Note: An order prohibiting publication of name of an individual is made in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 252
5463490

BETWEEN	EMILY URLICH Applicant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Robin Arthur
Representatives:	Derek Whitehead, Counsel for the Applicant Judith Manoa and Nikki Farrell, Counsel for the Respondent
Investigation meeting:	20 and 21 July 2016 in Whangarei
Date:	25 July 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

---

[1] Emily Urlich, a social work supervisor in the Child Youth and Family service (CYF) of the Ministry of Social Development (MSD) asked the Authority to investigate personal grievances she raised in 2014 and 2015 concerning matters in her workplace between 2009 and 2014.

[2] Her application for an Authority investigation was first lodged in June 2014. It was not resolved by mediation held on 30 September 2014 and 25 June 2015. In September 2015 Ms Urlich, through her representative, asked the Authority to proceed with an investigation of her application. The Authority then asked her to clarify the scope of her grievances as earlier correspondence from her representative had indicated she had raised a new grievance and further evidence would need to be lodged in support of her application. On 23 December 2015 Ms Urlich lodged a

document headed Amended Statement of Problem and bearing the title: "Time line and summary of personal grievances and attempts to resolve workplace issues since 2009".

[3] By a statement in reply lodged on behalf of the MSD chief executive on 20 June 2014 and an amended statement in reply lodged on 11 February 2016, MSD questioned whether the personal grievances referred to by Ms Urlich were properly raised within the required time. It did not consent to her grievances being raised outside the 90-day statutory period set by s 114(1) of the Employment Relations Act 2000 (the Act). MSD accepted one of those grievances was raised in 2010 but considered it was resolved in 2011. It considered no exceptional circumstances applied that would warrant Ms Urlich being granted leave to pursue some or all of her grievances outside the statutory limits set for such actions – being the 90 days to raise a grievance after an allegedly unjustified action of an employer and then, after a grievance is raised, the period of three years allowed to start proceedings in the Authority or Employment Court.

[4] In closing submissions made on the second day of the Authority's investigation meeting MSD accepted Ms Urlich had raised two grievances on 4 February 2015 that were within the statutory timeframe. Ms Urlich alleged she was unjustifiably disadvantaged in the period between 4 and 29 November 2014 because, on return from a period of sick leave, she received inadequate support and supervision. She also alleged she was unjustifiably disadvantaged by the deduction of 18 days from her annual leave entitlements during the period from 4 April to 3 November 2014 that she was absent from work due to stress-related illness. She was paid sick leave for most of that period. She returned to work soon after the Ministry advised it intended stopping her paid sick leave and she would have to use annual leave for any further time off but, according to Ms Urlich's oral evidence at the Authority investigation meeting, she was not aware until some time after her return to work of the extent of the deductions made from her annual leave entitlement.

[5] Actions, or omissions, of the employer occurring up to 90 days before 4 February 2015, that is from 7 November 2014, were inside the statutory period for raising a grievance. MSD conceded events after Ms Urlich returned to work on 4 November and relating to the disputed deduction of annual leave entitlements were

consequently within that period. Ms Urlich had also provided sufficiently specific details of her account of events giving rise to those alleged disadvantage grievances. Her account was set out in a signed 13-page paper, dated 29 November 2014, which her present representative attached to the grievance notification submitted to MSD on 4 February 2015.

[6] The grievance over deduction of annual leave entitlements, as a result of MSD's decision to stop providing sick leave, might alternatively be resolved on the basis that it concerns a disputed interpretation and application of the sick leave provisions in an applicable collective agreement or as a wage arrears matter.[1]

Issues

[7] The issues remaining for resolution by the end of the investigation meeting were:

(i) Could Ms Urlich proceed with a grievance about alleged bullying that MSD accepted she had raised in 2010 but MSD considered was resolved in 2011?

(ii) Were statements Ms Urlich wrote in health and safety notification reports in 2013 sufficient to amount to the raising of other alleged grievances?

(iii) Did any of the events or actions that gave rise to the grievances raised by Ms Urlich in 2014 (either by an email from her previous legal representative to an MSD representative on 2 April 2014 or in a statement of problem dated 16 May 2014 and recorded as lodged in the Authority on 3 June 2014) occur within the 90-day period prior to notifying her employer of the alleged grievances?

(iv) If any grievances notified to her employer in 2014 were raised out-of-time, should Ms Urlich now be granted leave to pursue those grievances on the grounds that:

(a) she was so traumatised or affected by the events giving rise to the alleged grievances that she was not able to properly consider raising the grievances within the 90-day period; and/or

---

[1] Employment Relations Act 2000, s 160(3).

(b) she had made reasonable arrangements to have the grievances raised on her behalf by an agent but the agent had unreasonably failed to ensure the grievance was raised in time?

The Authority's investigation

[8] To assist in determining those issues I received written and oral evidence from Ms Urlich; Anthea Raven, a former MSD advisor and colleague of Ms Urlich; Kela Lloydd, an MSD youth justice co-ordinator and Public Service Association (PSA) delegate; Arihia Tito, a CYF regional practice advisor; Ngaire Pijacun, a CYF supervisor; Clive Kilgour, an MSD human resources consultant; Fiona Matchitt, an MSD advisor who had worked as a CYF regional practice advisor; Trevor Wi-Kaitaia, a CYF site manager; Juliet Erihe, a former CYF site manager; and Marion Heeney, a former CYF regional director. Each of those witnesses attended the investigation meeting and answered questions under oath of affirmation. By prior arrangement Ms Erihe's attendance occurred through an audio-visual link, using Facetime, to an Authority investigation meeting room in Auckland.

[9] After hearing the closing submissions of the representatives, I gave an indication of preliminary findings, subject to reflection on the evidence and submissions.[2] This written determination has confirmed the indication given. As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Order prohibiting publication of a name of a witness

[10] During the investigation, at the request of MSD and without objection on Ms Urlich's behalf, an order was made prohibiting publication of the name of a witness who had provided information by affidavit and not attended the investigation meeting. I was satisfied it was consistent with the Act's object of building productive employment relationships and MSD's operational interests regarding existing employees to make such an order that was an exception to the open justice presumption that witnesses may typically be publicly identified.[3] The witness was a CYF site manager about whom Ms Urlich had complained in 2010. The name of that

---

[2] Employment Relations Act 2000, s 174 and 174B.
[3] *H v A* [2014] NZEmpC 92 at [78]-[80].

manager is not used in this determination. Publication is prohibited of the manager's name in relation to this determination and Ms Urlich's proceedings in the Authority.[4]

The 2010 bullying allegation

[11] MSD accepted Ms Urlich had raised a grievance in 2010 about bullying by a manager but disputed whether she could now continue to pursue that grievance along with the others she sought to raise in 2014.

[12] On 5 December 2010 Ms Urlich wrote a letter to a senior MSD manager complaining about difficulties she had experienced since August 2010 with her site manager. The complaint was investigated. Outcomes of the investigation were reported to Ms Urlich by letter on 15 April 2011.

[13] It was not until the grievances notified by Ms Urlich's previous legal representative on 2 April 2014 that the topic of bullying was raised again. In answer to questions at the Authority investigation Ms Urlich said this related to the manager who was the subject of her 2010 complaint and also to her interactions with Ms Heeney throughout 2012 and 2013.

[14] Section 114(6) of the Act prohibits an action in relation to a personal grievance being commenced in the Authority more than three years after the date on which the personal grievance was raised. Accepting Ms Urlich had raised a grievance about bullying by a site manager in December 2010, the grievance raised in April 2014 was clearly well outside the three-year period allowed to pursue a grievance on those grounds. It was out of time and could not proceed without leave due to exceptional circumstances.

[15] The allegation relating to her interactions with Ms Heeney in 2012 and 2013 was included in documents attached to the 2 April 2014 grievance notification. Ms Urlich accepted in answer to questions at the Authority investigation meeting that those interactions, at the latest in 2013, were well-outside the 90 day period by the time she sought to raise her grievances in April 2014.

---

[4] Employment Relations Act 2000, Schedule 2, clause 10(1).

Were statements in health and safety reports sufficient to raise a grievance?

[16] Ms Urlich submitted comments made by her in two health and safety incident reports she filed in 2013 were sufficient to put CYF on earlier notice of personal grievances she had about her workload, work pressures and "cumulative harm".

[17] The reports – referred to as SOSHI reports – used a template available in the CYF intranet system. Once filed by an employee a copy of the report was automatically sent to the employee's manager and to a manager in CYF's national office responsible for monitoring reports about health and safety concerns and incidents. The system included a 'prompt' for a local manager to then advise what she or he had done to investigate any reported health and safety incident. Local managers were expected to make those enquiries within 48 hours.

[18] The evidence of Ms Urlich and other CYF staff established that she and other supervisors in the Whangarei office had twice arranged for her to lodge SOSHI reports in 2013 as a means of prompting local managers to pay more attention to concerns she and other supervisors had about staffing levels and workloads. They believed this was likely because the reports were automatically copied to CYF's national office.

[19] One SOSHI report Ms Urlich filed on 19 April 2013 gave the date of the health and safety incident as being 19 April 2010. She described the injury as "suspected physical stress and suspected stress (other)" and provided the following "incident detail":

> I have been a supervisor here for 4 years and have throughout those years supervised teams of up to 12. Currently I am supervising a team of 9 with very high caseloads. We are currently one supervisor down and have been for over a year. As a supervisory team we feel that there are risks to clients and work overload on social workers and ourselves. We have raised our concerns to our Practice Leader and Manager and to PSA and been advised to fill out a soshi form.

[20] A second SOSHI, giving the incident date as 30 September 2012 but sent to her manager on 30 September 2013, described the injury as "high risk caseloads, social workers on stress and sick leave due to allocations, suspected physical stress, suspected stress (other)". It gave the following "incident detail":

> Our office has lost approx 7 experienced social workers and we now have four remaining senior practitioners who are extremely overworked with high caseloads of up to 60. We have 10 social workers with no previous CYF work history and 6 students. I have two social workers off on indefinite bereavement leave, one social worker on annual leave and there is no backfill. I am working three caseloads as well as trying to supervise and support two new social workers. We have unallocated high risk cases.

[21] The content of both reports was clearly intended as a means of collectively raising staffing and resource issues that Ms Urlich and other supervisors and social workers wanted generally addressed by local managers and drawn to the attention of national managers. Neither of those two particular reports had the character or specific detail necessary to satisfy the requirements of raising personal grievance.[5] The emphasis is on the word 'personal'.

[22] Ms Urlich did later file two SOSHI reports that were more personal in nature, but both were submitted after she had a legal representative notify MSD of personal grievances. One, dated 23 April 2014, was filed after her 2 April 2014 notification of grievances was sent. Another was filed on 1 July 2015, after the 4 February notification 2015 of two other grievances and after an unsuccessful mediation on 25 June 2015. Neither sought to raise a grievance. Rather Ms Urlich filed those two reports to back up personal grievances she had already notified to her employer.

Events prior to the 90-day period for raising a personal grievance

[23] The personal grievances Ms Urlich sought to raise on 2 April 2014 and in her 3 June 2014 statement of problem concerned work pressures, high workloads, bullying, cumulative harm, an unlawful direction to "data cleanse" or close some files, and four aspects of what she said were unfair recruitment practices.

[24] In answers to questions at the Authority investigation Ms Urlich accepted the event or action that gave rise to each such alleged grievance had occurred more than 90 days before her representative's email of 2 April 2014 seeking to raise her suite of grievances. They were all out of time. Two examples suffice.

[25] In November 2013 Ms Urlich and others were told of a project being undertaken by a "clean up team" to close some files. She and others were concerned that files were being closed without proper assessments of children's situation. MSD

---

[5] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

managers insisted only genuinely completed files were meant to be closed. However, even if Ms Urlich or others were given an unlawful direction to assist that project, her attempt to raise a grievance about it was made more than four months later.

[26] Ms Urlich was concerned that recruitment processes for positions she applied for in 2012 and 2013 were not fairly carried out and MSD managers improperly failed to provide her with requested records about those processes. In email correspondence with Ms Matchitt in August 2013 Ms Urlich specifically stated she was not seeking "a formal review" of the most recent recruitment process and did "not have concerns to discuss" with Ms Matchitt. When Ms Matchitt followed up the following month to ask whether there was "any other way" she could help, Ms Urlich responded on 27 September 2013 that she was "currently seeking professional advice" and would "follow up" once she had "clarified the appropriate approach, if any to the situation". MSD heard nothing more on the topic until the 2 April 2014 email, more than six months later.

Exceptional circumstances – not able to properly consider raising grievances?

[27] The Act allows the Authority to consider granting leave for Ms Urlich to pursue grievances not raised within 90 days if she established she "was so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance".[6]

[28] With the encouragement of Ms Erihe, her manager at the time, Ms Urlich went on sick leave from 4 April 2014. She did not return to work until 4 November 2014. Medical certificates referring to "work stresses" and a "very high workload" supported her absence on sick leave. For some of that time MSD provided assistance with counselling.

[29] However the medical evidence was insufficient to establish Ms Urlich was so affected or traumatised by her work circumstances in 2013 that she was not able to raise personal grievances about them until 2 April 2014. Her own evidence established she was, in fact, highly engaged throughout the latter part of 2013 and early 2014 in discussing with her colleagues what was happening at work and her concerns about it. For example she wrote a five-page letter of complaint, dated 14

---

[6] Employment Relations Act 2000, s 115(a).

October 2013, about Ms Matchitt and Ms Heeney's dealing with her but it was not submitted to MSD until April 2014. She and Ms Pijacun had co-written a 16-page detailed account of their view of events in the CYF Whangarei office from 2009 to early 2014 that was later submitted with the statement of problem lodged in June 2014. Both documents demonstrated Ms Urlich had considerable capacity to analyse and describe her view of the unsatisfactory work circumstances that she considered she and others faced through a number of years up to 2013. Her email of 27 September 2013 to Ms Matchitt, referred to above, also suggested she was evaluating her circumstances and options.

[30] On that evidences Ms Urlich had not established the degree of incapacity through the relevant 90-day periods that would amount to exceptional circumstances of being so affected or traumatised that a grant of leave was warranted. Leave on those grounds is denied.

Exceptional circumstances – unreasonable failure by an agent?

[31] Ms Urlich advanced two circumstances for consideration as to whether exceptional circumstances existed due to unreasonable failures by her agents.

[32] Firstly, she had discussed with her PSA delegate, Ms Lloydd, whether she should raise her personal grievances with union assistance. Ms Urlich said this discussion took place late in 2013, when her grievances would have been in time if raised then, but it was several weeks before Ms Lloydd consulted a union official and then advised her that she should go to a lawyer of her own to pursue her case.

[33] Secondly, when Ms Urlich decided to seek independent legal representation to pursue her grievances, there were delays in arranging a meeting with a lawyer in Auckland and then, after the meeting, in having her statement of problem lodged in the Authority.

[34] Satisfying the statutory requirement of exceptional circumstances on these grounds has two elements – Ms Urlich must have made reasonable arrangements to have the grievance raised on her behalf by an agent and then that agent must have "unreasonably failed" to ensure the grievance was raised within the required time.

[35] Ms Urlich's discussions with Ms Lloydd failed to meet both elements of that statutory test. She sought advice from the PSA about her prospects in pursuing her grievances. She had not made a firm request to Ms Lloydd to raise the grievance on her behalf or to have a PSA official do so. On that basis it cannot be said that the PSA had then unreasonably failed to raise the grievance in time.

[36] When Ms Urlich sought independent legal representation she decided, on the suggestion of a workmate, to instruct a lawyer in Auckland rather than in Whangarei. It took until late March 2014 for her to arrange a meeting in Auckland with her chosen lawyer who then notified MSD of her grievances on 2 April 2014 and later lodged the statement of problem on 3 June 2014.

[37] There was no significant delay between her March meeting with that lawyer (not her present representative) and the 2 April 2014 email. What was significant was that by the date of that March meeting Ms Urlich was already out of time, in terms of the events or situations that she said had given rise to her grievances in 2012 and 2013, to have those grievances raised within the required 90-days. On that basis failure to raise the grievance within the required time could not fairly be said to be the result of Ms Urlich having made reasonable arrangements in time *and* the instructed lawyer then unreasonably failing to do what she was asked to do within that time.

[38] On that evidence Ms Urlich had not established exceptional circumstances resulted from her having made reasonable arrangements with agents who unreasonably failed to act in time. Leave on those grounds is denied.

Summary of determination

[39] Ms Urlich did not raise the grievances referred to in the 2 April 2014 email and the 3 June 2014 statement of problem within 90 days of the events or situations that were said to have given rise to those grievances. She had not established the delay in doing so was due to exceptional circumstances that would warrant a grant of leave to raise the grievances outside that time. Ms Urlich may not now pursue those grievances.

[40] Ms Urlich has two grievances that were raised in time, on 4 February 2015. The Authority may now proceed to investigate those grievances.

Direction to mediation

[41] Following the oral indication of preliminary findings at the Authority investigation meeting both parties confirmed they were willing to attend further mediation to address the remaining issues between them. Ms Urlich commented about delays in arranging the previous two mediations in this matter and asked any further mediation be arranged promptly.

[42] Ms Urlich and MSD are directed to attend further mediation regarding her two 'live' personal grievances. Mediation should occur within eight weeks of the date of this determination. Under s 159(2) of the Act the parties must comply with this direction and attempt in good faith to reach an agreed settlement of their differences. Meanwhile the proceedings are suspended until this mediation has occurred or the Authority otherwise directs. Following mediation Ms Urlich is further directed to promptly advise, through her representative, whether the matter was resolved and, if not, whether she wishes to have the Authority proceed with an investigation of her personal grievance application.

Costs

[43] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority