

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 6  
5638147

BETWEEN      ERIC MESSICK  
                         Applicant

A N D            THE VICE CHANCELLOR OF  
                         THE UNIVERSITY OF WAIKATO  
                         Respondent

Member of Authority:      T G Tetitaha

Representatives:            Applicant in person  
   D France, Counsel for Respondent

Investigation Meeting:      24 November 2016 at Hamilton

Submissions Received:      14 November 2016 from both parties

Date of Determination:      10 January 2017

---

**DETERMINATION OF THE AUTHORITY**

---

**A. The five personal grievances of unjustified disadvantage are dismissed.  
Costs are reserved.**

**Employment relationship problem**

[1] Eric Messick alleges he was constructively and unjustifiably dismissed by the University of Waikato. He has raised five personal grievances. A preliminary issue has arisen about whether some of those grievances were raised within 90 days and commenced proceedings within 3 years. He seeks leave to raise and file those grievances if he is outside of the statutory timeframes.

[2] It had been intended to issue an oral determination at the end of the hearing. However following discussions with the parties and to allow an opportunity for them to explore settlement, the determination was reserved. Unfortunately the matter was not settled and the reserved determination shall now be issued.

**Relevant facts**

[3] Mr Messick was employed by the University of Waikato (University) from 2000 in various roles. From 2005 to 2012 he had a series of fixed term contracts and then permanent employment as a professional supervisor.

[4] In late 2012 he was diagnosed with depression. It was during this period he attempted to resign. The University did not accept his resignation. Instead they offered three paid sessions with a psychologist through their employee assisted programme (EAP).

[5] In January 2013 Mr Messick applied for an extension to those paid EAP sessions but it was refused.

[6] In April 2013 Mr Messick was disciplined and on 1 May 2013 he received a written warning.

[7] Mr Messick emailed on 16 May 2013 allegedly resigning, which was accepted by the University the same day.

[8] On 13 August 2013 Mr Messick raised the following personal grievances:

- (a) Disadvantage by a series of five fixed term contracts and one permanent contract between 2007 and 25 October 2012 which excluded him from the Performance Based Research Funding (PBRF) process while allowing him to do lecturing duties without opportunity for promotion or performance based salary increases;
- (b) Disadvantage due to the failure to account for and deal with high workloads that were outside of his job description;
- (c) Disadvantage due to the specific failure to deal with student numbers in PSYC587 Practicum;
- (d) Disadvantage due to mishandling of his work struggles via the EAP process;
- (e) Disadvantage by the 1 May 2013 warning; and
- (f) Unjustified dismissal on 16 May 2013.

[9] A statement of problem was filed on 12 August 2015 encompassing the above personal grievances.

### **Issues**

#### *Commencing proceedings within 3 years*

[10] All personal grievances must be commenced in the Authority within 3 years of the date they were raised with the employer (s.114(6) of the Act). Mr Messick was directed to file evidence about the date he filed his proceedings in the Authority.

[11] He produced evidence he paid the fee and attempted to file the application on the last day for filing (12 August 2015). An email from the Authority Support officer confirmed his application and fee had been received but was not processed until the following Monday. The respondent accepts the application was commenced within time.

[12] This application is dismissed with costs to lie where they fall.

#### *Unjustified dismissal*

[13] The respondent accepts Mr Messick was dismissed and his personal grievance was raised within 90 days.

[14] At hearing the University applied to strike out the personal grievances because they were frivolous. The 'frivolous' nature of the grievances was evidenced by Mr Messick's delay raising his grievance and filing his proceeding until the last day. The respondent submitted this gave the impression Mr Messick was wasting the Authority's resources.

[15] Given this application was raised at hearing and shall be defended I decline to deal with it at this time. Timetabling orders for filing evidence and submissions about this application shall be made in a separate Minute.

#### *Unjustified disadvantages*

[16] At a telephone conference on 21 October 2016 the following issues were identified for the preliminary hearing:

- (a) Whether the five unjustified disadvantage personal grievances were raised within 90 days?
- (b) If not, whether there are exceptional circumstances and whether it is just to grant leave for those personal grievances to be raised outside of the 90 days?

### **Were the five personal grievances raised within 90 days?**

[17] It is accepted Mr Messick first raised the personal grievances with the University by letter dated 13 August 2013. The onus is upon Mr Messick to prove he raised the grievances within 90 days and if not whether leave should be granted.

### ***Law***

[18] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware the employee alleges a personal grievance that the employee wants the employer to address.<sup>1</sup>

[19] What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.<sup>2</sup>

[20] In determining when the time for an employee to raise a grievance starts, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.<sup>3</sup> It is not necessary for the employee to have a belief, at this stage, in the existence of a personal grievance claim.<sup>4</sup>

### ***Raising of general concerns***

[21] Although Mr Messick attempted to submit the University was aware of his concerns generally, that does not meet the tests for raising a personal grievance. General awareness of an employee's concerns does not alert an employer to the fact an employee may be raising a personal grievance. More particularly, the University took steps at various times to address his concerns, including offering EAP. It would

---

<sup>1</sup> Section 114(2) of the Employment Relations Act 2000.

<sup>2</sup> *Creedy v. Commissioner of Police* [2006] ERNZ 517 (NZEmpC) at [36].

<sup>3</sup> *Wyatt v. Simpson Grierson* [2007] ERNZ 489 at [29]; applied in *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79; [2010] ERNZ 172.

<sup>4</sup> *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79; [2010] ERNZ 172 at [44].

have been reasonable to assume it had met his concerns by those actions and no further response was required.

***The 'raising' of the first personal grievance***

[22] The first grievance alleged disadvantage by a series of five fixed term contracts and one permanent contract between 2007 and 25 October 2012 which excluded him from the PBRF process while allowing him to do lecturing duties without opportunity for promotion or performance based salary increases.

[23] Mr Messick should have been reasonably aware of the circumstances giving rise to this unjustifiable action in 2012. When he started in February 2012 his job description specifically stated research was not part of his role and therefore he was ineligible for PBRF. He would also have been aware his role encompassed many of the tasks of a lecturer excepting research.

[24] He accepted he had attempted to get performance reviews to access promotion opportunities in early 2013 but was refused. During his EAP sessions in early January 2013 he said at the hearing that he "realised the University was not sticking to their contract."

[25] He was certainly aware of the specifics of this personal grievance by 9 April 2013 because he complained in an email to the University about his work being identical to a lecturer but not being remunerated the same. Although he stated at hearing he only realised on 9 May 2013 he should have been a lecturer, the earlier email suggests he was aware in April 2013.

[26] In my view Mr Messick was reasonably aware of the unjustifiable action giving rise to the first grievance by 9 April 2013. The last date for raising the grievance was 8 July 2013. He raised this with the University on 18 August 2013 - 41 days after the time limitation had expired.

***The 'raising' of the second and third personal grievances***

[27] The second and third personal grievances were disadvantage due to the failure to account for and deal with high workloads that were outside of his job description and disadvantage due to the specific failure to deal with student numbers in PSYC587 Practicum.

[28] Mr Messick accepted under examination by me his workload issues would have been known in late 2012. Mr Messick had also specifically complained in an email about the student numbers in the PSYCH587 on 16 April 2013.

[29] Even taking 16 April 2013 as the date he became aware of unjustifiable action, the last date for raising this grievance was 15 July 2013. He raised this with the University on 18 August 2013 - 34 days after the 90 day time limitation had expired.

*The 'raising' of the fourth personal grievance*

[30] An email dated 9 April 2013 from Mr Messick complained about the refusal to fund further EAP treatment. This was the cause of the disadvantage alleging mishandling of his work struggles via EAP. The date for raising the grievance must run from 9 April 2013.

[31] Mr Messick raised the fourth grievance with the University on 18 August 2013. Similarly to the first grievance, this was raised 41 days after the 90 day time limitation had expired.

*The 'raising' of the fifth personal grievance*

[32] Any unjustifiable action about the warning should have reasonably been known to Mr Messick after it was issued to him on 1 May 2013. The last date for raising this grievance was 30 July 2013. It was raised on 18 August 2013 - 18 days after the time limitation had expired.

[33] None of the personal grievances, with the exception of unjustified dismissal were raised within the 90 day time limitation period.

**Are there exceptional circumstances and whether it is just leave for those personal grievances to be raised outside of the 90 day limitation period?**

[34] Mr Messick alleges he was so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within the period.<sup>5</sup>

---

<sup>5</sup> Section 115(1)(a) of the Employment Relations Act 2000

**Law**

[35] The 90 day limit is to ensure that employers are promptly notified of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking into account the position of an employer facing a late claim) so requires.<sup>6</sup>

[36] Parliament has made the *exceptional circumstances* test more difficult to meet. This requires a high standard of proof. To be *so effected or traumatised* in s.115(1)(a) connotes substantial injury. Furthermore, an inability to *properly consider* raising the grievance means the employee must suffer the inability for the entire 90 day period; the fact that an employee is able to *properly consider* raising the grievance at some point during the 90 day period means the test will not be satisfied.<sup>7</sup>

[37] I do not consider the evidence here meets the high standard of proof required. There was evidence Mr Messick was well during the 90 day period including ten weeks of leave taken in January 2013.

[38] There is an absence of medical evidence which shows he was suffering substantial injury during the entire 90 day period. Diagnosis of depression is insufficient to meet the tests. Parties may be depressed but able to raise a grievance, and have done so in many cases before the Authority.

[39] Mr Messick gave evidence he sought legal advice during the period between May and July 2013 about the personal grievances he now seeks to advance.

[40] In my view, Mr Messick had the capacity to properly consider raising the personal grievances well within the time limitation. He has not proven there were exceptional circumstances sufficient to meet the statutory tests.

[41] Therefore the five personal grievances of unjustified disadvantage are dismissed. Costs are reserved.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

---

<sup>6</sup> *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79; [2010] ERNZ 172 at [33]

<sup>7</sup> *Telecom New Zealand Ltd v. Morgan* [2004] 2 ERNZ 9 (NZEmpC) at [23]-[24]