

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jason Downs (Applicant)
AND Switch Electrical Services Limited (Respondent)
REPRESENTATIVES Jason Downs, in person
Lee Eagle, for the respondent
MEMBER OF AUTHORITY Marija Urlich
AFFIDAVITS, SUBMISSIONS RECEIVED 12 and 23 May 2005
DATE OF DETERMINATION 30 May 2005

DETERMINATION OF THE AUTHORITY

[1] Jason Downs seeks leave of the Authority to raise a personal grievance regarding his alleged dismissal from his former employer Switch Electrical Services Limited (“Switch Electrical”) on 12 October 2004. Switch Electrical opposes this application.

[2] Mr Downs says there are exceptional circumstances that were causative of the delay and that it would be just in the circumstances for leave to be granted. These are that:

- (i) he was so affected by the dismissal that he was unable to consider a personal grievance; and
- (ii) he was unable to properly consider raising a personal grievance until after the expiry of the 90 day period when he then realised he would suffer substantial losses as a consequence of his dismissal.

[3] By agreement of the parties this investigation into the preliminary matter was conducted on the papers. All evidence was provided by affidavit.

The law

[4] Section 114(1) of the Employment Relations Act 2000 requires every personal grievance to be raised within 90 days of the date of the action upon which the alleged personal grievance came to the attention of the employee. If the employer does not consent to the raising of a personal grievance out of time then the employee may apply to the Authority for leave to raise the personal grievance out of time (section 114(3)). The Authority may grant leave if it considers exceptional circumstances occasioned the delay and it considers it just to do so.

[5] Mr Downs seeks to rely on the exceptional circumstance set out in subsection 115(a) of the Act which provides:

- “(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); ...”

[6] To successfully rely on this exception it is necessary for an applicant to establish to a high standard that they were unable to properly consider raising the grievance as a consequence of the dismissal or other matters which gave rise to the grievance (*Telecom NZ Ltd v Morgan*, unreported, 12 July 2004, AC 38/04, Judge Colgan).

Do exceptional circumstances exist?

[7] Mr Downs’ did not consider raising a personal grievance with his former employer until he realised he would suffer losses as a consequence of his dismissal. These losses were that he was unable to find employment as an apprentice electrician and as a consequence had to discontinue his studies. He has now found employment with the New Zealand Navy but may have to retrain, which he says is a further loss caused by his dismissal. When Mr Downs became aware of these losses he was outside the 90 day period for raising a personal grievance.

[8] This evidence does not support a claim for exceptional circumstances under section 115(a) of the Act. There is no evidence Mr Downs was so effected by his dismissal that he was incapacitated from turning his mind to raising a personal grievance.

[9] Mr Downs’ says he did not suffer any loss as a consequence to his dismissal until after the expiry of the 90 day period. An employee is required to raise a personal grievance within 90 days of the action which allegedly amounts to a personal grievance occurred or came to the attention of the employee (section 114(1)). Losses consequent to a dismissal are not the grounds upon which a personal grievance is based; rather they form the evidential basis of any remedies which may flow from the personal grievance.

[10] Mr Downs’ application for leave to raise his personal grievance outside the 90 day statutory limit cannot succeed.

Costs

[11] Costs are reserved. If Switch Electrical has incurred legal expenses in opposing Mr Downs’ application and wishes to seek costs in relation to those expenses then it should file and serve a memorandum of costs within 14 days of the date of this determination. Mr Downs will have a further 14 days to file and serve a memorandum in reply.

Marija Urlich
Member of Employment Relations Authority