

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2021] NZEmpC 33
EMPC 188/2018
EMPC 399/2018**

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

AND IN THE MATTER OF proceedings removed

BETWEEN BRIAN SAIPE
 Plaintiff

AND TRUDE JEAN BETHELL (ALSO KNOWN
 AS TRUDE JEAN BETHELL-PAICE)
 Defendant

Hearing: 7–9 December 2020
 (Heard at Auckland)

Appearances: M Donovan and S Greening, counsel for plaintiff
 R Hooker and K Kim, counsel for defendant

Judgment: 22 March 2021

JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Saipe started working for Bethells Beach Cottages (the Cottages) in November 2012 in the position of part-time assistant manager. He was dismissed by the defendant, Ms Bethell, by email dated 24 August 2013. Mr Saipe claims that his dismissal was unjustifiable.

Preliminary issue – can Mr Saipe bring his grievance?

[2] There is a preliminary issue as to whether Mr Saipe is able to bring his personal grievance to the Court. This issue arises because of the timing of the steps Mr Saipe took after receipt of the email of 24 August 2013. The Employment Relations Authority (the Authority) found that Mr Saipe had failed to file his statement of problem within the required three-year period from raising his personal grievance and declined to extend the time for doing so.¹ Mr Saipe has challenged the Authority's determination, but the case is proceeding with a different focus as both parties accept that the limitation period cannot be extended.²

[3] If Mr Saipe is able to bring his personal grievance, the question becomes whether his dismissal was unjustifiable.

[4] In addition, Mr Saipe has a claim for misrepresentation that he says caused him to agree to reduce his hours of work, and a claim for arrears of wages. Those claims have been removed to the Court. Mr Saipe also has challenged the Authority's findings on costs but that challenge was stayed pending the outcome of the substantive matters.³

Mr Saipe is unsuccessful

[5] As set out in this judgment, Mr Saipe is unable to bring his personal grievance claim as it was not filed with the Authority within the required time. If he had been able to pursue his claim for unjustifiable dismissal, he would have been successful and obtained orders for compensation for lost earnings and for humiliation, loss of dignity and injury to his feelings.

[6] Mr Saipe's other claims fail.

¹ *Saipe v Bethell* [2018] NZERA Auckland 180.

² *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128; *Saipe v Bethell* [2019] NZEmpC 103 at [4] and [13].

³ *Saipe v Bethell* [2018] NZERA Auckland 382.

Mr Saipe was employed to assist with marketing and with business systems

[7] Mr Saipe says that Ms Bethell is the “majority owner and operator” of the Cottages. Ms Bethell and her husband Mr Paice both contend that they are partners in the business.

[8] Mr Saipe was offered part-time employment by Ms Bethell in October 2012 at the rate of \$25 per hour. His role as assistant manager included assisting the Cottages with its marketing and with its business and IT systems.

[9] Although Ms Bethell says that the employment was casual and only for so long as the Cottages could afford to employ Mr Saipe, he was employed consistently for 30 hours per week from November 2012 until June 2013. In May 2013, Ms Bethell approached Mr Saipe and advised him that the business could not continue to employ him at 30 hours per week and that she wished to reduce his hours to 15 hours per week, effective from 7 June 2013. Mr Saipe agreed to the reduction in hours but, notwithstanding that agreement and despite Ms Bethell raising it with him, for several weeks he continued to work more hours and to claim wages for them.

[10] Towards the end of July 2013, Ms Bethell approached Mr Saipe again, this time in an effort to reach agreement that his hours would be reduced to 10 hours per week. Mr Saipe declined to agree to that reduction. Ms Bethell then attempted to get Mr Saipe’s agreement that he would reduce his hours to 12 hours per week. This also was not agreed although Mr Paice, who attended to paying Mr Saipe, started paying him for 12 hours per week.

[11] On Friday 23 August, Ms Bethell emailed Mr Saipe asking whether he would be available to meet on Monday 26 August. Mr Saipe responded that same day saying that he would be happy to meet once he was back paid for the preceding three weeks, and the Cottages confirmed in writing that he would continue to be paid for 15 hours per week until it was agreed otherwise.

[12] Ms Bethell responded by email dated 24 August 2013 in which she agreed to pay the backpay but then advised:

...as per our verbal contract to employ you as we could afford – the number of hours we can afford is 12 hours as this does not suit you we regret that we cannot continue engaging your services

[13] She continued:

As from this date 24th August 2013 we request you not use our website, emails or any companies associated with Bethells Beach Cottages and that you hand over any login and password details relevant to all work you have undertaken on our behalf.

It is with much regret that it has come to this we have valued your input into our business. We wish you all the best.

[14] Mr Saipe responded by email on 26 August 2013 commencing:

For the avoidance of future doubt I deny Trude's account of our employment [contract] as expressed in her email to me dated 24 August 2013 in which she dismisses me from my position...

[15] Later in his email Mr Saipe says "Clearly, an employment relationship problem exists between us".

[16] He invites Ms Bethell to attend mediation so that the problems can be resolved and "our working relationship may potentially improve as a result".

[17] Also that week, on 27 August 2013, Mr Saipe contacted the Ministry of Business, Innovation and Employment (MBIE) seeking a mediation date. He followed up with an email dated 29 August 2013.

[18] Mr Saipe says that he discovered on 1 November 2013 that, while he had been employed by the Cottages, Ms Bethell had offered his duties to a Belgian woman with whom Ms Bethell was friendly. This woman was hoping to get a visa to work in New Zealand and to move to New Zealand with her partner. Mr Saipe says it was that discovery that caused him to write again to Ms Bethell by letter dated 26 November 2013. He sent that letter to the Cottages' post office box address and it was delivered to that post office box on 29 November 2013.

[19] In that letter, Mr Saipe confirmed to Ms Bethell and Mr Paice that they would have received his notifications of personal grievances, that he was going to commence actions in the Authority and that he “was unjustifiably and summarily dismissed from [his] position without warning and at nil notice by [them] as [his] employer”. He says he “challenged the unjustifiable dismissal and parts of it when they came to [his] notice”. He provided further particulars “for the avoidance of doubt”, which included that Ms Bethell had summarily dismissed him without notice, that is, failed to give one week’s notice despite him being paid on a weekly basis.

[20] There was no evidence of any further contact between Mr Saipe and Ms Bethell or Mr Paice until Mr Saipe filed his statement of problem in the Authority, which he did on 29 August 2016.

There are time limits in the Employment Relations Act 2000

[21] The Employment Relations Act 2000 (the Act) provides that where an employee wishes to raise a personal grievance they must raise that grievance within the period of 90 days beginning on 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 latter, unless the employer consents to the personal grievance being raised after the expiration of that period.⁴

[22] The exception to this is that the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period, which may be granted if the Authority is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances; and considers it just to do so.⁵

[23] Importantly, if an employee wishes to proceed with a claim in the Authority, they must file their statement of problem with the Authority within three years of the personal grievance being raised.⁶

⁴ Employment Relations Act 2000, s 114(1).

⁵ Employment Relations Act 2000, s 114(3) and (4).

⁶ Employment Relations Act 2000, s 114(6).

Several issues arise

[24] This timeline gives rise to several issues to be determined in order to resolve the preliminary issue:

- (a) When was Mr Saipe's dismissal effective?
- (b) When did Mr Saipe first raise his personal grievance – by his email of 26 August 2013 or his letter of 26 November 2013?
- (c) If Mr Saipe raised his grievance outside the prescribed 90-day period, are there exceptional circumstances and is it just for him to have leave to raise his personal grievance?

The parties have competing arguments

[25] In summary, Mr Saipe contends:

- (a) His dismissal only took effect after a period of reasonable notice, which here would give an effective dismissal date of 2 September 2013.
- (b) This means that the email of 26 August 2013 could not constitute the raising of a personal grievance for unjustifiable dismissal as Mr Saipe had not been dismissed at that point.
- (c) Mr Saipe's personal grievance was raised by the letter dated 26 November 2013, which was submitted to the Cottages within 90 days of the effective date of dismissal.
- (d) It follows that the statement of problem was filed within three years of the raising of the personal grievance.

[26] Mr Saipe also raises some alternative arguments.

[27] He argues that, if the dismissal did take effect on 24 August 2013, then the email of 26 August was insufficient to raise the personal grievance and the personal grievance was raised by the later letter.

[28] He also says the later letter raised the grievance on the date that it was delivered to the Cottages' post office box, being 29 November 2013.

[29] He says further that if the grievance was raised outside the prescribed 90-day period then leave should be granted to permit him to pursue it.

[30] In summary, Ms Bethell argues:

- (a) Mr Saipe's dismissal was effective on 24 August 2013.
- (b) His email of 26 August 2013 raised his personal grievance for unjustifiable dismissal.
- (c) The Authority proceedings were not filed within three years of that date and therefore Mr Saipe cannot pursue his personal grievance.

[31] Ms Bethell also says, if the letter of 26 November 2013 raised the grievance, the date it was raised was the date the Cottages became aware of the letter, being 2 or 3 December 2013 or five working days after it was mailed, being the period recognised by the High Court Rules 2016.⁷ She says the grievance therefore was raised out of time, and there is no basis for granting leave.

Mr Saipe's employment ended on 24 August 2013

[32] In considering whether an employee has been dismissed, the test is an objective one – was it reasonable for somebody in the position of the employee to have considered that their employment had been terminated?⁸

⁷ Rule 6.6(1)(a)(i).

⁸ *Cornish Truck & Van Ltd v Gildenhuyis* [2019] NZEmpC 6 at [45].

[33] Understandably, it is not part of Mr Saipe's case that the 24 August 2013 email was not the instrument of his dismissal; the email was unequivocal; Ms Bethell advises Mr Saipe that the business cannot continue engaging his services and requests that he cease using the Cottages' systems; he was asked to hand over login details. In his email of 26 August 2013, Mr Saipe recognises that Ms Bethell had dismissed him from his position in her email dated 24 August 2013.

[34] Mr Saipe's argument rests on the effective date of the dismissal. Mr Saipe relies on cases where an employee has been paid their notice period but not worked it out, and the Courts have found that the employment continues until the end of that notice period.⁹ The cases say whether that is so in particular circumstances is a question of fact. The mere fact of a payment in lieu of notice does not itself prevent a termination from being a summary dismissal; but, if the payment is simply an alternative to the employer requiring the employee to work out the correct period of notice, which has been conveyed in clear and unambiguous terms, then that is a termination on notice and the employment ends at the end of the notice period.¹⁰

[35] The cases Mr Saipe cites, however, are not authority for his proposition that the notice the Cottages ought to have given him extends his employment. He was not given notice; he was not paid in lieu of a period of notice; the termination was a summary dismissal effective immediately, that is, on Friday 24 August 2013.

The email of 26 August was sufficient to raise a grievance

[36] A grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹¹

[37] For an employer to be able to address a grievance as the legislation contemplates, the employer must know what it needs to address. This is so that the

⁹ *Poverty Bay Electric Power Board v Atkinson* [1992] 3 ERNZ 413 (EmpC); *Ceres New Zealand LLC v DJK* [2020] NZEmpC 153, [2020] ERNZ 393.

¹⁰ *Ioan v Scott Technology NZ Ltd* [2019] NZCA 386, [2019] ERNZ 331 at [29].

¹¹ Employment Relations Act 2000, s 114(2).

employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates.¹²

[38] In the present case, Mr Saipe's email of 26 August 2013 refers to his dismissal by Ms Bethell and makes it clear that he considers that to be unjustifiable, not least because Ms Bethell says she is operating on the basis that he was a casual employee. Mr Saipe then advises that an employment relationship problem exists between the parties and proposes mediation.

[39] While Mr Saipe's letter of 26 November 2013 goes into more details about his concerns, the email of 26 August 2013 was sufficient to let the Cottages know that he had a personal grievance for unjustifiable dismissal that he wanted it to address, which is what s 114(2) requires.¹³ Through this letter, Mr Saipe raised his personal grievance for unjustifiable dismissal.

Mr Saipe cannot now pursue his personal grievance for unjustifiable dismissal

[40] As Mr Saipe did not file his statement of problem with the Authority until 29 August 2016, he did not commence his action in the Authority within three years of the personal grievance being raised, as required by s 114(6); the time limit is of mandatory effect.¹⁴

[41] Unfortunately for Mr Saipe, this means he cannot pursue his personal grievance for unjustifiable dismissal.

[42] This resolves the preliminary issue and means Mr Saipe's challenge is unsuccessful. However, for completeness I make the following observations.

¹² *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].

¹³ *Disabilities Resource Centre Trust v Maxwell* [2021] NZEmpC 14 at [18].

¹⁴ *Blue Water Hotels Ltd v VBS*, above n 2, at [21].

The letter of 26 November was effective when it was delivered

[43] If the personal grievance had been submitted through the letter dated 26 November 2013, it would have been raised with the Cottages on receipt into the Cottages' post office box. It is the employer who is responsible for managing its business, including when it takes notice of mail delivered to it. As the personal grievance letter was delivered to the post office box on 29 November 2013, that would be the date on which the grievance was raised.

Mr Saipe's 'new knowledge' does not change the starting point

[44] Mr Saipe says that it was in early November 2013, when he learned of the Cottages' engagement with the Belgian woman that he became aware of the true reason for his dismissal. He argues that the 90-day period for raising a grievance ran from then.

[45] Section 114(1) of the Act provides that the 90 days 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 latter. It is the *action* that is the focus. Here there can be no suggestion that Mr Saipe did not know that he had been dismissed after he received the email of 24 August. He immediately considered the dismissal was unjustifiable. That he later may have learned of further grounds on which he could argue the dismissal was unjustifiable does not shift the starting date for the 90-day period. Learning of new information might, in some circumstances, be relevant where an employee has not raised a personal grievance within the prescribed 90 days and wishes to argue that there were exceptional circumstances and that it was just to grant an extension of time within which to bring their personal grievance. However, given the facts and findings here, that issue does not arise.

[46] In any event, the letter of 26 November 2013 does not refer to the alleged new knowledge but confirms that the Cottages already had received notifications of Mr Saipe's personal grievances, and that he challenged the dismissal and parts of it when they came to his notice.

Had Mr Saipe been able to bring a personal grievance, he would have been successful

[47] The hearing of this matter proceeded on the basis that all evidence in relation to the claim would be led. Accordingly, the Court is able to assess what the outcome would have been had Mr Saipe succeeded on the preliminary issue.

[48] Although Ms Bethell asserted that Mr Saipe was a casual employee, he worked regular hours. Those hours were varied by agreement in June 2013. He was not a casual employee.

[49] The test for justification in s 103A of the Act requires the Court to consider whether the Cottages acted in a way that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[50] The Cottages was required to go through a fair process before dismissing Mr Saipe. There should have been consultation and consideration of Mr Saipe's views before a decision was made. He also should have been given notice of the termination of his employment.

[51] There was no process here, Ms Bethell simply reacted adversely to the email she received from Mr Saipe on 23 August 2013. She and Mr Paice considered the email contained an "ultimatum" demanding agreement that Mr Saipe would continue to be paid for 15 hours per week indefinitely, before he would meet. The email was firmly worded but only sought an assurance that he would be paid for 15 hours per week, being the agreed hours, until it was agreed otherwise.

[52] In any event, it was not open to the Cottages to summarily dismiss Mr Saipe without discussion.

[53] The dismissal was not carried in a way open to a fair and reasonable employer; if he had been able to bring his claim for unjustifiable dismissal, Mr Saipe would have succeeded.

[54] Although Mr Saipe sought wages until 22 December 2014, he would have only received the three months provided for in s 128(2) of the Act. This is because, on the evidence, I am satisfied that his employment would have ceased in any event within that time. The relationship between the parties had deteriorated and the Cottages had determined it could not afford to employ Mr Saipe at his contracted hours. The Cottages did not replace Mr Saipe. Although Mr Saipe points to the employment of the Belgian woman in a position not dissimilar to his, that was not on the horizon in August 2013. There was a suggestion she might come to New Zealand in March 2014 but that did not happen until November 2015 (at which time she worked for the Cottages until March 2016).

[55] The reimbursement would have been at the rate of 15 hours per week, which was the then agreed number of hours that Mr Saipe worked. While Mr Paice confirmed that his understanding was the decrease in hours was seen as temporary, I do not accept there was an agreement that Mr Saipe would automatically revert to 30-hours per week; rather I consider there was an agreement that the situation would be reviewed at the end of the low season, around Labour Weekend. In the circumstances, I do not accept that the Cottages would have agreed to increase Mr Saipe's hours.

[56] In addition, Mr Saipe would have been entitled to compensation for humiliation, loss of dignity and injury to his feelings. The dismissal was sudden and I accept Mr Saipe was distressed by it. The appropriate starting point for an award would have been \$20,000. However, I would have allowed a modest discount of \$2,000 for contribution, being the tone of Mr Saipe's email of 23 August 2013, bringing the award to \$18,000.¹⁵

Mr Saipe's other claims fail

[57] Mr Saipe claims that the Cottages misrepresented their motives and financial position when Ms Bethell asked him to agree to a reduction in hours. He says this misrepresentation induced him to enter into the variation and seeks the difference

¹⁵ Employment Relations Act 2000, s 124.

between what he earned from early June 2013 until the beginning of September 2013, and what he would have earned had he worked 30 hours a week over that time.

[58] I acknowledge that Ms Bethell had been having discussions with the Belgian woman about assisting her with her application for a New Zealand work visa for some time and that this included emails in May and June 2013. Her arrival in New Zealand however, was still uncertain and not imminent. Further, it is unclear what impact, if any, the employment of the Belgian woman would have had on Mr Saipe's employment. From the documentary evidence, it seems that, although Ms Bethell could see the Belgian woman adding value to the Cottages' business, Ms Bethell's engagements with her also were motivated by a desire to help her friend with her immigration application.

[59] When she approached Mr Saipe in May 2013 to discuss his hours, Ms Bethell was concerned about the Cottages' financial position, especially as the low season approached. This concern was reflected in the emails she sent Mr Saipe in July 2013, when he continued to work more than the agreed 15 hours. Mr Paice dealt with the financial side of the Cottages' business and he did not consider the business could afford to continue to employ Mr Saipe for the hours he then was working. I accept that the motivation for seeking a reduction in hours for Mr Saipe was financial, including concern over the viability of the business over the low season. I do not accept there was a misrepresentation that caused Mr Saipe to agree to the reduction in hours.

[60] The claim for wage arrears is for \$486.50 plus KiwiSaver and holiday pay on that amount, in respect of the period up to 2 September 2013. While the Cottages did underpay Mr Saipe initially, it then made up the shortfall. Mr Paice checked his calculations with a Labour Inspector who advised all payments had been made. I do not find the claim for arrears of wages proved.

Costs should be agreed

[61] The parties are to endeavour to agree on costs. If that does not prove possible, an application may be made by memorandum filed and served within 20 working days

of this judgment. If there is an application for costs, any response must be filed and served within a further 15 working days, with any reply then to be filed within five working days. The application then would be dealt with on the papers.

J C Holden
Judge

Judgment signed at 10.30 am on 22 March 2021