

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

[2013] NZERA Auckland 96
5379546

BETWEEN MEGAN BUSCH
 Applicant

AND COLIN MCCLOY & DAVID
 BRIDGEMAN, AS AGENTS OF
 ZION WILDLIFE GARDENS LTD
 (IN LIQUIDATION)
 Respondents

Member of Authority: Eleanor Robinson

Representatives: Liz Lambert, Advocate for Applicant
 Aaron Harlowe, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 12 March 2013 from Applicant
 5 March 2013 from Respondent

Determination: Thursday 21 March 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Megan Busch, has raised a personal grievance against the Respondents, Mr Colin McCloy and Mr David Bridgman as Agents of Zion Wildlife Gardens Limited (in Liquidation) (the Respondents) on the basis that they breached their duty to provide her with a safe and healthy working environment.

[2] Ms Busch's employment was terminated by the Respondents in their capacity as Receivers on 31 January 2012. The Statement of Problem was filed in the Authority on 30 April 2012 and served on the Respondents on 1 May 2012. There is no dispute between the parties that Ms Busch's Statement of Problem was filed and served outside the statutory 90 day time limit set out in s 114 of the Employment Relations Act 2000 (the Act), albeit by only one or two days.

[3] The Respondents did not consent to the raising of a personal grievance after the 90 day period specified in s114 (1) of the Act. Ms Busch consequently applied for leave to raise a grievance outside the 90 day time period, pursuant to s114(4)(a) and s115(a) of the Act, on the basis that “*exceptional circumstances*” had occasioned the delay.

[4] Specifically Ms Busch claims that she was so traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the statutory time period set out in s 114 of the Act.

[5] The Respondents oppose the raising of Ms Busch’s personal grievance outside the time period specified in the Act on the grounds that they do not accept that Ms Busch’s delay in raising the grievance was caused by exceptional circumstances.

[6] I now proceed to determine as a preliminary issue whether leave should be granted to raise the personal grievance after the expiration of the 90 day period.

The Legislation

[7] Section 114 Employment Relations Act 2000 provides:

(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

[8] Ms Busch seeks to rely on the following ground:

Section 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)*

Issues

[9] The issues for determination are therefore:

- i. Whether Ms Busch was so affected or traumatised by the matter giving rise to the personal grievance that this amounts to exceptional circumstances in terms of sections 114 and 115;
- ii. If so, whether it is just to grant leave pursuant to section 114(4)(b);

[10] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on the written submissions from the parties.

Background Facts

[11] The Respondents were appointed receivers over Zion Wildlife Gardens Limited(In receivership and liquidation)(Zion) on 26 July 2011. On 25 September 2011 Ms Busch had signed an individual employment agreement with Zion signed on behalf of the Respondents by Mr McCloy.

[12] By letter dated 31 January 2012 the Respondents terminated the employment of Ms Busch.

[13] That same day, 31 January 2012, Ms Busch accompanied by her mother Ms Patricia Busch, returned to Zion to find her access to the Zion site in which Ms Busch was at that time living, blocked to by a number of men and police officers.

[14] When Ms Busch refused to obey instructions of the police officers that she leave the premises in accordance with trespass orders, she had been arrested for trespass and further stated that she had been manhandled by police.

[15] Ms Busch submits that she had been so traumatised by the events on 31 January 2012 as to constitute exceptional circumstances in terms of s 115 (a) of the Act.

Determination

Whether or not Ms Busch was so affected or traumatised by the matter giving rise to the grievance that this amounts to exceptional circumstances in terms of sections 114 and 115 of the Act.

[16] The leading case on the interpretation and effect of section 115 (a) of the Act is *Telecom New Zealand Limited v Morgan*¹. The Court in addressing the application of s115(a) considered that Parliament had not intended to relax the tests for extending the limitation period when enacting ss 114 and 115 of the Act, and went on to observe in relation to s115 (a) that “*Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals or other matters giving rise to grievances*”²

[17] The Court further commented at paragraphs 23 and 24:

[23] *Deconstructing the subsection, the following elements appear necessary to meet the exemplar “exceptional circumstances” test under s115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. This is illustrated by the phrase “... has been so affected or traumatised...” Although being “affected “ may encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of “trauma” connotes very substantial injury.....In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.*

[24] *Next, s115 (a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to the exceptional circumstances. It*

¹ [2004] 2 ERNZ 9.

² Ibid at para [22]

is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s115 (a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not only a part of it by use of the phrase “ ... within the period specified ...”

[18] It is necessary to consider whether the trauma had been occasioned by the matter giving rise to the grievance and whether that trauma had the effect of rendering the employee unable to properly consider raising the grievance for the whole of the 90 day statutory period.

(i) Medical Evidence

[19] Ms Busch supplied an undated report of Dr Carolyn Mills, a NZ Registered Clinical Psychologist, as medical evidence that she had been suffering from trauma arising from the matter giving rise to the personal grievance.

[20] In the report, Dr Mills attributes the trauma suffered by Ms Busch to the events on 31 January 2012 and the repercussions arising from those events. Ms Mills confirms that Ms Busch is suffering from a nervous breakdown, severe Post Traumatic Stress Disorder, depression and shock. In particular Dr Mills states that Ms Busch: “... *cannot remember things and cannot focus on the road when she is driving or doing anything that requires concentration*”.

[21] I find it is established on the basis of Dr Mills’ report that Ms Busch suffered trauma as a result of the events on 31 January 2012. However to qualify as ‘exceptional circumstances’ pursuant to s 115(a) of the Act it is necessary that the trauma prevented Ms Busch from considering raising the grievance for the whole of the 90 day statutory period.

(ii) For the whole of the 90 day period

[22] As observed by the Employment Court in *Telecom New Zealand Limited v Morgan*³, the threshold for claiming exceptional circumstances has been set high by Parliament.

[23] An applicant seeking leave on the basis of exceptional circumstances must be able to establish that during the whole of the 90 statutory time period he or she was unable to consider raising a personal grievance. If an applicant is shown to have been able to undertake actions during that period that indicate that he or she was able to process information and make rational decisions accordingly, that will mitigate against the proposition that exceptional

³ [2004] 2 ERNZ 9.

circumstances affected the applicant's ability to raise a personal grievance during the whole of the 90 day statutory period.

[24] Mr Harlowe for the Respondents submits that during the 90 day period Ms Busch was cited as the second plaintiff in a High Court proceedings⁴ which is inconsistent with her having been too emotionally traumatised to consider raising a personal grievance.

[25] It is submitted by Ms Lambert that it had been Ms Patricia Busch acting alone who had instructed legal counsel in the High Court proceedings.

[26] I observe that it would be unusual for responsible legal counsel to undertake to represent a plaintiff in a High Court matter without having sought and taken instructions in the matter from that plaintiff. Moreover, even if Ms Patricia Busch alone instructed counsel in her capacity as an agent for Ms Busch, I consider it more likely than not that she would have taken instructions from Ms Busch. However I find this evidence not conclusive.

[27] Mr Harlowe submitted further evidence to substantiate that during the 90 day statutory period Ms Busch had been capable of undertaking actions indicative of an ability to be able to consider raising a personal grievance during the same period.

[28] The evidence, which is not disputed, is that of (i) Ms Busch taking part in a 'Campbell Live' television programme on 14 February 2012 in which she discussed an alleged incident at Zion, and (ii) of a newspaper article which appeared in the Northern Advocate newspaper on 12 April 2012 in which Ms Busch discussed the welfare of the horses which she had been unable to retrieve from Zion after 31 January 2012.

[29] In the newspaper article of 12 April 2012 reporting of an interview with Ms Busch Mr Imran Ali, Reporter, writes

The Lion Man's sister has lodged a police complaint alleging she has been unable to remove two \$30,000 horses and other items from Zion Wildlife Kingdom....

She wrote to the Ministry of Agriculture and Forestry and the SPCA two weeks ago ...

The first attempt to retrieve the animals was made on March 2.

[30] Ms Lambert submitted that the newspaper article concerned the welfare of the horses which was a fundamental contributing cause of the emotional trauma Ms Busch suffered

⁴ CIV-2012-488-234 filed with the High Court on 16 April 2012

following the events on 31 January 2012, and contained incorrect reporting in that it had been Ms Patricia Busch who had written to the Ministry of Agriculture and Fisheries, and not Ms Busch.

[31] Having considered this argument I note that the newspaper article attributes certain actions solely to Ms Busch, namely the making of a police complaint, letters to the Ministry of Agriculture and Forestry and the SPCA, and attempts to retrieve the animals.

[32] Even accepting that Ms Patricia Busch wrote the letter to the Ministry of Agriculture and Forestry, I find the ability of Ms Busch to consider and to carry out the other cited actions, and further to participate in a newspaper interview, to be inconsistent with a person too emotionally traumatised to consider raising a personal grievance within the same period.

[33] I also observe that whilst the newspaper article is focussed primarily on the issue of the horses, the Campbell Live interview, which took place on 14 February 2012 and which was closer in proximity to the events of 31 January 2012, concerned an allegation made by Ms Busch of an alleged unreported incident at Zion some years earlier. An incident totally unconnected with the welfare of her animals or the events on, or arising from, the events on 31 January 2012.

[34] I do not consider that an applicant who has been able to interface successfully with the Media as Ms Busch has been shown to have done on two separate occasions some 60 days apart would have been unable to properly consider raising a personal grievance in the same period of time or indeed within the 90 day period specified in s 114(1).

[35] I do not find in these circumstances that the evidence submitted supports the claim that Ms Busch was so traumatised by the events of 31 January 2012 that she had been unable to turn her mind to properly consider raising a personal grievance for the whole of the 90 day statutory period.

[36] I determine that the delay in Ms Busch raising her personal grievance within the 90 day statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances lasting at least the whole of the 90 day period.

Is it just to grant Ms Busch leave pursuant to section 114(4)(b)?

[37] On the basis that I have not found the delay in Ms Busch in making an personal grievance application to have been caused by exceptional circumstances pursuant to s 114 (4)

and s 115(a) of the Act, I cannot determine whether it would have been just to grant Ms Busch leave to proceed with her personal grievance

[38] Ms Busch's application for leave to raise a personal grievance with the Respondents is declined.

Costs

[39] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority