IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 515
3129199

	BETWEEN	ANDREW MCCLYMONT, MARGARET TAYLOR, STEVE OSKAM, MARK MCLENNAN, MARK THOMSON and KELSEY GRANT Applicants
	AND	RECEIVABLES MANAGEMENT (NZ) LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Chrissy Gordon, advocate for the Applicants Gillian Service and Dilshen Dahanayake, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further information received:	7, 23 and 28 September 2021 from the Applicant 23 September and 5 October 2021 from the Respondent
Date of Determination:	22 November 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants say that in 2019 they were unjustifiably dismissed or unjustifiably disadvantaged by their employer, so have personal grievance claims. A joint statement of

problem was lodged in the Authority in late December 2020. The original respondent, in reply, claimed that the personal grievance claims had not been raised within the time set by s 114 of the Employment Relations Act 2000 and it did not consent to the grievances being raised out of time.

[2] In May 2021, the applicants lodged applications for leave to raise their personal grievances out of time. In reply, the respondent repeated its position that grievances had not been raised within time. It opposed the application for leave.

[3] During a case management conference, it was agreed by the parties that the Authority would determine as a preliminary issue whether grievances were raised within time or if leave should be granted for grievances to be raised out of time. I now have the affidavits and statements of Mr McDonald and Mr McClymont in support, Mr Idas, Mr Parrish and Mr Johnston in opposition, together with submissions from both sides.

[4] The respondent was originally identified as Collection House Limited, an Australian registered company. Leave was granted in December 2020 for the applicants to serve the respondent outside New Zealand. However, the parties now agree that the correct respondent is Receivables Management (NZ) Limited, a New Zealand registered company. By consent, proceedings are amended to show that company as the respondent.

Were grievances raised within 90 days?

[5] Collection House Limited acquired the shares of Receivables Management (NZ) Limited (RML) in early 2019. Stephen Parrish was head of human resources for the Collection House Group. He was based in Brisbane. Mr Parrish sent an email to RML staff, including the applicants, on 29 April 2019. It outlined a proposal to restructure New Zealand operations, involving moving New Zealand collections operations to Auckland and other work to Dunedin. Mr Parrish foreshadowed a decision during the week of 7 May 2019. A second email on 30 April outlined a proposed restructure involving staff in Brisbane absorbing all Christchurch based Finance, IT, HR and administration work. Feedback was sought by 6 May 2019, with the week of 13 May 2019 given for an outcome on the proposal. The email indicates that there was a meeting on 29 April 2019. A third email on 13 May 2019 foreshadowed a meeting in Christchurch on 15 May 2019. The three emails show the "From" address as "Stephen.Parrish@collectionhouse.com.au."

[6] Denica Saunders is Chief Operating Officer for Collection House Group. There is a letter from Ms Saunders to Mr McClymont dated 15 May 2019, conveying a decision to close the Christchurch office and giving him notice of termination of his employment, effective on 31 May 2019. Mr McClymont was told of the decision on 16 May 2019. It appears that the other applicants were also given notice of termination at about the same time, although that correspondence is not in evidence.

[7] Jonathan Idas is Collection House Limited's Chief Legal Officer and Company Secretary. His evidence is that the Christchurch office was closed down by June 2019. Several former managers continued on some basis, but those arrangements are not presently relevant.

[8] Michael McDonald is an employment advocate. Mr McDonald wrote to "The Directors Collection House Group" on 19 August 2019. That letter says that Mr McDonald acts for Mr McClymont and sets outs grounds for Mr McClymont's claims regarding unjustified dismissal, unjustified disadvantage and remedies. There are requests under the Employment Relations Act 2000 for written reasons for the dismissal and time and wage records and for specific information in reliance on the Privacy Act 1993. The recipient was asked to agree to attend mediation, failing which matters would be lodged in the Employment Relations Authority. 6 September 2019 was shown as "Date of compliance". Mr McDonald also sent similar letters setting out personal grievance claims for Margaret Taylor and Steve Oskam. Mr McDonald's letters all show "steve.parrish.com.au" as the "By email" address. However, in evidence is a copy of an email dated 19 August 2019. The email was sent to steve.parrish@collectionhouse.com.au. It appears that the letters for Mr McClymont, Ms Taylor and Mr Oskam were attached.

[9] Similar letters dated 22 August 2019 for Mark McLennan and Mark Thomson were sent by email on 22 August 2019. A similar letter for Kelsey Grant (dated 22 August 2019 – "Date of compliance 13 September 2019) was sent by email on 29 August 2019. The letters show "steve.parrish.com.au" as the "By email" address, but both emails with letters attached were sent to steve.parrish@collectionhouse.com.au.

[10] All the letters for the applicants were only sent by email from michael@madeleyconsulting.com. Mr McDonald did not otherwise attempt to communicate with Mr Parrish, Ms Saunders, Collection House Group or RML. Mr McDonald received no

acknowledgement of or reply to the emails. These proceedings were lodged in the Authority in December 2020. The application provided Denica.Saunders@collectionhouse.com.au as an email address for the respondent. The Authority confirmed with Ms Saunders by email that she could accept service of the application by email. It was forwarded to her on 21 December 2020.

[11] The evidence for RML is that the applicants' personal grievance claims had not been raised with it before Ms Saunders received the application with the letters as attachments on 21 December 2020. Mr Parrish's evidence is that his work email address was always Stephen.parrish@collectionhouse.com.au. It was never steve.parrish.com.au or steve.parrish@collectionhouse.com.au.

[12] Mr McDonald's evidence is that his experience is that if an email is not delivered, a non-delivery notification is received by the sender. He says that his emails must have been received because he did not receive a non-delivery notification.

[13] Nathan Johnston is Chief Technology Officer for Collection House. His evidence is that the mail server for Collection House has no record of ever receiving email from michael@madeleyconsulting.com. He says that the system has no record of steve.parrish@collectionhouse.com.au ever being used. Because the emails were sent to an invalid email address, they were rejected by Clearswift Secure Email Gateway as configured at the time, were not delivered to Collection House's mail server and did not trigger any alert to Collection House. Mr Johnston explained that sending non-delivery notification receipts was disabled to protect against a hacking exploit known as Directory Harvest Attack.

[14] Mr Johnston's affidavit provides a complete answer to Mr McDonald's assumption that the emails must have been received. They were not.

[15] A grievance is raised with an employer as soon as the employee has taken reasonable steps to make the employer aware that the employee alleges a personal grievance that they want the employer to address.[1] I am referred to *Warren v Expressions Fashion Clothing Limited*,[2] in support of the submissions that Mr McDonald's use of an invalid email address amounted to the applicants' taking reasonable steps. In *Warren*, a representative sent a letter

[1] Employment Relations Authority, s 114(2).
[2] *Warren v Expressions Fashion Clothing Limited*, ERA Wellington, WA 139/05, 30 August 2005.

to the shareholders at the address for them given in the companies' office register, and to the company at an address he was given when he rang a phone number associated with the company to ask how he could contact the company in writing. The shareholder letter was returned, undelivered. The letter to the company at the given address was apparently not received until after the 90-day period. The representative did not write to the company's registered address. The Authority in that case found that the applicant through her representative had taken reasonable steps to make the employer aware of the grievance, within time. The representative was entitled to rely on the Companies Register address, as the shareholders had not updated it.

[16] The present case differs from *Warren*. Mr McDonald only used an invalid email address, despite emails from Mr Parrish showing his correct email address. There were no attempts to communicate and no explanation for not using RML's registered address. Use of an invalid email address fell short of being "reasonable steps", for the purpose of s 114(2) of the Employment Relations Act 2000.

[17] I find that Mr McDonald's use of an invalid email address for Mr Parrish meant that the applicants' personal grievance claims were not raised with RML.

[18] Mr McClymont says that he gave Mr McDonald "Steven Parrish's" correct email, with the name "Steven". Mr McClymont also points out that Mr Parrish's signature footer on emails was "Steve Parrish". However, the 2019 printed emails mentioned above and a 6 June 2019 email to Mr McClymont, all show the sender's email address as "Stephen.Parrish@collectionhouse.com.au." Mr Parrish's use of the abbreviation "Steve" in his signature footer at the end of an email does not detract from the finding that the emails with attachments purporting to raise the personal grievances were sent to an invalid email address.

[19] Mr McClymont's evidence is that the respondent was aware that staff were unhappy and were going to raise grievances. Even assuming that to be correct, it is not sufficient to constitute the applicants' grievances having been raised.

[20] In respect of his situation, Mr McClymont says that RML could not produce his employment agreement and he made them aware this was a serious breach of law. Again on the assumption that this is correct, it did not amount to Mr McClymont raising a personal grievance claim.

[21] Mr McClymont says that different employment agreements gave either two weeks or four weeks "compensation". Copies of the applicants' employment agreements are in evidence. As one might expect with individual agreements entered into at different times and for different roles, the terms vary. For example, the notice period is either two weeks, four weeks or a month. Some include a definition of redundancy but they all expressly exclude any entitlement to redundancy compensation. There is evidence that Mr McClymont disputed RML's failure to update his employment agreement and expressed concern that the two weeks' notice of termination in his original agreement was unfair compared to longer notice periods for other employees in his team. Mr Parrish replied to these concerns by email on 6 June 2019. I take from the reply that RML had paid Mr McClymont 2 weeks' notice, in addition to having given him notice earlier in May 2019. Mr McClymont's concerns in his evidence, also described in Mr Parrish's email, could not amount to him raising a personal grievance, as the concerns are not within the definition of personal grievances set out at s 103 of the Employment Relations Act 2000.

[22] There is no evidence that the other applicants did anything to raise concerns about the termination of their employment, except for the steps taken by Mr McDonald.

[23] For these reasons, I find that the applicants' intended personal grievance claims as set out in the statement of problem were not raised with RML within 90 days, as required by s 114 of the Employment Relations Act 2000. RML does not consent to the grievance claims being raised outside time.

[24] The applicants' are entitled to raise their grievances only with leave. They need to establish that the delay in raising their grievances was occasioned by exceptional circumstances and it is just to grant leave.

Was the delay in raising the grievances occasioned by exceptional circumstances?

[25] The exceptional circumstance advanced by the applicants in their leave application is s 115(b) of the Employment Relations Act 2000. The applicants need to establish that they made reasonable arrangements to have their grievances raised by Mr McDonald (or his company), and Mr McDonald unreasonably failed to ensure that the grievances were raised within the required time.

[26] RML submits that there is no evidence that the applicants made reasonable arrangements for Mr McDonald to raise their grievance. I am referred to *Melville v Air New Zealand Ltd*.[3] In that case, the employee's representative raised a personal grievance about the suspension and argued, during the disciplinary process, that it would be unjustifiable to dismiss the employee. Later, the employer ended the disciplinary process by dismissing the employee. That meeting ended with the representative and the employee saying "See you in Court". The representative was then away from work for a time. Others involved with the matter were not instructed by the employee to raise her grievance. There was no further communication with the employer until more than a month after the end of the 90 day period. The employee had to seek leave to raise the unjustified dismissal grievance out of time, based on the exceptional circumstance ground advanced in this case. In *Melville*, the evidence fell short of showing that the employee made a reasonable arrangement for her representative to raise a personal grievance about the dismissal. The possibility of "going to court" was briefly discussed between the employee and the representative after the dismissal, but the evidence fell short of showing that the employee had made "reasonable arrangements" for her grievance to be raised.

[27] RML points to the emails between Mr McDonald, Mr McClymont and the other applicants to say that they did not make reasonable arrangements for Mr McDonald to raise the applicants' personal grievance claims. However, the present case differs from *Melville*. Here, after the dismissals, Mr McClymont met with Mr McDonald on 12 August 2019. Mr McClymont told the other applicants that they needed to contact Mr McDonald for him "to act on your behalf". They needed to do that "this week" as "PG needs to go to CH soon". That is the context for the emails from the other applicants to Mr McDonald that followed. Those contacts then caused Mr McDonald to draft the August letters referred to earlier.

[3] *Melville v Air New Zealand Ltd* [2010] NZCA 563.

Taken overall, it would be sufficient to establish that the applicants had made reasonable arrangements for Mr McDonald to raise personal grievance as described in those letters.

[28] For current purposes, I would also accept that Mr McDonald's assumption that the emails had been received by Mr Parrish within time amounts to an unreasonable failure to ensure the grievances were raised within time. I treat the applicants as being able to show exceptional circumstances covered by s 115(b) of the Employment Relations Act 2000.

[29] RML submits that the delay in raising the personal grievances, from about August 2019 (the end of the 90 day period) to December 2020, was not occasioned by the exceptional circumstance in any event. I am referred to *GFW Agri-Products Ltd v Gibson*.[4] The Court of Appeal dismissed an appeal against the Employment Court judgement that a personal grievance claim had been raised within time. The Court nonetheless stated, so as not to be taken as endorsing an obiter part of the judgment under appeal, that an applicant seeking leave must show exceptional circumstances having a causative effect upon the delay in submitting the grievance.

[30] There is no specific explanation for the passage of time from the end of the 90 day period until December 2020, the date of proceedings. The applicants presumably considered that steps had been taken raising their grievances, so an action in the Authority could be commenced up to three years later.[5]

[31] In *Wilkens & Field Ltd v Fortune*,[6] the Court of Appeal again considered exceptional circumstances. The Court repeated the passage from *GFW Agri-Products Ltd*, before stating that there needs to be an explanation for the failure to submit a grievance within time, circumstances that are exceptional and that that they occasioned the delay in submitting the grievance. In *Wilkens & Field*, the Court held that the circumstances subsequent to the elapse of the 90-day period cannot constitute exceptional circumstances occasioning failure to submit a personal grievance within time. The Court of Appeal held that the Employment Tribunal had erred by including as part of its finding of exceptional circumstances, reference to the employer's conduct, after the end of the 90 day period, in response to the employee's claims.

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[4] *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323 (CA) at 330.
[5] Employment Relations Act 2000, s 114(6).
[6] *Wilkens & Field Ltd v Fortune* [1998] 2 ERNZ 70.

[32] The enactment of the Employment Relations Act 2000 and later reconsideration of *Wilkens & Field* in a Supreme Court case[7] do not detract from the observation about delay after the 90-day period not occasioning a failure to raise a grievance within 90 days.

[33] In the present case the passage of time after the end of the 90 day period can be taken into account as part of assessing whether it would be just to grant leave, rather than assessing whether an exceptional circumstance occasioned the delay in raising the grievances.

[34] I will turn to considering whether it is just to grant leave.

Is it just to grant leave?

[35] I find that it is not just to grant leave for the applicants' personal grievance claims to be raised out of time.

[36] The application for leave does not include an explanation of the passage of time since the expiration of the 90-day period.

[37] RML gave notice of termination to the applicants on or about 16 May 2019. RML remained unaware of the applicants' intended personal grievance claims challenging the process and substance of the decision to restructure its business, disestablish their positions and terminate their employment until December 2020 when it was served with the statement of problem.

[38] The Chief Executive and Chief Financial Officer were closely involved in the restructuring process and decision-making, but left positions with the Collection House group later in 2019. The Head of HR (Mr Parrish) and Head of Risk (John Chan) were also involved. They left their roles in May 2021. The Chief Operating Officer (Ms Saunders), who was involved, remains with the company. None are located in New Zealand. RML would face some challenges securing the cooperation or alternatively compelling the appearance of at least some of these potential witnesses. I also accept that there may be issues about recollection, as well. While the applicants might have had reason to retain recollection of events, there was no reason for RML's witnesses to do that until December 2020. I accept that RML is prejudiced by the delay.

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

[39] The applicants' advocate submits that the three year period within which an employee may commence a personal grievance action in the Authority implies that memory should be reliable for that period, at least. I do not accept that any such implication can be taken from the three year limitation period. To the contrary, the Employment Relations Act 2000 requires grievances to be raised promptly. That recognises the Act's object that problems are more likely to be resolved quickly and successfully if first raised and discussed directly. Procedures and institutions established by Part 10 of the Act support that.

[40] It is submitted that there were serious flaws in the way that the applicants' employment was terminated, so it would be unjust to decline leave. However, serious flaws are not apparent. As the new owner of RML, Collection House reviewed business operations. That resulted in a restructuring proposal, outlined in an email of 29 April 2019. It appears there was a meeting on 29 April, a further email on 30 April, additional information and a change to the time for any response. The emails include EAP support information and encourage feedback. There is a FAQ document with answers to questions that often arise with restructure proposals extending to redundancy. There is the 15 May 2019 letter to Mr McClymont, giving him notice of dismissal. It invited a response on the possibility of redeployment to another location, offered to meet with him, offered support with access to recruitment services and repeated the EAP offer. I assume the other applicants would have received a similar letter. The way in which RML conducted its business changed. On the face of it, the applicants were dismissed in accordance with their terms of employment, as a result of a genuine restructuring decision, made after consultation with them. There does not appear to be strongly arguable personal grievances.

Conclusions

[41] The applicants did not raise their personal grievance claims within the 90-day period set by s 114(1) of the Employment Relations Act 2000.

[42] Leave for the applicants to raise personal grievance claims after the expiration of the 90-day period is declined.

[43] A claim for costs may be made by lodging and serving written submissions within 28 days. The other party may then lodge and serve submissions in reply within a further 14 days. I will then determine costs in light of those submissions. Except for costs as just provided, the application is dismissed.

Philip Cheyne
Member of the Employment Relations Authority