IN THE EMPLOYMENT COURT
AUCKLAND

[2011] NZEmpC 175
ARC 118/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHRISTINE MAYNARD Plaintiff
AND	BAY OF PLENTY DISTRICT HEALTH BOARD Defendant

Hearing: By memoranda of submissions filed on 24 and 30 June and 15 July 2011

Appearances: Stan Austin, advocate for plaintiff
Gail Bingham, counsel for defendant

Judgment: 22 December 2011

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff, Ms Maynard, has challenged two determinations of the Employment Relations Authority (the Authority), which found that she was time-barred from raising a personal grievance against her employer, the Bay of Plenty District Health Board (DHB or defendant). The first, issued on 13 October 2010,[1] concluded that the plaintiff had not raised her grievance with her employer within the 90 day statutory period allowed. The second determination, issued on 15 November 2010,[2] declined the plaintiff's application for leave to raise her grievance after the expiration of that period as it did not find the delay was occasioned by exceptional circumstances.

[1] AA444/10.
[2] AA444A/10.

[2] This Court granted leave pursuant to reg 17 of the Employment Court Regulations 2000 for the two challenges to be joined. It also acted on the agreement of Mr Austin, the plaintiff's advocate and Ms Bingham, counsel for the defendant, that the challenges should be determined on the papers filed. These included an affidavit from the plaintiff, several affidavits from the defendant, an agreed bundle of documents and an exchange of written submissions.

Factual background

[3] Ms Maynard was employed by the DHB and its predecessors for 34 years. From 1991 her role was that of Laundry Supervisor, Whakatane.

[4] She claims that she was unjustifiably constructively dismissed when she resigned her employment with the DHB on 21 February 2010.

[5] The plaintiff had been the subject of a 10 week disciplinary investigation, during the course of which she was suspended. Although Ms Maynard sought to raise a personal grievance for that suspension in her statement of problem to the Authority, the suspension claim has subsequently been dropped.

[6] The plaintiff sought legal advice after she was suspended and engaged a solicitor to represent her. The solicitor subsequently attended the investigation meetings conducted by the DHB with Ms Maynard.

[7] Ms Maynard received the DHB's 30 page report into its investigation on 19 February 2010 and, after reading the report written by Sherida Cooper, the Business Leader for Non-Clinical Support Services, the plaintiff e-mailed Ms Cooper on Sunday 21 February 2010 her resignation, which read as follows:

> Dear Sherida
>
> I would hereby like to tender my resignation as Laundry Manager as of today 21/2/2010.
>
> I feel the treatment I have received over the allegations made by Faith LeMalie and your subsequent findings in the draft report I received on 20/2/2010 give me no choice and are tantamount to Constructive dismissal.

> My health has suffered very badly as my Doctor can confirm and I feel that you have sided with Faith right from the beginning of this whole investigation..I found your manner at each interview intimidating and bullying as well as extremely [one-sided].
>
> I would like to apply for my gratuity which is owing and also the four weeks long [service] leave pay that I should have received after 25 years service. I was never able to have a months leave at once. This can be verified by HR.
>
> Your Sincerely,
>
> Mrs [Christine] Maynard

[8] By a letter dated 23 February, Ms Cooper accepted the plaintiff's resignation, confirmed that her final pay and long-service leave payment would be made that day but stated that the plaintiff did not meet the age criterion for payment of a gratuity. It also stated:

> I am sorry that you have felt bullied as a result of the organization undertaking and investigation into the allegations of bulling and harassment made by Faith, however as a manager within the organization you must understand the organizations obligation to fully investigation such allegations. The investigation was at all times undertaken in a fair and balanced manner.

[9] Correspondence followed between the parties, the relevant content of which is outlined further on in the judgment.

[10] The plaintiff claims a personal grievance for unjustified dismissal, which met the statutory requirements, was raised on her behalf. Alternatively she requests that the Court grant leave for her to raise a personal grievance out of time due to exceptional circumstances.

Statutory requirements for raising a personal grievance

[11] Section 114(1) of the Employment Relations Act 2000 (the Act) requires that personal grievances must be raised with the employer, unless the employer otherwise consents, within 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. Here the triggering event was the plaintiff's letter of resignation of 21 February or its acceptance by the defendant on 23 February 2010.

[12] Alternatively, s 114(3) provides that employees may apply to the Authority for leave to raise a personal grievance after the 90 day statutory period. The Authority (and this Court on a challenge) may only grant leave if it is satisfied that the delay was caused by exceptional circumstances and that it is just to do so.[3]

[13] Section 115 of the Act provides specific examples of what may constitute "exceptional circumstances" for the purposes of s 114(4)(a). The list is non-exhaustive.[4] In the alternative, the plaintiff relies on s 115(b), which provides:

> For the purposes of s 114(4)(a), exceptional circumstances include—
> …
> (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; …

[14] The wording of that provision makes it clear that para (b) will apply only where the employee has made reasonable arrangements to have the grievance raised and the agent has unreasonably failed to ensure that it was.[5]

Did the plaintiff raise her grievance within the 90 day statutory period?

[15] It was accepted by the parties that the final day for Ms Maynard to file a personal grievance within the 90 day period required by the Act was 22 May 2010. To establish that her grievance was raised within the statutory period, Ms Maynard, in her statement of claim, relies on "her correspondence and that of her Solicitor, and the communications of the Boards officers and her Solicitor". In the Authority Ms Maynard was more specific on what matters should be considered in deciding whether her grievance was raised in time.

[16] It was submitted that the Authority must consider the fact that prior to her resignation she had been the subject of a ten week disciplinary investigation. It was

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[3] Section 114(4).
[4] *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7 at [26].
[5] *McMillan v Waikanae Holdings (Gisborne) Ltd* (2005) 7 NZELC 97,859.

also submitted for Ms Maynard that regard should be had to her letter of resignation, and letters of 7 and 20 April written to the DHB on her behalf by her then solicitor, the DHB's responses to all of those letters, and subsequent communications between the parties regarding mediation. The Court has held that all relevant communications may be looked at to determine whether a grievance has been raised.[6]

[17] In his letter to the DHB dated 7 April 2010, her solicitor expressed his disappointment that "you accepted a resignation from our client directly without first referring the matter to the writer" and "[w]e would have expected an employer acting reasonably to have declined to accept that resignation until such time as Ms Maynard had properly discussed the matter with her counsel." Her solicitor follows this by stating: "We take this issue no further at this time but our client reserves the right to re-visit the issue should it become necessary."

[18] Her solicitor also discussed in that letter the DHB's decision declining payment of a gratuity to Ms Maynard, claiming that she had been unfairly disadvantaged by this decision. Further, her solicitor states that Ms Maynard's doctor's assessment, immediately after she tendered her resignation, that the plaintiff was "clinically not well enough to continue her job" was a "determining factor in our client's decision to resign her employment."

[19] The plaintiff's solicitor concludes his letter of 7 April by inviting the DHB to "re-visit [its] decision with respect to payment of our client's gratuity payment" and "[i]f … the payment is not made [within seven days of the date of the letter] our client may raise a personal grievance in relation to the way her employment ended and seeking payment of her gratuity payment in any event."

[20] The defendant responded in a letter written by Ms Gail Bingham, GM Governance and Quality, dated 12 April 2010. In this Ms Bingham claims the DHB was "fully within its rights to accept Ms Maynard's resignation" and, as Ms Maynard had been assisted by legal counsel throughout the investigation process, "[i]t was therefore reasonable for the DHB to presume that she had consulted with [her

[6] *Ovation New Zealand Ltd (formerly Bernard Matthews New Zealand Ltd) v Puhia* [2011] NZEmpC 11 at [15]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139.

counsel] prior to making this decision [to resign].” Ms Bingham also confirmed that the plaintiff did not qualify for a retirement gratuity.

[21] In a further letter, dated 29 April 2010, her solicitor disputed the information Ms Maynard had been given in relation to the gratuity payment and stated that Ms Maynard had instructed that he put a practical settlement offer to the defendant. The terms of that offer were as follows:

> (1) You pay to our client a sum equal to 75% of her gratuity entitlement pursuant to Section 123(1)(c)(i) of the Employment Relations Act;
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> (2) Our client refrains from issuing a Personal Grievance relating to her treatment during her time at the hospital and the nature in which the employment relationship ended; and
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> (3) This arrangement remains strictly confidential to the parties.

[22] Her solicitor concluded his letter by stating:

> We would be obliged if you would provide us with your response to this proposal within seven (7) days of the date of this letter. If we do not receive your response within that time our instruction are to formally raise a Personal Grievance in this matter. It is our hope that that situation can be avoided.

[23] The DHB declined the proposed offer of settlement in a letter from Ms Bingham dated 5 May 2010.

[24] There was no further correspondence between the parties until a letter dated 4 June 2010 written by Ms Maynard’s solicitor to the defendant, requesting mediation, some 13 days after the expiry of the 90 day period for raising a personal grievance.

[25] In mid June 2010 the plaintiff sought a separate opinion from Mr Austin who represented the plaintiff from that point. Mr Austin wrote to the DHB on 30 June 2010 at length, setting out the plaintiff’s claims that she was unjustifiably suspended, had been subjected to an unfair and biased investigation process and had been unjustifiably constructively dismissed. It set out the remedies she sought for these claims.

Discussion

[26] The leading judgment on the question of what is required to raise a personal grievance claim is that of Chief Judge Colgan in *Creedy v Commissioner of Police.*[7] In that case, the Court held:[8]

> It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as … in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. … That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.
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> … It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it soon and informally, at least in the first instance.[9]

[27] Counsel for the defendant submits that there are no words contained within the correspondence between the parties that provide sufficient clarity that could be said to cause the DHB to know that a personal grievance for unjustified dismissal was being raised. Further, counsel submits that when the phrase "personal grievance" appears in the correspondence it is in reference to a possibility or in the context of some future event.

[28] It is arguable that the plaintiff, in her resignation letter of 21 February 2010, did specify her grievance sufficiently for her employer to address it. She can be said to have spelled out her complaint when, in claiming that the findings of the employment investigation were tantamount to constructive dismissal, she said: "… I

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[7] [2006] ERNZ 517.
[8] At [36]-[37].
[9] Note: Other aspects of the Employment Court's decision, unrelated to this commentary, were overturned on appeal: *Commissioner of Police v Creedy* [2007] NZCA 311, [2007] ERNZ 505 (CA); *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] ERNZ 109, [2008] 3 NZLR 7.

feel that you have sided with Faith right from the beginning of this whole investigation..I found your manner at each interview intimidating and bullying as well as extremely one-sided." Furthermore, by concluding her letter by requesting that a gratuity and four weeks' long service leave be paid, it is arguable that Ms Maynard is putting the defendant on notice as to how her grievance might be resolved.

[29] The plaintiff's amended statement of claim refers solely to a grievance that she was unjustifiably constructively dismissed. It is established law that a grievance cannot be raised in respect of a known or anticipated future event.[10] It is a fact that Ms Maynard's employment was not terminated until Ms Cooper accepted this on behalf of the defendant in her letter of 23 February. Therefore, it follows that the plaintiff's resignation letter cannot in and of itself have raised a valid grievance for unjustifiable constructive dismissal as she was still employed by the defendant up until the time her resignation was accepted.

[30] The letters of 7 and 29 April from the plaintiff's then solicitor to the DHB both mention the possibility of Ms Maynard raising a personal grievance in the future. The relevant passage in the 7 April letter states: "If, however, the payment is not made our client may raise a personal grievance in relation to the way her employment ended and seeking payment of her gratuity in any event."

[31] In the letter of 29 April her then solicitor states that the plaintiff has given instructions to put a practical settlement offer to the defendant. That offer was quoted at [21] above.

[32] On the plain meaning of the concluding words of that letter, quoted at [22] above, and given that a grievance cannot be raised in anticipation, since the defendant did respond to the proposal, albeit to reject it, within the required timeframe, it could be argued that the condition was met and therefore no personal grievance was raised.

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[10] *Creedy v Commissioner of Police* [2006] ERNZ 517 at [28]-[30]; *Melville v Air New Zealand* [2010] NZEmpC 87 at [18].

[33] However, I consider that interpretation would be too literal. The plaintiff in *Clark v Nelson Marlborough Institute of Technology*[11] used similarly conditional language in concluding a letter to her employer, which set out the issues she wished it to address and key outcomes she sought. The final paragraph of her letter stated:

> I am happy to discuss any of these points. I look forward to a speedy resolution. My preference is that this is resolved informally and promptly. However, if not, I believe I have very strong grounds for a personal grievance. I look forward to hearing from you and your response.

[34] The Court in that case held:[12]

> In deciding whether the effect of the plaintiff's letter … was to raise a personal grievance, it does not matter what she intended her complaint to be or her preferred process for dealing with it in the first instance. Equally it does not matter whether the defendant … recognised the plaintiff's complaint as a personal grievance or not. The only issues are whether the nature of the plaintiff's complaint was a personal grievance within the meaning of s103 and, if so, whether the letter complied with s114(2) by conveying the substance of the complaint sufficiently to the defendant.

[35] I consider that an analogy can be drawn with that case. Therefore, while it might not have been the plaintiff's then solicitor's intention to raise a personal grievance in his 29 April letter to the defendant, in fact that was its effect.

[36] While on their own each of the solicitor's letters were not sufficient to satisfy the statutory test, if looked at in combination with Ms Maynard's resignation letter and her solicitor's earlier letter to the defendant of 7 April, these three documents contain everything necessary to raise a personal grievance according to the guidance in *Creedy.* The details of Ms Maynard's complaints (bullying and bias in the investigation), along with her desire to resolve these issues at an early stage by payment of a gratuity, are conveyed sufficiently to the defendant to alert it to the fact that the plaintiff is raising a grievance, which it needed to address. My conclusion is reinforced by the defendant's letter accepting her resignation, which addressed both her concerns and the matter of the gratuity.

[37] I find that the plaintiff had raised a personal grievance for unjustified dismissal by 29 April and that this was within the 90 day statutory period. I

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[11] CC12/08, 19 August 2008.
[12] At [37].

therefore respectfully disagree with the findings of the Authority and conclude that the plaintiff's grievance was raised within the 90 day period.

Do exceptional circumstances apply?

[38] An alternative argument raised on behalf of the plaintiff is that exceptional circumstances exist such that Ms Maynard should be granted leave to raise her personal grievance out of time. The circumstances she relies on are based on her assertion that she made reasonable arrangements to have the grievance raised by her then solicitor but that he unreasonably failed to action her instructions to raise the grievance within the 90 day period.

[39] In her affidavit, Ms Maynard states that the outcome of a meeting with her then solicitor on Friday 26 February 2010 was as follows:

> … if I was paid my full gratuity or a significant portion of it then I would simply let the matters relating to my resignation lie. I was very clear though that if the matter was not resolved at an early date I wanted [my solicitor] to proceed with a personal grievance claim on my behalf.

[40] The Authority reserved the question whether there were exceptional circumstances in its first determination and gave leave for Ms Maynard to provide further evidence in support of the application for leave to raise the grievance out of time. The determination issued on 15 November 2010[13] records that on 8 November 2010, Mr Austin wrote to advise that Ms Maynard had no further evidence on the issue of exceptional circumstances and asked that the Authority proceed to determine the issue on the evidence already presented.

[41] The determination records that, when approached directly by an Authority support officer with a request that he join a conference call to discuss arrangements to give evidence, the plaintiff's then solicitor declined saying that Ms Maynard had not authorised him to do so. Mr Austin was also given the opportunity to provide a statement from the plaintiff's then solicitor to the Authority but did not do so. The Authority found that Ms Maynard's then solicitor could not be required to give evidence to the Authority without her authorisation, presumably because of legal

[13] AA 444A/10.

professional privilege. The determination notes that the Authority could not investigate further of its own motion and proceeded to determine the matter on the basis of the correspondence between the plaintiff's then solicitor and the DHB.

[42] Mr Austin submits that the efforts of her then solicitor up until the time of the 29 April letter had been informal but always directed at resolving the personal grievance and that her then solicitor was of a mind that he had concurrently raised the grievance and sought its resolution through the payment of the gratuity. This argument that her former solicitor believed he had raised the personal grievance cannot stand in the absence of any affidavit evidence from him.

[43] Mr Austin also submits on behalf of the plaintiff that her then solicitor was clearly instructed to raise a personal grievance as evidenced by his letter of 29 April.

[44] The Court held in *McMillan v Waikanae Holdings (Gisborne) Ltd*[14]that:

> … The requirement now is for the employee to make reasonable arrangements to have the grievance raised on his or her behalf. If the employee has not made such reasonable arrangements to have the grievance raised this will not constitute circumstances for the purposes of s 115(b).

[45] Unlike the situation in *Melville v Air New Zealand* where the plaintiff did not specifically instruct her solicitor to pursue the dismissal matter further with the defendant, in this case it seems clear that Ms Maynard did so instruct her then solicitor. It is evident that the plaintiff was keen to settle her complaints without the need to formally escalate her grievance. However, it can be reasonably inferred that if the defendant was not prepared to settle by paying the gratuity, or at least 75% per cent of this as sought in her then solicitor's 29 April letter, the plaintiff's unambiguous instructions were for her solicitor to raise a personal grievance on her behalf.

[46] This conclusion is supported by Ms Maynard's affidavit evidence as set out in para 17. Ms Maynard can thus be said to have made the required reasonable arrangements statutorily required by the first part of s 115(b).

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[14] (2005) 7 NZELC 97,859 at [25].

[47] Can it be said that her then solicitor unreasonably failed to ensure the grievance was raised within the required time?

[48] Having found that Ms Maynard did instruct her then solicitor to raise a personal grievance on her behalf if the gratuity she sought was not paid, the plaintiff was entitled to place reliance on the fact that he would follow her instructions. In fact, when the defendant responded negatively to the plaintiff's request, her then solicitor appears to have taken no steps to formally raise the grievance.

[49] I therefore concur with Mr Austin's submission on this point and find that exceptional circumstances pursuant to s 115(b) occasioned the delay in raising the grievance.

Is it just to grant leave?

[50] This is the second test under s 114(4)(b). In addition to finding exceptional circumstances, the Court must also be satisfied that it is just to grant leave. In *McMillan* I observed that in many cases it would be difficult, if not impossible, to determine whether it is just to grant leave, once the Court is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances, without delving to some degree into the merits of the case.

[51] I concluded in *McMillan* that, even if it had found that there were exceptional circumstances which occasioned the delay in that case, it would not have been just to have granted leave. This was because, on hearing the evidence of Mr McMillan in support of his grievance, it was clear that his claim was unlikely to be upheld.[15] Any considerations in balancing justice must necessarily be based on the evidence put before the Court.

[52] This case can be distinguished from *McMillan.* The affidavit evidence of Ms Maynard and the defendant is, by necessity at this stage, untested but it does not clearly indicate that a challenge to the Authority's decision is as unlikely to succeed as was the situation in *McMillan.*

[15] At [27].

[53] I am satisfied that Ms Maynard has at all times been intent on pursuing her complaints with the defendant that led to her resignation. Although counsel for the defendant has not argued that the DHB would be prejudiced by a grant of leave, I consider nevertheless that there is no evidence of prejudice to the defendant. The DHB was put on notice by the plaintiff's then solicitor as early as 7 April that Ms Maynard intended to bring a personal grievance if the gratuity she sought was not paid.

[54] I therefore find that s 114(4)(b) is satisfied and it is just to grant leave for the plaintiff to raise her personal grievance out of time.

[55] Therefore, if I am wrong in my finding that Ms Maynard's personal grievance was raised within the statutory 90 day period, I conclude in the alternative that exceptional circumstances exist and it is just for the Court to grant leave.

Costs

[56] Costs are reserved. If the parties cannot agree then a memorandum is to be filed and served within 30 days of the date of this judgment and a memorandum in response is to be filed and served within a further 21 days.

BS Travis
Judge

Judgment signed at 4.15 pm on Thursday 22 December 2011