

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2024] NZERA 232
3190759

BETWEEN

KYLE HURRING
Applicant

AND

THE WAREHOUSE LIMITED T/A
NOEL LEEMING
Respondent

Member of Authority: David G Beck

Representatives: Applicant in person
David France, counsel for the Respondent

Investigation Meeting: 19 March 2024 in Christchurch

Submissions Received: 19 March 2024 from the Applicant
19 April 2024 from the Respondent and further information
provided by both parties on 18 April and 19 April 2024.

Date of Determination: 22 April 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kyle Hurring worked for Noel Leeming Group Limited for two periods between January 2014 to April 2017 and November 2017 to 27 October 2021.

[2] Noel Leeming Group Limited is a dissolved legal entity that amalgamated with other companies in the Warehouse Group and is now The Warehouse Limited. For this determination however, I will refer to Mr Hurring's former employer as Noel Leeming.

[3] Mr Hurring's application to the Authority was received on 20 September 2022. Mr Hurring identified claims that Noel Leeming had unjustifiably dismissed him on 27 October 2021, after a dispute concerning his return to work following a significant period of sick leave.

[4] Noel Leeming contends that Mr Hurring's employment ended due to serious misconduct concerning persistent unacceptable communication that he had previously been formally warned about and, that he was justifiably dismissed. Noel Leeming says the personal grievance was raised out of time having only become aware of such when it was filed in the Authority and they have not consented to it being heard out of time.

[5] Mr Hurring says he raised the personal grievance shortly after his dismissal but if that is not found to be so, he is seeking for the grievance to be raised out of time due to exceptional circumstances related to his health and well-being.

The preliminary issue

[6] The preliminary threshold issue that this determination will be confined to, is whether Mr Hurring's personal grievance was raised within 90 days and if found not to be, should the Authority grant permission for the grievance to be raised out of time.

The Authority's investigation

[7] This matter has been delayed for a significant period as Mr Hurring was too unwell to attend an investigation meeting. At the investigation meeting of 19 March 2024, I heard evidence from Mr Hurring and Kimberley Rolland, Noel Leeming's employment relations advisor at the time of Mr Hurring's employment.

[8] As permitted by s 174E the Act, I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence and submissions except what is necessary to resolve the preliminary issue. I record the parties assisted in giving evidence, information, and submissions that I have carefully considered. As this investigation involved private medical information pertaining to Mr

Hurring, I have resolved to make only generalised reference to such to protect Mr Hurring's privacy.

What caused Mr Hurring's employment relationship problem?

[9] In his latter period of employment with Noel Leeming (November 2017 – October 2021), Mr Hurring worked as an installation specialist based in Christchurch. The work involved Mr Hurring installing Noel Leeming products (predominantly in private residences) and required him to travel around the Canterbury region usually accompanied by another installation specialist.

[10] In November 2020, Mr Hurring became unwell and was off work for a significant period. During this period Mr Hurring was in receipt of Accident Compensation Corporation (ACC) earnings related support.

[11] Evidence given during the investigation meeting, initially suggested that there was little contact between the parties until around July 2021, when Ms Rolland indicated Noel Leeming's People/Support team had contacted her to flag that Mr Hurring's length of absence was at issue and, they told Ms Rolland that his situation was "complex". Noel Leeming say they were unable to produce Mr Hurring's personal file due to a flood destroying records in their Christchurch office.

[12] However, after the investigation meeting, Noel Leeming disclosed earlier email correspondence between Mr Hurring and his local manager in mid to late December 2020 including Mr Hurring's ACC Social Worker indicating in a 29 December email that they had been appointed to advocate for him and that his health was in a "fragile" state. The social worker offered to act as a conduit for further communication regarding Mr Hurring's health and employment status but I was not provided with evidence that this overture was followed up.

[13] Ms Rolland recalled in mid-August 2021, requesting of Mr Hurring that he complete a drug test and provide a medical certificate on his potential fitness to return to work. I was also latterly provided with an email from Ms Rolland of 18 August 2021, to local Noel

Leeming management introducing herself and suggesting there was little clarity around what support Mr Hurring was getting from ACC.

[14] Mr Hurring responded with a non-negative drug test and then indicated he would supply a medical certificate. At this time (14 August), Mr Hurring had also made an assertion that he believed he was being constructively dismissed.

[15] On 17 August, Mr Hurring requested he be afforded a further period of sick leave and family violence leave. The next day, Mr Hurring also responded to Ms Rolland's request he clarify his ACC support payments' status and the identity of his ACC case manager. Mr Hurring indicated he wished to return to work.

[16] Ms Rolland replied on 23 and 27 August, indicating she was awaiting ACC contact and asserted Mr Hurring's constructive dismissal claim that referred to previous issues arising in his first period of employment, was outside of the statutory 90 days required to lodge a personal grievance.

[17] Mr Hurring in the interim, had visited his General Practitioner (GP) and provided information on his role with Noel Leeming and gave permission for disclosure of medical information and ACC contact. By letter of 22 August 2021, headed "Report for Kyle Hurring", that Noel Leeming say they received on 30 August, the GP detailed Mr Hurring's health issues and past diagnosis matters.

[18] I record the disclosure was specific and sufficient to objectively alert Noel Leeming to the fact that Mr Hurring was in an ongoing vulnerable state with complex health issues (a fact that the subsequently disclosed emails show Noel Leeming were already aware of).

[19] The GP noted Mr Hurring was in a situation where his recovery was “an ongoing process”; that Mr Hurring was working with an ACC treatment provider and seeing the GP’s practice “Health Improvement Practitioner”. The GP suggested:

I feel that Kyle would be fit to return to some form of work, including as an installation specialist, and that it would be a helpful part of his recovery.

[20] The GP then disclosed a significant complicating factor that Mr Hurring was not taking any prescribed medication but was “self medicating” and intended to continue doing so. The GP noted the likelihood that Mr Hurring’s medication would show up in a urine drug test and that it was inadvisable that Mr Hurring drive a vehicle. The GP concluded:

If he were to return to work, in whatever form, I would suggest he start back with 2 days per week initially for 3-4 weeks to see how he is managing initially, and if this was going well he could look to increasing his hours.

[21] Upon receipt of the GP’s letter, Ms Rolland, who was not based in Christchurch, described difficulty in engaging with ACC and Mr Hurring. Ms Rolland says she asked to meet with Mr Hurring but he declined the invitation. Thereafter, all communication between the two was by email. Objectively viewed, Mr Hurring’s subsequent emails to Ms Rolland, were hostile, abusive, and rambling but entirely consistent with his GP’s diagnosis.

[22] Ms Rolland says at this point (early September), she chose to disengage from contact with Mr Hurring. Noel Leeming management resolved to place Mr Hurring on notice his correspondence with Ms Rolland was concerning and it would be investigated in a disciplinary context. In the interim, Mr Hurring’s request for extended sick leave was approved and he did not return to the workplace.

Final warning

[23] Mr Hurring’s local fleet manager, Melvyn Kumar, after further email exchanges and an AVL meeting with Mr Hurring, issued a final written warning on 24 September. The finding that led to the warning, was that Mr Hurring had corresponded with Ms Rolland “in a socially unacceptable manner, specifically through the use of offensive and/or threatening language”. The warning that was administered in an objectively fair procedural manner,

identified what was unacceptable about Mr Hurring's communication and, warned that any repetition of such may lead to his dismissal.

[24] I record on viewing the correspondence, that this disciplinary outcome was open to Noel Leeming and 'on the surface' a fair and reasonable response. However, and I will return to this aspect of the relationship, Mr Hurring's correspondence was discursive and evidently disordered and in all the circumstances a fair and reasonable employer could have looked to engage with Mr Hurring in a different manner, notwithstanding his significantly challenging behaviour. I take this view, as by this point in time, Noel Leeming had been made aware of significant medical issues pertaining to Mr Hurring that explained his approach to communications.

Dismissal

[25] Despite the final warning from the next day, Mr Hurring engaged in more inflammatory and overtly threatening correspondence with local management and he copied Ms Rolland into such. This led after what was again an objectively fair procedural process commencing on 12 October in which Mr Hurring refused to fully participate, to Mr Hurring being summarily dismissed by Mr Kumar in an email sent at noon on 27 October 2021.

[26] The reasons expressed for the dismissal that was termed as being "with immediate effect" was contained in the email as:

Despite a clear warning about your behaviour, you have continued to display a disregard for engaging with us in a reasonable and professional way and your communications are unacceptable to us.

[27] Throughout the process that ended Mr Hurring's employment, he did not return to the workplace.

Did Mr Hurring subsequently raise a personal grievance?

[28] In an immediate email response at 12:18pm on 27 October 2021 to Mr Kumar and others (including Ms Rolland), Mr Hurring indicated “[I] have been refused my employment since 22 August 2021 on all grounds of discrimination and abuse...”.

[29] On 29 October 2021 Mr Hurring sent a further exceedingly discursive email to various parties; it included a heading: “TO:MY EMPLOYER:NOEL LEEMING-MELVIN KUMAR (NOEL LEMMING DISTRIBUTION FLEET MANAGER)”. Mr Kumar who had effected Mr Hurring’s dismissal was first on the list of email recipients and Ms Rolland was second. In the content of the email was a copy of an email to another lawyer not connected with these proceedings that indicated:

AS AN (UN)ESSENTIAL WORKER – I HAVE NOT BEEN IN EMPLOYMENT WITH MY (UN)ESSENTIAL EMPLOYER SINCE 18 NOV 2021;

MY EMPLOYER HAS ATTEMPTED TO TERMINATE MY EMPLOYMENT BECAUSE THEY DO NOT LIKE THE TRUTH;

THE TRUTH IS THAT I WAS & HAVE BEEN ABUSED & BULLIED IN WORKPLACE & THIS FORCED MY ORIGINAL RESIGNATION IN APRIL 2017.

[30] In a further email of 12 November 2021, that was again discursive and although copied to Ms Rolland and another Noel Leeming’s manager, did not directly address Ms Rolland, there is reference to:

You can’t terminate my employment Not when I was medically signed off 2 weeks before, and I told you that I would do that because of the stress of (non) employment and lack of communication back to me which breaches employment law as this is breaching good faith and many others... Go figure.

[31] Noel Leeming did not respond to Mr Hurring’s emails or seek any clarity from him. Ms Rolland’s written evidence that attached the emails in question, was “... it is difficult to understand what he is saying and the context or purpose in which he references his dismissal” and “... it is not apparent from his email what he is talking about” and: “If he is

seeking to raise a grievance in relation to his employment being terminated, he does not explain this in a way that can be understood”.¹

[32] In submissions, Noel Leeming’s counsel suggested objectively viewed the communication after the dismissal, could not have been reasonably understood as a grievance being raised and whether they were expected to respond to the messages Mr Hurring was sending.

The law

[33] The first issue is, has Mr Hurring, pursuant to s 114 of the Act raised a personal grievance with Noel Leeming.

[34] Section 114 of the Act requires that:

- (1) Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred ... unless the employer consents to the personal grievance being raised after the expiry of that period.
- (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.

[35] In *Creedy v Commissioner of Police* the Employment Court noted a person identifying a personal grievance needs to provide the employer with, “sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving soon and informally, at least in the first instance”.² However, in an instance of a straightforward unjustified dismissal grievance the court in *Disabilities Resource Centre Trust v Maxwell* has distinguished *Creedy* as:

Where, as there, the employee is simply alleging unjustifiable disadvantage, the employer may have no idea what actions it has taken that are being complained of.

¹ Witness Statement of Kimberley Freya Rolland, 19 May 2023 at para [16].

² *Creedy v Commissioner of Police* [2006] ERNZ 517.

But an explicit dismissal is different; the action the employee is complaining about is the dismissal by the employer.³

[36] In an earlier decision, *Chief Executive of Manukau Institute of Technology v Zivaljevic*, the Employment Court summarised some key principles the court has adopted:

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.⁴

The employment agreement

[37] A focus on early intervention and hopefully resolution, by open communication was detailed in clause 31 of Mr Hurring's individual employment agreement. It defines the term "Personal Grievance" as including: "You have been unjustifiably dismissed" and then under the heading: "Raising an Employment Relationship Problem" it encourages open communication to resolve concerns at the earliest juncture and identifies who to raise concerns with, being "your manager ors 'Ask People Support' on 27577". An email address for the latter was provided and a suggestion that an employment relationship problem should be raised "at the earliest opportunity, in an endeavour to resolve matter promptly by direct discussion".

³ *Disabilities Resource Centre Trust v Maxwell* [2021] NZEmpC 14 at [18].

⁴ *Chief Executive of Manakau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] – [38].

[38] The procedure then explains who to contact if the matter remains unresolved and then details: the time limit for raising a personal grievance; choice of procedure; request for reasons for dismissal; other options; and available remedies.

[39] The employment agreement procedure notes: “The grievance is ‘raised’ as soon as you have informed the Company [Noel Leeming] that you consider you have a personal grievance you want addressed” but has no guidance on the format of such communication.

[40] I observe that the employment agreement plain language explanation of services available to resolve employment relationship problems that is a requirement of s 65(2)(a)(vi) of the Act, was not (as criticised in *Zivaljevic*)⁵ in an easily understandable format but it does include reference to the 90 days limitation period. However, there was no direction from Noel Leeming to their own resolution process in the email dismissing Mr Hurring of 27 October 2021 and the policy contains no suggestion on obtaining independent representation.

Were Mr Hurring’s emails sufficient to raise a personal grievance?

[41] The crucial issue pursuant to s 114(2) of the Act, is whether Mr Hurring’s emails of 27, 28 October and 12 November 2021 were sufficient to make Noel Leeming aware that there was a grievance that he wanted them to address. In *Creedy* the court noted: “for an employer to be able to address a grievance as the legislation contemplates, the employer must know what it is it is addressing”.⁶

Assessment

[42] Applying the principles enunciated above, I am also conscious that all cases are fact and context specific. This case I would suggest, has some unique features in that Mr Hurring had just been the subject of a final written warning and dismissal process when Noel Leeming was already on notice from a GP (and ACC) that some capacity issues arose

⁵ Ibid at [56] – [60].

⁶ Op cit at [35].

in terms of Mr Hurring's health status. Those issues were manifesting themselves in objectively erratic communications. I was also convinced that Mr Hurring had also made Noel Leeming aware that he was experiencing significant domestic strife and parallel Family Court issues and was representing himself.

[43] Mr Hurring's communication approach became the focus of the dismissal, whereas, for Mr Hurring, his focus was a dispute about him seeking to return to work after a lengthy period of absence in a situation where Noel Leeming objectively had significant concerns about the practicality of such but discussion around this issue unfortunately, did not progress.

[44] The test is an objective one but it is, as the Employment Court in *Urban Décor Ltd v Yu* notes "not ignorant to context" and the totality of the circumstances.⁷ I must consider in all the circumstances, whether a reasonable person could have appreciated that Mr Hurring was raising a personal grievance about his dismissal.

[45] Against this background, once Mr Hurring was dismissed it was objectively unsurprising, he would seek to challenge the decision. In this context, the cited emails from Mr Hurring must be carefully assessed.

[46] I find the disordered manner of Mr Hurring's communication could not at the time be a surprise to Noel Leeming. What can be established from the communications is, Mr Hurring was unhappy with what he perceived as his 'medical clearance' to return to work, being ignored (albeit the clearance was objectively conditional) and he was unhappy with Noel Leeming terminating his employment.

[47] I accept that Mr Hurring's expressed 'ulterior' reasons for believing his employment had ended related to past events (alleged bullying dating back to April 2017) that this was a questionable premise and, a distinct grievance out of time, but that is not at issue. The issue is, was the communication sufficient to place Noel Leeming on notice that Mr Hurring was challenging the latest decision to dismiss him.

⁷ *Urban Décor Ltd v Yu* [2022] NZEmpC 56 at [30]. See also *Maynard v Bay of Plenty District Health Board* [2011] NZEmpC 175.

[48] I consider by a very narrow margin, that Mr Hurring's cited communications were just sufficient to alert Noel Leeming that he considered the dismissal unjustified. Put another way, a fair and reasonable employer could have easily appreciated that amongst the disordered communication was a claim for unjustified dismissal.

[49] I also, applying s 103A(3) of the Act by analogy and, the objects of the Act, need to have regard to the considerable resources available to Noel Leeming including access to legal advice and the fact that Mr Hurring was vulnerable, unwell, and unrepresented.

[50] I consider that Ms Rolland who gave evidence of her experience including that she is now the Warehouse Group's senior legal counsel and, was admitted as a Barrister and Solicitor in December 2016, was constructively aware of Mr Hurring's specific concern about his dismissal. It may have been disingenuous for her to rely on Mr Hurring's disordered communication style to suggest otherwise. I do, however, take account that Ms Rolland after making patient efforts to communicate and meet with Mr Hurring (that were rebuffed by him) was subjected to offensive and significantly unpleasant communication that may have clouded her overall judgment. In addition, as Mr Hurring was Noel Leeming's sole witness at the investigation meeting, it was not clear whether the decision to not engage further with Mr Hurring after he was dismissed, was solely Ms Rolland's.

Outcome

[51] In considering the significantly unique circumstances of this situation, including Noel Leeming being aware of Mr Hurring's health issues and challenging personal circumstances, I find Mr Hurring's cited emails raised his personal grievance within time. Despite the lack of detail suggesting what specific actions Mr Hurring wanted to challenge, I find objectively Noel Leeming was aware that Mr Hurring was challenging their dismissal decision and from his perspective considered it unjustified. Noel Leeming ought to have promptly engaged with Mr Hurring at the time.

[52] Given the above finding, I do not need to consider any exceptional circumstances under s 114(3) of the Act.

[53] I determine that Kyle Hurring's personal grievance claim alleging an unjustified dismissal, was raised within 90 days pursuant to s 114(3) of the Employment Relations Act 2000.

[54] The determination that an unjustified dismissal grievance was raised rests solely with the justification or otherwise for Noel Leeming's decision to dismiss Mr Hurring on 27 October 2021.

Next steps

[55] Utilising s 159(1)(b)(c) Employment Relations Act 2000, I direct the parties to attend further mediation to explore resolution. Should the matter not resolve itself Mr Hurring is to inform the Authority and a case management conference will be set up to determine how the substantive issue of Mr Hurring's unjustified dismissal claim is to be dealt with.

Costs

[56] As Mr Hurring was not represented and was the successful party, there are no issues as to costs.

David G Beck
Member of the Employment Relations Authority