

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 225
3029552**

BETWEEN MIRIAM ABDALLAH
 Applicant

AND AKINA TRADING LIMITED t/a
 THE BRAND OUTLET
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Greg Bennett, Advocate for Applicant
 Dave Robb, Advocate for Respondent

Investigation Meeting: 2 July 2018 at Auckland

Submissions received: 2 July 2018 from Applicant
 6 July 2018 from Respondent

Determination: 19 July 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether or not the Applicant, Ms Miriam Abdallah, raised her personal grievance with the Respondent, Akina Trading Limited t/a The Brand Outlet (Akina), within 90 days of the grievance occurring or coming to her notice, whichever is the later in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievance before the Authority.

[2] Akina denies that Ms Abdallah raised her personal grievance within the requisite 90 days statutory period.

Issue

[3] The issues for determination are:

- Which matters constituted the raising of a personal grievance in the letter received by Akina by email on 12 April 2018?
- Were they raised within the statutory 90 day time period for raising a personal grievance pursuant to s 114(1) of the Act?

Background Facts

[4] Akina operates a retail fragrance and make-up business, primarily via a website and ‘pop-up’ stores. Ms Abdallah was employed by Akina as an Assistant Retail Manager on 13 June 2017.

[5] She was provided with an individual employment agreement which was not signed by the parties (the unsigned Employment Agreement).

[6] In December 2017 Ms Abdallah raised a complaint of sexual harassment about an incident which had occurred involving another Akina employee, XWU, on 18 October 2017.

[7] In response to her complaint Akina engaged Grow Human Resources Limited (Grow HR), a consultancy firm, to investigate Ms Abdallah’s complaint. Grow HR commenced an investigation into Ms Abdallah’s complaint of sexual harassment in a timely manner.

[8] Grow HR provided Ms Abdallah with a copy of the investigation interview notes taken with XWU on 21 December 2017 and asked for her comments and response.

[9] Ms Abdallah was requested to treat the information as confidential, but instead she provided it to two other employees.

[10] Despite reminders from Grow HR, Ms Abdallah did not provide any response, information or comments in respect of the witness statement by XWU, nor did she request a time extension to provide a response.

[11] Due to her previous disclosure of information she had been requested to keep confidential, Ms Abdallah was not provided with a copy of the Investigation Report which Akina refused to provide unless Ms Abdallah agreed to comply with the strict confidentiality requirement.

[12] However Mr Green wrote to Ms Abdallah by email dated 8 January 2018 summarising the conclusion of the Investigation Report:

As requested here is what the report from Grow HR stated:

“In my view and with the information to date and consideration of the definition of Sexual Harassment in the Employment Relations Act 2000, there is insufficient evidence or basis for the allegation of sexual harassment to be established or upheld.”

Disciplinary Meeting

[13] By letter dated 15 January 2018 Akina invited Ms Abdallah to a disciplinary meeting scheduled to be held on 22 January 2018. The disciplinary meeting was in respect of six allegations comprising falsification of expenses claims, inappropriate behaviour towards management and colleagues, refusing to work with XWU, and disclosure of confidential information in respect of the sexual harassment investigation.

[14] Ms Abdallah requested a change to the date of the disciplinary meeting by email dated 18 January 2018. This was agreed by Akina and the meeting was rescheduled to be held on 24 January 2018.

[15] Ms Abdallah requested a copy of the Investigation Report on 18 January 2018, Mr Green replied by email on 19 January 2018:

I am happy to provide this with to you but you need to understand that it is a confidential document so cannot be shared with any of your work colleagues or with anyone else. You are able to share it with someone that is providing you with legal advice but that is all.

[16] Ms Abdallah responded: *“I can share it with my support persons as we all know right from the beginning.”*

[17] Mr Green replied by email dated 19 January 2018:

Sorry but that is not acceptable. I am giving you a lawful instruction that the document or any other information contained within the document is not be shared with anyone other than your nominated legal representative, who I am happy to provide the document to if you can provide the details of this person to me.

[18] Ms Abdallah did not send Akina confirmation that the rescheduled meeting date was acceptable, and following further enquiry by Akina, Ms Abadallah emailed that she was too sick to attend the rescheduled disciplinary meeting and she would send a medical certificate on 23 January 2018.

[19] Ms Abdallah sent a written statement to the allegations by email on 24 January 2018.

[20] That same date Ms Abdallah posted a lengthy and angry message on the Akina internal intranet messaging board, also emailing it to employees and suppliers.

[21] Ms Abdallah did not supply the promised medical certificate and in the absence of any further response from her, Akina wrote to her on 7 February 2018 terminating her employment on the basis of serious misconduct.

[22] On 12 April 2018 Akina received by email an undated letter from Mr Bennett (the Undated Letter) in which he advised that he was acting for Ms Abdallah.

[23] The Undated Letter stated in paragraphs 2 to 4:

...

2. Our client has raised an allegation of sexual harassment ... It is our understanding that Grow HR undertook and (sic) investigation into the allegation
3. We require a copy of the report that was written along with the investigation notes and any emails that were made in respect of the investigation, along with the original complaint.
4. We are raising a personal grievance in respect of a breach of contract on behalf of our client that relates to the sexual harassment complaint.

[24] The Undated Letter also referred to Ms Abdallah not having been paid correctly for her hourly rate and for annual leave days in accordance with the Holidays Act 2003 in paragraphs 5 and 6 and stated in paragraph 7: “... *It is concerning that you have not corrected any errors to this Holidays Act and therefore we are raising a personal grievance in respect of this matter.*”

[25] Finally the Undated Letter stated in paragraph 8: “*Our client is also raising a constructive dismissal due to the actions of her employer, Akina Trading Limited, as she has lost complete trust and confidence in her employer*”.

Determination

Which matters constituted the raising of a personal grievance in the letter received by Akina by email on 12 April 2018?

[26] A personal grievance is defined in s 103 of the Employment Relations Act 2000 (the Act) which states:

- (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim –
- (a) That the employee has been unjustifiably dismissed; or
 - (b) That the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since terminated) affected to the employee's disadvantage by some unjustified action of the employer;
 - (c) ...
 - (d) That the employee has been sexually harassed in the employer's employment ...

[27] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.¹ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the 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 the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases 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. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[28] I find that there are three matters raised as in the Undated Letter as constituting a personal grievance:

- A breach of contract related to the sexual harassment complaint;
- Errors in relations to the Holidays Act 2003; and
- Constructive dismissal

Breach of contract related to a complaint of sexual harassment

¹ *Creedy v Commissioner of Police*[2006] ERNZ 517

[29] The undated letter states at paragraph 4 that the personal grievance being raised related to a breach of contract in relation to the sexual harassment complaint.

[30] The breach of contract is not specified and Mr Bennett submits that Akina would have been aware that Ms Abdallah had an issue which related to her complaint of sexual harassment.

[31] Ms Abdallah made a complaint of sexual harassment to Akina in December 2017. In response, Akina engaged Grow HR which almost immediately commenced an investigation into Ms Abdallah's complaint.

[32] By 8 January 2018 Ms Abdallah had been informed by Mr Green that there was insufficient evidence to support a finding of sexual harassment in respect of her complaint. Ms Abdallah was also aware she had not been provided with a copy of the Investigation Report.

[33] Ms Abdallah therefore was in possession of all the information relating to the sexual harassment complaint on 8 January 2018 such as to support a claim of personal grievance. However she did not do so until Akina received the Undated Letter.

[34] The breach of contract is not specified in the Undated Letter, however it is submitted by Mr Bennett that it is founded on a failure of a breach of good faith.

[35] In clause 4.1 of the Unsigned Employment Agreement it provides at clause 4.1 **Obligations of the Employee** that the employee would: "*Deal with the Employer in good faith in all aspects of the employment relationship.*" The Employment Agreement contains no reference to a reciprocal duty on the employer.

[36] Nonetheless there is an implied duty on employers and employees to deal with each other in good faith which is also set out in the Employment Relations Act 2000 (the Act) in clause 4. Section 4 (1A) (c) of the Act sets out at s 4(1A)(c)(i) that employees should have access to information relevant to the continuation of their employment, and at s 4(1A) (c)(ii) the opportunity to comment upon it before a decision is made.

[37] As observed, by 8 January 2018 Ms Abdallah was aware that her complaint of sexual harassment had not been upheld, and was also aware that she had not been provided with the Investigation Report. This might have given rise to a claim that Akina had not behaved in good faith by not supplying her with a copy of the Investigation Report.

[38] The duty of good faith is a duty that applies to both employer and employee. Both are under a duty to be, inter alia, “*responsive and communicative*”². However despite being aware that her complaint of sexual harassment had not been upheld, and that the Investigation Report had not been provided to her on 8 January 2018, Ms Abdallah did not respond by making her employer aware that she was aggrieved by this situation or requesting the Investigation Report in a timely manner.

[39] Ms Abdallah did not raise a personal grievance until 12 April 2018. I find this to be outside the statutory time frame.

[40] Akina did not consent to Ms Abdallah raising a complaint in relation to the sexual harassment complaint outside the 90 day statutory time frame, and Ms Abdallah has not applied for leave to raise the personal grievance after the expiry of the statutory time frame on the basis that there are exceptional circumstance pursuant to s 114(4) of the Act.

[41] I determine that Ms Abdallah did not raise a personal grievance in respect of a breach of contract relating to the sexual harassment complaint.

Errors in relation to the Holidays Act

[42] The issue identified in paragraphs 5 to 7 of the Undated Letter is of an error in Akina applying the Holidays Act 2003 (HA).

[43] This complaint is stated in the Undated Letter as having given rise to a concern that Ms Abdallah had not received her correct hourly rate and annual leave day entitlement in accordance with the HA.

[44] It is a contractual claim and would constitute a wages claim arising under the HA.

[45] Ms Abdallah can raise this claim at any time within 6 years from the date it arose.

Constructive Dismissal Personal Grievance

[46] The undated letter states that it is raising a constructive dismissal personal grievance arising from: “*the actions of her employer*”.

[47] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

² S4 (1A)(b) of the Act

[48] Therefore in examining whether a constructive dismissal has occurred two questions arise:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation, and
- ii. Second, if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[49] In this case, Ms Abdallah did not resign; she was dismissed by Akina on 7 February 2018 and consequently there has been no dismissal to found a constructive dismissal claim.

[50] The dismissal might found a personal grievance claim for unjustifiable dismissal pursuant to s 103(1)(a) of the Act, but Ms Abdallah has not claimed unjustifiable dismissal.

[51] Moreover I find that the undated letter does provide sufficient specificity of the grievance for the employer to be able to address it.

[52] I determine that Ms Abdallah did not raise a personal grievance in respect of a breach of contract relating to the constructive dismissal claim.

Costs

[53] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority