IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 100
3068932

	BETWEEN	WILLIAM TELFORD Applicant
	AND	SGS NEW ZEALAND LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Shona-Ranai Fraser, counsel for the applicant Claire Mansell, counsel for the respondent
Investigation Meeting:	12 November 2019 in Hamilton
Submissions received:	19 November and 3 December 2019 from the applicant 26 November 2019 from the respondent
Date of determination:	2 March 2020

DETERMINATION OF THE AUTHORITY

A. The Authority declines to grant leave to William Telford to raise his dismissal grievance with SGS New Zealand Limited out of time.

Employment Relationship Problem

[1] William Telford worked for Industrial Valve Engineering Limited. That company later amalgamated and became known as SGS New Zealand Limited (SGS or the company).[1]

[1] I refer to SGS as Mr Telford's employer, even though the company had a different name during his employment.

[2] In June 2014 Mr Telford was dismissed by SGS on the basis that he was medically unfit to undertake his position. He had involvement with several representatives but his statement of problem, including an application to raise his dismissal grievance out of time, was not filed until 30 July 2019.

[3] With the parties' agreement, I decided to determine on a preliminary basis the questions regarding raising of the grievance and leave.

[4] An investigation meeting was held in Hamilton on 12 November 2019. I heard evidence from Mr Telford, lawyer Alex Hope, SGS's former human resources manager Robyn Deacon and former business manager Mandy Hudson. Mr Hope filed this claim on Mr Telford's behalf but stepped away from representation when it became apparent that he would have to give evidence.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.

What are the issues?

[6] At the case management conference it appeared there were issues about when the 90-day period ran from and whether Mr Telford raised his grievance verbally. However, by the time submissions were received the parties agreed that a grievance was not raised within 90 days. On the basis of the evidence before me I agree that no grievance was raised by 24 September 2014 when the 90-day period finished.

[7] The remaining issue for determination is therefore whether Mr Telford should be granted leave to raise his grievance out of time. Mr Telford relies on the failure of his agents to raise his grievance. There was also mention of his short term memory problems but this argument was not seriously pursued at the investigation meeting or in submissions.

What happened with Mr Telford's employment?

[8] Mr Telford worked for SGS from 2009 as a specialist trades assistant. On 18 February 2010 he suffered a workplace injury, falling about three metres onto a concrete floor. He received a head injury and injured his hand. He says that Ms

Hudson visited him in hospital and told him that if he could not continue in his current job the company would keep him on as a driver.

[9] In 2013 Mr Telford began having back pain which he attributed to another work incident. In 2014 SGS expressed concern about Mr Telford's health, wellbeing and fitness to work and sought a medical clearance. He received a clearance but Ms Hudson was concerned about the amount of medication Mr Telford was prescribed and asked for a report on that.

[10] The report said that given the medication Mr Telford was taking for back pain, he should not drive commercial equipment or operate heavy machinery as the medication will impair his thinking.

[11] There is dispute about whether a meeting was then held, but in any event by letter of 13 June 2014 Mr Telford was informed that he was dismissed for medical unfitness. The letter also mentioned concern about his communication with SGS on his health and ability to do the job. Mr Telford's last day of employment was 26 June 2014.

What happened with Mr Telford's first representative?

[12] In late June or early July 2014 Mr Telford contacted an employment advocate who advertised in the community paper. The advocate (Advocate A) had been a lawyer but it is not clear whether she had a practising certificate at this point. She was working in association with an advocacy company.

[13] On 2 July 2014 Advocate A came for a meeting at Mr Telford's house. Mr Telford asked the advocate if he could take SGS to court after losing his job. She said he could take an unfair dismissal case. Mr Telford indicated that he wanted to take his dismissal to court. The advocate said she would get the ball rolling right away. Mr Telford cannot recall mention of the 90-day period at that meeting.

[14] Mr Telford signed an authorisation form and agreement with the advocacy company to represent him regarding his employment and claim, as well as referring his claim to mediation and the Authority. The agreement included a no win-no fee arrangement. There is no specific reference in those documents to raising a grievance. Mr Telford gave documents which he held to the advocate.

[15] Mr Telford needed the dismissal letter to obtain a benefit and on 9 July 2014 his daughter emailed Advocate A asking for a copy. The advocate emailed back on 17 July enclosing the letter and apologising for the delay as she had "health issues". Mr Telford's daughter replied the same day that she was sorry to hear that and thanking her for the letter.

[16] On 28 August 2014, having heard nothing further, Mr Telford's daughter emailed the advocate:

> Hi I am just wondering if u got my email in regards to William (Billy) Telford and if u have any news for him.

[17] It is not clear which email Mr Telford's daughter is referring too. Her 17 July "thanks" email does not seek or need a response but there was no other email filed. Mr Telford was unable to assist on this question.

[18] Mr Telford thought that he rang Advocate A every few days or once a week, possibly including before the 28 August email. I cannot be confident about the number of calls but am satisfied that there was at least one call before Mr Telford moved on to his next step.

[19] The name and number of the man Mr Telford refers to as the advocate's boss is handwritten on Mr Telford's authorisation form to the advocacy company, in what appears to be Mr Telford's handwriting. The boss appears to have been the advocacy company's owner. Mr Telford phoned him. Mr Telford was unable to reliably recall when that was but from the sequence of events I conclude it was likely during the 90-day period.

[20] The owner said he had not been in contact with Advocate A for two months. Mr Telford asked if the advocacy company would carry on for him. The manager said no but offered the number of a Hamilton law firm.

[21] Mr Hope's later enquiries suggest that Advocate A has not worked as a representative since 2014 because of illness. Attempts to contact her and obtain her file were unsuccessful with the person contacted indicating that Advocate A was still unwell and did not want to be contacted.

What happened with Mr Telford's second representative?

[22] Mr Telford contacted the Hamilton law firm. He met with a lawyer (Lawyer B) on 25 September 2014. This was the first day after the 90 day period. Lawyer B did not do legal aid work and he could not afford her fees. The lawyer therefore referred Mr Telford to Lawyer C. On the limited evidence available it seems that Lawyer B was never instructed by Mr Telford to act for him.

[23] On or before 9 October 2014 Mr Telford went to a meeting with Lawyer C. As well as discussing his grievance he appears to have also discussed his ACC concerns. Lawyer C emailed the owner of the advocacy company asking for Mr Telford's file. The owner replied that all dealings had been with Advocate A, he had been unable to contact Advocate A for some time and her office line was disconnected.

[24] On 9 October Lawyer C emailed the SGS branch manager saying he now had instructions to act for Mr Telford in his "personal grievance". Although that reference to a personal grievance does not specify a type of grievance, the email goes on to request Mr Telford's personnel file including "all paperwork relative to his dismissal" as well as time and wage records.

[25] Ms Deacon from SGS took it that Mr Telford wanted to raise a personal grievance. On 13 October 2014 she replied that it was now more than 90 days ago since Mr Telford's last day of work on 26 June. Further:

> We are confident that we followed a fair and reasonable process and acted in the way that we, as his employer, could do in all the circumstances.

[26] Ms Deacon then records that SGS does not consent to Mr Telford bringing his personal grievance out of time.

[27] Lawyer C replied noting that the 90 day issue "if there was one" was separate to the request. The documents were again requested. SGS sent them on 24 October, with Ms Deacon writing that she looked forward to his confirmation that no further action would be taken on this matter. No confirmation appears to have been sent.

Phone call

[28] Ms Hudson recalls being called by a man she thought was Mr Telford's lawyer. She is unable to recall his name or precisely when the call occured. She assumes it must have been close to the time Mr Telford was dismissed, so 2014. She thinks the call was probably before the above correspondence from Lawyer C otherwise she would presumably have connected the name given on the phone with that in the correspondence. Although Ms Hudson accepted that it was possible that the man was an investigator or lawyer from ACC, it seems more likely that it was Lawyer C.

[29] Ms Hudson recalls the man ringing seeking information about Mr Telford's employment and ACC situation. Ms Hudson described what SGS had done. The lawyer then said he did not understand why Mr Telford insisted on pursuing the personal grievance claim and he (the lawyer) did not believe that Mr Telford had a valid claim against SGS. Ms Hudson found this bizarre.

Mr Telford's meetings with Lawyer C

[30] Mr Telford reports having three or four meetings with Lawyer C about his personal grievance. The first seems likely to have been on or before 9 October. Mr Telford thought the second one could have been one or two months later but was unable to remember when or what happened at any third or fourth meetings.

[31] Mr Telford recalls asking whether the message from Ms Deacon that the grievance was out of time was the end of it. Lawyer C replied no, it was just the start. Mr Telford asked whether they would be able to take her (seemingly Ms Hudson) or SGS to court and Lawyer C said yes. Mr Telford's impression was that Lawyer C was carrying on with the case. Mr Telford does not remember Lawyer C mentioning the need to apply for leave or permission to raise the grievance out of time.

[32] Given the uncertainty of Mr Telford's recollection I cannot be satisfied that he met with Lawyer C more than twice. It seems likely that he met once before the 9 October correspondence was met and once after SGS had responded, possibly when the documents were received. There was no evidence of Lawyer C ever writing to or making calls to Mr Telford or emailing him via his daughter.

[33] However, at some stage Lawyer C told Mr Telford that he had ceased doing legal aid work. Mr Telford's recall was this was possibly a year after he last met with Lawyer C. I was unable to establish whether legal aid was granted during the 2014 to 2016 period, prior to Mr Hope's involvement. Mr Telford assumed it must have been as Lawyer C never billed him. An alternative assumption could be that Lawyer C was not undertaking any work, for whatever reason. Mr Telford says that he thought the case was being progressed. He remembered Lawyer C telling him that the process can sometimes take over a year.

What happened with ACC?

[34] Mr Telford was also pursing an ACC case about his back problem. Mr Telford's evidence about who represented him for this was somewhat inconsistent. He was initially represented for the review by a lay ACC advocate. Lawyer C appears to have had some involvement but ultimately he referred the ACC case to Mr Hope, who took over in March 2015 and completed the appeal of the ACC decision.

What happened with Mr Telford's third representative?

[35] Following a phone call on about 30 June 2016, Lawyer C emailed Mr Hope saying Mr Telford:

> ...wishes to pursue a PG against his former employers. He wishes to do so by way of legal aid but I no longer do legal aid. Would you be willing to have a look at it?

[36] The next day Lawyer C wrote to Mr Hope thanking him for agreeing to look over the file and enclosing Mr Telford's file. At some point Mr Hope gave Mr Telford a legal aid form which he took away to fill out.

[37] On 30 August 2016 Mr Hope sent a letter detailing Mr Telford's dismissal grievance to SGS by fax. SGS's consent to the late raising of the grievance and to attend mediation was sought.

[38] SGS did not reply. Mr Hope says he was not unduly concerned as it is not uncommon for employers to take some time or, alternatively, to simply refuse to respond.

[39] Ms Deacon had some recall of receiving a letter in this period and believes it was the 30 August 2016 one. She asked a colleague to deal with it. Her memory was

that there was a decision not to reply as SGS had previously said it was not consenting to the grievance being raised out of time.

[40] On 19 September 2016 Mr Hope again faxed a letter to SGS, telling the company that Mr Telford had been granted legal aid. The request that SGS consent to mediation was repeated. No reply was received. Mr Hope acknowledged he had not followed up with SGS emphasising that it was important to keep costs down for the employee.

[41] At some point, possibly much later, Mr Hope also had discussion with Mr Telford about working for him on a firearms matter and gave him a legal aid form for that. Mr Telford decided to engage a specialist in that area and told Mr Hope to stop working on his claims. Mr Hope took that to mean the firearms and employment matters. He closed his files. Mr Telford says his intention was that Mr Hope only stop on the firearms matter, although he accepted that was not Mr Hope's impression of his communication.

[42] Mr Hope pointed out to the Authority that he had a legal aid grant for the personal grievance and so was throwing away income by closing that file, thus he would not have done so unless he believed that was Mr Telford's instruction.

[43] Mr Hope's impression was that Mr Telford had had enough of dealing with lawyers and cases at that point.

[44] I prefer Mr Hope's evidence that Mr Telford indicated to him to drop all his work. Mr Hope is an experienced lawyer and had financial motivation to proceed if he thought Mr Telford wanted that.

[45] Neither Mr Telford nor Mr Hope were able to provide much clarity regarding when the instruction to stop work was.

[46] On 1 July 2017 Mr Hope signed a lease for new offices but the move was troublesome with renovations delayed. Mr Hope's closed files were packed up and put in storage out of Hamilton. This included Mr Telford's file. There was a lot of uncertainty about when the move was actually going to happen. It did not occur until late June 2018.

[47] At some point Mr Telford tried to phone Mr Hope. He asked a secretary to get Mr Hope to phone him. He thinks he phoned again in a few months. During one of the calls the secretary said they were moving offices. It appears Mr Telford did not leave a message saying that he wanted to continue his employment case or asking what was happening with it. Rather he left the matter another six months and then phoned and spoke to Mr Hope. Mr Hope reminded Mr Telford that he had said to stop the grievance case. Mr Telford replied that he had meant the firearms case.

[48] Mr Hope says that Mr Telford came back to see him not long before Christmas 2018. Mr Telford was given a new legal aid application. Legal aid was approved. The statement of problem and application for leave were filed.

What evidential problems are there?

[49] As may already be evident, there are a number of evidentiary difficulties in this case.

[50] Advocate A was not available and neither was her file. Lawyer C did not give evidence. There was reference in correspondence to his file being passed on to Mr Hope but documents which one might expect to see, such as notes of a meeting or phone call with Mr Telford, were not included.

[51] Mr Telford's evidence was mostly not very detailed. On occasions he would make general statements, such as about making phone calls, but was unable to be more specific when asked about when that was. He could not even roughly identify whereabouts in a two year period events fell. He could not always provide much or any information about what was discussed, even at face to face meetings. To some extent this is understandable, particularly when events are several years old. However, in a case where there was only modest documentary evidence and Mr Telford's intent on pursuing his grievance is at issue, this was problematic.

When was the grievance raised?

[52] This is perhaps an unusual situation with the employer arguing that a grievance was raised earlier than the employee considers that occurred. SGS maintains that a grievance was raised by Lawyer C's letter of 9 October 2014. Mr Telford considers that the grievance was not raised until Mr Hope's letter of 30 August 2016.

[53] One possible implication of this is that if the grievance was raised in 2014, did the three year limitation period, under s 114(6) of the Act, expire in 2017? These proceedings were filed in 2019.

[54] The 9 October 2014 email is short on detail. It does not specify what type of grievance Mr Telford is claiming. It does not identify what he is unhappy or concerned about. The only reference to dismissal is in relation to some of the documents sought. The seeking of documents is not sufficient of itself to raise a grievance.

[55] The test is objective, so that it does not matter whether the employer recognised the complaint as a grievance or not.[2] The question is "whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer"[3].

[56] Clearly technical words are not required. On the flip side, the mere use of technical words may not be sufficient. In *Idea Services Ltd v Barker* the Employment Court found that the reference in a letter to personal grievances under various sections of the Act, including unjustifiable dismissal, was insufficient to raise a grievance.[4] It was noted that although relevant that the communications had occurred shortly after the dismissal, while the employer would have been aware the employee "took issue with her dismissal, it had no way of knowing (based on the information communicated to it) why that was so, to enable the plaintiff to address the defendant's concerns". [5]

[57] Here the letter does not identify what Mr Telford's concerns about his dismissal were. The nature of the response from SGS supports this. It replies very generically "…we followed a fair and reasonable process and acted in the way that we, as his employer, could do in the situation we found ourselves in".

[58] I have considered whether the letter combined with the phone call to Ms Hudson were sufficient in total to raise the grievance. Aside from the uncertainty about who the call was from, it was focused on gaining information. The caller

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[2] *Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99,483 at [37], *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [37].
[3] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [37].
[4] *Idea Services Ltd (in Stat Man) v Barker* [2012] NZEmpC 112.
[5] Ibid at [47].

expressed a view on the strength of Mr Telford's personal grievance although seemingly without giving any detail about what Mr Telford was concerned or aggrieved about. I conclude that this does not assist to support a grievance being properly raised.

[59] I have also considered whether the fact that SGS responded on the basis that a grievance had been raised with it, means that the grievance must have been raised. There is some sense to that argument.

[60] However, as referred to above, the Employment Court has stated on a number of occasions that the test is not whether the employer recognised that a grievance had been raised with it.

[61] This approach is reinforced by a consideration of a situation where the employee wished to raise one type of grievance (for example, sexual harassment) but the employer took the grievance to be about a recent (but unrelated) event such as a warning and responded on that basis. Surely the employee could not be said to have raised her grievance of sexual harassment in those circumstances.

[62] I conclude that Mr Telford's grievance was not raised by 9 October 2014 letter.

What about the limitation period argument?

[63] Even if I had found that the grievance was raised by the 9 October 2014 email, I am not certain Mr Telford's claim would therefore be barred by s 114(6) of the Act. That subsection provides:

> 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.

[64] The period starts from "the date on which the personal grievance was raised". When a grievance is not raised within 90 days although action, that would earlier have been sufficient to raise the grievance, can be taken, it is not seen as effective because the 90-day requirement. Leave is required under s 114(3).

[65] In *Blue Water Hotel Limited v VBS* a Full Bench of the Employment Court, when considering limitation issues, stated:

> ...if there are exceptional circumstances under s114(4), the start of the three-year period can be delayed.[6]

[66] I take that to mean that where leave is granted the three-year limitation period starts, or at least may start, from the granting of leave. In that case if leave is granted Mr Telford will then be able to pursue his grievance.

What is required for leave to be granted?

[67] Under s 114(4) of the Act the Authority may grant leave to raise the grievance out of time if two requirements are met:

> (i) the delay in raising the grievance was occasioned by exceptional circumstances, which may include one or more of the circumstances set out in s 115; and
>
> (ii) it is just to grant leave.

[68] Section 115 outlines exceptional circumstances as including:

> (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.

[69] "Exceptional" has been defined as "unusual".[7]

[70] In *Davies v Dove Hawkes Bay Inc* Chief Judge Colgan found:

> If a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.[8]

Were reasonable arrangements made by Mr Telford?

[71] I focus in this section on what happened during the 90-day period as the test is whether the agent failed to ensure the grievance was raised within the "required time". Issues after that time will be dealt with under the delay heading below.

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[6] *Blue Water Hotel Limited v VBS* [2018] NZEmpC 128 at [26].
[7] *Creedy v Commissioner of Police* [2008] NZSC 31
[8] *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83 at [29]

[72] Mr Telford acted promptly, meeting with Advocate A a week after his SGS employment finished. The advocacy company specialised in employment disputes. Advocate A had practised as a lawyer and undertook employment work.

[73] Mr Telford agreed with the advocate that she would take his unfair dismissal case to court. She said that she would get the ball rolling. The raising of a grievance may not have been explicitly discussed but I do not consider that to be fatal in these circumstances.

[74] There was an instruction to take the case to court and the advocate said she would get started. Taking into account the *Davies v Dove Hawkes Bay Inc* decision[9], I conclude that this was sufficient for Mr Telford to have a reasonable expectation that he could rely on the advocate's services, which would include the raising of a grievance as this is a required step.

[75] In addition to the discussion, Mr Telford's authorisation to the advocacy company authorised it to refer his claim to the Mediation Service, the Authority or the Court as well as to represent him in any way relating to his employment and claim. The agreement between Mr Telford and that company specifies that the company will keep him informed "at all times" and represent him "in a professional manner". The situation went further than just the seeking of advice.

[76] There was some initial exchanges regarding return of the dismissal letter. Then Mr Telford's daughter emailed on 28 August 2014 asking for news for her father. Mr Telford phoned but was unable to contact the advocate. He then made contact with the owner of the advocacy company and asked about him representing Mr Telford. This was a reasonable request as the written agreement was with the advocacy company rather than the advocate personally.

[77] The owner said they could not assist but gave him the number for a lawyer in Hamilton. He phoned the lawyer and made an appointment but they met a day after the 90 day period had expired.

[78] I conclude that Mr Telford made reasonable arrangements to have Advocate A and the advocacy company to pursue his personal grievance claim.

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[9] Above

Did the agent unreasonably fail?

[79] Raising a grievance is a standard part of representation in employment cases. The advocate was practising in the employment field. However, it was evident that, from at least a little prior to 17 July 2014, she was having health issues.

[80] The evidence suggests that the advocate had some years of serious unwellness and I accept that it may well have been very difficult for her to progress cases. However, on the evidence before me it was unreasonable for the advocate, either personally or through someone else, not to have informed Mr Telford and/or the advocacy company that she was not able to continue the case and had not raised the grievance.

[81] On the evidence available before me I also consider it unreasonable of the advocacy company not to have done more. Mr Telford's agreement was with that company. It appears that its owner was based in Auckland and it may not have had other advocates in Hamilton. That would have made face to face contact challenging. However, a brief letter from the advocacy company raising the grievance with SGS appears a reasonable expectation when its advocate had become unavailable and Mr Telford asked for representation towards the later part of the 90-day period.

[82] I conclude that Mr Telford's agents unreasonably failed to ensure that his grievance was raised within the 90 days.

Was the failure causative of the grievance not being raised?

[83] I am satisfied that on the evidence available the failure of Advocate A and the advocacy company to act was causative of the grievance not being raised. The advocate's unwellness arose from before 17 July 2014 and continued for an extended period after that, seemingly until 2019. The advocacy company then refused to assist.

[84] I conclude that the delay in raising the grievance within 90 days was occasioned exceptional circumstances.

Is it just for leave to be granted?

Delay

[85] There was a lengthy period between when the 90 days expired in September 2014 and when the application for leave and claim was case was filed in the Authority in July 2019. It was around four years and 10 months. Looked at another way, on the basis that the grievance was raised in August 2016, it was a month under three years after that before the claim and application for leave were filed.

[86] Mr Telford's expressed an approach that, as he had instructed lawyers to do things for him, he would largely let them get on with it, rather than hassling them.

[87] I accept Mr Telford has less means of communication than would be available to most people these days. He does not use emails. He does not have a landline nor a cell phone. He relies on family members to contact his lawyer and visa versa. He used his wife's cell phone when he was trying to call Lawyer C and Mr Hope. He says that she does not have an email address. Mr Hope says that in the end he took to posting letters to Mr Telford.

[88] It was suggested some of the delay was caused by Mr Telford being embroiled in the ACC case, although the evidence was that this only required three or four meetings with Mr Hope. It was also over by February 2016.

[89] I am not satisfied that the long period between the expiry of the 90 days and the filing of this case can be adequately explained in a way that is not at least partially Mr Telford's responsibility. I do accept that there were other causes for parts of the period, including the need to apply for legal aid.

[90] However, there were extended periods, sometimes seemingly of more than a year, when Mr Telford made no attempt to contact Lawyer C or Mr Hope. Although Mr Telford's knowledge of legal processes does not appear high, it should have been apparent to him that despite his wish to take SGS to court the case had not reached court despite years having passed.

[91] Mr Telford also told Mr Hope to stop work on his cases.

[92] There were also aspects of the evidence which suggest that Mr Telford had simply decided he had had enough of lawyers or legal processes. I cannot be satisfied that at all material times Mr Telford was intent on pursuing his claim.[10]

Prejudice

[93] SGS submits that it would be significantly prejudiced if leave was granted for the grievance to be raised out of time.

[94] There were a number of examples in the investigation meeting of witnesses having difficulty recalling events. Mr Telford was unable to recall a number of relevant and significant matters. Ms Deacon was struggling to recall any events regarding Mr Telford. Ms Hudson was unable to specifically recall what seems likely to be a critical meeting referred to in the dismissal letter but which she thinks did occur because of that reference. She also could not recall how the termination letter got to Mr Telford given that he was away from work at that time.

[95] Lapses of memory are not unusual with events that occurred over five years ago. If the matter is to proceed to a hearing, witnesses could be giving evidence regarding events which happened well over six years ago. Mr Telford's original accident was ten years ago and he bases part of his grievance claim on comments allegedly made by Ms Hudson shortly afterwards.

[96] Both SGS witnesses no longer work for the company although they did make themselves available for the investigation meeting into the leave application. Ms Hudson referred to her notes about events which would have remained at SGS but these were not produced and may not be available.

[97] There appear to be other documents which are no longer available, such as an email to Advocate A and a letter which Mr Telford recalled Lawyer B showing him from Ms Hudson.

[98] Against this I balance that SGS were aware of Mr Telford having instructed Lawyer C regarding his employment within a short period after the 90-day time expired. The company was also aware in 2016 that Mr Telford wished to pursue a personal grievance.

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[10] *Creedy v Commissioner of Police* (2006) 3 NZELR 66

Conclusion

[99] I make brief reference to the merits of Mr Telford's case. SGS had medical evidence that he should not undertake parts of his job. On the face of it that gave SGS a sound basis to take some action. Whether it was justified in taking the decision to dismiss at that point and whether it went about it in a fair and reasonable way, need to be established. There appears to be significant factual disputes regarding issues such as whether a meeting occurred shortly before the dismissal and whether Mr Telford was sent a copy of the medical report.

[100] In light of the very substantial time which has elapsed and the prejudice to SGS in terms of memory lapse and missing documentary evidence, I conclude that it is not just for Mr Telford to be able to raise his grievance out of time.

Costs

[101] Costs are reserved. The parties are encouraged to resolve the issue themselves. If they are unable to do so SGS shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Telford shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. I note that Mr Telford is on legal aid.

Nicola Craig
Member of the Employment Relations Authority