisen more recently.
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> [27] That is not the end of the matter. As the Court of Appeal made clear in *Hawkins*

the inquiry into whether consent has been given is two-fold: was the grievance raised

out of time (a question of fact); if so, did the employer consent to the grievance being raised out of time (consent being objectively assessed). In this case the grievance was raised out of time; the key inquiry is the way in which UQE, through SIO, responded to the grievance and whether those steps objectively reflect consent. In this regard the Authority centred its finding of consent squarely on

the way in which the steps taken by SIO could be seen to reflect the dispute resolution process in the collective agreement.

> [28] The plaintiff submitted that the Authority erred in this regard – engagement with a dispute resolution process does not necessarily reflect consent to a personal grievance being pursued out of time, as the Court in *Vulcan Steel Ltd v Wonnocott* made clear:15

Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test.

> [29] I agree with the general proposition and would add that while the fact that a resolution process contained within a collective agreement has been followed is not the test, the fact that it *has* been followed may be an indicator of consent. The focus is, after all, on conduct objectively reflecting consent to a grievance being pursued out of time. The fact that, following the 7 and 10 October meetings, SIO went down the dispute resolution process in the collective agreement was a relevant factor but needs to be viewed in a broader factual context. I agree with Mr Grindle (counsel for the plaintiff) that the narrow focus on steps taken under the collective agreement led the Authority into error in the particular circumstances.
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> [30] The relevant context in this case includes the informational vacuum which SIO was dealing with. In this regard it is evident from the Authority's findings that neither TBN or the union went on the front foot to clarify the position at the October meetings (so immediately prior to SIO taking steps to resolve the concerns that had been raised), and it is clear that there was ongoing uncertainty and confusion as to the relevant dates from TBN's perspective thereafter.

15 *Vulcan Steel Ltd v Wonnocott* [2013] NZEmpC 15 at [45].

> [31] This uncertainty and confusion is distinguishable from the arguments made in *Jacobsen* and *Hawkins* where the employers had failed to consider, or were unaware of, the 90-day issue in circumstances where the grievances had been raised appreciably out of time. This is not a case where the employer's engagement with the grievance arose from a misapprehension as to, or failure to consider, the relevant timeframe. UQE's conduct must be viewed in light of the ongoing lack of clarity around the dates in question, even after attempts at clarification were made. Those circumstances form part of the factual context informing the fact and degree exercise.
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> [32] The fact that TBN was aware that they had a grievance as early as 5 June 2019, but delayed in raising it with their employer until 10 October 2019, was relevant to an assessment of whether UQE had consented to the grievance being pursued out of time; was not considered by the Authority; and made consent less likely.16 Put another way, if SIO had the necessary facts to calculate that TBN's grievance was 38 days out of time, it is unlikely that consent would have been given.
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> [33] The lengthy delay in raising the grievance; the ongoing confusion or lack of information as to dates; and the difficulties that all of this presented to SIO were relevant to a consideration of whether UBQ, through SIO, consented to the grievance being pursued out of time. When regard is had to the context, and the surrounding circumstances, the company's apparent engagement with each of the steps in the collective agreement for resolving personal grievances did not objectively signify consent to TBN pursuing a grievance out of time. Rather, it was suggestive of good faith engagement by an employer with an employee and their representative in a timely manner about their concerns.
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> [34] I am driven to the conclusion that the Authority erred in law in concluding that UQE had consented to TBN's grievance being pursued out of time. Mr Cranney (counsel for TBN) made the submission that such a result was an unattractive one in the context of the Authority's unchallenged finding that discrimination had occurred. However unattractive that outcome is, it does not displace the clear statutory timeframes as set out in the Act.

16. See *Vulcan*, above n 15, at [46] where it was held that, in considering "degree", a minimal delay made employer consent more likely. In that case the delay was a day or two.

Conclusion

> [35] The challenge succeeds. The Authority's finding that the claim was not out of time is set aside. It follows that the claimed personal grievance is barred by s 114 of the Act and the Authority's finding in respect of that grievance, and its ensuing monetary award, must also be set aside.
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> [36] The parties are encouraged to agree costs. If that does not prove possible, I will receive memoranda, with counsel for UQE filing and serving within 20 working days of the date of this judgment; counsel for TBN within a further 15 working days; and anything strictly in reply within a further five working days.

Christina Inglis Chief Judge

Judgment signed at 12.45 pm on 16 March 2022