

Attention is drawn to the order prohibiting publication of certain information in this matter

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 96
3234979

BETWEEN W
 Applicant

AND YZ
 Respondent

Member of Authority: Antoinette Baker

Representatives: Robbie Bryant, counsel for the Applicant
 Naoimh McAllister, counsel for the Respondent

Investigation Meeting: 15 November 2023 in Queenstown

Submissions Received: On the day
Further information: 28 November 2023

Date of Determination: 21 February 2024

DETERMINATION OF THE AUTHORITY

Non-publication

[1] This is an application for leave to bring a personal grievance raised outside of the required 90-day time frame. This determination is subject to non-publication orders for reasons that follow.

[2] The Authority has the discretion to prohibit publication of matters before it.¹ The exercise of that discretion must be based on a principled basis with a starting point of open justice². I heard briefly from counsel for the parties. Non-publication was opposed by the respondent on the basis there was no need for it at this interim stage because sensitive matters involving third parties did not yet need to be considered.

[3] I am satisfied that it is reasonable to order non-publication as an interim measure given the nature of the sensitive third-party evidence that may sit at the heart of the substantive claim. While there may not be a need to reference those things in this interim determination, the identity of the applicant and respondent and the workplace would likely be easily identified back to this determination should the matter proceed to a substantive investigation with a subsequent non-publication order granted at that stage. Even at this stage, there is reference to criminal proceedings that have a connection to the preliminary matters and reference to these could easily be connected to sensitive matters involving third parties.

[4] Accordingly, I find it reasonable to order non-publication of the parties and location of the employment in this interim determination. The Applicant will be referred to in this determination as W, the respondent as YZ and where necessary the place of work as the workplace.

This application

[5] W commenced work as a ‘maintenance assistant’ for YZ in early November 2020³ and finished on 21 December 2020 when YZ decided his causal contract had ended. Prior to his employment ending YZ began to investigate a serious complaint it received from another employee about W. YZ did not resolve that investigation process and instead communicated that W’s employment had come to an end due to its causal nature. The complaint later became the focus of criminal charges and proceedings against W of which he was acquitted almost two years after his employment ended. Approximately 5 months after seeking employment

¹ Employment Relations Act 2000, schedule 2, clause 10 (1).

² *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney- General* [2022] NZEmpC 27.

³ Payroll records show he must have started work in November 2020 and not the nominated 1 December 2020 in originating statements.

advice and understanding he had a time limit to do so, he raised a personal grievance for unjustified dismissal with YZ.

[6] W asks for leave to raise a personal grievance against YZ, outside of the 90-day timeframe to do so. W says this is because he did not know he had to raise a grievance within 90 days due not having received an individual employment agreement (IEA) that contained a clause about this. Such a clause is required to be included in an IEA under section 65(2)(a)(vi) of the Employment Relations Act 2000 (the Act). The absence of such a clause may be considered within the definition of 'exceptional circumstances' under s 115(c) of the Act that may allow leave to be granted to raise a personal grievance beyond the 90 days if it is also just to do so.⁴

[7] YZ opposes the application to bring the personal grievance out of time. It says W did receive an IEA containing a clause that he had to raise a grievance within 90 days. It also says given the length of time this meant it would not be just to allow the application because witness recall would be impaired. To this W submits that the information required to inform an investigation about the justification of the dismissal is still available.

[8] W if successful in this application seeks to bring a claim that he was unjustifiably dismissed both on procedural and substantive grounds by YZ and asks for remedies of compensation, wages, relocation costs, payment of his notice period, penalties under s 65(2)(a)(vi) and (4) of the Act to be paid to him in full, and costs, including the filing fee. YZ, without prejudice to defending this application, says that W was not unjustifiably dismissed because he was not permanently employed, and his 'casual' employment ended.

[9] This determination deals only with the application to grant leave for W to bring his personal grievance out of time.

⁴ Employment Relations Act 2000, s114(4).

[10] If I am satisfied that the delay in raising W's grievance was caused by 'exceptional circumstances' and then if I find it just to grant leave for W to bring his grievance out of time, I must direct the parties to mediation 'to seek to mutually resolve the grievance.'⁵

The Authority's investigation

[11] I held an investigation meeting. I heard from W and two witnesses who remain employees of YZ: W's manager at the time that W was employed, and the YZ Human Resources and Recruitment Manager, a role she also held when W was employed. Respective counsel gave submissions. Further information was provided by YZ after the meeting, at my request. This further information was to clarify the evidence of emails in relation to attachments.

[12] As permitted by s 174E of the Act, I have not recorded all the evidence and submissions before me but set out my findings, conclusions and any orders made so as to dispose of this preliminary matter.

Issues

[13] The issues are:

- a. Are there 'exceptional circumstances' in relation to W's delay in raising his personal grievance in that his employment agreement did not contain a clause that included he had to raise a grievance within 90 days?
- b. If so, did that 'exceptional circumstance' occasion the delay in bringing the personal grievance?
- c. If so, is it just to grant leave for W to now bring the personal grievance?
- d. Should either party pay a contribution towards the costs of the other?

⁵ Employment Relations Act 2000, s114(5).

Are there ‘exceptional circumstances’ in relation to W’s delay in raising his personal grievance in that his employment agreement did not contain a clause that included he had to raise a grievance within 90 days?

[14] Section 114(4) allows the Authority upon application to grant leave to bring a grievance outside the 90-day timeframe if it is satisfied the delay is caused by ‘exceptional circumstances’.

[15] Specific situations of ‘exceptional circumstances’ are included under s 115 of the Act. W specifically relies on only one of these, s115(c) which is:

Where the employee’s employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; ...

[16] The relevant reference section under s115(c) for an IEA is s 65 of the Act which includes that the IEA must be in writing and amongst other things include:

A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised; ...

[17] W acknowledges he signed a document that was a letter to him from the Human Resources Manager dated 25 November 2020. The letter was two pages and headed ‘Casual Employment Agreement – Engagement Letter’ (signed letter). His recall is that it was in documents in an envelope that his manager left in the work van for him. He thought this was 20 October 2020. I find this unlikely for reasons that follow and particularly because he did not sign this document until 9 December 2020. The signed letter invited W to ‘undertake a casual term of employment on the terms of engagement in this letter *and in the*⁶ [YZ] Core Terms and Conditions of Employment for Casual Employees that were provided to you in your original casual term letter.’ The signed letter then continued to set out in a

⁶ My italicised emphasis added.

table the rate of pay and place of work; the 'Position' as 'Maintenance Assistant'; the 'Hours of Work' 'as required', and the End Date as 'On completion of the [YZ] Accommodation Project at the end of 2020.'

[18] The signed letter included next to 'Termination' the following:

As this is a casual agreement, no termination clause is required, but as a courtesy, either party will endeavour to provide 7 days' notice if the contractual relationship is no longer required.

[19] The second page of the signed letter carried a declaratory paragraph under which W signed and dated '9/12/20'. That declaration was:

I acknowledge I have read, considered and agreed to the foregoing terms and conditions of engagement. I also acknowledge that I have been given a reasonable opportunity to take independent advice, and accept the engagement on the above basis. I understand that my employment is on an 'as required' basis and I have no expectation of ongoing or permanent employment.

[20] YZ says that the signed letter imported into it the '[YZ] Terms and Conditions of Employment for Casual Employees' and as such I am asked to accept that this meant the document containing a clause about raising a grievance within 90 days was provided to W when he signed the above. It is submitted for W that W did not sign the document with the relevant clause and if he did receive it then it was only a document 'intended'. I agree with the submission for YZ for the following reasons.

[21] W's evidence is that he is 'old school' and he liked to do things on a 'handshake'. In his oral evidence, W said he probably would not have read any more documents than those he recalled signing. He says he only recalled signing something a couple of pages long and not something much longer such as the document that contains the clause about raising a grievance within 90 days.

[22] However, W acknowledged he did not read the signed letter before he signed it. When asked under cross examination whether he thought to ask about the reference in the signed letter to the '[YZ] Core Terms and Conditions of Employment for Casual Employees' he said he did not think to do this. This is not a surprise given he acknowledged he did not read the letter before he signed it.

[23] While I accept that W says he was someone who did things on a 'handshake', he provided YZ with detailed forms which he filled in about his contact details, bank account, KiwiSaver and IRD information. He signed these on 24 November 2020⁷. These forms must have required to him to read what he was filling in. W had also previously contracted to YZ in his co-owned business and his employment records provided by YZ show contractual documentation for this. I find some inconsistency here in being asked to accept that W was as lacking in understanding of contractual relationships or the importance of what he was signing as he now wants me to accept. That said, I find some likelihood that W did not in this instance take any notice of what he signed in terms of the signed letter that clearly referenced further terms and conditions: the '[YZ] Core Terms and Conditions of Employment for Casual Employees.' The declaration at the end of the signed letter shows me that W declared he had read what he was signing.

[24] The document provided to me called '[YZ] Core Terms and Conditions of Employment for Casual Employees' contains at Appendix B 'Procedure for Resolving Employment Relationship Problems and Personal Grievances' with clauses consistent with the employer's section 65 obligation. They include a plain explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised.

⁷ The handwritten date next to W's signature on the payroll information he provided is '24/11/2022' which I take to be a mistake. He had long left YZ's employment by that time. The accompanying document is the IRD records that W signed and dated 24 /11/2020 consistent with this being the likely date of signing these documents.

[25] W says he did not receive this document and only signed the above-mentioned signed letter. I find W did in fact sign and in doing so agreed to be bound by the attached terms called '[YZ] Core Terms and Conditions of Employment for Casual Employees'. If they were not attached, W had the opportunity to ask about this which under cross examination he says he did not do before signing. In any event I find a likelihood that what he signed (the signed letter) was the offer letter sent to him by his manager by email on 30 November 2020 when his manager was prompted to do so indirectly by the Human Resources manager. Emails support this including that the signed letter itself references an earlier set of documents consistent with the chasing up of the documentation for return by the human resources manager. The 30 November 2020 email was:

Hi [W]

Copy of these for your reference, you did get this signed etc and you have been paid?

Regards

[W's Manager]

Attached to the above were two documents:

IEA Casual – [W's name].pdf 417 KB; and

IEA Casual engagement letter – [W's name].pdf 251 KB.

[26] While W says he did not receive the above email, and cannot now find it, I prefer the evidence of YZ which is that it had the email retrieved by an IT person from its system. I note further that the email was sent to the email address nominated by W on the payroll information that he provided to YZ on 24 November 2020 and that he acknowledged to me in his oral evidence was his email address. I find it was likely sent to the correct email address that W used. The signed letter is also dated 9 December 2020 which is after 30 November 2020

when W's manager's email was sent to W with the second document attached, the 'IEA Casual – [W's name].pdf 417 KB'. I find that second attached document likely to have been the document '[YZ] Core Terms and Conditions of Employment for Casual Employees.' As I have already observed, that document contained the relevant clause about dispute resolution and raising a grievance within 90 days.

[27] Standing back from the above I find it likely that W did receive an engagement letter of employment that he signed which also referred him to further core terms and conditions of employment which included an explanation that was consistent with s 65 of the Act. This means I do not accept that there is the exceptional circumstance that W relies on that supports him bringing his grievance outside of the 90-day timeframe to do so.

[28] While I do not need to consider the next issues I note that had I found that W in the above circumstances did not have an IEA that contained the relevant clause about raising his grievance within 90 days, I would have considered that this, as one of the exceptional circumstances, may not have likely occasioned the delay in raising his grievance. This is because I would have considered the context that he had sought legal advice around the time that his employment ended. This was in relation to the criminal proceedings, but W gave evidence that he raised issues about his concerns about the way his employment ended at that stage and was told something to the effect that he needed to get the criminal matters sorted first and then seek advice about his employment matters with other advisors.

[29] In summary, W's application to bring his personal grievance application outside of the 90 day time frame to do so is dismissed.

Costs

[30] Costs are reserved. The parties are strongly encouraged to resolve any issue of costs between themselves.

[31] If they are not able to do so and an Authority determination on costs is needed YZ may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum W would then have 14 days to lodge any reply to memorandum.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.⁸

Antoinette Baker
Member of the Employment Relations Authority

⁸ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>