

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 140  
3171589

BETWEEN

PAULA DOYLE  
Applicant

AND

POINT CHEVALIER  
BOWLING CLUB INC  
Respondent

GLENN POOLE  
Second Respondent

IAN MCKENNA  
Third Respondent

SIMON MUNRO  
Fourth Respondent

Member of Authority: Marija Urlich

Representatives: Rachel Nightingale, counsel for the Applicant  
Ashley Johns, counsel for the Respondents

Investigation Meeting: On the papers

Determination: 21 March 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Paula Doyle was employed by the Point Chevalier Bowling Club Inc (PCBC) as a bar staff team member from 8 October 2020. When and how her employment ended is disputed by the parties. Ms Doyle says her employment ended on either 24 July 2021 or 16 March 2022 by way of unjustified constructive dismissal. She says, on either scenario she raised a personal grievance for unjustified dismissal within the 90-day statutory timeframe. She also says she raised personal grievances for unjustified actions

within the 90-day time period. Or, if necessary, she seeks leave from the Authority to raise these personal grievances out of time.

[2] PCBC and the second, third and fourth respondents (the respondents) do not accept Ms Doyle raised any personal grievances within the statutory 90-day statutory time frame and do not consent to her raising personal grievances out of time.

[3] This determination deals only with the preliminary jurisdictional issue of whether Ms Doyle raised personal grievances within the statutory 90-day timeframe.

### **The Authority's investigation**

[4] By consent the preliminary issue is determined on the papers. The Authority has received information from the parties filed in accordance with timetabling directions.

[5] During the course of my consideration of this employment relationship problem it became apparent the nature of Ms Doyle's personal grievance may be a different type from that alleged, specifically whether the events of 24 July could amount to an unjustified constructive dismissal and the subsequent communications between the parties between 24 July and 16 August could amount to a raising of a personal grievance.<sup>1</sup> The parties provided further submissions and information on these issues in accordance with a revised timetable.

[6] As permitted by s 174E of the Employment Relations Act 2000 (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. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

### **Issues**

[7] The issues requiring investigation and determination are:

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<sup>1</sup> Employment Relations Act 2000, section 122.

- (i) did Ms Doyle raise personal grievances for unjustified dismissal and/or unjustified action within 90 days of her employment with PCBC ending?
- (ii) if Ms Doyle's personal grievances were not raised within time, are there any grounds on which his claim could be permitted to progress?

### **Relevant law**

[8] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[9] The grievance is raised with the 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 the employee wants the employer to address.<sup>2</sup>

[10] In relation to s 114(2) and how a grievance is raised the Employment Court has said:<sup>3</sup>

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.”

[11] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles for raising a personal grievance:<sup>4</sup>

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<sup>2</sup> Section 114(2) of the Act.

<sup>3</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

<sup>4</sup> [2019] NZEmpC 132, at [36]–[38].

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 had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

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.

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 it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[12] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and
- (b) considers it just to do so.

[13] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

- (a) 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 period specified in section 114(1); or
- (b) 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 within the required time; or
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

### **The parties' employment agreement**

[14] Under the heading "Termination" the parties' written employment agreement provides:

As your employment is on a casual basis the Point Chevalier Bowling Club is under no obligation to offer you any ongoing employment. However should you decide that you do not wish to make yourself available to undertake casual employment with the company we would expect that you provide us with 14 days' notice of such an intention?

[15] The issue of whether Ms Doyle's employment was casual is not decided in this determination.

### **Background**

#### *24 July 2021 incident*

[16] On Saturday 24 July 2021 Ms Doyle was working in the PCBC bar. This was her usual place of work. Ms Doyle says a number of events during the course of her work that day, including a personal event which caused her embarrassment and discomfort, caused her to become overwhelmed. In an interaction with Mr McKenna, the third respondent and a PCBC committee member, Ms Doyle told him she was extremely stressed, that she could not "handle this anymore" and "I am done with this and I quit." Ms Doyle then left the workplace. Following a number of missed calls and later that evening she exchanged text messages with her manager Mr Poole, the second respondent:

Mr Poole

Can you answer your phone please.

Can you pick up your bloody phone. I need to know whats going on.

Ms Doyle

Unable to work Sunday.

Mr Poole

You need to come and see me first thing Monday morning.

Ms Doyle

I think we have mixed messages here, I told Ian I quit. I won't work under those conditions. I was just giving you a heads up so you can organize cover.

Mr Poole

You need to come in and see me. Ian is not your boss. I am your employer. I signed your contract. You need to give us two weeks notice in writing of your intention to terminate your contract. Thanks.

Ms Doyle

Please email me a copy of the contract. I am not available next week Monday to Friday.

[17] On 25 July Ms Doyle was contacted by another committee member. They spoke at length and discussed Ms Doyle providing an incident report as to the previous day's events and meeting with PCBC committee members to discuss such a report.

*28 July – exchange of correspondence*

[18] On Wednesday 28 July at 4.09pm Ms Doyle emailed PCBC a detailed incident report of the events of 24 July. She said in the report this incident was one of a number of ongoing issues for staff which had not been addressed, the situation was causing her stress and making her unwell, she was now seeking medical advice due to the consequences of not being able to take a bathroom or other break and in the past the issues had been explained away by Mr Poole. Ms Doyle set out her view of the factors contributing to the issues. With respect to her employment, Ms Doyle detailed how she had come to work for PCBC and summarised her current position as:

I am now unemployed, unable to get any benefit as I walked out and am extremely stressed that I am not in a healthy, positive mindset to even apply for a new place of work. I have sought advice from an expert in this field and WINZ have also been advised of the situation.

[19] At exactly 4.09pm Mr Poole emailed Ms Doyle as to her intentions regarding her employment. It appears from this email Mr Poole was unclear if Ms Doyle had resigned or intended to resign.

[20] On 30 July Ms Doyle went to her doctor and provided that day to the PCBC a medical certificate which includes '[Ms Doyle] has been suffering from stress, and as a result is medically unfit to work from 24 July 2021 until further notice.'

[21] Between 2 and 4 August Ms Doyle exchanged emails with Mr Munro, the fourth respondent and a former committee member of PCBC. The matters canvassed include that Ms Doyle would be paid for hours worked on 24 July, when that payment would be made, arrangements for the return of PCBC property including keys "while [Ms

Doyle is] off work”, that a copy of her signed employment agreement be provided and setting up a meeting with committee members to discuss the incident report. With respect to the meeting, Mr Munro advised Ms Doyle who would attend from the committee, Ms Doyle advised she would attend with a “support person/advisor”, they agreed the meeting would be minuted and a copy of the minutes sent to her. During the email exchange Ms Doyle noted, with regard to the return of PCBC property “.....although at this point I have not submitted my resignation. I will not be making a decision on this just yet”.

[22] On 4 August and prior to the planned meeting PCBC sent Ms Doyle a response to her incident report. The response acknowledged the events of 24 July were distressing and upsetting to Ms Doyle and PCBC’s intention was “...to ensure that all employees, including [Ms Doyle] are better equipped and supported to carry out their role in the future”. The issues identified in the incident report are summarised in the response as was the committee response and future proposed action to address the issues. There is no suggestion in the response that Ms Doyle’s incident report was inaccurate or exaggerated.

#### *5 August 2021 – meeting to discuss the incident report*

[23] On 5 August Ms Doyle met with committee members to discuss the incident report. The minutes of the meeting include Ms Doyle’s concerns about the workplace and how she would like those concerns addressed including that she was rostered 30 hours work each week, complete her bar manager course, have an improved relationship with her manager, receive support for large functions and a documented plan and telephone tree for dealing with difficult situations and calling in additional help. The minutes record Ms Doyle as undecided as to whether she wished to continue her employment. The parties agreed to resume the meeting.

#### *16 August meeting*

[24] The issues-based discussion the parties’ had on 5 August does not appear to have continued at the 16 August meeting. The focus of the meeting shifted to the relationship between Ms Doyle and Mr Poole and became heated. I note Mr Poole was not at the first meeting. A committee member present at the meeting attempted to get the discussion back on track – he asked Ms Doyle if she wanted to return to work at

PCBC and when she did not answer asked her if she wanted some other outcome. The meeting ended without resolution of the issues.

*18 August*

[25] On 18 August Ms Doyle emailed Mr Munro:

...on Monday I should have received a pay advice/pay slip. I am still employed and covered with a medical certificate, therefore, even with zero hours and zero pay, I still require a pay slip to be processed and sent to me, for my records and to send on to winz.

[26] He replied that day he would arrange for the payslip to be sent which occurred. This exchange coincided with COVID-19 level 4 lockdown announcement which continued in Auckland for some months.

*November 2021 – letter of recommendations*

[27] The next communication between the parties was when Ms Doyle wrote to PCBC on 15 November setting out a list of requirements to assist her return to work.

*21 January and 17 March 2022 – personal grievance raised*

[28] On 21 January 2022, Ms Doyle, through her representative, raised a personal grievance for unjustified disadvantage and breach of good faith and that she was a permanent employee who had remained on unpaid sick leave since 24 July 2021. On 17 March she raised further personal grievances for unjustified disadvantage and unjustified constructive dismissal. In the letter she tendered her resignation.

[29] On 25 March PCBC responded that it did not accept Ms Doyle's claims.

## **Discussion**

(i) *Did Ms Doyle resign on 24 July 2021?*

[30] A resignation is a unilateral act and an employee is not required to justify their decision to resign or demonstrate it was well thought through.<sup>5</sup> The assessment of

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<sup>5</sup> *Mikes Transport Warehouse Limited v Vermuelen* [2021] NZEmpC 197 and [39].

whether an employee resigned is an objective one.<sup>6</sup> Whether a resignation resulted from the actions of the employer may be assessed under the law of constructive dismissal.<sup>7</sup>

[31] In *Urban Décor v Yu & Anor* the Court summarised the correct approach to assessing whether a resignation has occurred:

...whether or not an employee has resigned is an objective test as to whether a reasonable employer, with knowledge of the surrounding circumstances, would have reasonably considered the employee to have resigned. Clear words of resignation are likely to clear that bar unless a different understanding can be informed by the surrounding circumstances.

As already noted, resignation is a unilateral act. Having been presented with a resignation, there is no ability for an employer to reject and declare the relationship ongoing.

[32] On 24 July 2021 Ms Doyle gave clear words of resignation, she left the workplace and did not return. Later that evening, after she was home and had collected herself, she confirmed her resignation to her manager Mr Poole.<sup>8</sup> On 28 July she submitted a detailed incident report which included she no longer considered herself employed. Ms Doyle was not rostered onto work again and did not present at the workplace for work. On an objective assessment, considering the relevant surrounding circumstances Ms Doyle resigned on 24 July.

[33] The parties' contemporaneous correspondence shows PCBC was uncertain as to whether Ms Doyle's communications amounted to a resignation. This may have been because a view had been formed that her resignation was conditional on being tendered in writing or made to the manager, as suggested by Mr Poole's text messages to Ms Doyle on 24 July and his email to her of 28 July. Such a view would be mistaken. Ms Doyle's resignation was unconditional. PCBC could not impose conditions on acceptance of the resignation because, as stated above resignation is a unilateral act. The parties' employment agreement does not require notice to be given in writing or to the manager and the requirement to provide 14 days' notice is somewhat vague, which might be appropriate given the parties agreed to characterise the employment relationship as casual in the written employment agreement.

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<sup>6</sup> At [39].

<sup>7</sup> At [33] – [42].

<sup>8</sup> Ms Doyle Incident Report page 3, final sentence.

[34] Having found Ms Doyle resigned her employment on 24 July is this then a situation where, on reflection, Ms Doyle resiled from her resignation? This seems likely. The difficulty Ms Doyle then faces is the information before the Authority does not support a finding that the parties agreed to revive or renew the employment relationship within the notice period.<sup>9</sup> The parties' apparent attempts to renew the relationship were not successful – the terms Ms Doyle set on 5 August for her return to work were not accepted at that meeting and by the time the parties resumed their discussion the 14-day contractual notice period, if Ms Doyle could be said to have been bound by it, had passed and, notwithstanding, no agreement to renew was reached.

(ii) *Did Ms Doyle raise a personal grievance within the statutory 90-day period?*

[35] Having found Ms Doyle resigned on 24 July to determine whether Ms Doyle has raised a personal grievance within the statutory 90 days the Authority must examine the communications between the parties for the period 24 July to 18 August 2021 and consider whether individually or in total they would constitute raising a grievance.<sup>10</sup>

[36] Reading the communications in totality it is clear Ms Doyle was dissatisfied with the circumstances of her employment, her view was she could no longer work under those circumstances and sought to negotiate a resolution of those concerns. This is not a situation where an employee advises of their intention to raise a personal grievance. In the incident report Ms Doyle narrated in detail her concerns about the workplace, how they had impacted on her, her view that as a consequence of those actions she was no longer employed and that she sought to resolve those concerns. She has raised a personal grievance for unjustified dismissal in circumstances which are likely properly assessed under the law of constructive dismissal.

[37] That Ms Doyle sought resolution of her concerns as an apparent condition to resume the employment relationship does not exclude the communications also amounting to raising a personal grievance. Such a situation, particularly given the complexity of the circumstances faced by the parties which they were attempting to

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<sup>9</sup> *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC3/94, 24 February 1994 at 2.

<sup>10</sup> Being the time span of the parties' communications within the 90-day period calculated from 24 July 2021.

resolve with themselves, is entirely consistent with an informal and accessible personal grievance process.

[38] Given the above findings it is not necessary to consider whether leave should be granted to raise a personal grievance out of time.

### **Outcome**

[39] Ms Doyle has raised a personal grievance for unjustified dismissal within the 90-day statutory timeframe.

[40] The parties will be contacted shortly by the Authority to progress the investigation of this employment relationship problem.

### **Costs**

[41] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority