

NOTE: This determination contains an order prohibiting publication of certain information at [25]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 362
3260679

BETWEEN JARED SMALL
Applicant

AND AIRWAYS CORPORATION OF
NEW ZEALAND LIMITED
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: John Hall, counsel for the Applicant
Geoff Davenport, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 29 February and 16 April 2024 from the Applicant
18 March and 17 April 2024 from the Respondent

Determination: 19 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves the preliminary question of whether Jared Small can pursue a personal grievance claim against his former employer, Airways Corporation of New Zealand Limited (ACNZL) for constructive dismissal. Mr Small says on 5 October 2022, he was advised of an employment investigation connected with events arising from a much earlier dispute in 2020 between Mr Small and a colleague. The allegation in 2022 was that Mr Small had breached a non-disparagement clause of a Memorandum of Understanding (MOU) he was a party to.

[2] Mr Small's constructive dismissal claim is based on several breaches of duty by ACNZL spanning several years that crystallised for Mr Small on 5 October 2022 when he was advised of the employment investigation into his conduct. This he says, caused him to resign the next day and raise a claim of constructive dismissal with ACNZL.

[3] ACNZL says none of the actions alleged to be breaches of ACNZL's obligations towards Mr Small were raised in time. The first time ACNZL knew Mr Small was raising a personal grievance was on 3 December 2022 when it received the letter from Mr Small's lawyer. Although this was within 90 days of Mr Small's resignation on 6 October, ACNZL says the matters he refers to in his personal grievance letter are outside the preceding 90 days. ACNZL does not consent to Mr Small raising a grievance outside the 90 day period and says as a consequence Mr Small's grievance cannot proceed.

The Authority's investigation

[4] By agreement with the parties, whether or not Mr Small's grievance was raised in time was investigated on the papers as a preliminary matter. Those papers comprised of Mr Small's statement of problem and the attached documents and ACNZL's statement in reply and documents together with submissions from counsel.

[5] 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.

Mr Small's employment at ACNZL and his claim

[6] Mr Small was employed by ACNZL as an air traffic controller. Problems arose earlier in the employment relationship in 2020. These problems related to incidents between Mr Small and another employee. ACNZL took action in relation to these matters. Mr Small raised an employment dispute with ACNZL and this was resolved by the parties entering into a record of settlement. An MOU was also entered into outside of the record of settlement. ACNZL was not a party to the MOU.

[7] It is important to note at this point there is no confidentiality clause in the MOU.

[8] Mr Small's constructive dismissal personal grievance claim came about after he was notified of an employment investigation into his conduct in 2022. It was alleged

Mr Small had disparaged the other employee and that this was in breach of the 2020 MOU. From Mr Small's perspective he had recently become concerned about the MOU being breached to his detriment by the other employee.

[9] Mr Small's resignation email recorded that he was giving notice of his resignation from ACNZL and gave a last day of work. Mr Small referred to difficulties with his mental health and recorded that he had been subjected to bullying and harassment over the previous two to three years. He finished the email saying that for the most part he had enjoyed his time at ACNZL and thanked his manager. The final sentence read "I have more respect for myself than to continue working for an organisation so intent on fostering workplace bullying."

Raising grievances

[10] Every employee who wishes to raise a personal grievance must raise the grievance within 90 days. This period begins on the date on which the action alleged to amount to a personal grievance occurred or when it came to the employee's notice, whichever is later, unless the employer agrees to the grievance being raised after 90 days.¹

[11] However, in cases of constructive dismissal, the Employment Court has confirmed that the 90 day time period for raising a personal grievance should run from the expiration of any period of notice of dismissal. Bearing in mind that in a constructive dismissal, termination of employment may appear to be by resignation but it is, in fact, an alleged dismissal. Therefore the 90 day period runs from the expiration of any period of notice after resignation.²

[12] In *Meyer v Ports of Auckland* the Court held the Authority did not have jurisdiction to investigate a grievance arising from an event on a specific day because it was out of time, but the event would inevitably form part of the constructive dismissal argument. The Court also noted that constructive dismissal cases could span a considerable period of time.³

¹ Employment Relations Act 2000, s 114(2) and (7).

² *Para Franchising Ltd v Whyte* [20022] 2 ERNZ 120.

³ *Meyer v Ports of Auckland* EmpC Auckland AC41/04, 28 July 2004.

Submissions and analysis

[13] Mr Small resigned on 6 October 2022 and the letter raising a personal grievance on his behalf is dated 3 December 2022. Mr Small says his grievance only became obvious to him the day before he resigned therefore the grievance was raised within 90 days from the date the grievance crystallised in his mind. In addition, he says there should be no reason why he cannot refer to matters outside the 90 day limitation period, in so far as they provide background.

[14] The statement of problem lists a number of breaches that form the basis for the constructive dismissal. Submissions on Mr Small's behalf state this is not a grievance based on a continuing course of action by the employer. The focus instead is the date on which the grievance crystallised in Mr Small's mind which was 5 October. That is the date Mr Small was notified of the employment investigation into his conduct and he resigned the next day. He says the date the grievance was raised was either the date of resignation (6 October) or the date the grievance was raised on his behalf in the letter of 3 December.

ACNZL submissions

[15] ACNZL seek a direction from the Authority that Mr Small cannot advance a personal grievance based on any events that pre-date 3 September 2022. That is the date 90 days before the letter raising the personal grievance. It says there are no incidents within the 90-day period that Mr Small can rely on to advance his claim. Instead, ACNZL says what Mr Small is attempting to do is re litigate the events that happened in 2020, 2021 and the first part of 2022, under the guise that:

- (a) he had late knowledge of those matters;
- (b) they are relevant to a breach of contract claim;
- (c) they are relevant context.

[16] While that submission appears to be consistent with the scheme of the Act, in some circumstances, in the context of a constructive dismissal grievance, the issue of 90 days falls away. Mr Small says on 6 October 2022 and on receipt of notification that his conduct was to be investigated to establish whether he had breached the MOU, he formed the view he could no longer continue to be treated like that by his employer. That formed the basis for his decision to resign the next day and formally raise a personal grievance for constructive dismissal which he did on 3 December.

[17] The raising of a constructive dismissal grievance based on a number of events that span periods of time outside of the 90 day period would appear to be consistent with the case law set out above and the notion of constructive dismissal.

[18] In the alternative, the commencement of the employment investigation was an event within 90 days of the grievance being raised. That opens the door to characterising the matter as a continuing grievance over a period of time so long as the earlier events are connected to events within the 90 day period. In *Davis v Commissioner of Police* the Employment Court noted:⁴

...the relevant evidence to be considered by the Court is not necessarily confined to events in those 90 day periods. Disadvantageous acts of omission in employment frequently do not occur in isolation but as part of a continuum of conduct which needs to be understood to determine whether the employee has suffered an unjustified disadvantage in respect of what has happened to that employee within the 90 day period.

[19] I note there will be hurdles for Mr Small in progressing this matter. Whether or not the earlier events that Mr Small seeks to rely on can be considered by the Authority when the substantive matter is heard, will depend on the facts. The degree to which they are connected and relevant to the reasons why he says he was constructively dismissed will need to be established. The full and final nature of the record of settlement between the parties will also be a consideration and whether or not ACNZL has breached any of its obligations towards Mr Small will be in issue.

[20] In light of the Court judgments set out above it is clear that Mr Small did raise his personal grievance with his employer within the 90 days required by section 114 of the Act.

Additional matters

[21] With regard to a breach of contract claim, it is unlikely the matter could proceed as a breach of contract claim in the alternative. Section 113 of the Act would operate as a bar to this because the breaches set out in submissions appear to relate to the dismissal. The personal grievance provisions in the Act are the only way to challenge a dismissal.

⁴ *Davis v Commissioner of Police* [2013] NZEmpC 266 at [47].

[22] ACNZL points out the breach of contract claim in the statement of problem is different to how it was set out in submissions. That issue would also need to be addressed at any substantive hearing should the matter proceed.

[23] It is worth noting in the context of a constructive dismissal claim that the employment investigation was completed after Mr Small resigned and resulted in a finding the complaints about Mr Small were not substantiated.

Non-publication

[24] An application was made by ACNZL for a non-publication order for the name of the other employee. This was not opposed by Mr Small.

[25] Given the factual background to this matter, I consider the other employee's privacy outweighs the public interest in publication of information that would identify them. In this case that displaces the normal rule of open justice. While I have not found it necessary to refer to them by name, a non-publication order is made in relation to the employee's name and any other identifying information about them. This is to ensure documents containing that information on the Authority's file are also subject to this order.

Findings

[26] Mr Small left his employment on 6 October 2022 and raised his personal grievance on 3 December 2022. Mr Small did raise his personal grievance with his employer within the 90 days required by s 114 of the Act and is entitled to pursue his grievance at the Authority.

[27] A case management teleconference will be convened with the parties to timetable the substantive matter and canvas the parties' views on mediation.

Costs

[28] Costs are reserved.

Sarah Kennedy-Martin
Member of the Employment Relations Authority