

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 610
3258919

BETWEEN

PETER CALLEN
Applicant

AND

ALARON PRODUCTS LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Maryline Suchley, advocate for the Applicant
Luke Acland, counsel for the Respondent

Investigation Meeting: 6 September 2024 by AV

Submissions Received: 6 and 16 September 2024 from the Applicant
6 and 13 September 2024 from the Respondent

Determination: 11 October 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination resolves preliminary issues about the raising of personal grievances.

[2] There is an issue whether Peter Callen raised personal grievances that he was unjustifiably disadvantaged in his employment and unjustifiably dismissed within the statutory timeframe to do so. There is an issue whether Alaron Products Limited (Alaron) impliedly consented to the late raising of the dismissal grievance. There is an application for leave to raise a personal grievance outside of the statutory timeframe on the basis that there are exceptional circumstances.

[3] Alaron does not accept that personal grievances were raised within the statutory timeframe or that it impliedly consented to the dismissal grievance being raised out of time. Alaron does not accept that there are exceptional circumstances so that leave should be granted to raise the grievance outside of the statutory timeframe.

The Authority investigation

[4] It was agreed during a case management conference with the Authority, Ms Suchley and Mr Acland that a preliminary investigation meeting would be held to determine what personal grievances were raised within the statutory timeframe. The application for leave to raise the unjustified dismissal grievance outside of the statutory timeframe would also be investigated at the preliminary meeting.¹ A date for a substantive investigation meeting was set for 28 November 2024 in Nelson. Timetabling directions were made for an exchange of statements of evidence for both meetings.

[5] The Authority received a statement of evidence from Mr Callen. Mr Acland advised the Authority and Ms Suchley that Alaron did not intend to lodge statements of evidence for the preliminary meeting.

[6] The investigation meeting was held by way of audio videoconferencing on 6 September 2024. The Authority heard affirmed evidence from Mr Callen. Mr Callen answered questioning from the Authority, Ms Suchley and Mr Acland. The Authority heard submissions from Ms Suchley and Mr Acland.

[7] After the investigation meeting the Authority asked Ms Suchley and Mr Acland whether they wanted to provide submissions about whether Alaron could reasonably be taken to have impliedly consented to an extension to the late raising of a personal grievance. Submissions were received on that point from Ms Suchley and Mr Acland.

The Issues

- (a) Did Mr Callen's letter of 8 May 2023 raise a personal grievance?

¹ Case management conference held on 2 July 2024. Directions of the Authority dated 2 July 2024.

- (b) If so, what personal grievance, or grievances were raised?
- (c) Was a dismissal grievance raised within the statutory timeframe?
- (d) If not did Alaron impliedly consent to the grievance being raised after the expiry of the statutory timeframe?
- (d) If Alaron did not impliedly consent to the dismissal grievance being raised after the statutory timeframe was the delay occasioned by exceptional circumstances and would it be just to grant leave to raise the personal grievance.

Did Mr Callen's letter of 8 May 2023 raise a personal grievance?

[8] On 19 April 2023 Alaron commenced consulting about a proposal for restructuring the engineering and maintenance teams. Mr Callen was an affected employee.

[9] On 8 May 2023 Mr Callen sent a lengthy letter by email to management at Alaron advising that he wanted to lodge a personal grievance against his manager. He raised issues about bullying by his manager which included a lack of communication and other concerns. There is an alleged link in the letter between the bullying conduct and an earlier health and safety complaint Mr Callen had made about another employee on 27 June 2022. Amongst other matters Mr Callen wrote the following in his letter:

...Ostracised, demonised and (most likely) soon to be unemployed through a vengeful, underhanded dismissal under the guise of 'disestablishment' and 'restructuring'. I am 100% certain that any re-application of mine will be dismissed outright thanks to R's immoral machinations...

[10] Mr Callen made further reference to his manager using his position to "expunge those people that he has a dislike for." He referred to seeking professional help for stress because of the alleged bullying. Mr Callen said in his letter the matter was something that needed to be investigated "thoroughly and independently." At or about the same time as the emailed letter Mr Callen went on stress leave for a week returning on or about 15 May 2023.

[11] The general manager of human resources at Alaron provided an initial response on 19 May 2023 to Mr Callen. There was a denial that the changes proposed to the structure were initiated by Mr Callen’s manager. Alaron stated that the review of the structure and subsequent changes are based on business reasons only and had nothing to do with individuals within the team.

[12] Mr Callen responded to the general manager of human resources. The date on which he did this is unclear. It would have very likely been before he was provided with formal notice of redundancy by letter dated 23 May 2023. After that date Mr Callen did not attend the workplace for work and asked for his one week’s notice to be paid in lieu. Mr Callen in his response did not accept that his manager did not have “major input” into the restructure and maintained that “it was personal”. He referred to the investigation into his concerns as a “sham” and stated that Alaron had not addressed his manager’s bullying.

[13] Section 114 of the Employment Relations Act 2000 (the Act) provides:

- (1) An employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with their employer within the applicable employee notification period unless the employer consents to the personal grievance being raised after the expiration 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.
- (3) Where the employer does not consent to the personal grievance being raised after the expiration of the [employee notification period], the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.
- (4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—
 - (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115; and
 - (b) considers it just to do so.
- (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.
- (6) No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.
- (7) In this section, **employee notification period** means,

- (a) in respect of a personal grievance under section 103(1)(d), the period of 12 months beginning with the date on which the action alleged to amount to the personal grievance occurred or came to the notice of the employee, whichever is later:
- (b) in respect of any other personal grievance, 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 later.

Conclusions from the letter of 8 May 2023

[14] Mr Acland submits that it is unclear if the matters complained of in the letter of 8 May 2023 fall within the definition of an unjustified disadvantage in s 103 (b) of the Act. Section 103(b) of the Act provides:

...that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or...

[15] There is no particular form of words required to raise a grievance. What is important is that what is said to raise a grievance is sufficient to enable the employer to address the grievance.²

[16] The key aspects of the letter of 8 May 2023 are that Mr Callen alleged he was bullied by his manager and that had impacted him in the workplace and his physical wellbeing. An employer has an obligation to provide a safe workplace. The other key aspect from the 8 May 2023 letter is that an ulterior motive is alleged for the restructuring. Mr Callen alleged that the restructure was designed to remove him from the workplace and was a sham and his manager was involved in this.

[17] There was sufficient information for Alaron to understand and address the concerns. The company provided a written response to Mr Callen on 19 May 2023. Mr Callen responded to Alaron before he was advised of the redundancy including that he was dissatisfied with the investigation.

² *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 at [36].

[18] The letter of 8 May 2023 raised personal grievances of unjustified disadvantage within the meaning of s 103(b) of the Act about the safety of the workplace because of the alleged conduct of a manager and the genuineness of the restructuring process.

[19] Some matters referred to in the letter are likely not confined to the 90-day period before 8 May 2023. The evidence that the Authority considers may need to include earlier events to determine any unjustifiable disadvantage claim within the 90-day period. Remedies only relate to the 90-day period, but the nature and scope of the remedies may be informed by a broader background to the events.³

[20] It was initially argued on behalf of Mr Callen that the letter of 8 May 2023 also raised a personal grievance of unjustified dismissal. An unjustified dismissal grievance cannot be raised before there has been an actual dismissal, or at the least, dismissal is inevitable.⁴ The employment relationship was still on foot at the time of the 8 May 2023 letter. It was not until 23 May 2023 that Mr Callen was advised his application for a role in the new structure was unsuccessful and he was provided formal notice of termination of his employment.

[21] Personal grievances alleging unjustified disadvantage are raised within the statutory timeframe in the letter of 8 May 2023. A personal grievance of unjustified dismissal is not raised in the letter of 8 May 2023.

Was a personal grievance alleging unjustified dismissal raised within the statutory timeframe?

[22] The calculation of 90 days for the raising of a grievance of unjustified dismissal could be undertaken from 23 May 2023 when formal notice of termination was given and Mr Callen asked to leave immediately and be paid in lieu of working notice. Alaron agreed to this request. The calculation could also be undertaken from 31 May 2023 when Mr Callen was advised his final pay including payment for notice and holiday

³ *Davis v Commissioner of Police* [2013] NZEmpC 226.

⁴ Employment Relations Act 2000 section 103(a).

pay would be paid. He was asked to return items belonging to Alaron. Until that date arguably some obligations between the parties remained.

[23] As Mr Acland submits either way the first time a dismissal grievance was raised with Alaron was when the company was served with a copy of the statement of problem on 26 October 2023. That was outside of the statutory timeframe for raising a grievance. The statement of problem was lodged with the Authority on 25 October 2023.

[24] A personal grievance alleging unjustified dismissal was not raised within the statutory timeframe.

Did Alaron consent to the grievance being raised after the expiry of the statutory timeframe?

[25] Alaron's general manager of human resources lodged a statement in reply on 3 November 2023. The statement in reply provided amongst other matters "We completely refute Mr Callen's statement of problem" which included the alleged dismissal grievance. The merits were addressed broadly including the genuineness of the restructuring process and decision-making. Relevant documents including those about the restructuring process, the job description for the role Mr Callen applied for unsuccessfully in the new structure and the notice of termination letter were attached.

[26] Alaron indicated that it would attend mediation in the statement in reply but raised concerns because it did not accept the claims of Mr Callen were valid. There was mention that nothing further had been heard from Mr Callen after an unrelated email from him on 2 June 2023 about removal from the mailing list. Nothing was stated about timeliness of the raising of the dismissal grievance. The answer to the question in the statement in reply about why Alaron had not already attended mediation was that there had been no request and there was no indication further actions were required following the original grievance and subsequent response.

[27] The parties were directed to mediation by the Authority on 14 November 2023 and mediation took place on 26 March 2024. The Authority was advised Mr Acland

would be representing Alaron on 12 April 2024. Mr Acland then raised jurisdiction issues about the raising of the personal grievances including the dismissal grievance.

[28] The Authority has considered whether Alaron consented to the late raising of the personal grievance in its statement in reply because it did not raise a jurisdiction issue that the dismissal grievance raised out of time.

[29] Ms Suchley referred the Authority to schedule 2 of the employment agreement between Mr Callen and Alaron and the options for Alaron if a grievance is raised out of time to accept or reject the claim.

Personal Grievances

If you feel that you have grounds for raising a personal grievance with the Company (for unjustified dismissal, unjustifiable disadvantage, discrimination, duress, sexual or racial harassment), then you must do so within 90 days of the action occurring or the grievance coming to your notice. Otherwise, your claim may be out of time.

If you raise your grievance out of time, we can choose to accept the later grievance or reject it. If we choose to reject it, you can ask the Employment Relations Authority to grant you leave to raise the grievance out of time.

[30] Mr Acland correctly submits the Authority is required to objectively assess whether Alaron by its conduct could reasonably be taken to have consented to an extension. This is a matter of fact and degree.⁵ Consent can be express or implied.⁶

[31] Mr Acland suggested it may be appropriate for the Authority to hear evidence from the general manager of human resources. The Authority does not consider that necessary given the objective nature of its consideration of the written communications in this matter.

[32] Mr Acland submits that Employment Court judgments about express or implied consent have involved communications and engagement before a statement in reply is lodged. In *Phillips v Net Tel Communications*, the Employment Court held the employer impliedly consented to an extension on the basis of a notice of intention to

⁵ Above n 5 at [24] and [25].

⁶ *Commissioner of Police v Hawkins (No 3)* [2009] NZCA 209.

defend under the Employment Contracts Act 1991 seeking mediation together with an earlier letter. It was stated in that judgment that it was not a situation where the filing of a notice of intention to defend alone would constitute implied consent to a late raising of a grievance.⁷

[33] As the Court of Appeal said in *Hawkins* whether there has been implied consent to the grievance being raised out of time is a matter of fact and degree.⁸

[34] In this matter the general manager of human resources had responded to earlier concerns raised by Mr Callen in his 8 May 2023 letter about the restructuring process when the relationship was still on foot. He had some familiarity with some of Mr Callen's concerns. The employment agreement provided that Alaron could accept or reject a grievance raised out of time. Mr Callen in his written evidence stated on receipt of the statement in reply that there was no mention his claims were outside of the 90-day limit, and he assumed Alaron had accepted them to be heard by the Authority.

[35] Whilst there was a direction to attend mediation from the Authority Alaron had not from the statement in reply refused to attend mediation outright but rather considered it had acted appropriately.

[36] Mr Acland submits that an objective observer would view the statement in reply as a response to a formal document under the "legal authority of the Authority" rather than implied consent to a late grievance. He submits an objective observer would view the statement in reply as having met "threshold compliance of the Authority jurisdiction."

[37] The Employment Court judgment in *Kerr v Associated Aviation (Wellington Limited)* decided under the Employment Contracts Act 1991 considered whether there was express or implied consent to late raising of a personal grievance from an exchange of letters.⁹

⁷ *Phillips v Net Tel Communications* [2002] 2 ERNZ 320.

⁸ Above n 5.

⁹ *Kerr v Associated Aviation (Wellington Limited)* unrep 19 February 1997 WEC 7/97.

[38] A detailed letter raising a grievance was sent to the employer by a lawyer almost 16 months after the employee's employment had ended under the then statutory process for raising grievances. It stated that the employer was required to give a written response detailing their view of the facts and whether they were prepared or not to grant the remedies requested in the letter. The employer responded without objection to the late raising of the grievance.

[39] The Court held in *Kerr* the employer incorrectly considered that he had to reply to the substantive merits based on what the employee's solicitor had stated. Once proceedings were lodged the notice of intention to defend was accompanied by a letter that referred to the jurisdictional issue about the late raising of the grievance. It was held that there was no express or implied consent to the late raising of the grievance by virtue of the earlier letter before proceedings were lodged.¹⁰

[40] Mr Callen was unrepresented when he lodged his original statement of problem.¹¹ The statement in reply following the commencement of proceedings was the time to raise any issue as to jurisdiction with the late submission of the dismissal grievance. The lodging of the statement in reply is not from an objective assessment limited to meeting "threshold compliance of the Authority jurisdiction". The general manager of human resources could have been expected to have appreciated that in a way that the employer in *Kerr* did not at the process stage.

[41] The Authority finds that objectively assessed Alaron can reasonably be taken to have impliedly consented to Mr Callen raising his dismissal grievance out of time. Alaron lodged a statement in reply that addressed the merits of the substantive claim and did not raise a jurisdiction issue about the late raising of the dismissal grievance. The parties thereafter attended mediation following a direction from the Authority.

¹⁰ Above n 9.

¹¹ A personal grievance may be raised by lodging and serving a statement of problem - *Premier Events Group Ltd v Beattie (No 3)* [2012] ERNZ 257.

[42] As a result of this finding the Authority does not need to go on to consider whether leave should be granted to raise the dismissal grievance outside of the statutory timeframe.

Findings

[43] Mr Callen raised personal grievances in his letter of 8 May 2024 alleging that he was unjustifiably disadvantaged in his employment because of an unsafe workplace due to bullying by his manager and that the restructuring process was not genuine and for the ulterior motive of removing him from the workplace.

[44] Alaron impliedly consented to the late raising of a personal grievance alleging that Mr Callen was unjustifiably dismissal.

[45] These will be the issues for substantive investigation.

Costs

[46] Costs are reserved and will be dealt with after the substantive investigation.

Helen Doyle

Member of the Employment Relations Authority