

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 77
5430928

BETWEEN KUNAL GOEL
 Applicant

AND THE DIRECTOR-GENERAL FOR
 PRIMARY INDUSTRIES
 Respondent

Member of Authority: G J Wood

Representatives: Applicant in person
 Andrew Scott-Howman for Respondent

Investigation Meeting: 27 June 2014 at Wellington

Submissions Received: 27 June 2014

Determination: 21 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Kunal Goel, seeks reinstatement to his former position as a Ministerial Coordinator with the Ministry of Primary Industries (MPI). This determination concerns his application to have his personal grievance investigated by the Authority even although it was raised outside the 90 day period set out in the Act. While Mr Goel claims that there are exceptional circumstances occasioning the delay and it is just for the Authority to investigate his employment relationship problem, he also now claims that he did in fact raise his grievance before his dismissal.

[2] MPI denies that Mr Goel raised any grievance with it after his dismissal and before the 90 day period had elapsed. It also considers that while exceptional circumstances do exist, it would not be just for the Authority to investigate his grievance.

Factual discussion

[3] Mr Goel was dismissed on 4 March 2013. He did not raise his personal grievance with MPI until 29 August 2013 and even then it was indirectly by way of application to the Authority. In his claim, the sole remedy that Mr Goel seeks is reinstatement.

[4] When Mr Goel gave evidence, he referred to concerns he raised during the disciplinary process he was subject to, as evidence he had raised a personal grievance. However, the law is clear (see *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517) that one cannot raise a grievance prospectively. Therefore, any concerns raised by an employee such as Mr Goel before they are dismissed cannot constitute the raising of a grievance about their dismissal, as it had not yet occurred.

[5] At the investigation meeting MPI conceded that Mr Goel met the test for exceptional circumstances under s.115 (a), namely that he had been 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. This was due to his mental state. Similarly, MPI has not sought to claim that it would be prejudiced in having to defend this claim.

[6] However MPI maintains that it would not be just for the Authority to investigate his grievance. The test over whether it is just or not for an application to investigate an out of time grievance involves, as is clear from cases such as *McMillan v. Waikanae Holdings (Gisborne) Ltd* [2005] 1 NZELC 97, 859, an assessment of the likely prospects of success of an applicant. This is particularly important where, as here, the sole remedy claimed is reinstatement.

[7] As was made clear in *Radio New Zealand Ltd v. Snowdon* [2003] 1 ERNZ 12, an employer is justified in requiring evidence that an employee is fit to return to work. Mr Goel was informed that MPI as a good employer in the state sector would have to be satisfied of Mr Goel's ability to work unsupervised if he were to be reinstated. In particular, the Authority would have to be satisfied that his mental state was such that he would be a harmonious and effective member of its workforce. Mr Goel has failed to provide any such evidence, despite being formally told on several occasions that this was an important component of his case. Mr Goel was encouraged throughout the process to obtain some medical evidence that would show that his mental health

issues had abated. However, the only evidence provided by him showed that he had discharged himself from a public hospital's mental health care against the hospital's advice. That documentation also stated that Mr Goel should be taking medication and undergoing psychological treatment, but he had declined to do so, a position he maintains to this day. That is Mr Goel's right. However the Authority must be satisfied that he has a realistic prospect of being reinstated before it could consider it just to allow his grievance to be investigated out of time. No such reassurance has been provided and I therefore determine that it would not be just for Mr Goel to be granted leave to pursue his grievance out of time.

Determination

[8] I therefore dismiss Mr Goel's application.

Costs

[9] Costs are reserved.

G J Wood
Member of the Employment Relations Authority