

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 304
5450095

BETWEEN SYLVIA MARY BAYNES
Applicant

A N D IAG NEW ZEALAND
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Kylie Dunn and Gillian Service, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 30 September 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Baynes) was employed by State Insurance, a subsidiary of the respondent (IAG) until she was dismissed for serious misconduct on 11 March 2011.

[2] A personal grievance in respect of that dismissal was not raised until 16 August 2011, outside the 90 day justiciable period. IAG did not consent to the late raising of the personal grievance then; nor has it changed its position on the matter since.

[3] Then, on 26 February 2014, Ms Baynes filed her Statement of Problem in the Authority which seeks to persevere with the claim for unjustified dismissal on the one hand but also raises bullying allegations which were not part of the original personal grievance. Accordingly, and for the avoidance of doubt, IAG does not consent to any additional grievance for unjustified disadvantage being raised now because that too is well out of time.

[4] At the time of the events leading up to the termination of Ms Baynes' employment, she was represented throughout by the Public Service Association (PSA). PSA was involved in the disciplinary process that led to Ms Baynes' dismissal for serious misconduct and if the PSA had any concerns about the process used by IAG leading up to the dismissal, it never raised any with the employer.

[5] Subsequently, PSA asked IAG to allow Ms Baynes to resign and IAG acceded to that request, advising PSA of its willingness to accept that change but PSA never responded, so the dismissal stood.

[6] Then on 16 August 2011, PSA purported to raise a personal grievance concerned exclusively with the dismissal and IAG resisted that on the footing it was out of time and refused to consent to the matter proceeding out of time.

[7] In respect to the bullying issue which is now referred to in Ms Baynes' Statement of Problem in the Authority, I note that Ms Baynes caused the then Department of Labour to investigate her allegation of bullying at the State Insurance call centre where she worked and the Department of Labour conducted its investigation and found no remedial action need be taken.

[8] The issue for determination in the present case is whether Ms Baynes has established that there are exceptional circumstances which justify the raising of her personal grievances out of time and whether it is just to allow those grievances to proceed: s.114(4) of the Employment Relations Act 2000 (the Act),

[9] At a telephone conference that I convened with the parties on 4 August 2015, it was agreed that the Authority would consider the question whether Ms Baynes should be allowed to proceed with her personal grievance and that this consideration would be done on the papers.

[10] For the sake of completeness, I observe that the reason this matter has not been addressed until now is that Ms Baynes underwent successive cataract operations on both eyes and also had a period overseas and accordingly the Authority agreed to tend her file until she was able to deal with the matter.

[11] In the run-up to this determination, the parties have attempted unsuccessfully to resolve matters in mediation, on two separate occasions. The matter now falls for determination by the Authority.

Issues

[12] The only issue in the present case is whether Ms Baynes should be granted the opportunity to raise one or both of her personal grievances out of time.

[13] Because those two grievances were raised at different times, it seems appropriate to deal with them separately.

The first personal grievance

[14] It is common ground that the first personal grievance was raised on 16 August 2011, that is some five months after the dismissal of Ms Baynes for serious misconduct on 11 March 2011. Contemporaneously with the raising of that grievance, IAG indicated to the PSA (which raised the grievance on Ms Baynes' behalf) that it did not consent to the grievance being raised out of time and since that personal grievance was raised and IAG responded to it refusing to entertain it, there has been no further engagement between the parties until the filing of the Statement of Problem on 26 February 2014.

[15] Moreover, the application for that personal grievance to be considered out of time was further delayed beyond the filing of the Statement of Problem by reason of Ms Baynes' ill health (two cataract operations) and her overseas travel which meant that the present application was not before the Authority until August of 2015.

[16] The law to be applied in this matter is clear. There are two limbs of the test set out in s.114(4) of the Act. That two limb test requires first the establishment of exceptional circumstances by the applicant and second the establishing of the proposition that the granting of the leave requested would be just.

[17] Ms Baynes must satisfy both limbs of the test in order to succeed.

[18] It is apparent on the evidence before me that Ms Baynes relies on the alleged failure of her representative (effectively the PSA) to raise the grievance on her behalf, she having made reasonable arrangements for the PSA so to do.

[19] As IAG observes in its submissions, Judge Colgan (as he then was) remarked in *Telecom New Zealand v. Morgan* [2004] 2 ERNZ 9 that the legislature had established "*a high threshold*" for raising a personal grievance out of time.

[20] Given that Ms Baynes must first establish that there were exceptional circumstances, I consider that aspect next. It is clear from decided cases that exceptional must be taken to mean unusual and cannot be mitigated by the Authority's equity and good conscience jurisdiction.

[21] Moreover, there must be a causative link between the unusual or exceptional circumstance and the failure to raise the grievance on time.

[22] The difficulty with the present application in my view is not so much the gap between the dismissal and the raising of the grievance out of time but the complete absence of any explanation as to why the matter was lost sight of after that date and not actively prosecuted.

[23] Put another way, even if I were to be inclined to allow some latitude to Ms Baynes for her obvious dissatisfaction with the PSA's behaviour in managing her claim against IAG, that still does not overcome the obvious deficit in prosecuting the matter after IAG refused its consent to allow the out of time grievance to proceed. After all, if Ms Baynes was dissatisfied with the PSA's representation of her, as appears to be the case, once the PSA had failed to get IAG to consider the out of time personal grievance in August 2011, one might have thought that Ms Baynes would immediately seek to advance the matter herself, but in fact she took some 2½ years to file a Statement of Problem in the Authority after IAG had refused to consider her late grievance and then, no doubt for understandable reasons to do with her health, did not undertake the process in the Authority with any degree of expedition either.

[24] There is nothing before me that suggests that Ms Baynes does not understand the law relating to the filing of personal grievances and the primacy of the so-called 90 day rule. It is apparent from Ms Baynes' submission that she engaged with her PSA organiser on 10 May 2011 and amongst other things, provided to that individual information concerning her case and nothing in the material Ms Baynes has provided to me suggests that she was not very clear about the legal requirement to deal with the matter within 90 days.

[25] It is also clear from the material before me that Ms Baynes says she first spoke to the PSA in April 2011, that is the month after she was dismissed. There is email traffic between Ms Baynes and PSA to support that contention.

[26] A statement in the collective employment agreement which covered Ms Baynes' employment emphasizes the 90 day justiciable period, if there were any doubt in the mind of either PSA or Ms Baynes. When time was to run from ought not to have been in issue; PSA acted for Ms Baynes in the disciplinary process up to and including the dismissal.

[27] For instance, it seems clear from the information before me that the PSA raised no objection to the process that IAG undertook in dismissing Ms Baynes and that seems inconsistent with the subsequent late raising of the grievance by PSA. Moreover, it is difficult to understand why IAG got no response to its offer to withdraw the dismissal and allow Ms Baynes to resign, an offer which IAG made in response to a suggestion from PSA.

[28] To be fair to Ms Baynes, I am satisfied she did remind PSA of the deadline loaming for the grievance to be raised. She says she did this not once but twice; certainly there is evidence before me of one such occasion, an email dated 5 June 2011.

[29] Ms Baynes also says that the PSA refused her instruction to raise a personal grievance, which would have been, at that stage, just out of time, and it seems the grievance was eventually raised by action of the PSA national office, notwithstanding Ms Baynes' allegation that PSA National Office lost some critical parts of her file.

[30] Then, in the course of a series of engagements with PSA in the Disputes Tribunal where Ms Bayne proceeded against the union apparently for breach of the Consumer Guarantees Act, Ms Baynes refers to an opinion given ostensibly to PSA by a senior employment lawyer dated 9 December 2011 which suggested that there were reasonable prospects of leave being granted.

[31] But even if I were to accept Ms Baynes' implicit submission that the PSA has not served her interests well in this matter, that still does not explain why Ms Baynes herself, having had what in her terms was an unsatisfactory experience with a representative, did not promptly raise the matter with the IAG or file the matter in the Authority then. Instead, she waited fully 2½ years to file a Statement of Problem in the Authority and then did not progress that claim urgently thereafter.

[32] I accept that part of the explanation for that delay is Ms Baynes' ill health which she documents in her submission but my conclusion is that if she had put the

matter before the Authority in 2011, and sought our intervention then, my conclusion might well have been different.

[33] In all the circumstances, I am not persuaded that exceptional circumstances exist to allow the raising of the initial personal grievance out of time. I understand that Ms Baynes has a strong sense of injustice but the opportunity ought to have been taken earlier to address her issues, either direct to IAG or by filing in the Authority. I have been as clear as I could be that she needs to satisfy the high hurdle that she is entitled to raise her grievance out of time first before she can address the substance of it and I have not been persuaded she has satisfied that test, although I have great sympathy for her position.

[34] There is insufficient material before me to ground any basis for the existence of exceptional circumstances, especially after the union's failure to get IAG to consent to the raising of the grievance out of time when, given Ms Baynes' evident unhappiness with PSA, I would have expected her to vigorously pursue her rights then rather than wait 2½ years to raise the matter.

[35] In case those conclusions are mistaken, I turn now to consider the second limb of the test to raise a grievance out of time and I conclude that the factors I must take into account here in assessing the overall justice of the case are matters including the extent of the delay, the reasons for the delay, the strength of the claim, if that can be ascertained, and any prejudice to the respondent: *Davies v. Dove Hawke's Bay Incorporated* [2013] NZEmpC 83.

[36] The delay is exceptionally long in seeking to raise the grievance. The initial attempt to raise it was out of time and was rejected by IAG and no further steps were taken until 2½ years after those events. As I observed in *Aberdeen v. Air New Zealand Ltd* [2011] NZERA Christchurch 48:

... the longer the delay continues, the more the prejudice to the employer and the more likely it was that it would be particularly difficult for [the employer] to either provide evidence about the matters complained of or take other appropriate steps to address or resolve the grievance raised.

[37] As submissions for IAG make clear, it is now 4½ years since Ms Baynes' dismissal and it is difficult to see how the employer could properly respond to the

grievance after that length of time, either to seek to resolve the grievance or to defend it.

[38] The passage of time makes a resolution of the grievance challenging if not impossible and an alternative decision to resist the grievance would itself be challenging because of the possibility that potential witnesses were no longer available, could not be found, or indeed had forgotten significant aspects of the matter.

[39] I observe in passing that I do not agree with one submission made for IAG to the effect that Ms Baynes failed to prosecute the grievance once it was raised. The grievance was never raised. The factual position is very clear that the PSA attempted to raise a grievance on behalf of Ms Baynes in August 2011 and IAG refused to allow the grievance to proceed. It follows that there was no grievance raised at that time and the first attempt to raise it **again** was with the Statement of Problem in February 2014.

[40] I do not consider I can make any reasonable judgment about the strength of Ms Baynes' case that underlies this whole matter; there is insufficient material before me for me to make any proper assessment.

[41] I am, however, satisfied that the prejudice to IAG is so great as to preclude any possibility that the overall justice of the case would allow the personal grievance to be raised at this late stage, some 4½ years after the dismissal.

The second grievance

[42] I do not propose to repeat the same analysis in respect to the second grievance. The second grievance concerns an apparent allegation of bullying which properly speaking would be an unjustified disadvantage grievance. This grievance is raised for the first time in Ms Baynes' Statement of Problem filed in the Authority on 26 February 2014 and supported by a significant amount of material that has been made available to the Authority.

[43] There is no material whatever before me which seeks to explain why it has taken so long for this allegation to be put before the employer. It is 4½ years since the dismissal and there simply is no submission that helps me understand why this particular aspect is only raised now. It is apparent on the material I have considered

relative to the original personal grievance that that was concerned exclusively with an allegation of unjustified dismissal.

[44] Ms Baynes says she instructed PSA to raise the bullying allegations at the time but it is clear they did not. Given Ms Baynes' obvious intelligence I do not understand why she would not have pursued this matter vigorously at the time rather than let it languish for so long.

[45] So for the first time, 4½ years after the dismissal, IAG is being confronted with allegations that there was allegedly bullying in its workplace some years ago.

[46] Even if there were a basis on which I could understand why it has taken 4½ years for that matter to be raised, it is still unjust to allow the grievance to proceed because of the evident prejudice to IAG in trying to respond appropriately to the matter.

[47] In this particular case, as well as concluding that the delay is even more unreasonable than was the case with the first grievance (where at least there had been some intimation earlier that a grievance was in contemplation), here the ascertainable strength of the grievance can be commented upon.

[48] Ms Baynes caused the then Department of Labour to investigate the workplace in respect of her claim of bullying (now raised formally for the first time) and the Department of Labour concluded that there was no remedial action required by IAG.

[49] Ms Baynes maintains that she was advised that all the then Department of Labour would do in such matters is ascertain if the employer under investigation had health and safety policies and procedures in place. I must say I doubt that submission; I should have thought the then Department would do a thorough, workmanlike job of investigating if there were any cause for concern although the Department may not have investigated any allegations particular to Ms Baynes.

Determination

[50] Ms Baynes has not provided me with any basis on which I can legally contemplate granting her the relief that she seeks, namely the right to raise two personal grievances out of time.

[51] I have not been satisfied that there is any exceptional circumstance in relation to either grievance which would justify their proceeding out of time and I have also concluded that it would be unjust to allow either grievance to proceed because in both cases, the delay is unreasonable and the prejudice to IAG significant while in respect of the bullying allegation, it would appear to have limited ability to succeed if a contemporaneous investigation by the then Department of Labour found no evidence of the behaviour complained of.

Costs

[52] IAG has been completely successful in this matter and in principle is entitled to have Ms Baynes contribute to its costs. In the circumstances of the case, I would urge IAG to not pursue costs, but in the event that that view is not accepted, and the parties are unable to arrange costs between themselves, IAG is to file submissions and Ms Baynes is to have 14 days thereafter to file submissions in reply.

James Crichton
Member of the Employment Relations Authority