

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 110  
3109832

BETWEEN                      BOJAN KOSTIC  
Applicant

AND                              MANUKA HEALTH NEW  
ZEALAND LIMITED  
Respondent

Member of Authority:      Marija Urlich

Representatives:            Allan Halse, advocate for the Applicants  
Geoff Bevan, counsel for the Respondent

Investigation Meeting:     20 – 21 September 2023 in Auckland

Submissions and further    20 October and 24 November 2023, from the Applicant  
information received:      7 November 2023, from the Respondent

Determination:              26 February 2024

---

**DETERMINATION OF THE AUTHORITY**

---

[1] Mr Kostic was employed as a beekeeper by Manuka Health New Zealand Limited (MHNZL) from mid-2019 until he gave four weeks' notice of resignation by letter dated 27 November 2019. Mr Kostic brings claims for unjustified disadvantage relating to a failure by MHNZL to justly and correctly investigate allegations of workplace bullying and unjustified constructive dismissal. He also seeks a finding that MHNZL's failure to keep him safe from workplace bullying breached s 4 and s 110A(1)(c) of the Act. He seeks remedies for compensatory damages and to reimburse costs of representation.

[2] MHNZL denies Mr Kostic has grounds for a personal grievance claim because Mr Kostic did not raise a personal grievance in relation to bullying within the 90-day statutory period and at all times he was treated fairly and in accordance with the duty of good faith.

## **The Authority's investigation**

[4] This determination follows determinations of preliminary matters which have arisen during the course of the investigation of this employment relationship problem.<sup>1</sup>

[5] In determining this employment relationship problem the Authority heard evidence from:

Mr Kostic

Tomislav Kalic

Keegan Blignaut, MHNZL's regional manager to whom Mr Kostic reported

David Campbell, MHNZL's general manager

Samantha Denz, MHNZL's human resource manager

[6] By consent Mr Kostic and Mr Blignaut gave evidence by audio-visual link. The Authority investigation was assisted by an interpreter of the Serbian language. 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.

## **Issues**

[7] The issues identified for investigation and determination are:

- a) Did Mr Kostic raise his personal grievances within the 90 days statutory timeframe?
- b) If not, should leave be granted to do so?
- c) If the Authority finds Mr Kostic's personal grievances were raised within the statutory time frame or grants leave to do, was Mr Kostic unjustifiably

---

<sup>1</sup> *Kalic & Kostic v Manuka Health New Zealand Limited* [2021] NZERA 26; *Kalic & Kostic v Manuka Health New Zealand Limited* [2023] NZERA 26.

disadvantaged in his employment by MHNZ's failure to fairly and reasonably investigate allegations of bullying?

- d) Was Mr Kostic unjustifiably constructively dismissed?
- e) If so, is Mr Kostic entitled to a consideration of remedies sought including:
  - a. Compensation from \$25,000 under s 123(1)(c)(i) of the Act.
- f) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Kostic which contributed to the circumstances which gave rise to his grievance?
- g) Did MHNZ's actions breach s 4 and/or s 110A(1)(c) of the Employment Relations Act 2000?
- h) Is either party entitled to an award of costs?

## **Relevant law**

### *Raising a personal grievance*

[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 said in *Creedy v Commissioner of Police*:<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

---

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

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

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:<sup>4</sup>

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.

---

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

[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

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

#### *The test for justification*

[14] Section 103A of the Act sets out the test for assessing whether an action including dismissal was justifiable. It requires an objective assessment of whether the employer's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the action and/or dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Kostic being treated unfairly.<sup>5</sup> The Authority's task is to examine objectively the decision-making process and determine whether what MHNZL did and how it was done were steps open to a fair and reasonable employer.

#### *Workplace bullying*

[15] Mr Kostic has raised a claim of workplace bullying and says MHNZL failed to fairly investigate his complaint. Following is the definition of workplace bullying contain on the WorkSafe NZ website:

---

<sup>5</sup> Section 103A Employment Relations Act 2000.

**Workplace bullying is: repeated and unreasonable behaviour directed towards a worker or a group of workers that can lead to physical or psychological harm.**

- > **Repeated** behaviour is persistent (occurs more than once) and can involve a range of actions over time.
- > **Unreasonable** behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating or threatening a person.
- > Bullying may also include harassment, discrimination or violence (see Section 4 of this guide for how these are dealt with).

**Note:** The bullying definition is adapted from Safe Work Australia's definition.

**Workplace bullying is not:**

- > one-off or occasional instances of forgetfulness, rudeness or tactlessness
- > setting high performance standards
- > constructive feedback and legitimate advice or peer review
- > a manager requiring reasonable verbal or written work instructions to be carried out
- > warning or disciplining workers in line with the business or undertaking's code of conduct
- > a single incident of unreasonable behaviour
- > reasonable management actions delivered in a reasonable way
- > differences in opinion or personality clashes that do not escalate into bullying, harassment or violence.

## **Background**

[16] Mr Kostic signed an individual employment agreement with MHNZL on 29 June 2019. He was recruited from overseas by MHNZL and granted a work visa to work for MHNZL in Kerikeri, Northland as a beekeeper with a work start date of 27 July 2019.

[17] Prior to his employment commencing, in July MHNZL proposed a new IEA to staff which was intended to replace a timebank system with payment for every hour worked per fortnight. Ms Denz and Mr Campbell presented the document to all potentially effected staff in a series of meetings held in July 2019. Because of the timing of his start date Mr Kostic missed this presentation. The proposed IEA contained a probationary period clause. MHNZL accepts this was an error because it was not intended for existing staff.

[18] In early September Mr Halse contacted MHNZL raising broadly on behalf of Mr Kostic's co-worker Mr Kalic that he (Mr Kalic) had concerns about the proposed IEA. The specific concern about the probationary period clause was not then identified. Following this communication on 11 September Ms Denz emailed Mr Campbell and asked him to speak to Mr Kalic about the proposed IEA and also asked him to check Mr Kostic understood the proposed IEA. In reference to Mr Kostic, Ms Denz' email includes "...as donot (sic) want another issue with him". This is understood as a reference to issues between the parties which precedes the subject employment relationship. What it demonstrates is MHNZL was alert to the need to communicate

clearly with Mr Kostic and that it knew he was anxious to ensure matters were correct with his employment.

[19] While there is a dispute as to whether Mr Campbell met with Mr Kostic on 12 September it is more likely than not that the meeting did occur because Ms Denz had asked Mr Campbell to do so the day before, he was in Kerikeri on 12 September and he had a clear recollection of the discussion including that Mr Kostic indicated he was not satisfied with the discussion. At this stage Mr Campbell and Ms Denz were not alive to the issue about the probationary clause.

[20] Then, most likely on 13 September Mr Blignaut presented Mr Kostic with the proposed IEA because he pre-signed it on 12 September. His evidence was he told Mr Kostic to take the proposed IEA away and that he could get advice. He accepted he would have said something like “trust me, don’t worry about this”. There was no evidence Mr Blignaut was alive to the probationary period clause issue at this time.

[21] After receiving the proposed IEA Mr Kostic contacted his immigration adviser to check it met the conditions of his work visa. As stated above the proposed IEA contained a probationary period clause and the adviser told him the probationary period was not consistent with the conditions of his work visa. Whether this advice was correct or not does not need to be considered here other than to say a trial period under the Employment Relations Act 2000 is not the same as a probationary period. What is important is that Mr Kostic was alarmed that the proposed IEA appeared to be significantly different to his current IEA, this difference had not been pointed out to him by MHNZL and when Mr Blignaut had presented the IEA to him, he said something to the effect of “trust me”.

[22] Mr Kostic discussed the concern raised by the immigration adviser with Mr Blignaut at least twice. Mr Blignaut passed the concern onto Ms Denz who said she would deal with it.

[23] On 21 September Mr Halse wrote to counsel for MHNZL raising the specific concern about the probationary period clause in the IEA and seeking an apology from Mr Blignaut he reported had told Mr Kostic the week before that there was “no trick” with the IEA.

[24] On 24 September Ms Denz sent to Mr Halse a proposed variation to Mr Kostic’s IEA which contained a clause to replace the timebank. There is no dispute the

replacement of the timebank would be an improved term of employment. The covering email asked Mr Halse to contact her if he had any questions. On 15 October Ms Denz wrote to Mr Halse seeking confirmation Mr Kostic had received the variation “as I would like to get this matter settled”. No reply was received.

[25] On 27 November Mr Kostic tendered his resignation giving four weeks’ notice and seeking to negotiate an earlier leaving date which by agreement was moved to 20 December. He commenced his new employment in the early new year. Mr Kostic said he resigned because he did not like how Mr Kalic and another co-worker were being treated and he felt MHNZL’s actions were placing his visa status under threat.

## **Discussion**

*Did MHNZL’s actions unjustifiably disadvantage Mr Kostic in his employment?*

[26] The personal grievance raised on Mr Kostic’s behalf by letter dated 21 September concerns the proposed IEA and MHNZL’s communications with him about it. Mr Kostic says the matter was handled so poorly and the communications with him about the proposed IEA so misleading that this undermined his confidence that his employer would treat him fairly and reasonably. He also says it is bound up with and is evidence of the bullying he experienced and observed other employees were subject to during his employment with MHNZL.

[27] The inclusion of the probationary period in the proposed IEA was an error. The evidence supports that conclusion and not the one invited which was the proposed IEA was designed to trick visa dependent migrant workers into undermining their visa conditions. As soon as the error was drawn to the attention of Ms Denz a variation was proposed. It is unfortunate that Mr Kostic was not available for the initial presentation of the proposed IEA but when concerns were raised MHNZL took reasonable steps to address those concerns including providing a variation. For completeness, Mr Kostic does not say in proposing a variation to his terms of employment MHNZL have breached s 63A(1)(d) of the Act and has not sought a penalty for such a breach.

[28] With respect to the bullying allegation Mr Kostic did not raise these concerns with MHNZL in such a way that the concerns could be investigated. While the 21 September letter records Mr Kostic’s concern about the single “no trick” comment attributed to Mr Blignaut, events had overtaken the parties somewhat with the focus on

the error in the IEA, steps were taken to remedy this and the matter was not raised again by Mr Kostic.

[29] The claim of unjustified disadvantage is not successful. The claim of breach of the duty of good faith is also unsuccessful.

*Did Mr Kostic raise a personal grievance for unjustified constructive dismissal within the statutory 90-day period?*

[30] The letter raising Mr Kostic's personal grievance for unjustified constructive dismissal is dated 16 June 2020. It is well outside the 90-day timeframe for when this cause of action arose on 20 December 2019. Mr Kostic has not sought leave to raise this grievance out of time and MHNZL has not consented. If he had it is unlikely leave would have been granted on the information before the Authority given the employment agreement contained an explanation concerning resolution of employment relationship problems, there was no suggestion Mr Kostic had arranged for the grievance to be raised and this had not occurred and while it is accepted Mr Kostic has found the circumstances of his employment difficult there is no evidence he was so effected by the situation as to have not been able to raise the grievance within the statutory timeframe.

[31] The Authority does not have jurisdiction to hear Mr Kostic's claim for unjustified constructive dismissal because that personal grievance was not raised within the statutory 90-day period.

*Breach of s 110A(1)(c)*

[32] This claim does not succeed. Mr Kostic did not raise a health and safety concern, including a claim of bullying. The evidence does not support a finding MHNZL prevented him or sought to prevent him taking reasonable steps to raise an issue or concern about health and safety.

### **Costs**

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[34] If they are not able to do so and an Authority determination on costs is needed MHNZL may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Kostic would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[35] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

Marija Urlich  
Member of the Employment Relations Authority

---

<sup>6</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).