IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 563
3078354

	BETWEEN	DEAN MILLAR Applicant
	AND	CHIEF EXECUTIVE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Marija Urlich
Representatives:	Ronald Jones, representative for the Applicant Juliet Dobson and Tara Helm, counsel for the Respondent
Investigation Meeting:	12 October 2021 (by audio visual link)
Further information and submissions received:	12 October and 3 November 2021, from the Applicant 12 October and 26 October 2021, from the Respondent
Determination:	15 December 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dean Millar was employed by Corrections as a corrections officer from April 2009 until his employment ended on 7 November 2019. He raised personal grievances for unjustified actions by way of a draft statement of problem dated 29 October 2019 which was hand delivered to a Corrections human resource manager on that date. These personal grievances were raised prior to Mr Millar's dismissal. He seeks leave to raise a personal grievance for unjustified dismissal outside the 90-day statutory timeframe.

[2] Corrections does not consent to the personal grievance for unjustified dismissal being raised out of time and opposes leave to raise the grievance out of time.

[3] This determination deals only with the preliminary jurisdictional issue of whether leave should be granted to Mr Millar to raise a personal grievance for unjustified dismissal out of time.

The Authority's investigation

[4] Mr Millar lodged his statement of problem in the Authority on 2 June 2020 and it was served on Corrections on 30 September 2020.[1] On 15 October 2019 Mr Millar had, through his representative, lodged an application with the Authority but that application could not be accepted for lodgement because it was incomplete.[2] By letter dated 30 October the Authority wrote to Mr Millar confirming the matter was placed on hold at his request of 29 October.[3] The October 2019 application concerned Mr Millar's personal grievances for unjustified action. It could not concern a claim of unjustified dismissal because Mr Millar was not dismissed until after that date, on 7 November 2019. As stated above there is no dispute the unjustified action personal grievances were raised with Corrections.

[5] In Corrections' statement in reply dated 14 October 2020 it raised a challenge to jurisdiction concerning the claim of unjustified dismissal (the preliminary matter). The Authority convened a case management conference with the parties on 3 March 2021 where it was agreed the preliminary matter would be determined on the papers along with a timetable for filing affidavit evidence and submissions. A timetable for an investigation meeting of the substantive matter was also agreed as were dates for an investigation meeting.

[6] Mr Millar did not comply with the filing directions for the preliminary matter as agreed and did not seek a variation to those directions though on 23 March he had filed a response to the statement in reply titled "Revised response to a Statement in Reply dated 14 October 2020 in reply to the Dept of Corrections statement that the issue is outside the statutory 90-day time frame". On 13 May the Authority wrote to the

[1] The service delay was caused by the Covid-19 lockdown.
[2] Refer Authority letter to Mr Jones 16 October 2019.
[3] Refer Authority letter to Mr Jones 30 October 2019.

parties inquiring if Mr Millar intended to file further information or submissions on the 90-day issue. Mr Millar did not respond to this correspondence. Having not heard further from Mr Millar on the preliminary matter, by minute dated 4 June the Authority summarised the process to date and what appeared to be Mr Millar's position in respect of the preliminary matter and made further timetabling directions for him to file affidavit evidence and submissions. The further directions were not complied with. On 15 July a case management conference was convened to progress the preliminary matter. A timetable for filing evidence and submissions was set as was a date for an investigation meeting. The timetable for the substantive investigation meeting was varied to accommodate the changes made for the preliminary matter. These timetabling directions were recorded in a minute dated 16 July. Mr Millar did not fully comply with these timetabling directions. The investigation meeting for the preliminary matter was then shifted to 12 October.

[7] By consent the investigation meeting was held by audio visual link. The Authority has received information from the parties filed in accordance with timetabling directions.[4] The Authority received evidence under affirmation from Mr Millar, Madison Slater, his partner, Ronald Jones, his advocate, Tara Downes, Corrections HR advisor and Angie Christine-Crawford. Mr Jones was granted leave to give evidence.[5] During the investigation meeting an adjournment was taken to provide the parties a further opportunity to produce relevant information including Mr Millar's final pay slip and any file note or other communication record between Mr Jones and Mr Millar relevant to the preliminary issue.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information provided by the parties and their submissions.

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[4] Timetable in minute 2 June 2021 subsequently varied by consent.

[5] *Brown and Ors v The Partners of The Partnership of International Football Academy of New Zealand* [2016] NZERA Christchurch 65.

Issues

[9] The issues requiring investigation and determination are:

(i) Did exceptional circumstances occasion Mr Millar's failure to raise a personal grievance within the statutory 90 days?

(ii) If so, is it just to do so?

Relevant law

[10] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins 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 outside the statutory timeframe.

[11] The grievance is raised with the 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 the employee wants the employer to address.[6]

[12] Under s 114(4) of the Act the Authority has discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[13] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

> (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

[6] Section 114(2) of the Act.

> (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.

[14] Mr Millar seeks to rely on s 115(a) as the exceptional circumstance which occasioned the delay in raising his personal grievance for unjustified dismissal. To do so he must establish that the trauma had the effect that he was "unable" to raise the grievance, and second, the trauma must have arisen from the matter giving rise to the grievance. In *Telecom New Zealand Ltd v Morgan* the court considered a grievance filed 9 days late.[7] The employee claimed the delay was caused by an exceptional circumstance related to post-dismissal trauma including clinical depression. The court refused leave as the employee had, in spite of the medical condition, functioned reasonably normally over that period:

> I consider Parliament did not intend to alter, by relaxing, the tests for extending the limitation period when it enacted ss 114 and 115 in 2000. Had it so intended, it is logical that it would have changed what is now s 114 but it did not do so. Instead, it sought to exemplify, but not limit, situations that would amount to exceptional circumstances … 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.

[15] The Court noted that trauma connotes "very substantial injury" and, in terms of the provision, this has to be sufficiently serious as to prevent the employee from properly considering the grievance for, it appears, the whole of the 90 day period.

Discussion

[16] By letter dated 7 November 2019 Correction's wrote to Mr Millar dismissing him with four weeks' pay in lieu of notice. This letter was sent following the parties attendance at mediation that day. Mr Millar had 90 days from 7 November to raise a personal grievance for unjustified dismissal, the expiration date being 7 February 2020. The dismissal followed a long disciplinary process which had commenced in April 2019.

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[7] *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9.

[17] Mr Millar received his final pay on 15 November 2019. Consideration has been given to whether it is arguable the 90-day period started from this date. I am satisfied it does not because the 7 November letter is clear that is the date of dismissal. If I am wrong and the 90-day period ended on 15 February 2020 for the reasons set out below it makes no difference to Mr Millar's claim because, he did not raise a personal grievance with Corrections for unjustified dismissal until some considerable time after this date.

[18] Mr Millar says he was too distressed, confused and upset after his dismissal to turn his mind to raising a personal grievance within the 90-day period. Mr Millar says he suffered mental ill health during the disciplinary investigation and this continued during the period after his dismissal. Ms Slater and Mr Jones gave similar, general evidence of their observations of Mr Millar's distress spanning the disciplinary investigation and the post dismissal period.

[19] Mr Millar has provided medical certificates certifying him unfit to work from 13 August to 4 November 2019 and a more detailed medical certificate dated 19 March 2020 which records he presented to his general practitioner in July 2019 with severe anxiety, work related stress, experiencing panic attacks and unable to sleep for which he was prescribed anti-depression medication, that his symptoms deteriorated in September 2019 and "he was suicidal for a for weeks" (sic), that he continued on medication and at date of the certificate was being reviewed regularly. Mr Millar also produced a police case summary dated 5 September 2019 which records Mr Millar's family had reported him missing for 24 hours on 4 September because he had been under a lot of stress and pressure due to the disciplinary investigation and following a minor argument at home he had left the property for 24 hours. The police report records Mr Millar was located on 5 September, police were satisfied he was not at risk of self-harm and left him in the care of his partner and young adult children.

[20] On the day of his dismissal, 7 November, Mr Jones said he told Mr Millar that he had 90 days in which to raise a personal grievance and because Mr Millar was in such a distressed state he did not follow up with him until 23 January when he sent him a text message "When is a good time to call". A diary note of Mr Jones' records they discussed the personal grievance process on 10 February 2021. The next document is

the statement of problem Mr Millar signed on 15 March 2020 and which was not lodged with the Authority until June 2020 and was not served on Corrections until 30 September 2020.

Was Mr Millar so affected and traumatised by the dismissal?

[21] It is accepted Mr Millar suffered depression, anxiety and other symptoms related to his work circumstances from July 2019 and that his symptoms deteriorated during September. It is also accepted Mr Millar was upset and distressed by his dismissal and that during the 90-day period he continued to be prescribed anti-depression medication and was under the regular medical review of his general practitioner. From these circumstances it does not necessarily follow that Mr Millar was so affected and traumatised by his dismissal that he was unable to properly consider raising a personal grievance within the 90-day statutory period. Factors which indicate the high threshold has not been met include:

- after experiencing a period where his symptoms deteriorated Mr Millar instructed Mr Jones to raise personal grievances for unjustified actions on his behalf and attended two mediations in respect of matters relating to those personal grievances;
- there was insufficient evidence before the Authority that his health was so effected by the dismissal that he could not take the steps he was able to take in October 2019 to instruct Mr Jones for example, evidence of a further deterioration in the symptoms such as he had experienced in September 2019;
- he communicated with Mr Jones during the 90-day period (expiring either 7 or 15 February) concerning matters relating to his dismissal; and
- he applied for and commenced new employment in December 2019 (a part time ground keeping role at the local high school).

[22] Mr Millar suggests in his evidence that he was unclear if he was in fact dismissed because Corrections did not ask him to return his uniform until sometime later and he received inquiries about availability to work on call hours after 7 November 2019. While I accept these factors were untidy and would have been unwelcome reminders to Mr Millar of how his employment ended, objectively, given the letter of 7 November and his communications with Mr Jones about a personal grievance for his

dismissal, there is not reasonable basis on which he could understand he had not been dismissed. Further there is no contemporaneous record that Mr Millar held the view he had not been dismissed at this time.

Did Mr Millar make reasonable arrangements to have the personal grievance raised?

[23] This does not appear to be the case. Mr Jones gave clear evidence that he told Mr Millar on 7 November he had 90-days to raise a personal grievance for unjustified dismissal, that he contacted him to inquire as to his intentions with respect to the personal grievance and they had a discussion within the (arguable) 90-day period. There is no suggestion in the evidence of either Mr Millar or Mr Jones that Mr Millar instructed Mr Jones to raise a personal grievance for unjustified dismissal within the 90-day period or that such an instruction was given or, having received such an instruction from Mr Millar that Mr Jones unreasonably failed to raise the personal grievance within the 90-days.

[24] A statement of problem for an unjustified dismissal claim was signed by Mr Millar on 15 March 2020, at least one month after the expiry of the 90-day period.

Does the relevant employment agreement contain a resolution explanation?

[25] Yes. Clause 12 of the relevant collective employment agreement sets out a compliant dispute resolution process including the 90-day period in which personal grievances must be raised.[8] It is noted Corrections recorded in the 7 November dismissal letter "If you feel aggrieved by this action you do have the right to take a personal grievance in terms of the Employment Relations Act 2000".

Other matters raised

[26] Mr Millar says Corrections knew he intended to challenge his dismissal because he communicated his dissatisfaction with the process during the two mediations the parties attended prior to the 7 November dismissal letter and Mr Jones told Ms Downes during another unrelated mediation early in 2020 that he was working on Mr Millar's personal grievance. Reference has also been made to communications with the

[8] Clause 12 Department of Corrections Frontline Staff (Prison Based) Collective Agreement CANZ 2019 – 2021.

Authority in October 2019 which are detailed in [4] above and difficulties with lodging documents in the Authority from March 2020. For completeness Corrections asserts the confidential nature of discussions at mediation and opposes any reference to discussions at mediation being put before the Authority.

[27] The difficulty with these other matters Mr Millar raises is Mr Jones gave very clear evidence that he told Mr Millar on 7 November that he had 90-days to raise a personal grievance and that he followed up with him within the 90-day period to ascertain his intentions. The strong implication is Mr Millar was left to consider whether he wished to pursue a personal grievance in respect of his dismissal having received the relevant information about what needed to be done. By 15 March 2020 there is clear evidence he had decided he wished to pursue such a personal grievance but this was at least a month after expiry of the 90-day period and this intention was not communicated to Corrections until 30 September 2020.

[28] If Mr Millar had established exceptional circumstances had occasioned the delay these other matters may have been relevant to an assessment of whether it would be just to grant leave. Having not passed the first hurdle though there are no grounds to make that assessment.

Outcome

[29] Mr Millar has not established an exceptional circumstance occasioned his failure to raise a personal grievance for unjustified dismissal within the statutory timeframe. His application for leave to raise a personal grievance for unjustified dismissal out of time is declined. The investigation meeting of Mr Millar's personal grievance for unjustified disadvantage is to proceed as scheduled.

Costs

[30] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority