

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 58
3020311

BETWEEN GREGORY PETER JAMES
Applicant

AND APEX CAR RENTALS LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Peter Stobbart, for Applicant
K Dunn and C Evans, Counsel for Respondent

Investigation Meeting: On the papers

Submissions and other 13 March 2018 from the Applicant
documentation received: 6 April 2018 from the Respondent

Determination: 6 July 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Gregory James, claims he was unjustifiably dismissed by Apex Car Rentals Limited (“Apex”). He seeks compensation from his former employer.

[2] Apex rejects Mr James’ claim and says he did not raise a personal grievance, or bring it to the attention of his employer, within the statutory ninety day period following the termination of his employment. It asks the Authority to dismiss his claim.

[3] At a telephone conference in February 2018 Mr James’ representative confirmed he was seeking leave to raise the personal grievance out of time. It was

agreed the Authority would determine this preliminary issue on the papers by way of submissions and affidavits.

Background

[4] The parties disagree over the date Mr James commenced his employment. Mr James says he was initially employed by Apex as a Car Groomer in November 2013 and that he later changed to full-time employment.

[5] Apex says Mr James commenced employment on 14 January 2014. It says he signed a full time employment agreement on 14 January 2014 and it has provided a signed copy of the employment agreement.

[6] Mr James claims he was exposed to chemicals in the workplace, which he was not trained to use correctly, and this resulted in "a dramatic reduction of personal health and mental state". He says he was not provided with the correct protective equipment: the equipment he was provided with being of poor quality and inadequate to protect him from exposure to chemicals while performing his job.

[7] Within 10 months of working at Apex Mr James claims he developed "extreme Urticaria and Dermatitis due to prolonged exposure to the hazardous chemicals in the workplace", although it was not diagnosed as such at the time. He says this led to his visiting his physician no less than 24 times in the following 12 months and eventually being referred to a specialist. During this time he also started to feel the psychological effects of the exposure to chemicals.

[8] He continued to work during this period, using his sick leave as required, as he received short-term relief from medication.

[9] On 21 October 2015, following an incident at the workplace, Mr James was temporarily suspended from work and invited to a meeting the following day. The meeting was delayed to the following week at the request of Mr Stobbart, acting as Mr James' friend and advocate.

[10] Mr James provided a medical certificate from his physician on 27 October 2015 stating that he was unfit for work and should be fit to return in four weeks. It stated Mr James was suffering from stress due to his skin condition, and expressed

concern over the level of toxins to which he was being exposed, speculating whether that was contributing to Mr James' current condition.

[11] Mr James went on sick leave at that time and did not return to the workplace. His employment was terminated for medical incapacity on 7 March 2016. This occurred shortly after his employer had received a new medical certificate from Mr James' physician advising that his capacity to work would be reviewed in July 2016.

[12] Mr James lodged a Statement of Problem in the Employment Relations Authority on 25 September 2017. This was served the same day on Apex, which had no previous knowledge of Mr James' personal grievance. It has not consented to the grievance being raised outside the statutory 90 day period.

Relevant legal considerations

[13] Section 114 of the Employment Relations Act 2000 (“the Act”) provides that a personal grievance must be raised within a period of ninety days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of the period.

[14] Under s. 114(4) of the Act the Authority has the discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time, subject to any conditions it sees fit to impose, 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.

[15] Section 115 of the Act makes further provision regarding exceptional circumstances under s. 114(4) as follows:

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); or
- (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; or

- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- (d) Where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[16] Mr James accepts his personal grievance was not raised within the statutory period. He asks the Authority to find that exceptional circumstances exist such that it would be just to allow him to raise his grievance out of time.

Should leave be granted to Mr James to raise his personal grievance after the expiration of the 90 day period?

Exceptional circumstances

[17] The Supreme Court in *Creedy v Commissioner of Police*¹ considered what was meant by 'exceptional circumstances'. It noted that the Court of Appeal in *Wilkins and Field Limited v Fortune*² treated exceptional circumstances as those which are:

Unusual, outside the common run, perhaps something more than special and less than extraordinary. This formulation appears to combine two different meanings, the first that of being unusual (the "exception to the rule") and a second and more stringent interpretation of somewhere between special and extraordinary."

[18] The Supreme Court's preference "for a number of reasons" was for the first meaning, i.e. "unusual (the 'exception to the rule')".

[19] Mr James relies on s.115(a) of the Act. Submissions on his behalf represent Mr James as being so incapacitated by poisoning he had received in the workplace in the course of his work as a car groomer that he was unable to be questioned about his work until 18 months after the termination of his employment. Mr Stobbart submits that, even at that stage, questioning had to stop after one hour of discussion due to Mr James breaking down and on one occasion becoming aggressive.

[20] An ACC psychological services assessment report dated 27 September 2017 refers to a skin condition Mr James developed while employed. The psychologist, Fran Hurnen, noted this resulted in what was described as "an ongoing trauma

¹ [2008] ERNZ 109 at 119.

² [1998] 2 ERNZ 70.

reaction experience". He noted that a diagnosis of unspecified trauma – and stress related disorder seemed warranted.

[21] The psychologist, who met with Mr James on 24 August and 7 and 21 September 2017 noted the "large degree of emotional reaction and discomfort" displayed by Mr James when probed about his skin issues.

Trying to talk about his experience triggered felt experiences like he was still feeling the skin symptoms he said. At these times I observed that his emotional symptoms would intensify, he would momentarily shrug, shake his head and body and state he could not talk about this anymore and say he had to leave. At other times when describing his experiences he would stop talking, his face would display intense emotion and anger and he would apologise for this.

[22] Following five further meetings with Mr James, the psychologist's report of 2 November 2017 noted the progress that had been made since his first encounter with him. Mr Hurnen noted Mr James had gone in that time "from a place where he was not able to stay focused on the conversation or handle the emotion accompanying his past...(to) a safe place where he could begin to talk and understand himself."

[23] Mr Hurnen noted that he had engaged in some psychoeducation with Mr James around stress and anxiety issues, as well as around Mr James' experiences concerning the chemical contamination.

[24] Counsel for Apex submits that Mr James has not provided medical evidence to support his assertion he was not well enough to raise a personal grievance within ninety days of his employment terminating. Counsel submits that, even if Mr James was so unwell that he was not able to raise a personal grievance within that time frame, there is no material before the Authority to explain why he could not raise it at any point over the subsequent 477 days to the date he actually raised his grievance on 25 September 2017.

[25] I do not accept that submission. I find the psychologist's reports submitted by Mr James to be persuasive. I accept he was so affected or traumatised by his condition, which led to the termination of his employment on medical grounds, that he was unable to instruct his representative to raise his personal grievance until September 2017. I am satisfied the delay was due to exceptional circumstances pursuant to s.114(4)(a) and s.115(a).

Is it just to allow the grievance to be heard out of time?

[26] Having satisfied the first part of s.114(4), I am required to consider whether it would be just to grant leave for Mr James' grievance to be raised out of time. In *Davies v Dove Hawkes Bay Incorporated*³ former Chief Judge Colgan stated the relevant considerations included:

[38] ... the extent of the delay, the reasons for the delay, the ascertainable strength of (the plaintiff's) claim, whether there will be any prejudice to (the defendant), and the overall justice of the case.

[27] The former Chief Judge also noted in *Austin v Silver Fern Farms Limited*⁴ that the test:

[73] ... amounts essentially to a balancing of the justices and injustices to the parties of permitting a late raised grievance to proceed.

[28] Apex submits it would not be just to grant leave to Mr James to raise his grievance so far after the expiry of the 90 day statutory time frame. In its submission, Mr James has not adequately explained that delay. I have already noted that I found the psychologist's reports persuasive and need not address that submission further.

[29] Additionally Apex submits that, on the material before the Authority, Mr James did not have a strong case, appeared to be pursuing a claim of constructive dismissal despite his employment having been terminated on medical grounds, and was seeking a wide range of remedies some of which were outside the Authority's jurisdiction to award.

[30] I have considered that submission but do not accept it provides a cogent argument for denying leave to Mr James to raise his personal grievance outset the statutory timeframe. I note the statement of problem was completed by Mr James with the assistance of Mr Stobbard. Mr James acknowledges his lack of legal expertise, and his inability to afford a lawyer. I understand Mr Stobbard is not an advocate by profession but is acting as a long-standing friend of Mr James.

[31] The statement of problem is discursive and its language may not conform with the niceties of legal terminology but it is unambiguous in intent. Any deficiencies are able to be addressed under section 219 of Act.

³ [2013] NZEmpC 83

⁴ [2014] NZEmpC 30.

[32] Counsel for the respondent also submits that allowing Mr James to proceed with his personal grievance more than two years after his dismissal would cause prejudice to Apex. I note that Apex filed submissions but not affidavits, as invited to do, and as had been discussed at the telephone conference of 16 February 2018.

[33] In submissions Apex made the general statement that "memories fade over time and witnesses move on". However, no details were provided of which witnesses' memories may have faded or who had moved on, and how this would prejudice Apex if Mr James were to be granted the leave he seeks. I accept, in a general sense, the investigation of a personal grievance for unjustifiable dismissal more than two years after termination of employment has occurred presents a greater challenge for the respondent than one investigated closer to the time. However, in the absence of information about the actual prejudice to Apex, I do not find its submissions compelling on this matter.

Determination

[34] For the reasons given above I am satisfied exceptional circumstances exist pursuant to ss. 114(4) and 115(a) of the Act such that it is just to grant leave to Mr James to raise his personal grievance outside the expiration of the 90 day period.

[35] In accordance with s. 114(5) of the Act, I direct the parties to use mediation, under the auspices of the Mediation Service of the Ministry of Business, Innovation and Employment, to seek to mutually resolve Mr James' grievance.

Costs

[36] As Mr James has been represented by a friend advocating on his behalf, I do not understand there to be any issue of costs between the parties.

Trish MacKinnon
Member of the Employment Relations Authority