

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 389
3137981

BETWEEN RORY MCCORMACK
Applicant

AND MARIN CONSTRUCTION
LIMITED
Respondent

Member of Authority: Alex Leulu

Representatives: David Fleming, counsel for the Applicant
Ray Parmenter, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 28 April 2023 from the Applicant
22 March 2023 and 12 May 2023 from the Respondent

Determination: 21 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Rory McCormack is pursuing personal grievance claims against his former employer, Marin Construction Limited (Marin) for unjustified disadvantage and unjustified dismissal. In March 2018 Mr McCormack started his employment for Marin as a carpenter. On 22 November 2019 Marin medically suspended Mr McCormack from his employment. Mr McCormack did not return to the workplace and, on 30 June 2020 he was dismissed by Marin because he no longer held a valid work visa.

[2] In its statement in reply, Marin opposes Mr McCormack's personal grievance claims alleging they were not raised within the 90-day time period in accordance with the Employment Relations Act 2000 (the Act).¹ This determination addresses the

¹ Employment Relations Act 2000, s 114.

preliminary issue of whether all or any of Mr McCormack's claims were raised within the 90-day time period and, if not whether the Authority should grant leave for his claims to be raised out of time.

Claim for unjustified disadvantage

[3] Mr McCormack's grievance for unjustified disadvantage covers the following allegations against Marin:

- (i) During his employment, Mr McCormack made a number of complaints to Marin about various workplace issues. He also asked Marin for information related to his complaints. Mr McCormack says he was unjustifiably disadvantaged because Marin failed to properly address his complaints and his requests for information.
- (ii) As a result of an ankle injury in April 2019, Mr McCormack required surgery in June 2019 and was unable to work. Mr McCormack says Marin had unreasonably demanded his return to full time work as it was contrary to medical advice and a prior arrangement between them for a gradual return to work.
- (iii) In June 2018 Mr McCormack claims he was a victim of a workplace assault. Because he complained to Marin about the assault, he says he became the victim of bullying and harassment from other Marin workers. Mr McCormack says Marin allowed the abuse from the other workers to continue unabated.
- (iv) In mid-2018 Mr McCormack and Marin attended mediation where Mr McCormack claims Marin agreed to provide him with an apprenticeship. Mr McCormack claims Marin failed to follow through with the agreement.

Claim for unjustified suspension and constructive dismissal

[4] Mr McCormack claims his medical suspension on 22 November 2022 was unjustified because it was unnecessary, and Marin failed to consult with him before deciding to suspend his employment.

[5] Mr McCormack also claims he was also constructively dismissed on 22 November 2022 because Marin required his return to fulltime work after his ankle

surgery and, he says Marin failed to address his bullying and harassment complaints. He also says Marin's actions prevented him from meeting his work visa obligations.

Investigation of the preliminary issues

[6] The parties agreed these preliminary issues could be investigated and determined 'on the papers'. In doing so, the Authority has considered the following lodged documents: an amended statement of problem, a statement in reply, written submissions from Mr McCormack dated 28 April 2023 and 26 May 2023, memoranda from Marin dated 22 March 2023 and 12 May 2023 and an affidavit from Mr McCormack dated 20 March 2023.

[7] The issue for determination is whether or not Mr McCormack had raised any or all of his personal grievance claims within the 90-day time period in accordance with the requirements of the Act.

[8] 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.

The statutory requirements

[9] Personal grievances must be raised by an employee with their employer within 90 days from when the alleged personal grievance action occurred or came to the notice of the employee, whichever is later.² Alternatively, an employer can consent to the raising of a personal grievance outside of the 90-day timeframe.

[10] A personal grievance is raised 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. This process provides an employer with sufficient notice to be able to appropriately respond to the grievance.³

[11] The Authority also has discretion, to grant an employee leave to raise a personal grievance out of time and can impose any conditions it sees fit if it:

² Employment Relations Act 2000, s 114.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

- (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.

[12] Factors that constitute exceptional circumstances include the following:

- (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 specific period; or
- (b) where the employee made reasonable arrangements to have the grievance raised on their behalf by their agent, 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;⁴ or
- (d) where the employer has failed to comply with the obligation to provide a statement of reasons for dismissal.⁵

Personal grievance for unjustified disadvantage

Three of Mr McCormack's initial four claims were raised in time

[13] With the benefit of time and the provision of further information and submissions from both parties, Marin now accepts a personal grievance for unjustifiable disadvantage was raised in time. Marin concedes a grievance was raised by Mr McCormack in a letter to Marin on 17 November 2019 (the grievance letter). Marin accepts the letter addresses three of Mr McCormack's four claims for unjustified disadvantage. Accordingly, the Authority has jurisdiction to investigate these three claims for unjustified disadvantage.

Mr McCormack's mediation claim was not raised in time

⁴ That is required by section 54 or section 65, as the case may be.

⁵ Employment Relations Act 2000, s 120(1).

[14] Marin argues the only claim not addressed by the grievance letter is in relation to the alleged failure by Marin to adhere to an agreement with Mr McCormack at mediation. In his submissions, Mr McCormack concedes there is no evidence to show the parties had entered into a formal settlement agreement under the Act.⁶

[15] There is also no evidence to show Mr McCormack had raised a personal grievance for disadvantage relating to the agreement at mediation prior to the grievance letter. Given mediation occurred in mid-2018 and the grievance letter was not sent until 17 November 2019, Mr McCormack is well outside the 90-day period. Marin has not consented to this claim being lodged outside the statutory timeframe.

There are no exceptional circumstances

[16] Mr McCormack submits there are exceptional grounds for any of his grievances being raised outside the required timeframe. Specifically, he identifies the failure of the actions of his previous employment advocate at the time to lodge the personal grievances within the required time.

[17] It is unclear when Mr McCormack had engaged the services of his previous advocate, but it is clear the advocate was engaged on 17 November 2019 (evidenced by the grievance letter). This is after the mediation had occurred. There is no evidence Mr McCormack instructed an advocate or lawyer to raise a personal grievance for the apprenticeship agreement at mediation. There are no other exceptional circumstances that warrants the granting of leave for this grievance to be raised out of time. For these reasons, the Authority does not have jurisdiction to investigate Ms McCormack's unjustified disadvantage claim in respect of any agreements reached at mediation.

Mr McCormack's further disadvantage claim

[18] On 19 November 2019, Mr McCormack texted Marin alleging abuse and threatening comments towards him by another Marin staff member. The alleged abuse occurred on both 18 and 19 November 2019. In the text message, Mr McCormack says it would be "added to the list". Mr McCormack submits now he had raised a personal grievance through his text message on 19 November 2019. The reference to "the list" is in respect of the matters he raised within the grievance letter two days before.

⁶ Employment Relations Act 2000, s 149.

[19] Although Marin acknowledges the text message in evidence, it has not responded specifically to Mr McCormack's submission or whether this further claim is within the jurisdiction of the Authority to investigate. I am satisfied Mr McCormack's text message considered together with his grievance letter provided enough information to realise a further personal grievance was raised on 19 November 2019. The Authority has jurisdiction to investigate this claim.

Personal grievance for unjustified suspension

[20] After his medical suspension on 22 November 2019, there was little direct communication between Mr McCormack and Marin. Marin was first informed of a grievance claim for unjustified suspension when the statement of problem was served on the company on 30 June 2021. This is well outside the statutory 90-day period for raising a personal grievance.

[21] Mr McCormack again relies on the failure of the actions of his previous employment advocate to lodge his personal grievance within the required time. There is no evidence to suggest Mr McCormack had discussed his suspension or termination with his advocate until he emailed his advocate on 16 June 2020. In the email, Mr McCormack says to his advocate:

"I need to know, are you representing me?."

"We started in November last year. It's now mid-June. I've been sacked since you sent a letter in my behalf."

[22] The letter referred to in the email appears to be the grievance letter of 17 November 2019. There is no reference or instruction by Mr McCormack in the email about raising a personal grievance for his medical suspension on 22 November 2019. Even if it did, the email is well outside the 90 days from Mr McCormack's medical suspension. For these reasons, there are no exceptional circumstances allowing the Authority to grant leave for Mr McCormack to lodge a claim outside the required time frame. The Authority does not have jurisdiction to investigate Mr McCormack's claim for unjustified suspension.

Personal grievance for unjustified dismissal

[23] With the appointment of new representation and again with the benefit of time and availability of new information, Mr McCormack acknowledges his claim for

constructive dismissal on 22 November 2019 should be a claim for unjustified dismissal on 30 June 2020.

[24] Mr McCormack's claim for unjustified dismissal is based on Marin terminating his employment by email on 30 June 2020 for not having the appropriate immigration visa. Mr McCormack replied to this email on the same day saying he was unjustifiably dismissed by Marin.

[25] Marin has accepted Mr McCormack's revised position and concedes that, based on Mr McCormack's email of 30 June 2020, a personal grievance for unjustified dismissal was raised within time. Marin's acceptance of this position is subject to Mr McCormack lodging a further amended statement of problem. Mr McCormack has acknowledged that an amended statement of problem will be lodged once a preliminary determination is made.

Summary and next step

[26] For reasons set out above, the Authority has jurisdiction to investigate the grievances identified in this determination as raised within time.

[27] As agreed to by the parties, an amended statement of problem will be lodged as soon as practicably possible. Upon lodging of the amended statement of problem, Marin will have 14 days to lodge a statement in reply. A further case management conference will be convened with the parties to set a timetable and date for an investigation meeting. The timetable will take account of the direction to further mediation given below.

[28] Before incurring the time and expense of preparing for an Authority investigation, it is practical and appropriate for the parties to consider again whether they could still resolve their employment relationship problem differences between themselves. Given the amount of time that has passed since the matter was first lodged with the Authority and taking into account the outcome of this determination in clarifying the areas of dispute between the parties, mediation may help resolve the matter amicably.

[29] Accordingly, under s 159 of the Act, the parties are directed to attend further mediation by no later than 31 August 2022. Under s 159(2) the parties must comply

with this direction and attempt in good faith to reach an agreed settlement of their differences.

Costs

[30] Costs are reserved pending the final determination of the matter.

Alex Leulu
Member of the Employment Relations Authority