

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 166  
3009853

BETWEEN                      BARRY HANLEY  
   Applicant  
  
A N D                              JOHNNY FISHER & PETER  
   SUCKLING t/a FISHER PAINTERS  
   Respondent

Member of Authority:        David Appleton  
  
Representatives:              Peter Cahill, Advocate for Applicant  
   Robert Thompson, Advocate for Respondent  
  
Investigation Meeting:        26 September 2017 at Christchurch, with the applicant giving  
   evidence remotely  
  
Submissions Received:        26 September 2017 from both parties  
  
Date of Determination:        28 September 2017

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A.        For the reasons set out in this determination, I decline to grant leave to Mr Hanley to raise his personal grievances after the expiration of the statutory 90-day period.**
- B.        Costs are reserved.**

**Employment relationship problem**

[1]        Mr Hanley has raised personal grievances for unjustified disadvantage, unjustified dismissal, discrimination and retaliatory action for having made a protected disclosure outside of the 90 day time limit prescribed by s 114 of the Employment Relations Act 2000 (the Act). He seeks leave from the Authority to raise the grievances outside of this timeframe, relying on exceptional circumstances.

[2] The respondent declines to consent to the personal grievances being raised outside of the 90 day statutory timeframe, and argues that the statutory test set down in sections 114 and 115 of the Act has not been satisfied.

### **Background**

[3] Mr Hanley was a painter working for the respondent, which operated as a partnership at the material time. Mr Hanley was injured at work on 15 October 2015. He went off sick, and was in receipt of ACC compensation. He says that, in the middle of February 2016, while he was still off work, he saw emails for the first time referring to a restructure of the partnership. One included a letter dated 10 February 2016, which stated that his position had been made redundant and that he was being given one week's notice.

[4] Mr Hanley believed that the dismissal was unfair, as he had been informed by his ACC case manager that there was plenty of work at the respondent business for when he was fit to return.

[5] At some point in March 2016, Mr Hanley consulted Community Law. Mr Hanley says he explained his situation to someone he believed was a law student, including about his dismissal for redundancy and his injury. He says that the law student went away and spoke with a solicitor, and returned about 10 minutes later, to tell him that he had no case.

[6] Mr Hanley says he was given the details of two law firms to call if he wanted further advice. Mr Hanley says he called these firms, but was told that he would be charged \$320 an hour. He could not afford to pay that, as he was on ACC, and his wife had just had a baby. Sometime later, in June 2016, he saw an advertisement on TV for a 'no win no fee' service, and called them the same day. This was the business that Mr Cahill worked for at that time. He saw Mr Cahill a couple of days later, and Mr Cahill wrote a personal grievance letter dated 27 June 2016.

[7] This personal grievance letter concentrated on the injury sustained by Mr Hanley, which was alleged to have been caused by a breach of his employment agreement in relation to health and safety and a breach of good faith. In other words, the letter raised a personal grievance on behalf of Mr Hanley for unjustified disadvantage. During the Authority's investigation meeting Mr Cahill conceded that the letter did not raise a personal grievance for unjustified dismissal.

[8] Mr Thompson replied on behalf of the respondent on 11 August 2016 denying the claims and pointing out that the personal grievance had been raised outside of the 90 days period. It appears that there was no further communication about Mr Hanley's personal grievance until he lodged a statement of problem with the Authority on 9 May 2017. This document raised personal grievances for unjustified dismissal and unjustified disadvantage, as well as in relation to having suffered retaliatory action for having made a protected disclosure (which is referred to as whistleblowing in the statement of problem) and for discrimination (apparently by reason of disability). All the personal grievances save for the one for unjustified disadvantage had been raised for the first time in the statement of problem.

[9] Mr Hanley is relying on two exceptional circumstances to argue that leave should be given to allow him to raise his personal grievances out of time. The first is that the individual employment agreement given to him when he commenced work did not contain the explanation concerning the resolution of employment relationship problems that is required by section 65 of the Act (the resolution explanation). The second was that he was told by Community Law that he had no case.

## **The law**

[10] Section 114 of the Act provides as follows;

### **114 Raising 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 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.

(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 1 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 3 years after the date on which the personal grievance was raised in accordance with this section.

[11] Section 115 of the Act provides:

**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

(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.

**Discussion**

*Were the personal grievances raised out of time?*

[12] First, it is necessary to address a point made by Mr Cahill in submissions that Mr Hanley did not raise his grievances out of time because he did so within 90 days of being advised by Mr Cahill that he had claims. I cannot accept that. It is not knowledge of the legal right to bring a claim that is the triggering event, but knowledge of the actions alleged to amount to a personal grievance. The actions in question were:

- a. the accident caused allegedly by breaches of the employment agreement; and
- b. the dismissal allegedly by reason of redundancy.

[13] Mr Hanley knew about the accident, and the circumstances of it how it occurred, on the day it happened. Mr Hanley knew about the dismissal when he saw the emailed letter dated 10 February 2015, which was around the middle of February 2015. At that time he also knew he had an injury (so could have inferred immediately that the dismissal could have been

by reason of that injury) and he knew that he had complained about health and safety matters (and so could have inferred immediately that the dismissal could have been by reason of whistleblowing).

[14] Therefore, the 90 days' time period for raising the personal grievance for unjustified disadvantage arising from the accident started to run from 15 October 2015, the day of the accident, and the 90 days' time period for raising the personal grievance for unjustified dismissal, discrimination and retaliatory action started to run from mid-February 2016, when he saw the letter of dismissal.

[15] Therefore, it is necessary to consider whether exceptional circumstances exist for allowing the Authority to grant Mr Hanley leave to raise the personal grievances out of time.

*Resolution explanation*

[16] The individual employment agreement given to Mr Hanley referred to the resolution explanation as being set out in Schedule 1 of the agreement. Mr Hanley says that he was not given a copy of Schedule 1. This document was produced by the respondent as part of the Authority's proceedings. Mr Fisher said in evidence that every employee would get a copy of the schedule with the employment agreement, and that there was no reason why Mr Hanley would not have received one.

[17] However, the schedule produced by the respondent was not signed by Mr Hanley, even though it had a space at the bottom for a signature. Mr Fisher could not testify that Mr Hanley was given a copy; only that he "would have been." On balance, I accept Mr Hanley's evidence that he was not given a copy of the schedule with the resolution explanation.

[18] Having made this finding, I must go on to consider whether that failing to provide the resolution explanation occasioned the delay in raising the grievances. I am not satisfied, on balance, that it did. According to the evidence of Mr Hanley, the delay was caused by a combination of the following:

- a. being told by Community Law that he had no case;
- b. not being able to afford to pay for advice from professional advisers,

- c. Mr Cahill not turning his mind to the dismissal, discrimination and retaliatory action issues until May 2017.

[19] Therefore, I cannot say that the failure to give Mr Hanley the resolution explanation was what occasioned the delay. Furthermore, the notes seen by the Authority of the Community Law caseworker<sup>1</sup> suggest that he was advised about the 90 day period within which to raise a grievance. Under the heading ‘Advice given:’ there is a hand written note that stated as follows:

If he finds employer is advertising for staff →redundancy is unjustified  
dismissal→ [illegible] 90,

[20] Unfortunately the notes have been cut off at the edge, and the Authority did not have access to the original notes. However, the reference to 90 is either a reference to a 90 day trial period or the 90 day time limit for raising a personal grievance. On balance, I believe it is the latter, as there was no 90 day trial period in the employment agreement (although there was a 90 day probationary period) and Mr Hanley had been employed for more than 90 days in any event.

[21] Therefore, I find that Mr Hanley had been advised about the 90 days’ time limit for raising a personal grievance for unjustified dismissal, and the failure to provide the resolution explanation could not have been the reason he did not raise the grievances in time.

*Being told he had no case*

[22] Although this is not a reason set out in s.115 of the Act, the list contained there is non-exhaustive. Therefore, this reason is potentially an exceptional circumstance. On the face of it, such a reason could amount to an exceptional circumstance given that s.115(b) treats as exceptional the circumstance where an employee makes reasonable arrangements to have the grievance raised by an agent, and the agent unreasonably fails to ensure that the grievance was raised in time. In other words, there is reliance on an agent (or adviser) and he or she lets the employee down (in this case, allegedly by giving bad advice).

[23] However, I do not accept that Mr Hanley was simply told he had no case. The notes of the case worker clearly state that Mr Hanley was advised to find out who had stayed at

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<sup>1</sup> Mr Hanley waived the legal professional privilege to which the notes were subject.

work and to ask the respondent why he was not chosen to stay on. Mr Hanley says that he decided not to contact the respondent despite this advice, because he regarded his employers as liars.

[24] Therefore, Community Law was not baldly stating that Mr Hanley had no case. It was asking him to find out more information. I infer that he told Community Law that he would not do that, at which point they said that they could do no more for him. This is supported by the handwritten note on the case notes which state: “unfavourable advice, felt uncomfortable to ask”.

[25] It is possible that Community Law told Mr Hanley that he had no case in respect of unjustified disadvantage, as the notes state that Mr Hanley needed to complain to WorkSafe, which may investigate the matter. That implies that it was saying there was no employment law avenue to explore in respect of the injury. However, by the time Mr Hanley consulted with Community Law, he had known about the circumstances of the injury since 15 October 2015, at least 138 days (assuming for argument that he consulted with Community law on 1 March 2016). Therefore, there had already been a delay in raising a personal grievance which cannot be attributed to Community Law.

[26] This conclusion means that Mr Hanley cannot rely on that reason as an exceptional circumstance which occasioned the delay.

*Having no funds to seek alternative advice*

[27] I do not accept that this can be an exceptional circumstance. It is unfortunately by no means unusual to be low on funds after having been dismissed. Indeed, many working people could not afford to spend \$320 an hour for legal advice. This cannot, therefore, count as an exceptional circumstance.

*Mr Cahill not turning his mind to the dismissal*

[28] Mr Cahill was candid and stated during the Authority’s investigation meeting that he did not address unjustified dismissal when he was consulted by Mr Hanley as he was concentrating on Mr Hanley’s injury. It was only after he had spoken to someone else much later that he realised that Mr Hanley may have claims in relation to the redundancy. This was when the statement of problem was lodged.

[29] I believe that this situation does amount to an exceptional circumstance. I believe that Mr Hanley was of the view that he had a claim for unjustified dismissal when he first met with Mr Cahill (or at least he believed that he had not been treated fairly, including by having been dismissed) and that he expected Mr Cahill to do whatever he had to do to pursue that claim on his behalf. The Authority saw a copy of a note made by the telephonist who first spoke to Mr Hanley when he called Mr Cahill's firm, and he or she had noted that it was possibly "too late for a dismissal pg". This suggests that unjustified dismissal was contemplated, but that there was a failure to pursue it.

[30] Was the delay in raising the personal grievance occasioned by this exceptional circumstance? Not entirely. A delay had already occurred. Assuming that Mr Hanley had first learned of his dismissal on 24 February 2016<sup>2</sup>, he first consulted Mr Cahill on 24 June 2016, 121 days later. Therefore, 31 days of delay beyond the expiry of the 90 days had already elapsed, and Mr Hanley's failure to raise a personal grievance in respect of the unjustified dismissal, discrimination and retaliatory action was not wholly due to Mr Cahill. Furthermore, the failure to raise a grievance for unjustified disadvantage was not at all due to any fault by Mr Cahill, as Mr Hanley had known of the action giving rise to that complaint since 15 October 2015.

[31] Section 114(4) makes clear that "the delay" has to have been occasioned by exceptional circumstances. That wording, in my view, connotes the entire delay, not part of the delay. Otherwise, an unexceptional reason for a delay could be ignored because an exceptional one arises later.

[32] In conclusion, I do not accept that this exceptional circumstance occasioned the delay as required under s 114(4) of the Act.

### **Conclusion**

[33] The personal grievance for unjustified disadvantage relating to the accident was raised 257 days after the action first arose. That is, the grievance was raised by Mr Cahill on 27 June 2016, when the accident causing injury had occurred on 15 October 2015. There appears to have been nothing done by Mr Hanley about that until he consulted Community Law around 139 days after the accident. No evidence was given for why it took him so long to seek

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<sup>2</sup> This is necessarily a guess as Mr Hanley did not remember the exact date he found out.

advice about that. I cannot, therefore, find that there were any exceptional circumstances occasioning the delay in respect of the unjustified disadvantage.

[34] The personal grievances for unjustified dismissal, discrimination and retaliatory action were raised around 441 days after Mr Hanley became aware of the dismissal. Only one reason (Mr Cahill failing to raise the grievance) could potentially amount to exceptional circumstances but when Mr Hanley had consulted Mr Cahill, a delay of 121 days had already occurred. Therefore, the exceptional circumstance did not occasion the delay, but only part of it.

[35] Therefore, I must decline to grant Mr Hanley leave to raise his personal grievances outside of the 90 day statutory time limit.

### **Costs**

[36] Costs are reserved. If the respondent wishes to seek a contribution from Mr Hanley, then it is to serve and lodge a memorandum of costs within 14 days of the date of this determination setting out the contribution sought and the basis for it. Mr Hanley will then have a further 14 days within which to respond.

David Appleton  
Member, Employment Relations Authority