

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 84
3097933

BETWEEN BIGSON GUMBEZE
Applicant

AND THE CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR CHILDREN
Respondent

Member of Authority: Philip Cheyne

Representatives: Max Rusero, counsel for the Applicant
Greg Cain and Renee Butler, counsel for the Respondent

Investigation Meeting: 17 December 2020 at Auckland

Submissions Received: 17 December 2020 from the Applicant
23 December 2020 from the Respondent

Date of Determination: 3 March 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bigson Gumbeze was employed by the Chief Executive of Oranga Tamariki – Ministry for Children (OT) as a senior social worker. He was dismissed by letter dated 14 December 2017.

[2] On 2 April 2020 Mr Gumbeze lodged an application in Form 1 with the Authority. The application describes the problem as OT refusing to accept Mr Gumbeze's personal grievance for unjustifiable dismissal. Mr Gumbeze says that OT's grounds for this are that his letter dated 18 December 2017 was insufficient to constitute notice of personal grievance and that he was out of time to raise a grievance now. Mr Gumbeze says in response that any delay in raising his personal grievance was occasioned by exceptional circumstances and that it is just to grant leave for him to raise the grievance out of time. As the exceptional circumstance, Mr Gumbeze says that his employment agreement did not include the explanation concerning the resolution of employment relationship problems that is required by the Employment Relations Act 2000, as he did not have a written employment agreement at the time he was dismissed. Mr Gumbeze seeks leave to raise his personal grievance out of time.

[3] Mr Gumbeze seeks to have "all his personal grievance claims including unfair dismissal to be addressed through mediation and or through The Employment Relations Authority". He seeks costs, his employer to be "held responsible for the failure [of] ... providing an employment agreement" and for his employer to provide the last five pay slips, as requested prior to the application. However, the present application is for leave to raise the dismissal grievance claim.

[4] The Chief Executive of Oranga Tamariki – Ministry for Children opposes Mr Gumbeze's application for leave. OT says it did not (and does not) consent to Mr Gumbeze raising his grievance out of time. Without prejudice to that position, OT says it dismissed Mr Gumbeze with effect from 15 December 2017 for a justifiable reason and in a procedurally fair manner. In summary, following an investigation, OT came to the view that Mr Gumbeze's practice was inconsistent with the requirements of its senior social workers, the principles and objects of the Oranga Tamariki Act 1989 and its purposes and values. It concluded that Mr Gumbeze's misconduct had eroded its trust and confidence, such as his continued employment was untenable. Those conclusions were set out in its letter of 14 December 2017.

[5] OT says that correspondence from Mr Gumbeze on 18 December 2017 and 5 January 2018 was not sufficient to raise Mr Gumbeze's personal grievance of unjustified dismissal. It next received correspondence on 3 February 2020 from Mr Gumbeze's representative who advised that he acted for Mr Gumbeze, referred to the 5 January 2018 "notice of personal grievance", Mr Gumbeze's instructions that he was "unfairly dismissed" and his instructions that he was "not well informed as to the real cause of the dismissal". Specified information was sought. OT replied on 18 February 2020 to say that Mr Gumbeze had not raised his personal grievance within time. Without prejudice to that, OT provided a substantive response to the information requests.

[6] OT says that Mr Gumbeze was employed under an agreement between Child, Youth and Family (as it was previously known) and the Public Service Association Te Pūkenga Here Tikanga Mahi. OT says that no exceptional circumstance occasioned Mr Gumbeze's delay in raising his personal grievance. Finally OT says that it would not be just to grant leave.

[7] By memorandum, OT sought to have the application for leave to raise a grievance out of time determined as a preliminary issue.

[8] Following a case management conference, Mr Gumbeze lodged a draft statement of problem setting out the basis for his personal grievance claim of unjustified dismissal together with a statement of evidence in support and a bundle of documents. OT lodged two volumes of documents. It was not required to lodge statements of evidence. The investigation meeting was limited to considering whether Mr Gumbeze's grievance was raised within time and, if not, whether leave should be granted now.

[9] The issues for determination are:

- (a) Did Mr Gumbeze raise his personal grievance of unjustified dismissal by his letter of 5 January 2018?
- (b) If not, did Mr Gumbeze's employment agreement include an explanation of the services available for the resolution of employment relationship problems?

- (c) If Mr Gumbeze's employment agreement did not include that explanation, did that exceptional circumstance occasion the delay in Mr Gumbeze raising his personal grievance of unjustified dismissal?
- (d) If so, is it just to grant leave?

Did Mr Gumbeze raise his personal grievance of unjustified dismissal by his letter of 5 January 2018?

[10] It is helpful to set out a little more of the context.

[11] Nicolette Dickson was Mr Gumbeze's regional manager. Ms Dickson wrote to Mr Gumbeze on 19 June 2017 setting out various concerns and inviting him to meet to discuss them. There followed meetings and further correspondence. In correspondence dated 2 August, Oranga Tamariki raised additional concerns, advised it was appointing an investigator and proposed placing Mr Gumbeze on special leave pending a report. Mr Gumbeze was placed on special leave on 4 August. Further concerns were raised in a letter dated 31 August 2017.

[12] The investigator's report was completed in November 2017. Oranga Tamariki provided Mr Gumbeze its "preliminary view" accepting the report's findings by letter dated 8 December 2017. Ms Dickson advised that her preliminary view was that Mr Gumbeze's employment would be terminated. By letter dated 14 December, Ms Dickson advised that her final decision was that Mr Gumbeze's employment would be terminated with effect from 15 December 2017.

[13] Mr Gumbeze wrote to Ms Dickson on 18 December. He promised a "response" to the 14 December letter by 5 January 2018. Mr Gumbeze drew Ms Dickson's attention to his previous communications regarding concerns and complaints, which he said had not been addressed. He expressed concern that Ms Dickson had "refused to address or attend to the concerns". He expressed shock that public resources were expended on "unethical practices and smear campaigns" but said that he would not subscribe to "scare tactics, jungle

employment policies/law to cover up wrong doing”. Mr Gumbeze concluded “Since these are not private matters, I will submit my written response, evidence, next steps and rationale to the Minister of Children and/or other stakeholders”. The opening and closing statements indicate that the letter was not intended to be read as Mr Gumbeze raising a personal grievance, although the statement about employment policies and law to cover up wrong doing gives context to Mr Gumbeze’s subsequent “response” to the dismissal.

[14] Mr Gumbeze sent his 18 December letter by email and Ms Dickson responded on 19 December. Her email stated “I will await any further correspondence from you with regards to this matter”. That was directed to the “response’ to the dismissal promised by 5 January 2018. Addressing the other matter, Ms Dickson reminded Mr Gumbeze about the importance of maintaining the privacy and confidentiality of third party information gained during his employment, in any communications with external persons. Ms Dickson also clarified Mr Gumbeze’s obligation to return equipment, given his dismissal brought the employment process to an end. Ms Dickson’s response reinforces the view that Mr Gumbeze’s 18 December letter was not intended to be taken as him raising a personal grievance about his dismissal.

[15] Mr Gumbeze then sent by email on 5 January 2018 a letter of that date to Ms Dickson. It reads:

Dear Ms Dickson

Re: Termination of Employment effective from 15 December 2017

I refer to my letter dated 18 December 2017 in which I acknowledged receipt of your letter dated 14th December 2017 regarding your decision to terminate my employment with immediate effect. I also made an undertaking to respond by the 5th of January 2018.

1. I refer to my previous correspondence with you and the reported concerns regarding serious issues of bullying against myself and other staff members, abuse of children in state care by staff who purport to be there for vulnerable children, and wrong doing by self-serving staff members who appear to derive power from unethical and corrupt practices.
2. It is my view that your decision to terminate my employment is yet another attempt to cover-up the wrong doings. For your information, I have held

information regarding intent by the Regional Management Team to terminate my employment since 2015. In the same period. A peer,... was threatened and warned not to engage me for representation in my capacity as a PSA delegate, she went against this warning and subsequently lost her employment.

3. I have informed you in past correspondence that I have evidence that substantiates my allegations and I made it clear that I will be handing over my information to credible investigators from the office of the children's commissioner or ombudsman or both.
4. Your refusal to act on the reports/complaints, which were submitted prior to what amounts to a vicious smear campaign upon my person, has created more questions regarding your integrity and bias in a single story that is bent on stereotyping and dehumanising.

I remain firm and resolute in defence of the vulnerable children's plight and the integrity of the social work profession.

My Next Steps:

I am putting you notice that:

- (a) I am taking legal action to raise a personal grievance for an unfair process and unjustified dismissal. *(This is a private matter to be addressed separately from original issues of concern)*

AND

- (b) I am also initiating an independent investigation on the issues raised backdating to 2012. *(This is a public issue being initiated by a concerned citizen to connect the dots impacting social services in New Zealand)*

It is sad and deplorable that public resources are being used to cover-up wrong doing instead of benefitting the most vulnerable children and their families

Kind Regards

[signed]

[16] Ms Dickson's reply by email on 9 January includes:

This is to advise that I have received your email correspondence dated 5 January 2018, advising of your intention to raise a personal grievance in relation to the termination of your employment with the Ministry on the 15 December 2017.

[17] There is no evidence of any further communication between Mr Gumbeze and OT from 14 December 2017 until February 2020.

[18] A grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹

[19] The Employment Court summarised principles arising from earlier cases on point in *Chief Executive of Manakau Institute of Technology v Zivaljevic*² as follows (omitting references):

[36] 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 has been a series of communications, ... the totality of those communications might also constitute raising the grievance.

[37] 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.

[38] 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 grievance. The employer must know what it is responding to; it must be given sufficient 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.

[20] If Mr Gumbeze raised a personal grievance claim of unjustified dismissal, it was by his 5 January 2018 letter. I accept that Ms Dickson understood the communication as Mr Gumbeze expressing his intention to raise a grievance in the future. Mr Gumbeze's letter did not say what steps he wanted OT to take in response to resolve any grievance and did not specify any remedies. Mr Gumbeze's statement that the dismissal was "yet another attempt to cover-up wrong doings" challenged the genuineness of the reasons advanced in the 14 December dismissal letter. Mr Gumbeze concludes by saying "I am putting you on notice that ... I am taking legal action to raise a personal grievance for an unfair process and unjustified dismissal". This can reasonably be read either that a personal grievance will be raised at a future time or as comprising the raising of that grievance. An employer who reads

¹ Employment Relations Act 2000, s 114(2).

² [2019] NZEmpC 132.

it with the latter understanding would be able to respond to the assertions about “cover-up” and “unfair process”, given previous events.

[21] Mr Gumbeze’s case is similar to *Coy v Commissioner of Police*.³ There the Court held that the following extract from a letter was sufficient to raise the employee’s grievance:

As per our conversation of the 4th of December 2002, I wish to formally advise you that I intend to proceed with personal grievance against the department.

Mr personal grievance will be based on:

- Harassment
- Denial of Procedural fairness
- Intimidation
- Victimisation

My Submission is currently being prepared and I anticipate it will be forwarded to you some time in the New Year, After Association input and other professional advice has been obtained.

[22] Read in conjunction with the earlier oral advice that “I can tell you now I am going ahead with a Personal Grievance because I think I have been personally treated very badly”, Ms Coy was held by a narrow margin to have met the test in s 114(2) of the Act by making it known that she alleged a personal grievance that she wanted her employer to address.

[23] In *Coy* no remedies were claimed, as here. The bullet points lacked specificity, in the same way that Mr Gumbeze’s assertions about genuineness and unfair process lacked specificity. In *Coy* the employer was not asked to do anything in response. Applying *Coy*, I find that Mr Gumbeze’s 5 January 2018 letter raised his personal grievance claim of unjustified dismissal.

[24] I am mindful that Mr Gumbeze’s application for leave was made on the assumption that a grievance was not raised within time. OT’s response to the February 2020 letter included raising that point and counsel for Mr Gumbeze then raised the exceptional circumstance argument. The Authority is not bound to treat a matter as being of the type

³ EmpC Christchurch CC23/07.

described by the parties and may concentrate on resolving the employment relationship problem. Mr Gumbeze's employment relationship problem is his claim to have been unjustifiably dismissed. Despite the form of the present application, I identified that a preliminary issues for investigation included whether Mr Gumbeze's personal grievance was raised within time.

[25] OT raises several additional points which I should deal with. Mr Gumbeze when questioned said that both the 18 December and 5 January letters' references to historical matters were unconnected to the process and reasons for his dismissal. However, the statement at paragraph (2) of the 5 January letter expressly referred to the dismissal and characterised it as a "cover-up". Mr Gumbeze's evidence does not alter that.

[26] Ms Dickson in response acknowledged Mr Gumbeze's letter "advising of your intention to raise a personal grievance". There was no further communication until the 3 February 2020 when counsel for Mr Gumbeze described the 5 January 2018 letter as "notice of a personal grievance". However, the absence of communication from Mr Gumbeze does not detract from the meaning of the statement at paragraph (2) of the 5 January letter.

[27] I am referred to *Dickson v Unilever New Zealand Limited*.⁴ In that case, following the dismissal, management was told that Ms Dickson would fight for her job. Ms Dickson later sent a letter to the employer as follows:

PERSONAL GRIEVANCE NOTICE

To Whom it may concern

Please treat this letter as the submission of my personal grievance based on unjustified dismissal. Particulars of my grievance will be provided presently.

...

There was no further communication. The Court held that the statement did not enable the employer to deduce grounds relied on by Ms Dickson for a grievance and the letter did not give the employer enough information to address any personal grievance. The grievance was

⁴ (2009) 6 NZELR 463.

out of time. However, in the present case, Mr Gumbeze's letter did provide enough information enabling OT to address the grievance.

[28] I am referred to *Creedy v Commissioner of Police*.⁵ There, a barrister wrote to the employer to serve notice of a personal grievance. The letter included mention of the type of grievance, without elaboration. The employer wrote back asking for specific details and disputing that the employee could reserve the right to pursue a grievance later. Despite that, the barrister did not provide details. The barrister's letter was held not to raise a personal grievance. The submission is that Ms Dickson's email similarly put Mr Gumbeze on notice that he had not raised his grievance. The differences are that Mr Gumbeze's 5 January letter was more than mere notification of an intention to raise a grievance later and Ms Dickson's reply did not expressly reject an attempt to reserve a right to pursue a grievance later. Ms Dickson did not request details of the grievance.

Did Mr Gumbeze's employment agreement include an explanation of the services available for the resolution of employment relationship problems?

[29] I will deal with the application for leave, in case I am wrong to find that Mr Gumbeze raised his personal grievance of unjustified dismissal within time.

[30] Mr Gumbeze was a PSA member employed in a position within the coverage of a collective agreement applicable between PSA and his employer between 1 December 2016 and 30 November 2018.

[31] On 9 December 2016, Mr Gumbeze was made a conditional offer of employment by the Ministry for Vulnerable Children Oranga Tamariki (MVCOT) from 1 April 2017. The offer was part of transferring the existing Child Youth and Family service to a new ministry. The offer was of new employment "governed by your existing terms of employment (whether an individual employment agreement or a collective agreement)". The condition allowed MVCOT to complete a safety check for Mr Gumbeze under the Vulnerable Children Act

⁵ [2006] ERNZ 517.

2014. Later, Mr Gumbeze received a letter dated 27 March 2017 confirming his acceptance of the conditional offer, his satisfaction of the condition and his unconditional employment with MVCOT as of 1 April 2017.

[32] Mr Gumbeze says he resigned from membership of the PSA with effect from 29 March 2017. There is a 6 April 2017 email he sent to various people with MVCOT addresses, copied to a PSA Organiser, and a letter dated 29 March 2017 conveying his resignation. Despite these indications of a resignation from PSA membership, Mr Gumbeze still paid union membership fees by deduction from his fortnightly pay, as shown by payroll records produced in evidence. Mr Gumbeze is critical of OT for not giving effect to his resignation, while OT says Mr Gumbeze did not advise it that he was no longer a PSA member and to cease membership fee deductions. The sole point for current purposes is whether Mr Gumbeze's employment agreement included an explanation of services to help resolve employment relationship problems. If Mr Gumbeze remained a PSA member, he was covered by the collective agreement which included that provision.

[33] However, I will make the assumption that Mr Gumbeze effectively resigned from the PSA prior to 1 April 2017. Mr Gumbeze was then employed on an individual employment agreement based on the collective agreement which had previously applied to him.⁶ He and his employer could by mutual agreement vary those terms. Mr Gumbeze says that he sent his acting site manager a letter dated 28 March 2017⁷ to "conditionally accept" the offer of 27 March 2017. The 28 March letter raises several concerns to be resolved before he would sign a new employment agreement. Mr Gumbeze then says he would "continue working under the current employment agreement terms and conditions pending this process". Mr Gumbeze's point is that he never agreed to or signed an employment agreement, so at the point of

⁶ Employment Relations Act 2000, s 61(2).

⁷ OT says it has no record of receiving this letter. For current purposes, I will make the assumption that it was sent to and received by OT.

dismissal there was no written employment agreement, meaning that an exceptional circumstance⁸ existed.

[34] As at 27 March 2017, Mr Gumbeze had already accepted a conditional offer of employment and met that condition. Nothing further was required for there to be a certain and binding individual employment agreement between MVCOT and Mr Gumbeze from 1 April 2017. Mr Gumbeze's 28 March letter makes no difference to that. Based on the assumption favourable to Mr Gumbeze's argument, from 1 April he was employed by OT on an individual employment agreement based on the previously applicable collective agreement. Mr Gumbeze's individual employment agreement incorporated clause 11 of the previously applicable collective agreement as a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance must be raised.

[35] The exceptional circumstance advanced by Mr Gumbeze did not apply. No other exceptional circumstances were asserted.

[36] It is not necessary to consider whether it would be just to grant leave.

Summary

[37] Mr Gumbeze raised a personal grievance claim of unjustified dismissal by his 5 January 2018 letter. The unjustified dismissal personal grievance is before the Authority for investigation and determination.

[38] No exceptional circumstance existed to allow the Authority to grant leave for the unjustified dismissal grievance to be raised out of time.

[39] There was no failure by OT to provide an employment agreement.

⁸ Employment Relations Act 2000, s 115(c).

[40] I reserve costs to be considered as part of an investigation and determination of Mr Gumbeze's unjustified dismissal grievance claim.

[41] The parties might now seek mediation assistance. The Applicant is to report to the Authority if that is agreed (including likely dates). If mediation is not agreed, the Applicant should advise the Authority. A case management conference will be arranged to consider whether the matter should be directed to mediation or if arrangements should be made to investigate Mr Gumbeze's personal grievance claim of unjustified dismissal.

Philip Cheyne
Member of the Employment Relations Authority