IN THE EMPLOYMENT COURT
CHRISTCHRUCH

[2014] NZEmpC 235
CRC 16/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	RUTHERFORD STREET KINDERGARTEN Applicant
AND	CATHERINE EMMA CHILTON Respondent

Hearing:	(on the papers dated 12 June, 14 July, 9, 10 and 31 October, 7 November 2014)
Appearances:	A Sharma, counsel for the applicant J Levenbach, counsel for the respondent
Judgment:	19 December 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The issue in this case is whether two personal grievances were raised by Ms Chilton within the statutory period of 90 days; and if not whether leave should be granted to file her personal grievances out of time. The Rutherford Street Kindergarten (RSK) challenges a decision of the Employment Relations Authority (the Authority) which found that a personal grievance of unjustifiable dismissal was raised within 90 days of Ms Chilton's dismissal.[1] The Authority also directed the parties to attend mediation.

[2] For the purposes of this judgment I have reviewed the Authority's determination, the pleadings, comprehensive affidavits, and submissions. Because

[1] *Chilton v Rutherford Street Kindergarten Committee* [2014] NZERA Christchurch 77.

the Authority will, unless matters are otherwise resolved, need to investigate a full history of the employment relationship in order to determine whether Ms Chilton's personal grievances are established, I record only those matters which are necessary in order to resolve the challenge.

[3] Counsel appropriately agreed that the challenge should be resolved on the papers, which necessarily meant that evidence has been given by affidavit and is untested. Consequently, the findings made herein will not bind any decision-maker who may need to consider the matter hereafter.

The essential facts

[4] Ms Chilton commenced employment with RSK in March 2008 as a Financial Administrator/Administration Assistant.

[5] RSK asserts that in early 2011, concerns arose as to whether certain wage payments which Ms Chilton was required to administer had been calculated correctly.

[6] On 31 March 2011, the President of RSK wrote to Ms Chilton. She noted that 17 March 2011 was the anniversary of her employment date, and there was an issue as to whether she was entitled to move to Step Nine, Grade C of the pay scale under the Early Childhood Education Collective Agreement of Aotearoa New Zealand (2009-2011) (the CA). Advice was given that she would be kept on Step Eight, because it was considered that her performance had been incompetent in terms of the CA. It was alleged that there had been an over-payment of $2,000 to staff since July 2010, which had caused undue stress to staff, the senior teacher, and the RSK Committee.

[7] The letter went on to state that an appraisal would be conducted before the end of the term, with steps being taken to ensure such a situation was not repeated; other assistance and guidance would also be given.

[8] A meeting was held the next day, 1 April 2011 between Ms Chilton and members of the RSK Committee. The then-President of RSK, Ms Drozdowski-Mant stated that her recollection was that the meeting came about because Ms Chilton was

not happy with RSK's decision not to increase her hourly rate. A minute of that meeting has been signed by members of the Committee. The minute records that Ms Chilton was unhappy with the letter she had received relating to pay; there was then a discussion as to some of the errors which had been made as to the calculation of pay for staff.

[9] A subsequent letter to Ms Chilton dated 11 July 2011 referred to the meeting, and stated that at it the following arrangements had been concluded:

a) Ms Chilton was to meet with the Treasurer the following day.

b) She was to have regular meetings with the senior teacher who was to sign off any changes in respect of staff payments.

c) The Committee expected Ms Chilton to understand the way in which the pay system worked, and that no further errors would be made.

d) She was to agree that she should avoid errors in wage calculations.

[10] On 24 May 2011, Ms Chilton spoke to an Advisory Officer of the New Zealand Educational Institute Te Riu Roa (NZEI). She explained what had occurred at the time of her appraisal, and that she felt she was not getting "any say in the matter nor an opportunity to explain why the error happened". She believed that the employer could not withhold her annual increment based on competency, because progression did not rely on whether she had performed competently. She reported that the senior teacher had told her to accept the fact that she was not going to receive an increase, even though this was allegedly in conflict with the terms and conditions of the CA. She sought the assistance of NZEI.

[11] On 2 June 2011, Ms Chilton authorised NZEI to represent her and to sign any papers on her behalf regarding "the dispute/grievance/action with my employer". In particular the authority included approval for NZEI to refer the matter to Mediation Services or to the Authority, or to seek any other relevant information.

[12] On 8 June 2011, the NZEI Field Officer wrote to RSK confirming that she was supporting Ms Chilton, and requesting a meeting to discuss the following issues:

- Her 2010 appraisal outlining her competence in undertaking her role.
- Progression on the administration pay scale as per part 6(g), page 20.
- The Administration job description.
- Opportunities for professional development.
- Policy development to guide implementation of the Collective Agreement.
- Support for the development of an [CA] Administrators' Network.

[13] Part 6(g), as referred to in the letter, was a reference to a provision of the CA which stated:[2]

> **Progression:** an administrative employee shall be paid on the appropriate step having regard to their previous experience and qualifications held and *shall* progress through the wage scale after each 12 months continuous service provided that an employee is employed for more than 10 hours per week. …

[14] On 25 May 2011, the senior teacher prepared a statement that summarised her views as to Ms Chilton's performance when calculating pay for staff; she concluded her statement by saying that in her opinion RSK had no need for an administrator who was being paid under Grade C of the CA. She said she had been informed by a previous senior teacher that she had been pressured to accept this Grade by Ms Chilton. A copy of this statement came to Ms Chilton's attention on 10 June 2011.

[15] RSK contend that in June 2011 further errors were discovered, which were not consistent with an employee on Ms Chilton's step or grade. On 4 July 2011,

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[2] (emphasis added).

therefore, RSK wrote to Ms Chilton outlining the employer's concerns about her work performance.

[16] The letter included this paragraph:

> The Committee has serious concerns over competency issues, and your continued ability to deliver in the role of Financial Administrator and Administration. It is the Committee's view that the concerns outlined amount to serious misconduct, and impact directly on RSK's ongoing confidence and trust in you to deliver in your role, which is considered to be a key position with the kindergarten. …

[17] A disciplinary meeting was accordingly proposed. This meeting took place on 7 July 2011. Ms Chilton was supported by a Field Officer from NZEI.

[18] Following the meeting, NZEI became aware of RSK's intention to dismiss Ms Chilton. The Field Officer wrote to counsel for RSK urging the employer to look at alternatives to dismissal, it being asserted that Ms Chilton had not been given an adequate opportunity to prove her competency under guidance.

[19] On 11 July 2011, RSK wrote to Ms Chilton, discussing each of the assertions that had been made, including Ms Chilton's responses at the disciplinary meeting, and in the NZEI letter. The RSK letter concluded by stating that allegations of serious misconduct were substantiated, that the Committee no longer had trust and confidence in Ms Chilton, and that her employment was accordingly terminated without notice.

[20] Following these events, Ms Chilton's circumstances were referred to Mr John Robson, Director, Legal and Compliance at NZEI, who discussed with Ms Chilton the possibility of issuing a statement of problem.

[21] On 4 August 2011, Ms Chilton attended her General Practitioner (GP). Various symptoms were discussed; the GP recorded that Ms Chilton had stress-related symptoms following her recent dismissal.

[22] On 24 August 2011, Mr Robson contacted counsel for RSK; there was a conversation which was recorded as taking some 25 minutes on "matters pertaining

to Ms Chilton". This was followed by Mr Robson sending a without prejudice email. The content of the email is not before the Court.

[23] By 5 September 2011, a statement of problem had been drafted by Mr Robson and forwarded to Ms Chilton.

[24] On 19 September 2011, there was a further discussion between the lawyers, although counsel for RSK stated that she could not discuss the matter. Accordingly, Mr Robson advised Ms Chilton that a letter should be sent to RSK; he provided a draft of that letter on the following day for Ms Chilton to consider.

[25] It was duly sent to RSK on 21 September 2011. It relevantly read:

> NZEI is authorised to represent the above member with respect to her employment at – and subsequent dismissal from – the Rutherford Street Kindergarten.
>
> NZEI has two concerns.
>
> Firstly it appears that your kindergarten, as employer, believed that it could 'fine' [Ms Chilton] for alleged shortcomings by denying her a salary increment. I refer to your letter to [Ms Chilton] dated 31 March 2011.
>
> Secondly, notwithstanding the fact that processes were put in place [and recorded by a signed minute] whereby alleged shortcomings would be addressed, no adequate time was ever afforded to allow improvements to occur.
>
> With respect to the first issue, NZEI contends that you were not in a legal position to deny [Ms Chilton] her increment. In your 31 March letter, the wrong provision of the relevant collective agreement is quoted. Teachers can be denied increments on performance grounds but the progression formula for administration workers is different and the grounds for denying 12-month increments are also different.
>
> With respect to the second (<u>and more important</u>) issue, I have reviewed a significant amount of paper and have concluded that there is a compelling argument to the effect that the processes that were put in place <u>were never</u> seriously expected to work. I note for instance, that the senior teacher wrote a note questioning the very need for the job, (let alone its grading or whether [Ms Chilton] could improve).
>
> Accordingly, please regard this letter as notice that NZEI considers that Ms Chilton has suffered personal grievance within the meaning of subsections 103(1)(a) and 103(1)(b) Employment Relations Act 2000.
>
> …

[26] On 7 November 2011, counsel for RSK responded. She referred to the circumstances of the 31 March 2011 letter, the subsequent letter from NZEI of 8 June 2011, and then the disciplinary meeting which had taken place albeit after some rescheduling of the anticipated dates. Then the letter stated:[3]

> The nature of your client's grievance was not specified sufficiently *until* your letter of 21 September last. It follows that any grievance that your client has, which is denied, is outside the statutory 90-day period. My instructions are that my client does not consent to the grievance being raised out of time.

[27] Mr Robson, in an affidavit which he filed in the Authority proceeding, stated that the personal grievance letter had been sent within 90 days of Ms Chilton's dismissal. Accordingly, the "three-year rule" in s 114(6) of the Employment Relations Act 2000 (the Act) was in play.

[28] There was then telephone interaction between Ms Chilton and Mr Robson. It is his evidence that he thought Ms Chilton concurred with his advice that "the game was not worth the candle", notwithstanding the significant unfairness of what had happened; but he went on to record that she was diffident in their telephone interactions and "very traumatised by the events". It was his professional opinion that there was good reason for this. He also considered that Ms Chilton did not grasp the distinction between raising a grievance with an employer, and the lodging of a statement of problem. He confirmed that on 23 September 2011, he sent an email to her stating "the case is now alive no matter what", which was in accordance with his views on the matter.

[29] On 8 November 2011, Mr Robson responded to the letter from counsel for RSK of the previous day. Relevantly for present purposes he said:

- As far as the statutory requirement of 90 days was concerned, it was unnecessary to formally state that a "personal grievance" was being raised. The law merely required a "problem" to be raised. It must have been clear when a 25-minute conversation was conducted on 24 August 2011 that NZEI was alleging a "problem".

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[3] (emphasis added).

- In any event, the letter of 21 September 2011 was well within a period of 90 days from the date of dismissal. Furthermore there was then a significant lapse of time before any response was given on behalf of the employer. He proposed telephone communications in the hope that matters could be satisfactorily concluded.

[30] There is no evidence that any further telephone communications occurred. On 11 November 2011, Mr Robson emailed Ms Chilton stating that “we will have to make some decisions soon”.

[31] For her part, Ms Chilton said in the affidavit she filed in the Authority that she thought a “personal grievance claim” had been lodged; she had no previous experience of these matters, and it was not until she sought subsequent legal advice that she learned what the actual position was. This came about because she contacted Mr Robson on 30 May 2012 enquiring as to what had happened, finishing with the words “since I have heard nothing further from you in relation to a letter back to the kindergarten that you mention, I am now asking for your confirmation that NZEI will not be resourcing any more time on my case”. She then sought legal advice from her current lawyer on 11 June 2012, who said he would review the matter. He did and, following correspondence between counsel, proceedings were issued on or about 12 December 2012.

Pleadings

[32] The relevant provisions of the Act relating to the raising of a personal grievance are as follows:

> **114 Raising personal grievance**
>
> (1) 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.
>
> (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 90-day 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.

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[33] Section 114(2) makes it clear that 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.

[34] There are three issues arising from the pleadings. First, the plaintiff criticises the Authority for considering whether a personal grievance was raised by 21 September 2011, because, it is asserted there was inadequate opportunity to provide evidence and submissions on this particular point. I make no finding in that regard because a de novo challenge has been raised and I must consider all issues afresh. I do note, however, that before considering any application for leave to raise a personal grievance after the expiration of the 90-day period, the Court must first be satisfied that a grievance has not in fact been raised within that timeframe in terms of s 114(2). A consideration of that issue may, in a case such as the present, be a necessary prerequisite before any application for leave could be considered. If in fact a personal grievance (or personal grievances) has been raised, the Court has no jurisdiction to grant leave.

[35] Having regard to the chronology which I have reviewed, it is essential that the Court reaches a view as to whether, objectively considered, personal grievances were in fact raised by the sequence of events up to 7 November 2011.

[36] The second issue arising from the pleadings relates to whether there has been an apparent concession by Ms Chilton's lawyer that the personal grievances were not raised within the 90 days. This is said to arise from an initial exchange of correspondence when counsel currently acting for Ms Chilton became involved.

[37] This issue cuts both ways. Mr Robson had argued that counsel for RSK conceded in her letter of 7 November 2011 there was a sufficient level of detail in the NZEI letter of 21 September 2011 as to meet the statutory requirements.

[38] What lawyers said to each other previously does not resolve the matter, in this case. What is required is an objective determination of the facts up to and

including the NZEI letter of 7 November 2011, in order to assess whether the legal requirements of s 114(2) of the Act were in fact met.

[39] The final preliminary point relates to whether Ms Chilton is raising an unjustifiable dismissal grievance, or whether she is also raising – as in fact was stated in the NZEI letter of 21 September 2011 – two personal grievances, the first being an unjustifiable disadvantage grievance arising from the employer's letter of 31 March 2011; and the second an unjustifiable dismissal grievance. Because that matter is not clear, I will consider both possibilities.

Unjustifiable disadvantage grievance?

[40] A review of the events which followed the letter sent by RSK to Ms Chilton on 31 March 2011 shows that Ms Chilton made it clear as from the following day that she was unhappy with the decision not to award her pay increment. This was formalised when the NZEI wrote to RSK on 8 June 2011, seeking a meeting to discuss progression on the administration pay scale, in accordance with part 6(g) of the CA.

[41] It is well known that what s 114(2) requires is that there should be a sufficient specification of the employee's concerns as to enable the employer to be able to address that grievance. To do so, the employer must know what to do.[4]

[42] I consider that a review of the total circumstances confirms there was sufficient specificity in the concerns raised as to a pay increase by Ms Chilton's immediate reaction to the letter about pay and the subsequent communication from NZEI on 8 June 2011. That letter raised the pay progression issue as one of the matters that Ms Chilton and the Field Officer wished to meet with representatives of RSK and discuss with a view to engaging "in a problem solving approach". I do not overlook the fact that Mr Robson stated subsequently in his letter of 21 September 2011 that he was at that point raising an unjustifiable disadvantage grievance; that is not fatal if in fact there had already been sufficient compliance with the legislative requirements, which I find was the case.

[4] See *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

Unjustifiable dismissal grievance?

[43] The next issue relates to whether a personal grievance with regard to the dismissal of 11 July 2011, was raised within 90 days. Again, it is necessary to consider the totality of the circumstances.

[44] At the time the dismissal occurred, there was an attempt by NZEI to seek an alternative to dismissal.

[45] There were then two telephone calls with counsel for RSK. On the strength of the two telephone calls, it must have been clear that Ms Chilton was challenging the dismissal. Otherwise Mr Robson of the NZEI would not have been involved.

[46] However, the position was put beyond doubt by Mr Robson's letter of 21 September 2011. When that letter is considered in the context of the events which had preceded it, it is clear that an unjustifiable dismissal grievance was being raised. A specific reference was made to the provision of the Act which relates to a claim of unjustifiable dismissal, s 103(1)(a). Reference was made to the fact that there was a compelling argument to the effect that processes that had been put in place were never seriously expected to work. These were the processes that had been agreed on 1 April 2011, and which were the subject of the disciplinary meeting when it was alleged Ms Chilton had not adequately complied with those processes. I hold that the information in Mr Robson's letter, when taken in context, was sufficient for RSK to know what the issues were that were being raised, and what it was they would need to address.

[47] Each of the personal grievances was accordingly raised within the requisite time period of 90 days.

Application for leave?

[48] Given the conclusion I have reached, I consider that this is not a situation to which s 114(3) applies. I make the following brief points, however, regarding the detailed chronology which was provided to the Court in respect of events after 7 November 2011:

a) There is evidence before the Court that Ms Chilton was stressed and traumatised by the events which occurred.

b) There was delay in any response being received to Mr Robson's letter of 21 September 2011; and had it been necessary to consider an application under s 114(3), this delay would have been a relevant factor pointing to the exercise of the discretion.

c) However, the most important factor would have been Ms Chilton's reasonable belief that all necessary steps had been taken to secure her position. Ms Chilton was understandably relying on Mr Robson's advice. However she discovered, following her email of late May 2012, that no further steps had been taken. Ms Chilton wanted the matter to be advanced and therefore instructed alternate counsel. In these circumstances, I would if necessary have considered that she had made reasonable grounds to have her grievance raised by NZEI as agent, and that there was a failure to clarify her intentions with her and then advance the matter.

d) I do not consider that any prejudice as far as RSK is concerned would require leave to be declined. For instance, it is evident from the high level of detail contained in the affidavits filed in the Court that there is a considerable volume of evidence available with regard to the circumstances giving rise to the events of 2011, which was created as the events occurred.

e) A review of the merits would not have been dispositive. On the material which is at present before the Court, the case is not straightforward for either party. Given the conclusions I have reached, I express no further view as to the merits.

f) I would have concluded that exceptional circumstances existed and that as there was an issue about Ms Chilton obtaining access to justice, leave should be granted.

Conclusion

[49] Ms Chilton, through NZEI, raised a personal grievance of unjustified disadvantage, and a personal grievance of unjustified dismissal, within the required period of 90 days in each instance.

[50] Given that conclusion, there is no jurisdiction – or need – to make any orders under s 114(3) of the Act.

[51] Essentially I have reached the same conclusion as did the Authority. Accordingly, the challenge is dismissed.

[52] I agree with the Authority Member that mediation should now proceed. At a telephone directions conference in this proceeding, I raised with counsel whether mediation should be directed by this Court. There was no consensus as to that possibility. However, the Authority's direction stands and mediation should therefore proceed.

[53] The defendant is entitled to costs, which I reserve. If the parties are unable to resolve this issue directly, a memorandum and evidence should be filed and served 20 working days after the date of this decision; and a memorandum in reply and evidence if any should be filed and served 20 working days thereafter.

B A Corkill
Judge

Judgment signed at 3.20 pm on 19 December 2014