

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 72
5102940

BETWEEN TALAIFO LEMALU
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Louise Darroch for the Applicant
 Andrew Caisley for the Respondent

Investigation Meeting: 23 February 2012

Determination: 28 February 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Lemalu is declined leave to raise his personal grievance under s114(4) of the Employment Relations Act 2000.**
- B. Costs are reserved.**

Employment relationship problem

[1] Air New Zealand Limited (ANZL) employed Talaifo Lemalu as a storeperson from 1997 to 2007. On 16 February 2007 ANZL supply chain manager Eddie Rutgers dismissed Mr Lemalu for serious misconduct.

[2] An ANZL disciplinary inquiry had concluded Mr Lemalu breached the 'airside' driving rules at Auckland Airport. During a night shift in January 2007 and while driving a delivery van in an area covered by the airside rules, Mr Lemalu was detected by a speed camera going faster than permitted. The camera flashed. Video

footage showed Mr Lemalu then sat in the vehicle for several minutes before approaching the camera and covering its lens, preventing it from operating.

[3] Mr Lemalu already had demerit points on his airside driving permit. The further demerit points for the offences in January 2007 meant he exceeded the permissible level of points and his permit was cancelled.

[4] Following his dismissal Mr Lemalu spoke with Engineering Printing and Manufacturing Union (EPMU) organiser Mike Loughran and solicitor Anne-Marie McNally about pursuing a personal grievance. On 2 April 2007 Ms McNally wrote to Mr Lemalu confirming the EPMU would not take any further action on his grievance.

[5] On 16 October 2007 Mr Lemalu lodged a personal grievance application in the Authority. In a letter attached to his application and dated 20 August 2007 Mr Lemalu acknowledged he had not raised his grievance within the required 90-day period. In its statement of reply on 1 November 2007 ANZL did not consent to the grievance being raised outside the 90 days set by the Employment Relations Act 2000 (the Act). The matter was referred to mediation which occurred on 17 March 2008 without resolving issues between the parties.

[6] The Authority suspended the proceedings on 24 April 2008 when Mr Lemalu advised he wanted to get a representative and legal aid. Air New Zealand also asked that the issue of Mr Lemalu's claim being filed out of time be dealt with as a preliminary issue. On 16 January 2009 Mr Lemalu asked for his application to be "*unsuspended*" and said he would represent himself. An Authority case management conference by telephone on 1 April 2009 was adjourned so Mr Lemalu could seek representation. On 9 April 2009 Christchurch advocate Kevin Murray advised the Authority he represented Mr Lemalu and was provided with copies of documents from the file. A letter was sent to Mr Murray on 30 April 2009 inquiring about Mr Lemalu's intentions but the file shows no response was received. More than two years later – on 29 June 2011 – Mr Lemalu advised the Authority he was now representing himself and wished to proceed.

[7] Arrangements were then made for an Authority investigation meeting of the preliminary issue as to whether Mr Lemalu should be granted leave under s114(4) of

the Act to raise his grievance outside the 90-day period. Those arrangements included the parties lodging an amended statement of problem and statement in reply.

[8] Following a joint proposal of counsel the Authority received evidence by affidavit from three witnesses and took Mr Lemalu's evidence, under oath, at the investigation meeting. The affidavits were from:

- (i) Mr Rutgers; and
- (ii) Mike Loughran, an EPMU organiser who had represented Mr Lemalu during his disciplinary meetings with ANZL; and
- (iii) Pam Low, a registered psychologist at Pro Care Psychological Services in Manukau, who had met with Mr Lemalu in five therapy sessions held between 13 December 2006 and 30 April 2007.

[9] The matter was determined on the basis of those affidavits, Mr Lemalu's written and oral evidence, relevant documents supplied with the pleadings and affidavits, and counsels' written and oral submissions to the investigation meeting. As permitted under s174 of the Act this determination has not set out all the evidence and submissions received but has stated the Authority's findings of facts and law and expressed conclusions on matters requiring determination.

Issue

[10] The issue for determination was whether Mr Lemalu's failure to lodge his personal grievance within 90 days of his dismissal on 16 February 2007 (that is by 17 May 2007) was "occasioned" (caused) by one or more of the following exceptional circumstances:

- (i) Mr Lemalu being so affected or traumatised by the matter giving rise to the grievance (that is his dismissal for breach of airside rules) that he was unable to properly consider raising the grievance in time; and/or
- (ii) Mr Lemalu making reasonable arrangements to have the grievance raised on his behalf by his union representative before 17 May 2007 but the union unreasonably failing to ensure the grievance was raised within the required time; and/or

- (iii) A combination of factors – including his psychological state, financial pressures on him, and a sense of hopelessness following the EPMU’s refusal to pursue his case – that were so unusual and uncommon and not regular, routine or normally encountered, he was unable during the statutory period to consider raising the grievance.¹

[11] Because I have concluded the delay was not occasioned by one or more such exceptional circumstance, it was not necessary to consider the second step of the threshold issue under s114(4)(b) of the Act as to whether it would also have been just to grant the leave sought.

Grievance not raised within 90 days

[12] While Mr Lemalu had acknowledged from the outset of lodging his application in the Authority that he did not raise the grievance within 90 days, his evidence to the investigation was that he told ANZL representatives at the time of his dismissal he was “*not happy*” with their decision to dismiss him and he intended to “*appeal it*”. The evidence of Mr Loughran and Mr Rutgers did not corroborate Mr Lemalu making any such statement at the time. However, even if he did as he said he did, that alone was not sufficient to raise a grievance.

[13] Mr Loughran’s affidavit attached copies of documents from EPMU’s file for Mr Lemalu. These included a copy of ANZL’s dismissal letter and on that copy the following words were written in Mr Lemalu’s handwriting:

I Tai Lemalu wish to appeal this judgement and every other judgements that Air New Zealand has laid against my name. And believe this ‘dismissal’ was not fairly considered and reasons of defence not taken into account. Past and all ‘disciplinary actions’, decisions and meetings.

[14] Mr Rutgers’ evidence was that he had not seen that note before it was provided in 2011 as part of papers lodged for the Authority investigation. He believed ANZL was not given a copy of it in 2007. I consider it most likely Mr Lemalu’s

¹ *Creedy v Commissioner of Police* [2008] ERNZ 109 (SC) at [31] considering the Court of Appeal’s earlier decision on the definition of exceptional circumstances given in *Wilkins & Field Limited v Fortune* [1998] 2 ERNZ 70.

comments were written only on his own copy of the dismissal letter or on a copy that he gave to Mr Loughran or Ms McNally and were not communicated to any ANZL representative within the 90-day period. However even if it had been given to ANZL that wording alone would not have been sufficient to raise the grievance.

Arrangements with EPMU

[15] The evidence of Mr Lemalu and Mr Loughran concurred that they had spoken on 16 February 2007 about Mr Lemalu raising a personal grievance over his dismissal. Mr Loughran had then promptly arranged for Mr Lemalu to meet with Ms McNally.

[16] In preparation for that meeting Mr Lemalu wrote a six page note about his grievance, dated 19 February 2007. He met twice with Ms McNally – once on 21 February and again on 1 March 2007. With his permission Ms McNally then made inquiries of the Manukau Super Clinic (about whether a medical issue may have contributed to the behaviour of Mr Lemalu on the night of the event for which he was dismissed) and Ms Low (about whether psychological issues contributed).

[17] Ms McNally wrote three letters to Mr Lemalu indicating doubts about whether he would be successful in a personal grievance. On 8 March she wrote giving her view that there was no realistic prospect of success. On 22 March, after considering the health information she had gathered, Ms McNally wrote that she continued to have “*strong reservations*” and asked Mr Lemalu to meet with her and work through the information together. When Mr Lemalu did not attend an appointment made for 2 April Ms McNally wrote to confirm the EPMU’s position on his grievance. Her letter stated the EPMU’s conclusion that ANZL could legally justify dismissing him and told Mr Lemalu the EPMU would not assist him to take the grievance any further.

[18] In his evidence to the Authority Mr Lemalu confirmed he received the EPMU’s 2 April letter.

[19] I was satisfied from the evidence on this point that, while Mr Lemalu had sought to have the EPMU raise the grievance on his behalf, the union did not agree to do so. The union solicitor carefully explored the possible evidence to support his case

and, after evaluating that material, advised him very clearly that it would not pursue his grievance on his behalf. Consequently there were no reasonable arrangements and no unreasonable failure of the type contemplated in s115(b) of the Act. That category of exceptional circumstance does not apply in Mr Lemalu's case.

[20] This was not a situation where he was given hurried or belated advice. From the date of the EMPU's latest advice Mr Lemalu still had 45 days of the statutory period remaining in which to take other measures to raise his grievance.

Inability due to effect and trauma?

[21] I was not satisfied the evidence supported Mr Lemalu's contention that he was so affected by the dismissal that he was unable to properly consider raising the grievance before 17 May 2007 – that is an exceptional circumstance of the type stated at s115(a) of the Act.

[22] His evidence was that he did not feel well enough to be able to think clearly and write a statement of problem to the Authority until several months after his dismissal.

[23] I find that does not accord with information available from two therapy sessions he attended with Ms Low during the 90-day statutory period – once on 14 March and once on 30 April.

[24] Mr Lemalu suggested Ms Low's notes from those sessions were overly optimistic or positive about his actual mental or psychological state at the time. However I prefer those notes, taken at the time, as more likely to be objective and accurate than Mr Lemalu's much later, subjective evidence.

[25] On 14 March Ms Low recorded that Mr Lemalu reported he was "*coping*", compiling information for his case and continued to be upset about being dismissed but was able to "*step back a bit at present*".

[26] By the time Ms Low and Mr Lemalu met on 30 April he had the news that the EPMU would not take his grievance for him. Ms Low recorded that Mr Lemalu

reported he was well, calmer, less angry and more philosophical. Although he had been told by the EPMU lawyer that he did not have a case to proceed, he said he was “*continuing to try and ‘have a say’ on his own*”. She also noted that they discussed getting another referral for further therapy sessions as “*he would like ongoing support as he proceeds with his employment dispute*”.

[27] Those notes confirmed, I find, that Mr Lemalu was able to properly consider raising his grievance at a date that was at least 16 days before the statutory period was due to expire.

[28] His own 19 February notes also showed that earlier in the 90 day period he was able to consider in considerable depth his own thoughts and feelings about the dismissal and his view of the circumstances that led to it. During his employment Mr Lemalu had raised issues of concern with ANZL in written form – including writing at least twice to the chief executive – and his 19 February notes showed he remained able to set out fairly complex arguments at considerable length.

[29] I find it unlikely that, having served as a union delegate for several years, Mr Lemalu was unaware of the time limit or other requirements for raising a personal grievance with ANZL. He had been through the ‘opening stages’ of that process in September 2005 when he talked with Mr Loughran about raising a grievance over a final written warning he had received at that time.

A combination of factors amounting to exceptional circumstances?

[30] I also considered Ms Darroch’s submissions, made in the alternative, that Mr Lemalu’s situation at the relevant time amounted to exceptional circumstances wider than any specific example given in s115.

[31] The categories of exceptional circumstances given at s115 of the Act are not an exhaustive exposition or comprehensive schedule of what may constitute such circumstances for the purposes of s 114 but those examples assist in determining when such circumstances exist and when they do not.² From that principle I accept a combination of factors – even including some aspects akin to the specific

² *Creedy*, *ibid*, at [26] and [28].

circumstances given in s115 – might amount to exceptional circumstances that caused delay in raising a grievance (if truly established as not usual, regular, routine or regularly encountered). If that combination was established as exceptional, consideration would then be required of whether it was just to grant leave to proceed with the grievance out of time. However I was not satisfied such a combination of factors delayed Mr Lemalu from raising his grievance.

[32] The factors submitted as acting in combination during the 90-day period in a way that was exceptional comprised:

- (i) Mr Lemalu’s history of mental health concerns said to be caused or made worse by pressures at work, including a nervous breakdown in 2004; and
- (ii) a sense of hopelessness or profound disappointment experienced by Mr Lemalu after being dismissed and being told by EPMU that it would not take his case; and
- (iii) financial and family pressures resulting from his dismissal including the prospect of eviction for failure to pay rent and having personal property repossessed.

[33] I agreed with ANZL’s submission that the pressures and feelings experienced by Mr Lemalu should not be downplayed or trivialised but were not circumstances that were so unusual or uncommon for someone who had been dismissed that they were exceptional.

[34] I was satisfied, from evidence already discussed, that it was more likely than not that throughout this period Mr Lemalu had remained able to consider and prepare the raising of a personal grievance even though he gave evidence that his comments to Ms Low at the time about continuing to have a say on his own were just “*angry talk*”.

Costs

[35] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, ANZL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Lemalu would then have 14 days from the date

of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[36] If the parties cannot resolve costs themselves, the Authority is likely to set costs on its usual tariff basis. For this relatively straightforward investigation meeting lasting less than two hours, the likely award of costs is \$1000. That amount would be subject to the parties' submissions about any factors requiring an upward or downward adjustment of the tariff.³

Robin Arthur
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.