

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 321
3100772

BETWEEN MATTHEW RICHARDSON
Applicant

A N D KUMEU VILLAGE AGED CARE
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Simon Lapthorne, counsel for the Applicant
Kirsti Laird, counsel for the Respondent

Investigation Meeting: 15 April 2021

Submissions Received: 15 April 2021 from the Applicant
15 April 2021 from the Respondent

Date of Determination: 26 July 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Matthew Richardson was employed by Kumeu Village Aged Care Limited (KVAC) undertaking maintenance at its rest home and dementia care business (the Rest Home).

[2] Mr Richardson says his employment was terminated by KVAC based on redundancy. He says KVAC gave him more than one month's notice deciding that his employment would end on 20 November 2019; however he asked to leave early as he found it difficult to keep working in the circumstances and this was agreed, so Mr Richardson stopped working at the Rest Home on 7 November 2019.

[3] Mr Richardson also says he was to receive a pay-out on 20 November 2019 for the equivalent of 25% of the shareholding of KVAC, being a payment he was otherwise due some time later under a relationship property agreement he had with one of the directors and shareholders of KVAC (the Share Payment). The Share Payment was to be made by KVAC and appeared to be offered by it in consideration of, or as compensation for, his redundancy.

[4] When Mr Richardson did not get the Share Payment, and also because he had not been paid any accrued but untaken holiday pay nor had KVAC paid for the lease on a company car he says he was allowed to continue to use, on 20 February 2020 he raised personal grievances for unjustified dismissal and unjustified action causing disadvantage.

[5] KVAC's response to these personal grievances was to state that the personal grievances were not raised within the required 90 days of the alleged events giving rise to the grievances occurring or coming to Mr Richardson's notice.¹

[6] As the parties were unable to resolve the personal grievances Mr Richardson lodged a statement of problem in the Authority claiming:

- (a) unjustified dismissal for the redundancy;
- (b) unjustified action causing disadvantage relating to alleged failings to pay him holiday pay, the lease on his company car and the Share Payment;
- (c) breach of contract for failing to pay him the Share Payment;
- (d) breach of the duty of good faith; and
- (e) breach of the Employment Relations Act 2000 (the Act) as KVAC failed to have an employment agreement for him.

[7] KVAC's response to these claims was to assert that the Authority does not have jurisdiction for the personal grievance claims as they were not raised in time and it does not have jurisdiction in relation to any of the claims concerning the Share Payment as that is not an employment relationship problem, primarily because it is not KVAC's obligation to pay but rather an obligation under a relationship property agreement between Mr Richardson and a KVAC shareholder.

¹ As required under s 114 of the Employment relations Act 2000.

[8] The parties agreed I would deal with the issue of jurisdiction for these two claims, and an application by Mr Richardson for leave to raise the personal grievances outside the 90 day time period,² as preliminary matters. This determination resolves those preliminary matters.

Events giving rise to the employment relationship problem

[9] Mr Richardson's employment with KVAC was, in part, a product of his marriage to Belinda Brice a 50% shareholder and director of KVAC.

[10] From the formation of KVAC in 2014 and the development of the Rest Home, which opened in 2015, Mr Richardson was involved in the Rest Home. This included helping Ms Brice set up the Rest Home.

[11] Whilst the amount of Mr Richardson's initial involvement with the Rest Home is disputed, it is clear that his involvement increased when his other business activities ceased and he began spending more time at the Rest Home undertaking maintenance and repair work. Eventually Mr Richardson and Ms Brice, who was also the General Manager of the Rest Home, agreed that he would be paid for his maintenance work and this started in January 2018.

[12] The way in which Mr Richardson's employment came about was indicative of how it continued to operate; it was somewhat ad hoc with Mr Richardson working on maintenance matters as required or as he saw necessary. Mr Richardson completed time sheets and was paid for his time but this was the extent of any employment relationship formalities. There was never an employment agreement between Mr Richardson and KVAC, there was no management supervision or direction over his work and it appears there was no formal reviews or assessment of his work.

[13] In September 2018 Ms Brice and Mr Richardson separated. This separation had no immediate impact on Mr Richardson's employment relationship with KVAC and he continued to work at the Rest Home in the semi-autonomous way he had established up until then.

² Section 114(3) of the Employment Relations Act 2000.

[14] On 13 May 2019 Mr Richardson and Ms Brice entered into an agreement for the division of their relationship property pursuant to s 21A of the Property (Relationships) Act 1976. The relationship property agreement had a connection with KVAC in that Ms Brice's 50% shareholding in KVAC was relationship property. As part of the division of all of their relationship property Ms Brice and Mr Richardson agreed that Ms Brice would pay Mr Richardson the value of half of her shares in KVAC (so 25% of the shares of KVAC). A valuation of KVAC was agreed and Mr Richardson was to be paid 25% of that value by 13 May 2021; this is the underlying payment that Mr Richardson says became the Share Payment.

[15] The relationship property agreement had no impact on Mr Richardson's employment relationship with KVAC and he continued to work at the Rest Home as he had done previously.

[16] However in October Ms Brice became concerned about Mr Richardson's work at Kumeu and decided to discuss scaling back his role with him. On 14 October 2019 Ms Brice met with Mr Richardson to discuss his ongoing employment with KVAC.

[17] Mr Richardson says that in this meeting Ms Brice told him:

- (a) KVAC was making him redundant as it needed to reduce costs.
- (b) As part of the redundancy he would receive the Share Payment to enable him to pursue other business opportunities.
- (c) His redundancy would take effect on the day he was paid the Share Payment, which was to be 20 November 2019.

[18] Ms Brice says that in the meeting on 14 October 2019:

- (a) She raised the various issues KVAC had with Mr Richardson's work – largely relating to the ad hoc nature of the work undertaken, whether the work done by him was necessary and whether the time spent on work was recorded accurately.

- (b) She then went on to explain that KVAC wanted Mr Richardson to have a defined role within the Rest Home business and suggested that this might be just mowing the lawns at the Rest Home.
- (c) They then discussed Mr Richardson's role, in the context of the issues and her suggestions regarding ongoing work, and they agreed Mr Richardson's maintenance work would be scaled back and he would take on the lawn mowing role.
- (d) She also told Mr Richardson that she had spoken to the other shareholder of KVAC about lending money from him to pay Mr Richardson the Share Payment, possibly by the end of November 2019, so that Mr Richardson could pursue other business opportunities.

[19] Following the 14 October 2019 meeting Mr Richardson continued to work at the Rest Home. Then on 6 November 2019 Mr Richardson sent an email to Ms Brice which included the following:

You told me my redundancy is effective on pay out date for the [Share Payment] and Im (sic) really feeling Im (sic) loosing (sic) my mojo at work and also want to get stuck in with packing everything up at home and putting into storage so I would like to finish up now.

[20] On 7 November 2019 Mr Richardson completed his time sheet for that working week and did not return to work at the Rest Home.

[21] On 19 November 2019 Mr Richardson received his final pay from KVAC with payment being made up until, and including, 7 November 2019. KVAC subsequently paid Mr Richardson two weeks' notice.

Were Mr Richardson's personal grievances raised in time?

[22] There are two parts to the preliminary issue of whether the personal grievances were raised in time:

- (a) Were personal grievances for unjustified dismissal and unjustified disadvantage raised by Mr Richardson within the 90-day period?

- (b) If not should I grant leave for Mr Richardson's personal grievances to be raised outside of the 90-day period?

Were personal grievances for unjustified dismissal and unjustified disadvantage raised by Mr Richardson within the 90-day period?

[23] Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[24] In this case, the actions giving rise to Mr Richardson's personal grievances are:

- (a) The date that Mr Richardson's employment came to an end for the unjustified dismissal personal grievance.³
- (b) The date KVAC failed to pay the Share Payment, Mr Richardson's accrued holiday pay and the lease payments for Mr Richardson's company car.⁴

[25] Based on the events giving rise to the employment relationship problem I assess the end date for Mr Richardson's employment to be as follows:

- (a) In the meeting on 14 October 2019 Ms Brice on behalf of KVAC told Mr Richardson one of two things, either KVAC was terminating his employment by reason of redundancy or it was reducing his role going forward such that he would undertake the lawn mowing only (and Mr Richardson may have agreed to this).
- (b) So, post 14 October 2019 Mr Richardson was either working under notice of termination (for an unconfirmed period, which Mr Richardson says was indicated to be 20 November 2019 when the Share Payment was likely to be made) or he was still employed albeit in a reducing maintenance role that was to become the lawn mowing role.

³ For the purposes of deciding the preliminary issue relating to the personal grievance for unjustified dismissal being raised in time, I do not need to decide if Mr Richardson was dismissed by KVAC or whether he resigned as this is a matter for the substantive claim if I determine I do have jurisdiction.

- (c) This means that Mr Richardson's email of 7 November 2019 was either him asking to not work his notice period in respect of the dismissal for redundancy or it was him resigning in response to the reduction in his role.
- (d) KVAC paid Mr Richardson on 19 November 2019 for his work up to 7 November 2019 and then it subsequently paid out two weeks' notice. So Mr Richardson stopped working on 7 November 2019 and was then paid for two weeks' notice, with this payment being made after the expiry of the two weeks. This means Mr Richardson was employed up until the expiry of the two week notice period being 21 November 2019 (albeit that he did not perform any work for KVAC during this time).⁵

[26] In conclusion, whether Mr Richardson resigned or was dismissed, the end of date of his employment with KVAC is 21 November 2019.

[27] Applying the 90 day time requirement from 21 November 2019 the date by which a personal grievance should have been raised for unjustified dismissal is 19 February 2020. Mr Richardson's grievances were raised on 20 February 2020, so for the unjustified dismissal grievance this was outside of 90 days by one day.

[28] Turning to the personal grievances for unjustifiable action causing disadvantage, the three actions complained of occurred, or came to Mr Richardson's attention, as follows:

- (a) Failure to pay holiday pay occurred on 19 November 2019 when Mr Richardson received his final pay from KVAC, which did not include any holiday pay. And then later that same day KVAC confirmed, in response to a query from Mr Richardson, that it considered him a casual employee and no holiday was owed.
- (b) Failure to pay the lease payments on the company car did not occur until after the end of November 2019 as the lease payment for that month had been paid by KVAC in advance.

⁵ *Ceres New Zealand LLC v DJK* [2020] NZEmpC 153.

- (c) Failure to pay the Share Payment. This was not paid on 20 November 2019 which was the date Mr Richardson says he was initially told the Share Payment would be paid. However, the situation is less clear than that as ongoing discussions between Ms Brice and Mr Richardson indicates there was no firm date for payment of Share Payment and in fact the last update on the timing of the Share Payment was on 20 November 2019 when Ms Brice advised Mr Richardson that the Share Payment would be made by the end of the financial year (three and a half months away).

[29] So, my conclusion is that any unjustifiable disadvantage grievances relating to the failure to pay the Share Payment and the failure to pay the car lease payments were raised in time but the grievance relating to failure to pay holiday pay was not raised in time – as 90 days from 19 November 2019 was 17 February 2020.

Should I grant leave for Mr Richardson's personal grievances to be raised outside of the 90-day period?

[30] So, I now turn to consider whether I should grant Mr Richardson leave to raise his unjustified dismissal grievance and the unjustifiable disadvantage grievance relating to failure to pay holiday pay outside of the 90-day period, pursuant to ss 114(3) and 114(4) of the Act.

[31] In order to succeed with an application for leave Mr Richardson needs to show that the delay in raising his personal grievance was occasioned by exceptional circumstances and it is just for me to grant leave as requested.⁶

[32] Exceptional circumstances for the purposes of an application under s 114 of the Act include the exceptional circumstances listed in s 115 of the Act. Mr Richardson relies on s 115(c) of the Act. That is where the employment agreement fails to contain the explanation for dispute resolution required in employment agreements pursuant to s 65 of the Act. As he did not have a written employment agreement with KVAC this requirement has not been met.

⁶ Section 114(4) of the Employment Relations Act 2000.

[33] I am satisfied that KVAC's failure to have a written employment agreement means it failed set out the explanation for dispute resolution in an employment agreement for Mr Richardson.

[34] This is not all that is required in order for me to grant leave under s 114 of the Act. I need to be satisfied that the exceptional circumstance caused the delay in raising the grievance and that it is just to allow the grievance to be raised after the 90 day period.

[35] KVAC argued that Mr Richardson was an experienced business man who had dealt with employees previously and therefore would have known about the 90 day requirement. However, I do not accept that and take Mr Richardson's evidence on this point as accurate. I conclude that he did not know of the 90 day requirement and I also conclude that had he known of it he would have made arrangements to lodge the grievances in time. Therefore it follows that the delay was caused by the exceptional circumstances.

[36] In terms of whether it is just for me to grant leave, I conclude it is. There are two reasons for this, the exceptional circumstance was attributable to KVAC – it should have had a written employment agreement for Mr Richardson – and the delay in both cases was minimal, one day and three days.

[37] In conclusion I am satisfied that Mr Richardson's personal grievances were either raised in time or they can be raised after the 90 days as I grant leave for this.

Does the Authority have jurisdiction to consider the claim based on payment for 25% value of KVAC?

[38] Mr Richardson's claim for the Share Payment is set out as a personal grievance for unjustifiable action causing disadvantage, a breach of contract and an estoppel.

[39] Mr Richardson says the discussion on 14 October 2019 between Ms Brice and Mr Richardson amounted KVAC agreeing to pay Mr Richardson the Share Payment and this agreement is either:

- (a) a term of Mr Richardson's employment agreement – so I have jurisdiction; or

- (b) a contractual promise by KVAC, for which Mr Richardson seeks compliance – so I have jurisdiction pursuant to s 161(r) of the Act as this is “any other action .. arising from or related to the employment relationship”.

[40] KVAC says I do not have jurisdiction, simply because any discussion on 14 October 2019 relating to the Share Payment was a discussion between Ms Brice in her personal capacity and Mr Richardson and never amounted to a contractual promise or agreement of any kind; there was never an agreement that bound KVAC nor was there any change to Mr Richardson’s employment agreement.

[41] On reviewing the evidence in my investigation meeting I accept KVAC’s position on this issue:

- (a) In relation to the Share Payment the underlying obligation was that Ms Brice was pay Mr Richardson the value of half of her shares in KVAC by 13 May 2021; this being a term of the relationship property agreement between Ms Brice and Mr Richardson.
- (b) Ms Brice only considered bringing forward the payment as Mr Richardson was looking for new business opportunities and this might work in with any agreed reduction in his role at KVAC. The Share Payment was not tied to Mr Richardson’s employment coming to an end or it being reduced.
- (c) Both Ms Brice and Mr Richardson agree that what was discussed was the other 50% shareholder in KVAC obtaining a loan to pay Mr Richardson the Share Payment; so it was never agreed that KVAC would buy the shares (assuming the limited circumstances in which a company can purchase its own shares could have been satisfied).
- (d) The agreement Ms Brice had with the other shareholder was that he would get finance to purchase 25% of KVAC shares from her and she would pay this money to Mr Richardson. Then at a later date, when she was able to finance it, she would buy 25% of KVAC shares back from the other shareholder.
- (e) However, when Ms Brice spoke to Mr Richardson on 14 October 2019 the other shareholder had only made enquiries about finance for the share purchase

from her and nothing had been finalised. So, there was no agreement that the Share Payment would be made on 20 November 2019, Ms Brice was unable to commit to this payment at the time. Mr Richardson's subsequent communications with Ms Brice over the timing of the Share Payment confirms that a firm date of 20 November 2019 had not been agreed.

- (f) Ms Brice could not bind KVAC or the other shareholder in respect of her own personal obligation to Mr Richardson and I believe Mr Richardson would have known this, given his prior business experience.

[42] I conclude there was no promise made by KVAC in relation to the Share Payment as alleged so there was no term of Mr Richardson's employment agreement that KVAC would pay him for the Share Payment, nor was there a contractual obligation on KVAC to do the same.

[43] If Mr Richardson has any claim in relation to the alleged Share Payment it may be against Ms Brice or even the other 50 % shareholder of KVAC – but I make no finding on this as I do not have jurisdiction in respect of either of those potential claims.

[44] The short point is I do not have jurisdiction in respect of the Share Payment claim Mr Richardson has lodged against KVAC.

Conclusion

[45] This determination has been issued outside the statutory period of three months after receiving the last communication from one of the parties. When I advised the Chief Delegate of the Authority this would occur she decided, as she is permitted by s 174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s 174D(2) of the Act.

[46] I have jurisdiction over Mr Richardson's personal grievances set out in his statement of problem, except for the grievance relating to the Share Payment, and these aspects of Mr Richardson's claims can continue.

[47] I do not have jurisdiction in respect of Mr Richardson's claims for the Share Payment and in this regard, the personal grievance for unjustifiable action causing disadvantage relating to the Share Payment, the breach of contract claim and the estoppel claim cannot continue.

[48] As there remain claims to be progressed in the Authority, and as some of those claims relate to personal grievances which I have granted leave to be raised outside of the 90 day time frame, I must direct the parties to mediation.⁷

[49] The parties are therefore directed to participate in mediation and attempt in good faith to reach a resolution of their differences. A copy of the statement of problem and statement in reply will be forwarded to the mediation team of the Ministry of Business, Innovation and Employment for their information. A dispute resolution coordinator will contact the parties directly to arrange a mutually acceptable date and time for mediation to take place.

[50] In the meantime my investigation is suspended. It is Mr Richardson's responsibility to advise the Authority, following mediation, whether the matter has been resolved or whether he wishes the Authority to continue its investigation

Costs

[51] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority

⁷ Section 114(5) of the Employment Relations Act 2000.