

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 456
3275779

BETWEEN ELLIN PAKALANI, SIOSIUA
 MAHINA and MATELITA
 ELONE
 Applicants

AND VAHEFONUUA TONGA
 METHODIST MISSION
 CHARITABLE TRUST
 Respondent

Member of Authority: Rachel Larmer

Representatives: Leilua Lou Alofa for the Applicants
 Rebecca Scott and Matthew Hutcheson, counsel for the
 Respondent

Investigation Meeting: On the papers

Information received: 23 July 2024 from the Respondent

Date of Determination: 26 July 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This preliminary determination records that the Authority does not have jurisdiction over any of the claims the applicants have made in the Statement of Problem (SoP) they lodged with the Authority on 30 January 2024.

[2] The respondent applied to the Authority on 23 July 2024 to dismiss this matter pursuant to clause 12A of Schedule 2 of the Employment Relations Act 2000 (the Act).

[3] The SoP was served by the Authority via email on the respondent on 9 February 2024. The respondent in its Statement in Reply (SiR), which was lodged without prejudice to its objection to jurisdiction, disputed the Authority's jurisdiction to investigate the applicants claims.

[4] The basis of the objection was that the applicants wanted the Authority to determine personal grievance claims that had not been raised with the respondent within the 90-day time limit required by s 114(1) of the Employment Relations Act 2000 (the Act).

The Authority's investigation

[5] The jurisdiction issue was determined 'on the papers'.

[6] During a Case Management Conference (CMC) held on 7 May 2024 the jurisdiction issues were discussed with the parties. There was also discussion about the ambiguity of the unjustified disadvantage personal grievance claims the applicants appeared to have wanted to record in the SoP.

[7] Directions of the Authority (DoA) dated 7 May 2024 were issued to the parties that addressed (among other things) the 90-day issue. It was agreed that if the jurisdiction issues needed to be determined, then that would occur 'on the papers.'

[8] The applicants said they had raised their personal grievances with the respondent within time, but the respondent disputed that. It said the first it knew of any personal grievance claims was when it was served with the SoP by the Authority.

[9] Because the parties had not yet been to mediation, a direction to mediation was made. Mediation occurred on 4 June 2024.

[10] The applicants were directed to provide further information (clarity) about their intended unjustified disadvantage grievance claims and about their raising with the respondent by the applicants of each of their dismissal and disadvantage grievances.

[11] The respondent was also directed to provide the applicants with copies of any documents that were relevant to the raising of grievances with it by any of the applicants and/or which related to any of the matters recorded in the SoP. The respondent advised that there were none.

[12] Notwithstanding the Authority's repeated attempts to obtain relevant information from the applicants' they failed to engage. The Authority therefore directed the applicants by 12pm on 13 May 2024 to provide clarity about what disadvantage grievance claims they were pursuing and to provide information about what they did, and when they did it, to raise each personal grievance claim.

[13] That timetable was breached.

[14] The applicants failed to respond to the Authority's attempts to contact them by phone and email on 15 and 16 May 2024. Their representative told the Authority by phone on 17 May 2024 that he would provide the required information the next day. That did not occur.

[15] The Authority contacted the applicants in the morning on 21 May and was told by their representative he would provide the necessary information by the end of that day. That did not occur.

[16] The Authority attempted to contact the applicants again, without success, on 23 May 2024. On 24 May 2024 their representative told the Authority the information would be provided by 27 May 2024.

[17] The applicants lodged a memorandum on 27 May 2024 that attached five emails their representative had sent their employer, which they claimed "demonstrated an intention to raise a personal grievance." None of these emails had raised a personal grievance claim. Nor did they provide any information about the applicants' unjustified disadvantage grievance claims.

[18] The applicants' memo said they would be relying on s 115(a) of the Act "given the bullish and intimidating environment they were subjected to." However, no application has been made pursuant to s 114(3) of the Act for leave to raise any personal grievance claims out of time. No information or evidence has been provided to support an "exceptional circumstances" claim under a 115(a) of the Act.

[19] The Authority issued DoA dated 28 May 2024 which expressed concern that the applicants did not appear to have taken on board the feedback the Member had provided during the CMC about the jurisdiction issues. The DoA set out the deficiencies in the information the applicant had provided in response to the Authority's various directions.

[20] The DoA dated 28 May 2024 set out exactly what information was required from the applicants about their personal grievance claims. That information has still not been provided.

[21] The Authority expressed its concern that in the three weeks following the CMC the applicants had done nothing to advance their matter by clarifying their specific unjustified disadvantage grievance claims, which had not been adequately particularised in the SoP. The applicants were encouraged to do a realistic 'risk versus rewards' analysis of their claims.

[22] The Authority also pointed out in the DoA that the proposed application the applicants wanted to make under s 114(3) of the Act, for leave on the grounds of the exceptional circumstances in s 115(a) of the Act, did not make sense as it was contradictory to their own stated position that they had in fact raised all of their personal grievances with the respondent within 90-days of each personal grievance arising or coming to their attention.

[23] The DoA dated 28 May 2024 set a timetable for the applicants to lodge their affidavit evidence and submissions on the disputed jurisdiction issues and to apply for leave under s 114(3) of the Act, if they were going to do so. They were also again warned of the possible adverse costs consequences they were likely to face if the preliminary issues did not go in their favour.

[24] The applicants were directed to lodge their evidence, submissions and possible s 114(3) leave application by 12pm on 24 June 2024. That did not occur.

[25] The applicants' representative emailed the Authority on 4 June 2024, but failed to provide any of the requested information the Authority has been seeking since the CMC on 7 May 2024.

[26] On 7 June 2024 the Authority asked the applicants to advise their intentions and to provide the required information. No response was forthcoming.

[27] On 10 June 2024 the Authority advised the parties that according to its service records the SoP was served by email on the respondent on 9 February 2024.

[28] The applicants failed to respond to the Authority's attempts to contact them on 10, 13 and 18 June 2024.

[29] On 25 June 2024 the applicants' representative responded to the Authority's email of that date by asking for an extension until 27 June 2024 to provide the required information. The extension was granted.

[30] The respondent asked the Authority not to give the applicants any more extensions beyond 27 June 2024.

[31] The applicants breached the extended deadline of 27 June 2024.

[32] The applicants' representative emailed the Authority on 27 June 2024, but did not provide the requested information. He said it would be provided on Monday 1 July 2024, but that did not occur.

[33] Mr Alofa's email dated 27 June 2024 also stated (among other things):

We have completed submissions on behalf of the Applicants to support their contentions that the 90-day rule under s 114 was satisfied by virtue of the emails already submitted pointing to inter alia, the laying of statement of problems in the Authority.

[34] The Authority responded to the parties on 27 June 2024 setting out what information was required from the applicants, and again advising them to do a realistic 'risk versus reward' analysis as they were vulnerable to adverse costs consequences.

[35] The applicants failed to provide the necessary information on 1 July 2024. After being contacted that day by the Authority the applicants' representative said he would have the information lodged the next day (2 July 2024). That did not occur.

[36] When the Authority contacted the applicants' representative on 3 July 2024 asking for the missing information he said it would be provided that afternoon. That did not occur.

[37] The Authority emailed the parties expressing concern about the unsatisfactory manner in which the applicants were conducting their case. They had failed to explain their disadvantage claims, they had not provided information they had been directed to provide since 7 May 2024, they repeatedly breached directions, and had even repeatedly breached extended directions that had been varied at their request.

[38] The applicants' representative repeatedly said he would lodge information, but then failed to do so. He was also difficult to contact, as he did not respond to the Authority's attempts to contact him and there was no ability to leave voicemails for him when he did not answer the Authority's phone calls.

[39] The Authority pointed out in its emailed dated 3 July 2024 that:

- (a) Siosiu Mahina's and Matelita Elone's employment had ended on 22 August 2024, so the SoP had been served on the respondent 171 days after the end of their employment;
- (b) Ellin Pakalani's employment had ended on 23 August 2024 and the SoP had been served on the respondent 170 days after that.

[40] The applicants were given until 12pm on 11 June 2024 to provide the information they had been directed to provide. However, that did not occur.

[41] The applicants' representative did not respond to the Authority's attempts to contact him by phone and email on 15, 16 and 17 July 2024.

[42] On 17 July the Authority emailed the parties to inform them that the unsatisfactory situation regarding the applicants continual breach of directions and failure to provide necessary information could not be permitted to continue.

[43] The Authority also recorded its preliminary view that, based on the currently available information, it did not have jurisdiction over the personal grievance claims in the applicants' SoP, because none of them had been raised within the statutory 90-day time limit.

[44] The Authority again extended the time for the applicants to provide the information they had been directed to provide to 12pm on 22 July 2024. However, they still failed to respond by that extended deadline. Their representative also failed to respond to the Authority's attempts to contact him about that latest timetable breach.

[45] On 23 July 2024 the applicants asked for an extension until 4pm on 26 July 2024. An extension was granted by until 12pm on 26 July 2024, instead of the requested time of 4pm.

[46] The Authority emailed the parties to make it clear that the extended deadline was a hard limit. The Authority said it would be determining the jurisdiction issues after that cut off deadline, which was likely to result in the applicants' claims being dismissed on the grounds the Authority lacked jurisdiction to investigate them.

[47] The applicants were warned that if a preliminary determination was issued, and it did not go in their favour, then they should expect that costs would be awarded against them.

[48] The applicants have not responded to the Authority, they have not complied with any of the timetable directions that have been issued and they have not provided any evidence or other information to establish that they had raised any personal grievance claims with the respondent before it was served with the SoP on 9 February 2024.

Issues

[49] The following issues are to be determined:

- (a) When did the personal grievance claims arise, or come to the applicants' attention?
- (b) When and how did the applicants raise their personal grievance claims?
- (c) Does the Authority have jurisdiction over any of the claims the applicants made in their SoP?
- (d) What costs and disbursements should be awarded?

Relevant law

[50] Section 114(1) of the Act states:

Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), 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 or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.

[51] Section 114(2) of the Act states:

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.

[52] Whether or not the employee has raised a personal grievance claim within time is a factual matter that is to be objectively determined by the Authority. A grievance cannot be raised in anticipation of an event. It must relate to an event that has occurred

or is occurring in accordance with the Employment Court decision in *Creedy v Commissioner of Police*.¹

[53] For an unjustified dismissal grievance, the grievance needs to be raised after the dismissal has occurred because s 103(1)(a) of the Act expressly requires the employee to have been dismissed in order to pursue a personal grievance for unjustified dismissal.

What is required to raise a grievance?

[54] There is no specific form of words or method required for the raising of a personal grievance claim. What is required is that the employee puts the employer on notice orally and/or in writing that they have a personal grievance claim.

[55] This requires the employee to provide the employer with sufficient information about their personal grievance so that the employer is aware of the nature of the grievance and therefore in a position to be able to respond to it.

[56] The level of detail required is not what would be expected to be included within a Statement of Problem, but it is insufficient for the employee to simply state that they have a grievance or to specify the type of grievance without providing further information.²

[57] The Authority may have regard to a series of communications, and it may find that the totality of all communications have in effect adequately raised a personal grievance claim. Whether that is the case will involve a factual inquiry to determine what the employer would reasonably have known, as a result of the totality of the communications between the parties.

[58] The purpose of raising a grievance with the employer is so that if it wants to, it is in a position to be able to address the grievance and to respond on its merits, with a view to resolving the grievance expeditiously and informally.³ It therefore follows that the employer must know what it is that it is being asked to address.

¹ [2006] ERNZ 517 at [28]-[30].

² *Creedy* at [36] and [37], above n1.

³ *Malcom v Chief Executive of the Department of Corrections* [2021] NZERA 489 at [79].

When did the personal grievance claims arise, or come to the applicants' attention?

[59] Siosiua Mahina's and Matelita Elone's dismissal grievances arose on 22 August 2023, which is the date their employment ended.

[60] Ellin Pakalani's dismissal grievance arose on 23 August 2024.

[61] The alleged unjustified disadvantage grievances for all of the applicants had to have arisen prior to the ending of their employment. Despite repeated requests for information about these disadvantage grievances, no such information has been forthcoming.

When and how did the applicants raise their personal grievance claims?

[62] The applicants said they raised their personal grievances with the respondent in the emails described below and in the SoP.

Did the emails raise any personal grievance claims?

[63] The emails the Authority was given on 28 May 2023 did not raise any personal grievance claims, as is evident from the summary below:

- (a) The first email the applicants' representative sent requested a meeting that day or the next day.
- (b) The second email was the respondent's reply on 23 August 2023 asking him to provide a "signed authority form for any employee you are representing."
- (c) The third email was his advice that he was "drafting statements of problems for lodging" which "would be served in due course."
- (d) The fourth email was from the respondent to the applicants' representative on 23 August 2023 saying that it needed the authority to act or any discussion about the employees would breach their privacy and confidentiality and the employer's Privacy Act 2020 obligations.
- (e) The fifth email was Mr Alofa's response that "we will now lodge proceedings for mediation to be directed."

[64] These five emails were not relevant to the issues the applicants had been directed to provide information about, namely the details of their unjustified disadvantage grievance claims and information about how and when and to whom and by whom, each applicant had raised with the respondent each personal grievance claim they wanted to pursue.

[65] The emails did not raise any personal grievance claims.

Did the SoP raise any personal grievance claims?

[66] The SoP raised unjustified dismissal claims for the three applicants. These were raised with the respondent when it was served with the SoP on 9 February 2024.

[67] However, there was insufficient information in the SoP to have appropriately raised any unjustified disadvantage personal grievance claims because the respondent did not have enough information about the disadvantage grievances to understand and address them.

[68] The respondent could not have what alleged conduct was viewed as disadvantaging the applicants, who was involved, when it occurred or how the applicants wanted it resolved. It looked like their disadvantage grievances at least partially related to their redundancy dismissals, so if that was the case it was part of the dismissal grievances.

[69] Even if the Authority was wrong about that, there was no evidence or any other information to establish that respondent had known about any disadvantage grievances before it was served with the SoP on 9 February 2024.

Does the Authority have jurisdiction over any of the claims the applicants made in their SoP?

[70] The dismissal grievances were raised with the respondent 170 or 171 days after the applicants' employment ended. It was likely that any disadvantage grievances in the SoP (if the Authority was wrong that these had not been appropriately raised) had been raised more than 171 days after they had arisen.

[71] This was 80 or 81 days outside the statutory 90-day period required by s 114(1) of the Act for the dismissal grievances and likely more than that for any disadvantage grievances.

[72] There was no explanation for this extensive delay. Nor was there an application under s 114(3) of the Act for the Authority to give the applicants leave to raise any personal grievance claims out of time.

[73] Accordingly, the Authority does not have jurisdiction over the personal grievance claims in the applicants' SoP, so their claims did not succeed.

What costs and disbursements should be awarded?

[74] The respondent as the successful party is entitled to a contribution towards its actual legal costs. The respondent advised the Authority on 23 July 2024 that it would be seeking costs and it wanted an opportunity to be heard on the costs issue.

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

[76] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondent may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the applicants will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[77] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁴ This matter will be dealt with as having involved a half-day investigation meeting, because it was determined 'on the papers'.

Rachel Larmer
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1