

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 102
5533794

BETWEEN CHRISTOPHER HEAPS
Applicant
AND CAMERON CIVIL LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Applicant in person
Myriam Heynen, Advocate for the Respondent
Investigation Meeting: On the papers
Submissions Received: 11 February 2015 from the Applicant
25 February 2015 from the Respondent
Date of Determination: 31 March 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Heaps) seeks leave to raise a personal grievance outside of the time stipulated in the Employment Relations Act 2000 (the Act) and that application is resisted by the respondent (Cameron Civil).

[2] When the matter came onto my list, I convened a telephone conference with the parties and as a consequence it was agreed that both parties would file submissions on the question and I would determine the matter on the papers.

[3] Mr Heaps' application is based on s.115 of the Act. That provision sets out a non-exclusive list of circumstances which could create an exceptional circumstance which would justify the granting of an application to proceed with a personal grievance notwithstanding that it is "*out of time*".

[4] The usual rule is set out in s.114 of the Act which broadly speaking requires that a grievance be raised with the employer within 90 days from the date the event complained of occurred or came to the notice of the employee, whichever is later. If the employer does not consent to a late raising of the personal grievance, an application may be made to the Authority and that application is considered by the Authority, after the Authority has given the employer an opportunity to be heard. The Authority may grant the application if it is satisfied that the delay in raising the personal grievance was caused by “*exceptional circumstances*” and if it believes that it is just to do so.

[5] Section 115 of the Act sets out a number of circumstances which the statute defines as creating those exceptional circumstances. It is, however, apparent from the wording of the statute and subsequent decided cases that the examples of circumstances constituting exceptional circumstances under s.115 is not an exclusive list.

[6] Mr Heaps was dismissed from his employment on 4 August 2014. There had been an altercation between himself and a supervisor on 29 July 2014 which resulted in a disciplinary process which, amongst other things, caused Mr Heaps to seek advice from the Waitemata Community Law Centre (the Community Law Centre).

[7] The Community Law Centre was unable to attend on Mr Heaps during the disciplinary process but there was an understanding that Mr Heaps could revert to it after the disciplinary process if that should prove necessary.

[8] In the result, Mr Heaps returned to the Community Law Centre on 24 October 2014, that is within the 90 days following the dismissal (the justiciable period), but only just.

[9] Mr Heaps says in his affidavit in support that the reason that he delayed attending on the Community Law Centre for such a long period after the dismissal was because of a series of family tragedies which befell him in that period and which effectively disabled him from dealing with other matters.

[10] Despite the tight timeframe, Mr Heaps indicates that the Community Law Centre prioritised the matter and sent a personal grievance letter on 30 October 2014 believing that it would arrive within the justiciable period. In fact, the letter did not arrive until 11 November 2014, some 10 days outside the justiciable period.

[11] It is apparent from Mr Heaps' affidavit that no attempt was made to email or fax the personal grievance letter because of the confidential nature of the matter and presumably the belief that the letter would arrive within time in the ordinary course of mail.

[12] Mr Heaps' personal circumstances during the justiciable period are disclosed in his affidavit in support. Briefly, he deposes that his brother died shortly after his dismissal, another sibling was seriously unwell and a niece was diagnosed with a terminal illness. In essence, Mr Heaps says his ability to deal with matters in a business-like fashion was materially affected, first by the trauma of the dismissal which his affidavit describes quite graphically and second by the serious ill health and/or death of close family members.

[13] The application for leave to be granted to raise the personal grievance outside of the justiciable period is resisted by Cameron Civil on the basis that, first Mr Heaps knew about the 90 day rule on his own evidence, second he worked part time during the justiciable period and therefore was sufficiently functional to hold down a job and so presumably could also have dealt with the raising of a personal grievance, and third there is no medical evidence to support Mr Heaps' contention that he was traumatised by either the dismissal or indeed the death of family members.

Issues

[14] The only issue that the Authority needs to address in the present case is whether Mr Heaps has demonstrated that he has grounds for exceptional circumstances which would justify him being granted the right to raise his grievance out of time and whether it is just to do so.

Are exceptional circumstances made out?

[15] The starting point for any consideration of this issue must be the question what the phrase exceptional circumstances means. In *Creedy v. Commissioner of Police* [2008] NZSC 31, the Court decided that the phrase meant "*out of the ordinary, unusual or uncommon*".

[16] That said, it is also clear from decided cases that the Authority must not set the bar too low. In *GFW Agri-Products Ltd v. Gibson* [1005] 2 ERNZ 323, the Court of Appeal said of the 90 day limit:

*That is a requirement of the law which is to be given effect to and which cannot be abrogated by invoking equity and good conscience. Similarly for the grant of leave an applicant must show exceptional circumstances having a **causative effect** upon the delay in submitting the grievance. The legislature has set the burden at the high level by requiring that circumstances be exceptional and that must be given proper application. [emphasis added]*

[17] So in order to create an exceptional circumstance, I need to find that the circumstances are out of the ordinary, unusual or uncommon and that they are causative of the failure to act.

[18] Moreover, it is clear that, as Mr Heaps himself observes in his affidavit, the “list” of exceptional circumstances found in s.115 of the Act is not exhaustive and that list is only a series of examples: *Austin v. Silver Farms Ltd* [2014] NZEmpC 30 per Chief Judge Colgan.

[19] Next, in an earlier decision of Colgan J (as he then was), *Telecom New Zealand Ltd v. Morgan* [2004] 2 ERNZ 9, His Honour by “*deconstructing the subsection*” identifies the elements necessary to meet the exceptional circumstances test in s.115(a). The first of those is that the consequences of the dismissal must be severe. His Honour relies on the use of the word “*traumatised*” in the statute to support his conclusion.

[20] Next, those effects must cause the potential grievant to be unable to “*properly consider*” raising the grievance; third the incapacity must relate to the whole of the justiciable period; and fourth a high standard of proof is required from the employee concerning the effects on his or her capacity.

[21] Applying that law to the present case, I first make a finding that Mr Heaps has satisfied me that he has broadly brought his claim within the definition of exceptional circumstances in the sense that his circumstances are unusual and out of the ordinary. I reach this conclusion because not only does Mr Heaps give me affidavit evidence of the trauma he sustained as a consequence of the dismissal, but he also had to cope with the terminal illness of not one but three close family members during the justiciable period (two of whom later died) and I am satisfied that, looked at in the round, those circumstances are indeed exceptional.

[22] I do not think, to take the point made by Cameron Civil, that I need to require Mr Heaps to produce medical information either about his own circumstances

concerning the dismissal, or indeed about the circumstances of his unwell family members. It is true that his affidavit refers to providing some medical information about his family later and he has not done that but I think the short point is that he has sworn his affidavit and I am entitled to take his evidence from that affidavit as sworn testimony, both concerning his own and the family circumstances.

[23] Moreover, relying on *Austin*, the serious illness of Mr Heaps' three identified family members are, I consider, relevant and appropriate additions to the range of circumstances which might be considered exceptional when those events happen or develop during the justiciable period.

[24] Applying *Morgan*, I think I can properly aggregate the distress Mr Heaps talks of relative to the dismissal with his natural anxiety and concern about his seriously ill family members and in consequence conclude that an aggregate of those matters would constitute the severity required by the law.

[25] Given that range of challenges, and the fact that those challenges either happened or developed during the justiciable period, I think I can properly conclude that the effect of those matters might well have precluded Mr Heaps from "*properly considering*" raising his personal grievance.

[26] Moreover, I think the fact Mr Heaps worked for a short period during the justiciable period cannot be enough for me to conclude he was capable of dealing with his grievance in a business like way; again, I rely on his evidence which is that he worked for around three weeks but in effect found he could not cope with what was pretty basic work. And even if the job is evidence of his ability to cope during the justiciable period his retort can be that he went to see his lawyer before the 90 day period was up, and understood that his grievance had been raised in time.

[27] While on the facts, those distressing family and personal circumstances did not occur for the totality of the justiciable period (Mr Heaps consulted with his lawyer on 24 October 2014), it is fair to observe that Mr Heaps then relied on his lawyer to get the personal grievance in on time and that reliance turned out to be misplaced. It follows that Mr Heaps could potentially rely also on s.115(b) of the Act where misplaced reliance on a lawyer or advocate to raise a grievance within time is itself a ground for exceptional circumstances.

[28] Finally, a high standard of proof is required. Of course, the onus is on the applicant employee to satisfy the Authority that they have met the test of exceptional circumstances. I think in the particular circumstances of this case, it is hard not to conclude that Mr Heaps, with the particular challenges within his family during the justiciable period, has met the high standard of proof required.

Is it just to grant leave?

[29] I conclude that it is just to grant leave in the present case. First, this is not a case where there has been a significant delay beyond the end of the justiciable period. This is not a case such as an earlier matter that I heard *Aberdeen v. Air New Zealand Ltd* [2011] NZERA Christchurch 48, where there was a five month delay in raising a personal grievance. Here the delay is a mere 10 days.

[30] Moreover, it is arguable, as I have already indicated, that Mr Heaps took proper steps to raise the grievance within time and for reasons which remain unexplained, the letter of grievance which ought to have arrived on the last day of the justiciable period, actually did not arrive until 10 days later. Certainly, Mr Heaps' affidavit and the supporting affidavit from his then lawyer (although the dates in his lawyer's affidavit are out by a month), both support the conclusion that Mr Heaps and his lawyer calculated that, on the basis of the lawyer giving the matter urgency, which she did, the letter would have been received by the employer on the last day of the justiciable period.

[31] Of course, with the benefit of hindsight, there ought to have been an email or a facsimile of the letter sent at the same time to ensure its receipt, but on the evidence before me, it certainly appears as if Mr Heaps and his lawyer discussed the question of getting the letter in on time and believed on reasonable grounds that that would happen.

[32] Of course, the longer the delay between the end of the justiciable period and the receipt of the grievance, the longer the potential prejudice to the employer. Here the delay was slight and I think any prejudice to the employer is slight.

[33] The next matter I need to turn my attention to is the question whether Mr Heaps has any real chance of success. Here I apply the law as I understand it from *Melville v. Air New Zealand Ltd* [2010] NZEmpC 87 where Judge Travis made clear

that one of the aspects the Authority must consider in the balancing of the parties' rights was whether the grievance had any real chance of success.

[34] I think the case for the grievant is at least arguable but perhaps no stronger than that. One influencing factor is that Mr Heaps was not represented throughout the disciplinary process that led to his dismissal and while Cameron Civil is adamant that it followed a proper process, Mr Heaps is equally adamant that the process was only initiated because he complained about an issue with his supervisor and then had the employer allegedly turn that around into a disciplinary issue directed at him (Mr Heaps).

[35] In all the circumstances, I am persuaded that I should grant leave on the basis of my conclusion that it is just to do so.

Determination

[36] I am satisfied on the material before me that Mr Heaps has demonstrated that the delay in raising his personal grievance was occasioned by exceptional circumstances and that it is just to grant leave for Mr Heaps' personal grievance to proceed.

[37] In terms of s.114(5) of the Act, I now direct the parties to mediation to see if it is possible for them to resolve Mr Heaps' grievance on their own terms.

[38] Mr Heaps is to notify my Authority officer of the result of mediation, as soon as mediation has concluded. If mediation does not resolve all matters, my Authority officer will then set up a conference call in which I can talk to the parties about setting the matter down for investigation.

Costs

[39] Costs are reserved.

James Crichton
Member of the Employment Relations Authority