

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 249  
3024720

BETWEEN                      MARK KARENA  
   Applicant

A N D                              RECREATIONAL HOLDINGS  
   LIMITED TRADING AS FISH  
   CITY HAMILTON  
   Respondent

Member of Authority:        Nicola Craig

Representatives:              Tony Barrow for the Applicant  
   Russell Drake for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        11 May, 1, 5 and 12 June 2018 from Applicant  
   29 May and 5 June 2018 from Respondent

Date of Determination:        13 August 2018

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**PRELIMINARY DETERMINATION  
OF THE AUTHORITY**

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**A. Mark Karena is able to pursue an unjustified dismissal claim against  
Recreational Holdings Limited trading as Fish City Hamilton.**

**Employment Relationship Problem**

[1]     Mark Karena was employed by Recreational Holdings Limited trading as Fish City Hamilton (Fish City or the company), as its IT, Communications and Web Administrator. He began work on 3 August 2013. Fish City is a boating, fishing and outdoor supply company.

[2] In August 2017 Fish City began a restructuring process. Mr Karena was told that his position was affected and he could be made redundant as there appeared to be no suitable alternative positions available for him. Mr Karena challenged the justification for the restructuring and then hired a representative.

[3] Some discussion occurred between the representatives for Mr Karena and Fish City. Mr Karena's employment was terminated by way of redundancy on 27 October 2017. The parties later attended mediation.

[4] Mr Karena claims that he was disadvantaged by unjustified actions of Fish City regarding the restructuring process, was unjustifiably dismissed, and that Fish City failed to act in good faith towards him.

[5] Fish City denies the allegations against it. It also says that Mr Karena has failed to raise a dismissal personal grievance within the 90 day period required by s 114 of the Employment Relations Act 2000 (the Act). In response Mr Karena, in the alternative to claiming the dismissal grievance was raised in time, applies for leave from the Authority to raise the dismissal grievance late.

[6] There is no dispute that Mr Karena raised, within time, a disadvantage grievance with Fish City in an attachment to an email sent on 24 September 2017.

### **The Authority's investigation**

[7] The parties agreed that the 90 day issue could be determined on the papers as a preliminary matter. The Authority received written statements from Mr Karena and his representative Mr Barrow, and various documents.

[8] For the respondent, written statements were received from Ross Christiansen (owner/operator of Fish City) and Nicholas Freke (a human resource consultant whose organisation was hired by Fish City). Submissions were received from both parties.

[9] As permitted by s 174E of the Act this determination does not record all the evidence in submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

**Good faith claim**

[10] Mr Karena claims that Fish City breached its duty of good faith to him. Although such claims are sometimes brought within a personal grievance, usually of the disadvantage or dismissal types, there is no requirement that they be brought in that way. In this instance Mr Karena has sought a penalty for breach of good faith. Penalty claims must be brought within twelve months of the action relied on becoming known.<sup>1</sup>

[11] Mr Karena's claim was accepted for lodgement in the Authority in March 2018, well within the 12 month period after the actions which are alleged to amount to the breaches of the duty of good faith occurred. I am satisfied that that claim can therefore be pursued.

**Raising a grievance**

[12] Under s 114 of the Act, employees who wish to raise a grievance must raise it with their employer within 90 days of when the action alleged to amount to a grievance occurred or came to the notice of the employee, whichever is the later.

[13] There are a few points during the sequence of events in this case where a grievance may have been raised.

[14] If Mr Karena is unable to establish that he raised the dismissal grievance in time, he applies under s 114(3) of the Act to raise his grievance after the expiry of the 90 day period.

**Mr Karena's email of 24 September 2017**

[15] Attached to the email was a document headed Events Timeline Leading to Workplace Relationship Issue for Mark Karena. It outlines a recent series of events and Mr Karena's concerns about them. He concludes:

... I believe it would be appropriate to discuss an exit strategy for me from the business – I ... believe the actions of Ross Christensen and Fish City are not the actions that a fair and reasonable employer could take ... resulting in me being unjustifiably disadvantaged and that Ross' actions amount to constructive dismissal. I am willing to discuss in good faith how we settle the employment relationship issue

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<sup>1</sup> Section 135(5)(a) of the Act.

which has now been created with a view to find a suitable outcome which recognises and fairly compensates me for the untenable situation I have been forced into.

[16] At this point Mr Karena was still working at Fish City and that situation continued until he received the dismissal letter of 27 October 2017.

### **Effect of constructive dismissal reference**

[17] Although Mr Karena raised an unjustifiable disadvantage grievance on 24 September 2017, did he also at that time raise an unjustifiable dismissal claim, in particular, by his reference to constructive dismissal?

[18] At the time the email was sent Mr Karena was still in employment. He had not been given notice of termination nor had he given notice of resignation. He never, even later, resigned.

[19] A grievance must relate to an event which has occurred or is occurring. It cannot relate to an anticipated future event.<sup>2</sup> I am not satisfied that as at 24 September 2017 Mr Karena could establish a constructive dismissal claim as he had not resigned.<sup>3</sup>

[20] Therefore at the point Mr Karena sent the email, given that he was still employed, the reference to constructive dismissal does not assist his argument that he raised a dismissal grievance.

### **Treating the disadvantage grievance as a dismissal grievance**

[21] I now consider whether I may use s 122 of the Act, as outlined in *New Zealand Automobile Association Inc v McKay*<sup>4</sup>, to regard Mr Karena's unjustified disadvantage grievance in the Events Timeline as a basis for a dismissal claim.

[22] Under section 122, the Authority is able to find a personal grievance other than that alleged. This is not prevented by anything in Part 9 of the Act, including the s 114 requirement to raise a grievance. It is clear from the *Automobile Association*

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<sup>2</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [28] – [30] (EC)

<sup>3</sup> *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 at 875-876

<sup>4</sup> *New Zealand Automobile Association Inc v McKay* [1996] 2 ERNZ 622 at p 633 line 5

decision that this issue can be considered at a preliminary stage, as well as substantively.<sup>5</sup>

[23] Although the *Automobile Association* case concerns the predecessor section<sup>6</sup> under the Employment Contracts Act 1991, I am satisfied that the same reasoning applies under the current Act.<sup>7</sup> The Employment Relations Act is also designed to be practical legislation.

[24] In order to treat the disadvantage grievance as a dismissal grievance claim, there must be sufficient similarities between the issues raised as disadvantage and what is Mr Karena's current dismissal claim. In the *Automobile Association* case the Court discussed the prospect of a grievance raised during the notice period which led to termination, requiring consideration of the justification for giving notice, in the same way that a dismissal grievance would.<sup>8</sup>

[25] In the present case the Events Timeline referred to the notification of the restructuring process, a meeting between the parties where Mr Karena challenged Fish City's justification for restructuring, a subsequent meeting where Mr Karena's engagement in his role is questioned and then Fish City passing on his details to a recruitment company. Mr Karena outlined his concerns about being targeted, the justifications for the restructuring not stacking up, the inclusion of engagement issues, and the outcome being presented as a *fait accompli*.

[26] The statement of problem outlines these same issues. Other than a reference to discussions about an exit strategy, which occurred after the Events Timeline was sent, there is little or nothing in the statement of problem about later events except the fact of dismissal on 27 October 2017.

[27] I conclude that under s 122 of the Act, I will treat the disadvantage grievance raised on 24 September 2017 as a dismissal grievance claim. Mr Karena is therefore entitled to pursue his dismissal claim. The merits of his claim will be considered at an investigation meeting.

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<sup>5</sup> See n 5 at p 634

<sup>6</sup> Section 34 of the Employment Contracts Act 1991

<sup>7</sup> See also *Holmes v Meta NZ Ltd* ERA, Christchurch, CA24/10, 4 February 2010

<sup>8</sup> See n 5, at p 633

[28] In the event that I am wrong in my decision regarding s 122, I go on to consider subsequent events and the application, in the alternative, to raise the grievance late.

### **Involvement of representatives**

[29] Some time after Mr Karena sent the Events Timeline, he contacted Tony Barrow from Pinnacle Security Consultants and asked Mr Barrow to represent him in this matter. By that point Fish City had also sought external assistance from Mr Freke.

[30] Mr Barrow contacted Mr Freke by email, stating that he had had an initial meeting with Mr Karena and *“have some serious concerns in relation to his ‘constructive dismissal’ from Fish City”*.

[31] Mr Barrow says that in a discussion on 11 October 2017 he told Mr Freke that Mr Karena was very unhappy and stressed as a result of Mr Christiansen’s actions and that if the matter could not be resolved, Mr Karena advised Mr Barrow that he wanted to raise a personal grievance. Mr Freke says the discussion between himself and Mr Barrow focused on expediently securing an exit payment for Mr Karena, which Mr Freke took as meaning that Mr Karena had accepted that his employment was concluding.

[32] On the basis of the evidence provided I cannot conclude that Mr Barrow raised a dismissal grievance claim during this discussion. The reference to personal grievance was conditional and future focused. Such statements are not sufficient to raise a grievance.<sup>9</sup>

### **Mediation in November 2018**

[33] Mr Barrow requested urgent mediation on behalf of Mr Karena, which Fish City agreed to attend. In the meantime Fish City gave Mr Karena the termination letter. Mr Freke says the letter was provided on his advice as he saw the only outstanding discussion as being about a potential exit payment.

[34] Arranging the mediation of itself did not amount to raising the dismissal grievance. Fish City’s participation in mediation cannot be regarded as consent to the

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<sup>9</sup> *Hawkins v Commissioner of Police* [2007] ERNZ 762 at [15]

late raising of the grievance as at this point the dismissal grievance was not late and Mr Karena had already raised another grievance, namely the unjustified disadvantage.

[35] Mediation was held on 17 November 2017. Mr Barrow was not present due to other work commitments out of town but arranged for a colleague to attend. Given s 148 of the Act, what was said at mediation must be kept confidential. Fish City says that it will not consent to confidentiality being waived.

[36] Mediation did not result in Mr Karena and Fish City reaching a resolution.

### **Job advertisement**

[37] In mid-January 2018 Mr Karena saw what he describes as his job advertised by Fish City on Seek. The job had a different title to Mr Karena's role, as it is for marketing and sales coordinator for both Fish City Hamilton (retail) and FC Boats (manufacturing).

[38] Mr Karena says that he was surprised and incensed by this as he saw that Fish City had said that it no longer needed anyone in his role and had been unable to afford to pay him, however, had according to the advertisement, subsequently expanded into a new factory and wanted someone to do what he describes as his job. This spurred Mr Karena on to see where things were at in relation to his case.

[39] I have considered whether seeing the advertisement could be viewed as the point when the dismissal grievance came to Mr Karena's attention. In *Macdonald v The Optimum Clothing Company Limited*<sup>10</sup> the applicant did not raise her personal grievance within 90 days of the effective date of her redundancy, but did do so within 90 days of seeing an advertisement for what appeared to be her former position, but on a part-time basis. The Authority found that she had raised her grievance within the statutory timeframe, considering that the facts of the dismissal and the reason for it were separated in time. The date of the advertisement was seen as the time when the personal grievance came to the applicant's notice.

[40] In Mr Karena's case, he was clearly disbelieving of the genuineness of his redundancy from the time the restructuring process was first announced to him. He explicitly says in the Events Timeline, sent on 24 September 2017, that the

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<sup>10</sup> [2012] NZERA Auckland 161

justifications for the restructuring do not stack up. Although the job advertisement could well have been evidence which he wished to rely on, I do not consider that he can say that his dismissal grievance first came to his attention when he saw it.

[41] I do not accept that the 90 day period for the dismissal grievance runs from when Mr Karena saw the job advertisement.

### **Lodging the claim**

[42] The 90<sup>th</sup> day from the date of dismissal was 24 January 2018.

[43] Mr Karena received a draft statement of claim<sup>11</sup> from Mr Barrow on 7 February 2018 and checked it. He replied to Mr Barrow on 13 February. Mr Barrow asked him to sign it, scan it and send a copy back to Mr Barrow. There were some issues with the scanning and Mr Karena eventually got a signed copy back to Mr Barrow on Friday, 16 February 2018.

[44] The Authority received a statement of problem for Mr Karena on 20 February but it was not accepted for lodgement for reasons which Mr Barrow was informed of. Mr Barrow emailed Mr Freke on the same day stating: “Just to let you know we have just filed a PG with ERA on behalf of Mark Karena”. Aside from any issue about whether there was sufficient specificity in the email, this is also outside the 90 day period.

[45] A revised statement of problem was accepted by the Authority on 6 March 2018. Fish City was then sent a copy of it.

### **Leave to raise the dismissal grievance late**

[46] The Authority may grant leave if it is satisfied that the delay was occasioned by exceptional circumstances (including those set out in s 115) and it is just to do so.<sup>12</sup>

[47] Section 115 of the Act provides examples of exceptional circumstances, although it is not an exhaustive list. The following subsections are relevant in this case:

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<sup>11</sup> Presumably statement of problem  
<sup>12</sup> Section 114(4) of the Act

(b) where the employee made reasonable arrangements to have the grievance raised on his behalf by an agent and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s 65.

### **Mr Karena's understanding regarding grievances**

[48] Mr Karena says that he had heard reference to the term "personal grievance" before and also to 90 days, but he was not sure how that worked. He thought he had 90 days to make his complaint to his employer. He was unaware of how the notification was to be made, whether words "personal grievance" had to be used or whether verbal notification was acceptable.

### **Use of an agent**

[49] I now examine whether Mr Karena had made reasonable arrangements to have the grievance raised on his behalf by Mr Barrow as his agent and whether Mr Barrow unreasonably failed to ensure that the grievance was raised within the required time.

[50] Mr Karena says that he was reliant upon his representative to get it right (regarding raising his grievance) and he believed that Mr Barrow had. Mr Barrow himself says that he has never missed a date and is horrified that he has done so.

[51] Mr Karena arranged for a representative in good time, in fact, prior to the termination of employment. From evidence provided by Mr Christensen, it appears that Mr Barrow has been providing representation in employment issues/disputes since 1991. It was reasonable for Mr Karena to instruct Mr Barrow as his agent. The evidence was that Mr Barrow was aware of Mr Karena's concerns.

[52] Both Mr Karena and Mr Barrow agree that Mr Karena instructed that if he was unable to resolve this issue at mediation then he wanted to raise a personal grievance. This is supported by Mr Barrow's statement in his first conversation with Mr Freke that if the matter could not be resolved, Mr Karena had advised him that he wanted to raise a personal grievance.

[53] Although Mr Barrow was not at the mediation, there was no suggestion that he was unaware of the outcome for any extended period. No agreement was reached at mediation on 17 November 2017. There was no evidence of any negotiations occurring after mediation. As at the next business day, Monday 20 November 2017, there was still over two thirds of the 90 day period from the date of dismissal remaining.

[54] Mr Karena followed up by way of his email of 18 January 2018 regarding the job advertised on Seek, and asking where things were at regarding “a court case etc”. This was still almost a week before the end of the 90 day period. Mr Barrow replied that he was working on it.

[55] I am satisfied that Mr Karena made reasonable arrangements for Mr Barrow to raise a grievance for him. The question is then whether Mr Barrow unreasonably failed to raise the grievance within the 90 day period?

[56] Mr Barrow outlines work he had away from his office in late 2017 and early 2018. He was negotiating what he describes as a large nationwide contract for one of his clients, which commenced on 24 October 2017 and concluded at the end of the day on 22 December 2017. Work on the contract continued from 8 January 2018 to 2 February 2018. This work usually involved trips to two towns or regions a week. Mr Barrow says that he was travelling from either late Sunday afternoon or first thing Monday morning and returning home on Friday afternoon or late evening. This was the cause of him being unable to attend mediation.

[57] Mr Barrow received Mr Karena’s 18 January 2018 email and made a note to get to work on the statement of claim for Mr Karena’s personal grievance.

[58] Mr Barrow accepts that in the event that the personal grievance was not raised, this was his failing. He says that he was not conscious of the time restriction as he believed Fish City to be aware of a personal grievance having been raised verbally with Mr Freke.

[59] Mr Barrow clearly had a busy workload and the 90 day timeframe period included the Christmas and New Year period. However, I consider it unreasonable for him not to have raised the dismissal grievance in time. I am therefore satisfied that there were exceptional circumstances, as outlined in s 115 (b) of the Act.

### **Explanation of resolution of employment relationship problems**

[60] I move on to look at whether Mr Karena's employment agreement with Fish City contained the explanation required by s 65 of the Act. Under s 65(2)(a)(vi), individual employment agreements must have a plain language explanation of the services available for resolution of problems, including "a reference to the period of 90 days in section 114 within which a personal grievance must be raised".

[61] Mr Karena's employment agreement contains a clause headed "*Employment relationship problems, personal grievances and disputes*"<sup>13</sup>. That provision states:

- (a) Any personal grievance, dispute over the application or interpretation of this agreement or any other employment relationship problem which may arise will be resolved using the procedures in the Employment Relations Act 2000.
- (b) The parties note that an explanation of the services available for the resolution of employment relationship problems is included in Schedule 4 of this Agreement.

[62] Schedule 4 is headed "*Dispute resolution services*" and begins as follows:

In the event of an employment relationship problem arising between an Employee and an employer, the following services are available for resolving the problem:

The Employee must advise the employer, preferably in writing, explaining the nature of the problem and what the employee wants done about it. This must be done within 30 days of the problem arising or of the Employee becoming aware of it.

The parties must meet to attempt to resolve the problem.

[63] Schedule 4 of the agreement does not refer to personal grievances as such except in relation to personal grievances involving discrimination or sexual harassment where the choice between the Human Rights Commission and Employment Relations Authority is set out.

[64] I find that the clause and schedule do not meet the requirements of s 65(2)(a)(vi) of the Act in that they do not include a reference to the period of 90 days within which a personal grievance must be raised.

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<sup>13</sup> Clause 14

[65] However, I am not satisfied on the evidence before me that the delay in raising the grievance was occasioned by this, as is required by s 114(4)(a) of the Act.

**Leave to raise the dismissal grievance late**

[66] Under s 114(4) of the Act I must consider whether, having established that the delay was occasioned by exceptional circumstances, whether it is just to grant Mr Karena leave to raise the dismissal grievance after the expiration of the 90 day period.

[67] I am satisfied that Mr Karena raised detailed concerns about the restructuring process from an early stage. There is no indication of prejudice to Fish City caused by the delay in notification of the dismissal grievance.

[68] In the event that I am wrong about the use of s 122 of the Act to consider the dismissal grievance, I would have granted Mr Karena leave to raise his dismissal claim late.

**Mediation**

[69] Mr Karena was already able to pursue his unjustified disadvantage and good faith claims. Now that he has established an entitlement to pursue his dismissal claim, I direct the parties to attend mediation within 60 days of the date of this determination.

[70] In the event that mediation is unsuccessful the Authority will go on to consider the substantive issue of whether Mr Karena's grievance and good faith claims are made out.

**Costs**

[71] As is the Authority's usual practice, any costs issues will be dealt with after the substantive determination.