

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 128/10  
5283713

BETWEEN FUGUAN (FRANK) CHEN  
Applicant

AND BANCLOGIX LIMITED  
Respondent

Member of Authority: Robin Arthur  
Representatives: Helen Wendelborn for Applicant  
Jo Douglas for Respondent  
Investigation Meeting: 9 March 2010  
Determination: 19 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Banclogix Limited (BL) posted a letter of dismissal to Frank Chen's home address on 10 October 2008. Mr Chen did not see the letter until 10 November 2008.

[2] Some 148 days after Mr Chen saw the letter a barrister acting for him at that time sent BL a letter raising a grievance on Mr Chen's behalf.

[3] BL did not consent to Mr Chen raising a personal grievance outside the statutory 90-day period for doing so and Mr Chen has applied to the Authority for leave to raise his grievance. He seeks leave on the grounds that his delay in raising his grievance with BL was due to exceptional circumstances.

[4] Those circumstances concern a period of mental ill-health suffered by Mr Chen, during which he was admitted to hospital and then released on a programme of medication and regular medical assessment.

[5] In the week before his admission to hospital Mr Chen had been asked to respond to queries from BL managers about whether he had complied with security procedures for use of BL's computer system. After providing a written report on 14 August he did not come to work on 15 August. On 19 August he had submitted a "*request to resign*" to BL's managing director. He came to a meeting with two managers on 20 August where he was asked to provide a further written report but was taken home after reporting he was unwell.

[6] On 21 August Mr Chen was taken to North Shore Hospital by a friend where he was examined under the Mental Health (Compulsory Assessment and Treatment) Act 1992. He remained in hospital until 10 September when he was released with an ongoing programme of regular medical assessments and a course of medication used to treat psychosis and depression. In a letter to BL dated 11 September a hospital doctor recommended Mr Chen remain off work for "*at least several weeks*".

[7] Mr Chen visited BL's offices on 12 and 25 September to deliver leave application forms. Following the latter visit BL managers decided to continue their investigation of the work matters it raised with Mr Chen in August and call him to a disciplinary interview. A letter sent to his home address on 6 October required Mr Chen to attend a meeting on 9 October. He did not attend that meeting because, unknown to BL, Mr Chen left New Zealand on 5 October to travel to China. He booked the trip on 18 September but did not tell his managers about his travel plans when he delivered a leave application form to BL's offices on 25 September. He left New Zealand with no confirmation that the leave was approved.

[8] BL managers decided to dismiss Mr Chen when he did not attend the disciplinary meeting and they could not contact him on his home telephone. He first saw the letter calling him to the disciplinary meeting and the dismissal letter only on 10 November 2008, the day of his return to New Zealand from his visit to China.

### **The issue**

[9] The central issue in this case concerns the effect of Mr Chen's mental ill-health on his ability or capacity to properly consider raising the grievance during the

90-day period from 10 November 2008 to 9 February 2009.

[10] Under s114(4) of the Employment Relations Act 2000 (the Act) the Authority may grant Mr Chen leave raise his personal grievance with BL outside the 90-day period:

*if the Authority –*  
*(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include 1 or more of the circumstances set out in section 115); and*  
*(b) considers it just to do so.*

[11] Section 115 gives four examples of exceptional circumstances for the purpose of s114. The examples are not exhaustive.

[12] In this case no issues appear to arise under three of the four examples given in s115 of the Act.

[13] Firstly, a representative had not unreasonably failed to raise Mr Chen's grievance after Mr Chen had made arrangements to do so (see s115(b) of the Act). The letter of 7 April 2009 says Mr Chen first went to the barrister's office about the grievance on 27 March 2009, which was some 137 days after Mr Chen first learnt of his dismissal. So there is no question that Mr Chen would have been within the 90-day period if the barrister had acted sooner once instructed.

[14] Secondly, Mr Chen's employment agreement did not lack information about the resolution of employment relationship problems (see s115(c) of the Act). His signed employment agreement, lodged with his statement of problem, specifies the requirements for raising a grievance within 90 days at clause 49.

[15] Thirdly, he had not earlier sought an explanation for dismissal which was not provided in the proper timeframe (see 115(d) of the Act).

[16] Rather the circumstances need to be examined in relation to two questions:

- a. Did they come within the terms of the fourth statutory example given at s115(a) of the Act – that is was Mr Chen so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within 90 days; or

- b. Because the statutory examples are not exhaustive, were the circumstances exceptional in some other way?

[17] Case law establishes circumstances are exceptional where they are “*unusual*” or “*outside the common run*” and may exist where the “*ability*” of an employee to respond and submit the personal grievance within 90 days” is affected by “*an unexpected delay or difficulty or other factor*”.<sup>1</sup>

[18] In respect of the example given in s115(a), four elements have been identified as required.<sup>2</sup>

[19] Firstly, the consequences of the dismissal or other matter giving rise to a grievance must be “*severe*”. Secondly, those effects must cause the employee to be unable to “*properly consider*” raising the grievance. Thirdly, the incapacity must exist for the whole of the 90 day period. Fourthly, a high standard of proof is required from the employee regarding the severe effects on his or her capacity.

### **The Authority’s investigation**

[20] Written witness statements were lodged by Mr Chen; Simon Zhao, a Waitemata District Health Board social worker who assisted Mr Chen both while he was in hospital and after being discharged; Dr Elsa Yeung, a Board doctor who as a psychiatry register conducted assessments of Mr Chen on 3 October 2008, 4 December 2008 and 30 March 2009; Greg Boland, New Zealand country manager of KVB Kunlun New Zealand Limited, an affiliated company of BL; Christine Booker, BL’s former human resources manager; and BL managing director Stefan Liu.

[21] Mr Chen, Mr Zhao, Dr Yeung, Mrs Booker and Mr Boland each attended the Authority’s investigation meeting. Under oath, these witnesses answered questions from the Authority and the parties’ representatives. The representatives also provided oral closing submissions, speaking to written synopses.

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<sup>1</sup> *Wilkins & Field v Fortune* [1998] 2 ERNZ 70, 76 (CA) followed in *Commissioner of Police v Creedy* [2007] 505, 514 (CA).

<sup>2</sup> *Telecom New Zealand Limited v Morgan* [2004] 2 ERNZ 9, 16 (EC).

## **Determination**

[22] In preparing this determination I have found it necessary to rely on only the evidence of Mr Chen, Mr Zhao and Dr Yeung, the submissions of the representatives and relevant contemporaneous documents.

[23] I find that Mr Chen has not met the high standard of proof necessary to establish that his particular circumstances occasioned the delay for the whole 90 day period. The evidence available to me suggests it was more likely than not that he was able during at least the latter third of that period to properly consider raising the grievance. I reach that conclusion for the following reasons.

[24] While Mr Chen had suffered previous episodes of serious mental ill-health in 2000 and 2004, his relapse requiring hospital admission on 21 August 2008 was an exceptional circumstance in the sense of being an unexpected difficulty which was unusual or out of the common run. Such a difficulty would affect his capacity to consider raising a grievance.

[25] Mr Chen's medical records show that on 26 August he was certified as being "*not mentally disordered and ... fit to be released from compulsory status*". The 11 September letter to BL from a doctor on Mr Chen's release from hospital described him as having "*made a good recovery*". When Dr Yeung assessed Mr Chen on 3 October her notes show she found he continued to experience residual psychotic symptoms, including paranoid delusions about his employer. He had stopped taking his prescribed anti-depressant medication and reduced the amount of the anti-psychotic medication he took.

[26] When Dr Yeung assessed Mr Chen again on 4 December her notes record significant improvements. While Mr Chen was said to continue to exhibit some residual psychotic symptoms, his depressive symptoms were noted to be in partial remission. His mood appeared normal and appropriate. He was not emotionally fragile or changeable. His judgement appeared intact, with no loss of goals and he was attending to his own daily living needs. Importantly Mr Chen reported he no longer felt paranoid to the point he needed to isolate himself at home. He told Dr Yeung he had recently attended an optometrist and had been to some work interviews.

[27] Although Mr Chen's evidence to the Authority was that he attended only one work interview, arranged with the assistance of WINZ, he started a full-time job at a supermarket on 6 January 2009.

[28] While Dr Yeung expressed the opinion in her evidence to the Authority that Mr Chen's symptoms by December 2008 would make him most unlikely unable to deal with any work related issues, I find that her objective observations recorded at that time suggest a greater level of ability. In her oral evidence Dr Yeung described Mr Chen's medication as being at relatively low doses. In response to a question on whether his medication would negatively affect Mr Chen's reasoning or capacity, Dr Yeung's view was that it was not likely to have such side effects at those levels.

[29] Even during earlier stages of this period of illness he had demonstrated a capacity to deal with relatively complex tasks. While still in hospital on 9 September he had written and arranged to have faxed to BL a detailed list of tasks which needed to be attended to at work. On 18 September he had visited his local travel agent office and made detailed travel arrangements. He had successfully travelled to and from China between 5 October and 10 November.

[30] Seeking work in December and working full-time from January also indicate a higher level of capacity than he had while severely unwell.

[31] And I find that in this period he did seek advice about his dismissal. The evidence for this comes from an email Mr Chen received on 20 February 2009 from a professional employment law advocate (not the barrister he later saw). That email told him that he was "out of time" for lodging a personal grievance.

[32] More importantly the email from the advocate includes this comment:

*I spent some time on this with you last year including reading a lot of paper you sent only to have you decide not to use my services. Now you have left it too late.*

[33] Mr Chen's evidence was that he could not remember having any contact with that advocate in 2008 or sending him any material apart from a copy of his dismissal letter. He says he only sent the copy of that letter on 20 February and not any earlier.

His only explanation for the advocate's assertion that they communicated on this matter in 2008 is that the advocate must have mistaken him for someone else.

[34] I find Mr Chen's explanation unlikely. Rather I accept the contents of the email as evidence that Mr Chen did consider raising a grievance sometime between 10 November and the end of 2008 and that he made a decision not to do so by using the services of that particular advocate.

[35] That conclusion is supported by the evidence of Mr Zhao. He was making regular house visits to Mr Chen through in the later months of 2008 and some of 2009. Although he cannot remember the date of the conversation, he recalls Mr Chen mentioning that he wanted to "*argue these issues*" and "*to find a lawyer to sort it out*".

[36] Having found that Mr Chen did consider raising a grievance within the 90-day statutory period, the question still remains as to whether he could *properly* consider doing so – that is returning to the issue of his capacity for evaluating and deciding on such a course of action.

[37] I acknowledge the distinction Dr Yeung made in her oral evidence that Mr Chen may have been able to do complex tasks – such as book and undertake international travel – but still not be capable of doing things which had a negative emotional attachment for him. In this case that refers to deciding on whether to take a grievance against an employer about which, during his mental ill-health relapse of August 2008, Mr Chen had developed paranoid delusions. At that time he believed BL was tapping his telephone calls and sending strange messages to his computer.

[38] However I consider the evidence already discussed shows Mr Chen's treatment and medication regime was sufficiently well-established by late 2008 that his capacity for proper consideration was likely to be sufficiently restored. The key points are that he sought an advocate's advice before the end of 2008 and sought and gained full-time work by 6 January 2009 – both indicators of deliberative capacity.

[39] Because of the conclusions reached I need not consider the specific question of causation raised by s115(a) – that is whether Mr Chen's ill-health arose from the effect or trauma of his dismissal or how BL had earlier dealt with him over work

issues. That would have required more detailed attention on whether work demands – including a change of manager and BL’s inquiry into whether Mr Chen had breached its computer security policy – affected or traumatised him so much that it triggered a collapse in his mental health. Some evaluation would then also have been required of the causative weight of his concerns around the same time about immigration issues in getting permission for his wife to move to New Zealand from China.

[40] Because I have reached the conclusion that the delay in Mr Chen raising his grievance was not occasioned by an exceptional circumstance lasting at least the whole of the 90-day statutory period, I cannot determine under the second limb of the requirements of s114(4) whether it would have been just to grant Mr Chen leave to proceed with his grievance. In doing so the Authority does not make any determination on whether Mr Chen had a valid argument over whether BL should have dismissed him so soon after an episode of severe mental illness. Rather the Authority must comply with the limits Parliament has set in the legislation about when leave may be granted.

[41] For the reasons given Mr Chen’s application for leave to raise a personal grievance with BL is declined.

### **Costs**

[42] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so, BL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Chen would then have 14 days from the date of service to lodge a reply before the Authority determines costs. No application for costs will be considered outside this timeframe without prior leave. Subject to any submissions which may yet be lodged, I can indicate a preliminary view on the basis of the material already before the Authority that this may be an appropriate case for costs to lie where they fall.

Robin Arthur  
Member of the Employment Relations Authority