

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 8

3042031

BETWEEN AKI
 Applicant

A N D WORLD VISION
 NEW ZEALAND
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 L Newport, Head of People & Culture on behalf of
 World Vision New Zealand

Investigation Meeting: On the papers

Submissions received: 26 October, 12 and 13 November 2018 from Applicant
 1 November 2018 from Respondent

Date of Determination: 10 January 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. I decline to grant the application for leave to bring a personal grievance.**
- B. The personal grievance application is dismissed.**
- C. Both parties were self-represented. They are to meet their own costs of the application.**

Nonpublication order

[1] A nonpublication order shall issue in respect of the applicant's name. This is because of the effect upon her mental health and wellbeing of publication of her name in conjunction with the personal health issues that give rise to this employment matter. The applicant shall be referred to as AKI in this determination.

Employment Relationship Problem

[2] The applicant (AKI) alleges she was constructively and unjustifiably dismissed by World Vision New Zealand when she resigned on 8 May 2015.

[3] Issues have arisen about when this personal grievance was raised with her employer. A personal grievance must be raised with an employer within 90 days. If not, the applicant requires leave to be granted to allow her to bring her matter before the Employment Relations Authority.

[4] This Determination deals with these issues only.

Relevant Facts

[5] World Vision New Zealand (World Vision) is a registered charity that is part of the World Vision International Charity partnership providing assistance to children worldwide.

[6] The applicant was employed on a casual basis on 17 November 2014 as a fundraising promoter and worked with the door to door team. Her duties required her to make cold calls in residential and commercial areas within the Upper North Island.

[7] At the time of her employment the applicant suffered ill health including severe depression for which she was prescribed medication. It is accepted World Vision was unaware of her ill health throughout her employment.

[8] In early April 2015 the applicant was unable to refill her prescription and ran out of medication. As a result she stopped taking medication believing this would not affect her wellbeing.

[9] It was during this period while working outside Auckland that she became upset and started uncontrollably crying. She told her work colleague she was unwell and arranged for her sister to collect her. She went to a nearby playground. While waiting the applicant had an uncontrollable need to urinate. When she could not find a toilet, she was forced to urinate in nearby bushes.

[10] When the applicant returned to work on 28 April she had resumed her medication. While working in a residential area, the applicant again experienced an uncontrollable need to defecate. She went to a nearby house to ask to use the toilet but no one was home. She was forced to use nearby bushes on the homeowner's property to relieve herself.

[11] Unfortunately the homeowner returned and saw her defecating on her property. The applicant apologised then left.

Termination

[12] The applicant was embarrassed and humiliated by the two experiences. As a result she tendered her resignation on 8 May 2015 which World Vision accepted.

[13] The applicant then sent further handwritten correspondence in June 2015 and chocolates to World Vision. This letter detailed the reasons for the events leading up to her resignation. She took responsibility for defecating on the homeowner's property and wished to apologise to World Vision and the homeowner. She also suggested more structured toilet breaks.

[14] World Vision replied in July 2015 thanking her for her feedback and chocolates. It advised the door to door team she had worked for had also been disbanded.

Personal Grievance

[15] In January/February 2016 the applicant became aware of rumours about her departure from World Vision.

[16] As a consequence the applicant sent six further letters to World Vision between March and April 2016 detailing her medical issues giving rise to the incident. She alleges these letters raised her personal grievance because she wrote it “within 90 days of becoming aware that my resignation had been misinterpreted.”

[17] World Vision replied on 24 May 2016 advising it had seen her correspondence and had made an open invitation to her to meet and discuss how she was feeling in March, which she did not take up. It was also concerned about her privacy given the amount of private medical information she had provided in a letter that was not marked private or confidential. Finally it noted she was employed on a casual basis, the door to door team no longer operated and it would no longer be engaging on this matter. They asked her to refrain from any further correspondence.

Memorandum of Understanding

[18] Despite the correspondence, the applicant still wished to pursue the matter. She sought mediation assistance from the Ministry of Business Innovation and Employment (MBIE) in May 2017.

[19] Both parties attended mediation. A Memorandum of Understanding was executed on 17 July 2017 (MOU). The MOU confirmed the parties attended mediation to discuss her resignation in 2015 and how to move forward from this. The MOU recorded World Vision’s view the incident leading to her resignation was an accident and that it placed no blame upon the applicant. World Vision agreed to provide a statement of employment including confirmation of her employment, the fact she resigned and the work she performed including “positive points” about her punctuality, attendance and presentation. The statement of employment was provided shortly thereafter.

[20] Despite executing the MOU and receiving the statement of employment, the applicant then lodged a complaint to the Human Rights Commission in November 2017. This was subsequently withdrawn. She also made a complaint to the Privacy Commissioner. This did not proceed due to the lack of evidence.

Statement of Problem

[21] In February 2018 the applicant sought further mediation. This was refused by World Vision due to the historic nature of her concerns and the steps taken to address these. The applicant continued corresponding with World Vision but could not resolve her concerns.

[22] On 11 October 2018 the applicant filed a statement of problem. The applicant submits she was constructively and unjustifiably dismissed by World Vision.

Hearing on papers

[23] Following the filing of the matter and emailing the parties, I determined to deal with this matter without holding an investigation hearing pursuant to s 174D of the Employment Relations Act 2000. Both parties have been given an opportunity to file any evidence or information they seek to rely upon prior to issuing this Determination.

Law

[24] The starting point for determining when personal grievances have been raised is ss114 and s115 of the Employment Relations Act 2000 (Act) below:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.
- (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance. ...

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or
- (b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[25] A personal grievance must be raised within 90 days “beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later.” Where the employer does not consent to the late raising of a grievance, the applicant must apply for leave.

[26] If leave is required, s114(4) of the Act requires the applicant to prove firstly the delay must have been occasioned by “exceptional circumstances” and secondly, the justice of the case must require an extension of time.¹

Has the employer consented to the late raising of the personal grievance?

[27] There is no express consent from World Vision to the late raising of any personal grievance by the applicant. The subsequent actions of World Vision do not alter this position.

[28] The applicant alleges World Vision would have dismissed her for the incident and that is why she resigned. The MOU and correspondence leading up to it confirms the incident was an accident and World Vision’s intention to assist the applicant to move forward. There is no acceptance in any way there is a personal grievance of constructive and unjustified dismissal. Later correspondence in 2018 also does not accept any personal grievance arose from any of its action.

[29] Given there is no evidence that World Vision has consented to the late raising of a grievance, the applicant must prove she raised her grievance within 90 days after the action alleged to give rise to the grievance occurred or “came to notice of the employee”.

When did the personal grievances come to the applicant’s notice?

[30] A grievance has been held to have come to notice of the employee and the 90 day period 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.”² This point is reached when all the necessary elements of the cause of action come into existence.

[31] The time for raising her grievance would usually start from the date of her resignation on 8 May 2015. This is the date her employment ended. Therefore the time limitation of 90 days ended upon 6 August 2015.

¹ *Creedy v Commissioner of Police* [2008] NZSC 31.

² *Wyatt v Simpson Grierson (a partnership)* [2007] ERNZ 489 at [29].

[32] The applicant's handwritten correspondence prior to this date does not refer to her raising her any personal grievance. It does explain in detail her health issues and embarrassment about the events leading to her resignation.

[33] The applicant claims she "offered to resign effectively avoiding a dismissal". None of this was made clear to World Vision within the 90 day time limitation period. Her submission she raised the grievance within 90 days of "becoming aware that my resignation had been misinterpreted" does not meet the tests for delaying the start of the time limitation for raising a personal grievance.

[34] This submission indicates at the time of her dismissal she had a belief and concern World Vision may try to (unjustifiably) dismiss her. This is sufficient to show she knew or ought to have known she had a personal grievance of constructive unjustified dismissal on 8 May 2015.

[35] Given she accepts she did not raise a personal grievance until April 2016, the applicant requires leave.

Was the delay occasioned by exceptional circumstances?

[36] Exceptional circumstances are "unusual (the "exception to the rule")".³ The exceptional circumstance here appears to be the fact the applicant suffers from severe depression. A diagnosis of depression is not necessarily unusual in and of itself to justify exceptional circumstances. It does not prevent applicants from raising personal grievances.

[37] There was also evidence that despite her depression the applicant could have raised a personal grievance prior to the end of the 90 day period on 6 August 2015. She was undertaking University study during this period. Although she submits the study may have hindered her ability to raise a grievance, this does not elevate her circumstances to being exceptional.

³ *Creedy v Commissioner of Police* [2008] NZSC 31.

[38] During 2015 she also acquired part time employment. It was through her employment she heard rumours about the circumstances of her leaving her previous employment in January/February 2016. Despite learning of these rumours, she still did not raise any grievance until April 2016. None of these circumstances are exceptional.

[39] The applicant also appears to have been well supported medically and by her community and family during this time.

[40] The applicant's handwritten letter in June 2015 indicates she was capable of communicating with World Vision following her resignation. The letter detailed her health and medical issues, accepted World Vision was unaware of her situation at the time of her resignation and accepted responsibility for the incidents leading to her dismissal. She apologised to World Vision and offered to apologise to the homeowner.

[41] The tone of her letter suggests she is to blame for the incident, not World Vision. A reasonable employer could not have known she was raising a personal grievance.

[42] All of these factors suggest there was no impediment to the applicant communicating with her employer to raise a personal grievance before the expiry of the 90 day time limitation period.

[43] Given the above, there are no exceptional circumstances that occasioned the applicant's delay until April 2016 in raising a personal grievance.

Does the justice of the case require an extension of time?

[44] In considering this factor, the strength of the applicant's case is relevant.

[45] The applicant submits the personal grievance arose due to "suspicions based on reactions from a few people at my church community" and following a meeting with her (then new) employer that she had "acted maliciously during [her] employment at World Vision." These matters came to her attention in January/February 2016.

[46] Because the applicant resigned, she would need to prove she was constructively and unjustifiably dismissed. This requires the applicant to prove firstly that her resignation was caused by a breach of duty by the employer; and secondly whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that she would resign.⁴

[47] The breaches of duty must have occurred during the applicant's employment. The rumours generated post-resignation in January/February 2016, do not breach any duty to the applicant.

[48] There is also no evidence World Vision generated any rumours about the applicant's departure. In fact World Vision has taken several steps following her resignation to reassure the applicant this is not the case including execution of a MOU. It has at all times acted to protect her privacy.

[49] Similarly there is no evidence World Vision intended dismissing the applicant for the incident at the time of her resignation. The door to door team the applicant was working with was disbanded within weeks of her resignation. It is likely her employment would have ended following the disbanding of the team.

[50] The first part of the test for constructive dismissal could not be met upon the evidence before the Authority.

[51] Further the applicant accepts she never raised any concerns about the incident with World Vision before she resigned. There is no basis to find World Vision would have foreseen her resignation as a consequence. The second part of the test for constructive dismissal would also be unmet.

[52] Although I am mindful the evidence has not been tested at hearing, I assess the strength of the applicant's case that she was constructively and unjustifiably dismissed as being low.

Outcome

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW* 1994] 1 ERNZ 168 (CA) at 172.

[53] In the circumstances I decline to grant the application for leave to bring a personal grievance.

[54] The personal grievance application is dismissed.

[55] Both parties were self-represented. They are to meet their own costs of the application.

T G Tetitaha
Member of the Employment Relations Authority