

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 106  
5529358  
5529389

BETWEEN	RAE QUIRKE First Applicant
A N D	JUDY HENDERSON Second Applicant
AND	HATO PAORA TRUST BOARD First Respondent
A N D	ANTHONY LOBB Second Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Applicants self-represented Ken Mair and Scott Doolan, Advocates for Respondents
Investigation Meeting:	On the papers
Determination:	2 November 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mrs Quirke and Ms Henderson were employed respectively as Hostel Laundry Manager and Hostel Laundry Assistant at Hato Paora College by the Hato Paora Trust Board (Hato Paora) for periods of 36 and 25 years before the termination of their employment for redundancy on 5 April 2013. Both employees were members of the Service & Food Workers Union.

[2] Mrs Quirke and Ms Henderson claim to have raised personal grievances for unjustifiable disadvantage and constructive dismissal through their Service and Food Workers Union (SFWU) representative, Lynn Williams.

[3] Hato Paora disputes that grievances were raised by Ms Williams on behalf of the applicants and asserts it did not know of their grievances until it received a copy of their' statements of problem from the Authority in November 2014.

[4] Following telephone conferences with the parties in February and April 2015 Mrs Quirke and Ms Henderson applied to the Authority for leave to file their personal grievances out of time. The basis of their application is that any delay in raising the grievances was occasioned by exceptional circumstances, with those circumstances being that they made reasonable arrangements to have their grievances raised as soon as possible following their employment being terminated.

[5] Hato Paora denies the existence of exceptional circumstances under s.115B of the Employment Relations Act 2000 (the Act).

[6] The second respondent, Anthony Lobb, has applied to the Authority to dismiss the claims made against him by Mrs Quirke and Ms Henderson. Mr Lobb is an employee of Hato Paora and holds the position of Director of Living. He says he is not the employer of the applicants and there was no employment relationship between them. Hato Paora does not oppose Mr Lobb's application. Mr Lobb has also requested that costs be awarded to him.

[7] Mrs Quirke and Ms Henderson oppose the application to dismiss the claims against Mr Lobb.

[8] These matters fall to be determined by the Authority on the papers following the filing of affidavits and submissions from the parties.

### **Issues**

[9] The issues for determination are:

- (a) Whether Mrs Quirke and Ms Henderson's personal grievances for unjustifiable dismissal were raised within 90 days;
- (b) If not, whether special leave should be granted to them to raise their grievances after the expiration of the 90 day period;
- (c) Whether the claims against Mr Lobb should be dismissed.

## Relevant law

[10] Section 114 of the Act provides that:

*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.*

[11] Where a grievance is not raised within the statutory 90 days and the employer does not consent to the employee raising the matter after the expiry of that period, the employee may apply to the Authority for leave to raise the grievance outside the statutory timeframe. The Authority may, after giving the employer an opportunity to be heard, grant leave if it is satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances and considers it just to do so<sup>1</sup>.

[12] The Act provides examples of exceptional circumstances at s.115:

*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*
- (c) *Where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or*
- (d) *Where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

## Was the grievance raised within 90 days?

[13] It is Mrs Quirke and Ms Henderson's evidence that they met with Ms Williams at Mrs Quirke's home on 18 April 2013 to discuss the process leading to their redundancies and their concerns that the process had not been carried out

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<sup>1</sup> Section 114, Employment Relations Act 2000

lawfully. They also discussed concerns regarding the accuracy of their redundancy payments and the message given to staff and students who had been told on their last day of employment that the applicants were “retiring”.

[14] At that meeting, Mrs Quirke and Ms Henderson say they instructed Ms Williams to raise their personal grievances. Following the meeting, they drafted a record of events, together with supporting details, and forwarded that document to Ms Williams the same day (18 April) in order that she could put together their personal grievance applications. They have deposed that Ms Williams emailed her acknowledgment of their personal grievance information on 19 June 2013, noting she was currently working on other union business which would be finished by the week of 8 July after which she would meet with the applicants.

[15] I find as a matter of fact, from an examination of the email correspondence supplied by the applicants, that Ms Williams acknowledged receipt of their personal grievance information on 21 April 2013. In that email Ms Williams stated she would deal with it the next day. I also find as a matter of fact that the 19 June 2013 email Ms Williams sent to Mrs Quirke was in response to Mrs Quirke's emailed request of 17 June 2013 for an update on progress. Ms Williams' response, which I will return to later, informed Mrs Quirke that she had received "*acknowledgement of receipt of PG*". In making these findings, I attribute the discrepancy between them and Mrs Quirke and Ms Henderson's statements to the two year passage of time between the events and their recollection of the order in which some events occurred.

[16] Ms Williams attended the February 2015 telephone conference with the Authority in which there was discussion of a letter she claimed to have sent by post to Mr Mair and the Hato Paora Trust Board on 15 July 2013. Ms Williams had informed the Authority by email dated 1 December 2014 that the Service and Food Workers Union had "*lodged a Personal Grievance to the Hato Paora Trust Board and the Employment advocate at the time Mr Ken Mair on the 15<sup>th</sup> July 2013 which was well within the 90 day period required*".

[17] During the February 2015 telephone conference Ms Williams said she had also emailed a copy of this letter to the Principal of Hato Paora school, Deborah Marshall-Lobb. She was asked to provide a copy of her email to the Authority and Hato Paora. That request was repeated in an email from the Authority to Ms Williams before the April 2015 telephone conference which she did not attend. In an email to the

Authority the following week, Ms Williams stated that the union's IT technician "*continues to search in our archives for the email..*" To date it has not been provided to the Authority.

[18] Hato Paora says the first it knew of any personal grievance claims by the applicants was when it received their statements of problem from the Employment Relations Authority on 14 November 2014. This was 19 months after the applicants' employment was terminated. Mr Mair is adamant he did not receive the letter of 15 July 2013 and would have taken action if he had received it. Ms Marshall-Lobb told the Authority she had done a thorough check of her email system and had sought the expertise of an IT specialist who also thoroughly checked her system. Neither search found evidence of the email Ms Williams claimed to have sent.

[19] I am satisfied from the information before me that there is no evidence to support Ms Williams' claim to have posted the letter dated 15 July 2013 to Hato Paora Trust Board or to Mr Mair, or that she emailed it to Ms Marshall-Lobb. I am further satisfied that Mrs Quirke and Ms Henderson's personal grievances were not raised within the statutory time frame.

[20] I note that Ms Williams referred in the 15 July letter to Mrs Quirke and Ms Henderson having been constructively dismissed from their employment on 19 April 2013. Mrs Quirke said in the course of the April telephone conference this was an error on the union's part and the correct date was 5 April 2013. By my calculation, even if Ms Williams had posted and emailed the letter(s) on 15 July 2013, the personal grievances would have been raised 102 days after the final date of employment for both applicants. Their grievances would therefore still be outside the 90 days specified by s. 114.

**Should leave be granted to Mrs Quirke and Ms Henderson to raise their grievances after the expiration of the 90 day period?**

***Exceptional circumstances***

[21] The Supreme Court in *Creedy v. Commissioner of Police*<sup>2</sup> considered "*exceptional circumstances*" as treated by the Court of Appeal in *Wilkins & Field Ltd v. Fortune*<sup>3</sup> as those which are "*unusual, outside the common run, perhaps something*

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<sup>2</sup> [2008] ERNZ 109 at 119

<sup>3</sup> [1998] 2 ERNZ 70

*more than special and less than extraordinary*". The Court preferred the first part of that meaning, i.e. "*unusual, outside the common run*", or "*the exception to the rule*".

[22] The Employment Court has noted, for example in *McMillan v. Waikanae Holdings (Gisborne) Ltd (t/a McCannics)*<sup>4</sup> that the examples of exceptional circumstances in s.115 are not intended to be exhaustive and may include one or more of the circumstances.

[23] Mrs Quirke and Ms Henderson rely on s.115(b) of the Act. They say they made reasonable arrangements to have their grievances raised on their behalf by Ms Williams who unreasonably failed to ensure that it was raised within the required time. As previously noted, Ms Williams has not filed an affidavit in the Authority.

[24] Mrs Quirke says that between April 2013 and November 2014, she phoned and emailed Ms Williams regularly asking for progress on their personal grievances. Ms Henderson says Mrs Quirke copied her into those emails and she and Mrs Quirke regularly spoke on the phone regarding the lack of progress on the matter.

[25] I have sighted the email correspondence between Mrs Quirke, who acted as the spokesperson for herself and Ms Henderson, and Ms Williams. It is clear from that correspondence that Mrs Quirke followed up in a timely manner on the meeting she and Ms Henderson had with Ms Williams on 18 April 2013 in which they instructed her to raise their personal grievances. Mrs Quirke emailed Ms Williams after the meeting with detailed information about the reasons for their being aggrieved and received a response from Ms Williams on 21 April 2013 to the effect that she would deal with the matter the following day.

[26] On 17 June 2013 Mrs Quirke again emailed Ms Williams asking for news of the personal grievances and what was to happen next. She received an email response from Ms Williams on 19 June 2013 as follows:

*Hi Rae, **Have had acknowledgment of receipt of PG**, we will met [sic] soon to write up specifics but I am currently doing AGMs for the union so these will be finished at the week of the 8th July so will meet up then. ...[emphasis added]*

[27] At this stage, which was well within the 90 day timeframe for raising a personal grievance, I am satisfied that Mrs Quirke and Ms Henderson had good

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<sup>4</sup> (2005) 7 NZELC 97,859

reason to believe their personal grievances had been raised with the employer. They had been informed by their union representative that she had received an acknowledgement of the receipt of their grievances and they had no reason to doubt the accuracy of that information.

[28] While there was a delay of four months between Ms Henderson and Mrs Quirke receiving that assurance and their next written follow up with Ms Williams, I find that to be reasonable because they were awaiting the next step in the process. Ms Williams emailed Mrs Quirke in October 2013 stating that she was trying to "*push the process*" and referring to Mr Mair and Mr Doolan expressing concerns that "*the PG is not warranted*".

[29] Mrs Quirke and Ms Henderson were concerned about the slow progress but had no reason to disbelieve their grievances had been raised in accordance with the 90 day time frame. In addition to having been informed by Ms Williams that she had received an acknowledgement of receipt of the personal grievances, they had also received an email from her on 24 October 2013 in which she implied she had been in discussion with Mr Mair and Mr Doolan.

[30] The same email had implied Ms Williams had been in contact with the Mediation Service as she asserted that "*Some PGs are taking a long time to get to mediation I have six more on top of yours and one goes back to January this year..*".

[31] In short, the evidence before me supports Mrs Quirke and Ms Henderson's view that their personal grievances had been raised within time and that, while matters were proceeding at a pace slower than they would wish, they were nonetheless in train.

[32] Further email correspondence followed between Mrs Quirke and Ms Williams in May 2014. By this time Mrs Quirke was clearly concerned about the delay in progressing the matter. Ms Williams responded that she would contact the Mediation Service again, noting that she was "*still awaiting dates for long before your PG went in*".

[33] I find Mrs Quirke and Ms Henderson made reasonable attempts to have their personal grievances raised within the 90 day time frame. They had every reason to believe their union representative had raised their grievances in time. I find their representative unreasonably failed to ensure this occurred. Accordingly I am satisfied

that the delay in raising the personal grievances was occasioned by the exceptional circumstance provided for in s. 115(b).

***Is it just to allow the grievances to be heard out of time?***

[34] Having satisfied the first part of s.114(4), I am required to consider whether it would be just to grant leave for Mrs Quirke and Ms Henderson's grievances to be raised out of time. As Chief Judge Colgan noted in *Austin v Silver Fern Farms Limited*<sup>5</sup>

*[73] "This test amounts essentially to a balancing of the justices and injustices to the parties of permitting a late raised grievance to proceed."*

[35] I have no doubt Mrs Quirke and Ms Henderson genuinely feel aggrieved about aspects of their treatment by their former employer and its Director of Living and that a failure to grant leave will result in their having no recourse to have those grievances resolved. The respondents take a different view. Mr Doolan submits Hato Paora was unjustifiably denied the opportunity to respond to, and potentially resolve, the employment relationship problems raised by the applicants allegedly in 2013.

[36] He submits it would now be unjust for Hato Paora to have to defend the personal grievances after such a long and unreasonable delay in lodging proceedings in the Authority. In Mr Doolan's submission the applicants could achieve the monetary remedies they are seeking by bringing a claim of negligence against the SFWU for its negligent representation.

[37] I accept there may be difficulties caused by the delay for Hato Paora, but those difficulties are equally present for Mrs Quirke and Ms Henderson. I do not consider this constitutes good reason to deny them the opportunity to pursue their grievances. As the merits of those grievances are yet to be tested, I am not in a position to make any findings about them. I am satisfied it is just to give leave to Mrs Quirke and Ms Henderson to proceed and to have their grievances determined on their merits.

[38] The next step is to refer the parties to mediation, as is required by s.114(5) of the Act.

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<sup>5</sup> [2014] NZEmpC 30

**Should the claims against Mr Lobb be dismissed?**

[39] Mrs Quirke and Ms Henderson say that for their entire employment period at Hato Paora they had been direct reports of the Hato Paora College Hostel Manager, later known as the Director of Living. They say that, to their knowledge, Mr Lobb was the Hostel Manager and the change to his title to Director of Living occurred during his tenure. They say he held all hostel meetings in which they were involved. He was in charge of their timesheets, wages, leave and any business connected to the College laundry. He gave them their directives and instructions.

[40] Mrs Quirke and Ms Henderson say it was their understanding that Mr Lobb had been delegated authority by the Board of Trustees to act as the employer. On the basis of these beliefs, they understood they had an employment relationship with Mr Lobb.

[41] I am satisfied that Mr Lobb is an employee of Hato Paora. Any directions and instructions he gave to Mrs Quirke and Ms Henderson were in his capacity as their manager or the manager to whom they directly reported. That does not make Mr Lobb their employer. I find there was no employment relationship between Mr Lobb and Mrs Quirke and Ms Henderson. Their employment relationship was with the Hato Paora Trust Board, with Mr Lobb being the employee of the Board to whom they reported.

[42] Accordingly, there is no justification for Mr Lobb to be cited as second respondent in these proceedings and he is to be removed from them.

**Determination**

[43] Leave is granted to Mrs Quirke and Ms Henderson to pursue their personal grievances. The parties are directed to mediation in the first instance.

[44] Mr Lobb is to be removed as second respondent in these proceedings.

**Costs**

[45] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority