IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 336
3091297

	BETWEEN	PHILIP MAURICE JAUNCEY Applicant
	AND	CANTERBURY SEAFOODS LIMITED Respondent
Member of Authority:	David G Beck	
Representatives:	Applicant in person Jane Argyle-Reed and Jo Lorigan-Innes, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	8 June and 27 July from the Applicant 12 August 2020 from the Respondent	
Date of Determination:	24 August 2020	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Philip Maurice Jauncey worked for Canterbury Seafoods Limited ("CSL") as a fish filleter/fork lift and delivery driver based in a Christchurch fish processing plant from 16 October 2017 - 23 September 2019.

[2] Mr Jauncey's application to the Authority was received on 11 February 2020 that identified claims that CSL had unjustifiably dismissed him and during his employment caused him physical injury by requiring him to undertake tasks beyond his physical capabilities. Mr Jauncey seeks financial compensation for the dismissal and the workplace injury.

[3] CSL contends that Mr Jauncey's employment ended due to ongoing medical incapacity and serious misconduct on 23 September 2019 after a lengthy absence and they assert that he was not unjustifiably dismissed or disadvantaged.

[4] CSL claim that Mr Jauncey raised his personal grievance out of time having only become aware of such when it was filed in the Authority and they have not consented to it being heard out of time.

[5] Mr Jauncey has made an application pursuant to section 114(3) of the Employment Relations Act 2000 ("the Act") seeking leave to have his personal grievance investigated outside the 90-day time period on the basis of exceptional circumstances.

[6] CSL opposes Mr Jauncey's application asserting Mr Jauncey has not met the test for exceptional circumstances citing *Telecom New Zealand Limited v Morgan* [1] as authority for the premise that exceptional circumstances are difficult to establish and require a high standard of proof.

The preliminary issue

[7] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on a single issue but I do not record all evidence and submissions received. The discussion below attributes recollections and assertions made from written statements, the parties' submissions and attached documentation.

[8] The matter to be addressed is whether Mr Jauncey has established sufficient exceptional circumstances and that it is just that I grant him leave to have his grievance proceed.

What caused the employment relationship problem?

[9] When Mr Jauncey commenced working for CSL he says he disclosed that he had pre-existing physical health issues from working as a brick-layer and digger operator that caused long term pain after surgery on his spine for which he regularly took prescribed medication. Shortly after commencing work on a fish filleting bench in October 2017 the work changed to include progressively: unloading a freezer and trucks, forklift operation and delivery truck

[1] *Telecom New Zealand Limited v Morgan* [2004] 2 ERNZ 9.

driving. Essentially Mr Jauncey became a labourer/driver. CSL claims Mr Jauncey assented to the changes and they assisted him in obtaining the requisite driving licences.

[10] On or around 16 July 2018 Mr Jauncey recalls aggravating a back issue whilst driving a delivery truck which required an MRI scan that showed he had a lateral split disc: Mr Jauncey says he continued working but sought lighter duties away from driving and loading/unloading tasks but this was very short-term before he had to resume labouring and driving work.

[11] On 30 October 2018, Mr Jauncey says he sustained a serious hamstring/knee injury after unloading goods whilst working at a client's premises and on 7 November after the injury was diagnosed, he went on ACC.

[12] The absence was lengthy as it also involved surgery and by early August 2019 Mr Jauncey provided his sixth medical certificate indicating that he was unfit to return to work for the period 30 July to 22 September 2019. In June 2019 CSL had sought further information and invited Mr Jauncey to meet on 15 August with his representative. This meeting despite several CSL attempts to schedule did not occur.

[13] CSL's counsel wrote to Mr Jauncey on 26 August 2019 indicating that CSL was seeking to engage and discover further medical information on his ongoing absence and it detailed an interim matter of Mr Jauncey allegedly being abusive to CSL staff that CSL categorised as 'misconduct'. Three issues Mr Jauncey had raised (i.e. a claimed late ACC payment, a bonus calculation dispute and that his job description had been changed) were also addressed in some detail in the 26 August letter.

[14] No meeting occurred as Mr Jauncey declined such and CSL's counsel in a further letter of 29 August warned Mr Jauncey that the consequence of non-engagement would be that:

> …. our client may make a decision regarding the matters contained within our letter in your absence. This letter puts you on notice that our client reserves the right to make any decision based on the information currently available. This decision may include terminating your employment with our client.

[15] The letter also asked Mr Jauncey to identify a time convenient to meet.

[16] Mr Jauncey did not respond and he does not contend that he did not receive the letters. Mr Jauncey was subsequently summarily dismissed by a letter of 23 September 2019. The reasons for the dismissal were described in summary as:

- Medical incapacity, Mr Jauncey being at this point in time absent for ten months.
- Lack of constructive engagement around a return to work programme and failure to provide detailed medical information on his future prognosis.
- A decision, in the absence of any explanation, that Mr Jauncey's verbal interactions with staff and a CSL contractor amounted to serious misconduct as it involved "verbal abuse".

[17] Mr Jauncey did not raise a personal grievance concerning his dismissal with CSL until he filed the matter in the Authority on 11 February 2020 and the parities have not attended mediation.

[18] CSL's counsel submitted that Mr Jauncey had failed to raise his personal grievance in accord with the process outlined in his employment agreement implying that would be a ground for ruling such out as he commenced his claim first in the Authority. I am not persuaded by this argument as being a barrier in itself and draw counsel's attention to the Employment Court decision *Pollard Contracting Ltd v Donald* that concerns this very issue where Judge Corkill held that provided other statutory requirements are met, filing a personal grievance first in the Authority is permissible and not just confined to rare circumstances. [2]

The law and what Mr Jauncey has to establish

[19] An employee failing to raise a personal grievance within 90 day time limit where the employer has refused to grant leave for it to be raised, may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it

i. is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances
ii. considers it just to do so.

[2] *Pollard Contracting Ltd v Donald* [2014] ERNZ 318 at [14] – [15].

[20] A definition of 'exceptional circumstances' is set out in *Wilkins v Field & Fortune* as being those that are "unusual, outside the common run, perhaps something more than special and less than extraordinary". [3]

[21] The Supreme Court in *Creedy v Commissioner of Police* [4] addressing the definition of "exceptional circumstances" stated:

> "[31] In Wilkins & Field, the Court of Appeal 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 being that of being unusual (the 'exception to the rule') and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.
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> [32] First, it accords with ordinary English usage. *As Lord Bingham of Cornhill* said in *R v Kelly* [1999] 2 All ER 13 (CA) , when construing a reference to 'exceptional circumstances':
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> We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.
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> Secondly, it will be easier to apply. The very language of Wilkins & Field implies both uncertainty ('perhaps') and lack of precision ('Something more than special and less than extraordinary'). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[22] The exceptional grounds upon which Mr Jauncey seeks to rely are set out in s 115(b) of the Act which states:

> For the purposes of section 114(4)(a), exceptional circumstances include-
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> (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 …

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[3] *Wilkins v Field & Fortune* [1998] 2 ERNZ 70.
[4] *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

[23] In addition, given that it has been held by the Employment Court that s 115 of the Act is not an exclusive list of factors [5] the Authority can take into account any other relevant matters that Mr Jauncey has identified.

Did Mr Jauncey make reasonable arrangements?

[24] There are two limbs to the test in s 115 (b) of the Act. The first limb concerns whether Mr Jauncey made reasonable arrangements to have the matter raised by an agent on his behalf and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit.

First Limb

[25] Mr Jauncey has indicated that during the 90 day period he contacted several solicitors but "I did not find anyone with whom I felt confident to assist my application". He also says that he telephoned the Employment Court on 28 September and 9 October 2019 and claims the people he spoke to were vague and did not tell him about the 90 day period and that his understanding was that he could not be dismissed as he was still on ACC and advising his employer of his injury progress.

[26] He then indicated during the 90 days (at an unspecified date) that he called into a law firm to make an appointment later that day but he called it off due to post-surgery pain he was experiencing so, he provided his lawyer with his personal details for further contact.

[27] The solicitor in question provided the Authority with an affidavit confirming that the cancelled first appointment was on 5 September 2019 prior to the dismissal and that Mr Jauncey did not reschedule until 14 January 2020 and that was his first appointment with the solicitor of around 90 minutes in which the solicitor was apprised of his dismissal followed by a discussion thereafter at a date unspecified. The solicitor is clear that their firm took no instructions and that no terms of engagement were entered into with Mr Jauncey.

[28] Mr Jauncey was provided with the solicitor's affidavit and he said that after making an initial appointment on 5 September 2019 to discuss his situation with a solicitor prior to his dismissal he cancelled the appointment due to pain issues he was experiencing and after being

[5] *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30 at [67].

dismissed on 23 September 2019 he first met his solicitor on 14 January 2020. He reiterated that he attended at a later unspecified date after 14 January and that he was told that the firm could not act for him due to a conflict of interest. I make the observation that by the time of the scheduled 5 September 2019 appointment Mr Jauncey would have been in possession of the 26 August 2019 letter from his employer proposing his dismissal so it is likely that he is confusing this cancelled appointment with his indication of when he first made contact.

[29] Mr Jauncey did not seek to instruct another representative and he then filed the matter with the Authority himself on 11 February 2020.

[30] I observe that by the time of the first solicitor appointment, Mr Jauncey would have known that he was already outside the 90 day period (22 December 2019). All he had to do during the 90 days if he could not physically attend an appointment, was to phone or write to his solicitor who he had chosen but not met, alerting them to his situation broadly and instruct the solicitor to preserve his position by raising a grievance with his former employer.

[31] I have to consider first whether the above demonstrates that Mr Jauncey made reasonable arrangements to have his grievance raised by his agent the solicitor.

[32] I find he did not do so in a timely manner as the 90 days had elapsed by some three weeks by the time he made his solicitor aware on 14 January 2020 that he had been dismissed.

Second limb

[33] The second limb of the test in s 115 (b) concerns whether Mr Jauncey's solicitor having been properly instructed, failed to raise the grievance within the requisite time limit. Given that the 90 day time limit had already expired by the time the solicitor was made aware of a potential personal grievance I find that she could not be held responsible for a delay in raising the personal grievance within the required time.

[34] The only criticism I can level is that it may not have been made clear to Mr Jauncey by his solicitor that he needed to first alert his employer to the grievance and then to make an application to have the matter heard out of time if he wished to pursue the matter.

[35] For the above reasons, I find that Mr Jauncey cannot rely upon s 115(b) of the Act as he did not make reasonable arrangements for his solicitor to raise his grievance within 90

days and the solicitor he consulted cannot be held responsible when they are not instructed within the 90 day period.

Other exceptional circumstances

[36] Mr Jauncey has sought to rely on an assertion that he was during the 90 days and thereafter suffering from ongoing debilitating pain and lack of mobility. Having viewed Mr Jauncey's ACC correspondence with CSL outlining the nature of his injury it is apparent that this would be the case.

[37] However, Mr Jauncey provided no medical evidence that would establish conclusively that the treatment he was receiving was likely to or did impact upon his ability to articulate his personal grievance or instruct someone to raise it with his employer in a timely manner.

[38] On balance however, given Mr Jauncey's resources and compelling personal circumstances I am prepared to accept the limited medical evidence that he has provided in equity and good conscience as being an exceptional factor to explain Mr Jauncey's delay in raising his personal grievance but I also need to consider whether further extra contextual matters exist and whether it is just to grant the leave.

Is it just to grant the leave?

[39] In finding that an exceptional circumstance exists, s 114 (4)(b) of the Act requires that I also have to be sure that in granting the leave for Mr Jauncey to be heard that I consider "it just to do so". In this respect I need to look at a number of factors that I group under the following headings:

The length of the delay and prejudice to CSL

[40] As Mr Jauncey was dismissed on 23 September 2019 and CSL were not placed on notice of the existence of a personal grievance challenge until he filed it with the Authority on 11 February 2020, some 51 days after the 90 day limit. I accept this delay is not minimal but the reasons for such have been explored above. However, Mr Jauncey was not seeking reinstatement and the business could have responded to the late grievance without any significant prejudice.

Merits of Mr Jauncey's claim

[41] Whilst the Employment Court in *Austin v Silver Fern Farms* granted leave for Mr Austin to raise a grievance where ACC matters were at issue it did so after carefully analysing a situation where the employer had deceived him of his ACC entitlements and adopted a strategy to divest itself of rehabilitation responsibilities. [6] Here I do not see a parallel situation, as CSL, from correspondence divulged, made significant and sustained efforts to engage with Mr Jauncey that were rebuffed without explanation and the nature of his injury meant he could not engage in a return to work programme.

[42] Procedurally, CSL sought to fairly engage with Mr Jauncey about the reasons for his ongoing absence and prognosis going forward. The final decision to end his employment was after placing him on notice that his ongoing medical incapacity was at issue for a job that required a degree of physical fitness that sadly Mr Jauncey was struggling to meet.

[43] The final period of attempted engagement spanned early June 2019 - 22 September 2019 and Mr Jauncey was in text communication for the initial part of this period but he rebuffed all attempts to meet including an offer to address employment issues he had raised.

[44] Whilst there was also a serious misconduct issue involved, Mr Jauncey did not constructively engage with his employer on this either and he has conceded that he was abusive in communication with CSL representatives albeit when he was under a significant degree of stress.

[45] Mr Jauncey has not identified any significant procedural or substantive issues that would bring the decision to dismiss him into doubt and whilst the burden of showing that they acted in a fair and reasonable manner falls on CSL this was a medical incapacity dismissal involving a significantly incapacitated employee who had been absent for ten months.

[46] Mr Jauncey has remained on ACC and he helpfully provided evidence that he is currently not fit for a return to employment as his latest ACC Medical Certificate has him as "[F]ully unfit for work" until 16 November 2020.

[47] If I was to grant leave it is very difficult to see what Mr Jauncey can point to, if anything, that renders his dismissal unjustified in all of the circumstances.

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[6] At [67].

[48] The law is well settled in this area (dismissal for medical incapacity) and provided the employer can establish that a number of factors have been fairly considered and steps taken they are not obliged to keep an employee's position open indefinitely where there is no reasonable prospect of the absent employee being able to meet the requirements of the job even if it involves a work related accident where employer culpability is at issue.

[49] Medical incapacity cases also point to a 'two way' good faith obligation on an absent employee to be communicative and constructive in engaging with their employer during periods of absence and that lack of engagement can impact on an employee's ability to challenge a dismissal. [7]

[50] I also have to make it clear to Mr Jauncey that the Authority has no jurisdiction to determine if he should be compensated for personal injury at work as such a claim needs to be pursued in the civil jurisdiction and he faces a high hurdle to overcome the bar that ACC coverage may prevent it proceeding.

[51] I find that on the evidence provided in the filed material that Mr Jauncey's prospects of establishing that he was unjustifiably dismissed are so remote as to make it unjust to allow this matter to proceed. Even if I did Mr Jauncey is currently unavailable for employment and is receiving ACC earnings related compensation. Contrary to Mr Jauncey's belief, an employer has no legal obligation to keep open a position whilst an employee is on ACC even if that is a result of a workplace incident.

[52] In concluding this I am mindful that Mr Jauncey is in in a very difficult position health wise and that this may be an ongoing chronic pain situation that must place him in a very vulnerable frame of mind. My thoughts go out to him and I sincerely hope with continued medical support that his pain situation can be alleviated.

Finding

[53] Whilst I have found that Mr Jauncey has demonstrated that it was more than likely that his ongoing medical situation prevented him from raising his personal grievance for unjustified dismissal within 90 days, I find that in the totality of his circumstances including

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[7] See for good example *Lyttelton Port Company Limited v Arthurs* [2018] NZEmpC 9 and *Dunn v Waitemata District Health Board* [2014] NZEmpC 201 at [43].

that he did not take reasonable steps to have his grievance raised, it would not be just to grant his application for leave to have this matter proceed further.

Conclusion

[54] **Mr Jauncey's application under s 144 of the Act is declined.**

Costs

[55] Costs are at the discretion of the Authority and here Mr Jauncey was unsuccessful in his application to have his personal grievance heard outside the 90 day limitation period. The parties are encouraged to make an agreement on costs that needs to take into account that this matter was determined 'on the papers' with relatively little legal complexity. I would encourage the parties to seriously consider allowing costs to lie where they fall.

[56] If no agreement is achieved, Canterbury Seafoods Limited has fourteen days following the date of this determination to make a written submission on costs and Mr Jauncey has a further fourteen days to provide a response. I will then determine what costs are appropriate.

David Beck
Member of the Employment Relations Authority