

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 436/08
5132253

BETWEEN ALISON INGLEY
Applicant

AND TE AWAMUTU
RESIDENTIAL TRUST
Respondent

Member of Authority: Vicki Campbell

Representatives: Cor Speksnijder for Applicant
Prue Dawson for Respondent

Investigation Meeting: 3 December 2008 at Hamilton

Determination: 22 December 2008

DETERMINATION OF THE AUTHORITY

[1] Ms Alison Ingley has lodged an application for leave to raise a personal grievance against Te Awamutu Residential Trust (the Trust) outside the statutory 90 period. This determination deals only with the threshold issue of whether leave should be granted to Ms Ingley.

[2] If Ms Ingley is to be allowed to raise her grievance outside 90 days the issues to be decided are threefold. First I must be satisfied exceptional circumstances exist. If exceptional circumstances exist then I must consider whether Ms Ingley's delay in raising her personal grievance was caused by those exceptional circumstances. I then must give consideration as to whether it would be just to allow Ms Ingley's grievance outside the 90 day period.

Do exceptional circumstances exist?

[3] Section 114(4) of the Employment Relations Act provides the discretion for the Authority to grant leave where the Authority:

- 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
- considers it just to do so.

[4] Section 115 sets out four occasions on which exceptional circumstances will exist. This case is concerned with s.115(b):

- where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time

[5] Ms Ingley claims she suffered a disadvantage in her employment and was then constructively dismissed. Ms Ingley says that following a consultation process in relation to a restructuring being undertaken by the Trust, she was offered but declined an unreasonable redeployment option. Ms Ingley says she knew that in declining the proffered position she would be made redundant.

[6] Further, Ms Ingley says it was the conduct of the Trust that caused her to decline the new position and therefore, even though she was actually dismissed by reason of redundancy, the true situation is that she was forced to turn down the new position, therefore she was in effect resigning as she knew that the consequences of her actions would lead to the termination of her employment. Ms Ingley was dismissed by reason of redundancy on 21 December 2007.

[7] In support of her claim Ms Ingley points to several incidents which occurred during 2007 and which Ms Ingley says led to her not accepting the alternative position when it was offered.

[8] On 4 January 2007 and in relation to sick leave Ms Ingley had taken from 22 – 29 December 2006, Ms Ingley received a letter outlining the expectations of the Trust with regard to employees taking sick leave or domestic leave.

[9] On 26 January the Trust wrote to Ms Ingley expressing concerns over the amount of sick leave she was taking and seeking Ms Ingley's permission to obtain further information from her doctor in order to assist her to return to work.

[10] Then, during May, June and July the Trust undertook an investigation into Ms Ingley's actions with respect to a washing machine and instructions she had

received pertaining to that washing machine. The investigation process concluded on 7 August when the Trust issued Ms Ingley with a written warning.

[11] Ms Ingley says these events led her to lose trust and confidence in the Trust. These actions, combined with what she considered to be an unreasonable offer of redeployment, Ms Ingley felt she had no option but to turn the offer of redeployment down, a decision which she knew would inevitably lead to her dismissal.

Exceptional Circumstances

[12] In September 2007 Ms Ingley was diagnosed with breast cancer and underwent mastectomy surgery. On 27 November Ms Ingley commenced a course of chemo-therapy at three weekly intervals until 19 February 2008 when the treatments increased to weekly. The treatments then continued until 17 June 2008.

[13] Concurrently with Ms Ingley's cancer treatment, and on 2 December her son was involved in a serious head on motor car collision which saw him hospitalised for two months, being discharged in February 2008. Initially Master Ingley was in a critical condition.

[14] It was common ground that at the time the Trust was working through the process which led to Ms Ingley being made redundant on 21 December, it was not aware Ms Ingley was undergoing treatment for cancer, nor was it aware her son was in a critical condition in hospital.

[15] During the process of consultation over the restructuring, Ms Ingley was represented by Mr Frank Jackson, of the PSA. Ms Ingley advised Mr Jackson that she intended to take a personal grievance over her dismissal, but did not go so far as to instruct him to raise a personal grievance on her behalf. Ms Ingley was dissatisfied with Mr Jackson's representations.

[16] On 4 February 2008 Ms Ingley attended a meeting with Mr John Peebles, an employment relations advocate based in Hamilton. As she was unable to drive, Ms Ingley attended the meeting with Mr George Gwynn, who himself was seeking advice about an employment relationship problem he had with the Trust.

[17] I am satisfied from the evidence presented at the investigation meeting that at the meeting with Mr Peebles on 4 February, Ms Ingley instructed Mr Peebles to raise a personal grievance on her behalf. I am also satisfied that Mr Peebles failed to carry out these instructions. Given her situation, I am satisfied Ms Ingley took reasonable steps to follow up with Mr Peebles to see what was happening. Eventually Mr Peebles acknowledged that he couldn't remember what had had done but promised to look at his file and get back to Ms Ingley. Mr Peebles failed to make any further contact with Ms Ingley.

[18] In August 2008 Ms Ingley instructed Mr Speksnijder, who wrote to the Trust seeking its consent to raise Ms Ingley's personal grievance out of time. That consent was denied by the Trust.

Was the delay in Ms Ingley raising her grievance occasioned by the exceptional circumstances?

[19] I am satisfied that the test in s.115(b) has been met. It was the unreasonable failure by Mr Peebles to ensure Ms Ingley's grievance was raised within the requisite 90 day period which occasioned the delay.

Is it just to grant the leave

[20] The final question is whether it is just to allow the case to be brought outside the 90 day period. There have been some inordinate delays with this matter being pursued, however, I am satisfied that Ms Ingley has, at all times, been intent on pursuing her grievances against the Trust.

[21] Given the limited nature of the investigation to date I can make no assessment of the relative merits of the dismissal or unjustified disadvantage claims or the responses to those claims.

[22] I am satisfied that the disadvantage to Ms Ingley in not having the merits of her grievance investigated and determined outweighs any prejudice to the respondent. Accordingly I grant leave for Ms Ingley's grievance to be raised out of time.

Mediation

[23] As required by Section 114(5) of the Act there will be a direction to the parties to use mediation to seek to mutually resolve the grievance.

Costs

[24] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority