

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2024] NZERA 374
3223599

BETWEEN	RAY MARSHALL Applicant
AND	NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	Claire English
Representatives:	Ray Marshall in person Channy Mao, counsel for the Respondent
Investigation Meeting:	On the Papers
Submissions received:	3 April 2024 from Applicant Up to 19 June 2024 from Respondent
Determination:	24 June 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Ray Marshall, was dismissed by the respondent (Defence Force) on 24 June 2020. His last day of work was 22 July 2020. On 2 April 2020 and 20 October 2020, he wrote to Defence Force with various claims. On 13 April 2023, he filed a statement of problem in the Authority, raising claims of unjustified dismissal and unjustified disadvantages, and seeking remedies.

[2] Defence Force says that Mr Marshall failed to raise a valid personal grievance claim of unjustified dismissal within 90 days, and failed to raise unjustified disadvantage claims within 90 days. It further says that the statement of problem filed

in the Authority on 13 April 2023 refers to three disadvantage claims which were raised on 2 April 2020 and are therefore outside the statutory 3-year limitation period and cannot be pursued in the Authority. I record that in any event, Defence Force denies Mr Marshall's substantive claims.

[3] After the filing of the statement of problem in April 2023, there were some administrative delays, including the need for an extension of time for the filing of a statement in reply, and several attempts to set up a case management conference. Mr Marshall was initially represented, but ceased to be so, and then took some time to consider whether he wished to progress this matter. The matter was brought before myself again in January 2024 and after discussions with the parties about mediation it became clear that preliminary issues as to whether Mr Marshall's claims were raised within time needed to be determined.

[4] Timetabling orders were made for the filing of statements from the parties on the preliminary issues and this determination deals with those issues.

The Authority's investigation

[5] For the Authority's investigation written statements were lodged from both parties. 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 preliminary issues

[6] The preliminary issues requiring investigation and determination were:

- (a) Did Mr Marshall raise a valid personal grievance claim for unjustified dismissal within 90 days of his employment ending?
- (b) Did Mr Marshall raise unjustified disadvantage claims within 90 days relating to:
 - i. communication with the police on 1-3 April 2019,
 - ii. attendance at a particular meeting on 23 May 2019, and
 - iii. a decision to cease paying him while suspended on 30 August 2019?

- (c) Is Mr Marshall out of time to commence action in the Authority in respect of three unjustified disadvantage claims set out above, which Defence Force says were first raised on 2 April 2020?

Unjustified Dismissal – was this claim raised within 90 days?

[7] Defence Force accepts that it dismissed Mr Marshall on notice on 24 June 2020, and that his last day of work was 22 July 2020. It says that the final date on which Mr Marshall could have raised personal grievance claims was 20 October 2020.

[8] Defence Force acknowledges that Mr Marshall emailed it about his dismissal on 20 October 2020, but says that this email was not sufficient to raise a valid personal grievance.

[9] I will first consider if Mr Marshall has raised a valid personal grievance for unjustified dismissal. It is common ground that this claim stems from an email from Mr Marshall on 20 October 2020. The email stated in its entirety:

In accordance with the Employment Relations Act 2000, I am giving you notice that under S113(1)(2)(a)(b)(c) I will be pursuing a Personal Grievance against the NZDF for Unjustified Dismissal.

My Lawyer has previously notified NZDF that this would happen, however to avoid any doubt this email may now serve as formal notification of my intentions.

Please acknowledge receipt of this email.

[10] Defence Force says that the 20 October 2020 email is insufficient to raise a personal grievance as it does not provide sufficient information for Defence Force to know what it is responding to or to enable it to address the merits of the claim, and it did not do enough to convey the substance of Mr Marshall's complaint. This is because the email did not explain why Mr Marshall considered his dismissal to be unjustified.

[11] In addition, Defence Force refers to other correspondence between it and Mr Marshall's then lawyer, namely letters on 27 August 2019, 9 September 2019, 12 September 2019, 12 November 2019, 16 December 2019, and 15 January 2020¹, but

¹ At paragraph 24 of the respondent's Submissions on a Preliminary Matter dated 29 February 2024.

says these letters were not sufficient to raise a valid personal grievance of unjustified dismissal on Mr Marshall's behalf.

[12] Mr Marshall says that:

NZDF have accepted that I submitted on 20 October 2020 the Grievance which they acknowledged and accepted.

By accepting this Grievance the NZDF have to my mind acknowledged the Grievance concerns all actions taken against me in their process of Termination, inclusive of all parties from 2018 through to my Termination.

[13] I first note that s 114 of the Act provides that an employee "must" raise any personal grievance with their employer within 90 days of the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee. In the case of a personal grievance for unjustified dismissal, the event is the ending of employment, and in the present case, there is no dispute between the parties that the correct starting point is Mr Marshall's last day of work on 22 July 2020.

[14] This 90 day period begins on the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later, unless the employer consents to a claim being raised outside the statutory time frame, which Defence Force does not.

[15] The 20th of October 2020 was the 90th day, and was therefore the last possible day on which Mr Marshall could have raised a personal grievance about his dismissal.

[16] I must therefore consider whether Mr Marshall's personal grievance claim for unjustified dismissal was sufficiently detailed. This has been summarised by the Court as follows:

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....

The issues are 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 is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.²

[17] On its own, the email of 20 October 2020 does not convey the substance of Mr Marshall's complaint to his former employer. It merely says that the personal grievance is "for Unjustified Dismissal". There is no information that would allow Defence Force to address the grievance, as Mr Marshall has not said what it is about his dismissal that he considered to be unjustified. There is nothing of substance that Defence Force could have responded to, and no detail that might have suggested any steps that could have been taken by it to reach resolution with Mr Marshall.

[18] In addition, I note that Mr Marshall has worded this email in a very specific way. He has said that "I am giving you notice" that "I will be pursuing" a personal grievance, and that "this email may now serve as formal notification of my intentions." This indicates that Mr Marshall was intending to raise a personal grievance in the future as he says "I will be pursuing" this, not that he is pursuing matters in the present. The words suggest that this email is merely advance notification of something more to follow, in other words a "heads up", which is what is suggested by the use of the words "notification of my intentions". Defence Force might expect from this that further detail and a firm claim will follow, rather than this email being a claim which Mr Marshall expects to be engaged with in substance, as the substance itself is not present.

[19] The issue is whether the employer has been provided with sufficient details of the complaint for it to respond to.³ I find that the 20 October 2020 email did not provide sufficient details to amount to the raising of a personal grievance claim for unjustified dismissal.

[20] Further, I do not accept it is accurate to say, as Mr Marshall submits, that by "accepting" receipt of Mr Marshall's email, Defence Force have "acknowledged the Grievance concerns all actions taken against me in their process of Termination, inclusive of all parties from 2018 through to my Termination."

[21] First, the email of 20 October 2020 does not say that Mr Marshall was concerned with "all actions taken against me in their process of Termination" from 2018 onwards. Mr Marshall could have said that, but the plain reading of the email shows that he did

² See *Chief Executive of Manukau Institute of Technology v Zivaljevic*, [2019] NZEmpC 132, at [36] – [38].

³ *Ibid*, the test being set out at para [41].

not. Second, I am not aware of any correspondence from Defence Force suggesting that it “accepted” or “acknowledged” or agreed with the substance of Mr Marshall’s claims, as opposed to simply acknowledging receipt of his email, which is what Mr Marshall requested occur in the last line of his own email.

[22] Mr Marshall’s submission as to the scope and detail of his email of 20 October 2020 is not supported by the plain text of that email, and therefore does not change my conclusion that insufficient detail was provided.

[23] For completeness, I have considered whether the substance of Mr Marshall’s complaint of unjustified dismissal could have been raised through a series of communications, in particular the letters of 27 August 2019, 9 September 2019, 12 September 2019, 12 November 2019, 16 December 2019, and 15 January 2020 referred to above.

- a. The letter dated 27 August 2019 sent on behalf of Mr Marshall does not purport to raise a personal grievance claim and is instead focused on requests for information and correcting what were said to be inaccuracies in meeting notes.
- b. The letter dated 9 September 2019 is from Defence Force rather than Mr Marshall and is in response to his letter dated 27 August 2019.
- c. The letter dated 12 September 2019 is from Mr Marshall’s lawyer to Defence Force. It again raises issues around meeting notes and seeks further information. It does not purport to raise a grievance.
- d. The letter dated 12 September 2019 is from Mr Marshall’s lawyer to Defence Force, again raising issues around meeting notes
- e. The letter dated 16 December 2019 is from Defence Force rather than Mr Marshall and continues discussions about meeting notes.
- f. The letter dated 15 January 2020 is from Mr Marshall’s lawyer to Defence Force. It continues the discussion about meeting notes, refers to the prospect of mediation, and states that Mr Marshall had previously raised a personal grievance claim against New Zealand Cadet Forces, which was acknowledged to be a separate entity to Defence Force.

[24] It will be apparent from the above summary that this chain of correspondence between the parties was focused on Mr Marshall's continuing objections to meeting notes and their accuracy, and was not focused on raising personal grievance claims. Nothing in this correspondence suggests that it is related to Mr Marshall's eventual dismissal, which did not occur until some months later.

[25] I note for completeness that Mr Marshall refers at a later point in his submissions to a "Personal Grievance meeting and therefore I had the reasonable expectation that what I disclosed would be kept in confidence or protected." He then refers two sentences later to a meeting where a personal grievance was raised on 17 December 2018 relating to discussions that canvassed issues with New Zealand Cadet Forces. I am satisfied that this does not refer to a personal grievance which is the subject of these proceedings in the Authority, and that Mr Marshall is relying on his email of 20 October 2020 as being the correspondence which raised his personal grievance claim of unjustified dismissal with Defence Force.

[26] Accordingly, my view is that Mr Marshall did not raise a valid personal grievance claim for unjustified dismissal within the 90 days prescribed by s 114 of the Act. At no time did Mr Marshall tell Defence Force why he thought his dismissal was unjustified or what was required to resolve his grievance. This claim cannot proceed.

Unjustified Disadvantage Claims – were they raised within 90 days?

[27] Mr Marshall set out multiple claims of unjustified disadvantage in a letter to Defence Force dated 2 April 2020.

[28] The starting point is s 114 of the Act which provides that an employee "must" raise any personal grievance with their employer within 90 days.

[29] This 90 day period begins on the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later, except where either the employer consents to the grievance being raised out of time which Defence Force does not.

[30] In his letter of 2 April 2020, Mr Marshall states that he raises the claims in it after receiving new and/or further information on 19 December 2019. On perusal of the 2 April 2020 letter, some of the claims raised in it refer to events which occurred

during the first half of 2019, were decisions properly communicated to him by Defence Force at the time they occurred, and appear to have been fully within Mr Marshall's knowledge at the time they occurred.

[31] Some other claims, particularly the claims relating to the actions of Mr Marshall's manager in raising complaints with the Police and/or in relation to Mr Marshall's security clearance, I accept are matters which only properly came to Mr Marshall's attention as of 19 December 2019. However, even these matters would need to have been raised by him with Defence Force within 90 days, that is, by 16 March 2020. For the purposes of these proceedings in the Authority, Mr Marshall has raised three unjustified disadvantage claims based on the letter of 2 April 2020, as set out at paragraphs 1.2, 1.3, and 1.4 of the statement of problem.

[32] Mr Marshall's position as set out in his submissions to the Authority is that:

Even if I accept that I became aware of the facts on Friday 20 December 2019, and then sent a PG to NZDF (Group Captain Ward) on 2 April, this was only 89 days (Excluding Christmas shutdown and public holidays) well within the 90 day limit

[33] I will start by considering the correct start date for calculating the 90 day period under s 114. Section 7(b) states that the period of 90 days must be calculated beginning with the date on which the action alleged to amount to the personal grievance either occurred, or (as Mr Marshall argues is the case) came to the notice of the employee, whichever is later.

[34] Mr Marshall himself has given three possible dates on which he says he received information from the police in response to an OIA request. In his letter of 2 April 2020 at paragraph 2, he states this was on 19 December 2019.

[35] In his submissions to the Authority, he refers to this date as being 17 December 2019 and then also suggests it was 20 December 2019. In the absence of other documents, I prefer the date of 19 December 2019 set out in the 2 April 2020 letter as being the closest to a contemporaneous comment. I am satisfied that 19 December 2019 is the correct date from which to assess the beginning of the period of 90 days as required by s 114(7)(a) of the Act.

[36] Using the start date of 19 December 2019⁴, the 90th day from this date is 17 March 2020. As the grievance must be raised “within” these 90 days as set out in s 114(1), the last date on which Mr Marshall could have raised his personal grievance in accordance with the statutory timeframe is 16 March 2020⁵.

[37] The correspondence demonstrates that Mr Marshall did not raise his personal grievance claims until more than 2 weeks after this, on 2 April 2020. As such, the letter of 2 April 2020 is not within the statutory timeframe of 90 days, and does not constitute a valid claim in accordance with the time requirements of s 114 of the Act.

[38] Mr Marshall’s submits that the letter of 2 April 2020 was sent on the 89th day and is therefore within time, on the basis of:

excluding the period of Christmas closure (20 December 2019 to 5 January 2020) which is 16 days, also including 2 further stat days of Wellington Anniversary and Waitangi Day.

[39] Mr Marshall does not set out in his submissions the authority he relies on to define “the period of Christmas closure” or to exclude it and the two statutory holidays he names from the calculation of time required in s 114 of the Act.

[40] My view of Mr Marshall’s position is that he is essentially arguing that certain “non-working days” should be excluded from the calculation of the 90 day timeframe. However, the Act refers specifically to “days” not “working days”. There is nothing in the Act which would automatically exclude from the calculation period the days to which Mr Marshall refers, and the use of the word “days” in the section reinforces that all days are to be counted.

[41] The final date that I have calculated of 16 March 2020 was a Monday, and as such, there would be no need to rely on any more general rule providing that where time for doing any act expires on a non-working day, that act may be completed on the next working day.

[42] My view remains that, in relation to matters that came to his attention as a result of an official information request on 19 December 2020, Mr Marshall had until 16

⁴ The words “beginning with” indicate that the period is inclusive of the day on which the grievance occurred or came to the employee’s notice (see *North v Silverfern Farms Ltd* ERA Wellington WA123/09, 28 August 2009).

⁵ Section 54 of the Legislation Act 2019.

March 2020 to raise personal grievance claims with Defence Force. There is no provision to extend the statutory timeframes in the way that Mr Marshall suggests.

[43] Having reached this conclusion generally, I will consider the specific unjustified disadvantage claims set out in paragraphs 1.2, 1.3, and 1.4 of the statement of problem, to determine if this general proposition applies to these specific claims.

Unjustified Disadvantage – decision to cease paying Mr Marshall while he was suspended – paragraph 1.4 SOP

[44] Mr Marshall was suspended on 26 June 2019. His suspension was initially on pay.

[45] On 30 August 2019, Defence Force determined that Mr Marshall's suspension should continue on an unpaid basis, as of 5 September 2019, and advised him of this.

[46] Mr Marshall raised a personal grievance claim about the 30 August 2019 decision that his suspension should become unpaid in his letter of 2 April 2020.

[47] The date of 2 April 2020 is significantly in excess of 90 days after 30 August 2019 when Mr Marshall became aware of the decision to cease paying him. Mr Marshall puts forward no reason for the delay, and acknowledges that he was notified of this decision on 30 August 2019 before it came into effect on 5 September 2019.

[48] The raising of this grievance on 2 April 2020 is out of time, and cannot proceed.

Unjustified Disadvantage – Defence Force's communication with the Police on 1-3 April 2019 – para 1.2 SOP

[49] On 2 April 2020, Mr Marshall raised a personal grievance that his manager had provided misleading information about him to the Police on between 1 and 3 April 2019, which led among other things to the Police carrying out a search of his home.

[50] Mr Marshall says in his letter of 2 April 2020 that he became aware of his manager's communications with the Police (which were not conveyed to him at that time) on 19 December 2019.⁶

⁶ Mr Marshall gives the date of 19 December 2019 at paragraph 2 of his letter of 2 April 2020. I note that in his submissions to the Authority, he refers to this date as being 17 December 2019 and also suggests it was 20 December 2019. In the absence of other documents, I prefer the date of 19 December 2019 set out in the 2 April 2020 letter as being the closest to a contemporaneous comment.

[51] The latest date for raising a personal grievance claim counting from 19 December 2019 is 16 March 2020. This means that the grievance raised on 2 April 2020 is out of time.

[52] Accordingly, Mr Marshall's personal grievance claim relating to the communications to the police on 1-3 April 2019 is out of time, and cannot proceed.

Unjustified Disadvantage – security clearance meeting on 23 May 2019 – para 1.3 SOP

[53] On 2 April 2020, Mr Marshall raised a personal grievance claim about his manager's attendance with him at a meeting to discuss his security clearance on 23 May 2019. Mr Marshall's grievance is not simply about his manager's attendance at that meeting, which he was aware of as of 23 May 2019, but is rather about the import of his attendance in light of the knowledge that his manager was the person who had made complaints about him to the Police on 1-3 April 2019.

[54] Mr Marshall only became aware of these actions by his manager on 19 December 2019, making 19 December 2019 (and not 23 May) the correct date for the assessment of whether this grievance was raised within time.

[55] The latest date for raising a personal grievance claim counting from 19 December 2019 is 16 March 2020. This means that the grievance raised on 2 April 2020 is out of time and cannot proceed.

[56] Accordingly, the personal grievance claims of unjustified disadvantage raised by Mr Marshall on 2 April 2020 and summarised at paragraphs 1.2, 1.3, and 1.4 of the statement of problem are out of time as they have not been properly raised within the timeframes set out at s 114 of the Act.

Was action commenced in the Authority in relation to a personal grievance within 3 years?

[57] In addition to the points set out above, Defence Force raises that, even were the letter of 2 April 2020 to raise timely personal grievance claims, any action in the Authority in relation to a personal grievance claim must be commenced within three years as required by s 114(6) of the Act. It submits that the statement of problem was filed in the Authority on 13 April 2023, which is more than 3 years after the letter of 2

April 2020, and that this is also a bar to the claims set out at paragraphs 1.2, 1.3, and 1.4 of the statement of problem.

[58] As I have already determined that these claims are out of time, I do not need to determine this issue. However, I record that had I needed to do so, I would have found that these claims were also out of time in accordance with s 114(6) of the Act.

[59] The Court has interpreted this provision strictly and has found that there is no power to extend this time limit, which was intended by Parliament when imposing precise time limits.⁷

[60] There is no dispute on the underlying facts related to this argument. Mr Marshall raised multiple grievance claims in his letter of 2 April 2020.

[61] When he filed his statement of problem in the Authority on 13 April 2023, this was more than three years after the date on which these personal grievance claims were raised on 2 April 2020. Accordingly, those parts of the statement of problem which rely on the 2 April 2020 letter cannot proceed in the Authority.

[62] For completeness, I note that Defence Force acknowledged receipt of Mr Marshall's 2 April 2020 email, and said that it would respond later. Mr Marshall had requested that receipt be acknowledged, and that he awaited responses. My view is that acknowledging receipt where this had been requested does not amount to Defence Force accepting or agreeing with Mr Marshall's claims and is not a substantive response to them, especially where it is indicated that responses will follow.

Orders

[63] Mr Marshall did not raise a valid personal grievance claim for unjustified dismissal within the 90 days prescribed by s 114 of the Act. The claims set out at paragraph 1.1 of the statement of problem claim cannot proceed.

[64] Mr Marshall's personal grievance claim relating to the communications to the police on 1-3 April 2019 set out at paragraph 1.2 of the statement of problem is out of time and cannot proceed.

⁷ See *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128, [2018] ERNZ 374

[65] Mr Marshall's personal grievance claim relating to the attendance of his manager at a meeting on 23 May 2019 set out at paragraph 1.3 of the statement of problem is out of time and cannot proceed.

[66] Mr Mashal's personal grievance claim relating to the decision to cease paying him while suspended on 30 August 2019 set out at paragraph 1.4 of the statement of problem is out of time and cannot proceed.

Costs

[67] Costs are reserved.

[68] The Authority will contact the parties shortly via email to convene a conference call to discuss the steps needed to progress the remaining claim at paragraph 1.5 of the statement of problem, relating to a deduction from Mr Marshall's final pay.

Claire English
Member of the Employment Relations Authority