

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 38
5383166

BETWEEN EMMA MARJORIE SWENEY
Applicant

A N D WANAKA HARDWARE &
BUILDING SUPPLIES LIMITED
T/A MITRE 10
Respondent

Member of Authority: David Appleton

Representatives: Ken Usmar, Advocate for the Applicant
Diana Hudson, Counsel for the Respondent

Investigation Meeting: Determined by consideration of the papers by consent

Submissions Received: 17 February and 19 March 2015 from the Applicant
10 March 2015 from the Respondent

Date of Determination: 30 March 2015

DETERMINATION OF THE AUTHORITY IN A PRELIMINARY MATTER

- A. The letter written to the respondent on 8 March 2011 on behalf of the applicant was not a valid personal grievance for unjustified dismissal.**
- B. Exceptional circumstances did not occasion the entire delay in raising the applicant's personal grievance for unjustified dismissal, and leave to raise it after the expiration of the statutory time limit is therefore declined.**
- C. Costs are reserved.**

Prohibition from Publication Order

[1] The submissions and evidence put before the Authority contained allegations of professional negligence against a solicitor and barrister practising in the region where the employment took place. This lawyer has not had the opportunity to respond to these allegations and it would not be just to name her without having first given her that opportunity.

[2] I therefore prohibit from publication any information that could identify this lawyer, save for that contained in this determination, and she shall be referred to as Ms X in this determination.

[3] Whilst the actions of a second lawyer (the late Ms Andrea Derbidge) are also the subject of scrutiny, she has not been openly accused of negligence, and so I do not prohibit publication of her identity.

Employment relationship problem

[4] Ms Sweney claims that she was unjustifiably dismissed on or around 11 February 2011 following a disciplinary investigation into alleged stock handling irregularities.

[5] The respondent denies that the dismissal was unjustified but also asserts that the Authority does not have jurisdiction to consider the application on the grounds that no valid personal grievance was raised within the 90 day time limit imposed by s.114(1) of the Employment Relations Act 2000 (the Act).

[6] This determination deals solely with the question of whether a valid personal grievance was raised within the 90 day time limit and, if it was not, whether the Authority should grant leave to Ms Sweney to raise her personal grievance after the expiration of the 90 day period pursuant to s.114(4) of the Act.

Brief account of the events giving rise to this application

[7] Ms Sweney was employed by the respondent as a shop assistant. In June 2010 she received a final written warning broadly in relation to her work performance. She engaged Ms X and, in August 2010, Ms X raised a personal grievance in relation to the final written warning. A mediation between Ms Sweney and the respondent was scheduled for 17 November 2010. Prior to that mediation taking place, in October

2010 the respondent wrote to Ms Sweney raising a further disciplinary matter in relation to her work performance.

[8] Ms Sweney attended that disciplinary meeting in October 2010 and, on 26 November 2010, received a written warning. This written warning was issued after the parties had attended mediation on 17 November 2010. Ms X wrote to the respondent on behalf of Ms Sweney on 16 December 2010 raising concerns about this written warning.

[9] On 3 February 2011 the respondent wrote to Ms Sweney asking her to attend a disciplinary meeting on 8 February 2011. This related to alleged stock irregularities. Ms Sweney attended the disciplinary meeting on 8 February 2011, received a letter the following day advising her that she was guilty of serious misconduct, putting her on immediate suspension and asking her to attend a meeting two days later to give her an opportunity to explain why she should not be dismissed. Following that meeting, Ms Sweney was dismissed on 11 February 2011.

[10] On 8 March 2011 Ms X wrote a letter to Ms Sweney, a copy of which was put before the Authority by Ms Sweney's current representative (and so, I infer, Ms Sweney has waived privilege in this communication with her legal adviser). In this, Ms X advised Ms Sweney inter alia:

We confirm that you have 90 days from the date of termination to lodge your personal grievance. Whilst this is a considerable period of time we think it prudent to advise Mitre 10 of your proposal to pursue a personal grievance and accordingly we have corresponded with them. We have enclosed a copy of the letter for you.

[11] It is assumed that the enclosed letter to Mitre 10 was a letter bearing the same date which Ms X wrote to the respondent's representative (Ms Hudson) in the following terms:

MITRE 10 AND EMMA SWENEY (OUR REF: 367732-12)

We hereby give notice that our client intends to pursue a personal grievance in respect of Ms Sweney's dismissal.

We advise that we have made application for Legal Aid and we currently await a response from Legal Services Agency before progressing the personal grievance claim.

Yours faithfully

[Identifying details omitted]

[12] Ms Sweney then received a communication from Legal Services Agency dated 14 March 2011 advising her that they had written to Ms X regarding the application and seeking further information.

[13] On 17 March 2011 Ms Sweney emailed Ms X and provided her with the answers to the questions asked by Legal Services Agency, and sent another email to Ms X on 22 March 2011 to see if she had received the email of 17 March. Ms X replied the same day referring to having responded to the Legal Services Agency.

[14] Mr Usmar states that, over the next few months, the only contact Ms Sweney had from Ms X were statements through the post chasing payment of her bill with Ms X's law firm. The 90 day time limit within which to raise the personal grievance following Ms Sweney's dismissal expired on Thursday 12 May 2011.

[15] Ms Sweney emailed Ms X on 19 October 2011 to inquire what was happening with her case and asking whether Ms X was leaving the firm as she had heard and whether Ms X would take her case with her. Ms X responded on 24 October 2011 to say that she had not heard from Ms Sweney since around the dismissal and repeated the fact that she had told the respondent's representative on 8 March 2011 that Ms Sweney intended to pursue a personal grievance. She also said she had not heard back from Legal Services Agency and that she could do no further work for Ms Sweney until the firm's account had been paid. Ms X did not answer Ms Sweney's question about Ms X leaving the firm.

[16] On or around 11 December 2011 Ms Sweney found out that Legal Services Agency had not received the information they required to complete a decision on her application and emailed Ms X to tell her this. Ms Sweney received no reply.

[17] On 14 December 2011 Ms Sweney emailed a partner of Ms X's firm, having learned that Ms X no longer worked for them. Ms Sweney received no reply and, on 15 February 2012, emailed the partner again, as well as the Legal Services Agency asking them what information they still required. Legal Services Agency responded the following day sending a copy of the letter they had sent to Ms X on 14 March 2011.

[18] On 20 February 2012 Ms Sweney contacted Equitable Employment Solutions Limited and her case was given to Ms Andrea Derbidge, a solicitor contracting to the company to carry out employment law services in the Canterbury region. On 22 March 2012 Ms Derbidge wrote to the respondent in the following terms:

*The Manager
Mitre 10
PO Box 237
Wanaka*

Attention: Mark Watson

Without Prejudice

Dear Mark

Re: Emma Sweney

I am now acting for Emma Sweney. I refer to the notice given to you by [Ms X's firm] on 8 March 2011 of a personal grievance and note that there has been no reply to this letter.

I am now progressing this matter on Emma's behalf and am preparing formal documentation to lodge with the Employment Relations Authority. These set out Emma's claim for;

- *Unjustified dismissal*
- *Damages for multiple breaches of Employment Law by your company spread over a long period including the issuing of an invalid warning letter and refusal to retract same.*

Emma is, however, prepared to give your company an opportunity to discuss her grievances with her prior to filing these documents. This offer is open for fourteen days from the date of this letter. Please contact the writer by telephone [details omitted] or email [details omitted] if you are prepared to have such a meeting, and we will arrange a time and place suitable to both parties.

*Yours faithfully
Andrea Derbidge*

[19] On 1 April 2012 Ms Hudson responded to Ms Derbidge on behalf of the respondent stating that Ms X's letter of 8 March 2011 did not meet the threshold for raising a personal grievance and, accordingly, the matter was outside the 90 day period in which any personal grievance claim could legally be submitted.

[20] On 2 April 2012 Ms Derbidge sent a brief email to Ms Sweney stating that she had written to the respondent but had not heard back from it. On 13 April 2012 Ms Sweney emailed Ms Derbidge to ask if she had heard back from the respondent. There does not appear to have been any response.

[21] On 1 May 2012 a partner at Ms X's former firm advised Ms Sweney that they *reluctantly* agreed to waive the fees currently owed by Ms Sweney.

[22] Although the Authority was not shown any written communication by Ms Derbidge to Ms Sweney telling her of Ms Hudson's response on behalf of the respondent, on 7 September 2012 Ms Derbidge wrote to Ms X's former firm saying that *it appears that the letter sent by [Ms X] is insufficient to constitute proper notice of the personal grievance and we are now forced to apply to the Employment Relations Authority to file an application out of time.* Ms Derbidge stated that her letter was notice of intention to *look to your firm for losses* suffered by Ms Sweney as a result of [Ms X's] *negligence.* There is no record of any response.

[23] On 11 April 2013 Ms Derbidge sent a brief email to Ms Sweney to say she was sorry she had been out of touch and referring to a family crisis. She stated that she would be back in touch within 48 hours.

[24] On 7 May 2013 Ms Sweney emailed Ms Derbidge to find out why she had not received any contact from her. Mr Usmar says that Ms Sweney then *managed to make some sort of contact with Ms Derbidge* but that this was intermittent at best and appeared to have ceased around the end of 2013, although Ms Sweney made numerous attempts to contact Ms Derbidge throughout 2014.

[25] In September 2014 Ms Derbidge passed away with no further progress having been made on Ms Sweney's file since her letter of 22 March 2012.

[26] Ms Sweney's application to the Authority was lodged with the Authority on 18 December 2014.

The issues

[27] The Authority must determine whether:

- (i) A valid personal grievance for unjustified dismissal was raised within the 90 day time period required by s.114(1) of the Act, and, if not:
- (ii) Whether the Authority should grant leave for Ms Sweney to raise her personal grievance after the expiration of that 90 day period.

The law

[28] Sections 114 and 115 of the Act provide as follows:

114. Raising a 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 with 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 one or more of the circumstances set out in section 115); and

(b) Considers it just to do so.

(5) *In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.*

(6) *No action may be commenced in the Authority or the court in relation to a personal grievance more than three years after the date on which the personal grievance was raised in accordance with this 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); 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*

[29] Section 219 of the Act provides as follows:

219 Validation of informal proceedings, etc

(1) If anything which is required or authorised to be done by this Act is not done within the time allowed, or is done informally, the court, or the Authority, as the case may be, may in its discretion, on the application of any person interested, make an order extending the time within which the thing may be done, or validating the thing so informally done.

(2) Nothing in this section authorises the court to make any such order in respect of judicial proceedings then already instituted in any court other than the court.

Was a valid personal grievance raised within 90 days of the dismissal?

[30] It is now well established that a personal grievance must be raised with sufficient specificity for the respondent to understand what the personal grievance is. This principle was established by the Employment Court in *Creedy v. Commissioner of Police [2006] ERNZ517*, and was not overturned by subsequent judgements on appeal. The Employment Court stated at [36] the following:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[31] Whilst it may well be the case that the respondent would have been able to have inferred that Ms Sweney was wishing to challenge her dismissal, I do not accept that the letter sent by Ms X dated 8 March 2011 passes the specificity test, for two reasons. First, it gives no clue at all on what basis Ms Sweney wished to challenge her dismissal. Ms Sweney may have been unhappy with the process followed, the substantive decision, or both. Without knowing more details of the reasons behind the

challenge, it is not possible for the respondent to be able to realistically address Ms Sweney's concerns.

[32] Second, the letter states quite clearly that Ms Sweney intended to pursue a personal grievance. An expression of intention to do something does not amount to the doing of it. It would have been completely reasonable and legitimate for the respondent to have expected a further communication from Ms X setting out the details of the grievance that Ms Sweney was intending to pursue. It cannot be reasonable to have expected the respondent to have taken any further steps in the light of the content of Ms X's letter.

[33] In conclusion, therefore, I reject the assertion that Ms X's letter of 8 March 2011 amounted to the raising of a valid personal grievance in respect of Ms Sweney's dismissal.

Should the Authority grant leave to Ms Sweney to raise a personal grievance out of time?

[34] The test set out in s.114(4) requires two limbs to be satisfied. The first is that the delay in raising the personal grievance was occasioned by exceptional circumstances and, second, that the Authority considers it just to grant leave.

[35] The exceptional circumstances relied upon by Mr Usmar in his submission is that set out in s.115(b). This sub-section itself consists of two elements; the first is that the employee made reasonable arrangements to have the grievance raised on her behalf by an agent, and, second, that that agent unreasonably failed to ensure that the grievance was raised within the required time.

Was the delay occasioned by exceptional circumstances?

[36] Ms Sweney relied on two representatives to pursue her personal grievance against the respondent; Ms X and Ms Derbidge. It is necessary to examine the actions of these representatives separately.

Reliance on Ms X

[37] First, I accept that Ms Sweney made reasonable arrangements to have the grievance raised on her behalf by Ms X. Ms X was an experienced lawyer, and had

been engaged by Ms Sweney before to represent her in respect of her employment with the respondent.

[38] I do not accept the respondent's submissions that Ms Sweney should have known that it was insufficient for Ms X to have written a letter referring to an intention to raise a personal grievance. Ms Sweney is not a qualified lawyer. I infer from the surrounding circumstances that Ms Sweney reasonably (but erroneously) believed that this action protected her.

[39] Therefore, I am satisfied that the first limb of the exceptional circumstances test at s.115(b) is satisfied as far as Ms X's representation is concerned.

[40] The second limb of s.115(b) is also satisfied, in so far as Ms X is concerned, as any qualified and experienced lawyer should reasonably have known that expressing an intention to raise a personal grievance would be insufficient to satisfy s.114(1) and the specificity test. Therefore, the agent (Ms X) unreasonably failed to ensure that the grievance was raised within the required time.

Reliance on Ms Derbidge

[41] Once it had become clear to Ms Sweney that Ms X had failed to act in her best interests, it was reasonable for Ms Sweney to have relied upon Ms Derbidge to have taken such actions as were necessary to progress her grievance. I infer that, when Ms Sweney first contacted Ms Derbidge, Ms Sweney believed that a valid personal grievance had been raised in time on her behalf. It is not clear when Ms Sweney first became aware that this was being contested by the respondent, but I infer that it was no later than 7 September 2012, when Ms Derbidge wrote to Ms X's former law firm stating that Ms X's letter was insufficient, although it could have been as early as the first week in April 2012 when Ms Hudson wrote to Ms Derbidge challenging the validity of the grievance.

[42] Although Ms Sweney was not relying on Ms Derbidge to raise her personal grievance for her, as the time to have done so had passed, she was relying on her to seek to rectify the default caused by Ms X. Therefore, a failure by Ms Derbidge to do

so would not fall within s.115(b), but could amount to an exceptional circumstance occasioning the delay in raising the personal grievance.¹

[43] Giving Ms Sweney the benefit of the doubt as to when she discovered that the personal grievance had not, in fact, been correctly raised, and so assuming that this was not until September 2012, it was reasonable for Ms Sweney to have expected Ms Derbidge to have taken urgent steps to rectify the situation. An experienced practitioner would have known that these steps would have required an urgent application to the Authority under s.114(3) of the Act for leave to raise the personal grievance after the expiration of the 90 day period. Indeed, Ms Derbidge referred to taking such an action in her letter to Ms X's former law firm.

[44] However, it appears that no action had been taken by Ms Derbidge between 7 September 2012 and 11 April 2013, when Ms Derbidge contacted Ms Sweney to say that she would be in touch within 48 hours. Ms Sweney contacted Ms Derbidge again on 7 May 2013.

[45] Section 114(4) makes clear that the delay in raising the personal grievance must have been occasioned by exceptional circumstances. The initial delay (between May 2011 and September 2012 at the latest) flowed from Ms X's failure, and Ms X's failure was an exceptional circumstance. The next period of delay (between September 2012 and September 2013) flowed from Ms Derbidge's lack of action (although it is accepted that a point would have been reached when Ms Derbidge was unable to act due to her illness).

[46] Whilst it was reasonable for Ms Sweney to have relied upon Ms Derbidge in September 2012 to have taken steps to rectify the situation created by Ms X's failure to raise the personal grievance, I believe that it ceased to be reasonable for Ms Sweney to have continued to rely on her after May 2013, at the latest. It is not known whether or what Ms Sweney knew about Ms Derbidge's illness, or what the nature of the *intermittent contact* was that was referred to by Mr Usmar, but Ms Sweney had been told by Ms X on 8 March 2011 of the need to raise the personal grievance within 90 days, and she knew by September 2012 at the latest that this had not been done. Once it was clear by May 2013 that Ms Derbidge was also not acting

¹ It is clear from s.114(4)(b) and s.115 of the Act that the list of exceptional circumstances set out in s.115 (a) to (d) is not exhaustive.

to pursue her personal grievance, it would have been reasonable for Ms Sweney to have taken other steps to pursue the grievance.

[47] It is not known when Ms Sweney instructed Mr Usmar, but the statement of problem was not lodged until 18 December 2014. It is not known why a further 19 months went by before this action was taken, and no evidence has been tendered that enables me to infer that other exceptional circumstances are relied upon.

[48] In short, it appears that there were exceptional circumstances that occasioned part of the delay in raising a valid personal grievance, but that the whole delay has not been accounted for. Section 114(4) refers to exceptional circumstances that occasioned *the delay*. The use of the definite article and the word *delay* in the singular signals that the requirement is for the whole delay to have been occasioned by exceptional circumstances, not just a portion of it. In the absence of any evidence to the contrary, I infer that part of the delay (from May 2013 until December 2014) was occasioned by Ms Sweney herself failing to take proactive steps to rectify the failure she had discovered in September 2012 at the latest. Without more, that does not constitute an exceptional circumstance.

Conclusion

[49] As I am not satisfied that the entire delay in raising the personal grievance for unjustified dismissal was occasioned by exceptional circumstances, I decline to grant leave to enable Ms Sweney to raise it outside of the 90 day period required by s.114(4) of the Act. I am not required to examine the other aspect of the test, as to whether it is just to grant that leave, but will say briefly that the delay between the dismissal in February 2011 and the likely date of any investigation meeting (which would not have taken place until the second half of 2015) is likely to have created undue prejudice for the respondent because of the fading of memories by the passage of time.

Costs

[50] The parties should seek to agree how the costs of the proceedings are dealt with between them. However, in the absence of any agreement within 28 days of the

date of this determination, the respondent may serve and lodge a memorandum of costs within a further 14 days, and the applicant shall have a further 14 days within which to serve and lodge any response.

David Appleton
Member of the Employment Relations Authority