IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 146
3066737

	BETWEEN	EVAN HARVEY Applicant
	AND	INFRACORE LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Ken Patterson, Counsel for the Applicant Christie Goodspeed & Jeremy Sparrow, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and/or further evidence	28 February 2020 from the Applicant 13 March 2020 from the Respondent
Determination:	9 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Evan Harvey, claims that he was unjustifiably disadvantaged in his employment with the Respondent, InfraCore Limited (InfraCore).

[2] Mr Harvey claims that he was unjustifiably disadvantaged by InfraCore:

(i) Failing to properly pay appropriate hourly rates for work done;

(ii) Making unauthorised and inappropriate pay reduction;

(iii) Making an unauthorised/not agreed change in designation from 5.2 Foreman to "no job description" position;

(iv) Providing a new job description employment arrangement which is defective in that it lacks proper description of the duties, tasks, experience and qualifications required;

(v) Making an unexplained and unauthorised removal of additional allowances;

(vi) Filing to engage and discuss changes to employment conditions and issues to him thereby acting in bad faith towards him;

(vii) Failing to properly deal with the personal grievance he raised, simply advising "the matter is final";

(viii) Holding an improper and intimidating disciplinary meeting and follow–up letter obfuscating the reality of the meeting and its outcome;

(ix) Using a biased "random" drug testing regime; and

(x) Unfairly refusing to pay wet weather allowance for grave digging and in the follow-up enquiry making threats of employment termination vocalised to other workers.

[3] InfraCore denies that Mr Harvey was unjustifiably disadvantaged in relation to any of the claims and that, moreover, Mr Harvey is out of time to raise any of the disadvantage claims.

[4] This determination addresses the preliminary issue as to whether or not Mr Harvey raised the unjustifiable disadvantage personal grievances with InfraCore within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his personal grievances before the Authority.

Note

[5] The parties agreed to the Authority determining this preliminary issue based on the papers currently before the Authority including the Statement of Problem and the Statement in Reply, documents submitted by the parties, and submissions from the parties.

Issues

[6] The preliminary issue to be determined by the Authority is whether or not Mr Harvey raised the unjustifiable disadvantage personal grievances within the statutory limitation period pursuant to s114 (1) of the Employment Relations Act 2000.

Brief Background

[7] Mr Harvey commenced employment with Rotorua Lakes Council in 1995 as a Mower Operator. Mr Harvey was a union delegate following the commencement of his employment. During the period of his employment Mr Harvey's original employer has undergone reorganisations and effectively changed its identity including that of Rotorua Lakes Council, and Rotorua Contracting prior to Mr Harvey's current employer InfraCore. This has not affected Mr Harvey's continuity of employment which has remained unaffected by the changes in the employer identity.

[8] In 2016 Mr Harvey's was employed as a Foreperson- small mowers and walkways and was paid $24.48 per hour.

[9] During the period 1 July 2016 to 30 June 2017 there was a collective agreement in place between Rotorua Contracting Limited (Rotorua Contracting) and AWUNZ (Northern Amalgamated Workers Union New Zealand) and F1RST Union Inc (F1RST Union) (the 2016- 2017 Collective Agreement).

October 2016 Restructure

[10] On or about October 2016 Rotorua Contracting engaged in a consultation process and restructuring as a result of which the Foreperson roles were phased out and a new position of Contract Supervisor was created.

[11] Mr Harvey applied for the Contract Supervisor position, but was not successful.

[12] By letter dated 13 October 2016, Mr Harvey was offered the position of Mower Operator-Mowing Team. The wage rate was $19.60 gross per hour (being grade 3, level 4 in the 2016-2017 Collective Agreement). The letter also stated that Mr Harvey would be paid a wage equalisation allowance, thereby increasing Mr Harvey's wage rate to the hourly rate of $24.48 for a period of two years.

[13] The letter dated 13 October 2016 stated: "If you are satisfied with these terms and conditions, please return the following documentation …. (If not returned by this date the offer shall lapse."

[14] Mr Harvey indicated that he was unhappy with the choices offered to him and as a result in a letter dated 20 October 2016 Rotorua Contracting advised that he could either accept the role of Mower Operator, which was a Grade 3 role with the wage equalisation allowance for a period of two years, or opt for redundancy.

[15] The letter dated 20 October 2016, which was signed by the Chief Executive of Rotorua Contracting Limited, referred to a conversation held with Mr Harvey on 18 October 2018 and set out the terms of the offer contained in the letter dated 13 October 2018 and stated:

> Recognising that you want to seek further advice and/or support in the issue, we can advise we will extend the decision date around accepting the offer we have made, or not, out to Friday 28 October 2018.

[16] Mr Harvey accepted the terms set out in the letter dated 13 October 2016 by signing and returning the letter on 8 November 2016.

February 2017 Restructure

[17] Rotorua Contracting advised Mr Harvey in a letter dated 27 February 2017 that it was considering further restructuring, however advised him that, should the proposal be implemented as proposed, the impact on him would be: "No change".

[18] The restructure proposal was adopted on 3 April 2017 but there were no changes to Mr Harvey's position, his duties, responsibilities or pay-rate, and he continued to receive the wage equalisation allowance.

May 2018 Restructure

[19] In May 2018 InfraCore advised its employees that it was considering a restructure and after a consultation process, the restructure proposal was made effective on 2 July 2018.

[20] The outcome of that process as it affected Mr Harvey was advised in a letter dated 1 June 2018 which stated:

> The outcome of this restructure for your current position is a change in the reporting line and a new job title of Walkway Vegetation Maintainer; please refer to Appendix A which will confirm your reporting line. There are no other changes to your terms and conditions of your employment.

[21] InfraCore, AWUNZ and F1RST Union had negotiated a new collective agreement which involved a new tiered pay model. In accordance with the collective agreement for the term 1 July 2018 to 30 September 2019 (the 2018 – 2019 Collective Agreement) the Walkway Vegetation Maintainer position was a Tier 2 position within the 'Work Area – mowing and Walkway Care'.

[22] Clause 10 of the 2018 – 2019 Collective Agreement described the work to be undertaken by Mr Harvey:

> Mowing and walkway care work – includes hand mowing, ride-on mowing, tractor mowing, side arm mowing operations, verti-draining operations, track and walkway maintenance (weed-eating, hedge trimming, path-edging).

[23] During a meeting by Mr Malcolm Smith, Operations Manager – Parks & Public Spaces, held with Mr Harvey on 26 September 2018 to discuss an offer of: "the continuation of grand-fathering after 13 October when his current grand-fathering clause ceases." Mt Smith stated in a file note that InfraCore had offered to continue with a grand-fathering allowance to his Gr3.4 role to the equivalent pay of Gr4.4. However Mr Harvey had refused to discuss the offer.

[24] On 10 October 2018 Mr Harvey received a letter from InfraCore reminding him that the wage pay equalisation allowance would cease with effect from 8 November 2018 but that: "All other terms and conditions of your employment will remain unchanged."

[25] In a letter dated 25 October 2018 InfraCore advised Mr Harvey of his new pay rate which had increased from $20.02 per hour to $21.50 per hour. The letter note: "this calculation excludes the impact of your previously grandfathered rate which ceases on 08 November 2018."

[26] Mr Harvey raised his dissatisfaction with some employment matters on or about January 2019 in response to which InfraCore responded by letter dated 18 January 2019:

> … below sets out the company's position on two employment matters regarding yourself. …
>
> *Remuneration Change*
> You have expressed dissatisfaction at the level of your post grand-father period pay rate.
>
> Based on the attached information, and in particular the signed letter of 08 November 2016 and that you declined the offer made to you on 26 September 2018, the company does not believe you have been unjustifiably disadvantaged.
>
> *Field information*
>
> You have been asked … to provide information regarding the timing of your work, specifically duration to complete a site and time completed.
>
> You have refused this stating you require this request in writing and the reasons why.
>
> The company believes this is a fair and reasonable requirement of your role …
> Please take this as formal notice to comply with this request. Failure to do so could be considered serious misconduct with regard to the InfraCore Code of Conduct and accordingly may result in disciplinary action, including termination of employment, being taken against you.

[27] A letter from InfraCore to Mr Harvey dated 24 January 2019 stated:

> In terms of your current remuneration I have to advise that this is in accordance with your current role which was agreed upon through the collective bargaining process. InfraCore now considers this matter final.

[28] Mr Harvey raised a personal grievance in a letter to InfraCore dated 1February 2019 which stated:

> I am raising a personal grievance for unjustified disadvantage.
>
> The reason I believe I have a personal grievance is that since the end of the grandfathering agreement I am not getting remunerated properly for the duties that I am expected to perform.
>
> The facts as I see them are
>
> - You are not acknowledging the extra duties that I perform
> - You have not given me a formal job description listing duties; tasks, experience and qualifications required
> - You are not interested in meeting to discuss these issues
> - You communicate to me '*the matter is final'.*

[29] InfraCore responded by letter dated 8 February 2019 setting out its views on his claims and concluding that it did not accept that Mr Harvey had been disadvantaged in his employment and that it had acted in good faith throughout the relationship.

Disciplinary Process

[30] Mr Harvey was invited to attend a disciplinary process on 4 April 2019 in relation to issues: "that potentially amount to serious misconduct." This was in relation to an allegation that Mr Harvey had refused to undertake a reasonable work instruction given on 29 March 2019, and which was repeated on 3 and 4 April 2019.

[31] There was a disciplinary meeting held on 8 April 2019 those present were Mr Harvey, his representative Mr Patterson, his support people and members of the InfraCore management team.

[32] Following the meeting Mr Harvey was advised in a letter dated 9 April 2019:

> We discussed the allegations of serious misconduct and we listened to your explanation that you considered the task was a health and safety risk to continue with alone and given the fact this wasn't followed up adequately we decided further formal action was not warranted.

Random Drug Testing

[33] InfraCore has a random drug testing process for all employees.

[34] Mr Harvey claims in the statement of problem dated 11 July 2019 that since the introduction of the random drug testing process approximately four years ago, he had been selected and targeted for random drug testing.

Refusal to pay wet weather allowance for grave digging and follow-up enquiry

[35] Mr Harvey was requested by his supervisor to assist in the digging of a grave on 14 July 2017. Mr Harvey refused to undertake the work as he was entitled to do under the applicable collective agreement. Subsequently he changed his mind and decided to complete the work in conjunction with two other employees.

[36] In the Statement of Problem dated 11 July 2019 Mr Harvey claims that his employment was threatened to be terminated as a result of this incident.

Raising of a Personal Grievance

[37] Section 114(1) of the Employment Relations Act 2000 the Act) states:

> (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;

[38] In *Wyatt v Simpson Grierson (A Partnership)* the Employment Court stated:

> ... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.[1]

[39] I find that the language of s 114(1) as applied by the Employment Court in *Wyatt v Simpson Grierson (A Partnership)* makes it clear that it is necessary that there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised.

[40] Section 114(2) of the Act states:

> 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

[1] *Wyatt v Simpson Grierson (a Partnership)* [2007] ERNZ 489 at [18]

> representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address."

[41] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.[2] In this case, Chief Judge Colgan stated:

> [36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising 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.

[42] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer[3].

[43] I therefore consider each interaction between the parties in light of these considerations.

Did Mr Harvey raise his unjustifiable personal disadvantage grievances within the statutory limitation period pursuant to s 114(1) of the Act?

(i) Failing to properly pay appropriate hourly rates for work done

(ii) Unauthorised and inappropriate pay reduction;

[44] The letter dated 13 October 2016 offered Mr Harvey the position of Mower-Operator – Mowing Team at an hourly rate of $19.60 gross. It also set out an agreement to pay Mr Harvey a wage equalisation allowance which would have the effect of maintaining his wage at the former level of $24.48 per hour gross. The letter stated clearly that the wage equalisation allowance would cease at the end of two years.

[45] In November 2016 Mr Harvey signed the letter dated 13 October 2016 accepting the terms offered.

[46] I find at the time of signing the letter dated 13 October 2016 Mr Harvey was aware of the circumstances to the extent necessary to form a reasonable belief that in his view

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[2] *Creedy v Commissioner of Police*[2006] ERNZ 517

[3] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

InfraCore's action was unjustified. Namely he was aware that the wage rate was $19.60 gross per hour, and the wage equalisation allowance was for a period of two years and would cease at that time.

[47] Mr Harvey raised no personal grievance in relation to these terms at that time or in the period between 13 October 2016 and 1 February 2019.

[48] On 10 October 2018 Mr Harvey was advised that the wage equalisation allowance would cease. I find that this was in accordance with the terms as outlined in the letter dated 13 October 2016 which Mr Harvey had accepted by signing and returning the copy of the 13 October 20016 letter on 8 November 2016.

[49] I find that on 13 October 2016 the issue giving rise to the personal grievance raised on 1 February 2019 came to the notice of Mr Harvey in that he was aware from the letter dated 13 October 2016 of the amount of his hourly wage rate, the wage equalisation allowance, and the fact that it would cease in two years.

[50] I find that Mr Harvey was therefore aware on 13 October 2016 of the circumstances to the extent necessary to form a reasonable belief that in his view InfraCore's action was unjustified.

[51] Mr Harvey did not raise a personal grievance with Infracore in relation to this issue until 1 February 2019.

[52] I determine that Mr Harvey raised the personal disadvantage grievances that he had not been properly paid the appropriate hourly rates for work done and there had been an unauthorised and inappropriate pay reduction outside of the statutory limitation period pursuant to s 114(1) of the Act.

(iii) Unauthorised/not agreed change in designation from 5.2 Foreman to "no job description" position;

(iv) New job description employment arrangement is defective in that it lacks proper description of the duties, tasks, experience and qualifications required;

[53] In 2016 Mr Harvey's was employed as a Foreperson- small mowers and walkways. During 2016 the foreperson roles were phased out following a consultation process and restructuring.

[54] Mr Harvey subsequently accepted the position offered in the letter dated 13 October 2016 of Mower Operator – Mowing Team which was described as being: "Grade 4, Level 4 of the Rotorua Contracting Limited Collective Employment Agreement."

[55] I find at the time of acceptance of the terms in the letter dated 13 October 2016 Mr Harvey was aware that he had accepted the position of Mower Operator – Mowing Team which was set out in the applicable collective agreement. He was therefore aware of the circumstances to the extent necessary to form a reasonable belief that InfraCore's action was unjustified.

[56] I find that Mr Harvey raised no grievance in relation to the change in his position from 5.2 Foreman to Mower Operator – Mowing Team until 1 February 2019.

[57] I find that Mr Harvey's position of Mower Operator – Mowing Team was covered by the applicable collective agreement reached as a result of collective bargaining between the company and AWUNZ and F1RST Union.

[58] As set out in clause 10 of the 2018 – 2019 Collective Agreement the work to be undertaken by Mr Harvey is described as:

> Mowing and walkway care work – includes hand mowing, ride-on mowing, tractor mowing, side arm mowing operations, verti-draining operations, track and walkway maintenance (weed-eating, hedge trimming, path-edging).

[59] I find that the work to be undertaken by Mr Harvey is described in the collective agreement and this fulfils the requirement for a job description.

[60] I find that in November 2016 when Mr Harvey accepted the change in the job designation and its identification in the applicable collective agreement he was aware of the change in circumstances to the extent necessary to form a reasonable belief that InfraCore's action was unjustified, however he raised no personal grievance until 1 February 2019.

[61] I determine that Mr Harvey raised the personal disadvantage grievance that there had been an unauthorised/not agreed change and new job description employment arrangement outside of the statutory limitation period pursuant to s 114(1) of the Act.

(v) Unexplained and unauthorised removal of additional allowances

[62] As set out in Applicant's submissions, this grievance relates to the removal of the wage equalisation allowance which occurred on 8 November 2018.

[63] I have already found that Mr Harvey was aware from the letter dated 13 October 2016 that the wage equalisation allowance would cease in 2018. He was thus aware from October 2016 of the action alleged to amount to a personal grievance, however he raised no grievance at that time.

[64] At the time of raising this grievance in the statement of problem dated 11 July 2019 I find that Mr Harvey was out of time to raise this issue as a personal grievance.

[65] I determine that Mr Harvey raised the personal disadvantage grievance that there had been an unexplained and unauthorised removal of additional allowances outside of the statutory limitation period pursuant to s 114(1) of the Act.

(vi) ***Failure to engage and discuss changes to employment conditions and issues thereby acting in bad faith towards the employee.***

[66] As set out in Applicant's submissions, this grievance relates to the removal of the wage equalisation allowance which occurred on 8 November 2018.

[67] In the letter raising a personal grievance dated 1 February 2019 Mr Harvey raises a grievance in relation to his claim that InfraCore is: "not interested in meeting to discuss these issues". The issues are set out in the letter as arising since: "the end of the grandfathering agreement".

[68] As I have already found, Mr Harvey was aware in October 2013 that the wage equalisation agreement would come to an end in November 2018.

[69] The letter dated 18 October 2016 refers to a discussion which had been held with Mr Harvey about the offer contained in the letter dated 13 October 2016, that letter also advised Mr Harvey that it would extend the deadline for acceptance of the offer in order to allow him time to seek advice on the terms of the offer if he wished to do so.

[70] I note that the letter dated 20 October 2016 indicates that there had been engagement and discussion with Mr Harvey about changes in the employment conditions and issues, however Mr Harvey did not raise a personal grievance until 1 February 2019.

[71] I find that Mr Harvey was aware from October 2016 of the action alleged to amount to a personal grievance; however he did not raise a personal grievance at that time despite being provided with the opportunity to seek advice and discuss the changes. He accepted the conditions by signing and returning the 13 October 2016 copy letter on 8 November 2016.

[72] I determine that Mr Harvey raised the personal disadvantage grievance that there had been a failure to engage and discuss changes to employment conditions and issues outside of the statutory limitation period pursuant to s 114(1) of the Act.

(vii) Failing to properly deal with the personal grievance raised, simply advising "the matter is final"

[73] The personal grievance raised by Mr Harvey in the letter dated 1 February 2019 referred to a statement by the company that: "the matter is final." This was raised as arising from the: "end of the grandfathering agreement" and was related to Mr Harvey's remuneration.

[74] As set out in the preceding paragraphs, I have found that Mr Harvey was aware from October 2016 of the action alleged to amount to a personal grievance. He did not raise a personal grievance at that time.

[75] InfraCore provided a detailed response to Mr Harvey's 1 February 2019 personal grievance in a letter dated 8 February 2019 which set out a detailed response to each of the issues raised by Mr Harvey.

[76] There is no further correspondence between the parties on this issue.

[77] The statement of problem filed on 11 July 2019 raised a number of disadvantage claims, including the claim that the personal grievance had not been properly dealt with, simply advising that 'the matter was final'.

[78] The disadvantage grievance was not stated as arising from the removal of the wage equalisation allowance and I conclude that it is a new disadvantage grievance arising from the response provided by InfraCore on 8 February 2019 to the personal grievance letter dated 1 February 2019.

[79] I find that the raising of the personal disadvantage claim arising from the InfraCore response dated 8 February 2019 in the statement of problem dated 11 July 2019 is outside of the statutory time frame for raising a personal grievance.

[80] I determine that Mr Harvey raised the personal disadvantage grievance that InfraCore failed to properly deal with the personal grievance was raised outside of the statutory limitation period pursuant to s 114(1) of the Act.

(viii) Improper and intimidating disciplinary meeting and follow–up letter obfuscating the reality of the meeting and its outcome.

[81] Mr Harvey was invited to attend a disciplinary meeting on 8 April 2019 in relation to an allegation of serious misconduct, namely that he had refused to undertake a reasonable work instruction on 29 March 2019, and which was repeated on 3 and 4 April 2019.

[82] Following the meeting InfraCore wrote to Mr Harvey by letter dated 4 April 2019 stating that it had listened to his explanation and concluded that no further action was necessary.

[83] The statement of problem filed on 11 July 2019 raised a personal grievance disadvantage claim stating that Mr Harvey considered the letter dated 9 April 2019 was: "wrong" and: "humiliating" because: "it did not properly describe the situation at all"; and that Mr Harvey wanted the letter removed from his file.

[84] I observe that there was no disciplinary action taken against Mr Harvey by InfraCore and therefore there is no disadvantage affecting his terms and conditions of employment.

[85] The statement of problem filed on 11 July 2019 raised this issue as a personal grievance and I find that it did so outside the statutory limitation period.

Should Mr Harvey be granted leave to raise this personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[86] InfraCore does not consent to Mr Harvey raising his unjustifiable dismissal grievances outside the statutory 90 day timeframe.

[87] Mr Patterson submits that there are exceptional circumstances pursuant to s 115 (b) of the Act which states:

> 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;

[88] Mr Patterson submits that he took additional time to prepare the statement of problem documentation.

[89] In addition Mr Patterson submits that leave should be granted to raise the issue out of time because of the claim was raised only three days outside of the statutory limitation period.

[90] Section 115 (b) of the Act states that exceptional reasons which had occasioned the delay in raising a personal grievance within the statutory time limitation period include the employee having made reasonable arrangements to have the agent raise the grievance on his behalf, and where the agent: "unreasonably failed to ensure the grievance was raised within the required time".

[91] Counsel for the Respondent submits that the reason provided by the Applicant of taking additional time to complete the statement of problem documentation is insufficient for establishing whether or not exceptional grounds apply because there is no evidence that the Applicant made reasonable arrangements to have Mr Patterson raise the personal grievance on his behalf.

[92] Counsel for the Respondent submits that the Applicant would need to provide evidence including his unequivocal instructions to raise this particular grievance prior to the 90 day expiry, evidence that he provided details of the relevant concerns, evidence of seeking regular updates, and further information regarding why his counsel then failed to raise it, however no such evidence has been provided.

[93] There is no evidence of the steps taken by Mr Harvey to ensure Mr Patterson raised the personal grievance on his behalf; however I accept that given the fact that Mr Patterson was aware of the need to prepare the statement of problem, it is reasonable to assume that Mr Harvey had instructed him to raise the personal grievance.

[94] Moreover as counsel familiar with employment law as evidenced by a number of appearances as representation in the Authority in various cases, I find that Mr Patterson would have been aware of the statutory time limitation period.

[95] Whilst I accept that there is no evidence of Mr Harvey making enquiries as to the filing of the statement of problem I find that, having issued the instruction to Mr Patterson in his capacity as a lawyer familiar with employment law to raise the personal grievance on his behalf, it was reasonable of Mr Harvey to consider he could rely on Mr Patterson's competence to ensure the statement of problem was filed within the statutory time limit.

[96] Whilst this lack of competence on Mr Patterson's behalf has resulted in the personal grievance being raised outside of the statutory time limitation period, I find that this default lies with Mr Patterson and it would be unfair for Mr Harvey to suffer in circumstances in

which he had issued the necessary instruction because of the incompetence of his representative in not raising the personal grievance within the statutory time limitation period.

[97] I find that the interest of justice lies in permitting Mr Harvey to raise this personal grievance outside of the statutory time limitation period in the circumstances and given the short period of time it was raised outside of that period.

[98] Mr Harvey is therefore granted leave to raise the personal grievance that InfraCore failed to properly deal with the personal grievance outside of the statutory time limitation period pursuant to s 115 (b) of the Act.

(xi) Biased "random" drug testing regime

[99] Mr Harvey alleges that that since InfraCore introduced random drug testing on or about four years ago he has been: 'singled out and treated without good faith".

[100] The most recent random drug test took place on 25 October 2018. The claim was first raised in the statement of problem dated 11 July 2020. It was therefore raised outside the statutory time limit.

[101] It is submitted for the applicant that the reason for the delay in raising this issue was due to: "the considerable degree of trauma and embarrassment" the testing caused the applicant.

[102] The leading case on the interpretation and effect of section 115 (a) of the Act is *Telecom New Zealand Limited v Morgan*[4]. The Court in addressing the application of s115(a) considered that Parliament had not intended to relax the tests for extending the limitation period when enacting s114 and s115 of the Act, and went on to observe in relation to s115(a) that "Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals or other matters giving rise to grievances"[5]

[103] The Court further commented at paragraphs 23 and 24:

> [23*]* Deconstructing the subsection, the following elements appear necessary to meet the exemplar "exceptional circumstances" test under s115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. This is illustrated by the phrase "… has been so affected or traumatised…" Although being "affected " may encompass a range of

[4] *Telecom v New Zealand Limited v Morgan* [2004] 2 ERNZ 9.
[5] Above n4 at [22]

> effects from relatively minor to very serious, the accompanying use of the derivative of "trauma" connotes very substantial injury…..In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.
>
> [24] Next, s115 (a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to the exceptional circumstances. It is the inability to "properly consider" raising the grievance that is required to be established by an applicant for leave relying on s115 (a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not only a part of it by use of the phrase " … within the period specified …"

[104] It is necessary to consider whether the trauma had been occasioned by the matter giving rise to the grievance and whether that trauma had the effect of rendering the employee unable to properly consider raising the grievance for the whole of the 90 day statutory period.

[105] There is no evidence before the Authority that Mr Harvey was incapable of considering whether or not he wished to raise this matter during the whole of the 90 day period. Indeed it is submitted by the Applicant that Mr Harvey did not wish to raise the issue and did so only at the encouragement of his counsel.

[106] I find that Mr Harvey was able to consider raising the claim within the whole of the 90 day statutory period but decided not to raise it until he was prompted to do so by his counsel.

[107] I determine that the delay in Mr Harvey raising his personal disadvantage grievance within the 90 day statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances lasting at least the whole of the 90 day period.

Is it just to grant Mr Harvey leave pursuant to section 114(4)(b)of the Act?

[108] On the basis that I have not found the delay in Mr Harvey in making an personal grievance application to have been caused by exceptional circumstances pursuant to s 114 (4) and s 115(a) of the Act, I do not find that it would have been just to grant Mr Harvey leave to proceed with his personal grievance in relation to random drug testing

[109] Mr Harvey is therefore not granted leave to raise the personal grievance in relation to random drug testing outside of the statutory time limitation period pursuant to s 115 (b) of the Act.

(xi) Unfair refusal to pay wet weather allowance for grave digging and follow-up enquiry with threats of employment termination vocalised to other workers.

[110] Mr Harvey undertook the digging of a grave on 14 July 2017. He claims that he was subjected to threats of employment termination as a result of this incident.

[111] In the statement of problem dated 11 July 2019 Mr Harvey states that this incident was never mentioned to him at all, but that it is very similar: "to the working alone incident that I was called to the disciplinary hearing about."

[112] It is submitted for the Applicant that the behaviour exhibited by the Respondent during the disciplinary meeting held on 8 April 2019 was: "similar behaviour" to that exhibited in relation to the incident on 14 July 2017, however there is no evidence supporting this claim having been raised at any time prior to 11 July 2019.

[113] I determine that Mr Harvey raised the personal disadvantage grievance that InfraCore threatened him with employment termination in relation to the grave digging incident outside of the statutory limitation period pursuant to s 114(1) of the Act.

Next Steps

[114] I have determined that Mr Harvey has been granted to raise his personal grievance in relation to the disciplinary meeting held on 8 April 2019. The Authority will convene a case management conference to set timetable directions for the investigation of Mr Harvey's substantive claim.

Costs

[115] Costs are reserved.

Eleanor Robinson
Member of the Employment Relations Authority