

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Darcy Edward Sharplin (Applicant)
AND Westpac Banking Corporation Limited (Respondent)
REPRESENTATIVES Rebecca Dromgool, Counsel for Applicant
Samantha Turner, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 1 August 2005
SUBMISSIONS RECEIVED 9 and 18 August 2005
DATE OF DETERMINATION 23 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Darcy Sharplin says he was unjustifiably and constructively dismissed by his former employer, Westpac Banking Corporation Limited ("Westpac"). Mr Sharplin's employment ended when he resigned on 12 September 2002.

[2] No personal grievance was raised in respect of the resignation until the filing of the statement of problem in November 2004. That date is significantly outside the 90-day period set out in s 114(1) of the Employment Relations Act 2000. Westpac does not consent to the late raising of the grievance. Accordingly this determination addresses whether leave should be given to proceed with the grievance on the ground that exceptional circumstances occasioned the delay in its raising.

[3] Westpac also says that Mr Sharplin's employment ended in accordance with an agreement, rather than by his resignation. This matter was also to be dealt with as a preliminary matter.

Mr Sharplin's resignation

[4] Mr Sharplin was employed as the manager of Westpac's Hinemoa St branch, in Rotorua. A couple named Papple - who at the beginning of their association with the Hinemoa Street branch in 1999 operated a mortgage elimination business - became 'Highly Valued Customers' at the branch. Because they had that status Mr Sharplin devoted considerable personal attention to them and their business, and over time he came to believe he knew them well. At the same time he developed a great deal of trust in them.

[5] In or about late 2000 the Papples changed the name of their business and operated it as an investment business under the name Lakeland Wealth Creators. The business' bank accounts continued to be held at Hinemoa St.

[6] In August 2002 the assets of Lakeland Wealth Creators were frozen, and the operating company was placed in liquidation. The Papples have since been charged and convicted of fraud-related offences in relation to its activities. The nature of those activities, and the connection with the bank, led Westpac to investigate Mr Sharplin's association with the business. Kevin Atkinson, the Westpac Bay of Plenty regional manager at the time, conducted the disciplinary investigation which culminated in Mr Sharplin's resignation on 12 September 2002.

[7] The resignation was offered as part of a settlement agreement which provided:

"The parties agree to the following terms of settlement relating to the termination of the employment agreement.

1. [Mr Sharplin's resignation]

...

4. The foregoing shall comprise full and final settlement of all matters arising from the employment of Darcy Sharplin with Westpac Trust."

[8] I record that Mr Sharplin was not charged with any offence. There was no suggestion in the evidence before the Authority so far that charges were pending against him. According to Mr Atkinson, the bank's concern was with the quality of Mr Sharplin's exercise of judgment regarding the Papples and their business.

Delay in raising the personal grievance

[9] In his statement of problem, Mr Sharplin gave these reasons for the delay:

- (i) his state of mind following the end of his employment; and
- (ii) his lack of awareness of any time constraint on pursuing a grievance; and
- (iii) his mistaken belief that he could not take any action until the charges against the Papples were heard and determined.

1. State of mind

[10] Section 115 (a) of the Employment Relations Act provides:

"... 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 consider properly raising the grievance within the period specified in section 114(1);"

[11] The Employment Court considered the requirements of s 115(a) in **Telecom New Zealand Limited v Morgan** (12 July 2004, Judge Colgan, AC 38/04). His Honour identified the elements necessary to meet the exceptional circumstances test under that provision as:

- (a) the consequences of the matter giving rise to the grievance must be severe, with the use of the word 'trauma' connoting very substantial injury;
- (b) this injury must be such as to cause the employee to be unable to properly consider raising the grievance; and
- (c) the incapacity must exist for the entire 90-day period.

[12] The evidence in **Morgan** included evidence that Mr Morgan experienced symptoms of depression including poor and interrupted sleep patterns at about the time of his dismissal, and that he was placed on anti-depressant medication. However after looking at the overall evidence about Mr Morgan's actions after his dismissal, the Court was not satisfied he was unable to consider raising his grievance for the entire 90-day period.

[13] Here Mr Sharplin said that, in the first 12 – 18 months after the termination of his employment, his confidence was so seriously affected that he did not go out and sought only his own company. He believes he was clinically depressed, although he did not seek medical attention and the diagnosis is his own. Inevitably, therefore, no medical evidence on the matter was made available to the Authority. Even if Mr Sharplin's symptoms were those of depression, his state of mind did not lead him to become completely socially isolated, for example, because he spoke of the support he received from friends and family. In addition, hurtful though he said it was, he was able to talk to them about what had happened to him. Indeed he spoke eloquently during the investigation meeting of the 'gut wrenching' effect on him of the loss of his job, and his feeling that he had done nothing wrong.

[14] It is also significant that Mr Sharplin was able to hold down a job starting in November 2002, which is relatively comfortably within the 90 day period. I regard that as an indicator of Mr Sharplin's ability to think despite his upset state of mind. Although he characterised the job as a back room position not requiring much contact with people, it was not a menial position and Mr Sharplin said it was offered to him by a friend who wanted to use his professional skills.

[15] As for the extent of the injury to Mr Sharplin's feelings, for that injury to amount to an 'exceptional circumstance' it would have to be 'something out of the ordinary', and not a factor which might affect all cases: **McDonald v Health Technology Limited** [1992] 2 ERNZ 735, 750. Without wishing to belittle Mr Sharplin's feelings, they are of a kind expressed frequently by people who have nevertheless raised a personal grievance within the necessary time limit. In that sense, the feelings are not out of the ordinary.

[16] A number of questions of causation also arose out of Mr Sharplin's evidence. One of them was whether the injury to his feelings caused him to be unable to properly consider raising a grievance. He gave oral evidence that, had he known there was a time limit on the raising of grievances, he would have approached the bank sooner. That does not connote an inability to properly consider the matter, or that traumatic injury to Mr Sharplin's feelings prevented it from being raised. In an affidavit Mr Sharplin said his personal circumstances meant he had so much going through his mind at the time that he would not have been able to turn his mind to raising a personal grievance if he had known about the time limit. That statement also raises a question about whether traumatic injury to feelings caused the failure to raise the grievance in time, or whether there were other operative factors.

[17] Overall the evidence suggested the reason Mr Sharplin did not raise his grievance within the 90-day period was that, upset or not, he simply did not think of it. That may, in turn, be because he did not know about it. In any event, the evidence did not go so far as to indicate there was traumatic injury to his feelings, arising from the grievance, nor that the injury - traumatic or not - prevented Mr Sharplin from giving proper consideration to raising the grievance.

2. Awareness of time constraints

[18] In applications decided under the Employment Contracts Act 1991, the Employment Tribunal often made findings that ignorance of the 90-day time limit did not amount to an exceptional circumstance. More recently, in cases decided under the Employment Relations Act, the

Employment Relations Authority has applied s 115(c) of the Act to find ignorance of the time limit is an 'exceptional circumstance' when the applicable individual employment agreement failed to include the required reference to it.

[19] Here the parties' employment agreement pre-dated the passage of the Employment Relations Act. It was not updated to include the reference to the 90-day limit on raising personal grievances now required by s 65(2)(a)(vi) of the Act, although by virtue of s 242 the failure to include the provision does not amount to a breach of the Act.

[20] Moreover Westpac says that, despite the lack of reference in his employment agreement, Mr Sharplin should have known about the time limit. As branch manager, on behalf of Westpac he signed certain staff employment agreements containing the provision. The agreements were prepared by the bank's human resources staff. Mr Sharplin said all he did was give them to the staff members to read, and sign if they were satisfied. He would then sign too, without reading the contents. This disregard strikes me as somewhat cavalier, regardless of whether specialist human resources support was available.

[21] The bank also had on the premises an apparently out-of-date policy and procedure manual. Nevertheless the manual referred to the 90-day time limit on raising personal grievances. Mr Sharplin said he never had any occasion to refer to it.

[22] Overall, I do not believe either party is in a strong position regarding this point. However Mr Sharplin could have become aware of the time limit if he had at least taken an interest in the contents of the employment agreements of people who reported to him. That factor tips the balance against a finding that his lack of awareness amounts to an exceptional circumstance.

3. Belief that the charges against the Papples had to be heard and determined first

[23] This reason is not capable of supporting a grant of leave to proceed with the grievance. Without making any attempt to seek advice on the matter Mr Sharplin formed a view that was wrong, and must take the consequences.

[24] For all of these reasons I decline leave to pursue the personal grievance.

Termination in accordance with agreement

[25] The above finding means it is not necessary to address the effect of the settlement agreement embodying Mr Sharplin's resignation.

Costs

[26] Costs are reserved. The parties may agree on the matter, or seek a determination from the Authority. If they seek a determination they should file and serve memoranda setting out their positions.

R A Monaghan
Member, Employment Relations Authority