

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 496  
3123995

BETWEEN                      MICHAEL SOMERVILLE  
Applicant

AND                              FUJITSU GENERAL NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:        Trish MacKinnon

Representatives:             David Fleming and Keziah Singleton, counsel for the  
Applicant  
Matthew McGoldrick, counsel for the Respondent

Investigation Meeting:        On the papers

Submissions [and further    12 March, 14 and 21 April and 12 May 2021 from the  
Information] Received:       Applicant  
14 April and 5 May 2021 from the Respondent

Date of Determination:       9 November 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Michael Somerville brings claims of unjustifiable disadvantage and unjustifiable dismissal against his former employer, Fujitsu General New Zealand Limited ("Fujitsu" or "the company"). Mr Somerville, who was the Managing Director of Fujitsu at the time, was suspended from his employment on 16 March 2018.

[2] Mr Somerville raised personal grievances for unjustifiable disadvantage on 5 April 2018 and 14 May 2018, relating to his suspension and its continuation. Each was raised within the statutory 90 day timeframe for raising a personal grievance.

[3] Mr Somerville was dismissed for serious misconduct on 9 July 2018, with the dismissal taking effect immediately. He claims that correspondence from his lawyer at the time made his employer aware of his personal grievance for unjustifiable dismissal. If the Authority finds otherwise, Mr Somerville seeks leave to raise the grievance out of time.

[4] Fujitsu denies Mr Somerville raised a personal grievance over his dismissal at the time, although it says he threatened to do so. It says the first time Mr Somerville raised a personal grievance about his dismissal was in the statement of problem the Authority served on the company on 12 November 2020. That was approximately two years after the statutory time frame for raising the grievance had elapsed and Fujitsu does not consent to Mr Somerville raising the personal grievance out of time.

[5] It was agreed in a case management conference with the parties in February 2021 that the Authority would determine on the papers whether a personal grievance for unjustifiable dismissal had been raised within 90 days of the dismissal occurring. If the Authority determined it was not, it would consider whether leave should be granted to Mr Somerville to raise his grievance out of time.

[6] Mr Somerville and Stuart Gloyn, who was his legal representative at the time of his suspension and dismissal, provided affidavits on his behalf. Sarah Gatehouse, Fujitsu's Head of People and Culture for Australia and New Zealand, and Bridget Smith, Fujitsu's legal representative during the events leading up to and after Mr Somerville's dismissal, provided affidavits for Fujitsu. Both parties provided submissions through their current legal representatives.

[7] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

### **Relevant Law**

[8] Section 114 of the Employment Relations Act 2000 (the Act) provides that a personal grievance must be raised with the employer within a 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.

[9] 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 that the employee wants the employer to address.<sup>1</sup>

[10] The Authority has the discretion under section 114(4) of the Act, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose if it:

- (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.

[11] Section 115 makes further provision regarding exceptional circumstances under section 114(4) as follows:

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.

### **When did Mr Somerville raise his personal grievance for unjustifiable dismissal?**

[12] Mr Somerville submits an unjustified dismissal personal grievance was raised on his behalf by Mr Gloyn within the statutory 90 day time frame. He says this is clear from the totality of communications between Mr Gloyn and Fujitsu's representative, Ms Smith.

[13] Mr Somerville refers to Mr Gloyn's letter of 6 July 2018, in response to Fujitsu's notification on 29 June 2018 of its proposal to terminate Mr Somerville's employment. At the

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<sup>1</sup> Section 114(2) of the Act.

end of Mr Gloyn's letter after responding to the proposal he stated: "If my client's position is terminated proceedings will issue."

[14] While acknowledging an unjustified dismissal grievance cannot be raised before the employee has been dismissed, Mr Somerville asserts that communications made on his behalf by Mr Gloyn before his dismissal form part of the history of communications between the parties. In his submission, the communications made by Mr Gloyn after the dismissal may be seen in light of the earlier communications.

[15] Mr Somerville deposed that, at the time Fujitsu notified him of its proposal to dismiss him, he was discussing with Mr Gloyn raising a further personal grievance if dismissal occurred. They had also discussed whether a settlement could be negotiated to bring the matters to a close and Mr Gloyn had initiated discussions with Ms Smith on this that proved unsuccessful.

[16] Mr Somerville submits Fujitsu was aware by late August 2018 of his objection to his dismissal, and the reasons for his objection. Pre-dismissal communications had raised issues of predetermination; lack of good faith; unreasonable decision-making process; and Mr Somerville's intention to issue proceedings if Fujitsu dismissed him. Post-dismissal, Mr Gloyn's email to Ms Smith of 23 August 2018, immediately following a telephone discussion between them, had confirmed Mr Somerville's instruction to issue proceedings. Such proceedings could only originate from the raising of a personal grievance in accordance with s 113 of the Act.

[17] Fujitsu submits that Mr Somerville did not raise a grievance within 90 days of the date of his dismissal on 9 July 2018. The company says it is axiomatic that a dismissal must have occurred for a personal grievance for unjustified dismissal to be raised. It cites former Chief Judge Colgan in *Creedy*<sup>2</sup> in support of that proposition.

[18] Fujitsu acknowledges the totality of correspondence between an employer and employee might constitute the raising of a grievance but says that, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what it is addressing. In this instance, in Fujitsu's submission, that is not the situation.

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<sup>2</sup> *Creedy v Commissioner of Police* [2006] 517 at [28] to [30].

[19] In reviewing the few pieces of correspondence between the parties, through their respective representatives, between Mr Somerville's dismissal on 9 July 2018 and the end of the 90 day period for raising a personal grievance, Fujitsu submits there is nothing that raises a grievance. It says the correspondence mainly concerned the return of property to Fujitsu.

[20] At one point in the communications within the 90 day time frame, Mr Gloyn referred to proceedings that had "not yet issued" and to proceedings that "will issue." Ms Smith, who was acting for Fujitsu, deposed that Mr Gloyn was referring to future events that did not ultimately occur. She also deposed that she received "no correspondence whatsoever from Mr Gloyn" between 23 August 2018 and 21 November 2019.

[21] On reviewing the communications from Mr Gloyn to Fujitsu, I accept Mr Somerville cannot indicate one specific communication in which he raised a personal grievance over his dismissal. I am satisfied by a very narrow margin, however, that the communications from Mr Gloyn, when seen in their totality, were sufficient to make Fujitsu aware Mr Somerville was unhappy about his dismissal and why he was dissatisfied.

[22] Mr Gloyn's letter of 6 July 2018 signalling Mr Somerville's intention to issue proceedings in the event of his dismissal cannot be considered to have raised a grievance in respect of an event that had not yet occurred. It did, however, make clear the nature of Mr Somerville's objections to his employer's process and his perception that the disciplinary process was incomplete. That led to Mr Gloyn responding to Fujitsu his belief that it was premature to comment on the proposed penalty of dismissal before the investigation was completed.

[23] While Mr Gloyn's subsequent written communications did not use the words "personal grievance" or "unjustified dismissal", it was not necessary that they do so. Mr Gloyn's email of 23 August 2018 to Ms Smith which, according to its content, was written immediately following a telephone discussion between them, was primarily concerned with the return of property. It also covered the matter of litigation as Mr Gloyn noted:

4       As we both know, proceedings have not yet issued. There is no departure from my instructions and my previous correspondence with you. Proceedings will issue ...

9        You have my assurance that proceedings will be issued as soon as possible.

[24]    There was no detail of the proceedings that were to be issued. However, the previous correspondence from Mr Gloyn to Ms Smith, apart from one very short email on 5 August 2018 relating solely to the return and collection of property, was his letter of 6 July 2018 setting out why Mr Somerville believed Fujitsu's disciplinary process to be incomplete and the company's process to be unfair. That letter ended with the advice that proceedings would issue if Mr Somerville's employment was terminated.

[25]    This situation can be distinguished from that in *Disabilities Resource Centre Trust v Maxwell* where Judge Holden found that statements made in the context of the disciplinary process were not part of the communication of Ms Maxwell's grievance.<sup>3</sup> That was because the matters Ms Maxwell had raised in the disciplinary meeting were made in an effort to persuade the employer not to dismiss her, not to claim the dismissal was unjustifiable. Also, there was nothing in Ms Maxwell's letter raising the personal grievance "that could be said to incorporate by reference anything she had said in the disciplinary meeting."<sup>4</sup>

[26]    In Mr Somerville's situation, Mr Gloyn's letter of 6 July 2018 clearly alerted the employer to his concerns over the unfairness of its process and to the lack of completion of its investigation. Mr Gloyn's indication that proceedings would issue in the event of Mr Somerville's dismissal was confirmed in his email of 23 August 2018 following the dismissal.

[27]    I accept Mr Somerville's submission that, although the nature of the proceedings to be issued were not specified, a personal grievance is the only type of proceeding by which an unjustified dismissal can be challenged, in accordance with s 113(1) of the Act. It would have been evident to Fujitsu that the proceedings referenced in both the 6 July 2018 letter and the 23 August 2018 email related to a personal grievance for unjustified dismissal.

[28]    I find Mr Gloyn's email of 23 August 2018 was sufficient, in the context of the earlier communication, to raise Mr Somerville's grievance. As noted earlier, the finding is made on a slim margin.

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<sup>3</sup> [2021] NZEmpC 14 at [19].

<sup>4</sup> N3 at [19].

**Exceptional circumstances?**

[29] In the event that I am wrong about Mr Somerville's grievance having been raised in time, I consider his circumstances to be exceptional under s 115(b) of the Act. I accept that Mr Somerville made reasonable arrangements to have his grievance raised on his behalf by Mr Gloyn.

[30] Neither Mr Gloyn nor Mr Somerville stated the date on which Mr Somerville gave the instruction to pursue a personal grievance for unjustified dismissal but both deposed the instruction had been given. I find the correspondence from Mr Gloyn to Fujitsu, relating to the issuing of proceedings on 6 July 2018, bears that out.

[31] Mr Somerville's affidavit referred to discussions he had with Mr Gloyn about raising a personal grievance if he was dismissed. That was clearly the basis for Mr Gloyn stating in his letter of 6 July 2018 that proceedings would issue if Mr Somerville was dismissed.

[32] After the dismissal, there is evidence, attached to Mr Somerville's affidavit, that he sent a long email to Mr Gloyn on 19 July 2018, most of which was redacted as privileged communications. The email also contained his "thoughts on the case". Under the heading "General", Mr Somerville wrote:

Our grievances – does anything need to be done to ensure they don't pass the 90 day expiry?

[33] It was Mr Somerville's evidence that Mr Gloyn assured him a grievance had been raised about his dismissal, and everything that needed to be done to ensure he could pursue his claim had been done.

[34] Mr Gloyn deposed that, at that time, he was satisfied an unjustified dismissal grievance had been raised through his correspondence and discussions with Ms Smith.

[35] Mr Somerville followed up with Mr Gloyn by email on 2 August 2018, dealing with return of property and leave issues as well as the following:

Have you had a think about the direction to take regarding the submission to ERA or EC?

Hope all is well and I trust all is in hand. I look forward to hearing from you soon.

[36] The email indicates Mr Somerville had engaged in discussions with his legal representative over the progression of his grievances and the appropriate forum in which to pursue them.

[37] While there is little evidence that Mr Somerville pursued matters further, I find it reasonable that he believed his dismissal grievance had been raised and that matters were in train. He deposed that, in December 2018 at a function at Mr Gloyn's house, he was introduced to an advocate Mr Gloyn had engaged to assist him with his (Mr Somerville's) case and was told that the advocate was handling his mediation. The advocate told Mr Somerville Fujitsu had rejected one date for mediation and he was working on getting a new date.

[38] Mr Somerville deposed that he followed up with the advocate in February 2019 and was informed Fujitsu was delaying matters. In his reply affidavit Mr Somerville acknowledged he had, since filing his first affidavit, had confirmation from the Ministry of Business, Innovation and Employment that no mediation request had been made. Notwithstanding that, I consider Mr Somerville was entitled to rely on advice given to him by an employment advocate for whose services he had been invoiced through Mr Gloyn.

[39] Mr Gloyn deposed that he had arranged for the advocate to organise mediation and left it to him to do so. Mr Gloyn said he did not believe there were any pressing limitation issues as he was aware that the time limit for bringing personal grievance proceedings in the Authority is three years from when the grievance has been raised.

### **Just to grant leave?**

[40] Fujitsu submits that, even if Mr Somerville had established exceptional circumstances existed, the justice of the matter weighed heavily against his being granted leave to raise the grievance out of time. It submits Mr Somerville has little realistic prospect of success and there have been significant delays and periods in which Mr Somerville did nothing. Fujitsu also submits it would be prejudiced if the matter were to proceed due to the elapse of time and the moving on of key personnel whom it says it is unable to contact.

[41] For his part, Mr Somerville submits that he intends to pursue the personal grievances he raised over his suspension, and if he were unable to pursue his personal grievance for unjustifiable dismissal, which had a far greater impact on him, he would be left with an abiding sense of injustice.

[42] With regard to the prejudice claimed by Fujitsu in relation to not being able to locate witnesses, Mr Somerville deposed that he could provide contact details for all four witnesses referred to in Ms Gatehouse's affidavit. He said he had searched on LinkedIn and Google, an exercise Ms Gatehouse could just as easily have undertaken.

[43] I have considered both parties' submissions and find it would be just to grant Mr Somerville leave to raise his grievance for unjustifiable dismissal out of time if that grievance had not been raised by Mr Gloyn's email to Fujitsu on 23 August 2018, referencing his earlier communication to the company of 6 July 2018.

#### **Next steps**

[44] The Authority will be in touch with the parties shortly to discuss progression of Mr Somerville's grievances against Fujitsu.

#### **Costs**

[45] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority