

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 345
3050652

BETWEEN TUI LISA EILEEN
BROUGHTON
Applicant

AND AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Jenni Maree-Trotman

Representatives: Keshila Fayen, advocate for the Applicant
Max Williams, counsel the Respondent

Investigation Meeting: On the papers

Submissions and further Information received: 23, 24 April & 20 May 2019 from the Applicant
8 May 2019 from the Respondent

Date of Determination: 11 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether or not Tui Broughton raised her personal grievance with AFFCO New Zealand Limited (AFFCO), within 90 days of the grievance occurring or coming to her notice, whichever is the later, in accordance with the requirements of s 114(1) of the Employment Relations Act 2000 (the Act).

[2] AFFCO denies Ms Broughton raised her personal grievance within the requisite 90-day period. It does not consent to a personal grievance being raised outside the time period specified in the Act and does not accept that Ms Broughton's delay in raising her grievance was caused by exceptional circumstances.

The issues

[3] The issues requiring investigation and determination are:

- a. Was Ms Broughton's personal grievance for unjustified dismissal raised within the statutory timeframe?
- b. If not, should leave be granted to Ms Broughton to file her personal grievance out of time?

[4] It is noted that Ms Broughton had withdrawn her claim for unjustified disadvantage by the time this determination was issued.

The process

[5] With the parties' consent this investigation was held on the papers. To assist with this process the Authority was provided with an affidavit from Ms Broughton and an affidavit from Yvonne Bennett. Ms Bennett was AFFCO Horotiu's HR/Health and Safety Co-Ordinator at material times. In addition, the parties each filed submissions.

[6] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

Background

[7] Ms Broughton commenced employment with AFFCO Horotiu in November 2016 as a process worker.

[8] On or about 10 May 2017, Ms Broughton injured her finger and required 3 days off work. A medical certificate was provided to AFFCO. After returning to work for a short period she provided AFFCO with one or more additional medical certificates.

[9] On 23 and 27 May 2017 Ms Bennett, phoned Ms Broughton. During these phone conversations Ms Bennett reminded Ms Broughton that she needed to keep her medical certificates up to date.

[10] By 6 June 2017 Ms Bennett had not received Ms Broughton's medical certificate so she phoned her. The phone number she used was the same as that used when she had spoken to Ms Broughton earlier, was the number recorded on her employment file, and was the same number she had used to phone and text in sick to work. There was no answer so she left a message for her to call her about the medical certificate. Ms Broughton did not respond.

[11] On 12 June 2017 AFFCO sent Ms Bennett a letter (the first abandonment letter) advising:

This letter is to advise that you have been absent from work for more than 3 working days without contact and that your employment is currently being reviewed in accordance with the Employment Relations Act 2000.

You need to contact us urgently to explain your absence; failing to do so will result in your employment being terminated.

Failure to provide us with an acceptable explanation for your absence will also result in your employment being terminated.

If you have not been in touch with us within 2 days of this letter being sent, your employment will be terminated without any further correspondence. Any money owed to you after any deductions have been made for gear not returned or money owed to the Company, will be deposited in to your bank account.

Should you make contact within 2 days we will consider your explanation and after due consideration advise the outcome in relation to the termination of your employment.

[12] On 13 and 15 June 2017, Ms Bennett tried phoning Ms Broughton again. Her diary notes show she left messages asking Ms Broughton to contact her. In her phone message of 15 June she also referred to the first abandonment letter and told Ms Broughton she needed to provide her medical certificate. Ms Broughton did not respond.

[13] On 26 and 28 June 2017 Ms Bennett again tried phoning Ms Broughton. Her diary notes show she left messages noting Ms Broughton was "AWOL" and asking her to phone her urgently. Ms Broughton did not respond.

[14] On 30 June 2017 AFFCO sent Ms Bennett a second abandonment letter. The content mirrored that of the first abandonment letter. Ms Broughton did not respond.

[15] On that same day Leanore Bullen, the WorkAon ACC Case Manager handling Ms Broughton's injury, contacted Ms Bennett. The essence of this email was that ACC, who had been managing Ms Broughton's claim for a non-work related injury, had suspended ongoing cover and compensation as it had found her symptoms related to a work injury. Ms Bullen advised that she wanted to discuss this with Ms Bennett at their meeting the following week.

[16] Ms Bullen also spoke with Ms Broughton. Her claim notes record that she advised her that she was meeting with Ms Bennett the following week to discuss the next step. She indicated that this may involve "light duties while investigation is pending".

[17] On 6 July 2017 a meeting was convened between Ms Bullen and Ms Bennett. At this meeting the parties discussed Ms Broughton's injury and her returning to work. Ms Bennett mentioned the abandonment letter and indicated that she would check with HR regarding Ms Broughton's employment status and would let Ms Bullen know.

[18] On 13 July 2017 Ms Bennett phoned Ms Broughton. She did not answer so she left a message asking her to urgently contact her as she had received "no answer from AWOL". She went on to ask her for her bank account number as monies were owing to her. Ms Broughton did not respond.

[19] On 14 July 2017, Ms Bullen communicated with Ms Broughton about arranging a meeting with Ms Bennett to discuss a return to work undertaking light duties while AFFCO/WorkAon were investigating her injury claim.

[20] On 17 July 2017 Ms Bullen emailed Ms Bennett to advise that Ms Broughton had been issued with a light duties medical certificate. She asked if AFFCO was able to provide her with light duties.

[21] Within 30 minutes of receipt of that email, Ms Bennett phoned Ms Broughton again. She did not answer so she left a message asking her to urgently contact her. Ms Broughton did not respond.

[22] That night Ms Bennett emailed Ms Bullen to advise:

To my knowledge Tui was sent an abandonment of employment letter as she had not updated Affco for over a month.

I knew this claim was going to end back up in Affco's lap, which is why I didn't want to accept the original claim.

[23] On 18 July 2017 Ms Bullen responded:

Could you please confirm for sure the status of Tui's employment with Affco, when we last spoke you were going to double check with HR what her employment status was. In Tui's communications with me she has spoken as if there was no change to her employment with Affco (and any advice to the contrary to her would need to come from Affco not myself). If Tui's employment has been terminated, could you please confirm that she knows this and what date her employment ended. I will be back in the office tomorrow and will be able to talk further about this case.

[24] On 21 July 2017 Ms Bullen emailed Ms Bennett enclosing a direction from the Senior Technical Advisor at Aon NZ regarding the payment of compensation to Ms Bennett while ACC and Aon were in a dispute surrounding liability. She advised that while discussions were being held with ACC as to where the liability rested, the primary owner (AFFCO) needed to pay compensation to "ensure the worker is not disadvantaged". She asked Ms Bennett to action this immediately.

[25] Jennifer Sauer replied on AFFCO's behalf disputing payment of compensation to Ms Broughton while its investigation was underway. Ms Bullen's notes record that Ms Sauer asked her to advise Ms Broughton that she was investigating her case further and would have an answer to her the following week.

[26] On 24 July 2017 Ms Sauer emailed Ms Bullen to advise that Ms Broughton's medical certificate ran out on 20 July 2017.

[27] On 14 August 2017 Ms Bullen emailed Ms Bennett, copying an email received from Ms Broughton, and asking her to respond directly to Ms Broughton. The email advised:

I have just spoken to ACC who advised me to ask you if my position was still available for me to return to work. At this stage it may be another 6 weeks before I get to have my operation and maybe a few more weeks after the operations for rehabilitation. If you could let me know asap I would be very grateful.

[28] On 15 August 2017 Ms Bennett responded. Her letter advised:

It is great news to hear you are going to have an operation in the near future.

It is with regret your position is no longer available, as we had not received any contact from you. You were a valued staff member and would welcome for you to reapply in the new season at your earliest convenience.

We still have not had any confirmation from you regarding your bank account details, so any monies owing to you can be paid.

We would like to take this opportunity to wish you and your family well for any future endeavours.

[29] On 22 August 2017 Ms Broughton contacted Ms Bullen advising that she had not heard from Ms Bennett about her employment. She asked if she could get hold of her as “I need to know if I need to look for another job or not”. Ms Bullen responded, copying in Ms Bennett, and advising Ms Broughton to “respond to all”, excluding herself, as it was best to liaise directly with Ms Bennett regarding employment concerns as she could not help with that. Ms Broughton replied that she had done that and had received no reply.

[30] I pause here to note that I do not accept Ms Broughton did not receive Ms Bennett’s email of 15 August 2017. This email was sent to the same email address that Ms Broughton had used to communicate with WorkAon at all material times including on 14 August 2017. In addition, it was the same email address that she used to communicate with Ms Bennett on 24 August 2017. It is also noteworthy that, when this was pointed out to Ms Broughton on 24 August 2017, she did not dispute she had received it.

[31] On 24 August 2017 Ms Bennett responded:

That is great news once again to hear you will soon have the surgery you have long waited for.

As you will find attached is the email I sent you on 15/8/17. To validate the time and day the email was sent to your above email address, if you look in the top right hand corner of the attached email it is identified there.

Your email address was verified by Leanore (case manager at Work Aon), from emails in which you previously sent Leanore.

As per email attached, it is unfortunate Affco was not able to hold your position open as we had not received any response back after several attempts to contact you via mail and phone.

As you were a valued, skilled employee, I would recommend you reapply at the reception onsite, for a possible position for our up and coming 2017/18 Beef season. The 2017/18 Beef season is likely to commence in October 2017 following our Annual Maintenance Shut down.

Are you able to please confirm your bank account details, for payment of any monies that may be owing to you.

We would like to wish you all the best and success with your up and coming surgery and rehabilitation, and I would like to personally take this opportunity to wish you and your family all the best for any future endeavours.

[32] Ms Broughton responded advising that she had just realised she had been sending all of her emails to the wrong email address. She went on to provide her bank account details and to advise:

I will come and reapply next season because I really liked my job and not working is driving me crazy as well as getting FAT hahaha.
Because this has happened will I still be looked at for employment?
Provided my op is over and finger healed?

... Thank you and I hope I see you next season.

[33] Ms Broughton did not reapply for a position with AFFCO at the start of the 2017/18 Beef season.

[34] On 22 November 2017, Ms Broughton's representative raised personal grievances on Ms Broughton's behalf with AFFCO for unjustified disadvantage and unjustified dismissal.

Issue 1: Was Ms Broughton's personal grievance raised outside the statutory timeframe?

The legal position

[35] Section 114 (1) of the Act provides:

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.

[36] Section 114(2) of the Act provides that a personal 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.

[37] In *Creedy v Commissioner of Police* Chief Judge Colgan noted that the personal grievance procedures in the Act are:¹

...aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...

The date of termination

[38] There is a dispute between the parties as to the date when Ms Broughton's employment with AFFCO came to an end.

[39] I understand AFFCO's position to be that Ms Broughton was dismissed on or about 2 July 2017, being 2 days after its second abandonment letter was sent. Ms Broughton, on the other hand, maintains she was dismissed on 24 August 2017, being the date she received Ms Bennett's email of the same date.

[40] For reasons that will become apparent, if they have not already, I find it more likely than not that Ms Broughton was dismissed on 15 August 2017. AFFCO's actions prior to that date are inconsistent with it having terminated Ms Broughton's employment any earlier.

[41] There is no evidence before me that Ms Bennett communicated with either WorkAon or Ms Broughton, prior to 15 August 2017 that Ms Broughton's employment was at an end. This is despite Ms Bullen's requests for clarification on the status of Ms Broughton at the meeting on 6 July 2017 and in her email of 18 July 2017. Rather, the parties continued to act as if they were governed by an employment relationship. For example, Ms Bullen's records show:

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 at para [39].

- a. On 14 July 2017, Ms Bullen communicated with Ms Broughton about arranging a meeting with Ms Bennett to discuss a return to work undertaking light duties while AFFCO/WorkAon were investigating her injury claim.
- b. On 17 July Ms Bullen emailed Ms Bennett asking if AFFCO could provide Ms Broughton with light duties.
- c. Thereafter there was an exchange of correspondence between Ms Bullen and AFFCO regarding payment of worker's compensation to Ms Broughton so as not to disadvantage her while ACC and WorkAon/AFFCO were in dispute as to the cause of her injury.
- d. On 24 July 2017 AFFCO noted that Ms Broughton's medical certificate had run out.

[42] There is evidence that Ms Bennett left phone messages for Ms Broughton on 13 and 17 July 2017. However, neither message advised her that she had been dismissed. Had Ms Broughton been dismissed by the time of these calls then it is more likely than not that Ms Bennett would have told her so. This is especially so in relation to the last phone message which was left after Ms Bennett had received Ms Bullen's email that day that recorded her and Ms Broughton's understanding that Ms Broughton was still employed and wanted to return to work on light duties.

[43] It is also noteworthy that Ms Bennett's email of 15 August 2017 makes no mention of Ms Broughton having been terminated earlier than that date and nor did her email of 24 August 2017.

[44] For completeness I note that Ms Bennett's affidavit refers to a conversation between Ms Broughton and Ms Bullen that came to Ms Bennett's notice on 21 July 2017. She deposes that she became aware that Ms Broughton had contacted Ms Bullen and confirmed with her that her employment was terminated with AFFCO. This evidence is hearsay. While the Authority is not bound by technicalities, I do not find this evidence reliable and therefore have not taken it into account. Ms Broughton denies the conversation. There is no documentary evidence provided that supports the conversation as having taken place, despite my being provided with what appears to

be Ms Bullen’s full notes. In addition, an opportunity afforded to AFFCO to provide evidence from Ms Bullen, or to have her summoned to verify this conversation, was not taken up.

The date the personal grievance came to Ms Broughton’s notice

[45] As an alternative argument, Ms Broughton claims that her personal grievance did not come to her notice until 27 October 2017. The argument appears to be that although Ms Broughton was aware she was dismissed on an earlier date, she did not realise she was *unjustifiably* dismissed until 27 October 2017. This is the date she says she found out her surgery was not going ahead and, that being the case, the date that she became aware that the termination of her employment would be permanent.

[46] In *Robertson v IHC New Zealand Inc* the Court stated that:²

... if circumstances later came to the notice of the affected employee which arguably rendered his/her earlier termination of employment a personal grievance comprising an unjustified dismissal, then the 90-day period will commence from the date the affected employee reasonably concludes he/she has been unjustifiably dismissed because of the further information he/she has derived concerning the contended basis of his/her dismissal.

[47] Although *Robertson* concerned a redundancy rather than a dismissal for cause, the same principles apply.³

[48] Taking heed of the Court’s comments in *Robertson* I am not persuaded that there was any further information that came to Ms Broughton’s knowledge after her dismissal that she was not already aware of at the date of her dismissal.

[49] The email correspondence of 15 August 2017 made it clear that Ms Broughton’s employment was at an end because AFFCO had been unable to make contact with her. It made no promise of future employment, nor did its email of 24 August 2017. At best there was a “possibility” that Ms Broughton may have been re-employed in the 2017/18 Beef Season if she re-applied but there was certainly no guarantee. Indeed it would appear that this was also Ms Broughton’s understanding. Her reply email dated 24 August 2017 asked whether she would be “looked at” for

² *Robertson v IHC New Zealand Inc* [1999] I ERNZ 367 at 387.

³ *Underhill v Coca-Cola Amatil (NZ) Limited* [2017] NZEmpC 117.

employment given “this had happened”. I understand from Ms Broughton’s affidavit, that she never received any response to this email.

[50] In these circumstances I am satisfied that Ms Broughton’s action for unjustified dismissal came to her notice on 15 August 2017. As at this date she had all information necessary to “reasonably conclude” whether her dismissal was or was not justified.

Finding on Issue 1

[51] The date for calculating the commencement of the 90-day period is 15 August 2017. The latest date for raising a personal grievance was 12 November 2017. Ms Broughton did not raise a personal grievance until 21 November 2017. As such, she is out of time for raising a personal grievance.

Issue 2: Should leave be granted to Ms Broughton to file her personal grievance out of time?

[52] AFFCO has, at all material times, maintained that it did not consent to the filing of Ms Broughton’s personal grievance out of time. In those circumstances, Ms Broughton’s grievance can only be heard and determined with the leave of the Authority.

[53] In determining whether to grant leave, the Authority must be satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and that it would be just to do so.⁴

[54] Exceptional circumstances are defined in s 115 of the Act as including:

- 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
- 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

⁴ Employment Relations Act, s 4.

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.

[55] In the present case, Ms Broughton relies upon the first of these circumstances. However, as part of my investigation, I have also considered the other circumstances identified in s 115 of the Act.

[56] In *Telecom New Zealand v Morgan* the Employment Court found that the following elements were necessary to meet the "exceptional circumstances" test in s 115(a)⁵.

- a. Firstly, the consequences of the dismissal or other matter giving rise to a grievance must be severe. That is illustrated by the use of the phrase "... has been so affected or traumatised...". Although being "affected" may encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of "trauma" connotes very substantial injury. In a physical sense, this means shock following a physical wound or injury characterised by a drop in body temperature and mental confusion. In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.
- b. Next, 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).

⁵ *Telecom New Zealand v Morgan* [2004] 2 ERNZ 9 (EmpC) at [23]-[24].

- c. 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 ... ”.

[57] The Court noted that this interpretation of the statutory test was a difficult test to satisfy and that the high standard of proof meant the majority of cases will fall short.⁶

Analysis

[58] I decline to grant Ms Broughton leave to raise a personal grievance out of time in relation to her claim for unjustified dismissal.

[59] I find that Ms Broughton was not so affected or traumatised by the matters giving rise to her personal grievance for unjustified dismissal that she was unable to properly consider raising her grievances within the period specified in section 114(1).

[60] Ms Broughton began to experience depression and anxiety about 5 weeks after receipt of Ms Bennett’s email correspondence of 24 August 2017. Other than from this time, there is no evidence before me that Ms Broughton suffered any incapacity at any other time such that she was unable to properly consider raising a personal grievance within the whole of the 90-day statutory timeframe.

[61] I also find no other exceptional circumstances exist. Ms Broughton did not make arrangements to have her grievance raised on her behalf within the 90-day period. The documentation produced by Ms Broughton shows she did not engage her Representative until 16 November 2017, being after the 90-day period had expired. In addition, her employment agreement contained the explanation concerning the resolution of employment relationship problems that is required by the Act, and there is no evidence that AFFCO failed to comply with the obligation under section 120(1) of the Act to provide a statement of reasons for Ms Broughton’s dismissal.

[62] For completeness, I note that in the submissions filed by Ms Broughton’s representative she included allegations of fact that had not been included in Ms

⁶ Above at n 5, at [25].

Broughton's affidavit or an affidavit filed from the Representative herself. This was subject to an objection from AFFCO, raised through a memorandum.

[63] On 9 May 2019 this issue was brought to the Representative's attention in a note from the Authority that advised, inter alia:

The Authority is unable to accept evidence through submissions. If Ms Fayen wishes to rely on facts in her submissions then these must be supported by an affidavit that has been sworn or affirmed before a Solicitor, Justice of the Peace or Deputy Registrar of the Court. Alternatively the facts must be supported by documentary evidence. Ms Fayen is to advise the Authority by **4 pm on Friday 10 May 2019** whether or not she or her client wish to file an affidavit and, if so, when this can be provided. A timetable will then be set for any reply affidavit to be filed by the Respondent.

[64] Despite the Representative attending to other matters requested by the Authority in that note, she did not provide an affidavit from either herself or Ms Broughton deposing to various matters upon which she relied in her submissions. For this reason, and taking into account the principals of natural justice, I have not taken into account those matters in reaching the findings I have made in this determination.

Outcome

[65] The overall outcome is:

- a. Ms Broughton's personal grievance for unjustified dismissal was not raised within the statutory 90-day time period.
- b. Ms Broughton has failed to establish the existence of exceptional circumstances under s 115 of the Employment Relations Act 2000. The Authority therefore declines her application to raise her personal grievances outside the statutory 90-day time period.
- c. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority