

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**AA 396/10  
5162565**

BETWEEN                      TANIA DEICHERT  
   Applicant  
  
AND                                      APN HOLDINGS NZ  
   LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Applicant in person  
   Phillipa Muir, Counsel for Respondent  
  
Investigation Meeting:      16 August 2010 at Whangarei  
  
Submissions received:      16 August 2010 from Applicant  
   16 August 2010 from Respondent  
  
Determination:                3 September 2010

---

**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

---

**Employment Relationship Problem**

[1]     The applicant, Ms Deichert, resigned from her employment with APN Holdings NZ Limited (“APN”) with effect from 5 October 2007. On 22 December 2008 APN received an email from an ex-employee, Ms Kiri Carew. Attached to the email was a letter from Ms Deichert addressed to Mr Rick Neville, Chief Operating Officer of APN NZ Regional Newspapers, raising a personal grievance alleging that she had been unjustifiably constructively dismissed.

[2]     APN did not consent to the raising of a personal grievance after the 90 day period specified in s114 (1) of the Employment Relations Act 2000 (“the Act”). Ms Deichert consequently lodged a Statement of Problem on 19 May 2009 applying for leave to raise a grievance outside the 90 day time period, pursuant to s114(4)(a) and s115(a) of the Act, on the basis that “*exceptional circumstances*” had occasioned the

delay. Specifically Ms Deichert says she was “*too traumatised to deal with the situation at the time*”.

[3] APN opposes the raising of Ms Deichert’s personal grievance outside the time period specified in the Act on the grounds that it does not accept that Ms Deichert’s delay in raising the grievance was caused by exceptional circumstances.

[4] I now proceed to determine as a preliminary issue whether leave should be granted to raise the personal grievance after the expiration of the 90 day period.

### **The Legislation**

[5] Section 114 Employment Relations Act 2000 provides:

*(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.*

*(4) On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority –*

*a. Is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*

*b. Considers it just to do so*

[6] Ms Deichert seeks to rely on the following ground:

***Section 115 Further provision regarding exceptional circumstances under section 114***

*For the purposes of section 114(4)(a), exceptional circumstances include-*

- a) *Where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1)*

## **Issues**

[7] The issues for determination are therefore:

- i. Whether Ms Deichert was so affected or traumatised that this amounts to exceptional circumstances in terms of sections 114 and 115;
- ii. If so, whether it is just to grant leave pursuant to section 114(4);

## **Background Facts**

[8] Ms Deichert commenced employment with APN on 8 August 2005, initially in the position of Sales Consultant and, following promotion on or about May 2006, as Advertising Sales Manager for Northern Publishing, a division of APN Holdings NZ Limited.

[9] Ms Deichert was issued with an Individual Employment Agreement which she signed on 19 August 2005. At clause 39 the procedure to be followed in order to resolve any employment relationship problem was outlined, this included a provision that any personal grievance must be raised with the company “*within 90 days of the action occurring or the grievance coming to your notice*”.

[10] Ms Deichert was responsible for overseeing and managing various major advertising clients and overseeing the content of advertising-based publications, and reported to Ms King-Lassauw, the Advertising Director. Prior to December 2006 Ms Deichert says she and Ms King-Lassauw “*had a positive professional and personal relationship*” and made “*an invincible and winning team*”.

[11] In December 2006 Ms King-Lassauw went on leave overseas for a period of six weeks, during which time Ms Deichert was appointed as Acting Advertising Director. In this role Ms Deichert was responsible for approximately 70 staff and liaised with, and reported to, Mr Verdon, who was at that time the General Manager of Northern Publishing.

[12] Following Ms King-Lassauw's return from leave, Ms Deichert says that their relationship deteriorated to the point where she felt bullied and undermined, and was criticised by Ms King-Lassauw before other members of the staff. As a result of this Ms Deichert says she became emotionally upset.

[13] In April 2007 Ms Deichert's evidence was that there was an altercation between her and Ms King-Lassauw at a business fair. Thereafter Ms Deichert says that the relationship between them, and her health, deteriorated.

[14] On 23 August 2007, Ms Deichert left work early and returned home. Ms Deichert was absent from work on the days following and on 27 August 2007 APN received a medical certificate signed by Ms Deichert's doctor. This signed Ms Deichert off on sick leave until 10 September 2007.

[15] As the medical certificate did not specify the reasons for the absence, Ms King-Lassauw wrote to Ms Deichert asking for a meeting to clarify the reasons. The letter stated that APN wanted to work with Ms Deichert to find a positive outcome. This meeting did not take place and Ms Deichert explained that this was because she "*couldn't face Anita King again*".

[16] The day Ms Deichert was due to return to work, 10 September 2007, APN received a further medical certificate, stating Ms Deichert would be unable to return to work for a further 4 weeks due to "*workplace stress*". APN says it had had no notification of the fact that Ms Deichert was suffering from workplace stress prior to receiving this second medical certificate.

[17] Ms Deichert that same day telephoned another employee, Jenny Vaile. Ms Deichert advised Ms Vaile that she was resigning and said that she was willing to meet Mr Verdon offsite in order to return the company mobile telephone and car.

[18] Mr Verdon met with Ms Deichert on 10 September 2007 in a café away from the Northern Publishing offices. At this meeting Ms Deichert explained that she was resigning and talked to Mr Verdon about the behaviour of Ms King-Lassauw. Mr Verdon stated that he asked Ms Deichert if she wanted to pursue the matter further and confirmed that Ms Deichert had stated she did not.

[19] Mr Verdon says Ms Deichert asked him if she could be paid in lieu of notice and he agreed to this. Mr Verdon then gave Ms Deichert a Leavers Form on which he added a handwritten note at the bottom stating: *“This is a full and final settlement of this employment arrangement”*. Ms Deichert read this and signed the form.

[20] By letter dated 11 September 2007 Ms Deichert resigned her employment with APN stating that her last day of employment would be 5 October 2007

[21] Ms Deichert did not raise a personal grievance with APN immediately following her resignation.

[22] On 8 October 2007 Ms Deichert commenced employment at Ojinos Gym as Manager. The Gym was owned by the same owners of the World of Fitness Gym. Ms Caroline Houston was one of these owners.

[23] Ojinos Gym had some 400 members, of whom approximately 20 would attend each day. There were 2 employees who worked as Instructors. Ms Houston’s son, Mr Justin Rood, was the Manager of the World of Fitness Gym. Mr Rood’s responsibilities included managing the staff at both the World of Fitness Gym and Ojinos Gym. In this capacity he says he had regular contact with Ms Deichert.

[24] Ms Deichert says that she did not apply for the position of Manager at Ojinos Gym but, following discussions with Ms Houston, undertook the role on a trial basis while she and her partner decided whether they wanted to take a financial stake in Ojinos Gym.

[25] Ms Deichert says that her relationship with Ms Houston, whilst good at first, deteriorated and that problems arose which impacted upon the financial commitment she and her partner were prepared to make to Ojinos Gym. These problems, which were both financial and personal in nature, lead to their decision not to proceed with the financial stake in Ojinos Gym.

[26] In February 2010 Ms Deichert left her employment at Ojinos Gym and on 21 February 2010 commenced employment as an Advertising Account Manager at Radioworks, a radio company.

[27] **Determination**

**Whether Ms Deichert was so affected or traumatised by the matter giving rise to the grievance that this amounts to exceptional circumstances in terms of sections 114 and 115.**

[28] As noted by Ms Muir in submissions, the leading case on the interpretation and effect of section 115 (a) of the Act is *Telecom New Zealand Limited v Morgan*<sup>1</sup>. The Court in addressing the application of s115(a) considered that Parliament had not intended to relax the tests for extending the limitation period when enacting ss 114 and 115 of the Act and went on to observe in relation to s115 (a) that “*Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals or other matters giving rise to grievances*”<sup>2</sup>

[29] The Court further commented at paragraphs 23 and 24:

[23] *Deconstructing the subsection, the following elements appear necessary to meet the exemplar “exceptional circumstances” test under s115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. This is illustrated by the phrase “... has been so affected or traumatised...” Although being “affected” may encompass a range of effects from relatively minor to*

---

<sup>1</sup> [2004] 2 ERNZ 9.

<sup>2</sup> Ibid at para [22]

*vey serious, the accompanying use of the derivative of “trauma” connotes very substantial injury.....In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.*

*[24] Next, s115 (a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to the exceptional circumstances. It is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s115 (a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not only a part of it by use of the phrase “ ... within the period specified ... ”*

[30] There are two assessments which need to be made in applying the test under s 115(a) of the Act. The first is to show that the trauma had the effect that the employee was unable to properly consider raising the grievance for the whole of the 90 day period. The second is that the trauma must have been occasioned by the matter giving rise to the grievance.

*First assessment: whether the trauma had the effect that the employee was unable to properly consider raising the grievance:*

*(i) Medical evidence*

[31] Ms Deichert supplied a letter dated 9 March 2009 from her General Practitioner, Dr Helagi-McCarthy, as medical evidence that she had been suffering from stress and depression.

[32] I find that there are inconsistencies with the medical evidence such that it does not provide evidence of trauma during the 90 day period:

1. The letter from Dr Helagi-McCarthy states that Dr Helagi-McCarthy did not see Ms Deichert after a consultation on 10 September 2007 until 30 June 2008, which was almost nine months after the termination of Ms Deichert’s employment with

APN. This confirms that Ms Deichert had not consulted Dr Helagi-McCarthy during the 90 days period following the termination of her employment.

2. Although not conclusive, the fact that Ms Deichert informed the Authority that she had not been on anti-depressants while employed at Ojinos Gym during the 90 day period, is nonetheless of relevance to the issue of evidence of trauma.

[33] I find that the medical evidence supplied to the Authority does not support Ms Deichert's contention that she was so traumatised by the matter giving rise to the grievance that she was unable to consider raising the grievance for the whole of the 90 day period.

*(ii) Experience at Ojinos Gym*

[34] Ms Deichert commenced employment as Manager of Ojinos Gym three days after her employment ended with APN, where she continued to work throughout the remainder of the 90 day period.

[35] I find that there are significant aspects of this employment at Ojinos Gym which are at variance with the concept of being "*so affected or traumatised*" that Ms Deichert was unable to consider raising the grievance during the period:

- During her employment, Ms Deichert managed two other employees, interfaced with clients and assisted new members, purchased supplies, reconciled the accounts and carried out the banking. These are significant responsibilities.
- Ms Deichert stated that she had known the owner of Ojinos Gym, Ms Houston, to be a difficult personality before starting work at the Gym since Ms Deichert had dealt with her as a client while she was employed at APN. However Ms Deichert had been willing to accept employment at Ojinos Gym of which Ms Houston was an owner and further, to engage in financial discussions with her during this time.
- Ms Deichert stated that the two employees whom she managed were unhappy when she started work at Ojinos Gym due to the alleged

bullying attitude of Ms Houston, but that she was able to alter this situation. When questioned as to how she accomplished this, Ms Deichert explained that she “*bore the brunt when the owners weren’t happy*” and was “*quite protective*” towards the staff she managed.

- Ms Deichert explained that she had taken up the employment at Ojinos Gym with a view to her and her partner taking a financial stake in the business. This had involved requesting financial accounts and visiting an accountant to draw up a Heads of Agreement document
- Ms Deichert explained that she and her partner had been sent an invoice in respect of half the accountancy fees, which they had neither accepted nor paid. As a result of the non payment the matter had been referred to the debt collection agency Baycorp. Ms Deichert said that she had disputed the matter with Baycorp and had been successful in having it set aside.
- The evidence of Mr Rood, which I accept as credible, was that Ms Deichert appeared to be excited about the new role at Ojinos Gym and throughout her employment appeared to be happy and emotionally stable.

In light of the above I find that Ms Deichert was able to demonstrate an ability to undertake a role of some responsibility during the 90 day period, to interface and intercede on behalf of other staff with a known difficult personality, and to make assessments on the financial implications of an investment in a business. I do not accept therefore that Ms Deichert was so traumatised during this period that she was unable to properly consider raising the grievance during the 90 period.

*Second assessment: whether the trauma was occasioned by the matter giving rise to the grievance.*

[36] In considering this second assessment I find the following issues of relevance in assessing whether the trauma suffered by Ms Deichert was occasioned by the matter giving rise to the grievance:

- The wording of the letter of resignation in which Ms Deichert writes: *“I am extremely grateful to Anita King for giving me “an opportunity of a lifetime”. I can leave still feeling a huge amount of respect for her”* does not accord with the explanation that Ms King-Lassauw’s behaviour had induced an emotional breakdown in Ms Deichert.
- The explanation given by Ms Deichert that the trauma emanated from her time at APN is at variance with her statement that *“I absolutely loved my job. I loved publishing. I loved what I had to contribute to the company”*.
- The explanation given by Ms Deichert that the trauma emanated from the incidents at APN involving Ms King-Lassauw’s alleged bullying behaviour, I also find to be undermined by the fact that Ms Deichert voluntarily took up employment working for someone whom she said she had known before accepting the position, and whom she described as a difficult personality; someone she said employees at APN did not like to work for, and of whom the two employees at the Gym were *“terrified”*.
- Ms Deichert admitted that there were significant personal and financial stressors in her life during this period. I consider that these impacted substantially on Ms Deichert and as such, weaken the case for the trauma having arisen from events connected to APN.

I accept that Ms Deichert may have been emotionally stressed and upset at the time of her resignation but I do not find that there is a sufficient evidential basis for concluding that the trauma was occasioned by her experiences at APN.

[37] In conclusion I do not find that Ms Deichert was so affected or traumatised that this amounted to ‘exceptional circumstances’ in terms of ss114 and 115 of the Act.

## **Second Issue.**

[38] In reaching the conclusion in relation to the first issue, this effectively disposes of the matter. Leave to raise the grievance out of time is declined.

## **Costs**

Costs are reserved. I note here that costs typically follow the event<sup>3</sup>. The parties are invited to agree on the matter. If they are not able to do so, the respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

---

<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808