

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 371
5367829
5367855

BETWEEN

LESLEY KAREN HARRIS
Applicant 5367829

ROY TE RIINI
Applicant 5367855

AND

KAWERAU SOCIAL
SERVICES TRUST BOARD
Respondent

Member of Authority: R A Monaghan
Representatives: L Harris and R Te Riini in person
E Burke, counsel for respondent
Investigation meeting: 8 August 2012 at Rotorua
Submissions received: 19 and 26 September 2012
Determination: 16th October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lesley Harris and Roy Te Riini were employed by the Kawerau Social Services Trust Board (the trust board). They say they have personal grievances in that they were first suspended then dismissed unjustifiably. Although they have lodged separate employment relationship problems, the problems arise out of the same set of circumstances and are being heard together.

[2] The trust board says the grievances were not raised within the 90-day period required under s 114(1) of the Employment Relations Act 2000, and it does not consent to the grievances being raised out of time.

[3] Ms Harris and Mr Te Riini say the grievances were raised in time, or if not then they seek leave under s 114 (3) and (4) to raise the grievances out of time on the

ground that exceptional circumstances existed and it is just that leave be granted. Regarding the existence of exceptional circumstances they rely on s 115, which reads in part:

For the purposes of s 114(4)(a) exceptional circumstances include –

- a. ..*
- b. Where the employee has made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time;...*

[4] This determination addresses whether the grievances were raised in time, as well as the application for leave to raise the grievances out of time should that be necessary.

Background

[5] The trust board operates the Mountain View Rest Home, where Ms Harris and Mr Te Riini worked. In or about November 2008 a review of staffing needs began, the possibility of redundancies was raised with the staff members, and expressions of interest in voluntary redundancy or reduced working hours were sought. A restructuring proposal was put the staff members at a meeting on 28 November 2008. Proposed redundancies were to take effect in January 2009.

[6] Some staff members disputed the need for restructuring and made very wide-ranging allegations and accusations about the clinical services manager in particular, including an accusation that the manager preferred the clinical services staff to the support services staff in the proposals under consideration. Ms Harris and Mr Te Riini were members of the support services staff. By letter to the trust board dated 22 December 2008 Ms Harris detailed the accusations and concerns, and called for the resignations of the chairman of the trust board and the clinical services manager. Ms Harris and Mr Te Riini wrote a further letter dated 2 January 2009 raising additional concerns about the way in which other correspondence, and in particular a letter dated 22 December from the support services staff, had been addressed. The chairman replied in a letter dated 9 January 2009.

[7] It came to the attention of the trust board that accusations such as negligence, sneakiness, fraudulent and deceitful behaviour which Ms Harris and Mr Te Riini had made against the chairman and the clinical services manager were allegedly being circulated in the community. By letters dated 15 January 2009 Ms Harris and Mr Te Riini were asked to attend a disciplinary meeting to address that concern, as well as other concerns detailed in the letters, about their conduct.

[8] Ms Harris and Mr Te Riini were also given an opportunity to comment on whether they should be suspended on pay in the meantime, which they did on 19 January by agreeing in part that some of the disruptive behaviour in question would not continue. As a result the suspensions did not go ahead, but the trust board subsequently found that the working environment was continuing to deteriorate and imposed suspensions on 21 January.

[9] Ms Harris and Mr Te Riini provided written responses to the 15 January letters, in letters dated 28 January. Disciplinary meetings also went ahead that day. A decision to dismiss both of them for serious misconduct was made on 5 February 2009, and confirmed in a letter dated 12 February 2009.

Were the personal grievances raised in time

[10] In December 2008 Ms Harris and Mr Te Riini sought advice and assistance from an employment advocate in respect of the proposed restructuring, and provided a full briefing on their view of events to date. After their dismissals in January 2009 they provided the advocate with relevant additional information. They intended to raise personal grievances.

[11] Unfortunately the advocate had become seriously ill and spent periods in hospital in early 2009. She concluded that she would be unable to pursue Ms Harris' and Mr Te Riini's personal grievances, and in a message to them dated 17 April 2009 she advised that she could not assist any further.

[12] Ms Harris and Mr Te Riini were aware that a 90-day period applied to the raising of personal grievances, and that the cut-off date was looming, and took prompt steps to obtain alternative representation. A union organiser, Rawiri Daniels, was

suggested. Although Ms Harris and Mr Te Riini were not members of Mr Daniels' union he agreed to help them.

[13] The relevant material was forwarded to Mr Daniels on or about Monday 27 April. Included in that material were draft personal grievance letters dated 23 April 2009 which Ms Harris and Mr Te Riini had prepared. The letters contained some allegations which were not justiciable and sought some remedies that were not available in law, although it was possible to discern from them that Ms Harris and Mr Te Riini challenged the justification for their suspensions and their dismissals as well as the grounds for those challenges. It was also clear that they wished to raise personal grievances with their employer, and sought reinstatement and other remedies which were available to them in respect of their personal grievances.

[14] Mr Daniels took the view, correctly, that the letters went too far and needed redrafting. Ms Harris and Mr Te Riini understood from their discussions with Mr Daniels that he would attend to that matter and would forward the result to the employer.

[15] Mr Daniels chose to proceed differently. Without further reference to Ms Harris and Mr Te Riini, in separate letters addressed to the rest home 'manager' and dated 1 May 2009, Mr Daniels advised:

This letter is to formally raise with you a personal grievance with regards to s 103 of the Employment Relations Act 2000.

We believe the company's actions to terminate Lesley's [and Roy's] employment was substantively unjustified and procedurally unfair.

[16] The letters sought interim reinstatement, reimbursement of lost remuneration, and compensation for injury to feelings. Mr Daniels described the letters as being in a standard form, and acknowledged they did not contain any information about why the dismissals were substantively unjustified and procedurally unfair.

[17] No other personal grievance of any kind was referred to in the letter, and in particular there was no mention of the suspensions.

[18] By letter dated 15 May 2009 the trust board's representative, Clive Thomson, asked that the grounds on which the assertions of unjustified dismissal were based be identified. There was no reply.

[19] The applicable legal test of whether a personal grievance has been raised is contained in *Creedy v Commissioner of Police*, where the Employment Court said:

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable to employer to address it. So it is insufficient, and therefore not a raising of a grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of grievance. ... As the court determined in case under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address.¹

[20] Measured against that test the 1 May letters did not contain sufficient information to amount to the raising of a grievance. No other approach had been made to the employer addressing either the suspensions or the dismissals. There was nothing in the surrounding circumstances such that, if these were considered together with the letters, it could be said in totality that a grievance had been raised.

[21] For these reasons I find the grievances were not raised within the necessary 90 day period.

Were there exceptional circumstances

1. Background

[22] On several occasions from May 2009, both by telephoned and emailed messages, Ms Harris made enquiries of Mr Daniels about progress with the grievances. She did not receive a reply until, in December 2009, Mr Daniels indicated a mediation date was being sought. Nothing further was heard on that matter, and Ms Harris resumed her requests for updates.

[23] On 8 October 2010, almost 18 months after his first approach to the employer, Mr Daniels left a message for Mr Thomson asking that he make contact. Mr Daniels

¹ [2006] ERNZ 517

took this step because he was in the process of meeting with Ms Harris and Mr Te Riini about their grievances, and was discussing the remedies they sought. Ms Harris said in evidence that, until about that time, she believed Mr Daniels had raised the grievances by forwarding the draft 23 April 2009 letters.

[24] Mr Daniels and Mr Thomson met on 15 October 2010. Mr Daniels advised that Ms Harris and Mr Te Riini both sought a sum in full and final settlement of their claims of unjustified dismissal. Mr Thomson advised Mr Daniels later that day that no offer would be made, and that the trust board did not accept that a personal grievance had been raised within the requisite 90 days.

[25] This does not appear to have been conveyed to Ms Harris and Mr Te Riini, who continued to believe mediation was being arranged. More requests by Ms Harris for updates from Mr Daniels followed and were not responded to.

[26] It was another 8 months until, by letter dated 30 May 2011, Mr Daniels advised Mr Harris and Mr Te Riini that he had sent letters dated 1 May 2009 but did not receive a reply (that was not so as there was a reply dated 15 May). Mr Daniels also reported that Mr Thomson claimed not to have sighted the letter raising the grievances, although Mr Thomson's denial concerned the 23 April 2009 letters (which he had not seen and which had not been forwarded to the employer) not the 1 May letters. Mr Daniels acknowledged in the 30 May letter that the matter had not been referred to mediation.

[27] Ms Harris began seeking assistance elsewhere. However there was no further approach to the employer, and the statements of problem were not lodged in the Authority until January 2012.

2. Determination

[28] Two elements of s 115(b) must be satisfied in order for the circumstances to amount to 'exceptional circumstances'. They are whether:

- (i) the employee has made reasonable arrangements to have a grievance raised by the agent; and

(ii) the agent has failed unreasonably to ensure that the grievance was raised in the required time.

[29] I find Mr Daniels failed unreasonably to ensure Ms Harris' and Mr Te Riini's grievances were raised in the required time. He did not do what had been discussed, and what he had been instructed and was expected to do, regarding the preparation and forwarding of letters raising personal grievances within the necessary time. Instead he sent inadequate standard form letters. He did not report to Ms Harris and Mr Te Riini on what he had done, or copy the 1 May letters to them, and they assumed he had acted as discussed. He failed to take the opportunity at an early stage at least to attempt to redress matters when he failed to respond to Mr Thomson's letter of 15 May. He provided no explanation for any of this or his subsequent conduct, other than to say he was busy with other matters.

[30] The remaining question is whether Ms Harris and Mr Te Riini made reasonable arrangements to have their grievances raised.

[31] The circumstances in *Melville v Air New Zealand Limited*² are similar to those here, and the Authority is obliged to apply the law as explained in that case. Ms Melville was dismissed on 24 March 2009. Her union representative overlooked sending a letter raising a personal grievance on the ground of unjustified dismissal, and when he took a period of leave he handed the file to another person who assumed the letter had been sent. When he returned Ms Melville enquired about progress with her grievance, as she knew there was a time limit. She was assured everything was in hand, as by then the representative also assumed a grievance had been raised. By the time the omission was identified the 90-day limit had passed.

[32] The Employment Court concluded there were difficulties for Ms Melville in whether she had made reasonable arrangements to have her grievance raised on her behalf. She knew a time limit applied. Her failure lay in her failure to make reasonable arrangements to ensure the grievance was raised in time, although she did provide broad and general instructions for the union to take the necessary steps to pursue the grievance³. She could, for example, have asked if the grievance had been

² [2010] NZCA 563 (declining leave to appeal); [2010] NZEMPC 87

³ at [33]

raised within the 90-day time limit. The court assumed she had not done so because she believed a grievance had already been raised, but this did not change the outcome.

[33] An application for leave to appeal was made to the Court of Appeal. The application was dismissed, but the Court of Appeal said this:

*[27] If the judge is to be taken as saying ... that there must always be an express instruction by the claimant to the agent to bring a **timeous** claim, then we could not accept that as a matter of law. That would amount to a quite unwarranted narrowing down of the statutory provision in s 115(b). In the words of the provision, the employee has to make 'reasonable arrangements' to have the particular grievance raised on her behalf.*

[28] But if the judge is to be taken, on a fair reading of his judgment, to be making a finding of fact that reasonable arrangements had not been made in this particular instance on the dismissal point, ...

[29] In our view the latter reading of the judgment is the appropriate one.⁴

[34] In both *Melville* and another case to which the courts referred,⁵ there were findings that the employees concerned had been less than clear about precisely what the agent was instructed to do and that the employees' follow up steps were inadequate or non-existent.

[35] I do not consider the steps taken by Ms Harris and Mr Te Riini suffered from a comparable degree of inadequacy. There was no doubt about what Mr Daniels was instructed to do – he was to redraft in a suitable form the letters raising personal grievances which they had prepared, and was then to raise the grievances with the employer in the form of the redrafted letters before the approaching expiry of the applicable time limit. The extent of the preparation was such that I do not consider it reasonable to expect Ms Harris and Mr Te Riini to further prompt Mr Daniels to forward their letters in time. I find on the facts here that matters had progressed to the point that Ms Harris and Mr Te Riini were entitled to assume Mr Daniels would act as instructed.

[36] For these reasons I find there were exceptional circumstances under s 115(b).

⁴ [2010] NZCA 563

⁵ *McMillan v Waikanae Holdings (Gisborne) Limited (t/a McCannics)* (2005) NZELR 402

Is it just to grant leave to raise the grievances

[37] Section 114 (4) also has two elements to be satisfied, namely that exceptional circumstances exist and it is just to grant leave to raise a grievance.

[38] One such consideration concerns the effect of the delay on the employer.

[39] Not all of the considerable delays in this matter were attributable to Mr Daniels, and a further substantial and inadequately explained delay in pursuing the grievances followed the end of Ms Harris' and Mr Te Riini's association with Mr Daniels. Unfortunately, several months later in 2011 and during the period of that delay, the chairman of the trust board passed away. His evidence would have been critical to the employer's response to the grievances. As a result I find that delays for which Ms Harris and Mr Te Riini were responsible have prejudiced the employer's position.

[40] Another consideration concerns the merits of the grievances. I am not in a position to say the grievances are lacking in merit, although from the material available to me there is a strong likelihood of findings of significant levels of contributory fault in the event of findings that the suspensions and the dismissals were unjustified. Such findings would limit substantially the monetary remedies available to Ms Harris and Mr Te Riini. As for reinstatement, I did not understand that remedy to be pursued but in the light of the size of the employer and the length of the delay orders for reinstatement would be very unlikely in any event.

[41] I conclude that the prejudice caused to the employer by the delays in this matter outweighs the considerations relevant to the merits of the grievances.

Grant of leave

[42] For these reasons the applications for leave to raise the grievances out of time are declined.

Costs

[43] Costs are reserved.

[44] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve a written account of what is sought by way of costs and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority