

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 485
5266223

BETWEEN MANJIT NAGRA
 Applicant

AND THE CHIEF EXECUTIVE OF
 THE DEPARTMENT OF
 LABOUR
 Respondent

Member of Authority: K J Anderson

Representatives: A Hope, Counsel for Applicant
 A Brown, Counsel for Respondent

Investigation: On the papers

Determination: 10 November 2011

DETERMINATION OF THE AUTHORITY

Background

[1] This matter is before the Authority after following a lengthy and tortuous route. The applicant, Mr Manjit Nagra, was previously known as Manjit Singh. He was formerly employed by the Department of Labour (DoL) as a compliance officer with the New Zealand Immigration Service (NZIS)¹ in Hamilton. On 3rd February 2004, the Police arrested the applicant and charged him with four dishonesty offences. Also on 3rd February 2004, the applicant was suspended from his employment (on full pay) while an investigation into his circumstances was undertaken by the NZIS.

[2] Via a *Statement of Problem* dated 15th December 2004 (received by the Authority on 16th December 2004), the applicant² claimed that:

[he] has been unjustifiably disadvantaged in that the Respondent has conducted and concluded an investigation and made a preliminary decision to dismiss him from his

¹ Now Immigration New Zealand

² In the name of Manjit Singh - as he was then.

employment on the basis of an incomplete and unfair investigation and has thereby suffered a personal grievance.

The applicant also sought an interim injunction staying the disciplinary investigation being undertaken by the NZIS, until the criminal proceedings were concluded. An *Amended Statement of Problem* (dated 17th December 2004) was received by the Authority on 20th December 2004, but the unjustified disadvantage claim remained the same, as recorded above.

[3] Following an investigation by the Authority³ and a subsequent challenge to the Employment Court,⁴ the outcome was that an injunction was granted by the Court; restraining the NZIS from continuing with its disciplinary investigation and from undertaking any disciplinary action, until the criminal proceedings against the applicant were completed. As a result of the injunction, the NZIS did not take any further action in regard to the disciplinary proceedings and the applicant remained suspended from his employment on full pay.

[4] On 1st September 2005, the applicant was convicted of three criminal offences in the High Court in Hamilton. Consequently, the NZIS resumed its disciplinary proceedings. The outcome being that the applicant was dismissed; effective from 30th November 2009.

[5] The matter of the unjustified disadvantage claim referred to above was not actively pursued within the Authority by the applicant until Mr Hope, acting for Mr Nagra, wrote to the Authority on 28th April 2009. Nonetheless, there is an earlier letter on file from Mr Hope to the Authority, dated 21st August 2008, requesting that the Authority “resurrect the file” and arrange a conference call at the earliest opportunity. It is unclear what happened from there, though Mr Hope’s letter of 28th April 2009 refers to “a number of discussions” with the Senior Support Officer. It also appears from the content of this letter, that sometime in 2008, Mr Hope may have sought to obtain some material from the file held by the Authority.⁵ This appears to have been due to circumstances arising whereby the applicant’s file “could not be located” because of a change in the law firms acting for the applicant. It also appears that given the effluxion of time, the Authority had some difficulty locating the applicant’s file

³ AA 17/05, Member Anderson, 21 January 2005

⁴ *Singh v Chief Executive Officer of the Department of Labour* [2005] ERNZ 569

⁵ Relating to Mr Singh’s proceedings.

from the archives. In any event, attached to the letter dated 28th April 2009, was an amended *Statement of Problem* by which the applicant sought to reopen the unjustified disadvantage claim that was originally filed with the Authority in December 2004.

[6] Via a minute dated 22nd July 2010, the Authority required counsel for the applicant to make some material amendments to the *Statement of Problem* before it could properly be processed and forwarded to the respondent. Not the least of these is that the document remained in the name of Manjit Singh, albeit the Authority had been informed that he was now known as Manjit Nagra, via a legal name change. A further *Amended Statement of Problem* was received by the Authority on 8th September 2010. Apart from making the necessary changes to ensure that the procedural requirements of the Authority were met, the applicant raised three new claims that were not in the original *Statement of Problem*. The claims presented are now as follows:⁶

1. The problem (or matter) that the Applicant wishes the Authority to resolve is:
 - 1.1 The Applicant claims that he has been unjustifiably disadvantaged in that the Respondent has conducted and concluded an investigation and made a preliminary decision to dismiss him from his employment on the basis of an incomplete and unfair investigation and has thereby suffered a personal grievance.
 - 1.2 **The Applicant claims that he has been unjustifiably disadvantaged in that the Respondent has carried out an unfair investigation that resulted in criminal charges being laid against him and has thereby suffered a personal grievance.**
 - 1.3 **The Applicant claims that he has been unjustifiably disadvantaged in that the Respondent has dismissed him on the basis of the criminal convictions against him knowing that the convictions were obtained as a result of bias, the unfair and unlawful retention of information and the failure to advise him of prior complaints and investigations that would have aided him in the defence of the criminal charges against him.**
 - 1.4 **The Applicant claims that he was unjustifiably dismissed by the Respondent on 29th November 2005.**

[7] A *Statement in Reply* was received by the Authority on 6th October 2010. In regard to the first of Mr Nagra's claims, the DoL says (in substance) that:

- (a) It denies the allegation that Mr Nagra has been unjustifiably disadvantaged. The DoL says it did not conduct and conclude an

⁶ The new claims were presented in bold print.

investigation, or make a preliminary decision to dismiss him from his employment, on the basis of an incomplete and unfair investigation.

- (b) That the personal grievance should not be investigated by the Authority as it was dealt with by way of an interim injunction, and the associated costs award, which halted the initial disciplinary process and prevented the applicant from any form of disadvantage.
- (c) Mr Nagra has not pursued this personal grievance claim for a period of 5 years.
- (d) The delay in pursuing the grievance seriously prejudices the ability of the DoL to defend the claims.

[8] In regard to the second claim of Mr Nagra, the DoL says (in substance) that:

- (a) It denies the allegation that Mr Nagra has been unjustifiably disadvantaged. The DoL says it did not carry out an unfair investigation that resulted in criminal charges being laid against Mr Nagra.
- (b) That the personal grievance should not be investigated by the Authority as Mr Nagra has used the Amended Statement of Problem to raise a new personal grievance and this grievance has not previously been raised within the 90 days required by s.114 of Employment Relations Act 2000 (the Act).
- (c) The criminal charges were laid as the result of a Police investigation.
- (d) The delay prejudices the DoL.

[9] In regard to the third claim of Mr Nagra, the DoL says (in substance) that:

- (a) It denies the allegation that Mr Nagra has been unjustifiably disadvantaged. The DoL says that it did not dismiss Mr Nagra on the basis of a criminal conviction, knowing that the criminal convictions were obtained as a result of bias and the unfair and unlawful retention of information, and a failure to advise Mr Nagra of prior complaints and investigations that would have aided him in the defence of the criminal charges against him.
- (b) That the personal grievance should not be investigated by the Authority as Mr Nagra has used the Amended Statement of Problem to raise a new personal grievance and this grievance has not previously

been raised within the 90 days required by s.114 of the Act. Further, Mr Nagra has not filed an application to raise a personal grievance out of time and the DoL has not given consent to raise a new personal grievance out of time.

- (c) The criminal charges were laid as the result of a Police investigation and the convictions followed a criminal trial at the Hamilton High Court.
- (d) The DoL dismissed Mr Nagra in November 2005 after completing its own investigation, providing him with an opportunity to comment on the allegations and taking into account the responses of Mr Nagra, before making a decision.
- (e) The delay prejudices the DoL.

[10] In regard to the forth claim of Mr Nagra, the DoL says (in substance) that:

- (a) It denies that Mr Nagra was unjustifiably dismissed.
- (b) That the personal grievance should not be investigated by the Authority as Mr Nagra has used the Amended Statement of Problem to raise a new personal grievance and this grievance has not previously been raised within the 90 days required by s.114 of the Act. Further, Mr Nagra has not filed an application to raise a personal grievance out of time and the DoL has not given consent to raise a new personal grievance out of time.
- (c) The DoL believes that its decision to dismiss Mr Nagra was fair and reasonable in the circumstances when considering the nature of the misconduct after having regard to Mr Nagra's explanation, following a fair process.
- (d) The serious delay prejudices the ability of the DoL to defend the claim.

Application to raise personal grievances out of time

[11] Following further discussions between the Authority and the parties it was agreed that an application to raise the three additional personal grievances out of time, pursuant to s.114(3) of the Act, would be filed with the Authority by Mr Nagra and responded to by the DoL. As also agreed with the parties, the Authority will now

determine the matters in question “on the papers” having received written submissions from both parties, along with a sworn affidavit from Mr Nagra.

The submissions for Mr Nagra

[12] The primary submission for Mr Nagra, supported by his affidavit, is that before, and subsequent to his dismissal by the DoL on 30th November 2005, he sought to obtain information from the DoL relating to the allegations of misconduct in his employment, and the criminal charges. Mr Nagra says that he was provided with some information by the DoL but “unbeknown” to him, some information was withheld.⁷ The evidence shows a series of written exchanges between Mr Nagra and the DoL relating to his requests pursuant to the Privacy Act 1993 for particular information to be provided to him. As Mr Nagra was dissatisfied with the refusal of the DoL to provide certain information to him, he complained to the Ombudsman and the Privacy Commissioner. Mr Nagra says that the outcome of these complaints was that the Privacy Commissioner directed the DoL to release further information to him and this information was released on 18th June 2010.

[13] Mr Nagra says that the information that was released to him related to:

- (a) The name of the person who made the complaint, or initiated the investigation into the alleged theft of a car belonging to [Ms L]⁸. Mr Nagra was convicted of stealing and selling this car and retaining the proceeds of the sale.
- (b) A “major investigation” into the serious allegations of misconduct against Mr Nagra in “about 2003.” Mr Nagra says that the allegations were never revealed to him and the result of the investigation was that no misconduct was found.

[14] It is submitted for Mr Nagra that the new information:

- 2.14.1 Could have provided the Applicant with evidence to support his claim given that other witnesses had changed their stories.
- 2.14.2 Was information the Applicant was entitled to know as he was entitled to know who his accusers were.

⁷ It appears that the initial request to the DoL to provide certain information to Mr Nagra (or Mr Singh as he was then) would have been via an official information request dated 19th April 2007, as evidenced from a letter in response from the DoL dated 3rd May 2007.

⁸ As this person is not directly related to the matter before the Authority, it is appropriate that her identity is not made public in order to protect her privacy.

2.14.3 Would have supported the Applicant's denials, would have supported his claims of his good character and would have supported his claim that allegations against him were malicious and resulted from his effectiveness as an Immigration Officer working within immigrant communities.

[15] The further submissions for Mr Nagra are that:

As the result of the information released to him on 18th June 2010, the Applicant became aware of unjustifiable actions that made the dismissal unfair and unjustifiable.

And;

The Applicant's lack of knowledge of the information released to him on 18th June 2010 and the facts contained in that information, was an exceptional circumstance that caused him to delay raising his personal grievances.

[16] The evidence of Mr Nagra is that:

As soon as I received the information dated 18 June 2010, I knew that this information was important to my case. I had suspected that the Department of Labour were withholding information that would support my case. This proved it. The information here showed me that the Department of Labour were deliberately withholding information that would show that my claims set out in my 10 November 2005 letter to [Mr F] were correct. In that letter I told Mr F that complaints had been made against me in the past and I had been cleared on all matters. I also said that certain members of the Indian community wanted to see me go down because I did my job so well. The most serious allegations that were made against me were those that were concealed by the Department of Labour and the results never shown to me. I was also denied the opportunity of speaking to the witness, Ms L, or having her give evidence at the trial. At this stage when I received this information I formed the view that withholding this information was an unjustifiable action by the Department of Labour and it rendered my dismissal unjustified. I then raised my personal grievance within 90 days of the 18 June 2010 disclosure of information.

[17] The further evidence of Mr Nagra is that the DoL were "always aware" that he was "pursuing my claim." In summary, it appears to be the view of Mr Nagra that due to his "repeated requests" for information and the response of the DoL pursuant to the Official Information Act, the DoL cannot say that it was "unaware" that he was "continuing to pursue" his claims.

The submissions for the DoL

[18] The DoL has provided a comprehensive summary of the requests for information made by Mr Nagra from 13th October 2008 to 2nd February 2011. However, the DoL denies that it was aware that Mr Nagra was pursuing a personal grievance claim due to the existence of the requests for information. The DoL says that Mr Nagra had a number of "different matters" which were more "current" than

the personal grievance matters, including an appeal against the criminal conviction, and an appeal against the decision of the Registrar of the Immigration Advisers Authority, who declined to grant Mr Nagra a licence as an immigration adviser. It is the submission for the DoL that the requests for information by Mr Nagra could have related to any one of those matters. The DoL also says that at no time did Mr Nagra mention or raise a personal grievance whilst he was requesting information.

[19] The submissions for the DoL also posit that Mr Nagra's criminal case did not depend upon the identity of the complainant Ms L and that the criminal charges and convictions were the result of a criminal investigation and proceedings undertaken by the Police. Further, all matters associated with the criminal proceedings, including the charges, calling of prosecution witnesses and full disclosure of information, which Mr Nagra received at the time, was handled by the Police. The DoL also says that the facts of the criminal proceedings are not in doubt and that Mr Nagra always knew about the involvement of Ms L in the matter as she was named in the summary of facts disclosed by the Police. Hence, Mr Nagra was afforded every opportunity to defend the charges and he was able to call his own witnesses in defence, including Ms L. But in any event, apart from the matters involving Ms L, Mr Nagra was also convicted for the theft of the sum of \$1,900.

[20] In addition to the above, the submissions of the DoL also refer to its investigation of Mr Nagra's actions pertaining to his employment. The DoL says that Mr Nagra was given "ample opportunity" to comment or ask questions and he did not raise or mention any of the matters he now raises. The DoL also submits that the documents referred to by Mr Nagra are not relevant to his dismissal. Nor did they affect or prejudice him in respect of the disciplinary proceedings and his subsequent dismissal; and there is an insufficient nexus between the alleged grievances and the dismissal of Mr Nagra in 2005.

Analysis and Conclusions

[21] The germane provisions of s.114 of the Act provide that:

- (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.

- (2) 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 employer wants the employer to address.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) 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 circumstances (which may include any 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.

Was the personal grievance raised with 90 days?

[22] The argument for Mr Nagra centres around s.114(1) of the Act in relation to the 90 days time limit, 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 ...” (emphasis added). The argument for Mr Nagra appears to be that upon obtaining further information from the DoL on or about 18th June 2010, it “came to his notice” that he had grounds to raise three further personal grievances, in addition to the unjustifiable disadvantage grievance that he raised in 2004. But I can find nothing in the material that Mr Nagra refers to that in any way suggests that there is any nexus between that material and the reasons given for the dismissal of Mr Nagra in November 2005, or the process leading up to the dismissal. It follows that given the substantial effluxion of time, I undoubtedly must find that the personal grievance was not raised within the 90 days required by s.114(1) of the Act.

Was the delay in raising the personal grievance occasioned by exceptional circumstances?

[23] The rather brief submissions for Mr Nagra, in regard to the exceptional circumstances argument, largely centre around the material released to him on or about 18th June 2010. But given my earlier finding that I can find nothing in that material to support the raising of the grievance within the 90 days time limit, it

follows that I also find that there are no exceptional circumstances that permit Mr Nagra to raise the additional personal grievances pursuant to s.114(4) or s.115 of the Act.

Determination

[24] For the reasons set out above, I find that Mr Nagra did not raise a personal grievance within the 90 days required by s.114(1) of the Act. And pursuant to s.114(4) and s.115 of the Act, I cannot find any exceptional circumstances that allow leave to be granted for Mr Nagra to raise the additional personal grievances he has presented. The application is declined.

The original personal grievance raised in 2004

[25] While I am not required to determine the original unjustifiable disadvantage grievance raised by Mr Nagra in 2004, I would make the observation that there are some factors that he may wish to consider before he continues with that matter. Firstly, there was an injunction granted by the Employment Court that prevented the DoL from continuing with its disciplinary investigation until the criminal proceedings were completed; hence any disadvantage that may have arisen was effectively halted by the Employment Court. And there is the fact of the criminal convictions imposed upon him by the High Court, and the subsequent further investigation by the DoL of the circumstances relating to those convictions and the associated decision to dismiss Mr Nagra. Therefore, it is difficult to see what grounds he may now have to continue to pursue that grievance. But even in the event a grievance is found to exist, the matter of the level of any remedy that might be available could be influenced by a possible finding that Mr Nagra's contribution to the circumstances is relevant. However, I am not required to determine that matter and should Mr Nagra decide to pursue this, it would be appropriate that another member of the Authority should investigate that problem.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority