IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2012] NZEmpC 187
CRC 10/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TREVOR KILGOUR Plaintiff
AND	QUEENS HIGH SCHOOL BOARD OF TRUSTEES Defendant

Hearing: 7 and 8 November 2011
(Heard at Dunedin)

Appearances: Jennie Guthrie, counsel for the plaintiff
Richard Harrison, counsel for the defendant

Judgment: 5 November 2012

JUDGMENT OF JUDGE A A COUCH

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[1] This case involved a challenge and a cross challenge to selected aspects of a determination of the Employment Relations Authority.[1] The hearing before the Court was non de novo.

[2] Mr Kilgour was employed at Queens High School for 25 years, largely working with electrical and audio visual equipment. He left in early 2009. For the 20 years or so prior to that, his employer was the defendant, the Queens High School Board of Trustees (“the Board”).

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[1] [2011] NZERA Christchurch 63.

[3] In its investigation, the Authority identified four employment relationship problems between the parties which gave rise to numerous issues. The background to those issues involved was summarised by the Authority as follows:

> [3] From in or about mid-2004, Mr Kilgour worked 27.5 hours per week from 9am to 3pm Monday to Friday. In August 2008, there was a review of support staff hours at the High School with an identified need to reduce costs because of limited operations funding.
>
> [4] In or about late November 2008, there was a proposal by the High School that Mr Kilgour's hours reduce from 27.5 to 5.5 hours per week. This reduction in hours was later confirmed by letter dated 3 December 2008. Mr Kilgour signed the letter agreeing to the changes to his hours on 12 December 2008. Within a day or two of that date he made it clear to the Principal of the High School Julie Anderson that he was unhappy with the change of hours and no longer wished to agree to such a change. It was agreed a discussion about this would wait until the New Year.
>
> [5] When undertaking the review of Mr Kilgour's hours, the High School proceeded on the basis that his conditions were based on those in the support staff collective agreement 2 December 2007 to 1 March 2009 between NZEI Te Riu Roa, the Service and Food Workers' Union and the Secretary for Education acting under delegation from the State Services Commissioner (the collective agreement). Mr Kilgour was not a member of either union party. He explained at some time in or about 1999 he had been advised by a union representative from NZEI that his position would probably not be covered by collective contracts/agreements negotiated by the union on behalf of support staff. He did not revisit this issue of coverage with NZEI until January 2009.
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> [6] At the time of the review Mr Kilgour did not turn his mind to what conditions governed his employment. He said in his evidence during the Authority investigation meeting that because of the nature of the role he performed he did not have breaks with other staff and, on reflection, he could see that he was *out of the loop* on many staff-related issues.
>
> [7] Mr Kilgour's last known employment agreement at the time of the review of his hours was an individual employment agreement that had been offered to him in 2004. Under the provisions of that agreement any change to Mr Kilgour's hours of work required agreement. Agreement to a change of hours was not required under the conditions of the collective agreement.
>
> [8] The High School in reviewing the hours did not consider whether the change to hours was such that Mr Kilgour's position had become surplus to the requirements of the High School and did not apply the redundancy provisions set out in Mr Kilgour's 2004 individual employment agreement.
>
> [9] In 2009, following two meetings with the principal and support services manager at the High School, Mr Kilgour delivered the following letter to the High School:
>
> > *27/01/09*
> >
> > *Dear Mrs Julie Anderson,*

> *You have asked me to write a letter rescinding the offer of 12/12/2008.*
>
> *At the time, I signed the proposed change to my job under a certain amount of pressure and because I thought I had no other real option. I phoned you on the weekend of the 12th and told you I was not happy with the situation.*
>
> *I cannot keep working at Queen's High. I cannot go from surviving on a wage to surviving on pocket money.*
>
> *The reduction in hours and the wage rate you proposed on 12/12/2008 mean that I do not have a job.*
>
> *Yours sincerely,*
>
> *Trevor Kilgour*
>
> [10] Mr Kilgour did not return to the High School and undertake any work in 2009.

[4] Other significant findings of fact by the Authority were:

(a) From 1997 onwards, pursuant to s 75(1) of the State Sector Act 1988, the State Services Commissioner promulgated conditions of employment for support staff in schools reflecting the terms of collective contracts or collective agreements concluded with unions ("the promulgated conditions"). Those conditions of employment were not offered to Mr Kilgour.

(b) The collective agreement and the conditions of employment promulgated by the State Services Commissioner provided for the positions of support staff to be graded according to the duties, skills and responsibility involved. The grades were A, B and C. The wages payable to support staff reflected that grading. The 2004 individual employment agreement did not provide for grading and Mr Kilgour's wages were fixed by agreement. From 2004 onwards, he was paid wages at a rate equivalent to slightly more than the top of grade A.

(c) Section 75(2) of the State Sector Act 1988 required an employer entering into an individual employment agreement with a support staff person to obtain the concurrence of the State Services Commissioner to the terms of that agreement. The Board did not obtain concurrence to the 2004 agreement with Mr Kilgour.

[5] The four employment relationship problems identified and determined by the Authority were:

(a) A personal grievance that Mr Kilgour was disadvantaged in his employment by the process leading to the proposed reduction in his hours of work. That process was said to be unjustified because it proceeded on the basis of the promulgated conditions of employment rather than the 2004 individual employment agreement ("the reduced hours grievance").

(b) A personal grievance that Mr Kilgour was disadvantaged in his employment by the Board's failure to offer him the promulgated conditions of employment. This was said to be unjustified because it denied Mr Kilgour a fair and reasonable bargaining environment ("the bargaining opportunity grievance").

(c) A personal grievance that Mr Kilgour was disadvantaged in his employment by the Board's failure to carry out the annual wage reviews required by the 2004 agreement ("the wage review grievance").

(d) A claim for redundancy compensation in accordance with the terms of the 2004 individual employment agreement.

[6] In its determination, the Authority concluded:

(a) The terms of employment between the parties as at August 2008 when the review of Mr Kilgour's hours of work commenced were those contained in the 2004 agreement.

(b) Mr Kilgour's position was redundant to the needs of the Board in December 2008 and his letter of 27 January 2009 amounted to a resignation. Mr Kilgour was therefore entitled to redundancy

compensation in accordance with the terms of the 2004 individual employment agreement.

(c) The action of the Board in unilaterally altering Mr Kilgour's hours of work was in breach of the terms of the 2004 individual employment agreement and was unjustifiable. The reduced hours grievance was therefore sustained.

(d) The Board's failure to offer Mr Kilgour the promulgated conditions was not, of itself, unjustifiable. What was unjustifiable was the actions of the Board in largely treating Mr Kilgour as if his conditions of employment were the promulgated conditions in circumstances where the Board had not obtained the concurrence of the State Services Commissioner to the 2004 individual employment agreement, offered the promulgated terms of employment to Mr Kilgour or drawn them to his attention. This affected Mr Kilgour's employment to his disadvantage because he lost the opportunity to negotiate his wages under the 2004 individual employment agreement with an understanding of the grading system in the promulgated conditions and the wage rates attaching to those grades. This was the loss of a chance. The bargaining opportunity grievance was therefore also sustained.

(e) On the evidence, Mr Kilgour did not establish that his position fell within grade B or C under the collective agreement. As a consequence, the disadvantage he suffered by not having a proper opportunity to bargain for improved conditions of employment did not include the loss of a chance to bargain for wages comparable to those payable for positions graded B or C.

(f) Under the promulgated conditions, Mr Kilgour would have been entitled to 29 cents per hour in recognition of his qualifications. It was highly likely that, had Mr Kilgour bargained for an increase in his wages comparable to such an allowance, the Board would have

accepted the need for consistency between employees in terms of allowances regardless of whether they were contractually entitled to them. As a result of the Board's failure to make him aware of the promulgated conditions, he lost the chance to successfully bargain for an additional 29 cents per hour.

(g) Mr Kilgour was not entitled to pursue the wage review grievance because he had not raised it with the Board within the 90 day period specified in s 114(1) of the Employment Relations Act 2000.

[7] Based on these conclusions, the Authority ordered the Board to pay Mr Kilgour the following amounts as remedies

(a) In respect of the reduced hours grievance, redundancy compensation of $15,786.01 based on the formula in the 2004 individual employment agreement less an overpayment of wages made to Mr Kilgour following the end of his employment.

(b) In respect of the bargaining opportunity grievance, additional wages of $2,009.70. This sum was calculated on the basis of 29 cents per hour for 27.5 hours per week for 42 weeks per year for 6 years.

(c) In respect of both personal grievances, compensation for distress of $7,000.

The challenges

[8] Each party chose to challenge the Authority's determination in only one respect.

[9] Mr Kilgour challenged the Authority's conclusion that he had not established that his position fell within grade B or C under the promulgated conditions. He sought a finding that his position would have been grade C or, failing that, grade B. The significance of this challenge is that, if it succeeds, Mr Kilgour may be able

argue that he is entitled to greater remedies in respect of the bargaining opportunity grievance.

[10] The Board's cross challenge was pleaded as follows:

> The Defendant says the Authority erred when it found that the Defendant's actions relating to the formation of the plaintiff's employment agreement could give rise to a personal grievance [65].

[11] The notation "[65]" was a reference to the paragraph in the determination where the Authority recorded the conclusion being challenged. This made it clear that the cross challenge related to the promulgated conditions grievance. If this cross challenge is successful, it would finally decide the matter as Mr Kilgour's challenge can only relate to the extent of remedies available to him in respect of the bargaining opportunity grievance. For that reason, I deal with it first.

[12] In respect of the cross challenge, the Board described the nature and extent of the hearing sought as follows:

> **Nature and Extent of Hearing of Cross-challenge**
>
> 7. The Defendant does not seek a full rehearing of the entire matter.
>
> 8. The Defendant seeks a hearing in respect only of whether or not the grievance based on events at the time the applicable employment agreement was entered into is time barred under the Employment Relations Act 2000, and/or the Limitation Act 1950, and so could not form the basis of any award of compensation by the Authority in respect of the Plaintiff's rate of pay or allowances.
>
> 9. Whether or not the Authority's Determination on that matter is upheld, the Defendant does not seek to disturb the Authority's global award of compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

[13] The relief sought was then described as follows:

> **Relief sought on Cross-challenge**
>
> 10. A finding that whether or not the Defendant's actions at the time the Plaintiff's employment agreement was formed were unjustified, no action of personal grievance can arise from those actions because;
>
> a. no grievance was notified within 90 days as required by section 114(1) of the Employment Relations Act 2000; or

b. no action in respect of a grievance was commenced within 3 years as required by section 14(6) of the Employment Relations Act 2000; or

c. the cause of action accrued more than six years before any claim was brought in the Authority and is barred by section 4(1) of the Limitation Act 1950.

[14] An unusual and significant feature of this pleading is that the Board specifically made no claim for reduction in the remedies awarded by the Authority. In his final submissions, Mr Harrison confirmed this and, under a heading "Personal Grievance Out of Time", said "The defendant's counterclaim is not intended to interfere with the Authority's monetary awards which have all been paid to the plaintiff."

[15] As required by s 182(3) of the Employment Relations Act 2000 where a hearing de novo is not sought, I gave directions as to the nature and extent of the hearing. Those directions were:

(a) Extent of the hearing – the following issues:

(i) Whether the plaintiff's employment properly fell within grade B or grade C of the Support Staff in Schools Collective Agreements.

(ii) Whether the plaintiff was entitled to pursue the personal grievance sustained by the Authority in terms of s 114 of the Employment Relations Act 2000 and s 4 of the Limitation Act 1950.

(b) Nature of the hearing – a witness action in which the parties may adduce any evidence relevant to the issues above.

[16] Evidence was given before the Court by four witnesses; two for each party. Mr Kilgour gave evidence and was supported by Mrs Collins, a teacher at the school from 1986 until 2004. For the Board, evidence was given by the principal, Ms Anderson and the school's executive officer, Ms Daly.

Was the bargaining opportunity grievance raised in time?

[17] A personal grievance is a statutory cause of action. It can only be pursued within the scope allowed by the statute. The starting point is that it must be raised with the employer within the time allowed. That is defined in s 114 of the Employment Relations Act 2000, the first part of which is:

> **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.

[18] It is readily apparent that, in order to decide whether a personal grievance was raised in time, the Court must identify the action alleged to amount to a personal grievance, when that came to the attention of the employee and when the employee raised the grievance within the meaning of subsection (2).

[19] The action of the Board alleged to amount to the bargaining opportunity grievance was summarised by Mr Kilgour's advocate, Bill Clark, in the statement of problem lodged with the Authority:

> By repeatedly failing to promulgate the terms and conditions of negotiated SSCAs[2] as instructed by the minister, or to make the Applicant aware of the applicability of the SSCA to his terms and conditions of employment, the Respondent denied the Applicant access to a fair and reasonable bargaining environment.

[20] This failure by the Board was ongoing and continuous from 2004 until the end of 2008 but it is clear that Mr Kilgour was unaware of the promulgated conditions until very close to the end of his employment.

[21] Mr Kilgour's evidence in chief was that he first became aware of the collective agreement and the promulgated conditions at a meeting which he and Mr Clark had with Ms Daly in January 2009. In answer to oral questions, however, Mr Kilgour said that he had been made aware of the collective agreement and the grading system in it by Mr Clark when he consulted him in December 2008. He also said that he was aware of the collective agreement from a conversation he had in

[2] "SSCA" was a reference to the Support Staff Collective Agreement, whose terms formed the basis of the promulgated conditions.

December 2008 with an organiser of the NZEI. What was not clear from the evidence, however, was whether Mr Kilgour became aware through those conversations of the State Services Commissioner having promulgated conditions of employment based on the collective agreement and applicable to his position. As it was the failure of the Board to make Mr Kilgour aware of the promulgated conditions which was the foundation of the bargaining opportunity grievance sustained by the Authority, I proceed on the basis that the actions of the Board alleged to amount to the grievance first came to Mr Kilgour's attention in January 2009.

[22] The next issue, which is the critical one, is whether the bargaining opportunity grievance was raised within 90 days after that meeting with Ms Daly in January 2009. It is appropriate to consider all the evidence of events from that date onwards.

[23] The only evidence about what was discussed at the meeting with Ms Daly in January 2009 was given by Mr Kilgour in his evidence in chief. He said:

> 9. In January 2009 Bill represented me at a meeting with the school. He was trying to get some of my hours re-instated. We gave the school a copy of my 2004 IEA since they didn't have a copy on record. Di Daly (Support Staff Manager) used the term 'promulgation' and said the 2004 Agreement didn't count because, except for wages, my terms of employment were those of the Collective.
>
> 10. Bill questioned Di Daly about promulgation. From what was being said, it began to seem to me that maybe I had not been paid at the proper rate of pay. I began to realise that if the Collective applied to me that I had been underpaid for years because my job hadn't been graded properly. I didn't know anything about that sort of stuff.

[24] On that evidence, it cannot be said that the bargaining opportunity grievance was raised at the meeting with Ms Daly in January 2009. The next event appears to have been a second meeting later in January. Again, the only evidence of this meeting was given by Mr Kilgour who said:

> 11. Later in January 2009, the school asked me to attend another meeting with them. I took Bill with me again. They offered to pay me redundancy. But since we disagreed on the way redundancy should be calculated and since we disagreed on how much money I should have been getting paid, we all agreed to go to mediation to get it sorted out.

[25] Mr Kilgour then went on in his evidence to say that Mr Clark raised a personal grievance on his behalf in a letter to the chairman of Board dated 27 January 2009:

> Geoff Mitchell
> Chairman of Queens High School Board of Trustees
> [address]
> Dunedin
>
> 27/01/09
>
> Dear Sir,
>
> this letter formally raises with you a claim of personal grievance under S. 103 (1) b of the Employment Relations Act 2000.
>
> Reducing Trevor Kilgour's hours of employment by 80% constitutes unjustifiable disadvantage and has created a situation of redundancy.
>
> Two meetings have been attended, but a successful resolution to the situation has not been arrived at.
>
> Redress sought:
>
> • Redundancy compensation as per the IEA dated 2004
> • Compensation for under payment of wages
> • Damages for humiliation and loss of dignity
>
> As agreed at the meeting on 27/01, this matter will now be referred to the Mediation Service in an attempt to reach a resolution.
>
> Yours sincerely,
>
> Bill Clark

[26] Mrs Guthrie relied on the reference in this letter to a claim for "under payment of wages". She suggested that this could only be a reference to grading issues which, by implication, raised the bargaining opportunity grievance. I do not accept that submission, relying as it does on two consecutive implications; the first being that a claim for wages was necessarily based on grading and the second being that the claim based on grading was for loss of a chance to bargain effectively.

[27] I am reinforced in that conclusion by the lack of evidential support for the submission. There was no evidence of any prior discussion between the parties about the loss of a chance for Mr Kilgour to bargain more effectively had he known about the promulgated conditions. Such discussion as there had been about grading seems to have been based on the erroneous proposition that the collective agreement or the promulgated conditions somehow formed Mr Kilgour's actual terms of employment.

[28] There was no evidence of any further communication with the Board about the nature of Mr Kilgour's personal grievance claims until the statement of problem was served on it shortly after 18 August 2009. The statement of problem included allegations of the conduct of the Board underlying the bargaining opportunity grievance and of the disadvantage to Mr Kilgour said to have resulted from that conduct. The statement of problem also specified the remedies sought by Mr Kilgour but did not explicitly identify the allegations as comprising a personal grievance or allege that the Board's actions were unjustifiable. I find, however, that it was sufficient to raise the bargaining opportunity grievance in terms of s 114(2).

[29] In summary, I find that the bargaining opportunity grievance was first raised with the Board in the statement of problem received by the Board in late August 2009. It was therefore not raised within the statutory time period specified in s 114(1) of the Employment Relations Act 2000.

[30] As a fallback position, Mrs Guthrie submitted that the Board had implicitly consented to the bargaining opportunity grievance being raised out of time. In support of this submission, she referred me to a determination of the Authority in which such a conclusion had been reached.[3] In that determination, the member properly identified the leading authority on the point, *Commissioner of Police v Hawkins*[4] where the Court of Appeal said that, in considering whether an employer has impliedly consented to a personal grievance being raised out of time, the real issue is "… whether [the employer] so conducted himself that he can reasonably be considered to have consented to an extension of time."[5] This requires consideration of the employer's subsequent conduct as a whole. The Court of Appeal also approved the proposition stated in several decisions of this Court that, in any given case, whether the employer has consented will be a matter of fact and degree.

[31] As to the facts, Mrs Guthrie again invited me to infer from the evidence that the Board was aware in January 2008 that Mr Kilgour was pursuing a claim for loss of a chance. I have already rejected that proposition but add that, even if the Board had somehow suspected as much, that would provide no basis on which to infer that

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[3] *Scott v Animal Attraction Ltd* CA 183/09, 21 October 2009.
[4] [2009] 3 NZLR 381.
[5] At [24].

the Board was willing to grant an extension of time for Mr Kilgour to raise a personal grievance in that regard.

[32] I find that there was no evidence of events prior to August 2009 from which it could be inferred that the Board implicitly consented to an extension of time for raising a personal grievance.

[33] After the bargaining opportunity grievance was raised in the statement of problem lodged on 18 August 2009, the Board's response was in the form of a series of three statements in reply. In the first statement, the Board challenged the form in which Mr Kilgour was pursuing the issue underlying the bargaining opportunity grievance. It suggested that the claim could only be pursued by way of an application for judicial review and noted that the Authority lacked jurisdiction to entertain such an application.

[34] In the first amended statement in reply, the Board repeated its objection to the bargaining opportunity grievance being determined on the grounds that it was properly a matter for judicial review. Under the heading "Failure to carry out remuneration reviews", the Board also said:

> Any grievance relating to a failure to review his salary has never been notified and is out of time and the Respondent does not consent to any grievance being raised out of time.

[35] In the second amended statement in reply, the passages referred to in the first amended statement were repeated again and the following additional paragraph added at the end of the statement:

> Any other grievances claimed by the Applicant are out of time.

[36] These responses to the allegations and claims made in the statement of problem were not unequivocal and did not specifically allege that the bargaining opportunity grievance was out of time. Having regard to all the evidence adduced, however, the inference I draw from the statements in reply is that the Board objected to the Authority's jurisdiction to determine the bargaining opportunity grievance and that it objected generally to personal grievances being raised out of time. Those inferences are inconsistent with the proposition that the Board implicitly consented

to the bargaining opportunity grievance being raised out of time and I reject that proposition.

[37] It follows from the conclusions I have reached that the Authority did not have jurisdiction to determine the bargaining opportunity grievance. The cross challenge is successful. As the Board explicitly declined to seek any reduction in the remedies awarded in respect of the bargaining opportunity grievance, however, no further orders are made as a consequence.

The grading challenge

[38] As I have decided that the Authority had no jurisdiction to decide the bargaining opportunity grievance, there is no scope for any increase in the remedies awarded by the Authority in respect of that grievance. Therefore I need not decide the challenge.

[39] In recording that conclusion, I should comment on the manner in which the challenge was advanced. Both in the Authority and in the Court, Mr Kilgour's case was that he was somehow entitled to redundancy compensation according to the formula in the 2004 individual employment agreement but based on the wage rates he would have received had he been employed under the promulgated conditions of the collective agreement. Even in her final submissions, Mrs Guthrie suggested that, if Mr Kilgour succeeded in persuading the Court that his position would have been graded B or C under the collective agreement, he would be entitled to payment of redundancy compensation at the rate of wages provided for in the collective agreement.

[40] That could never be so. As the Authority determined, the applicable terms of employment were at all material times those contained in the 2004 individual employment agreement. Mr Kilgour's rate of wages under that agreement was the rate set by the Board each year and accepted by Mr Kilgour. The grading system and the rates of wages provided for in the collective agreement never formed part of the conditions of Mr Kilgour's employment and he never had any right to receive wages at a rate based on that grading system.

[41] The only way in which the grading and wage provisions of the collective agreement had any relevance to Mr Kilgour was in terms of remedies for the bargaining opportunity grievance. Even there, the disadvantage to Mr Kilgour was not the difference between what he actually received and the rates of wages in the collective agreement. Rather, it was the loss of a chance to negotiate wages higher than he actually received. The value of that chance could only be sought as a remedy under s 123(1)(c)(ii) of the Employment Relations Act 2000 in relation to the bargaining opportunity grievance, not a greater entitlement to redundancy compensation under the 2004 individual employment agreement.

Conclusion

[42] In summary, my decision is:

(a) The bargaining opportunity grievance was not submitted within the time allowed by s 114(1) of the Employment Relations Act 2000.

(b) The Board did not consent to the bargaining opportunity grievance being submitted out of time.

(c) The Authority had no jurisdiction to determine the bargaining opportunity grievance.

(d) The cross challenge is successful.

(e) By operation of s 183(2) of the Employment Relations Act 2000, that part of the Authority's determination sustaining the bargaining opportunity grievance is set aside and this decision stands in its place.

(f) There is no need to decide the challenge and it is not decided.

Costs

[43] In the normal course, the Board would be entitled to a contribution to the costs it has incurred in resisting Mr Kilgour's challenge. It may be, however, that

the Board is willing to extend the goodwill it has shown towards Mr Kilgour in not seeking to claw back the remedies he was awarded in relation to the bargaining opportunity grievance by not seeking an award of costs. I do not make a ruling to that effect, however, and it is now a matter for the Board whether it wishes to seek costs. If so, I expect counsel will discuss the matter in the first instance. Failing agreement, Mr Harrison should file and serve a memorandum within 30 working days after the date of this decision. Mrs Guthrie will then have 20 working days after service in which to respond.

A A Couch
Judge

Signed at 10.00am on 5 November 2012.