

**IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY**

**[2013] NZEmpC 184
CRC 9/13**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN ROBYN ANN HUTCHISON
 Plaintiff

AND NELSON CITY COUNCIL
 Defendant

Hearing: on the papers - documents received 31 May, 15 July and 23 July
 2013.

Appearances: Plaintiff in person
 Maree Kirk, counsel for the defendant.

Judgment: 2 October 2013

JUDGMENT OF JUDGE AA COUCH

[1] Ms Hutchison was employed by the Nelson City Council (the Council) from 30 May 2011 until her dismissal on 13 December 2011. She decided to pursue a personal grievance that her dismissal was unjustifiable. To that end, she lodged a statement of problem with the Employment Relations Authority (the Authority).

[2] The Authority identified as a preliminary issue whether Ms Hutchison had raised her personal grievance with the Council within the 90 day period provided for in s 114(1) of the Employment Relations Act 2000 (the Act). That issue was investigated by the Authority which determined¹ that, although counsel for Ms Hutchison had written to the Council within time recording that personal grievances were being raised, the letter lacked the necessary detail to be effective.

¹ [2012] NZERA Christchurch 208.

[3] Ms Hutchison then applied under s 114(3) of the Act for leave to raise her dismissal personal grievance after the expiry of the 90 day period. That application was the subject of a second determination² in which the Authority declined leave. Ms Hutchison challenges that second determination and this judgment decides that challenge. The matter proceeded by way of a hearing de novo.

[4] The parties agreed that this application should be decided on the papers. Extensive affidavits and submissions have been filed. I have read and considered those documents fully but I need not refer to much of that material in this decision.

Sequence of events

[5] This summary is based on the affidavit evidence provided in relation to the application currently before the Court. That evidence is untested and, accordingly, the facts recorded below are for the purposes of this decision and should not be regarded as final for the purposes of any subsequent hearing.

[6] Ms Hutchison was employed by the Council as an executive assistant to two managers. Within a few months after she started work on 30 May 2011, issues began to arise in the workplace. In broad terms, management believed there were shortcomings in Ms Hutchison's conduct. Ms Hutchison rejected those criticisms and accused management of failing to support her in her work and of bullying her.

[7] From 6 October 2011, Ms Hutchison was on sick leave. On 14 October 2011, the parties attended mediation where Ms Hutchison was represented by an organiser from the Public Service Association. On 21 October 2011, Ms Hutchison was suspended and remained on suspension until her dismissal. On 27 October 2011, Ms Hutchison instructed Anjela Sharma to represent her.

[8] On 31 October 2011, management provided Ms Hutchison with a lengthy letter detailing the Council's allegations about her conduct under five headings. These were discussed in further mediation on 2 November 2011 and at a formal disciplinary meeting on 9 November 2011. Immediately after that meeting, Ms

² [2012] NZERA Christchurch 280.

Sharma sent a very detailed, 19 page letter to the Council recording Ms Hutchison's response to the allegations.

[9] The disciplinary process then took more than a month to complete. This was in part due to Ms Hutchison's health and limitations on Ms Sharma's availability. During this period, there were several exchanges of emails and the Council responded in detail³ to Ms Sharma's letter of 9 November 2011.

[10] On 9 December 2011, the Council wrote to Ms Sharma setting out the conclusions reached on each of the allegations of misconduct by Ms Hutchison. Some allegations were discarded but the majority were sustained. The Council reached an "interim decision" that Ms Hutchison should be dismissed for serious misconduct and invited comment on that outcome. There was no response from Ms Hutchison or Ms Sharma and, on 13 December 2011, the Council confirmed its decision to dismiss Ms Hutchison.

[11] Shortly after her dismissal, Ms Hutchison withdrew her instructions from Ms Sharma. She then took no steps for more than two months. In her affidavit, she gives several reasons for this delay relating to her health. I need not record those in detail.

[12] On 21 February 2012, Ms Hutchison saw a lawyer at a community law centre who advised her to seek legal representation. She contacted Steven Zindel the same day and arranged an appointment with him.

[13] Ms Hutchison met with Mr Zindel on 23 February 2012. At that meeting, she told him that she wished to pursue a personal grievance of unjustifiable dismissal and provided Mr Zindel with a good deal of documentation, including a very detailed "draft statement of claim" she had prepared. It appears, however, that Ms Hutchison did not have Ms Sharma's file and was therefore unable to provide that to Mr Zindel. Ms Hutchison completed an application for legal aid which Mr Zindel sent to the Legal Services Agency a week or so later.

³ This letter was 10 pages long.

[14] At the end of the meeting, Mr Zindel dictated a letter to the Council regarding Ms Hutchison's grievance. That letter was subsequently sent in draft to Ms Hutchison for comment and, after some modification, was sent by Mr Zindel to the Council on 1 March 2012

[15] In the letter, which ran to three pages, Mr Zindel provided a summary of events from Ms Hutchison's point of view. This included details of her initial employment, her dissatisfaction with a perceived lack of support from management, the mediations, the allegations by management of misconduct, her suspension and the disciplinary process resulting in her dismissal. Mr Zindel then set out in some detail Ms Hutchison's response to a particular allegation that she had improperly kept a copy of notes of a disciplinary meeting involving another employee of the Council.

[16] Mr Zindel concluded his letter as follows:

... we are writing to you direct to provide the necessary formal notification of the personal grievance for unjustified dismissal. We include in this matter the earlier actions in terms of an unjustified disadvantage grievance in relation to the bullying and other conduct that had occurred, when Ms Hutchison had done nothing out of order and otherwise had provided good and faithful service.

Ms Hutchison has already been through two external mediations in this matter and, for that reason, is reluctant to participate in any further mediation. Accordingly, we will proceed to the Employment Relations Authority direct and we request your advice as to whom you authorise to accept service of the documents. Also, this grievance may be settled without proceedings having to be filed, however there would need to be an urgent private meeting, which could be held on a without prejudice and off the record basis, for this to occur. We are always agreeable to attending such a meeting but must say that the prospects of settlement are low at this time.

If you have any explanation for your actions, apart from the brief letter of 13 December, referring as it does to earlier letters, then please provide such a response. It would be helpful to have a precise statement of the reasons for our client's dismissal to guide us in drafting the statement of problem for the Employment Relations Authority. Our client considers that, given the extent of relationship fallout with her managers, reinstatement would not be a viable option for her. Thus, the issue is compensation for what she claims to be her unjustified treatment.

[17] The Council referred Mr Zindel's letter to Ms Kirk as counsel. She replied on 5 March 2012:

I refer to your letter dated 1 March 2012 regarding your client Robyn Hutchison. As advised, I act for Nelson City Council.

The letter purports to be formal notification of two personal grievance claims neither of which is accepted as a properly raised grievance though on distinct grounds. Dealing with these separately the responses are:

Unjustified dismissal

Despite the fact that you traverse your client's, often incorrect, version of the background events there is nothing to support an unjustified dismissal grievance.

The statement that "Ms Hutchison was summarily dismissed" was a fact known to NCC. That statement does not provide any detail, let alone 'sufficient detail', for NCC to address.

This is not accepted as a properly raised personal grievance complying with section 114 (2) Employment Relations Act 2000 as interpreted and applied by the Employment Court in the Creedy v Commissioner of Police [2006] ERNZ 517 (EC) at paragraph 36.

Unjustified disadvantage

The reference here is "the bullying and other conduct that occurred" and that is presumably a cross reference to the preceding paragraphs where a version of the background is presented. All of the alleged matters going to an unjustified disadvantage claim are not only insufficient in detail but also outside the 90 day time limit under section 114 (1) Employment Relations Act 2000.

All of the allegations pertain to events prior to Robyn's suspension on or about 20 October. The 90 days therefore expired well before 18 January 2012. To purport to raise a personal grievance on 1 March 2012 is outside the statutory time limit and NCC do not consent to a personal grievance being raised out of time.

[18] When he received this letter, Mr Zindel immediately sent a copy on to Ms Hutchison without comment. She replied:

Thanks Steven

And so the thuggery continues! ☹ How predictable!

What now? I am ready to fight as hard and/or dirty⁴ as necessary – Justice (with a major element of exposure) is my primary objective, laced with some compensation, with any luck.

Awaiting your advice

Thanks & regards ... Robyn

[19] Mr Zindel did not respond to that email or to Ms Kirk's letter. On the morning of 12 March 2012, Ms Hutchison sent him another email in which she said:

⁴ The words "and/or dirty" were absent from the copy of this email annexed to Ms Hutchison's original affidavit but she accepted in a supplementary affidavit that they were present in the original.

Good morning Steven

I am eagerly awaiting the next steps in this matter. If it is necessary for us to meet, I can be available either today or tomorrow. After that, I am heavily engaged in organising a conference for this coming weekend.

Thanks and regards.

[20] That afternoon, Mr Zindel wrote back:

I'm waiting to hear back from legal aid about funding, so as not to run up too many costs in the meantime if legal aid refused.

[21] Ms Hutchison promptly wrote back "Thanks Steven. Will await your advice." There was then no further communication between Ms Hutchison and Mr Zindel for more than two weeks.

[22] On 30 March 2012, Mr Zindel was informed by the Legal Services Agency that Ms Hutchison appeared not to be eligible for legal aid and requested further information. There was then discussion in which Mr Zindel advised Ms Hutchison to continue her application for legal aid but she decided not to do so. In an email to Mr Zindel on 5 April 2012, Ms Hutchison said: "I will find a way to self represent." Mr Zindel then invoiced Ms Hutchison for his work to that point and gave her his file.

[23] After that, Ms Hutchison conducted her own case. On 13 June 2012, she lodged a statement of problem with the Authority. The Authority's first determination, in which it concluded her dismissal grievance had not been raised in time, was given on 25 September 2012. Ms Hutchison then made her application for leave to raise that grievance out of time. The Authority's determination refusing leave, which is the subject of the present challenge, was given on 19 December 2012.

Legislation

[24] The parts of the Act relevant to this matter are:

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.

...

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

...

[25] Ms Hutchison's application under s 114(3) relies on exceptional circumstances as defined in s 115(a) and (b). I deal with paragraph (b) first in two parts: whether Ms Hutchison made reasonable arrangements with Mr Zindel to have him raise her personal grievance and then whether he unreasonably failed to ensure that the grievance was raised within the required time.

Did Ms Hutchison make reasonable arrangements?

[26] I am in no doubt that Ms Hutchison made reasonable arrangements with Mr Zindel to have her unjustified dismissal personal grievance properly raised with the Council.

[27] On 23 February 2012, she provided him with clear instructions and ample information. In her submissions, Ms Kirk suggested that this information was insufficient because it did not enable Mr Zindel to say in his letter to the Council which particular aspects of the dismissal decision and/or process were alleged to be unjustifiable. I do not accept that proposition. One of the documents Ms Hutchison provided to Mr Zindel was her “draft statement of claim”. That contained sufficient information for Mr Zindel to draft a letter effectively raising Ms Hutchison’s personal grievance that she had been unjustifiably dismissed. Mr Zindel indicated to Ms Hutchison that he believed this was sufficient by dictating his detailed letter to the Council in her presence at the end of their first meeting. That letter was sent on 1 March 2012, well within the 90 day period.

[28] The only issue regarding the arrangements made by Ms Hutchison is whether her response to Ms Kirk’s letter of 5 March 2012 was reasonable. In her affidavit, Ms Hutchison said:

35. Mr Zindel showed no concern regarding this letter and, from this, I deduced that he did not agree that his letter dated 1 March 2012 was deficient in any way and it would seem that it was for this reason that he chose not to respond to NCC's letter dated 5 March 2012.

36. Equally, I trusted Mr Zindel's judgment and, although somewhat anxious regarding the matter, having sent a number of emails to prompt him, I accepted that he had the matter in hand and resolved to await his further advice.

[29] This was an entirely reasonable position for Ms Hutchison to take. She engaged Mr Zindel as counsel experienced in employment law and, having given him instructions, it was reasonable for her to rely on him to do what was necessary to implement those instructions. In fact, she went further than simply leaving the matter in Mr Zindel’s hands. On 5 March 2012, she confirmed to Mr Zindel that she wished to proceed with her claim against the Council, albeit in somewhat

extravagant terms. On 12 March 2012, she again confirmed her wish to proceed by saying that she was “eagerly awaiting the next steps in this matter” and offering to meet with Mr Zindel that day if necessary.

Did Mr Zindel unreasonably fail to raise the grievance within time?

[30] The history of this matter creates an unusual aspect to this question. As noted earlier, the Authority determined that Mr Zindel’s letter of 1 March 2012 did not effectively raise Ms Hutchison’s dismissal grievance. That determination was not challenged and, for the purposes of this proceeding, the parties have properly regarded it as correct. Having considered all the material before the Court, I would reach a different conclusion on this issue. As this possibility was not argued, however, I consider the application of s 115(b) on the basis that the grievance was not properly raised and leave consideration of the merits of that conclusion to my assessment of the overall justice of the matter.

[31] In his affidavit, Mr Zindel says that, when he received Ms Kirk’s letter of 5 March 2012, he disagreed with her assertion that an unjustifiable dismissal grievance had not been effectively raised and saw no need to do more. In adopting this approach, Mr Zindel placed a great deal of reliance on his own assessment of the situation. While counsel are often required to exercise judgment, the fact that opposing counsel, who was also experienced in employment law, had expressed a contrary view with reasons should have sounded an alarm. In this case, Mr Zindel had a week in which to supplement his original letter with the few additional details necessary to put it beyond question that the grievance had been effectively raised. That required the work of perhaps half an hour at most and, while he is undoubtedly a busy practitioner, it was unreasonable of him not to have done so. On this basis, and on the assumption that the dismissal grievance was not effectively raised by his letter of 1 March 2012, I find that Mr Zindel unreasonably failed to raise it within the required time.

Is it just to grant leave?

[32] For the reasons given above, I find that the delay in raising Ms Hutchison's dismissal grievance was occasioned by exceptional circumstances. That is one of the two criteria for granting leave under s 114(3). The other is that the Court must consider it just to grant leave. That requires all the circumstances to be taken into account.

[33] As indicated earlier, my view of Mr Zindel's letter of 1 March 2012 is that, in the context of what had passed between the parties up to that time, it was effective to raise Ms Hutchison's dismissal grievance. I have formed that view for the following reasons.

[34] In Mr Zindel's letter, he characterised the Council's treatment of Ms Hutchison prior to her suspension as unjustifiable action and made it the subject of a disadvantage grievance. In doing so, however, Mr Zindel did not dissociate that conduct from the overall description of events giving rise to Ms Hutchison's unjustifiable dismissal grievance. In her response on 5 March 2012, Ms Kirk attempted to isolate the claim of unjustifiable dismissal by describing the bulk of Mr Zindel's letter as "background".

[35] It appears from the material currently before the Court that the dismissal on 13 December 2011 was based on the Council's conclusions about events which had occurred over the preceding several months. Through Ms Sharma, the Council was well aware of the deficiencies in both substance and process alleged by Ms Hutchison in relation to those issues and the Council's investigation of them. The correspondence in both directions was voluminous and detailed. Mr Zindel specifically put his letter in that context with the second sentence where he said:

Ms Hutchison previously engaged Anjela Sharma on this employment personal grievance, notification of which is formally given to you although there is an extensive history already.

[36] It may properly be said that, as Ms Sharma was only involved as Ms Hutchison's representative prior to the dismissal, she could not have raised a personal grievance arising out of the dismissal. That was addressed by Mr Zindel

towards the end of his letter where he said explicitly that he was giving “formal notification of the personal grievance for unjustified dismissal.”

[37] The threshold for raising a personal grievance, explained in s 114(2) of the Act, is not particularly high. There is certainly no need to provide detailed particulars. What is required is to make the employer sufficiently aware of the grievance to enable the employer to address it in the manner contemplated by the Act. In all the circumstances, I am satisfied that, after receiving Mr Zindel’s letter of 1 March 2012, the Council was in that position with respect to Ms Hutchison’s dismissal grievance. This must be regarded as a factor strongly in favour of granting leave for Ms Hutchison to have that grievance determined on its merits.

[38] Turning to other relevant factors in assessing the overall justice of the matter, there is no suggestion by the Council that it would be prejudiced by the dismissal grievance being raised out of time. Where there is no prejudice to the employer, the Court will usually be reluctant to deny a grievant a hearing on the merits.

[39] In Mr Gully’s affidavit on behalf of the Council, and in Ms Kirk’s submissions, they draw attention to statements made by Ms Hutchison, and by Ms Sharma on her behalf, suggesting that she was motivated to pursue her grievance by a desire to publicly embarrass the Council. It would be unfortunate if Ms Hutchison still harboured such a motive and, if so, she would be well advised to discard it. Parties who try to use litigation for a collateral purpose often find that it rebounds on them.

[40] Another relevant factor is the apparent merit of Ms Hutchison’s case. Ms Kirk submits that her chances of success are slight and that this should weigh against granting leave. On the untested material before the Court, however, I am unable to reach a conclusion about the merits of Ms Hutchison’s case with any degree of confidence. While the parties are in broad agreement about the sequence of events, they give differing accounts of the detail and interpret them in wholly different ways.

[41] A further factor usually taken into account in deciding applications such as this is the extent of delay until the grievance was effectively raised and the explanation for that delay. My conclusion that the grievance was effectively raised within the 90 day period takes this factor out of the equation in this case.

[42] On an overall assessment, it is just that Ms Hutchison be permitted to pursue her dismissal grievance through the statutory procedure. Her application under s 114(3) of the Act is granted.

Resolution of the grievance

[43] As the effect of the Authority's determination was to bring the proceedings before it to an end and Ms Hutchison elected a hearing de novo in the Court, it follows that the entire employment relationship problem between the parties is now before the Court and all further steps must be taken in the Court⁵.

[44] If Ms Hutchison still wishes to pursue her grievance, she must now file and serve a statement of claim complying with reg 11 of the Employment Court Regulations 2000 within 20 working days after the date of this judgment. The Council must then file and serve a statement of defence in accordance with regs 19 and 20 of those regulations.

Comments

[45] In her application, Ms Hutchison relied on "exceptional circumstances" under both s 115(a) and (b). As I have decided the matter on the basis of para (b), it is unnecessary for me to decide whether the definition in paragraph (a) was also satisfied and I have not done so.

[46] Leave has been granted for Ms Hutchison to pursue only her personal grievance that she was unjustifiably dismissed. There is no scope for her to pursue a separate personal grievance based on disadvantage arising out of the Council's actions prior to her suspension on 21 October 2011. That would be out of time.

⁵ See the decision of the full Court in *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 at [60].

[47] The fact that leave has been granted should not be seen as an endorsement of Ms Hutchison's claim. As recorded above, I am unable to form any clear view of the merits of the claim on the material currently before the Court and it is entirely a matter for Ms Hutchison to decide whether to pursue it further. If she chooses to do so, she must accept the risk that, if she is unsuccessful, she may be liable to make a substantial contribution to the Council's costs of defending it.

[48] If Ms Hutchison decides to pursue her substantive claim in the Court, she should make sure that she fully understands the requirements of reg 11 of the Employment Court Regulations 2000. To comply with that regulation, a statement of claim must be in a distinctly different form to a statement of problem lodged with the Authority.

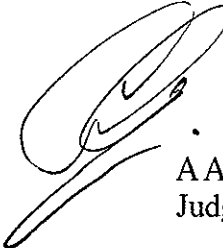
Conclusions

[49] In summary, my judgment is:

- (a) The challenge is successful.
- (b) Ms Hutchison's application under s 114(3) of the Act is granted.
- (c) The employment relationship problem between the parties is now before the Court and, if the matter is to proceed, the parties must follow the directions given in paragraph [44] above.
- (d) Pursuant to s 183(2) of the Act, the determination of the Authority is set aside and this decision stands in its place.

Costs

[50] Costs relating to this application are reserved to be decided as part of an overall consideration when proceedings before the Court are concluded.



AA Couch
Judge

Signed at 3.00 pm on 2 October 2013.