



her behalf, however circumstances beyond her control led to her application being filed outside the statutory 90 day time limit set out in s 114 (1) of the Act.

[5] GFL opposes the raising of Ms Kanta's personal grievance outside the time period specified in the Act on the grounds that it does not accept that Ms Kanta's delay in raising the grievance was caused by exceptional circumstances.

[6] I now proceed to determine as a preliminary issue whether Ms Kanta raised the personal grievance claim on 6 January 2010, or as an alternative whether leave should be granted to raise the personal grievance after the expiration of the statutory 90 day time limit set out in s 114 (1) of the Act.

#### *Explanatory Note*

[7] I note that the delay in progressing this matter following receipt of the Statement of Problem by the Authority on 31 October 2011 and the Statement in Reply during November 2011 is attributable to Ms Kanta having been intermittently overseas and otherwise unavailable during the period between the receipt of the Statement of Problem and the Investigation Meeting held on 18 October 2012.

#### **Issues**

[8] The issues for determination are:

- Whether Ms Kanta verbally raised a personal grievance on 6 January 2010;
- If it is determined that Ms Kanta did not verbally raise a personal grievance on 6 January 2010, whether there are exceptional circumstances in terms of sections 114 and 115 such that it is just to grant leave pursuant to section 114(4)(b).

#### **Background Facts**

[9] Ms Kanta commenced employment with GFL as a Machine Operator in April 2007. Ms Kanta's employment required her to repetitively lift a heavy guard hood on the machine which she was operating and on 3 September 2008, Ms Kanta injured her right wrist while undertaking work-related tasks.

[10] Ms Kanta was referred to the GFL doctor and underwent a process of referral and treatment subsequently; however Ms Kanta had not been medically cleared as fit to return to work at the date of a meeting held on 6 January 2010. The meeting had been called by GFL to discuss and consider the medical reports received from an Occupational Therapist and the GFL appointed doctor, and what should be the appropriate outcome following consideration of this information.

*6 January 2010 Meeting*

[11] Ms Kanta was invited to attend the meeting on 6 January 2010 by letter dated 24 December 2009 and invited to bring a support person with her to the meeting. The meeting held on 6 January 2010 had been attended by Ms Mala Naidoo, GFL Human Resources Manager, Mr Andy Graves, GFL Health and Safety Manager, and Ms Christine James, GFL Health and Safety representative.

[12] Ms Kanta, a member of the NZ Amalgamated Engineering, Printing and Manufacturing Union (Inc) (EPMU), had been supported at the meeting by Mr Ruka Kelly, EPMU union delegate.

[13] The parties agreed that the medical report of Dr Dryson had been discussed at the meeting and Ms Kanta had been advised that her employment had been terminated following a period of absence of 14 months. The termination of Ms Kanta's employment was made with effect from that same date, 6 January 2010.

[14] The decision to terminate Ms Kanta's employment was confirmed in a letter signed by Ms Naidoo dated 11 January 2010. The letter explained the reasons why GFL considered Ms Kanta was unable to perform the duties for which she had been employed and concluded:

*Given the above we are unable to secure a role suitable to your physical capability and from a duty of care we have been fair and reasonable in managing this matter in the last 14 months and cannot sustain this longer. Hence, we will be terminating your employment with Griffins Foods Ltd as of the 6<sup>th</sup> January 2010, due to a "frustration of contract". Any outstanding pay and or monies owing to you will be paid as at this date.*

[15] Ms Kanta said she had informed GFL at the meeting on 6 January 2010 that she was raising a personal grievance after she had been informed that her employment was terminated. Ms Kanta said that she had written to GFL that same day with notification that she had given her permission for Mr Kelly to be provided with a copy of her personnel file.

[16] Ms Naidoo and Mr Graves both deny that Ms Kanta had indicated that she would be raising a personal grievance at any time during the meeting on 6 January 2010. Ms Naidoo said after the meeting had finished, Mr Kelly had returned to ask if he could have a copy of Ms Kanta's file and she had told him that she would need Ms Kanta's permission to provide this. Ms Naidoo said Mr Kelly had subsequently provided a handwritten permission note from Ms Kanta and she had released the file, however this note had not contained any reference to the fact that Ms Kanta was raising a personal grievance.

[17] Ms Naidoo said that if Ms Kanta had raised a personal grievance at the meeting on 6 January 2010 she would have informed Mr Scott Munday, Group Human Resources Manager, as this would be the standard procedure in these matters.

[18] Mr Munday confirmed that Ms Naidoo had not informed him of a personal grievance having been raised by Ms Kanta on 6 January 2010 and that the reporting of such an event would have been the normal procedure in such a case. Mr Munday also said that in his dealings with Ms Naidoo, he had found that she could be relied upon to adhere to the normal procedures.

#### *EPMU Involvement*

[19] Ms Kanta said she had contacted the EPMU office during the holiday period following her dismissal on 6 January 2010 and had left messages with the call centre staff requesting that Mr Steve Westoby, EPMU Organiser, call her. However Ms Kanta said that she had not heard from Mr Westoby until the end of January 2010.

[20] Mr Westoby explained that the EPMU has an annual shutdown during the Christmas period when some employees are required to take four weeks leave; consequently he had been on leave from the end of December 2009 until late January 2010. Mr Westoby explained that during the annual shutdown period there are duty organisers available and the call centre employees are instructed not to contact those organisers who are on annual leave.

[21] As a result, Mr Westoby said he had not received any messages that Ms Kanta wanted him to call her until he returned to the office in late January 2010. Mr Westoby said that on or about 26 January 2010 he had telephoned and spoken to Ms Kanta.

[22] Ms Kanta said that during this call she had told Mr Westoby that she wanted the EPMU to raise a personal grievance on her behalf and she had given permission for GFL to provide a copy of her personnel file to the EPMU. Ms Kanta said Mr Westoby had confirmed

to her that he had her file. Mr Westoby said he had received a copy of Ms Kanta's personnel file, but he could not recall exactly when he had done so.

[23] Ms Kanta said she had asked Mr Westoby to raise a personal grievance before the 90 days statutory time limit expired and that he had replied that he would examine her personnel file and contact her after he had done so.

[24] Mr Westoby said during the telephone conversation with Ms Kanta on or about 26 January 2012 he had informed her that he could not agree to pursue a personal grievance on her behalf at that stage as he had only heard her account of what had happened.

[25] Mr Westoby said he had subsequently attended the GFL site on or about 5 February 2010 and had spoken to Ms Naidoo and Mr Graves. After discussing with Ms Naidoo and Mr Graves the reasons for Ms Kanta's dismissal, Mr Westoby said he had concluded that Ms Kanta did not have grounds to support raising a personal grievance.

[26] Ms Naidoo confirmed that she had spoken to Mr Westoby concerning Ms Kanta's dismissal on 6 January 2010 at the GFL site, and that Mr Westoby had informed her that he did not believe Ms Kanata had grounds to support raising a personal grievance.

[27] Mr Westoby said he had contacted Ms Kanta shortly after his meeting with Ms Naidoo and Mr Graves, and he had informed her that he did not consider she had grounds to support raising a personal grievance against GFL.

[28] Mr Westoby explained at the Investigation Meeting that the EPMU dealt with many unjustifiable dismissal claims by members, and it had to be responsible in deciding which claims it chose to support given the accountability it had towards its members and the allocation of member funds.

[29] Mr Westoby further explained that as a consequence the EPMU would pursue only those cases in which it believed there was a reasonable prospect of success. Therefore on some occasions Mr Westoby said that he had to be '*brutally honest*' in telling a member wanting the EPMU to pursue an unjustifiable dismissal claim in which the EPMU believed there was a low prospect of success, that this would not happen. This had been the case in his dealings with Ms Kanta.

[30] Ms Kanta denied that Mr Westoby had told her that she did not have grounds to raise a personal grievance, and said that had he done so, she would not have continued to

persistently call both him and the call centre during February 2010, and she would have obtained a second opinion from an independent lawyer.

[31] Mr Westoby agreed that Ms Kanta had called him on several occasions despite his having provided her with his opinion that she did not have grounds for raising a personal grievance, however despite him reiterating this during the calls, she had been unable to accept his opinion on the issue.

[32] Mr Westoby explained that, although he could not recall specifically having advised Ms Kanta that she could take a grievance independently of the EPMU and that she must commence that process within 90 days of the dismissal, as this was his normal practice, he was sure he would have done so on this occasion.

[33] As Ms Kanta would not accept his view on the matter, Mr Westoby stated that he had offered her the opportunity to meet with Ms Anne-Marie McNally, the EPMU lawyer, to obtain a second opinion. Mr Westoby said he had telephoned Ms Kanta to arrange a meeting with Ms McNally; however she had failed to respond to his calls.

[34] Ms Kanta said she had spoken to Mr Westoby in early March 2010 and told him she was going to Australia and the 90 day period would have elapsed by the time she returned. Ms Kanta said she had asked Mr Westoby if she could speak to a lawyer before she went to Australia because he had not raised a personal grievance on her behalf at this point.

[35] Mr Westoby said that he had not been told by Ms Kanta in March 2010 that she had been going to Australia, and he had not heard further from her until he received a telephone call from her in late June or early July 2010. Mr Westoby said he had been quite angry that Ms Kanta had not been in touch for approximately 3 months as he had been trying to arrange the meeting for her with Ms McNally.

[36] Mr Westoby said that after Ms Kanta made contact with him in late June or early July 2010, he had passed the matter over to Ms McNally who had written to Ms Kanta on 7 July 2010.

[37] In the letter Ms McNally had explained the background to Ms Kanta's termination from GFL on the basis of 'frustration'. The letter concluded:

*Dr Dryson wrote a report dated 10 December 2009 confirming you are restricted from performing a full range of work duties. That*

*supports the company's action in terminating your employment. I regret that there is no legal basis on which we can challenge this.*

[38] Mr Westoby said that Ms Kanta had not at any time during their conversations informed him that she had raised a personal grievance verbally with GFL on 6 January 2010. However Mr Westoby confirmed Ms Kanta had made it very clear during their many conversations that she had been fully aware of the 90 day time limit for raising a personal grievance.

#### *Inder Lynch Involvement*

[39] Ms Kanta said that in August 2010 she contacted Inder Lynch, Lawyers. At this time Ms Kanta explained that she had not been working and was in receipt of sickness benefit, and consequently an application for legal aid was made prior to Inder Lynch undertaking any work on her behalf.

[40] On 22 December 2010 the Legal Aid Services Agency had written confirming that Ms Kanta's application for legal aid had been accepted; however due to Inder Lynch's close-down period over the Christmas - New Year period, Ms Kanta's lawyer had not received this letter of confirmation until 10 January 2011.

[41] Although Ms Kanta had met with Inder Lynch on 14 January 2011, she had subsequently returned to Fiji and therefore did not formally instruct Inder Lynch to pursue her personal grievance against GFL until 27 May 2011 following her return to New Zealand.

[42] On 27 May 2011 Inder Lynch had written to GFL seeking an extension of the 90 day statutory time limit period. In the letter Inder Lynch had written:

*We note that Ms Kanta is outside the 90-day time limit for raising a personal grievance. We submit, however, that this is due to circumstances outside of our client's control. We understand that Ms Kanta raised her employment issue with her union lawyer shortly after her employment was terminated. However, despite her attempts to follow this matter up, there was a significant delay and she did not receive a response from her union lawyer until late July 2010, which we note was outside the 90-day time limit in any event.*

[43] The letter concluded with the advice that if GFL did not consent to Ms Kanta raising her personal grievance outside the 90-day time limit, Inder Lynch had been instructed to seek leave under s 114(3) of the Act, i.e. an application to the Authority to raise the personal grievance outside the statutory 90-day time limit:

*Please advise whether you consent to Ms Kanta raising her personal grievance outside of the 90-day time limit prescribed in the Employment Relations Act 2000. In the event that you do not consent, we are instructed to file an application seeking leave under section 114(3) of the Act.*

[44] Ms Kanta said she had informed Inder Lynch at the meeting on 27 May 2011 that she had verbally raised a personal grievance with GFL at the meeting on 6 January 2010. However in a letter dated 16 June 2011 written by Inder Lynch to GFL, Inder Lynch advised GFL that it had been informed by Ms Kanta at a meeting on 7 June 2011 that she had verbally raised a personal grievance at the meeting on 6 January 2010.

[45] In the letter of 16 June 2011 Inder Lynch had written: *We are therefore instructed to file a personal grievance in the Employment Relations Authority without further delay.*

[46] Mr Mundy replied to this letter of 16 June 2011 by email dated 20 June 2011 stating that GFL did not accept that: *Ms Kanta had made her intentions of pursuing a personal grievance clear at the time of her dismissal.*

[47] Ms Kanta said she had returned to Fiji in July 2011 where she remained for most of July, returning there again in August 2011, and she did not contact Inder Lynch until 18 August 2011 to arrange an appointment to finalise her application.

[48] Ms Kanta said she had been advised by Inder Lynch that it could not continue to act for her and her file had been transferred to Law & Associates on 6 March 2011.

## **Determination**

### **The law**

[49] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss 114(1) and (2) of the Act which state:

#### **114 Raising a Personal Grievance**

(1) *Every employee who wishes to raise a personal grievance must ... raise the grievance with his or her employer within the period of 90 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 that period.*

(2) *For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make the employer or a representative of the*

*employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[50] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.<sup>1</sup> In this case, Chief Judge Colgan stated:

*[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[51] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer<sup>2</sup>.

### **Did Ms Kanta verbally raise a personal grievance on 6 January 2010?**

[52] Ms Kanta said that she had verbally raised a personal grievance during the meeting on 6 January 2010, Ms Naidoo and Mr Graves deny that she had done so.

[53] Ms Naidoo said that had Ms Kanta raised a personal grievance on 6 January 2010, she would have escalated the issue, as was normal GFL procedure, to Mr Munday as Group Human Resources Director. Mr Munday confirmed that Ms Naidoo had not done so, and had confirmed that in his view, it would be uncharacteristic of Ms Naidoo not to have done so.

[54] I find that Ms Kanta did not verbally raise a personal grievance at the meeting on 6 January 2010 and in reaching this conclusion I have taken into account the following:

- There was no evidence submitted by Mr Kelly, EPMU delegate, in confirmation of the personal grievance having been verbally raised by Ms

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<sup>1</sup> *Creedy v Commissioner of Police*[2006] ERNZ 517

<sup>2</sup> *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

Kanta at the meeting on 6 January 2010, despite his having attended that meeting in the capacity of Ms Kanta's representative.

- Ms Kanta submitted that she had been unable to contact Mr Kelly and GFL had not provided his details to her. I observe that Ms Kanta had engaged competent legal counsel to assist her in the matter who would have been conversant with clause 5 of Schedule 2 of the Act which sets out the right of a party to a matter before the Authority to apply for a witness summons. I therefore conclude that the non-inclusion of Mr Kelly as a witness was a deliberate decision on the part of Ms Kanta and/or her representatives;
  - Ms Kanta further submitted that her doctor, Dr Selva Selvakumar, who could have confirmed that she had informed him on 14 January 2010 that she had verbally raised a personal grievance on 6 January 2010, was not present to attest to this fact at the Investigation Meeting because her lawyer did not inform him of the date. I observe again that Ms Kanta had engaged competent legal counsel and that there had been ample time for Ms Kanta and/or her lawyer to have provided the necessary notification to Dr Selvakumar
- There is no reference to Ms Kanta having raised a personal grievance recorded in the notes taken at the meeting on 6 January 2010 by Ms Kames, which both Ms Naidoo and Mr Graves confirmed as being an accurate record. Further there is no evidence to the fact that Ms Kanta allegedly raised a personal grievance in the letter she had written to GFL requesting that a copy of her personnel file be provided to Mr Kelly.
  - I find Ms Kanta's evidence that she was aware that she was required to raise a personal grievance within the statutory 90 day time limit and had done so verbally on 6 January 2010 to be inconsistent with her course of dealing with both the EPMU and Inder Lynch.
  - *Ms Kanta's dealings with Mr Westoby and the EPMU:*
    - During their telephone conversation on 26 January 2010 Ms Kanta said she had asked Mr Westoby to raise a personal grievance before

the expiry of the 90 day statutory time limit, which would not have been necessary had Ms Kanta verbally raised a personal grievance on 6 January 2010;

- Ms Kanta's evidence that she had asked Mr Westoby if she could speak to a lawyer in early March 2010 because she was going to Australia and he had not raised a personal grievance on her behalf by that date, which meant that the statutory 90 day time limit would have elapsed by the time she returned to New Zealand. This would not have been necessary had Ms Kanta verbally raised a personal grievance on 6 January 2010;
- Mr Westoby's evidence that although there had been several telephone calls between himself and Ms Kanta; she had never mentioned to him that she had verbally raised a personal grievance with GFL on 6 January 2010.

- *Ms Kanta's dealings with Inder Lynch:*

- Ms Kanta's evidence was that she had informed Inder Lynch at a meeting on 27 May 2011 that she had verbally raised a personal grievance with GFL on 6 January 2010. However the letter from Inder Lynch dated that same day does not refer to this having been the case. On the contrary the letter seeks an extension of the statutory 90 day time limit, and failing consent being given, advises that Inder Lynch had been instructed to seek leave to raise the personal grievance outside the statutory 90 day time limit pursuant to s 114(3) of the Act.
- Although Ms Kanta said that she had informed Inder Lynch at the meeting on 27 May 2011 that she had verbally raised a personal grievance at the meeting with GFL on 6 January 2010, the second letter from Inder Lynch dated 16 June 2011 states that this advice had not been provided to it by Ms Kanta until the later meeting on 7 June 2011.
- The fact that the letter from Inder Lynch to GFL on 16 June 2011 advising it of Ms Kanta's instructions to file a personal grievance

with the Employment Relations Authority on the basis that she had verbally raised a personal grievance with GFL on 6 January 2010, is totally at variance with the previous instructions from Ms Kanta.

[55] Even if I were to accept that Ms Kanta had verbally raised a personal grievance at the meeting on 6 January 2010 which I do not, in light of Ms Kanta's evidence that she did so by stating: "*I am raising a personal grievance*", I find that this would not have met the requirement as set out by Judge Colgan in *Creedy v Commissioner of Police*<sup>3</sup>.

[56] These requirements are that the person raising a personal grievance must meet the requirement of providing sufficient detail for the employer to know the nature of the grievance and the remedies sought. As stated by Judge Colgan: "*So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance*".

[57] Having determined that Ms Kanta did not bring her personal grievance within the 90 day period in accordance with s 114(1) of the Act and because GFL does not consent to Ms Kanta raising her personal grievance outside that time limit, I turn to consider whether there were exceptional circumstances such that Ms Kanta should be granted leave to pursue her personal grievance.

### **Were there exceptional circumstances in terms of sections 114 and 115?**

#### **The law**

[58] An employee who has failed to raise a personal grievance within 90 days time limit and the employer has refused to grant leave for it to be raised out of time, may apply to the Authority to raise a personal grievance 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 :

- (a) *is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances*
- (b) *considers it just to do so*

[59] The meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune*<sup>4</sup> as being those which are "*unusual, outside the common run, perhaps something more than*

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<sup>3</sup> [2006] ERNZ 517 at para [36]

<sup>4</sup> [1998] 2 ERNZ 70

*special and less than extraordinary*<sup>5</sup>. The Supreme Court in *Creedy v Commissioner of Police*<sup>6</sup> upheld this meaning, and it can now be taken to be settled.

[60] The exceptional grounds upon which Ms Kanta seeks to rely on those set out in s 115(b) of the Act which states:

***115 Further provision regarding exceptional circumstances under section 114***

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

- (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*

*Exceptional Circumstances*

[61] Ms Kanta said that she had instructed Mr Westoby to raise a personal grievance on her behalf with GFL.

[62] I find that Mr Westoby's evidence corroborates Ms Kanta's evidence on this point, however Mr Westoby said that he did not confirm to Ms Kanta that the EPMU would accede to her request during the telephone call on or about 26 January 2010 because he had only heard her version of events.

[63] Mr Westoby stated that following this telephone conversation he had visited GFL and, having spoken to Ms Naidoo and Mr Graves, he had concluded that Ms Kanta did not have grounds to support taking a personal grievance against GFL. Mr Westoby said that he had informed Ms Kanta of this shortly after his visit to GFL.

[64] I find that Mr Westoby's evidence on this point, which is in direct conflict to that of Ms Kanta, is supported by Ms Naidoo's evidence that Mr Westoby had informed her when he had visited GFL that he did not consider Ms Kanta had grounds for raising a personal grievance.

[65] Mr Westoby's evidence is further supported by the explanation that the EPMU would not support a member's unjustifiable dismissal claim unless convinced that there was a reasonable prospect of success of the claim being upheld. Having informed Ms Naidoo that

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<sup>5</sup> [1998] 2 ERNZ 70

<sup>6</sup> [2008] 1 ERNZ 109

he did not believe Ms Kanta had grounds to support taking a personal grievance against GFL, I find it credible that Mr Westoby would have informed Ms Kanta of this on the first opportunity following his visit to GFL.

[66] Further both Ms Kanta and Mr Westoby confirm that there were several telephone calls between them following Mr Westoby's meeting with Ms Naidoo and Mr Graves on or about 5 February 2010, and I do not find it credible that an experienced EPMU Organiser like Mr Westoby would not have acted promptly in respect of Ms Kanta's personal grievance had he believed that she had grounds to support one and she had been calling him consistently to urge him to do so.

[67] Rather I find the evidence of these telephone calls to support Mr Westoby's evidence that Ms Kanta refused to accept what he had advised her, and that he had been attempting to arrange an appointment for her to see Ms McNally, in order for Ms McNally to explain the legal situation to her.

[68] Consistent with this view, I find that the letter from Ms McNally dated 7 July 2010 provides a full explanation of the reasons for Ms Kanta's termination of employment, including an explanation of 'frustration of contract': "*This is a legal term that is used when someone, through no fault of their own, is unable to do all of the work they are employed to do*".

[69] I find that Mr Westoby had reached the conclusion following his visit to GFL that Ms Kanta had no grounds to support raising a personal grievance and he had conveyed this conclusion to her in a timely manner.

[70] I determine that Ms Kanta has failed to establish that Mr Westoby "*Unreasonably failed to ensure that the grievance was raised within the required time*" pursuant to s 115 (b) of the Act. Ms Kanta has failed to establish 'exceptional circumstances' in terms of ss114 and 115 of the Act.

#### *Just to grant leave*

[71] The second limb to s114 (4) requires the Authority to consider whether it is just to grant leave for Ms Kanta to raise the grievance out of time. The then Chief Judge Goddard discussed the principles of whether it was just to grant leave in *Gibson v GFW Agri-Products*

*Ltd*<sup>7</sup>. In that case the Court suggested that unless the employer can show that it would be substantially disadvantaged by the granting of leave, it will normally be just to grant leave.

[72] The merits of the case are relevant to this enquiry. In this case I find that on the evidence submitted by Ms Kanta in the Investigation Meeting, she had been fully aware of the 90 day rule due to her having previously been involved in raising a personal grievance against a previous employer in which the 90 day rule issue was pivotal.

[73] I have found that there is no evidence that supports Ms Kanta having raised the personal grievance within the 90 day time limit, or that Mr Westoby unreasonably failed to have it raised on her behalf.

[74] Further I note that this matter has been extraordinarily protracted with some 16 months elapsing before the personal grievance was raised by Inder Lynch on behalf of Ms Kanta, and that there was a further delay of some months before the application to raise the personal grievance out of time was filed with the Authority. The 90 day issue was set down for preliminary determination by the Authority on two separate occasions, however both dates had to be vacated due to Ms Kanta's inaction.

[75] In these circumstances I determine that it is not just to grant Ms Kanta leave to raise the personal grievance out of time

[76] Leave to raise the grievance out of time is declined.

[77] I am unable to assist Ms Kanta further.

### **Costs**

[78] Costs are reserved. I note here that costs typically follow the event<sup>8</sup>. The parties are invited to agree on the matter. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
Member of the Employment Relations Authority

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<sup>7</sup> [1994] 2 ERNZ 309

<sup>8</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808