

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 423
3072632

BETWEEN

MARGRET ADDY
Applicant

AND

THE GREAT ADVENTURE
TOURISM COMPANY
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Ira White, advocate for the Applicant
Shelley Eden, counsel for the Respondent

Investigation Meeting: On the papers

Information and submissions received: 6 August 2020 and 4 and 7 September 2020 from the Applicant
27 August 2020 and 8 and 22 September 2020, from the Respondent

Determination: 14 October 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Margret Addy was employed as a hostel manager by The Great Adventure Tourism Company Limited (GATC) to run two of its lodges from 27 October 2017 until her resignation effective 2 December 2018.

[2] After her employment ended Ms Addy filed a claim with the Authority to recover wage arrears from GATC. The wage arrears claim did not include any personal grievances. In early July 2020, 18 months after her employment with GATC ended, Ms Addy sought to enlarge her claim against GATC to include personal grievances for

unjustified action causing disadvantage and unjustified constructive dismissal. Ms Addy says she only decided to pursue the grievances in July when several pieces of evidence became available. Ms Addy has not sought leave to raise personal grievances out of time.¹

[3] GATC says Ms Addy failed to raise any personal grievances within the statutory 90 day time frame and it does not consent to the personal grievances being raised out of time.

[4] This determination deals only with the preliminary issue whether Ms Addy has raised personal grievances that she was unjustifiably disadvantaged in her employment and unjustifiably constructively dismissal within the statutory 90-day timeframe. It does not determine the merits of Ms Addy's wage arrears claim.

The Authority's investigation

[5] In July 2020 the investigation meeting scheduled for the wage arrears claim was adjourned because the enlargement sought raised a preliminary issue for which there was insufficient time to investigate and determine before the scheduled hearing dates and, any personal grievances should be heard with the wage arrears claim. By consent the preliminary issue is determined on the papers. The Authority has received affidavits from Ms Addy, William Perry, Ms Addy's partner who was also employed by GATC at the relevant time and Steven Green, GATC's Director of Operations along with information and submissions from the parties.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives.

¹ Section 114(3) of the Act.

Issues

[7] The issues requiring investigation and determination are:

- (i) Did Ms Addy raise a personal grievance for unjustified action at any time during her employment or within 90 days of her resignation?
- (ii) Did Ms Addy raise a personal grievance for unjustified constructive dismissal within 90 days of her date of resignation?

[8] Ms Addy and GATC signed an individual employment agreement with a commencement date of 27 October 2017. The agreement contains a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised, as required by s 65(2)(a)(vi) of the Act.

Relevant law

[9] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days.² The period begins 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 outside the statutory timeframe.

[10] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:³

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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 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.”

² Section 114 Employment Relations Act 2000.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[11] In *Creedy* the Court held that a brief letter from the employee's barrister advising the employer that his client had a personal grievance based on unjustified disadvantage did not meet the statutory requirements for raising a grievance. The grievance is raised with the 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 the employee wants the employer to address.

[12] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:⁴

The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

Were personal grievances raised?

Unjustified actions causing disadvantage – October 2017 to September 2018

[13] Ms Addy says she was unjustifiably disadvantaged in her employment by GATC failing to provide support and resources necessary to do her job, failing to pay her for hours worked in excess of the agreed weekly hours, failing to pay for respite weekends and failing to pay bonuses⁵. She says she raised these concerns with Mr Green and GATC's owner Tyrone MacDonald in December 2017 and January, February, October and November 2018 and also during weekly meetings. Ms Addy relies on emails in February 2018 between Mr Perry and GATC's then Director of

⁴ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [36]–[38].

⁵ Third Amended Statement of Problem 4 August 2020.

Operations and the follow up email to Ms Addy to support her claim that she raised personal grievances.

[14] All the evidence and documentation provided has been reviewed. The emails and communications Ms Addy seeks to rely on prior to October 2018 do not raise a personal grievance either by explicit reference or otherwise. The emails do not either individually or in totality constitute a raising of a personal grievance. It is accepted Ms Addy raised deficiencies in working hours, staff levels, laundry and transport resources and difficulty taking time off with GATC but the Authority is not satisfied the requirements to raise a personal grievance have been met. This is because there was insufficient evidence before the Authority that Ms Addy's communications to GATC about the issues included her communicating to GATC that the issues, in her view, amounted to unjustified actions causing her disadvantage in her employment which she wanted addressed.

[15] As stated in *Creedy* an employer "must be given information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance."⁶ Ms Addy's communications in the period prior to October 2018 did not include the information necessary for GATC to address any personal grievance. It is not sufficient to raise events that are or have occurred in the work place to raise a personal grievance there must be sufficient information communicated to the employer that a grievance is being raised in relation to those events which Ms Addy wanted addressed. Consideration has been given to whether the raising of the same or similar issues more than once over time could amount to raising a personal grievance. GATC could not reasonably be expected to deduce from the raising of issues in the manner described in the evidence that it was Ms Addy's intention to raise a personal grievance or personal grievances.

Unjustified action and/or unjustified constructive dismissal - October to November 2018

[16] The next period to examine is from October 2018 to the end of Ms Addy's employment with GACT on 2 December.

⁶ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [37].

[17] On 19 October Ms Addy met with Mr Green. She told him she was resigning. Mr Green said Ms Addy said she wanted to earn more money and was worried about her relationship. Ms Addy then had a discussion with Mr MacDonald, following which he authorised Mr Green to offer Ms Addy a \$5000 pay increase and a paid trip to Rarotonga for her and Mr Perry.

[18] On 28 October 2019 Ms Addy resigned her employment with GATC. Under the terms of the parties' employment agreement Ms Addy was required to give one month's notice of resignation which she did. Her last day of employment with GATC was 2 December 2018. The resignation letter is silent on the reasons for resignation and does not, on its face, either explicitly or by implication raise personal grievances for unjustified action causing disadvantage or unjustified constructive dismissal.

[19] On 15 November Ms Addy and Mr Perry met with Mr Green and Mr MacDonald. Ms Addy presented an overtime estimate and raised questions about how the bonus was calculated. Ms Addy's notes of the meeting record a discussion focused on Ms Addy's frustration about how the bonus was calculated and structured. The notes do not indicate a personal grievance was raised during the meeting.

[20] On 26 November 2018 Ms Addy emailed Mr Green:

Hi Steve

Attached are timesheets for 12/11/18 – 25/11/18. (Scan0565).

Also attached is my payslips for the last month which shows that my salary pay-rise has not yet been included, nor the back date mentioned by Ty in our meeting. Can you please let me know what happened there? Thanks again.

Kind regards

Margi Addy/Manager
Howards Mountain Lodge

[21] Mr Green replied the following day by email including GATC's reasoning for not continuing with the trip offer and refers to the context in which the offer was made, which was Ms Addy's discussion with Mr Green and Mr MacDonald on 19 October:

Thanks for your email. To clarify – the pay rise and trip to Rarotonga that the company offered you (in my conversation with you on Friday 19th October, evening) was conditional on you continuing to work for the company. This was clear from the discussion and is logical given the company's position that

we wished to retain your services. It would be illogical to give a pay rise to a departing employee.

It was at the time offered as a back date to the beginning of October and as a good will response to you mentioning that you were considering resigning on Friday 19th October which the Company was seeking to address. When you decided to resign and move on you invalidated this offer.

A takeaway from our meeting last week however was that the company would consider your feedback in last week's meeting and advise further. This is still the case. It may be that the company decides to backdate this pay increase anyway even though you declined our offer.

I think it was obvious from our meeting that the company remains consistent in its goodwill.

You(sic) quarterly bonus (recently ratified and approved) and July bonus is being paid in this week's pay run, this brings your total bonus earned YTD in the nine months you were in the scheme to \$5,166.
The late expenses submitted are being checked.

Can we have a discussion today around handover and check out on Monday, so the company is informed of your planning this week and so that we can make arrangements for Monday 3rd onwards.

Kind regards

Steve

[22] In her affidavit dated 3 September 2020 Ms Addy accepts the \$5000 pay increase and trip to Rarotonga were conditional on her remaining employed. The handover meeting appears to have occurred.

[23] There is no dispute Ms Addy raised her dissatisfaction with the job at the 19 October meeting and told her employer she was considering resigning. GACT responded by offering a trip to Rarotonga for her and Mr Perry and a \$5000 pay rise. GATC offered the trip and pay increase to persuade Ms Addy not to resign. The offer was not to resolve a personal grievance as is clear from Mr Green's email of 27 November.

[24] I find the facts of this matter are distinguishable from those in the Employment Court judgment in *Miriam Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99.⁷ In *Clark* it was found that there was no doubt that what Ms Clark alleged in her letter was found to have raised her personal grievance that is, that her employment

⁷ The Authority has considered Ms Addy's submissions regarding *Clark* and a determination of the Authority *Slabbert v Idea Services Limited* [2019] NZERA 52.

had been affected to her disadvantage by the unjustifiable action of the defendant as her employer. The nature of the complaint therefore fell as Judge Couch stated at [35] squarely within the definition of s 103 of the Act. The Authority is not satisfied grievances were raised at either the 19 October meeting or 15 November meeting or during the parties surrounding communications either individually or in totality. As stated earlier, concerns may have been raised but they were not raised in a manner which amounts to the raising of a personal grievance.

Outcome

[25] The application is unsuccessful. Ms Addy did not raise personal grievance for unjustified action causing disadvantage or unjustified dismissal within the statutory 90-day period.

Costs

[26] Costs are reserved until after the substantive matter is determined.

Marija Urlich
Member of the Employment Relations Authority