IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 180
5639611

	BETWEEN	BRIAN SAIPE Applicant
	A N D	TRUDE JEAN BETHEL (also known as TRUDE JEAN BETHEL-PACE) Respondent

Member of Authority:	T G Tetitaha
Representatives:	S E Greening, Counsel for the Applicant R Hooker, Counsel for the Respondent
Submissions received:	16 June, 1, 12 and 29 September, 20 October and 5 December 2017 and 14 and 28 March 2018 from Applicant 16 and 29 June, 20 November 2017 and 16 April 2018 from Respondent.
Date of Determination:	06 June 2018

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. I decline the application to exclude the 2015 matter from consideration and in support of my determination.

B. I decline to grant a non-publication order.

C. Costs reserved.

Employment Relationship Problem

[1] Brian Saipe alleges he was unjustifiably dismissed by Trude Bethel on 24 August 2013 and unjustifiably disadvantaged by the unilateral reduction in hours of work on 24 July 2013. There is an additional issue of wage arrears arising from the reduced hours of work. Ms Bethel denies she unjustifiably dismissed or disadvantaged Mr Saipe.

[2] Ms Bethel seeks the striking out of both personal grievances. This is on the basis Mr Saipe failed to raise his personal grievances within the 90 day time period and/or failed to file the statement of problem within 3 years of raising the personal grievances. Mr Saipe denies he requires leave to raise his personal grievances or an extension of time for filing his statement of problem.

Relevant Facts

[3] Ms Bethel operated a rental business for cottages at Bethels Beach. It is accepted she employed Mr Saipe as a part time administrator in November 2012. The parties do not have any signed employment agreement. At the beginning of his employment Mr Saipe was working up to 30 hours per week.

[4] Following the seasonal downturn in holiday rentals during winter, Ms Bethel spoke to Mr Saipe about his hours of work. There is a dispute about the parties agreement regarding his hours of work.

[5] By 24 August 2013 the dispute about the hours of work remained unresolved. Ms Bethel emailed Mr Saipe stating they could not continue his services.

Raising of the Personal Grievance

[6] On 26 August 2013 Mr Saipe emailed Ms Bethel stating there was "an employment relationship problem" between them, described the problem as unilateral reduction of hours, failure to comply with the contract and dismissal. He sought for both parties to attend mediation. Mediation did not occur.

[7] On 26 November 2013 Mr Saipe wrote again. He noted Ms Bethel had received notification of his personal grievances and referred to having an unjustified dismissal. He sought lost income and damages.

[8] Approximately three years later on 29 August 2016 Mr Saipe filed a statement of problem with the Authority.

[9] Ms Bethel filed a statement in reply protesting jurisdiction to hear the personal grievances and raising a counterclaim regarding breach of fidelity by unlawful removal of company information during employment namely email correspondence and subsequent misconduct by use of the same to damage the business. She seeks a penalty of $25,000 and compensatory damages.

Hearing

[10] The matter was set down for an investigation meeting on 16 June 2017. However the meeting was adjourned partway through taking Mr Saipe's evidence as he did not wish to return to the room.

[11] The parties Counsel then sought an oral indication about the preliminary issues of time limitations for raising the personal grievances and filing the statement of problem. An indication was given that the grievances were raised on 26 August 2013, the statement of problem was therefore filed outside of the time limitation of 3 years. Mr Saipe was required to seek an extension of time for filing the statement of problem under s219 of the Act. His evidence did not meet the tests for leave to be granted.

Determination on the papers

[12] The parties subsequently sought a determination of the time limitation issues for the personal grievances "on the papers." The evidence the parties relied upon were the statements of problem and reply and the briefs of evidence sworn or signed and the attached documents and a bundle of documents filed by Ms Bethel. Mr Saipe was also examined in part at a hearing on 16 June 2017. The parties have agreed to admit the untested evidence and do not require examination of Mr Saipe or Ms Bethel.

[13] At a telephone conference on 7 July 2017 the parties agreed to deal with this preliminary matter on the papers. Directions were made for the filing of submissions. Mr Saipe filed submissions by his representative and his own submissions. Unfortunately these contained substantial amounts of new evidence. He was directed to file this in an affidavit form if he wished to rely upon it.

[14] I was subsequently made aware of material from a personal grievance application Mr Saipe filed in 2015 that the Authority had in its possession (the 2015 matter). I made the parties aware of this material and asked for their views on whether I could consider it as part of this matter.

[15] Mr Saipe sought an exclusion and non-publication order in respect of the 2015 matter. Submissions were directed and the final piece of information was

received on 16 April 2018 from both parties. The matter is now ready for determination.

Issues

[16] The issues for determination are:

a) Should the 2015 matter be excluded from consideration in this matter?

b) Should a non-publication order be granted for this matter if material from the 2015 matter is admitted?

c) When did Mr Saipe raise his personal grievances of unjustified dismissal and disadvantage by unilateral reduction in hours? Is leave required to raise these grievances out of time under s114(3)?

d) Did Mr Saipe file proceedings regarding the personal grievances within 3 years of them being raised (s114(6))?

e) If no, are there grounds to extend the three year time limitation under s219?

Exclusion orders

[17] Mr Saipe submits the 2015 matter should be excluded because it is untested evidence, was settled in mediation and is the subject of confidentiality. As the parties to the 2015 matter have not consented to the release of the material on the Authority's file, the Authority cannot refer to it in any subsequent determination.

[18] The 2015 matter is a personal grievance application filed and prepared by Mr Saipe personally during the limitation period of three years that applied in this current matter. In the 2015 matter, Mr Saipe alleged personal grievances of unjustified disadvantage and dismissal against another employer arising from his employment that had ended on 19 April 2012.

[19] The respondent had filed a "Notice of Protest to Jurisdiction" alleging s114(6) of the Act prevented Mr Saipe from bringing any action more than three years after the grievances had been raised. Mr Saipe's actions in the 2015 matter

and the time limitation issue raised therein are directly relevant to the current matter before me.

Is the 2015 matter covered by the confidentiality provisions pertaining to a mediated settlement?

[20] The confidentiality of mediated settlements is governed by s149(3)(b) of the Act. Confidentiality is limited to "the agreed terms of settlement" and "except for enforcement purposes, no party may seek to bring those terms before the Authority or the Court, whether by action, appeal, application for review, or otherwise." Section 149 does not expressly include the Authority's file on the 2015 matter. There is no indication in the Act that it should extend to the 2015 matter at all.

[21] No copy of the record of settlement has been provided. From my experience in viewing records of settlement, the agreed terms of settlement do not generally include the Authority's file. There is no indication on the 2015 matter of any order suppressing or restricting its content from the (then) presiding Member. On the basis of the evidence before me, the terms of settlement and s149 do not include the 2015 matter. The parties consent to its release is therefore not required.

Should I exclude untested evidence on the 2015 matter?

[22] The Authority has the power to "call for evidence and information from the parties or from any other person" and "may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not."[1]

[23] There is some irony in Mr Saipe's protest the 2015 matter contains untested evidence. The preliminary matter before me is also being determined on the basis of untested evidence.

[24] The Authority is often asked to consider evidence and information that is not strictly "legal evidence" insofar as being sworn or the subject of cross-examination. The weight of this evidence (if admitted) is a matter for submission.

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1 Section 160(1)(a) and (2) of the Employment Relations Act 2000.

[25] Equity and good conscience requires I admit parts of the 2015 matter for consideration in this matter. The 2015 matter is highly relevant to Mr Saipe's grounds for seeking leave and/or an extension for filing the statement of problem. Parties have been offered the opportunity to view the 2015 matter and to make submissions about its weight prior to determination.

[26] Given the above I decline the application to exclude the information and evidence on the 2015 matter. It is admitted in respect of this matter. Costs reserved.

Non-publication order

[27] The Authority has the power to make non-publication orders subject to conditions it thinks fit.[2] The Employment Court[3] has recently reviewed non-publication orders in this jurisdiction in light of a Supreme Court decision[4]. The starting point is the principle of open justice. A high standard must be met before that principle can be appropriately departed from. A "stringent" approach to applications for non-publication is required because of the fundamental importance of the principle of open justice. Parties seeking the order *"must show specific adverse consequences that are sufficient to justify an exception to their fundamental rule [of open justice] … the standard is a high one."*[5]

[28] There is no evidence of specific adverse consequences to Mr Saipe if publication was to occur. The identity of the employer in the 2015 matter can be protected by referring to it as "X". None of the witnesses shall be referenced by name other than Mr Saipe. The agreed terms set out in the record of settlement shall not be referenced because that document does not form part of the Authority file. The application for non-publication orders is dismissed. Costs reserved.

Did Mr Saipe raise his personal grievances within 90 days?

[29] The two personal grievances Mr Saipe submits were raised at different times. The unjustified disadvantage was raised on 26 August 2013 by email and the

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2 Clause 10 Schedule 2 Employment Relations Act 2000.
3 *XYZ v ABC* [2017] NZEmpC 40 at [66] and following.
4 *Erceg v Erceg* [2016] NZSC 135.
5 See n 3 at [65], [68] to [70] citing with approval the approach in *Erceg*.

unjustified dismissal was raised on 29 November 2013. He alleges an implied notice period of one week (ending 2 September) meant this grievance was raised within 90 days of the dismissal on 24 August 2013.

[30] Ms Bethel submits both personal grievances were raised on 26 August 2013 by email.

[31] In raising a personal grievance it is important that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.[6] No formality is required to raise a personal grievance.[7]

[32] The 26 August 2013 email to Ms Bethel is set out in full below:

> 26 August 2013
>
> Dear Trude and John,
>
> **NOTICE OF EMPLOYMENT RELATIONSHIP PROBLEM RE TRUDE'S EMAIL OF 24 AUGUST 2013 AND THEREIN NOTICE OF MY DISMISSAL**
>
> For the avoidance of future doubt I deny Trude's account of our employment contract as expressed in her email to me dated 24 August 2013 in which she dismisses me from my position, in particular, but not limited to the so called casual nature of our employment contract. I also deny other aspects of her email in particular but not limited to:
>
> 1.1 Your assumptions that said contract conferred any authority upon you as the employer to unilaterally reduce my paid working hours.
>
> 1.2 All allegations that I have failed to comply with the said contract.
>
> 1.3 Your assumptions that said contract conferred any right upon you in the current circumstances as the employer to dismiss me.
>
> Clearly, an employment relationship problem exists between us. I believe the best way to resolve the problem is by mediation and I have contacted the Mediation Service of the Labour Group within the Business Innovation and Employment and asked to be informed of dates available for a mediation.
>
> I expect that the Auckland office of the Mediation Service will be in touch with me.
>
> I invite you to take part in a mediation meeting, (which is free) as I believe the problem would be best resolved by a prompt mediation and that our working relationship may potentially improve as a result.
>
> Please respond promptly as both mediation service and I wish to know whether you as my employers wish to participate, so that a date for the fixture may be found.
>
> Regards

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6 *Creedy v. Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

7 *Twentyman v The Warehouse Limited* [2016] NZEmpC 172 at [42].

[33] There is sufficient detail in the above email for an employer to know there was an employment relationship problem related to both the unilateral reduction in hours of work and dismissal. He also disputed the employment was casual. The outcome he sought was mediation to improve their working relationship.

[34] Although Mr Saipe submits he was entitled to an implied notice period of one week ending on 2 September 2013, this makes no difference given the above finding. I also do not accept his submission the earliest he could have raised a personal grievance for unjustified dismissal was at the expiry of the implied notice period of 2 September 2013. The cases cited in support of this proposition do not assist in extending the time for raising a grievance. They refer to wage arrears not extension of time for raising personal grievances. The time for raising a grievance must run from the date the action occurred or came to the notice of the employee under s114.

[35] The dismissal occurred on 24 August 2013. Both personal grievances were raised on 26 August 2013. This is within the 90 day time limitation period for raising a grievance under s114(1). Leave is not required under s114(3) of the Act.

Were the personal grievances filed in the Authority outside of the 3 year time limitation?

[36] The law requires any personal grievance action to be commenced in the Authority within 3 years after the date on which the personal grievance was raised.[8]

[37] Mr Saipe raised both personal grievances on 26 August 2013. Therefore the last day for filing a personal grievances action was 26 August 2016. He filed his statement of problem on 29 August 2016 – 3 days short of the statutory time limitation. He therefore requires an extension of time for filing the statement of problem under s219 of the Act.

Should the time limitation be extended under s219 of the Act?

[38] Mr Saipe submits the statement of problem was lodged 2 days outside of the limitation period, there is a strong case for unjustified dismissal, he was

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8 S114(6) of the Act.

fundamentally misled by the respondent about the true reason for terminating his employment, and took a number of proactive steps to make the respondent aware he was pursuing the personal grievance.

[39] The Authority has discretion to extend the time for filing a personal grievance application outside of the three year time limitation.[9] The relevant factors in determining whether to exercise that discretion are the reason for the omission to act within time, the length of delay, any prejudice to any other person, the effect on the rights and liabilities of the parties, subsequent events and merits.[10]

Reason for delay

[40] The explanations for the delay were the applicants belief he had until 28 November 2016 to lodge a statement of problem, an intervening health issue on 25 August 2016 and his health and limited finances to instruct a lawyer at the time he filed his statement of problem.

[41] I have some doubt about the reasonableness of Mr Saipe's belief he had until 28 November 2016 to lodge a statement of problem. Mr Saipe should have been well aware of the time limitations for filing a personal grievance application. This is because he has appeared before the Authority[11] and Court[12] regarding time limitation matters in 2005, 2006 and 2009. The 2015 matter above also included an application filed to strike out Mr Saipe's personal grievances because it was filed outside of the three year time limitation. There is no evidence to support this belief other than submission.

[42] The evidence of the intervening health issue is medical correspondence about possible angina from April 2015 to 2017 and Mr Saipe's affidavit at para 6.1.1 that states:

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9 Section 219; *Roberts v. Commissioner of Police* EmpC Auckland AC33/06, 27 June 2006.

10 *Day v. Whitcoulls Group Limited* [1997] ERNZ 541 (EmpC); *Stevenson v. Hato Paora College Trust Board* [2002] 2 ERNZ 103 (EmpC) at [8]; *McDonald v. Raukura Haurora o Tanui* [2003] 2 ERNZ 322 (EmpC) at [15]; *Jack v. Faithfull Funeral Services Limited* EmpC Auckland, AC 38/06, 12 July 2006 at[14]; *An Employee v. An Employer* [2007] ERNZ 295 (EmpC) at [9]; *Ball v. Healthcare of New Zealand Limited* [2012] NZEmpC 91 at [21].

11 *Saipe v Waitakere Enterprise Trust Board* AA381A/05, AEA593/04; *Saipe v Golden Bridge Marketing & Ors* AA403/09.

12 *Saipe v Waitakere Enterprise Trust Board* AK AC 40/06.

> 6.1.1 … I confirm that on 25 August 2016 I experienced an angina attack. I elected to go home. I did not seek hospital admission because I was not near a hospital. I carry emergency medication and knew immediate rest was the best treatment to restore impaired function.

[43] The evidence of the debilitating effect of his intervening health issue is undermined by his activity on the 2015 matter. The 2015 matter shows the parties were set down for an investigation meeting on 12 July 2016 – one month prior to the deadline for filing proceedings. This was adjourned and Mr Saipe confirmed his availability for a hearing in September 2016 despite having these health issues.

[44] Mr Saipe also drafted a statement of problem earlier in 2015 which he signed on 25 August 2016 – the last day for filing and the date he states he had an angina attack. This evidence indicates he chose to leave the filing until the last possible minute. He does not explain why he did so especially given his previous history with the Authority and Court about time limitation issues.

[45] From the 2015 matter it is clear Mr Saipe had financial resources to instruct a lawyer because he had one representing his interests before the Authority throughout July, August and September 2016. He also was capable of giving instructions and drafting his brief of evidence earlier.

[46] Given the above evidence, I do not accept there was any reasonable explanation for Mr Saipe's delay in filing his statement of problem.

Length of Delay

[47] The delay in filing was not substantial being 3 days at most.

Prejudice/hardship

[48] There is little prejudice to Ms Bethel in the late filing of this matter by 3 days.

Effect upon rights and liabilities

[49] If dismissed the personal grievances are at an end. However other issues of penalties for breach and wage arrears remain to be determined.

Subsequent events

[50] Although there was an attempt at mediation, no further steps were taken from November 2013 until the statement of problem was filed.

Merits

[51] In assessing the merits at this stage, I have kept in mind the evidence is untested and (largely) unsworn.

[52] There was no written employment agreement. However from the evidence this appears to have been a casual employment arrangement due to the seasonal nature of the business.

[53] Ms Bethel's evidence was his employment was for "as long as [she] could afford to do so."[13] The parties appear to engage in discussions on an almost weekly basis towards the end of his employment regarding his hours of work. Mr Saipe's hours of work also fluctuate substantially.

[54] An example is Ms Bethel email to Mr Saipe on 30 May 2013 stating:

> Your hours here. I would like to give you 15 hours a week for answering emails – this will again support me. We need to think about the way in which we pay you? On an hourly rate not through the PAYE system or through this system. Let me know there.

[55] Mr Saipe replies in an email dated 3 June 2013 stating, amongst other things:

> I want to continue to be paid as PAYE employee on a weekly basis (with adjustments to the lower pay and lower tax rate taking effect from next Friday 7 June).

[56] This appears to be evidence of the parties agreement to less hours of work. Mr Saipe therefore cannot be unjustifiably disadvantaged by any unilateral reduction in hours because the evidence suggests this occurred by consent.

[57] The evidence then shows Mr Saipe continuously working in excess of 15 hours per week despite the parties agreement. By July 2013 Mr Saipe was no longer adhering to any agreement about hours of work.

[58] The parties then enter into weekly and at times daily correspondence about his hours of work. Mr Saipe emailed on 2 July stating "as expected my hours were greater than normal" and sought payment for an additional 19 hours

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13 Paragraph 12 T Bethel Brief of Evidence (unsworn).

worked between 21 and 27 June 2013 in excess of the agreed 15 hours.[14] He alleges he advised Ms Bethel of this additional work by email on 23 June. Ms Bethel denies she received any emailed advice of this.

[59] Ms Bethel replied by email on 4 July 2013 stating she has no money and needed more bookings. She asks that he "talk to me for any extra hours to allow me to work some of these aspects myself and keep your hours down. This is crucial – having explained we are on the breadline weeks ago."[15]

[60] Mr Saipe acknowledges Ms Bethel's tenuous financial situation in a lengthy email on 5 July but states "my work could not be halted for a wage negotiation that potentially would have taken at least a week." He suggests she take out a small loan to cover any shortfall in his wages.[16]

[61] Ms Bethel then sought to reinforce Mr Saipe seek her permission before exceeding his wage limit. Her email on 8 July stated "we could not run up extra time/wages for you and where possible needed to keep these to a minimum". She goes on to state "it is imperative at all times if you are going over your wage limit to phone me and talk this through. Our bookings are minimal and have not doubled to allow high wage input."[17]

[62] Ms Bethel emailed again on 9 July 2013. She stated she could not afford Mr Saipe making off-site business visits and asked that he hand her work rather than "clock up so many extra hours".[18]

[63] By 24 July 2013 Ms Bethel is emailing Mr Saipe about reducing his hours of work to 10 hours per week. Mr Saipe rejects this stating "it will always be at least 15 hours per week."[19]

[64] By 28 July 2013 Ms Bethel emails asking that he confine his hours of work to 12 hours per week because they were now having difficulties paying him for the additional hours of work he had undertaken without their consent.

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14 RBOD p10.
15 RBOD p43.
16 RBOD pp7-10.
17 RBOD pp 6-7.
18 RBOD p44.
19 RBOD pp16-17.

[65] By 13 August 2013 Ms Bethel was seeking a meeting with Mr Saipe regarding his hours of work. Mr Saipe replied the following day seeking full payment of his additional hours worked before he would reply.

[66] Ms Bethel emailed on 20 August 2013 that she was having difficulty meeting her bills and wanted to discuss a further reduction to 12 hours per week.

[67] Mr Saipe replied with an email on 23 August stating he did not consent to any reduction in pay and the he was now employed "for 15 hours (min) per week" and sought confirmation of this in writing. He also alleged there was a shortfall in payment for the extra hours he had worked. He was only happy to meet when he received the alleged shortfall payment and confirmation of the 15 hours minimum per week in writing. The following day Mr Saipe's employment is terminated.

[68] The evidence shows the parties continuous negotiation of hours of work each week. It suggests there was no agreement about hours of work at all from week to week.

[69] There is other evidence from the 2015 matter that suggest this employment was not permanent. Mr Saipe does not refer to this employment at all in the 2015 matter. In fact his evidence shows he was actively applying for other jobs during the period of employment with Ms Bethel of "over 150 applications".

[70] Mr Saipe also produced in the 2015 matter a "calculation of salary from 3rd May 2012 to 21st December 2014" prepared by his accounting expert dated 30 August 2016. The calculations do not refer to any income he received from Ms Bethel's employment.

[71] I accept these grievances cannot at this stage be classified as frivolous or vexatious without testing the evidence further. However neither grievance can be categorically considered strongly arguable.

[72] There is also evidence of contributory behaviour that may require reduction of remedies. The grievance remedies may be outweighed by the costs in litigating this matter. However that cannot be assessed until substantive hearing.

Overall justice

[73] Standing back and considering this matter, the overall justice weighs in favour of declining to extend the time for filing.

[74] There was no justification for the delay, even if it was insignificant and did not create any prejudice. The grievances are not strongly arguable.

[75] Mr Saipe also does not appear to take proactive steps to seek leave even if he is out of time. As is the case here and in the 2015 matter, the respondent employers have had to file strike out applications. The granting of leave would be an indulgence.

[76] The personal grievance applications are dismissed. Costs reserved.

T G Tetitaha
Member of the Employment Relations Authority