IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 77
3034723

	BETWEEN	ALEKSANDAR ZIVALJEVIC Applicant
	AND	CHIEF EXECUTIVE OF MANUKAU INSTITUTE OF TECHNOLOGY Respondent

Member of Authority:	Nicola Craig
Representatives:	The Applicant in person Mere King, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	31 August and 5 November 2018 from the Applicant 12 September, 23 October and 13 November 2018 from the Respondent
Date of determination:	14 February 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Aleksandar Zivaljevic raised an unjustifiable dismissal grievance claim with the Chief Executive of Manukau Institute of Technology within the time required under s 114 of the Employment Relations Act 2000 (the Act).

B. Mr Zivaljevic's letter of 28 March 2018 to the Mediation Service is not admissible in this proceeding due to s 148 of the Act.

C. Costs are reserved.

Employment Relationship Problem

[1] Aleksander Zivaljevic was employed by the Chief Executive of the Manukau Institute of Technology (MIT) from 2013 in the Faculty of Nursing and Health Studies (FNHS). Initially he was employed as an Enterprise Leader. There is some dispute regarding the title and nature of Mr Zivaljevic's later work for MIT.

[2] From late 2016 to early 2018 MIT undertook restructuring exercises of its executive management team and then its leadership teams. In September 2017 a review of academic and supporting roles began. In early November 2017 proposed changes were announced, affecting Mr Zivaljevic and a number of other employees and a formal consultation process was begun.

[3] Mr Zivaljevic was informed by letter that his position was being disestablished.

[4] Mr Zivaljevic's employment concluded and he claims that he was unjustifiably dismissed. He raises issues including the genuineness of his redundancy, redeployment discussions and decisions, as well as good faith. He also claims that his final pay including a severance payment, was not calculated correctly. Mr Zivaljevic also has issues about his lack of access to his files and emails on MIT controlled storage and email systems.

[5] MIT disputes Mr Zivaljevic's claims, saying that this was a genuine redundancy with a fair process. It also challenges whether Mr Zivaljevic's grievance was raised in time under s 114 of the Employment Relations Act 2000 (the Act).

[6] An issue arose regarding Mr Zivaljevic's letter of 28 March 2018 to the Mediation Service at the Ministry of Business Innovation and Employment (MBIE) sent before the parties attended mediation. MIT applied to have the letter excluded from the proceeding. Another Member of the Authority initially looked at this

question but decided that that matter was better dealt with as part of my determination of whether Mr Zivaljevic's grievance was raised in time.

[7] The parties agreed to have the preliminary matters heard on the papers. I received affidavits from Mr Zivaljevic, Kirsten Sargent (MIT Head of Human Resources, People and Culture) and Andrew Bhimy (MIT Executive General Manager, People and Culture).

[8] As permitted by s 174E of the Act this determination has not recorded everything 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.

Issues

[9] The preliminary issues for determination are:

(a) Did Mr Zivaljevic raise his unjustified dismissal personal grievance claim in time, including consideration of whether his letter to the Mediation Service of 28 March 2018 is admissible?

(b) If Mr Zivaljevic did not raise his grievance claim in time, did MIT consent to the raising after the expiry of that period?

What happened regarding Mr Zivaljevic's cessation of employment?

[10] It is necessary to determine when the dismissal occurred or came to the notice of Mr Zivaljevic, in order to determine when the 90 day period set out in s 114 of the Act runs from.

[11] The parties disagree. Mr Zivaljevic says that his understanding, from a letter of 29 November 2017 and the subsequent email amending dates, was that his circumstances meant that his employment would finish on 29 January 2018. MIT says that Mr Zivaljevic's employment terminated on 22 December 2017.

[12] On 29 November 2017 MIT held a meeting with staff and informed them that it had decided to proceed with the restructure, with some amendments. Mr Zivaljevic and others received an outcome pack including a letter of the same date.

[13] Unfortunately the outcome letter of 29 November 2017 leaves room for uncertainty. It says:

> This letter serves to formally provide you **notice** in accordance with the terms and conditions outlined in your Employment Agreement, that **effective today 28th November 2017**, MIT will be moving forward with the amended structure…This means that your role as ENTERPRISE LEADER will be disestablished …
>
> …you have been provided with formal notice as per the notice period outlined in your Employment Agreement. Therefore **should you chose not to apply for one of the new roles or you are unsuccessful for one of the new roles…or are not successful in redeployment elsewhere in MIT…your employment would be terminated by way of redundancy on 28th January 2018** at the conclusion of your notice period. It is **our intention subject to** any further conversations had, or **any redeployment process you may be undergoing**, that as we are heading into the annual leave and MIT's close down period, **should you be unsuccessful for redeployment or chose not to apply for roles your employment would conclude with MIT on Friday December 22nd** and you will be paid out the remainder of your notice. [1]

[14] On 30 November 2017 Ms Sargent emailed Mr Zivaljevic apologising that "a date was misrepresented", in the letter:

- Your letter stated that "…effective today 28th November 2017…". **This should have read "…effective today 29th November 2017".**
- It was stated that "…your employment would…28th January 2018 at the conclusion of your notice period". **This date should have been the 29th January 2018.**

[15] Mr Zivaljevic's employment agreement provides for not less than two months' written notice of termination.[2] There is no reference in that clause to payment in lieu of notice however, the compensation for redundancy provision includes a payment of "16% of the annual salary or the appropriate proportion of this amount may be paid in lieu of notice".[3]

[16] Mr Zivaljevic applied for a Research Director role but was told on 18 December 2017 that he was unsuccessful. In January 2018 he applied for a Head of Practice position but this was after events just before Christmas which I go on to describe. Mr Zivaljevic says that he understood there would be redeployment discussions held with those who did not apply for new roles or were not successful with new roles. There appears not to have been such further discussion.

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[1] Emphasis added
[2] Clause 4.1 of the agreement
[3] Clause 13.1(a) of the agreement

[17] Instead on 22 December 2017 someone arrived, seemingly without prior announcement, to collect Mr Zivaljevic's MIT iPad and laptop. MIT says that any identification, building access and/or security cards were also collected. That afternoon MIT disabled Mr Zivaljevic's MIT account, which included access to his MIT emails and files, held on MIT's Google Drive cloud storage.

[18] Mr Zivaljevic received his final pay (which included redundancy compensation, accrued holiday entitlements and payment in lieu of the balance of his notice period) on 29 December 2017 in accordance with MIT's usual pay cycle.

When did the dismissal occur?

[19] I have considered whether a payment in lieu of notice to Mr Zivaljevic may have taken the termination of employment until the end of January 2018. On occasion that may be the appropriate interpretation of events.[4]

[20] However, regardless of both Mr Zivaljevic's understanding that his employment was going to run until late January 2018 and the justifiability of what MIT did, MIT's actions on 22 December 2017 clearly amounted to a sending away of Mr Zivaljevic. MIT took back the allocated electronic devices, and his access card/s. It disabled his access to the MIT Google Drive and email systems. His final pay was authorised, albeit not actually received until a week later due to the Christmas break. MIT made it clear that the employment relationship was over. This was reinforced in Mr Bhimy's January 2018 emails.

[21] Mr Zivaljevic's employment was terminated on 22 December 2017.

Was the grievance raised in January 2018?

[22] Mr Zivaljevic claims that his letters to Andrew Bhimy of MIT in January 2018 explain "the details of the problem or grievance", as well as requesting more information. He identifies that the clause 15.3 of his employment agreement does not prescribe a format other than written. He then expected a meeting to be set up by Mr Bhimy, in accordance with clause 15.4.

[4] For example, *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413

[23] Mr Zivaljevic says that he planned to communicate after the meeting, as clause 15.4 of the agreement says "if after meeting the Employee still wishes to pursue a personal grievance… the Employee must notify the Employer in writing within 90 days of the original event."

[24] The first correspondence Mr Bhimy received from Mr Zivaljevic following 22 December 2017 was an email of 5 January 2018. The email requested:

(a) Payslips relevant to his redundancy payment;
(b) That access be re-enabled to his email account and Google Drive; and
(c) MIT's standpoint in relation to redeployment and the reasons guiding the decision not to offer redeployment to him.

[25] On 18 January 2018, having returned from leave, Mr Bhimy responded. This included advising Mr Zivaljevic that his final pay slip would be provided to him and of MIT's stance on redeployment. Mr Zivaljevic was told that he could not access his emails as he was no longer employed but could be given access to Google Drive to back up his personal documents.

[26] Mr Zivaljevic replied the following day, stating that he understood his termination date to be 29 January 2018. He stated that removal of access to emails and repossession of the laptop "[was] a huge disadvantage to me in the process of preparing my response to the termination of employment that I consider unjust". He also stated "I believe that I was not given a fair treatment in the process of restructure and I am preparing a letter to you to highlight the points I find relevant". Access to emails and files was sought to enable him to complete the letter mentioned in clause 15.3 of the employment agreement.

[27] Mr Bhimy replied on 24 January 2018 including the following:

> MIT believes that it undertook a fair and transparent process during the Academic Review. We worked hard to develop our approach in consultation with unions and legal advisors, to help ensure that we delivered a process that was both legally compliant as well as fair and equitable to all impacted.

[28] MIT's position that employment was terminated on 22 December 2017 is set out. Mr Bhimy goes into some detail regarding redeployment, questioning one of Mr Zivaljevic's references, noting the roles being considered significantly different and thus contestable. The State Services Act is referred to. MIT's recruitment process is described as transparent and fair. Comment was also made about why Mr Zivaljevic was not redeployed to the Research Director role.

[29] Mr Zivaljevic responded on 26 January 2018, in an email of over a page of single spaced text. He describes the outcome of the process as rather a shock to him, with MIT giving him what he sees as an unjustified dismissal. Further he says he is intending to send a personal grievance as soon as he gets access to all the information he requires.

[30] Mr Zivaljevic extensively discusses redeployment noting:

> …redeployment is clearly stated as a separate step to re-applying in the change documents…In my view MIT ignored its good-faith obligations and has never offered redeployment to the affected staff members.

[31] He also says that he will request more information about the hiring process in a separate communication "along with other documents needed to support my personal grievance". He questions email access, MIT's approach to redeployment and the feedback about the Research Director role.

[32] After commenting on the State Sector Act question Mr Zivaljevic says:

> … please consult your legal team before taking my claims for granted (which I am sure you will). I expect your comment on this is one of the important points that contributed to my personal grievance.

[33] Mr Bhimy responded to Mr Zivaljevic's questions on 5 February 2018. He then stated that he could not add any further information and that he now considered the redundancy matter closed.

[34] Mr Bhimy accepts that from the correspondence he gathered Mr Zivaljevic was unhappy with the termination of his employment by MIT. He says however, that it did not indicate to him that Mr Zivaljevic was raising a personal grievance. He says that he understood that Mr Zivaljevic was intending to raise a personal grievance in future, and saw himself as "simply assisting him by providing explanations and information relating to his redundancy. It was clear to me that he was still at the stage of gathering information relating to his dismissal". Reference is also made to the lack of mention of any remedies.

Were the communications in January sufficient to raise a personal grievance?

[35] Clearly a mere seeking of information or referring to the prospect of raising a personal grievance claim in the future is not enough to raise a grievance. In January 2018 Mr Zivaljevic was seeking information and he did say that he was going to set out his grievance once he had got the information.

[36] However, I do not consider that Mr Zivaljevic's indication that he will provide further correspondence setting out his claim to necessarily be fatal to him having raised his grievance in January 2018. There are two themes running through the correspondence, one being the seeking of further information and the other being the expression of dissatisfaction with aspects of what MIT had done. Would an objective observer have considered that Mr Zivaljevic was raising a grievance at this time?

[37] Did he do enough to inform his employer of the nature of the alleged grievance?[5] A low threshold of information is needed to raise a grievance.[6] There is no requirement for any specific remedies claimed to be mentioned when raising a grievance.[7] I can also look at the totality of the communications between Mr Zivaljevic and MIT during this period.[8]

[38] Did Mr Zivaljevic provide an indication of the factor or factors which he contended made his dismissal unjustified?[9] In the January emails he:

- referred to the dismissal as unjust and unjustified
- said that he had not been given fair treatment
- noted the parties appeared to have different understandings regarding redeployment
- claimed that he was not offered other similar positions
- said that MIT had ignored its good faith obligations.

[5] *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112.
[6] *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 at [42]
[7] *Idea Services* at [40].
[8] *Idea Services* at [41].
[9] Idea Services at [46], also referred to in *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017]NZEmpC 117 at [39].

[39] MIT's replies are also significant. It responded in some detail on issues which Mr Zivaljevic raised, justifying its decisions. It was responding to the concerns which Mr Zivaljevic identified.

[40] I am satisfied that an objective observer would consider that Mr Zivaljevic did raise an unjustified dismissal personal grievance with MIT in January 2018.

Is the 28 March 2018 letter admissible?

[41] Although it is not necessary as regards the issue of whether the grievance was raised, I go on to consider the issue of the letter's admissibility, as it may have relevance to the substantive issues which remain to be considered later.

[42] MIT argues that the letter of 28 March 2018 should not be admitted on the basis that it attracts confidentiality under s 148 of the Act. Mr Zivaljevic says that the letter was created to communicate his personal grievance, and thus was not created for the purpose of mediation.

[43] Under s 148 of the Act confidentiality is given to any "statement, admission or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation." No evidence is admissible of information with the confidentiality privilege.

[44] In *Rose v Order of St John* Chief Judge Colgan summarised the principles from previous Employment Court and Court of Appeal decisions as:

> All communications "for the purposes of mediation" attract the statutory confidentiality except possibly where public policy dictates otherwise. Documents which are prepared for use in, or in connection with, mediation come within the ambit of s 148(1) as do statements and submissions made orally at mediation or a record thereof. Only documents which came into existence independently of mediation are excluded from this confidentiality. The important distinction is that documents or other communications that exist independently of mediation may be admissible or discoverable even if they were referred to or even had their genesis in mediation…[10]

[45] The letter runs to nine pages. I regard the following points as significant:

[10] *Rose v Order of St John* [2202] NZEmpC163 at [9].

(a) Although the letter is headed "[t]o whom it may concern" Mr Zivaljevic sent the letter directly to the Mediation Service, rather than to MIT;

(b) The letter requests that MBIE provides mediation services and help the issues be resolved;

(c) The letter contains a "settlement proposal"; and

(d) The letter was used as a base for Mr Zivaljevic's letter to the Authority attached to his statement of problem but with the references to the Mediation Service removed. This suggests that the purpose of the letter had changed from when Mr Zivaljevic initially wrote to the Mediation Service.

[46] I conclude that the 28 March 2018 letter was a document made for the purposes of mediation and thus subject to the confidentiality privilege of s 148 of the Act. Although there is the prospect of a public policy exception to the application of s 148, I am not satisfied that there is any such consideration in this case. The letter is not admissible.

When did the letter reach MIT?

[47] For the sake of completeness I refer to the issue of receipt of the letter. The requirement under s 114 of the Act is to raise the grievance with the employer and thus it is receipt of the letter by MIT which is crucial for this purpose. Although the letter was received by the Mediation Service on 28 March 2018, it was not automatically forwarded to MIT, as Mr Zivaljevic believed it would be. The letter did not reach MIT until it was requested by MIT and provided directly by Mr Zivaljevic on 9 April 2018.

Other issues

[48] MIT went to mediation with Mr Zivaljevic without, at that point, raising any assertion outside of the mediation context about the 90 day issue. However, having decided that the grievance was raised in January 2018 I do not need to consider the prospect of MIT having consented to late raising of the grievance by its attendance at mediation.

[49] Mr Zivaljevic belatedly, in his submissions of 5 November 2018, in the alternative, sought leave to raise his grievance late, in the event that I found the grievance was raised outside the 90 day period. Although specific grounds were not

identified at that point, I perceive they relate to concerns identified by him earlier regarding MIT's responses to his requests for information and the employment agreement's disputes and personal grievances clause. That clause sets out a more complex process for the raising and progression of issues than s 114 of the Act requires. However, having found the grievance was raised in time, I do not need to consider the issue of leave.

Costs

[50] Costs are reserved.

Nicola Craig
Member of the Employment Relations Authority