

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 25
5623492

BETWEEN

MARIA SPILLMAN
Applicant

A N D

TANDEM SKYDIVING 2002
LIMITED t/a TAUPO
TANDEM SKYDIVING
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
Don MacKinnon, Counsel for Respondent

Investigation Meeting: 26 January 2017 at Taupo

Date of Oral
Determination: 26 January 2017

Date of Written
Determination: 31 January 2017

ORAL DETERMINATION OF THE AUTHORITY

A. Leave is declined. The applications for the grievance of unjustified disadvantage are dismissed. Costs are reserved.

Employment relationship problem

[1] Maria Spillman has filed an application for determination of personal grievances of unjustified disadvantage and unjustified dismissal.

[2] A preliminary issue has arisen about whether I may hear part of that application. The law requires an employee to raise their personal grievances within 90 days.

[3] The personal grievance of unjustified dismissal was raised within time and that will progress to hearing. However, at the beginning of the investigation meeting

yesterday, Ms Spillman accepted her personal grievances of unjustified disadvantage by bullying and a warning in January 2015 were not raised within 90 days with her employer, Taupo Tandem Skydiving (TTS). This personal grievance cannot progress to hearing unless she is granted leave by the Authority to do so. Ms Spillman seeks leave and this oral determination is to resolve that application only.

[4] To be granted leave requires Ms Spillman to satisfy me that the delay in raising the personal grievance was occasioned by exceptional circumstances and that it is just for me to grant leave.

Relevant Facts

[5] TTS is a tourism operation focused on tandem skydiving based at Taupo Airport. Ms Spillman was employed in December 2010 initially as a video editor and more latterly as a parachute packer.

[6] Mr Funnell issued Ms Spillman with a verbal warning on 22 January 2015. This arose from complaints by her co-workers

[7] On 29 October 2015 Mr Funnell sought a meeting on 4 November concerning complaints from her co-workers. Despite efforts to arrange a meeting, none could occur in a timely fashion.

[8] Instead on 4 November 2015, Ms Spillman emailed Mr Funnell stating:

I am wanting to notify you that I will be raising a personal grievance for unjustified actions, harassment and disadvantages in the workplace.

[9] On 9 November 2015, Mr Funnell sought details of that personal grievance. He raised some concerns about Ms Spillman's safety in returning to the workplace. Ms Spillman replied that she was safe to do her job but was uncomfortable with meeting with Mr Funnell and another employee without a support person.

[10] On 10 November 2015, Mr Funnell replied after reflecting overnight about Ms Spillman's 9 November emails. He noted TTS still had no detail about her allegations and therefore did not accept her assurances she was safe to return to work. As a casual worker and due to issues of safety, TTS declined to offer her any further work until they had an opportunity to meet and resolve her concerns.

[11] Ms Spillman replied that she wished to meet on the following Thursday which TTS was happy to do. Unfortunately that meeting did not occur. Instead, Ms Spillman's lawyer sent an email attempting to raise a personal grievance of unjustified dismissal and unjustified disadvantages of bullying and harassment and migrant worker exploitation. However, no detail was given again of who was the perpetrator, what they were alleged to have done and when this bullying, harassment and worker exploitation had in fact occurred and what she wanted to remedy it. Instead she sought agreement for both parties to attend mediation.

[12] TTS replied seeking a meeting as had previously been arranged. Ms Spillman's lawyer replied that it was inappropriate to meet and again sought mediation.

[13] TTS replied again noting it did not have sufficient information about the personal grievance and could not respond to it or resolve it without that. It did reply to the alleged unjustified dismissal noting Ms Spillman was a casual employee but it also believed mediation was premature. No mediation in fact occurred until after Ms Spillman had filed her statement of problem in the Authority on 27 April 2016.

Law

[14] A grievance is raised with an employer as soon as the employee has made or taken reasonable steps to make the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹

[15] What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.² No formality is required to raise a personal grievance.³

[16] I may grant leave, first, if satisfied that the delay in raising a personal grievance was occasioned by exceptional circumstances and secondly, whether I consider it just to do so.⁴

¹ s114(2) of the Employment Relations Act 2000 (Act).

² *Creedy v. Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]

³ *Twentyman v The Warehouse Limited* [2016] NZEmpC 172 at [42].

⁴ s114(4) of the Act.

⁴ *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] 3 NZLR 7, [2008] ERNZ 109 at [31] to [32] Supreme Court applied the definition of "exceptional circumstances" per Lord Bingham of Cornhill in *R v Kelly* [2000] QB 198; [1999] 2 All ER 13.

[17] Exceptional circumstances are “unusual”⁵:

It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

[18] The 90 day limit is to ensure that employers are promptly notified of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking into account the position of an employer facing a late claim) so requires.⁶

Was there exceptional circumstances?

[19] Ms Spillman submits she has an exceptional circumstance under s.115(1)(a) of the Employment Relations Act 2000 (the Act). She submits she suffered severe depression from July 2014 as a result of the alleged bullying. She was therefore incapable or unable to raise her personal grievance about the bullying and the warning within the 90 day time limitation.

[20] Ms Spillman does not deny she could have done things, however, she could not deal with TTS. She did not have another job and could not go on sick leave or lose this job. She made submissions about feeling embarrassed and ashamed of what had occurred. She believed there was no point in going to Mr Funnell because she felt he had breached any good faith with her and would not take what she had to say seriously. She thought her migrant status was being exploited by TTS’s actions. In particular she points to the verbal warning which referred to her going to the Department of Labour for advice about these matters. She felt that if her employer was going to restrict her from obtaining advice from the Department of Labour, there was no point in raising any issues with Mr Funnell. Ms Spillman accepts she has nothing on paper to show the extent of her trauma. Her only evidence is her word.

Unfortunately, the law requires more. An applicant may be so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider

⁶ *Silver Fern Farms Ltd v. North* [2010] NZEmpC 79; [2010] ERNZ 172 at [33]

raising the grievance within the period.⁷ However, Parliament has made the “exceptional circumstances” test more difficult to meet. This requires a high standard of proof. To be so “effected or traumatised” in s.115(1)(a) connotes substantial injury. Furthermore, an inability to “properly consider” raising the grievance means the employee must suffer the inability for the entire 90 day period. The fact that an employee is able to properly consider raising the grievance at some point during the 90 day period means the test will not be satisfied.⁸

[21] Ms Spillman accepts there is no medical evidence about the trauma including in particular the depression she was suffering. In my experience, applicants come before me on a regular basis suffering from some form of depression. They do and have raised personal grievances within time despite their personal trauma. I also take note of the fact that during the 90 day period Ms Spillman was able to undertake work. She was also able to apply for New Zealand residency status. She was consulting lawyers.

[22] Ms Spillman was also consulting the Ministry of Business Innovation and Employment about her grievances during the 90 day period. She attempted to raise a personal grievance of bullying on 4 November 2015 albeit without the necessary details for an employer to respond.

[23] The earliest event occurred in July 2014 and the latest 10 November 2015. She raises the personal grievances of unjustified disadvantage by bullying with any specificity and about the January warning for the first time on 27 April 2016. Given the above evidence, she was capable of considering raising a personal grievance during the 90 day time limitation period.

[24] For those reasons it is my determination that there is insufficient evidence to warrant there being an exceptional circumstance under s.115(1)(a) of the Act.

Is it just to grant leave?

[25] Even if there was an exceptional circumstance, I would not be minded to grant leave for the disadvantage by bullying to proceed to hearing. One of the alleged bullies has left the company. The events are largely un-documented. Significant time

⁷ Section 115(1)(a) of the Employment Relations Act 2000

⁸ *Telecom New Zealand Ltd v. Morgan* [2004] 2 ERNZ 9 (NZEmpC) at [23]-[24].

has elapsed since the events Ms Spillman complained of. The earliest event occurred in July 2014. Even at this stage I am uncertain about when the last event occurred. There was an allegation that the last event may have occurred up to and until 10 November 2015 when Ms Spillman was allegedly dismissed. Given the events in October and November 2015 primarily involved the disciplinary hearing, I do not necessarily accept that that could be part of any bullying. The ability for this employer to respond would be impossible given the time elapsed, uncertainty of events, lack of records and the unavailability of at least one protagonist.

[26] However, I may have been inclined to grant leave in respect of the disadvantage about the warning. There is certainty about the event and some merit in Ms Spillman's complaint about that warning. Despite the effluxion of time, that was a documented event. There are letters and correspondence including the warning available to the Authority from that period of time. The decision-maker, Mr Funnell is also available to give evidence about his process.

[27] However, given my above determination about the exceptional circumstance, leave is declined. The applications for the grievance of unjustified disadvantage are dismissed. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority