IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2021] NZERA 184
3109612

	BETWEEN	GAIL BAYLIS Applicant
	AND	CHIEF EXECUTIVE OF THE PORIRUA CITY COUNCIL Respondent

Member of Authority:	Philip Cheyne
Representatives:	Allan Halse, advocate for the Applicant Michael Mercer and Melissa Lo, counsel for the Respondent
Investigation Meeting:	29 April 2021 in Wellington
Date of Determination:	4 May 2021

DETERMINATION OF THE AUTHORITY

A. The application for leave under section 114(3) of the Employment Relations Act 2000 is dismissed.

B. Costs are reserved, subject to the timetable mentioned below.

Employment relationship problem

[1] Gail Baylis worked for Porirua City Council from February 2015. Ms Baylis was given two months' notice of dismissal on 11 July 2018, so her employment ended with effect from 11 September 2018.

[2] On 13 July 2020, Ms Baylis' representative lodged a statement of problem with the Employment Relations Authority. Ms Baylis applies for leave to raise personal grievances of unjustified disadvantage and unjustified dismissal. Ms Baylis apparently relies on actions between 2016 and 2018 as the basis for an unjustified disadvantage personal grievance regarding bullying and the September 2018 dismissal for the unjustified dismissal personal grievance. The application states it is based on s 115(a) and s 115(b) of the Employment Relations Act 2000.

[3] The Porirua City Council does not consent to any personal grievance being raised out of time and opposes the application for leave.

[4] At the first case management conference, Mr Halse for Ms Baylis supported a direction to mediation but Mr Mercer for PCC opposed a direction. In its reply, PCC says that it was not aware of Ms Baylis' intention to raise a personal grievance until 17 July 2020 when it received the statement of problem. I was persuaded that mediation would not contribute constructively to resolving the problem. Arrangements were made for Ms Baylis and PCC to disclose documents, following which the leave application would be set for investigation. At the second conference, directions were made for Mr Halse on behalf of Ms Baylis to lodge and serve statements of evidence in support of the leave application and a draft statement of problem setting out the grievances in respect of which leave was being sought. Mr Mercer for PCC was then to lodge its statements of evidence. An investigation meeting was set for 29 April 2021 to consider the leave application.

[5] Mr Halse did not lodge any statements of evidence, nor a draft statement of problem. When reminded by the Authority Officer, Mr Halse on 26 March 2021 referred to and attached correspondence from Ms Baylis as evidence of her having mentioned concerns of being bullied to PCC, as early as December 2017. The attachment is Ms Baylis' summary that she had sent to CultureSafe NZ on 4 October 2018. It outlines some incidents and Ms Baylis' actions from 2016 to April 2018, then refers to the written notice of dismissal.

Statements of evidence relevant to the application for leave to raise grievances out of time and a draft statement of problem for those grievance claims were still not lodged. Given that, statements of evidence from PCC were not required. The investigation meeting was to proceed by way of submissions on the application for leave, based on the material that had been lodged with the application for leave, the reply and the material discussed during the case management conferences and later lodged with the Authority.

[6] At the time set for the start of the meeting, Ms Baylis was not present. Mr Halse said he was expecting she would attend, but had not able to communicate with her that morning. I deferred starting, but Mr Halse still had not had direct contact with Ms Baylis when we resumed. I proceeded, hearing submissions from Mr Halse, then Mr Mercer and a reply from Mr Halse.

Application for leave

[7] To paraphrase s 114 of the ERA, every employee who wishes to raise a personal grievance must do that within 90 days, unless the employer consents to the grievance being raised out of time. If the employer does not consent to a grievance being raised out of time, the Authority on the employee's application for leave to raise a grievance after 90 days, may grant leave if satisfied that the delay was occasioned by exceptional circumstances and if the Authority considers it just to do so.

[8] Exceptional circumstances are defined in s 115 of the ERA as including where the employee was so affected or traumatised by the matter that they were unable to properly consider raising the grievance about it (s 115(a)); and where the employee made reasonable arrangements to have the grievance raised by an agent who unreasonably failed to ensure it was raised within time (s 115(b)). Both are advanced in the present case.

[9] I understood Mr Halse to characterise the time limitations as technicalities. A personal grievance claim is a statutory provision for an employee to seek redress. The statute allows a personal grievance claim as of right if the employee raises it within time. If the claim is not resolved, the employee may then commence an action in the Authority within three years. If the employee did not raise the claim within time, the statute allows the employee to seek leave by application to the Authority. In determining this application for

leave to raise grievances out of time, I must apply the law, based on facts established by evidence.

[10] The following issues arise on the application for leave:

(a) Was Ms Baylis so affected or traumatised by matters giving rise to an unjustified disadvantage grievance claim, that she was unable to properly consider raising it within time?

(b) Was Ms Baylis so affected or traumatised by the dismissal that she was unable to properly consider raising a personal grievance concerning the dismissal within time?

(c) Did Ms Baylis make reasonable arrangements to have the unjustified disadvantage grievance and unjustified dismissal grievance raised on her behalf by CultureSafe NZ?

(d) Did CultureSafe NZ unreasonably fail to ensure that Ms Baylis' grievances were raised within time?

(e) If an exceptional circumstance is established, would it be just to grant leave?

(f) Is any further investigation by the Authority required?

[11] Without objection, I amended the proceedings to be in the name of "Gail Baylis". Proceedings had been initiated with the spelling "Bayliss". However, I take from the medical certificates, the employment agreement and the spelling used in most emails that "Baylis" is the correct spelling.

[12] I will first set out more of the context for these issues, drawn from the documents on file.

Context

[13] Ms Baylis was employed on an individual agreement, later joined the Public Service Association and was then covered by a collective agreement. Each employment agreement contained an explanation concerning the resolution of an employment relationship problem.

[14] Ms Baylis, in her account sent to Mr Halse on 4 October 2018, describes some issues between her and another worker. December 2017 is the last date given for anything specific. Ms Baylis describes contact between her, the facility manager and her direct manager about the issues. It resulted in an instruction to Ms Baylis and the worker that they were not to have any contact with each other at work.

[15] Medical certificates certify Ms Baylis as medically unfit for work from 23 April 2018, the last of them stating she would not be fit to return to work before 8 August 2018. The doctor also completed two WINZ work capacity medical certificates certifying Ms Baylis as having no current capacity for work, to be reviewed in July then on 8 October 2018. The certificates were provided to PCC.

[16] There is an email dated 14 May 2018 from PCC's chief operating officer (COO) to the facility manager, outlining a discussion between Ms Baylis and the COO on 11 May 2018. Ms Baylis is reported as describing being bullied by the other worker, raising that with the facility manager but nothing being done to change the working environment. Ms Baylis is reported as saying she wanted to raise a formal complaint and the COO as asking her to revert when ready to do so. The discussion was shortly after Ms Baylis went on sick leave.

[17] The employment agreement provided for PCC to be able to terminate an employee's employment if, by ill health, they became permanently incapacitated from performing their duties. Permanent incapacity is defined as including two consecutive months' absence. PCC wrote to Ms Baylis on 22 June 2018 raising its concern about Ms Baylis' absence from work since 23 April, referring to this provision. A meeting was suggested. At that stage, Ms Baylis had been certified as medically unfit but was due to resume work on 8 July. The WINZ work capacity certificate was due for review on that date as well.

[18] There is an email dated 2 July 2018 from Ms Baylis to the facility manager and the COO. Ms Baylis outlined the history of her feeling bullied by the other worker, it being reported to the facility manager, PCC's response, ongoing issues and Ms Baylis suffering a breakdown. The facility manager forwarded the email to PCC's HR manager. The HR manager later on 2 July 2018 followed up arrangements for a meeting with Ms Baylis' PSA representative regarding "Gail Baylis – return to work?" The meeting was on 9 July 2018. Ms Baylis provided a certificate that she was medically unfit until 8 August 2018 and a WINZ work capacity certificate due for further review on 8 October 2018.

[19] On 11 July 2018, PCC gave Ms Baylis two months' notice in writing of termination of her employment on the basis of permanent incapacity. In a further letter on 4 September 2018, PCC invited Ms Baylis to provide a medical update on her current situation by 7 September if she was fit to resume work. The PSA representative at Ms Baylis' request proposed a staged return to work, for weekend shifts for three months. PCC proposed two weekday shifts, to facilitate regular review of the return to work by Ms Baylis' manager. PCC sought a medical certificate clearing Ms Baylis to return to work. PCC's 11 September 2018 letter records no response to that request and confirms the termination of employment as at that date.

[20] PCC next heard from or for Ms Baylis when it received the statement of problem on 17 July 2020.

[21] It is not suggested that Ms Baylis arranged for the PSA to raise a personal grievance on her behalf.

Was Ms Baylis so affected or traumatised by matters giving rise to an unjustified disadvantage grievance claim, that she was unable to properly consider raising a personal grievance within time?

[22] Ms Baylis gave no evidence and no medical evidence was produced. I can only assess this issue on information gleaned from the documents produced to the Authority.

[23] Copies of some emails were included with the statement of problem. In an email to the facility manager and the COO at 5.31am on 2 July 2018 Ms Baylis refers to the work situation causing her "to breakdown and …remove myself from the situation with my Doctor's advice". The same message was sent to the PSA at about the same time. This was ahead of the 9 July 2018 meeting. In an email to Mr Halse on 4 October 2018 Ms Baylis apologises for the delay in sending information to him as her employment was terminated "which spun me into a very deep depression". In a 15 November 2018 email, Ms Baylis repeats a request for contact from Mr Halse because she was "desperate for my bullying case to be fought for me and time is running out". An email on 17 March 2019 from a friend to Mr Halse includes mention that Ms Baylis "has suffered mental illness due to the nature of her treatment from her employer" and "has suffered unwarranted depression" upon Mr Halse's "admission of untimely defense of her case". In her email on 29 May 2019 to

CultureSafe NZ, Ms Baylis explained "I'm not well, have been in hospital" and mentioned other matters that had delayed her response to CultureSafe NZ's request for documents. In an email of 23 November 2019, Ms Baylis said she had been "very ill for a time, in and out of hospital, went through a very depressive episode afterwards". The email mentions the consequences of this.

[24] No medical certificates were included with the statement of problem. Certificates it had received from Ms Baylis were part of the material provided, as directed, by the PCC. The medical certificates do describe the medical issue. The WINZ work capacity medical certificate of 8 June 2018 attributes "Anxiety" as the barrier or limitation for Ms Baylis then having "No current capacity to work". Ms Baylis' condition was being treated by "Medication". 8 July 2018 was set as the review date. The second WINZ work capacity certificate dated 6 July 2018 repeats "Anxiety" as the reason for Ms Baylis having no current capacity to work and "Medication" as the treatment being provided. 8 October 2018 was set as the date to review Ms Baylis' capacity to work.

[25] As part of the proposal for a staged return to work, the PSA representative on 6 September 2018 conveyed that Ms Baylis' "anxiety and inability to work for the last few months stems from her working relationship with [name]".

[26] In *Telecom New Zealand Ltd v Morgan* the Employment Court held that s 115(a) of the ERA connotes "very substantial injury" that has to be sufficiently serious to prevent the employee from properly considering raising the personal grievance for the whole 90 day period. The Court considered that Parliament had established a "high threshold".[1]

[27] The assessment of whether Ms Baylis' circumstances meet the test is not assisted by the absence of a draft statement of problem. Ms Baylis has not set out the details and dates of any unjustified (in)actions said to have affected her employment to her disadvantage. I make the assumption that the (in)actions must have been while Ms Baylis was at work, prior to when she was first certified medically unfit for work (late April 2018). Mr Halse did not make a different submission.

[28] Emails demonstrate Ms Baylis engaging with her PSA representative, the facility manager and the COO in July 2018. I take from these emails that Ms Baylis was able to

[1] *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 (EmpC).

properly consider raising a personal grievance, at least at the time of these July emails. There is no medical assessment that Ms Baylis lacked an ability to properly consider raising a personal grievance then, or earlier, by reason of the effects on her of matters giving rise to a grievance. Prior to late April 2018, Ms Baylis worked her regular shifts, except for a short period in January 2018.

[29] Even on the assumption that Ms Baylis' unjustified disadvantage claim crystallised after she went on sick leave because of some continuing (in)action by PCC, there are email communications by Ms Baylis such as in August and November 2018 to indicate that she had the capacity to properly raise a personal grievance claim.

[30] Ms Baylis has not established the existence of an exceptional circumstance under s 115(a) during her employment to occasion any delay by her in raising her unjustified disadvantage grievance with respect to the claim of bullying and PCC's response to it.

Was Ms Baylis so affected or traumatised by the dismissal that she was unable to properly consider raising a personal grievance concerning the dismissal within time?

[31] To recap, Ms Baylis was given two months' notice of dismissal on 11 July 2018. The dismissal was effective on 11 September 2018. Ms Baylis had a statutory right to raise a grievance about the dismissal on or before 9 December 2018. Ms Baylis' grievance concerning her dismissal was first brought to PCC's notice in July 2020.

[32] The emails referred to above demonstrate that Ms Baylis would have been able to raise a grievance in early July, but that pre-dates her dismissal. The information to indicate that Ms Baylis' ability diminished to the point of her being unable to properly consider raising her dismissal grievance are her statements about her mental health in her emails. For example, in her email to CultureSafe NZ on 4 October 2018 Ms Baylis says "my employment was terminated which spun me into a very deep depression". I am mindful of the medical certificates certifying Ms Baylis as medically unfit for work and the WINZ certificates attributing Ms Baylis' incapacity for work to anxiety. However, this falls well short of establishing that Ms Baylis was so affected or traumatised by the dismissal so that she was unable to properly consider raising a personal grievance about it until after 9 December 2018.

[33] There is an email dated 31 August 2018 from Ms Baylis to Mr Halse. The opening four paragraphs repeat what Ms Baylis said in her 2 July 2018 emails to the facility manager and COO and then to the PSA. Ms Baylis then outlines PCC's intention to terminate her employment if she was unable to return to work and the four response options canvassed with her by the PSA representative. One option was a return to work plan. PCC would require a medical clearance. This appears to inform the 6 September 2018 staged return to work proposal the PSA communicated to PCC, on Ms Baylis' instructions. There is also the email from Ms Baylis on 15 November 2018 to CultureSafe NZ expressing her concern that time was running out for her case to be taken. These communications reinforce the view described above that Ms Baylis was not so affected or traumatised by the dismissal, so that she was unable to properly consider raising a personal grievance about it until after 9 December 2018.

[34] Ms Baylis has not established the existence of an exceptional circumstance under s 115(a) to occasion the delay in raising her claim of unjustified dismissal.

Did Ms Baylis make reasonable arrangements to have the unjustified disadvantage grievance and unjustified dismissal grievance raised on her behalf by CultureSafe NZ?

[35] Mr Halse told me that there would have been some earlier contact between Ms Baylis and CultureSafe NZ. However, the material before the Authority of Ms Baylis' first contact with CultureSafe NZ, is her email to Mr Halse on 31 August 2018. After setting out the background, the four options canvassed with her by PSA and the basis for the PSA advice that a three month negotiated pay-out was probably no longer achievable, Ms Baylis asked:

> Is there anything you think you could help with in this case as I don't feel going back to work in these conditions is in my best interest?
>
> Gail Baylis

[36] The evidence of the next contact with CultureSafe NZ is the 4 October 2018 from Ms Baylis to Joanne Turner. The attachment to the email sets out Ms Baylis' account of having been bullied from "two years ago" through to April 2018, her sick leave and the PSA's involvement from April and her dismissal. There is then an email from Mr Halse to Ms Baylis on 13 October 2018. He asks Ms Baylis the name and location of her employer and the date of the dismissal. Earlier, Ms Baylis had identified her employer in her 31 August 2018 email. It appears from the 1, 2 and 15 November 2018 emails that Ms Baylis had still not been able to speak to Mr Halse or someone at CultureSafe NZ. The next communication

with CultureSafe NZ for Ms Baylis was on 17 March 2019. In April 2019, Dr Bishop for CultureSafe NZ stated that she would send an "application for leave next week". At the same time, Dr Bishop sent Ms Baylis CultureSafe NZ's terms and conditions.

[37] Based on these exchanges, counsel submits that Ms Baylis did not make reasonable arrangements with Mr Halse and/or CultureSafe NZ until after the March 2019 exchange or later. However, Mr Halse told me that Ms Baylis had made arrangements to have her grievances raised by CultureSafe NZ as part of the exchanges that caused Ms Baylis to send the 31 August 2018 email to Mr Halse. If counsel is correct, CultureSafe NZ could not have unreasonably failed to ensure that Ms Baylis' grievances were raised within time, as the arrangement for it to act for Ms Baylis was not until months after the expiry of the 90 days. In that case, Ms Baylis could not establish the delay in raising her grievances was accompanied by the exceptional circumstance described at s 115(b) of the ERA. The present application for leave would have to be dismissed. Based on the documents produced, I agree with counsel's submission. Section 115(b) does not assist Ms Baylis.

[38] However, it may be that Mr Halse's view that a reasonable arrangement had been made by Ms Baylis with CultureSafe NZ on or before 31 August 2018 is based on material that is not before the Authority. The emails of 4 & 13 October 2018 and 1, 2 and 15 November 2018 suggest there might have been an arrangement. In an email on 26 March 2019, CultureSafe NZ apologised to Ms Baylis for the delays in "responding and acting for" Ms Baylis. That is not inconsistent with the existence of an arrangement to act. In case I am wrong to find that no arrangement was made with CultureSafe NZ until March 2019 or later, I will assess whether it would be just to grant leave for Ms Baylis to raise her grievances out of time.

Would it have been just to grant leave?

[39] Assuming Ms Baylis, on or shortly before 31 August 2018, had arranged with CultureSafe NZ to raise her personal grievance claims of unjustified disadvantage and unjustified dismissal, CultureSafe NZ did not raise these grievances with PCC, apart from the present application for leave lodged in July 2020. The time for raising the unjustified dismissal grievance as of right ended in December 2018. Time in respect of an unjustified disadvantage grievance must have ended earlier.

[40] By March 2019, it would have been apparent to CultureSafe NZ that it had not raised Ms Baylis' grievances within time. Dr Bishop in a 26 March 2019 email said the most obvious option to explore was a "personal grievance for unjustified dismissal". On 25 April 2019 she wrote "I will send your application for leave next week". On 24 November 2019, Dr Bishop wrote "we will need, as previously discussed to submit an application for leave to extend the time to raise your grievances".

[41] I must consider the overall justice of the case, which includes taking account of the position of an employer facing a late claim.[2]

[42] A response to the grievances would require PCC to obtain key evidence from other employees who it no longer employs. Evidence of events at the workplace prior to April 2018 and the dismissal process and decision in July and September 2018 would be required. If PCC can arrange for key witnesses to be available, the passage of time will quite likely affect their recollections of any events.

[43] However, there is no evidence about why CultureSafe NZ did not lodge the present leave application in March or April 2019 when the delay was brought to its attention on behalf of Ms Baylis. There was further contact in May, June, November and December 2019, then in February 2020. There is no evidence about why CultureSafe NZ did not first attempt to lodge an application for leave until June 2020. Given the lack of explanation for the continuing delay for the application, the prejudicial effect for PCC caused by the delay, means that it would be unjust to grant leave to Ms Baylis.

Outcome of the application for leave

[44] Ms Baylis has not established that delay in raising her personal grievances was occasioned by exceptional circumstances. The application for leave must be dismissed.

[45] If CultureSafe NZ had unreasonably failed to raise Ms Baylis' personal grievances, it would not have been just to grant leave for Ms Baylis to raise personal grievances out of time.

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[2] *Creedy v Commission of Police* [2008] NZSC 31.

Is any further investigation by the Authority required?

[46] Mr Halse refers me to *Dollar King Ltd v Jun*.[3] In that case, the Employment Court held that the Authority does not have power to impose statutory penalties of its own motion, except where expressly provided by statute. As a creature of statute, the Authority must act in accordance with its statutory powers. I read *Dollar King* as supporting my approach in this case. The Authority's role, its investigative process, the focus on substantial merits rather than technicalities, the powers of the Authority and its control over procedure do not authorise me to ignore express statutory provisions, based on one party's appeal to fairness.[4]

[47] An employee raises a personal grievance if the nature of their complaint is a personal grievance as defined in the Employment Relations Act 2000 and if their communication meets s 114(2) of the ERA by conveying the substance of their complaint in sufficient detail so that the employer knows what it is responding to on its merits with a view to resolving it.[5]

[48] Mr Halse for Ms Baylis took the position that Ms Baylis had not formally raised her personal grievances with PCC. There is no evidence of any communication by or on behalf of Ms Baylis from 11 July 2018 to raise a complaint about PCC's decision to give her notice of dismissal. I agree with Mr Halse that Ms Baylis requires leave in order to raise a personal grievance claim of unjustified dismissal. Because there is no proper basis on which leave can be granted, the Authority has no power to investigate whether the dismissal was unjustified.

[49] An employer's response to an employee's claim of being bullied by a co-worker might give grounds for a personal grievance claim that the employee's employment has been affected to their disadvantage by an unjustified action by the employer. Taken together, the discussion between Ms Baylis and her COO on 11 May 2018[6] and Ms Baylis' email on 2 July 2018 could be read as her raising a complaint about PCC's response to her earlier claims of having been bullied. Notes of exchanges noted during the 9 July 2018 meeting reinforced the earlier communications. These were among the documents lodged by PCC in accordance with my direction.

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[3] *Dollar King Ltd v Jun* [2020] NZEmpC 91.
[4] Employment Relations Act 2000, s 157(3).
[5] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.
[6] Described in the 14 May 2018 email by Ms Evans to Ms Chapman.

[50] On 30 March 2021, I directed that if Ms Baylis intended to say that any personal grievance had already been raised with PCC, proceedings in respect of those grievances should be commenced without delay by lodging a statement of problem as required by Form 1 of the Employment Relations Authority Regulations 2000. I noted that if a statement of problem was lodged, the 29 April 2021 investigation meeting could also be used to consider any issues arising under s 114(2) and s 114(6) of the ERA.

[51] In the absence of a draft statement of problem describing the grievances for which leave was sought, the absence of proceedings in the Authority in respect of any personal grievance that had been raised with PCC and the absence of evidence in support of the present application, there is nothing further the Authority can do to investigate Ms Baylis' employment relationship problems.

Costs

[52] I am asked to reserve costs. If there is a claim for costs, counsel may lodge and serve a submission in support within 28 days. Mr Halse for Ms Baylis may lodge and serve a submission in reply within a further 14 days. I will then determine costs.

Philip Cheyne
Member of the Employment Relations Authority