

Attention is drawn to paragraphs 6-8 of this determination prohibiting publication of certain information.

Determination Number: CA 21A/06
File Number: CEA 98/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN A (Applicant)
AND New Zealand Police (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
Raewyn Gibson, Advocate for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 10 May 2006
11 May 2006
DATE OF DETERMINATION 27 June 2006

DETERMINATION OF THE AUTHORITY

History

[1] By an interim determination dated 14 February 2006, I decided that Ms A had not raised her personal grievance within time. However, I also concluded that she had, in addressing matters for the original investigation meeting, made an application in terms of s114(3) of the Act to the Authority for leave to raise that grievance outside the 90 day period.

[2] I then directed that there be a telephone conference with the representatives of the parties to agree a process for dealing with that application and that telephone conference was held on 9th March 2006.

[3] At that telephone conference, a timetable was agreed for the receipt of the application and the response. I directed that there be a further telephone conference to discuss the conduct of the hearing once the application and response had been considered.

[4] That second telephone conference took place on 28 April 2006 and resulted in an agreement that the only evidence that was required was evidence from Mr Dave McKirdy who was and is the Southern Field Officer for the New Zealand Police Association. It was Mr McKirdy who had initially purported to raise the original grievance with Police on 17 November 2003.

[5] In the result, the hearing on the application for leave proceeded on 10 May 2006 and Mr McKirdy's evidence was taken the following day.

Prohibition on publication

[6] In my interim determination dated 14 February 2006, I made an order prohibiting publication of the name of the applicant, the name of the medical practitioner referred to in the proceedings, the name of a Police witness and prohibition on any information that may lead to the identification either of the applicant or the medical practitioner concerned including in particular the name of the town or city in which the medical practitioner practises.

[7] I made that order by agreement of the parties and because the reasons for which the order was originally made still applied, I decided that those orders will remain in place.

[8] Accordingly, the applicant will continue to be referred to throughout this determination as Ms A and the medical practitioner concerned as Dr B. A witness is referred to as Witness C.

Employment relationship problem

[9] This is an application by Ms A for leave under s114 (3) of the Employment Relations Act to raise the personal grievance after the expiry of the 90 day period. The application relies on both subsections (a) and (b) of s115.

[10] The application is resisted by Police on the basis that the facts in evidence do not disclose that the delay was occasioned by the kinds of exceptional circumstance contemplated by subsections (a) and/or (b) of s115 of the Act, and on the basis that it is not just to grant leave in the particular circumstances of this case.

The law

[10] It is appropriate to set out in full the relevant statutory provisions. Section 114(3) of the Employment Relations Act provides as follows:

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90 day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

[11] Subsection 4 of s114 is also relevant. It provides as follows:

(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly subject to such conditions (if any) as it thinks fit, if the Authority – (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any one or more of the circumstances set out in s115); and (b) considers it just to do so.

[12] The two circumstances on which Ms A seeks to rely from s115 of the Act are as follows:

“For the purposes of s114(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 s114(1)

[for which read 90 days]; 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; ...”

Applying the law

[13] The usual rule requires a grievance to be raised within 90 days of the matter relied upon for that grievance or of that matter coming to the notice of the grievant whichever is the later. If the grievance is not raised in time, the employer may consent to the grievance being raised out of time.

[14] In the factual circumstances of the instant case, my determination of 14th February 2006 held that the grievance had not been raised within time and as a matter of fact, the Police did not consent to the grievance being raised outside of the 90 day period. It follows that s114 (3) applies.

[15] My earlier determination also decided that the applicant’s submissions in respect of the first investigation meeting inter alia constituted an application to the Authority for consent to raise the grievance out of time pursuant to s114(3) of the Act.

[16] Subsection 4 of s114 requires the Authority to hear the employer and then to consider whether leave ought to be granted on whatever conditions the Authority sees fit where the Authority is satisfied that there are exceptional circumstances and where the Authority thinks it is just to do so.

[17] Ms A, having made an application for leave under s114(3) claims exceptional circumstances and refers particularly to subclauses (a) and (b) of s115 which prescribe respectively exceptional circumstances generated by trauma (subsection (a)) and by the failure of an agent (subsection (b)).

[18] The factual position has been well traversed. Mr McKirdy of the Police Association raised Ms A’s *grievance* with Police on 17 November 2003. There is no reference in that communication to the basis on which the grievance is presently before the Employment Relations Authority.

[19] Mr McKirdy’s evidence was that Ms A had seen a colleague of Mr McKirdy’s in the Police Association on 14 November 2003 and he had acted promptly on the sketchy information he had on 17 November 2003. Mr McKirdy’s evidence was that he had not at that point met Ms A and in fact did not meet her face to face until 5 December 2003.

[20] Mr McKirdy’s evidence was in effect that he wanted to *stop the clock* in relation to the 90 day statutory time limit by raising the grievance but Ms A alleges that the Police Association took no proper steps to satisfy themselves of the basis of the grievance.

[21] Ms A also contends that, having been apprised of a grievance, the Police were somehow obligated to conduct inquiries and satisfy themselves of precisely what the terms of that grievance were. Whatever else is true, that proposition certainly does not stand up to scrutiny. There is no basis in law for requiring an employer to provide further and better particulars, of its own motion, of the details of a grievance raised with it by one of its employees.

[22] This is so even where that employee is afflicted with health problems which might make it more difficult for the employee to perform normally. In my opinion, the employer has no obligation to satisfy itself of the basis of an employee’s grievance, even where it knows that the employee has health problems.

[23] Ms A also contends that because of those same health problems, she was unable to manage her relationship with the Police Association and unable to satisfy herself that they were, as it were,

doing what she asked. I accept that that is a proper area of inquiry, falling as it does squarely into the category of a s115(a) matter but I am not persuaded that the evidence supports Ms A's contention.

[24] The Authority has not heard from the person at the Police Association who Ms A spoke to on 14 November. That person is no longer in the jurisdiction and not able to be contacted. However, there is no suggestion that Ms A was so traumatised at that time that she was unable to give proper instructions. Had that been the position, Mr McKirdy, an experienced union official, would have been apprised of that fact.

[25] Nothing in the correspondence from the time around the raising of the purported grievance in November 2003 suggests that there was any confusion or doubt about Ms A's ability to manage her relationship with the Police Association. There was no item of correspondence, no reference in any document, which suggests that she was physically or mentally incapable of directing her affairs.

[26] The evidence supports the contention that Ms A sat down with the Police Association and went through the whole case. That being the position, it is very difficult to see how it can be contended that she was somehow not capable of directing her own affairs at that time.

[27] Further and critically, the trauma that the applicant seeks to rely upon was only sufficient to prevent her from raising *the right grievance*, not any grievance. By this I mean that the applicant was perfectly capable of raising a grievance within time when Mr McKirdy acted on 17 November 2003. The only difficulty is that the subject matter of that grievance is not the basis on which she now chooses to advance her position and indeed the present basis on which she seeks to advance her position was not actually raised until 30 March 2005 when the statement of problem was filed in the Authority.

[28] At no stage before that date was there any suggestion that the applicant Ms A was in any way confused or unable to direct her own affairs. Yet she purported to rely on the raising of the grievance on 17 November 2003, which was manifestly on a different basis from the grievance she now sought to advance.

[28] When Ms A instructed her present representative about 12 months after the raising of the alleged grievance, there again was no suggestion that Ms A was traumatised to the extent that she was unable to give her new representative sensible instructions.

[29] Accordingly, I have no difficulty in reaching the conclusion that Ms A cannot rely on subsection (a) of s115 (the traumatic circumstances leg) as a basis for sustaining her claim that the delay in raising the personal grievance was occasioned by exceptional circumstances.

[30] I need to consider now the question of whether Ms A can rely on subsection (b) of s115 to ground her exceptional circumstance claim. Subsection (b) of course is activated by the failure of a representative to raise a grievance after reasonable arrangements have been made.

[31] Ms A says that she fully briefed the Police Association on 14 November 2003, that she expected them to conduct whatever other inquiries they thought appropriate and to raise a sustainable grievance at that time.

[32] In support of that contention, it is worth considering just exactly what Mr McKirdy notified Police of when he raised the matter with them on 17 November 2003. He mentioned a number of matters, none of which touch in any way on the eventual nature of the grievance pleaded in the

statement of problem (deceiving and misleading conduct) but also none of which are actually sustainable grounds for a personal grievance. On that basis, it is difficult to see how an experienced union official like Mr McKirdy could have reached the conclusion that he had in fact done what he was asked to do.

[33] In the email confirming the raising of the grievance, Mr McKirdy refers to the allegedly inappropriate medical examination in December 1989 and he says *the problem is in relation to the medical examination*. Quite clearly, Mr McKirdy cannot have believed that that was the basis of the grievance because it was very clearly out of time.

[34] He then goes on to say that Ms A raised the problem with Police *approximately 8 years ago* and that Police failed to deal with it appropriately.

[35] Mr McKirdy then refers to Ms A having made a criminal complaint relating to the same factual matrix and that that is currently being investigated by Police and then he says he will *forward further details of this problem, hopefully in about two weeks, after I have had time to talk to Ms A and after I have had time to collate details*.

[36] It is difficult to escape the conclusion that Ms A could have had a reasonable belief that she had provided the Police Association with all of the information at her disposal save for the information in the Police complaints file (which she subsequently gave Mr McKirdy authority to access) and, on the basis of this email, that Mr McKirdy had put a stake in the ground to protect Ms A's position and was undertaking to take further steps to apprise the Police of the position.

[37] When Mr McKirdy gave evidence before the Authority, he made a number of revealing observations. Most significantly, he said that he had no recollection of ever being told of the allegation which became the centre piece of the personal grievance as pleaded in the Authority of deceiving and misleading conduct. Further, he said that to his knowledge, no-one in the Association were aware of that issue either.

[38] Perhaps even more graphically, Mr McKirdy says in a letter to Ms A's present representative:

It is also prudent to point out that the grievance the [Police] Association raised is different from what you have filed

In effect, Mr McKirdy is explicitly conceding that the Police argument in respect to the difference between the grievance raised on 17 November 2003 and the one pleaded in the statement of problem on 30 March 2005 is correct.

[39] This view, coupled with Mr McKirdy's evidence that he knew nothing of the *deceiving and misleading conduct* and to his knowledge nobody else in the Police Association knew of it either, suggests powerfully that the issue was never raised by Ms A in 2003 and so in truth there were always two *grievances* one raised in 2003 and subsequently abandoned and another raised in 2005 using the same broad factual matrix but with an entirely different kernel.

[40] It remains for me to consider only one more issue in relation to the involvement of the Police Association in this matter. It is the question of whether they had an obligation to Ms A to present her grievance in the way that it was subsequently presented by her present representative, that is as revolving around deceiving and misleading conduct. It is after all the obligation of a representative in the employment jurisdiction to assist the grievant to run an argument which has the most chance of success and one might have thought that a disadvantage claim based around the treatment of a very historical matter is not the strongest argument to advance.

[41] However, I am loathe to make a finding against the Association in this sort of context without evidence that the Association knew or ought to have known that there was this alternative scenario revolving around deceptive and misleading conduct. Faced with the very clearest evidence from Mr McKirdy, who I regard as a truthful and honourable witness that he knew nothing of that aspect and his explicit statement in a letter to Ms A's present representative that they had filed a different grievance, I reach the conclusion that the Police Association did not do anything improper in its management of Ms A's grievance and accordingly, she cannot rely on subparagraph (b) of s115 either.

[42] Finally, I need to consider the question whether the justice of the case would have supported the granting of leave and for reasons which I will deal with directly, I do not think that that aspect is made out either. Clearly, having not found exceptional circumstances existing to justify granting leave, the question of the justice of the case does not need to be considered.

[43] However, for the sake of completeness I simply note that on this aspect, I accept the submission on behalf of Police that the evidence in the substantive investigation meeting simply did not support the contention that there had been deceiving and misleading conduct by Police.

[44] Indeed, quite the reverse was the case, as the evidence supported the view that both the Police officer concerned (Witness C) and Ms A each recalled the conversation that the pair of them had in exactly similar terms so there could be no reasonable basis on which Ms A could now contend that Witness C, a police witness, had deceived or misled her.

[45] It follows that Ms A's *new grievance* the one which I hold was first raised in the statement of problem dated 30 March 2005, had little discernible merit and accordingly the justice of the case, even if the Authority had found exceptional circumstances, would not encourage the granting of leave.

Determination

[46] For the reasons I have outlined above, Ms A's application for leave to bring a grievance out of time fails.

[47] I would, however, be failing in my duty if I did not remind the parties that this grievance comes before the Authority while Ms A's employment relationship with Police continues.

[48] All of the Police witnesses who gave evidence before me spoke positively about Ms A's contribution to the work of Police and to her long term prospects as a serving Police officer.

[49] It is discouraging and disappointing that the parties have not been able to resolve this issue, which is of very considerable concern to Ms A, without recourse to the Authority. Having had the Authority now determine the matter on a legal basis, it is my hope that the parties can now enter into some dialogue which will enable Ms A, in particular, to satisfactorily close this unfortunate chapter of her life, and move on with her career with the active and positive encouragement of Police.

Costs

[50] In the normal course of events, I would reserve costs without expressing a view as to how the parties should deal with the costs. However, bearing in mind the observations I have just made, I invite the parties to resolve costs themselves but I express the strong view that they should agree between them that costs lie where they fall.

James Crichton
Member of Employment Relations Authority