IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 363
3018931

	BETWEEN	ROHIT ARORA Applicant
	A N D	RESTAURANT BRANDS LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	E Telle/M Pollak, Counsel for Applicant S Langton/S Maxfield, Counsel for Respondent
Investigation Meeting:	20 - 22 August 2018 at Auckland
Submissions Received:	22 August 2018 from Applicant 22 August 2018 from Respondent
Date of Determination:	21 November 2018

DETERMINATION OF THE AUTHORITY

A. I decline to grant leave to raise the personal grievances out of time. The personal grievance application is dismissed. Costs reserved.

Employment relationship problem

[1] Rohit Arora was employed by Restaurant Brands Limited ("RBL") in 2015. He suffered an injury at work on 17 December 2015. He alleges this was caused by the unjustified actions of his employer RBL.

[2] Mr Arora then encountered personal difficulties including a period of imprisonment. During his incarceration RBL terminated his employment. Upon his release he sought to raise his personal grievances of unjustified disadvantage by the injury and dismissal with RBL. This was more than 90 days after those actions occurred.

[3] This Determination deals with the issue of whether leave is required and if so should it be granted to raise these personal grievances outside of the 90 day time limitation.

[4] There is a third cause of action alleging breaches of the employment agreement. This has not been considered in this determination because it was not included within the issues for preliminary determination. The Respondent submits the outcome of this determination may affect the viability of this cause of action. I intend issuing directions on the hearing of this matter in a separate Minute.

Relevant facts

[5] Rohit Arora is an immigrant of Punjabi-Hindi descent from the city of Amritsar in north western India. He immigrated to New Zealand on 14 September 2014 on a student VISA that allowed him 20 hours work per week. He enrolled to study computer engineering and obtained work with another employer.

[6] RK sponsored Mr Arora's immigration to New Zealand. RK was known to Mr Arora and had also immigrated to New Zealand from India. Mr Arora lived with RK up and until January 2016. At the time RK was a manager of KFC Papakura. KFC Papakura is one of a number of branded fast food outlets owned by RBL.

[7] RK assisted Mr Arora with obtaining employment at KFC Papakura. Mr Arora was employed as a team member at KFC Papakura starting on 25 October 2015.

Injury

[8] During this period of time Mr Arora entered into a relationship with SS. She became pregnant but wanted to terminate the pregnancy. The abortion was performed on 17 December 2015. Mr Arora supported SS during the procedure.

[9] Mr Arora was not scheduled to work. Later the same day he was called by RK and agreed to come into work.

[10] At the end of his shift at 11.50 pm he was directed to clean the hood and hood filters above the pressure cookers. The pressure cookers are cylindrical drum-like containers used for cooking chicken in hot oil. The pressure cookers have round openings with lids that could be opened or closed.

[11] The pressure cookers were mobile and the lids were open at the time Mr Arora started cleaning. He had got a step ladder and while standing on the ladder he placed one foot on the edge of the cooker. He slipped and his left leg was immersed in hot cooking oil. RK was duty manager and immediately placed his leg in a bucket of water and ice for 12 to 20 minutes.

[12] Mr Arora was taken to Middlemore hospital. Upon admittance hospital staff were told Mr Arora's injuries had occurred at home. The hospital records show the injuries were allegedly caused by hot oil splashing onto his leg while frying. Mr Arora also obtained accident compensation for a "non-work" injury.

[13] It is accepted no-one present on 17 December 2015 reported Mr Arora's injury to RBL.

[14] Mr Arora remained in hospital until the following day. He returned to hospital on 29 December 2015 for skin grafting and was released on 6 January 2016.

[15] In January 2016 Mr Arora moved in with SS.

[16] Mr Arora returned to work on 19 March 2016. By then RK had been transferred to another KFC branch. The transfer had been approved on 15 December 2015. Another employee was appointed to manage KFC Papakura.

[17] On 23 March 2016 Mr Arora sought a transfer to KFC Mangere through the Unite union. He sent an email referring to a burn he received on or about 17 December 2015 and his need for a transfer from KFC Papakura to KFC Mangere.

[18] Around this time performance issues began to arise. In May 2016 Mr Arora received "coaching" discussions. These related to incidences for not complying with the "closing procedures" properly (leaving dirty dishes repeatedly having said he had done them), giving late notice he would not be working a shift; and for leaving work early without doing his closing at all. At one stage during the coaching discussions he walked out.

[19] His transfer was refused as KFC Mangere had no available hours that Mr Arora could work. He remained at KFC Papakura until September 2016.

Termination

[20] On 10 September 2016 Mr Arora was arrested on an unrelated criminal matter involving his now former partner SS. He was remanded in custody on 11 September. SS went to KFC Papakura the same day and informed the store that Mr Arora was in custody and his Court hearing was the next day.

[21] Mr Arora applied for bail on 12 September which was refused. He instructed his criminal barrister, Harvena Cherrington, to make contact with KFC Papakura to inform them he would not be coming into work because he had been imprisoned. She called but was unable to speak to anyone. She left a telephone message with her contact details but never received any return call. He asked if she could assist him with his employment matters but she refused as employment was not her area of expertise. He took no further steps to contact RBL.

[22] The KFC Papakura manager had been trying to contact Mr Arora by mobile on 11, 19, 21, 22 and 26 September 2016 regarding his non-attendance at work. By 26 September 2016 Mr Arora had failed to attend work for three rostered shifts on 14, 15 and 19 September 2016.

[23] RBL instigated an investigation sending a letter dated 26 September 2016 to his last known mailing and email address. The purpose of the meeting was to discuss concerns about his failures to attend work for two or more consecutive shifts due to imprisonment and the possibility of a conviction impacting upon his future employment. A meeting was set down on 29 September 2016.

[24] SS then emailed RBL again advising Mr Arora had been imprisoned and that he would be released on 5 October 2016. RBL decided to postpone the meeting. It then sent a further letter dated 7 October 2016 seeking a meeting on 14 October 2016. No further information was received from SS or Mr Arora about his imprisonment or availability to meet.

[25] Following Mr Arora's non-attendance at the 14 October meeting, RBL terminated his employment on 24 October 2016. The reason for the termination was abandonment of employment.

[26] Mr Arora was granted bail on 28 January 2017 to a Tauranga address where he currently resides. He alleges it was not until his release that he became aware of his

dismissal. He then instructed his lawyer to send a letter dated 7 February 2017 attempting to raise personal grievances of unjustified disadvantage and dismissal.

[27] A statement of problem was filed on 31 August 2017 detailing his disadvantage and dismissal grievances. The criminal charges were dismissed on 5 October 2017.

Hearing

[28] Despite filing the statement of problem in August 2017, this matter has been unable to progress to an earlier hearing due to amended pleadings, interlocutory applications and substantial amounts of evidence being filed by the applicant outside of timetabling directions. The 6 December 2017 hearing had to be vacated following the filing of significant amounts of evidence and an amended statement of problem on 20 November 2017.

[29] Two amended statements of problem have now been filed. The latest statement of problem was filed on 28 March 2018.

[30] Several interlocutory matters have required determination before this hearing could proceed. Mr Arora filed an application for removal to the Court which was declined on 16 March 2018.[1] He also sought disclosure of RBL's Worksafe file and the personnel file of another employee. It had been alleged a Worksafe prosecution was imminent. When the prosecution failed to eventuate, he filed a private prosecution under the Health and Safety at Work Act 2015. He then sought stay and removal (again) to the Court which was declined on 31 July 2018.[2]

[31] The preliminary hearing occurred on 20 to 22 August 2018, nearly 12 months after it had been filed and 10 months after it had been originally set down. This was an extraordinary lengthy process to bring on for hearing a preliminary matter in the Authority.

Application for leave to raise a personal grievance

[32] Mr Arora had originally conceded leave was required in his personal grievance letter dated 7 February 2017. When he filed his statement of problem in August 2017

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1 *Arora v Restaurant Brands Limited* [2018] NZERA Auckland 88.
2 Notice of Direction dated 31 July 2018.

his position had changed. He now states the grievances were raised within time but if not, he seeks leave.

[33] I have confined the determination of leave to the grounds set out in the second amended application for leave to bring a claim for personal grievances outside of 90 days (if necessary) dated 22 March 2018 (the Application) filed on 23 March 2018.

[34] There are essentially four exceptional circumstances relied upon. These are:

a) Various alleged actions of RK on behalf of RBL;

b) Post-traumatic stress he was suffering as a result of his injury in December 2015 and subsequent events;

c) Cultural circumstances; and

d) Imprisonment in September 2016.

[35] As noted to the parties, if the leave is required and granted, the parties shall be directed to mediation pursuant to s114(5) of the Act. If leave is not required or mediation does not resolve matters, the grievances may proceed to hearing. Otherwise the application shall be dismissed.

Law

[36] The starting point is ss114 and 115 of the Employment Relations Act 2000 (Act). These sections set out the time limit for raising a personal grievance with an employer and the requirements for raising a grievance outside of the time limitation:

> **114 Raising personal grievance**
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> (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.
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> (2) 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 representative of

> the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.
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> (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.
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> (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—
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> (a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and
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> (b) considers it just to do so.
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> (5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance. …
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> **115 Further provision regarding exceptional circumstances under section 114**
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> For the purposes of section 114(4)(a), exceptional circumstances include—
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> (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
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> (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
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> (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
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> (d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[37] A personal grievance must be raised within 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." There is no consent from RBL to the

late raising of any personal grievance by Mr Arora. Therefore Mr Arora must prove he raised his grievance 90 days after the action alleged to give rise to the grievance occurred or "came to notice of the employee".

[38] In assessing when a grievance "came to notice of the employee" the Court has found:[3]

> … 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.

[39] It is settled law that "a cause of action accrues when all the necessary constituents of the cause of action come into existence."[4]

[40] Constructive notice of a cause of action may give rise to an earlier date for the raising of a personal grievance than the receipt of actual notice of the dismissal or disadvantage. The issue to determine is when an employee has "sufficient notice of the circumstances" to be able to claim that they have been dismissed.[5]

[41] Further s114 of the Act requires a grievance is raised with specificity:[6]

> It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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 …
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> … What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

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3 *Wyatt v Simpson Grierson (a partnership)* [2007] ERNZ 489 at [29].
4 See above at [36].
5 *Drayton v Foodstuffs (South Island) Ltd* [1995] 2 ERNZ 523 at 530; referred to in *Underhill* at [81].
6 *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[42] A statement to the effect that "I have a personal grievance for unjustified dismissal" has been found to be insufficient to raise a grievance.[7]

[43] If leave is required, the applicant must show there are exceptional circumstances. Section 115 sets out a number of exceptional circumstances.

[44] The Supreme Court has held that "exceptional circumstances" means unusual, in that it is the exception to the rule.[8] There are two conditions to the grant of leave under s114(4) which must be satisfied. First, the delay must have been occasioned by "exceptional circumstances" and secondly the justice of the case must require an extension of time.[9]

[45] An exceptional circumstance under s115(a) of the Act has been held to have "a high threshold" and the use of "trauma" connotes a very serious injury. Further:[10]

> It is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to "properly *consider*" raising the grievance that is required to be established by an applicant for leave relying on s 115(a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not for only a part of it by use of the phrase "within the period specified …"

When did Mr Arora raise his personal grievances?

[46] It is accepted the personal grievance of unjustified disadvantage pertaining to his injury at work in December 2015 was raised by his lawyer's letter dated 7 February 2017. The time limitation for the personal grievance of unjustified disadvantage pertaining to his injury began on 17 December 2015. The last day for raising a personal grievance was 17 March 2016. The personal grievance was in fact raised 314 days after the time for raising a grievance had expired.

[47] The time limitation for the personal grievance of unjustified dismissal began on 24 October 2016. The last day for raising a personal grievance of unjustified dismissal was 22 January 2017.

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7 *Underhill v Coca-Cola Amatil (NZ) Ltd* [2017] NZEmpC 117 at [38].

8 *Creedy v Commissioner of Police* [2008] NZSC 31 at [31].

9 *Creedy* at [25].

10 *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [23] ff.

Do alleged continuous breaches of personal grievance extend the time for raising grievances?

[48] Mr Arora submits RBLs failure to accept the burns took place at work and to carry out reasonable steps to address the applicant's complaint means the personal grievance "is continuous and so was raised in time". This statement is illogical and legally incorrect.

[49] The definition of an unjustified disadvantage in s103(1)(b) of the Act requires there to be unjustified action by an employer to "that employees employment or 1 or more conditions of the employee's employment" and includes actions "during employment that has since terminated."

[50] His employment had terminated on 24 October 2016. RBL first became aware of the applicants personal grievances on 7 February 2017. It is only then that RBL raises a concern about whether this injury occurred at work. No personal grievance can arise in respect of these actions that occurred after termination of employment. Personal grievances by their definition pertain to an employer's actions during the employment relationship only. There can be no continuous breach extending the time for raising a grievance by RBLs actions after the employment had ended.

[51] Therefore Mr Arora requires leave to raise the unjustified disadvantage grievance.

Given notice of dismissal was not received until January 2017 does this delay the start of time limitation period?

[52] Mr Arora further submits in respect of the unjustified dismissal grievance that he was unaware of his dismissal until 28 January 2017. Therefore the 90 day time limitation runs from this date and his grievance raised on 7 February 2017 is within time.

[53] RBL submits Mr Arora had actual knowledge of his dismissal because he had received the letter of termination at the last known contact addresses he had provided RBL. Further it submits he had constructive knowledge because his employment agreement provided for abandonment; he knew he had not attended several rostered

shifts; knew he had to contact RBL regarding his whereabouts and why he was not attending work; after he was made aware his lawyer could not contact his employer he took no further steps and received his final pay. Therefore the last day for raising a grievance was 22 January 2017.

When did the dismissal come to the notice of Mr Arora?

[54] There was conflicting evidence about when Mr Arora became aware of his dismissal. Mr Arora's referred to assistance from a knowledgeable cellmate with his legal matters including employment and immigration. The cellmate drafted his letter to immigration in November 2016 and assisted him with finding an employment lawyer in December 2016. Under examination he accepted he was thinking about raising his employment issues with RBL as early as September 2016.

[55] Although Mr Arora accepted that not presenting for work between September 2016 and February 2017 would have resulted in his dismissal, he referred to a promise by RK to preserve his job for his belief he would not have been dismissed.

[56] This belief was contrary to his collective employment agreement (CEA). Clause 12.5 of the CEA provided for termination in the event of abandonment of employment "if an employee is absent without good cause from work for 2 consecutive shifts, which he/she has been rostered to work …" Any variation to the CEA "must be mutually agreed to by both parties … and recorded in writing."[11]

[57] There was no written document varying the terms of his CEA in line with RKs alleged promise. Mr Arora stated he did not read the CEA although a copy was provided to him by RBL together with his application for Union membership. His ignorance of the law and his contractual obligations does not give rise to any exceptional circumstance.[12]

[58] The Court has held that dismissal occurred when written notice in accordance with the parties employment agreement had been provided and in the circumstances

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11 ABD pp351 and 356; Respondents Bundle of Documents (RBD) Tab 3 pp 18 and 24.

12 See *Muggeridge v Maiden Construction Co Ltd* [1992] 1 ERNZ 232; *Thomson v Thomson* [1992] 2 ERNZ 84.

the employees could "reasonably conclude" that there was an unjustified dismissal.[13] Further the Court has found:[14]

> If the affected employee should reasonably have concluded earlier than the date immediately contemplated – but later than the actual date of dismissal – that he/she was unjustifiably dismissed from his/her employment, then the 90 day period will commence from the date upon which that realisation should reasonably have been made, if it is a later date than the actual date upon which the termination of his/her employment takes effect.

[59] There were indications Mr Arora knew prior to January 2017 that his employment could be terminated. His request to his criminal lawyer to contact his employer in September 2016 to explain his whereabouts can be for no other reason than to seek to preserve his job.

[60] By October 2016 he had taken no further steps to contact his employer. When asked about his lack of effort, he initially stated he did not have money to use the telephone. However it was clear he had been communicating with his parents and a friend or relative to whom he was to be bailed in Tauranga.

[61] He was also aware that he could have written letters to his employer paid for by the Department of Corrections. This is because he wrote to Immigration in November 2016 about the deportation order.

[62] He then alleged it was RBLs responsibility to find him in the prison system before taking action to dismiss. I assume he was relying upon the duty of good faith to be responsive and communicative. Given he is also subject to this duty, it was more reasonable that he took steps to inform them of his situation and location. The absence of contact would have reasonably led his employer to believe he had abandoned his employment.

[63] There is also evidence that he knew or ought to have known he had been dismissed earlier and had raised his personal grievance out of time. The letter from his lawyers dated 7 February 2017 states in relation to both personal grievances:

> We appreciate that Rohit is out of time to raise a personal grievance. But we have no doubt that in the circumstances leave will be granted

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13 *Underhill v Coca-Cola Amatil (NZ) Limited* [2017] NZEmPC at [79] ff.

14 *Robertson v UIHC New Zealand Inc* [1999] 1 ERNZ 367 at 387.

> for him to do especially given it was KFC which took steps to prevent Rohit from notifying anyone (through RK) that the event took place.

[64] He then sought to resile from this position by his lawyers letter dated 23 August 2017.

[65] In these circumstances a reasonable employee would have expected to have had his/her employment terminated. Therefore this grievance was out of time when it was allegedly raised on 7 February 2017.

Was the dismissal grievance raised with RBL on 7 February 2017 or later?

[66] RBL submits the letter dated 7 February 2017 was insufficient to raise the personal grievance of unjustified dismissal. It submits the first time this was properly raised with RBL was the filing of the original statement of problem on 31 August 2017.

[67] The letter dated 7 February 2017 states in relation to the unjustified dismissal grievance:

> For the avoidance of doubt this letter amounts to notice of any personal grievance Rohit has against KFC pursuant to the Employment Relations Act 2000. There is also an issue that Rohit was wrongfully dismissed. He is currently unemployed. In addition to a payment of compensation he seeks that Restaurant Brands reconsiders reinstating his employment.

[68] There is a scarcity of information about the dismissal grievance. There is no explanation for why or how the dismissal was unjustified. It is simply inadequate for an employer to understand why it was at fault and why it should be remedied as suggested.

[69] The dismissal grievance was first raised with any specificity on 31 August 2017 when Mr Arora filed his statement of problem. The basis for the unjustified or "wrongful dismissal" is the allegation that his employment was terminated "without me being given any chance to explain" and that RBL ought to have known he was in Prison.

[70] This is 221 days outside of the time limitation for raising a grievance.

[71] Therefore Mr Arora requires leave to raise both personal grievances as a consequence.

Did RK's alleged actions give rise to an exceptional circumstance?

[72] Mr Arora alleges there were unjustified actions by RK on behalf of RBL that both disadvantaged him and prevented him from raising his grievance within time. In summary these were:

a) Refused to take him to hospital immediately taking him home instead;

b) Pressured him and the other workers present when he was injured not to tell anyone including RBL about the injury because "it would look bad on all of us" and "we would lose our jobs";

c) Told the hospital he had hurt himself at home frying chips;

d) Promised Mr Arora "as long as I went along with the story he would look after me and make sure that I was provided for until I was fully fit and able to work again and that I would not lose my job"; and

e) Continued to visit him to reinforce his silence.

[73] There is evidence Mr Arora was taken to hospital within a very short time of the injury occurring. His evidence was the injury occurred at 11:50 pm. He spent 12-20 minutes cooling the injury in a bucket of water. He was admitted to the Emergency Department at Middlemore Hospital 15 km away and 15-20 minutes by car at 00.30 AM. There was little (if any) time for him to be taken home.

[74] Mr Arora at the time lived within 5 minutes of the hospital. If he had been taken home it was for a very short time before being admitted. This may have occurred because RK did not accompany him to the hospital and returned to work according to a co-workers statement about the night. From the hospital records another flatmate was with Mr Arora at the hospital.

[75] There is nothing to suggest any nefarious intent in the events leading to his admission to hospital. RK as manager would have been required to return and lock up the KFC at the end of the shift. Getting another flatmate to accompany him to hospital would not be unexpected. However RK did not tell the hospital Mr Arora had been hurt at home while frying. It is more likely Mr Arora or the flatmate whom told the hospital because this explanation for the burn is noted on his admission forms and within the hospital records.

[76] These hospital records remain unchanged today. Mr Arora also applied for and continues to receive accident compensation on the basis his burn did not occur at work.[15] At hearing he confirmed he never corrected this with ACC.

[77] Notes from interviews by Jennifer Buddle General Manager, People & Performance, with his co-workers about the evening were produced by consent.[16] They show a different picture of what was said by RK and later by Mr Arora about his injury.

[78] One worker recalls RK telling her upon his return from the hospital that Mr Arora "had told [RK] that he didn't want us talking about it with the rest of our colleagues." When she later asks Mr Arora about the injury he tells her he "didn't want to talk about it." She did not know about a story the injury had occurred at home.

[79] When the same worker was asked by Ms Buddle "Were you ever threatened about keeping it quiet?" She replies "No I was just trying to be respectful about [Mr Arora] asking us to keep it quiet. I thought he was embarrassed about what had happened." She did not recall RK telling her it would look bad or she would lose her job if she told.

[80] Another worker confirmed he had been told to say the injury had happened at home by RK. He explains RK "would have told me that so we could be safe. So it doesn't have to be an incident." When asked why an incident would be bad, he replies "because Rohit was probably not doing the procedure" inferring the reason for not telling was to protect Mr Arora not the co-workers.

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15 Sworn BOE J Buddle dated 16 August 2018 at paragraphs 30 and 31 and documents 12 and 13.

16 Document 23 ABD.

[81] The evidence suggests RK and Mr Arora were both actively cultivating the falsehood that the injury had occurred at home – RK with co-workers and Mr Arora with health professionals and ACC. They both ask co-workers not to talk about the injury. The evidence does not suggest there was a culture of fear or that his co-workers thought they would lose their jobs if they told.

[82] At hearing Mr Arora admitted to falsification of his training records. He was presented with documents he had signed stating he had undertaken training including cleaning the area where he was hurt. Mr Arora confirmed he had signed off these documents including a "Back of House training skills" that confirmed he had been observed cleaning the cookers and fryers[17] but he now states this had never occurred. He blamed RK giving him documents to sign without complying with RBLs requirements. Mr Arora also signed the work health safety policy that required he "report all injuries immediately (within 24 hours) to their manager"[18].

[83] There is a general legal principle that no act done by an agent in excess of his or her authority is binding on the principal where the affected person has notice that in doing the act the agent is exceeding their authority.[19] The signing and completion of training and acknowledgement of the work health safety policy were requirements of RBL. Mr Arora was required to complete the training and to understand and adhere to its policies and procedures under clause 23 of the CEA. RK's alleged actions requiring Mr Arora sign but not complete training nor read policies cannot have been authorised by RBL.

[84] Mr Arora must have been aware he was being asked to sign RBLs documents he had not read. He had sufficient intellect and English language proficiency to understand the possible problems this could create for RBL and himself if discovered. He was studying towards a tertiary diploma in computer engineering. There was every reason to assume he was aware RK's actions were not on RBLs behalf in the circumstances.

[85] Mr Arora had also admitted SS's abortion affected his state of mind that day at work. A letter he wrote to Immigration in November 2016 stated he would "zone out" on occasion and "as a direct consequence of the abortion I seriously burnt myself

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17 RBD tab 8.
18 RBD tab 10.
19 *Te Rakau o Te Wao Tapu Trust v Hohepa-Smale* [2013] NZEmpC 73 at 14.

at work [the] same day."[20] This admission suggested his distraction caused the incident, not any lack of training.

[86] Ms Buddle's evidence confirmed no disciplinary action had been taken regarding previous reported burn injuries at KFC Papakura while RK was the store manager.[21] This presupposes there is no conduct of concern. A different outcome may have occurred here if a health and safety investigation had uncovered Mr Arora's lack of training and falsification of documents.

[87] Falsification of documents was serious misconduct. The CEA's definition of serious misconduct included "falsification, misreporting or being a party to falsification, of any Employer document or record (whether electronic or otherwise) ..."[22] This misconduct could have led to Mr Arora's and RKs dismissal. This indicated RK and Mr Arora's own self-interest in preserving their employment was the motivating factor in not disclosing the injury. It could also remove reinstatement as a remedy and/or lead to the reduction of any other remedies.

[88] Finally RK was not summonsed to give evidence. Mr Arora was given the opportunity to summons RK before the end of the hearing. His Counsel declined to do so. It is understood RK may now be a hostile witness for Mr Arora.

[89] Given the above RK's actions do not give rise to exceptional circumstances.

Was Mr Arora suffering from post-traumatic stress disorder and did this give rise to an exceptional circumstance?

[90] Mr Arora relies upon the testimony of an expert witness, Dr John McEwan, for the diagnosis of post-traumatic stress disorder (PTSD) and its connection to his injury on 17 December 2015 and the circumstances of his workplace.

Expert evidence

[91] Expert evidence has always been subject to common law rules regarding its admissibility. These common law rules have now been codified in the Evidence Act 2006 (EA). Sections 25 and 26 of the EA sets out the basis for admissibility of expert evidence:

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20 Affidavit R Arora sworn 22 November 2017 Exhibit S.
21 Sworn BOE J Buddle dated 16 August 2018 at paragraphs 24 and document 10A.
22 RBD tab 3 p26.

25 Admissibility of expert opinion evidence

(1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

(2) An opinion by an expert is not inadmissible simply because it is about—
(a) an ultimate issue to be determined in a proceeding; or
(b) a matter of common knowledge.

(3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding.

…

26 Conduct of experts in civil proceedings

(1) In a civil proceeding, experts are to conduct themselves in preparing and giving expert evidence in accordance with the applicable rules of court relating to the conduct of experts.

(2) The expert evidence of an expert who has not complied with rules of court of the kind specified in subsection (1) may be given only with the permission of the Judge.

[92] The relevant Code of Conduct for Expert Witnesses is set out in Schedule 4 of the High Court Rules below:

Schedule 4
Code of conduct for expert witnesses

Duty to the court
1 An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert's area of expertise.
2 An expert witness is not an advocate for the party who engages the witness.
[2A If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.]
[2B In subclause 2A, conditional fee agreement has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.]

Evidence of expert witness
3 In any evidence given by an expert witness, the expert witness must—
(a) acknowledge that the expert witness has read this code of conduct and agrees to comply with it:
(b) state the expert witness' qualifications as an expert:
(c) state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:
(d) state the facts and assumptions on which the opinions of the expert witness are based:
(e) state the reasons for the opinions given by the expert witness:

> (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
> (g) describe any examinations, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
> 4 If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
> 5 If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

[93] Applying the above evidential rules, there are issues about the admissibility of Dr McEwan's expert evidence in this proceeding.

Was this evidence "substantially helpful"?

[94] The overriding duty of an expert witness is to assist the Authority "impartially on relevant matters". Issues of impartiality have arisen because Dr McEwan is providing Mr Arora with ongoing counselling. Mr Arora is his patient. There was potential for Dr McEwan to become an advocate for Mr Arora.

[95] His evidence also purported to provide a diagnosis of post- traumatic stress disorder (PTSD). There are fundamental problems with this diagnosis. Dr McEwan does not hold any medical degree. He is a specialist counsellor with a doctorate in theology. Diagnosis of PTSD is usually given by a psychiatrist. Both Mr Arora and Dr McEwan accepted there has not been a medical diagnosis of PTSD. Dr McEwan also accepted he was not qualified to give a medical diagnosis. His diagnosis of PTSD does not contain any qualification about his ability to give that evidence.

[96] The importance of medical diagnosis is to provide an objective assessment of Mr Arora's physical and mental capability to raise a grievance within time. A psychiatrist would have reviewed all of the evidence in this proceeding and Mr Arora's medical notes. This would have enabled them to identify or exclude unrelated physical or psychological reasons for his behaviour. They could have assisted me with their views on Mr Arora's capabilities given his activities during the time limitation period.

[97] Dr McEwan admitted he had not seen all of the evidence in this matter, including any of the Respondents. He had also not viewed all of Mr Arora's medical notes other than those attached to the affidavit of Dr Patrick Alley. Dr Alley's

evidence and the attached medical notes are limited to supporting his evidence the injury was sustained by immersion in hot liquid.

[98] As a consequence Dr McEwan could not provide the Authority with an unqualified opinion about Mr Arora's PTSD diagnosis including its causes and effect upon his ability to raise a grievance because he had insufficient material to do so.

[99] The lack of material and failure to interview Mr Arora undermined the conclusions in his witness statement dated 19 October 2017 that Mr Arora would not have been capable of notifying RBL of what happened to him "until the time that he did". This finding was not supported by any direct evidence from Mr Arora. This is because he had not at that stage met with or interviewed Mr Arora. Further at hearing he admitted he still did not know the date Mr Arora had in fact raised the grievance.

[100] When questioned why he did not interview Mr Arora at the time, he referred to time pressures and the need to prevent injustice. This again indicates he is not giving impartial evidence and is becoming an advocate for Mr Arora.

[101] When asked why the applicant did not seek a psychiatrist's diagnosis he stated there was insufficient money to do so. Further when questioned about payment for his services, he advised he would receive payment only if successful. This should have been disclosed in his evidence in accordance with the above Code but was not.

[102] Even if PTSD was medically diagnosed, Dr McEwan accepted under examination that does not prevent the raising of a personal grievance within the time limitation period. Anecdotally many applicants come before the Authority suffering from PTSD but able to raise grievances within time.

[103] Dr McEwan accepted it was the surrounding circumstances that may give rise to a reluctance to raise a grievance. The surrounding issues he identified as causing the failure to raise the grievance were a culture of fear in this workplace and RKs actions. Given he did not view substantial parts of the evidence, I do not accept his conclusions reached about these matters.

[104] He was unaware of other more plausible reasons for non-disclosure such as Mr Arora's falsification of training records. This was serious misconduct that could have led to dismissal. It provided an alternative explanation for Mr Arora's reticence to raise a personal grievance.

[105] Dr McEwan obliquely refers to SS's actions including her role in his imprisonment but does not identify this as having any causal link to Mr Arora's stress and/or reticence to raise a grievance. There was evidence of allegations she was a financial drain and this was why he needed to work.

[106] Mr Arora also undertook various activities that suggested he had greater capability to possibly raise a grievance. Dr McEwan was also unaware of this evidence.

[107] In these circumstances Dr McEwan's evidence was not substantially helpful and I set it to one side.

Was Mr Arora so affected or traumatised by the injury that he was unable to raise the grievance within the time limitation period?

[108] Mr Arora engaged in various activities in January/February 2016 and immediately afterwards that showed he was capable of raising a grievance within the 90 day time limitation period. He moved houses from living with RK to SS. He engaged an immigration lawyer to change his VISA.

[109] More importantly he emailed the Union on 23 March 2016 seeking a transfer and advising his left leg was burned on or about 17 December 2015. The Union official confirmed under oath that he told the Union that the burn had occurred at work.

[110] There was also evidence suggesting RKs influence had significantly dwindled both during the period of time limitation and subsequently. RK left KFC Papakura in December 2015. Mr Arora became dissatisfied with RK and moved in with SS in January 2016.[23] The last time he could clearly recollect seeing RK was in April 2016. Before his incarceration he had had no contact with RK.[24]

[111] There was medical evidence showing Mr Arora was physically well enough to return to work and "properly consider" raising a grievance. The medical certificates provided to RBL show he was fit to return to work on 10 February 2016. The Registrar of plastic surgery at the hospital provided an ACC certificate on 12 January 2016 for Mr Arora to start work in the next 2-3 weeks. His occupational therapy

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23 ABD p54 Affidavit R Arora 30 August 2017 at 25.

24 Witness statement R Arora 24 October 2017 at 12.

records show he reported nil pain by 10 February 2016[25] and nil pain and nil functional limitations and had returned to full work and study by 12 April 2016.[26] There is no record of Mr Arora raising any complaint about his injury impeding his wellbeing at work prior to 7 February 2017.

[112] I am not persuaded Mr Arora was so traumatised by his injury that he was incapable of raising a personal grievance by 17 March 2016.

Did his cultural circumstances prevent Mr Arora from raising a personal grievance?

[113] Both parties accept that culture may be an exceptional circumstance for the purposes of granting leave to raise a grievance out of time. They disagree whether this is the case here.

[114] There are indications that by 2038 New Zealand will become even more ethnically diverse. Statistics New Zealand projects in 2038 there will be a decrease in the "European or other" ethnic group from 75% to 66% and corresponding increases in all other ethnicities – Maori rising to 18 percent, Asian (including Chinese and Indian ethnicities) rising to 22 percent, and Pacifica rising to 10.2 percent.[27] Nearly half of New Zealand's population is projected to be of non-European ethnicity.

[115] There is a corresponding projected rise in the employment of Asian ethnicities. Statistics New Zealand recorded in September 2018 that 395,300 Asian people (including Indian ethnicity) were employed. The working-age population of Asian people also increased in the year ended September 2018 (up 10.6 percent) to reach 573,600.[28]

Law

[116] The Supreme Court has considered the effect of cultural practices upon the law[29]. The Court identified factors for an applicant seeking to rely upon cultural

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25 Applicants Bundle of Documents (ABD) at p251.
26 Applicants Bundle of Documents (ABD) at p246 ff.
27 Statistics New Zealand website https://www.stats.govt.nz/news/ethnic-populations-projected-to-grow-across-new-zealand.
28 Statistics New Zealand website https://www.stats.govt.nz/information-releases/labour-market-statistics-september-2018-quarter.
29 *Takamore v Clark* [2012] NZSC at [95] per Elias CJ.

practices. Applying that dicta to this case bearing in mind s114 of the Act, results in a four stepped inquiry for determining culture as an exceptional circumstance:

a) What are the custom or cultural values relevant to this determination?

b) Is the custom contrary to law? The law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law.

c) Was the application of the custom or cultural value here an exceptional circumstance?

d) Is it just to grant leave?

What were the relevant custom or cultural values?

[117] Mr Arora provided evidence from Parminder Singh about Indian culture and the impact upon migrants generally.

[118] Mr Singh gave evidence based upon his personal knowledge about the culture of young Indian migrants like Mr Arora from the Punjab region in India. He believed their ethnicity, birthplace, religion and language placed value upon emotional bonds and relationships above all else. This included employment relationships. Indians preferred long-term associations with an employer. To maintain the relationship they are often compliant and seek to keep any areas of concern private to preserve group harmony and ensure no one loses face.

[119] Placidity is also valued. Feelings of discomfort are masked in silence to avoid embarrassment of self or others. When ill at ease, Indians observe in silence while inwardly determining what is expected of them by their workplace managers. He also referred to Mr Arora as being of a low caste making him more likely to behave submissively at work.

[120] Mr Singh highlighted the differences between Indian culture and the cultural norms seen in New Zealand workplaces:

> The sense of agreement and cooperation with an authority figure is strong and all-important to these [Indian] people and is a value that is often at odds with the cultural norms seen in the majority of New Zealand workplaces.

[121] As a result he believed young Indians like Mr Arora were less likely to complain about unjustified actions within their workplace. He accepted there were justifiable limitations upon this cultural practice. It would not justify murder or suicide. However lesser forms of what may appear to others as unwise or dishonest activity maybe permissible.

[122] Mr Singh confirmed there were few (if any) accessible resources available to Indian ethnic populations (and possibly other ethnic populations) about employment law written in their own language and taking account of these cultural norms.

Was the custom or practice contrary to law?

[123] The Act does not specify culture as an exceptional circumstance in s115. However the list of exceptional circumstances set out therein are not exhaustive. The Act also does not prohibit culture being an exceptional circumstance.

[124] This is consistent with the New Zealand Bill of Rights Act 1990. Section 20 affirms the rights of ethnicities to enjoy and practice their culture and language generally. This right extends to the workplace.

[125] There have been relatively few cases in this jurisdiction that have considered culture as an exceptional circumstance. A decision of the Employment Tribunal found "the cultural and religious climate" was an exceptional circumstance pursuant to s33 of the Employment Contracts Act 1991.[30]

[126] The law does (and has) allowed for culture as an exceptional circumstance.

Was Mr Arora's culture an exceptional circumstance here?

[127] Mr Singh had not read any of the evidence filed in this proceeding. He did not have a full picture of Mr Arora's actions immediately prior to and following the injury as a result. Therefore he could not exclude with any certainty the possibility Mr Arora was acting in his own self-interest by not reporting the injury as opposed to in accordance with a cultural norm.

[128] While there may be reluctance for Indian employees to complain, there was evidence Mr Arora was not reluctant about coming forward about his concerns. In

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30 *Neonakis v Greek Orthodox Community of Wellington & Suburbs (Inc)* [1992] 2 ERNZ 494.

December 2015 he blames his shift supervisor for the alleged theft of a drink during a disciplinary investigation.

[129] By March 2016 he was capable of telling his Union about his injury at work as the basis for a transfer to another store.

[130] By May 2016 he is refusing to sign a document called "coaching discussions" regarding his inadequate performance and walking out of the meeting. These actions are inconsistent with a cultural norm of placidity and co-operation.

[131] Anecdotally I am also aware that Indian applicants have and do successfully raise grievances within the time limitation period – even in circumstances where their employer was Indian. There is little to show Mr Arora's culture is any barrier to his raising concerns.

[132] I am not persuaded Mr Arora's culture was an exceptional circumstance here. There is no need to consider the fourth step as a consequence.

Did Mr Arora's imprisonment give rise to an exceptional circumstance?

[133] The fact of his imprisonment for reasons unrelated to the workplace is accepted.

[134] I do not agree the fact of imprisonment prevents the prisoner from contacting anyone outside. Prisoners are able to send letters paid for by the Department of Corrections.[31] Mr Arora was aware of this fact because he sent a letter to Immigration in November 2016. He also had access to a lawyer albeit a criminal barrister. He could have asked her to contact his employer again but did not.

[135] The Authority has rejected imprisonment as a special circumstance.[32] I agree with this dicta. Mr Arora could have made arrangements to raise his grievance of unjustified disadvantage prior to imprisonment. He could have contacted his employer but failed to do so.

[136] I do not accept the fact of his imprisonment gives rise to any exceptional circumstance.

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31 See Department for Corrections website internet and mail https:// www.corrections.govt.nz /working_with_offenders/prison_sentences/being_in_prison/internet_and_mail.html.

32 *Williams v PPCS Belfast* Employment Relations Authority, Christchurch, CA 17/08 20 February 2008.

[137] There is no need to consider whether it is just to grant leave given there are no exceptional circumstances found.

[138] Therefore I decline to grant leave to raise the personal grievances out of time. The personal grievance application is dismissed. Costs reserved.

T G Tetitaha
Member of the Employment Relations Authority