IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 129
EMPC 337/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TEDDY AND FRIENDS LIMITED Plaintiff
AND	PHILLIP PAGE Defendant

Hearing: On the papers

Appearances: A Schirnack and E Crowley, counsel for plaintiff
E Hartdegen, counsel for defendant

Judgment: 20 July 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] At issue is whether Phillip Page brought personal grievances against Teddy and Friends Ltd (TFL) within the 90-day period required by s 114 of the Employment Relations Act 2000 (the Act).

[2] Mr Page had been employed as a Lodging and Daycare Supervisor by TFL, which trades as Pets and Pats.

[3] In considering whether the grievances were brought within time, the Employment Relations Authority determined that TFL's lawyers had written to

Mr Page terminating his employment on 7 August 2020 with immediate effect.[1] Ninety days from that date to raise a personal grievance for unjustified dismissal would therefore have been 5 November 2020.

[4] The Authority examined the written communications between the parties that spanned the following days, from 8 to 21 August 2020. It determined that, reading the communications in totality, it was clear Mr Page had been dissatisfied with the circumstances in which his employment ended and that he sought to negotiate a resolution of those concerns. Accordingly, he had raised a personal grievance for unjustified dismissal within the statutory timeframe.[2]

[5] The Authority determined that in respect of a claim of unjustified action, the issues would likely have folded into the unjustified dismissal personal grievance and, in any event, details of unjustified action had not been raised with sufficient specificity to enable the Authority to conclude that there was a separate personal disadvantage grievance.[3]

[6] These conclusions have been challenged on a de novo basis by TFL. For the purposes of the challenge, an affidavit annexing the relevant communications following the termination has been filed, as have submissions by each party. It was agreed that the challenge should be resolved on the papers.

Chronology

[7] An email sent by TFL's lawyer, Ms Preston, to Mr Page on 7 August 2020 referred to alleged violent and threatening behaviour by him towards Ms Beer, a manager, on 23, 24 and 27 July 2020. Ms Preston said that Mr Page's conduct warranted a disciplinary investigation for potential serious misconduct, with immediate dismissal being a possible outcome.

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1 *Page v Teddy and Friends Ltd* [2021] NZERA 406 (Member Urlich).

2 At [18].

3 At [18].

[8] But Ms Preston went on to state that, since the incident, Mr Page had said he felt unsafe and did not wish to return to his employment. On 2 August 2020 he had proposed an "exit plan". From this it was concluded that he clearly regarded the employment relationship as being no longer tenable. TFL, as employer, would treat his employment as being terminated as of the date of the email. Final pay would be processed as part of the next pay run. Mr Page was reminded of his restraint of trade and confidentiality obligations.

[9] On 8 August 2020, Mr Page sent an email addressed to Ms Preston, but it was in fact sent to Ms Beer. He denied engaging in violent or threatening behaviour, and he said that if he had done anything wrong, disciplinary action should be brought against him. He went on to say that he felt unsafe and threatened by Ms Beer through her actions of intimidation, screaming and yelling at him. He also wrote that he had never regarded the employment relationship as no longer being tenable even if Ms Beer may have made it sound that way. He said that he wanted an "exit plan not to work with [Ms Beer] anymore." He concluded his communication by stating his legal adviser would be in contact with her regarding a "plan forward".

[10] The next day, on 9 August 2020, Mr Page sent a further email reiterating these points. This time he forwarded the email to Ms Preston, Mr Luscombe (his lawyer), and others. The subject heading of the email was "Viable exit plan from Pets and Pats".

[11] Mr Page repeated that if he had done anything wrong, disciplinary action should be brought against him. As before, he said he felt unsafe and threatened by Ms Beer. He denied saying he regarded the employment relationship as no longer being tenable, even if Ms Beer may have made it sound that way. He expected all his wages to be paid until an exit plan could be reached that suited both parties. He considered the suggestion that his contract should be terminated to be "very offensive". Again he said his legal adviser was being copied into the email and would be contacting TFL's lawyer with regard to an "exit plan moving forward".

[12] On 11 August 2020, Mr Luscombe spoke to Ms Preston who made a brief file note. She noted that Mr Luscombe would be responding to her email of

7 August 2020; his response would be in relation to restraint of trade issues and "finding a tenable solution going forward or, putting [Ms Beer] on notice of his intentions and finding out what is acceptable".[4]

[13] On 17 August 2020, Ms Preston wrote to Mr Luscombe stating, among other things, that Mr Page had falsely informed a client he was still employed by TFL. Ms Preston referred to obligations under the employment agreement, and suggested Mr Page should be reminded of these.

[14] In response, on 21 August 2020, Mr Luscombe said he had taken instructions and the allegations were denied. Later in his email he said he would take further instructions from his client concerning a way forward, including "the assertion of the restraint of trade mentioned in your first communication with my client".

[15] That was the final communication between the parties prior to the filing of a statement of problem. That document was dated 2 November 2020. It was sent to the Authority's online portal on 5 November 2020, but not acknowledged as having been received by the Authority until 6 November 2020. It was not served on TFL until 10 November 2020.

The parties' cases

[16] In essence, the plaintiff asserts that the communications recorded above were not sufficient to raise either a dismissal or a disadvantage grievance because the post-termination correspondence was open-ended and did not indicate with sufficient clarity the grievance which Mr Page wished TFL to address. All that was raised was a suggestion that restraints of trade needed to be dealt with and that the parties needed to find "a way forward". The plaintiff was consequently not put on sufficient notice of a problem which it would need to deal with.

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[4] Emphasis added.

[17] By contrast, the defendant submits that if the correspondence is considered in totality, it was plain that Mr Page contested the allegations made against him, including the allegation that he wished to terminate his employment, and that in essence he wanted an exit plan not to work with Ms Beer anymore.

Applicable principles

[18] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. That period begins 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 outside the statutory timeframe.

[19] It is convenient to record the passage in *Chief Executive of Manukau Institute of Technology v Zivaljevic*, referred to by both the Authority and the parties in their submissions, where Judge Holden held:[5]

> [36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. 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.
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> [37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.
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> [38] 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.

[20] I respectfully adopt this summary.

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5 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 (footnotes omitted).

Analysis

[21] It is apparent that immediately following the notice of termination sent by Ms Preston, Mr Page wished to dispute both the assertion that he had engaged in inappropriate conduct towards Ms Beer and that he had said he did not wish to return to his employment, proposing an exit plan.

[22] He did this almost immediately in the email which he sent to Ms Beer on 8 August 2020, the contents of which were essentially repeated in his subsequent communication of 9 August 2020.

[23] In both these emails, he was plainly disputing the conclusion that had been drawn from the circumstances and that he wished to cease his employment. He said this had been offensive. Moreover, he made it clear that if TFL considered that there had been misconduct, it should institute a disciplinary process.

[24] Even on the basis of those communications, it was plain enough he considered that the employment relationship was still on foot, and that the employer needed to address the concerns to which he had referred.

[25] The reference to an "exit plan" was somewhat confusing. On the evidence before the Court, it was a term first used by Ms Preston in her email of 7 August 2020, apparently citing something Mr Page had said to Ms Beer. In Mr Page's response the next day, he emphasised that he wanted an exit plan "not to work with [Ms Beer] any more".

[26] It was submitted for Mr Page that English is a second language for him. The Court was advised that he is not familiar with the "legalese" and terminology of the law as it relates to the lodging of a personal grievance claim.

[27] Whatever may have been meant by the reference to an exit plan, what is certain is that Mr Page expected his current employment to remain on foot until the parties had engaged further. It was evident that he was challenging the dismissal, so that the parties could negotiate a "plan forward" as he put it.

[28] The conversation between the lawyers on 11 August 2020 also made this clear. The file note is brief. It appears Mr Luscombe told Ms Preston that his response would include reference to restraint of trade issues or putting Ms Beer on notice of his intentions and thereby finding out what was acceptable.

[29] Standing back, the correspondence to which I have referred was, in my judgement, sufficiently detailed as to make it clear that Mr Page disputed all elements of the letter terminating his employment. He suggested in effect that he should be regarded as still being employed, that there should be a disciplinary process or a negotiation which might see him not working with Ms Beer, or alternatively, that he depart on agreed terms.

[30] I am satisfied that by 11 August 2020, a dismissal grievance had been raised with sufficient particularity as to inform the employer of his position and what it needed to do to put things right: negotiate constructively about the problems that had arisen. It was plainly within 90 days of the purported termination.

[31] I have not been provided with either evidence or submissions as to the basis for a separate disadvantage grievance.

[32] The Authority's conclusion that Mr Page's concerns were essentially those which gave rise to the dismissal grievance is, on the face of it, an appropriate finding. Like the Authority, I conclude that there is no basis for concluding that a separate disadvantage grievance has been raised.

Result

[33] I am satisfied that an in-time dismissal grievance was raised with TFL, notifying it of the problem Mr Page wished his employer to address. There is insufficient evidence to establish that an in-time disadvantage grievance was raised.

[34] The challenge is dismissed.

[35] The proceeding has been assigned Category 1A for costs purposes under the Practice Direction Guideline Scale.[6] Counsel should use their best endeavours to resolve this issue directly in the first instance. If they are unable to do so, an application may be made within 21 days, with a response given in a like period thereafter.

B A Corkill
Judge

Judgment signed at 3.00 pm on 20 July 2022

[6] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.