

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 266
3137164

BETWEEN	KATHERINE JOY HOLLAND Applicant
AND	TIFFANY & CO. (NZ) LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Laura Scampion and Jordan Jeffcoat, counsel for the Respondent
Investigation Meeting:	18 March 2022 by audio-visual link
Submissions received:	21 January 2022 from Applicant 11 February from Respondent
Determination:	23 June 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This preliminary determination deals with the issue of whether 12 of 73 allegations made by Katherine Joy Holland against her former employer, Tiffany & CO. (NZ) Limited (Tiffany & Co), were raised within 90 days of their occurrence or their coming to Ms Holland's notice. Tiffany & Co says that Ms Holland did not make it aware of these allegations within the 90-day statutory time frame of s 114 of the Employment Relations Act 2000 (the Act). It does not consent to these being raised now. Should it be found that the allegations were not raised in time, the Authority must consider whether there are exceptional circumstances that occasioned the delay and whether it would be just for the matters to be investigated despite the effluxion of time.

[2] For the reasons that follow, the Authority finds that Ms Holland did not take reasonable steps to make Tiffany & Co aware of 10 of the 12 allegations said to be raised outside the 90-day statutory time frame. The Authority further finds that the delay in raising these allegations was not occasioned by exceptional circumstances and that it would not be just for these to be taken any further by way of investigation. It follows that with respect to these 10 allegations, Ms Holland's application for leave under s 114 (4) of the Act is declined.

The Authority's investigation

[3] In accordance with the Authority's time tabling directions recorded in its minute of 10 December 2021, written submissions from Ms Holland and Ms Scampion, Tiffany & Co's counsel, were received on 21 January and 11 February 2022 respectively. A submission hearing via audio-visual link was held with the parties on 18 March 2022.

[4] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[5] Ms Holland is a citizen of the United Kingdom who moved to New Zealand in October 2016 to take up an offer of employment as the Operations Co-ordinator of a newly-established Tiffany & Co store in Auckland.

[6] It is understood that the manager of the Auckland store was Krista Vanopstal with whom Ms Holland shared a good working relationship until the appointment of Beau Nelson as store director in May 2017. Working at the relevant time with Ms Holland were Holly Page and Lena Gerasimenko, both of whom worked as assistant managers, and Neal Ibbotson, the operations manager of the Australia New Zealand division of Tiffany & Co who lived in Australia.

[7] In broad terms, Ms Holland alleges that her managers, Mrs Nelson and Ms Vanopstal, discriminated and disadvantaged her when they discovered that she had become pregnant. As a result, Ms Holland has raised four personal grievances with Tiffany & Co dated 23 April 2018, 9 January 2019, 19 June 2019, and 9 March 2020.

The first personal grievance

[8] Briefly stated, the first personal grievance recorded that Ms Holland was admitted to hospital in April 2018 where she later gave birth to her son who was born six weeks premature. Ms Holland was concerned that she had not received a written response from Mrs Nelson regarding her parental leave application, which had been provided to Mrs Nelson on 29 January 2018 and reminded about on 5 March 2018.

[9] Ms Holland was concerned with the way her performance meeting with Mrs Nelson had gone which was scheduled for one hour but had lasted for almost three. She further expressed concerns about not being given the opportunity to speak or expand on points during the meeting, read feedback from other staff, and not being given a sufficient opportunity to prepare for the meeting.

[10] Ms Holland stated that she felt extremely upset after the review which focussed on negative criticism and personal remarks about her. Moreover, she regarded some of Mrs Nelson's own comments regarding her pregnancy as discriminatory and inappropriate. As Tiffany & Co's human resources department had signed off on the review, Ms Holland sought clarification from the company regarding its position.

Relevant law

[11] Section 114 of the Act sets out what is required of an employee to raise a personal grievance. A personal grievance must be raised within 90 days of the relevant event occurring or coming to the notice of the employee (whichever is later) unless the employer consents to a later date, or with leave from the Authority.

[12] Where an employer does not consent to the personal grievance being raised outside the 90-day period, the employee will need to seek leave from the Authority to raise the grievance after the expiration period. The Authority may only grant an application for leave under section 114(4) of the Act, if the delay in raising the personal grievance was occasioned by exceptional circumstances (set out in s 115) and that it would be just to do so.

[13] Section 115 sets out four exceptional circumstances which, if established, must be accepted as exceptional such that a personal grievance may be raised out of time.

While s 115 does not purport to constitute an exhaustive list, the section refers to the following four circumstances specifically:

- (i) 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 90-day period (s 115(a)); or
- (ii) 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 in time (s 115(b)); or
- (iii) where the employee's employment agreement does not contain an explanation of how to resolve employment relationship problems (s 115(c)); or
- (iv) where the employer has failed to comply with the obligation to provide a statement of reasons for dismissal (s 115(d)).

[14] On 22 April 2021, Ms Holland lodged a statement of problem with the Authority which contains 73 allegations against Tiffany & Co. Of these allegations, Ms Scampion initially challenged allegation 40 which related to Mrs Nelson and Ms Vanopstal ignoring Ms Holland's absence from work from 13 to 17 April 2018 due to illness. However, Ms Scampion concedes in her submissions that allegation 40 was raised with Tiffany & Co in time. As such, for the purposes of this preliminary determination, it is not necessary for the Authority to consider this allegation. However, there remains 11 other allegations in Ms Holland's statement of problem that counsel submits were not raised within the 90-day statutory time frame and to which the company does not consent to an extension of time.

Allegations five and six

[15] Allegations five and six of Ms Holland's statement of problem allege that, on 28 August 2017, she was isolated by Mrs Nelson from head office and from the head of her department and that Mrs Nelson had allegedly stated on the same day that she had a list of individuals she would not hesitate to "move on."

[16] The alleged comments attributed to Mrs Nelson by Ms Holland are denied by Tiffany & Co. It is observed that Ms Holland's first personal grievance of 23 April 2018 makes no reference to what Mrs Nelson has purportedly said about moving certain staff on. However, Ms Holland submits that she raised allegations five and six orally with Sophie Firmager, Tiffany & Co's human resources director, on 12 July 2018. However, this too is denied by the company. There being no record or transcript of that meeting, based on the information and evidence before the Authority, it has not been established that Ms Holland raised allegations five and six within the 90-day statutory time frame.

[17] Nor has it been shown that Tiffany & Co impliedly consented to these allegations being raised out of time. Nothing arises from the company's responses to Ms Holland's grievances that suggests Tiffany & Co was aware of these specific allegations and had actively engaged with them in some way.

[18] Even if I were to find Ms Holland's delay in raising allegations five and six with Tiffany & Co to be occasioned by exceptional circumstances, I do not find it just to grant leave for these to be investigated given that the comment allegedly made by Mrs Nelson was not directed at Ms Holland but at other staff. As such, the comment has no probative value.

Allegations seven and eight

[19] Allegation seven concerned a claim by Ms Holland that Mrs Nelson had offered her overseas training to be "job-ready" for a new supervisor role which was never mentioned with her again after Mrs Nelson learned that she had become pregnant. Allegation eight related to Tiffany & Co's management becoming "suspicious" that Ms Holland was pregnant.

[20] It is common ground that Ms Holland did not put allegations seven and eight to Tiffany & Co in writing. Despite this, it was claimed that the allegations were raised orally with the respondent during the same meeting noted above with Ms Firmager on 12 July 2018. However, there is a paucity of evidence such as meeting minutes, a transcript or an audio recording to verify matters. Without some corroborative evidence, Ms Holland has not established that she verbally raised these grievances with her employer.

[21] In the alternative, Ms Holland claimed that she was unaware of the material facts to raise allegation seven with Tiffany & Co. The submission is incongruous. Ms Holland cannot on the one hand claim to have raised allegation seven with her employer while at the same time deny knowledge of that very allegation.

[22] As to allegation eight, Ms Holland asserts this is part of a continuum of conduct by Tiffany & Co. However, I find allegation eight, which relates to management suspecting Ms Holland of being pregnant, to have no evidential support from the documents before the Authority. The words “came to the notice of the employee” in section 114(1) of the Act is synonymous with actual knowledge of the action giving rise to the grievance. Until such evidence of allegation eight is obtained, it would be premature for it to be included as part of the Authority’s investigation.

[23] Ms Holland submitted that any delay in raising allegations seven and eight in time were occasioned by exceptional circumstances. She provided a number of reasons, some overlapping, which included her vulnerability as a work visa holder, threats made by Mrs Nelson to move certain employees on, and the risk to her pregnancy.

[24] I acknowledge the difficult and stressful circumstances associated with the premature birth of Ms Holland’s son in April 2018. However, s 115 of the Act makes clear that the delay in raising the grievance must be occasioned by exceptional circumstances. It is observed that Ms Holland informed Ms Vanopstal of her pregnancy on 5 January 2018. She therefore had over three months to raise allegations seven and eight with Tiffany & Co’s human resources department before her admission into hospital in mid-April 2018. That did not occur and the respondent has only become aware of allegations seven and eight as a result of Ms Holland’s statement of problem which was filed with the Authority some three years later.

[25] Given the inordinate delay and the effluxion of time with allegations seven and eight, and the fact that there are multiple allegations for the Authority to investigate, it would not be just for these matters to also be included in what is already an intricate and complex investigation.

Allegation nine

[26] Allegation nine of the statement of problem alleges that, on 16 November 2017, Mrs Nelson attempted to expose Ms Holland's pregnancy to other staff at a work dinner by allegedly questioning her about the alcoholic content of her drink.

[27] On its face, it does not appear that allegation nine is an unjustified disadvantage claim. In any case, the incident was not raised within the required 90-day statutory time frame and it does not appear that Tiffany & Co has impliedly consented to the allegation being raised out of time. Something more than just passively standing by is required; there needs to be substantive or affirmative action on the part of the employer.¹ Based on the information and evidence before the Authority, it cannot be said that Tiffany & Co has actively engaged with allegation nine with a view to resolving it.

[28] As to whether there are any exceptional circumstances for the delay in raising allegation nine, Ms Holland's work visa status at the relevant time is neither unusual nor out of the ordinary. To find otherwise would mean that anyone on a temporary visa would meet what is intended to be a high threshold – an exception to the rule. I find no exceptional circumstances for allegation nine to be progressed further to an investigation meeting.

Allegation 16

[29] Allegation 16 was a claim made by Ms Holland that she was ignored and excluded by her operations manager, Mr Ibbotson, following the announcement of her pregnancy in January 2018. As noted above, Ms Holland's first personal grievance of 23 April 2018 makes no reference to allegation 16, which is surprising given that, if Mr Ibbotson had ignored or excluded her from conference calls, there was a reasonable opportunity for Ms Holland to have raised allegation 16 in her personal grievance.

[30] Ms Holland sought to extend the 90-day time frame on the basis that she only became aware of Mr Ibbotson's involvement with her 2018 performance review on 15 October 2018, which is when she was provided with certain documents from Tiffany & Co. However, this does not explain why Ms Holland did not raise allegation 16 much

¹ *Frater v Truck Stops (NZ) Ltd* [2016] NZERA Christchurch 128.

earlier given that Mr Ibbotson's actions would have manifested soon after the announcement of Ms Holland's pregnancy in January 2018, more than nine months earlier. As to whether leave should now be granted to consider a historical allegation, for the same reasons recorded above, I find the delay in raising allegation 16 was not occasioned by exceptional circumstances.

Allegation 20

[31] Allegation 20 of the statement of problem refers to Mrs Nelson ignoring and isolating Ms Holland when a story about her pregnancy was published on Tiffany & Co's global company intranet. It is noted that the story was published on 7 February 2018 where it remained for at least a week. While allegation 20 was not raised in Ms Holland's first personal grievance, she submits that it has been impliedly consented to by Tiffany & Co as the allegation was included in a subsequent letter by Ms Holland of 20 June 2018 to which the company has responded.

[32] Ms Holland's letter of 20 June 2018 was in response to a preliminary findings letter from Elena Leocata, a human resources assistant manager of Tiffany & Co, into various concerns Ms Holland had raised with Ms Firmager. The letter is 10 pages in length and expressly refers to Mrs Nelson not acknowledging her for her story. The letter further records that, on 18 February 2018, Ms Holland had won a prize for her story which was acknowledged by Mrs Nelson during a morning meeting, albeit very briefly.

[33] By referring to Mrs Nelson's brief acknowledgment of the prize Ms Holland had won for her story, it would not have been reasonably clear to Tiffany & Co that she still felt ignored and isolated. Standing back and looking at the 20 June 2018 letter objectively, I find that allegation 20 was not raised with sufficient specificity for Tiffany & Co to either address it or impliedly consent to it being raised out of time.

Allegation 35

[34] Allegation 35 concerned the boycotting of Ms Holland's baby shower by Mrs Nelson and Ms Vanopstal. It is understood that the baby shower, an outside work event, was attended by every member of Ms Holland's team with the exception of Mrs Nelson

and Ms Vanopstal. Allegation 35 was mentioned in Ms Holland's first personal grievance of 23 April 2018 which states:

This is demonstrated by the fact that the team recently took it upon themselves to plan and hold a baby shower for me in March, inviting my partner and his mother and sister, which was extremely generous and touching. This was held outside of office hours at a significant distance from the store and was attended voluntarily by every member of the Auckland team and by two former team members who have left the business. The only members of the team who declined to attend were the two senior managers Beau [Mrs Nelson] and Krista [Mrs Vanopstal].

[35] When Ms Holland writes in her personal grievance letter that both Mrs Nelson and Ms Vanopstal were the only members of her team who did not attend her baby shower, I find that she is not being trite, banal or neutral. At the core of her grievance is her pregnancy and how this affected her career when Mrs Nelson and Ms Vanopstal became aware of it. This is the correct context the above extract must be read. I am satisfied that an objective observer would consider that allegation 35 was raised in time with Tiffany & Co as a grievance.

Allegation 37

[36] Allegation 37 of the statement of problem refers to Mrs Nelson having authored a presentation to senior managers in Australia in which she described how she created a "high performing team" in New Zealand by "breaking down resistance" and "removing the bad apples".

[37] Allegation 37 is similar to allegation 6 which concerned an alleged comment by Mrs Nelson that she had identified several individuals whom she would not hesitate to "move on". For similar reasons, I find that allegation 37 was not raised in time because evidence of the presentation was provided to Ms Holland in October 2019, but was not raised by her former counsel in the fourth personal grievance of 9 March 2020.

[38] There is no suggestion of counsel error and nor has it been demonstrated that the delay in raising allegation 37 was occasioned by exceptional circumstances. Even if exceptional circumstances were found, the reference to "bad apples" was not directed to any one individual in particular. As such, devoting time to exploring an issue that is not directly relevant to the matters at hand would be counterproductive.

Allegation 59

[39] Allegation 59 concerned Ms Holland being invited on 23 January 2019 to a meeting, but later excluded because she wished to bring her child who she was still breastfeeding. The incident allegedly occurred after Ms Holland had written two personal grievances with Tiffany & Co. Given Ms Holland's clear understanding of what was required of her under s 114 of the Act, and acknowledging the sheer number of remaining allegations that the Authority must also investigate, I decline leave for this matter to be raised out of time as it would not be just to do so.

Allegation 65

[40] Allegation 65 of Ms Holland's statement of problem related to her becoming "scapegoated" for health and safety audits that were not undertaken by management. Ms Holland asserts that she raised this allegation orally with Tiffany & Co in discussions with Holly Willing, the store director, in August 2019 and November 2019. The respondent denies the oral disclosures were made.

[41] In the absence of minutes, a transcript or an audio recording of the content of what was discussed between Ms Holland and Ms Willing, it has not been established that allegation 65 was orally raised with Tiffany & Co within the 90-day statutory time frame. Allegation 65 is substantially different from the core of Ms Holland's grievance, namely how she was treated as a result of her becoming pregnant in September 2017. In my view, the allegation is too far removed in time for it to be a continuance of the same grievance. There are no exceptional circumstances.

Conclusion

[42] For the reasons given, allegations 35 and 40 shall remain as part of the Authority's ongoing investigation of Ms Holland's grievances. However, the Authority finds that allegations 5, 6, 7, 8, 9, 16, 20, 37, 59 and 65, were not raised by the applicant with the respondent within the 90-day statutory time frame. The Authority further finds that there are no exceptional circumstances occasioning the delay and that it would not be just for leave for these grievances to be raised outside the expiration period.

[43] Ms Scampion has raised other procedural matters in her submissions which the Authority will discuss with the parties at the next case management conference.

[44] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority