

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 129
3182739

BETWEEN	MICHAEL ROSS Applicant
AND	CONCENTRIX SERVICES (NEW ZEALAND) LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Steph Dyhrberg and Paddy Miller, counsel for the Applicant June Hardacre and Bonnie Simmonds, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions received:	25 October 2022 and 21 November 2022 from Applicant 12 November 2022 and 6 December 2022 from Respondent
Determination:	14 March 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Michael Ross was employed by Concentrix Services (New Zealand) Limited (Concentrix Services) from 4 May 2020 until he resigned from his employment on 15 December 2020. Mr Ross claims that he was constructively dismissed and has lodged a statement of problem with the Authority claiming that he was unjustifiably dismissed and unjustifiably disadvantaged in his employment.

[2] A preliminary issue arises as to whether Mr Ross raised a personal grievance, or personal grievances, within the 90-day period prescribed by s 114 of the Employment Relations Act 2000 (Act).

[3] Mr Ross submits that he raised an unjustified constructive dismissal personal grievance with Concentrix Services by way of text message on 15 December 2020. He argues that the text message conveyed the substance of his personal grievance claim. Mr Ross also claims that he validly raised a personal grievance of unjustified disadvantage.

[4] Concentrix Services submits that the 15 December 2020 text message did not raise a personal grievance in terms of s 114 of the Act and that Mr Ross did not otherwise raise a personal grievance for constructive dismissal or unjustified disadvantage within the relevant 90-day period as required. Concentrix Services does not consent to Mr Ross raising a personal grievance out of time.

The Authority's investigation

[5] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' based on written submissions. An opportunity was provided to the parties to lodge affidavits, if necessary, although none were lodged. I have proceeded to consider the issues based on the submissions lodged.

[6] 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.

[7] As permitted by s174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Preliminary issues

[8] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[9] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[10] There are several principles relevant to whether a personal grievance has been raised in accordance with s 114 of the Act. I summarise them as follows:¹

- (a) The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing, and there is no particular formulation of words that must be used.
- (b) Whether a grievance has been raised for the purposes of s 114(2) is to be objectively determined having regard to the facts of each case. The test is “whether to an objective observer the communication was sufficient to elicit a response from the employer”.
- (c) There is no requirement that the grievance be raised in writing, and it may be established by a “totality of communications”.
- (d) The level of detail required is not such as would be required in, for example, a statement of problem.
- (e) The substance of the grievance must be made clear, but an employee is not required to specify the type of relief sought.
- (f) Merely advising an employer that the employee has a personal grievance, or specifying the statutory type of grievance without more, will be insufficient.

[11] In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, Judge Holden said:²

[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 personal 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.

¹ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2009] NZEmpC 35, at [36] to [38]; *Idea Services Ltd (in statutory management) v Barker* (2013) 10 NZELR 262, at [39] and [41]; *Goodall v Marigny (NZ) Ltd* [2000] 2 ERNZ 30; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] 1 ERNZ 139; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517;

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [38].

Communications said to comprise the raising of the personal grievances

[12] Mr Ross says that the cumulative effect of a series of communications raising concerns with Concentrix Services response to sexual harassment claims and health and safety, including a text message on 15 December 2020, amounted to the raising of personal grievances of both unjustified disadvantage and constructive dismissal.

[13] Concentrix Services submit that Mr Ross gave no indication prior to 15 December 2020 that he had a personal grievance in relation to the sexual harassment investigation or process, and instead that he merely communicated dissatisfaction at the treatment of others. It says that Mr Ross's communications were insufficient to convey a personal grievance in relation to either unjustified disadvantage or in relation to his constructive dismissal claim.

[14] Mr Ross relies on a range of communications. I consider each of the relevant communications below, and their cumulative effect.

Meeting of 19 October 2020

[15] Mr Ross says that he met with his Team Leader Manager and the Senior Operations Manager on 19 October 2020. He says that he advised Concentrix Services he had been approached by two other employees as to their experience of sexual harassment in the workplace and that he thought the alleged wrongdoer was a danger in the workplace.

Interview of 12 November 2020

[16] Mr Ross says that he attended a fact finding interview with the General Manager of Concentrix Services on 12 November 2020. Mr Ross submits that he expressed his view that Concentrix Services could not be relied upon to do the right thing, and that in raising the issues he had he received only "...obstructions, denials, and shutdowns".

Email and letter of 9 November 2020

[17] Mr Ross emailed the CEO of Concentrix Services on 9 November 2020 expressing concerns as to the process followed in relation to the handling of complaints. The correspondence primarily dealt with concerns appearing to be raised on behalf of other employees, although also included the following statements:

I am speaking to you on behalf of myself and the three young woman involved....

...
... It has been rough on the women involved and myself.

Meeting on 3 December 2020

[18] Mr Ross says he attended a meeting on 3 December 2020 where he again met with the General Manager. Mr Ross says that he left that meeting with an impression that a third employee coming forward about her experience with the alleged wrongdoer did not matter to the General Manager.

Conversations between Mr Ross and Mr Brunton – 15 December 2020

[19] Mr Ross says that he spoke to his Team Leader on 15 December 2020 and requested a period of stress leave. Mr Ross says that he asked the Team Leader not to discuss his application for leave with two other employees at Concentrix Services, because he understood they were friends with the alleged wrongdoer, and that he wanted it kept confidential. He further says that the Team Leader was dismissive of his request and refused to provide him with the assurance sought as to confidentiality.

[20] Concentrix Services says that Mr Ross's Team Leader called Mr Ross at approximately 12.00pm midday on 15 December 2020 and that on that call Mr Ross requested two weeks leave effective immediately due to his being emotional and under stress. It says that his Team Leader asked what the cause of the stress was, but that Mr Ross declined to tell him. The Team Leader advised Mr Ross that he could not immediately approve the leave, and that he would have to go through the usual process for making a leave request.

[21] Two audio recordings were provided to the Authority of the telephone conversations between Mr Ross and the Team Leader on 15 December 2022. Mr Ross submits that the recordings show that the Team Leader failed to provide assurance that his request for confidentiality would be honoured. Concentrix Services submits that the recordings should be given no weight as they do not cover each of the conversations in full.

The resignation text message – 15 December 2020

[22] At approximately 2.00pm on 15 December 2020, Mr Ross sent a text message the Team Leader Manager as follows:

I'm resigning

I won't work for a company that doesn't respect its employees.

I specifically asked [Team Leader] not to refer me to [the two other employees] as they are friends of [the alleged wrongdoer].

I told him it was confidential, he has dismissed my concerns.

Concentrix has broken my trust several times over.

I'm so emotionally stressed from this experience and now I am forced to resign for my own health, as well as the clear breach of good faith, among other awful experiences along the way.

Regards

Michael Ross

Did Mr Ross raise a personal grievance?

Mr Ross's position

[23] Counsel for Mr Ross submits that the cumulative effect of his communications, and the text message of 15 December 2020, constituted the raising of personal grievances for unjustified disadvantage and constructive dismissal. He says that the failure by Concentrix Services to provide the confidentiality assurance was the final straw in relation to his claimed constructive dismissal.

[24] It is also submitted on behalf of Mr Ross that the 15 December 2020 text message referenced how he had been unjustifiably disadvantaged in his employment. The text refers to Concentrix breaking Mr Ross's trust several times over, and to "...other awful experiences along the way".

[25] Submissions for Mr Ross were also made to the effect that he was not obliged to notify Concentrix Services every time he was aggrieved by one of its actions. Regardless, it is submitted that the correspondence of 9 November 2020 detailed his concerns about health and safety in the workplace and comprehensively covered his concerns and explained how he wanted those concerns addressed.

[26] Counsel for Mr Ross submits that the Act does not require an employee to state how they would like the matter resolved.³ Further, in response to Concentrix Services submissions as to a requirement that the employer be advised that the employee wants

³ And in doing so referred to *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112, at [40].

their concerns addressed, that “[i]t was too late for the Applicant to express what he wanted the Respondent to do to address his grievances”.

Concentrix Services position

[27] Submissions were made on behalf of Concentrix Services that Mr Ross did not articulate that he felt personally aggrieved, nor that he considered Concentrix Services had breached any obligation towards him, in the correspondence of 9 November 2020. It was submitted that the 9 November 2020 correspondence did not provide context to any of the matters raised in the text message of 15 December 2020 and that the concerns raised had been addressed by the time the text message was sent.

[28] Counsel submitted that discussion between the CEO and Mr Ross on 10 December 2020 indicated that Mr Ross was comfortable with the outcome of Concentrix Services’ investigation and it could not reasonably have connected the general statements in the resignation text message to the content of the 9 November 2020 correspondence.

[29] Concentrix Services also submits that the 9 November 2020 correspondence does not identify the basis of Mr Ross’s alleged personal grievance because the email relates to sexual harassment concerns in the workplace that did not involve Mr Ross, and that the text message of 15 December 2020 contained no reference to the sexual harassment matter.

[30] Concentrix Services does not contest that an employee need not convey how they want a grievance to be addressed, but submit an employee must convey that the employee wants the employer to address it.

[31] In relation to the claim the text message conveyed a personal grievance as to constructive dismissal, Concentrix Services submit that it may have conveyed the type of statutory grievance Mr Ross was seeking to raise, but that it could not be said to have conveyed the basis for the grievance with sufficient detail such as to afford the employer an opportunity to respond to it on the merits.

[32] Concentrix Services argues that the sentence “I am forced to resign for my own health, as well as breach of good faith” does not provide any relevant context, and as such does not convey the basis for the alleged grievance. It says that the sentence is too vague to be taken as Mr Ross raising a grievance whether read in isolation or not. It

submits that the text only refers generally to alleged breaches and does not explain the situation said to give rise to the grievance.

Discussion and analysis

[33] The overall tenor of the 15 December 2020 text message was that Mr Ross was resigning because the Team Leader dismissed concerns he expressed as to confidentiality. There is no clarity at all in the text message as to what other concerns Mr Ross had. The text message did not raise a personal grievance of unjustified disadvantage in relation to Concentrix Services treatment of the sexual harassment matters, nor did it provide a sufficient connection to any earlier concerns he may have had such as to put Concentrix Services on notice that he had an unjustified disadvantage personal grievance.

[34] The 15 December 2020 text message did not explain at all what the alleged breach of good faith related to, nor did it explain what the “other awful experiences” were. I do not consider an objective observer, considering the context of the earlier communications, would have understood Mr Ross was raising a personal grievance of unjustified disadvantage.

[35] I find that Mr Ross did not raise a personal grievance in relation to an alleged unjustified disadvantage. His communications were in the nature of a complaint, and whilst there was some reference to his being impacted, I do not consider the communications were sufficient to make it clear that Mr Ross had a personal grievance. Mr Ross made no reference to having any sort of claim in his communications prior to the text message of 15 December 2020. He clearly expressed concerns with Concentrix Services handling of the relevant complaints, and he undoubtably raised those concerns. However, I do not consider an unjustified disadvantage personal grievance was raised.

[36] Concentrix Services says that the communications prior to the text message did not relate to any alleged grievance raised by Mr Ross. However, the issue is not that, and instead it is one of whether any of the individual communications, or the totality or series of communications, conveyed a personal grievance. I find that not to be the case. I find there is nothing in the text message that could reasonably be seen as linking the resignation to Mr Ross’s complaints about the harassment and health and safety issues. Further, whilst the earlier communications conveyed dissatisfaction, I do not consider,

in isolation or when taken in their totality, they raised an unjustified disadvantage personal grievance.

[37] The text message of 15 December 2020 did contain elements that might make up a constructive dismissal claim. It also referred specifically to the confidentiality issue and the assurance sought by Mr Ross not being provided. Whilst it included those two things, it conveyed no express desire to have Concentrix Services address the issues.

[38] An employee does not need to specify the resolution sought when raising a personal grievance. However, that is different from saying that an employee does not need to convey that they have a personal grievance they want their employer to address.

[39] As Concentrix Services submitted, Mr Ross could have said he wanted his concerns addressed but did not explicitly do so in the text message. It may have been, as was submitted on behalf of Mr Ross, that it was too late for him to express how he wanted the grievance to be addressed. However, it was not too late for Mr Ross to explain that he wanted Concentrix Services to address his personal grievance. Section 114(2) of the Act requires that the employee takes steps to advise their employer that they have a personal grievance that they want their employer to address.

[40] An employee's desire to have the employer address the personal grievance might be implied. Such an implication has been held to be sufficient by the Employment Court where an employee's description of their concerns in "an official complaint" letter containing allegations of unprofessional and unjustified treatment, and accompanied by other detailed notes, was made by an employee.⁴

[41] The text message of 15 December 2020 conveyed a resignation and some of the reasons for the resignation. It also contained complaints, including that, at least in part, Concentrix Services actions had forced Mr Ross to resign. I consider that Mr Ross did convey that he had a complaint in the nature of an unjustified dismissal personal grievance as to what he considered was a forced resignation. I consider communication of the alleged personal grievance was enough to establish that Mr Ross wanted Concentrix Services to address his complaint.

⁴ *Gates v Air New Zealand Ltd* (2009) 7 NZELR 41, at [17] and [18].

[42] The specific reference to forced resignation, accompanied when the full text message is read by specific reference to the confidentiality issue, was sufficient to establish that Mr Ross had a complaint in the nature of an unjustified dismissal personal grievance. Whilst no specific remedy was sought, I consider that the raising of the personal grievance on the basis that Mr Ross was forced to resign because of Concentrix Services actions, was enough to satisfy s 144(2) of the Act.

[43] The 15 December 2020 text message specifically mentioned the confidentiality issue and read in context I find that it clearly communicates that as being the primary basis for the forced resignation. I consider that sufficiently specified the personal grievance such as to enable Concentrix Services to respond to it on the merits. I do not consider s 114(2) requires any separate expression that an employee wants the employer to address a personal grievance. To the extent I may be incorrect in that approach, I also find that the assertion of the resignation being forced, and the content of the text message as including complaint rather than merely communicating the fact of resignation, implied that Mr Ross had a personal grievance he wanted Concentrix Services to address.

Conclusion

Constructive dismissal

[44] I find that Mr Ross did raise a personal grievance with Concentrix Services as to his constructive dismissal claim in compliance with s 114 of the Act. When taken in context, I find that the text message made it sufficiently clear that Mr Ross alleged a personal grievance that he wanted Concentrix Services to address.

Unjustified disadvantage

[45] I find that Mr Ross did not validly raise a personal grievance of unjustified disadvantage within the 90-day period required by s 114 of the Act. The correspondence of 9 November 2020 did not sufficiently convey that Mr Ross was aggrieved in his own right, nor that he was alleged to have been impacted personally by actions of Concentrix Services, and nor that he had a personal grievance as opposed to him making a general complaint.

[46] The text message of 15 December 2020 contained no discernible reference to other communications or events that could be said to have amounted to the raising of a personal grievance based on unjustified disadvantage and Mr Ross's alleged concerns

about health and safety or the treatment of harassment claims in the workplace. I do not consider a personal grievance for unjustified disadvantage was otherwise raised when considering the earlier communications, and nor when considering the totality of the communications.

Costs

[47] Costs are reserved.

Case management conference

[48] A case management conference will be arranged to discuss the further conduct of this matter.

Rowan Anderson
Member of the Employment Relations Authority