

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 665  
3230059

BETWEEN

ASHMITA KHATRY  
Applicant

AND

MAJESTIC NAILS AND  
BEAUTY LIMITED  
Respondent

Member of Authority: Davinnia Tan

Representatives: Eleanor Dyche, counsel for the Applicant  
Stephanie Berkahn and Jeremy Sparrow, counsel for the  
Respondent

Investigation Meeting: On the papers

Submissions received: 12 October 2023 from the Applicant  
1 November 2023 from the Respondent

Determination: 9 November 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Ashmita Khattry was employed by Majestic Nails and Beauty Limited (MNBL) as a store manager in September 2020.

[2] Ms Xiao Niu is the sole director and shareholder of MNBL.

[3] On 27 October 2022, Ms Khattry was granted a Migrant Exploitation Protection Work Visa.

[4] On 4 November 2022, Ms Khattry resigned from MNBL.

[5] On 1 February 2023 counsel for Ms Khattry wrote to MNBL raising several personal grievances on Ms Khattry's behalf. Counsel for Ms Khattry claimed that

MNBL's treatment of Ms Khatry amounted to discrimination, unjustified action, bullying and harassment, and constructive dismissal.

[6] In doing so, counsel for Ms Khatry made reference to various conditions of her employment going back to the first two years of employment and complained about Ms Niu's conduct towards Ms Khatry when Ms Khatry was on sick leave and on holiday. Dates were not provided for these alleged actions. However in September 2022, Ms Khatry did take some time off work due to sickness and it is alleged that Ms Niu continued to harass Ms Khatry during this period.

[7] On 17 May 2023 Ms Khatry lodged a statement of problem with the Authority and made the following substantive claims against the respondent:

- (a) Discrimination – s103(1)(c) of the Employment Relations Act 2000 (the Act);
- (b) Unjustifiable action – s103(1)(b) of the Act;
- (c) Bullying and harassment as a breach of good faith obligations;
- (d) Constructive dismissal – s103(1)(a); and
- (e) Arrears of wages owing.

[8] The claim of constructive dismissal arises from the same, if not similar, factual circumstances as the claims of discrimination, unjustified disadvantage, bullying and harassment.

[9] MNBL considers that that Ms Khatry is outside the statutory 90-day time limit to raise items (a) to (c) but accepts that her unjustifiable (constructive) dismissal claim is within the 90-day time limit and that her claim for arrears of wages owing is also within the six-year statutory time period.

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

[10] The jurisdiction issues were discussed with the parties' representatives during a case management conference (CMC) that was held on 13 September 2023 . As a result of discussions during the CMC it was agreed that the 90-day issue would be dealt with as a preliminary issue, prior to a substantive investigation.

[11] By agreement the preliminary jurisdiction issue was dealt with 'on the papers'.

[12] 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.

### **The issues**

[13] The issues requiring investigation and determination were:

- (a) Whether Ms Khatri raised any or all, of her personal grievance claims within the statutory 90-day time period;
- (b) If not, should leave be granted under s 114(4) of the Employment Relations Act 2000 (the Act)?
- (c) Should either party contribute to the costs of representation of the other party.

### **Submissions**

#### *Ms Khatri's submissions*

[14] Counsel for Ms Khatri submitted that the “claims of discrimination, unjustified disadvantage, breach of good faith obligations, constructive dismissal, and arrears of wages” were “raised at numerous points throughout the Applicant’s employment”.

[15] Counsel for Ms Khatri also submitted that there were exceptional circumstances because Ms Khatri was on a closed work visa and she was terrified of being deported, as when she did raise complaints, she would be threatened about her visa status. However, Counsel did not identify when those complaints were specifically raised with MNBL.

[16] It was further submitted that Ms Khatri was in a fragile mental state which meant she was not in a fit state to raise a personal grievance until she felt safe to do so upon obtaining the Migrant Exploitation Protection Work Visa. As such Ms Khatri should not be disadvantaged and barred from raising these claims due to the fact they were raised only after she had resigned. Counsel submitted that Ms Khatri raised these claims as soon as possible when she could resign without being liable for deportation.

[17] Counsel submitted that in the event the Authority granted leave for exceptional circumstances under s 115 of the Act, an order for parties to use mediation (as required

under s 114(5) of the Act) would be unlikely to reach a resolution because parties had previously attended mediation which had been unsuccessful.

#### *MNBL's submissions*

[18] Counsel for MNBL submitted that it accepts that Ms Khatri is within the statutory time period to bring her constructive dismissal claim because she had resigned on 4 November 2022 and had raised the personal grievance on 1 February 2023. MNBL also accepts that the arrears in wages claim is within the six-year statutory timeframe.

[19] However, MNBL does not accept that the other claims of bullying and harassment, discrimination, and unjustified disadvantage, are within the 90-day timeframe. Counsel for MNBL submitted that it appears, from submissions provided on behalf of Ms Khatri, that issues relating to these claims seemed to have arisen around September 2022 (at the latest) for Ms Khatri. However it is not clear when exactly due to the lack of particularities in submissions and a lack of supporting evidence that Ms Khatri ever raised her issues with MNBL prior to 1 February 2023. As such Counsel considers there is a lack of evidence to show that a personal grievance in relation to these claims were raised within 90 days.

[20] Counsel for MNBL also submitted that there are no exceptional circumstances applicable here. This is because Ms Khatri was granted the Migrant Exploitation Protection Work Visa on 27 October 2022, but only raised her personal grievance and other claims on 1 February 2023. It is also submitted that counsel for Ms Khatri has not specified which ground is being relied on in s 115 of the Act, nor provided evidence that Ms Khatri's mental health issues were a direct consequence of what gave rise to the grievance such that she was unable to raise her personal grievance within the 90-day period.

[21] Counsel for MNBL submitted that in the absence of further particulars, and with no supporting evidence, the reasoning provided for raising the claims out of time do not meet the threshold for exceptional circumstances under s 115 of the Act.

#### **Has Ms Khatri raised her personal grievance claims within 90 days?**

##### *Relevant law*

[22] Section 114(1) of the Act sets out the statutory time limit for raising a personal grievance. The employee must raise the grievance with the employer "within the period

of 90 days beginning 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 agrees otherwise.

[23] A personal grievance can only be raised outside that time with the employer’s consent, or with the leave of the Authority which can only be granted in exceptional circumstances.

[24] A grievance is considered to have been raised with an employer as soon as the employee makes or takes reasonable steps to make the employer or its representative aware that the employee alleges a personal grievance that the employee wants the employer to address.

### *Analysis*

[25] As MNBL has accepted that the personal grievance claim of constructive dismissal and arrears in wages claim are both within their respective statutory time period, I only need to consider whether the following claims have been raised within the 90-day period under s 114 of the Act:

- (a) Bullying and harassment;
- (b) Discrimination; and
- (c) Unjustifiable disadvantage.

[26] Submissions by counsel for Ms Khatri have failed to identify when Ms Khatri raised or communicated the matters which she considered amounted to a personal grievance prior to her raising a formal personal grievance on 1 February 2023. Counsel has stated that all the claims were “raised at numerous points throughout the Applicant’s employment” without providing any further details, such as dates or actions taken by Ms Khatri that shows that these claims were communicated to MNBL prior to 1 February 2023. Submissions have been vague and not pointed to any steps Ms Khatri took prior to 1 February 2023 to raise those claims with MNBL.

[27] Although it is well-established that a grievance can be raised orally or in writing and there is no particular formula of words that must be used, I find that Ms Khatri has not identified any steps that she took to make MNBL aware that she had an employment complaint or employment relationship problem (and what it was) to enable MNBL to address it. At the very least, this level of particularity is necessary so that the

employer knows what it is responding to, and they must be given sufficient information to address the grievance and to be able to respond to the complaint with a view to resolving the complaint informally and as soon as practicable.<sup>1</sup>

[28] Counsel for Ms Khatri submitted that MNBL behaved in a manner which amount to bullying and harassment, discriminatory conduct, and actions that unjustifiably disadvantaged Ms Khatri. However the current issue is not whether these alleged actions took place, but whether Ms Khatri had made MNBL aware that she was raising a personal grievance in relation to those actions within the 90- day time frame.

[29] Unfortunately, for the reasons above, I am not persuaded that Ms Khatri did.

### **Should leave be granted under s 114(4) of the Act?**

[30] Counsel for Ms Khatri has sought leave under s 114(4) of the Act for the personal grievances in the event the Authority finds that they were raised out of time.

[31] Section 114(4) of the Act provides that the Authority may grant leave for a personal grievance to be raised outside of the 90-day period if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and where it considers it is just to do so.

[32] Section 115 of the Act sets out a non-exhaustive list of circumstances where exceptional circumstances exist.

[33] Counsel for Ms Khatri did not identify a specific ground under s 115 in which Ms Khatri relied on but submitted that Ms Khatri did not feel safe to formally raise a personal grievance until she was in receipt of the Migrant Exploitation Protection Work Visa. It is claimed that this was because Ms Khatri was threatened with her closed visa status throughout her employment with MNBL. It was submitted that Ms Khatri's mental health was also in a fragile state around that time. Medical certificates provided to the Authority show that Ms Khatri was medically unfit for work from:

- (a) 2 September 2022 to 6 September 2022;
- (b) 6 September 2022 to 12 September 2022;
- (c) 12 September 2022 to 10 October 2022; and

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<sup>1</sup> *Creedy v Commission of Police* [2006] 1 ERNZ 517; *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99.

(d) 10 October 2022 to 21 November 2022.

[34] On 2 September 2022, Ms Khatri made a report of exploitation to the Ministry of Business, Innovation and Employment (MBIE) about MNBL. On 21 September 2022, MBIE wrote to Ms Khatri stating that it was “satisfied that it is credible that exploitation may have occurred” and advised Ms Khatri she was eligible for a Migrant Exploitation Protection Visa. Ms Khatri subsequently applied for this visa and received it on 27 October 2022.

[35] Other medical information provided to the Authority also show that Ms Khatri has had poor mental health in 2023. Due to the sensitive nature of this health information, I do not consider it appropriate or necessary to elaborate on this point.

[36] Notwithstanding the medical certificates and other information provided as they relate to Ms Khatri’s health over those periods, Counsel for Ms Khatri has not explained how these circumstances caused the failure to raise the grievances within 90-days.

[37] Additionally, by 27 October 2022, Ms Khatri had obtained a Migrant Exploitation Protection Work Visa, but did not raise the personal grievance until 1 February 2023, more than three months after. It has been submitted that Ms Khatri had delayed raising a personal grievance due to threats of her closed visa status, but by 27 October 2022, her visa status was no longer at risk, As such, I find that this delay remains unexplained.

[38] For completeness, I note that while on its face it could be argued that there were exceptional circumstances, the existence of exceptional circumstances is not by itself enough to allow an employee to raise a grievance out of time. It must be shown that the exceptional circumstances caused the employee’s failure to raise the grievance within the 90-day period.<sup>2</sup>

[39] For the reasons above I do not accept that there were exceptional circumstances that caused Ms Khatri’s failure to raise her grievances within the 90-day period.

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<sup>2</sup> *Hanley v Fisher* [2017] NZERA Christchurch 166.

## **Next steps**

### *Constructive dismissal and arrears in wages claims*

[40] Ms Khatri's claim for unjustified (constructive) dismissal has been made within the 90-day period and her claim for arrears of wages has been made within the six-year statutory timeframe.

[41] Therefore both of these substantive matters may proceed in the Authority.

### *Leave denied for other personal grievance claims*

[42] As Ms Khatri has not satisfied the Authority that she raised her personal grievance claims of bullying and harassment, discrimination, or unjustified disadvantage within 90 days pursuant to s 114 of the Act, and I have found that there were no exceptional circumstances which caused the delay, leave is denied under s114(4) of the Act.

### *Case management conference*

[43] As the parties have been unsuccessful in resolving the dispute through mediation, I do not consider it helpful to direct parties to mediation at this point. Instead, a case management conference will be convened to discuss next steps with regards to the claim for unjustified (constructive) dismissal.

## **Costs**

[44] Costs are reserved until resolution of the substantive matter.

Davinnia Tan  
Member of the Employment Relations Authority