

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 325
3042095

BETWEEN MARION SAUNDERS
 Applicant

AND THE CHIEF EXECUTIVE OF
 THE INLAND REVENUE
 DEPARTMENT
 Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person
 Paul Gillespie, Counsel for Respondent

Investigation Meeting: On the papers with input up to 20 December 2018

Determination: 31 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Marion Saunders, claims she was unjustifiably dismissed though her application also suggests that while not pleaded she believes she was unjustifiably disadvantaged in her employment.

[2] Key to this determination though is the fact Ms Saunders accepts she did not raise her grievances in 90 days as required by the Act and now seeks leave to do so out of time.¹

¹ Section 114 of the Employment Relations Act 2000

[3] The respondent objects and the parties agreed the issue of whether or not the grievance(s) proceed be considered as a preliminary issue determined on the papers.

[4] The determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

Discussion

[5] Ms Saunders left her employment on 9 October 2015 having been advised of her cessation the previous day. The first document which can be considered the formal lodging of a grievance is the application to the Authority which also contains the s 114 application. It was filed on 8 October 2018.

[6] There is then the fact a number of the issues about which Ms Saunders complains were events which Ms Saunders either witnessed or which occurred some-time prior to her dismissal. In some cases they were years earlier. That raises the issue of s 114(6) of the Act. It reads:

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.

[7] A full bench of the Employment Court recently considered this section and its impact.² The Court concluded the limitation in s 114(6) was absolute and applying that I have to conclude that while not expressly pleaded as grievances a number of the issue raised by Ms Saunders cannot now be considered.

[8] That leaves one potential grievance which is the termination. Albeit by a very narrow margin s 114(6) does not preclude consideration of that but the fact remains the lodging was first formal notification of the grievance and it occurred well beyond the 90 days specified in s 114(1).

[9] Leave to proceed can be granted provided the Authority is satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances such as, but not limited to, those specified in s 115. Section 115 provides:

² *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128

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.

[10] It is here Ms Saunders second problem arises. None of the above apply.

[11] While there is a suggestion Ms Saunders was traumatised to such an extent she could not immediately progress her claim that is not expressly said and there is no supporting evidence. Furthermore she suggests this period of incapacity, if indeed it was, only lasted till June 2016.

[12] There is then evidence she sought legal advice about her circumstances at least four times yet no suggestion Ms Saunders expressly instructed anyone to advance her case and who failed to do so.

[13] The employment agreement fulfils its obligations in respect to an explanation about the resolution of employment relationship problems and finally there is no evidence a s 120(1) request was made. Indeed the papers strongly indicate Ms Saunders was well aware of what had occurred and why.

[14] Ms Saunders accepts she did not raise a grievance and the papers confirm she sought advice on her situation and was appraised of the requirements. Notwithstanding the accrual of that knowledge there is no explanation as to why she did not act earlier and nothing that comes remotely close to providing an explanation of an exceptional circumstance that might allow the granting of an application pursuant to s 114(4) especially when notification of the grievance was left to the eve of the date upon which her application would have been totally precluded.

Conclusion

[15] For the above reasons the application Ms Saunders be allowed to pursue a grievance lodged out of time is refused.

[16] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority