

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 127  
5528330

BETWEEN            MARGARET LOWE  
                                 Applicant  
  
AND                    WAIMAPU STATION  
                                 PARTNERSHIP  
                                 Respondent

Member of Authority:      Trish MacKinnon  
  
Representatives:            Jills Angus Burney, Counsel for Applicant  
                                 Susan Hornsby-Geluk, Counsel for Respondent  
  
Investigation Meeting:      9 December 2014 at Greytown  
  
Submissions Received:      9 December 2014 from the Applicant  
                                 9 December 2014 from the Respondent  
  
Determination:              17 December 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Margaret Lowe was a casual employee from July 1969 until 2014 on Waimapu Station, the farm her husband managed for the owners, Waimapu Station Partnership. Mrs Lowe and her husband, Eugene, who had lived on the farm for 45 years, left the property on 14 August 2014 and Mrs Lowe's employment terminated from that date, if not earlier.

[2] Mrs Lowe claims to have been disadvantaged by actions of her employer on, and arising from, 30 June 2014.<sup>1</sup> She raised a grievance with her employer by letter from her representative on 20 October 2014.

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<sup>1</sup> Initially Mrs Lowe cited 3 July 2014 as the date of the action leading to disadvantage in her employment, but the correct date was clarified in the course of the investigation meeting.

[3] Waimapu Station Partnership (WSP) denies Mrs Lowe has grounds for a personal grievance and does not give consent to her raising a grievance out of time. Mrs Lowe seeks leave from the Authority to raise her grievance outside the statutory 90 day timeframe. She claims exceptional circumstances under s.114(4) and s.115(a) of the Employment Relations Act 2000 (the Act).

[4] Mrs Lowe has an additional claim relating to holiday pay which is not subject to a 90 day timeframe. That claim will form part of a wider investigation meeting, scheduled for March 2015, which will include a range of claims involving Mr Lowe and WSP.

### **Issue**

[5] The issue for determination is whether Mrs Lowe satisfies the test for leave to be granted to raise her personal grievance after the expiry of the statutory 90 day period.<sup>2</sup>

### **The Authority's investigation**

[6] An investigation meeting, with a twofold purpose, was held on 9 December 2014 in Greytown. In part it was to investigate Mrs Lowe's application for leave to raise her grievance out of time. Its second purpose was to hear the evidence of two witnesses who had been summonsed on a different but related matter. That evidence has no relevance to Mrs Lowe's application for leave to raise a grievance out of time and will not be considered further in this context.

[7] Mrs Lowe gave evidence by way of an affidavit dated 20 November 2014 in support of her application for leave to raise her grievance after the expiry of the 90-day period. She declined the opportunity to give supplementary oral evidence in the investigation meeting.

[8] Mrs Lowe's representative, Ms Angus Burney, asked the Authority to consider two statements filed previously by Mrs Lowe, in addition to her November affidavit. The first of these was an affidavit Mrs Lowe had sworn on 1 September 2014 in relation to Mr Lowe's claim against WSP. The second was a witness statement dated 22 October 2014 prepared by Mrs Lowe after she had raised her personal grievance and was seeking joinder with the claims between Mr Lowe and WSP.

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<sup>2</sup> Section 114 of the Act.

[9] Oral and written submissions were made regarding Mrs Lowe's application for leave by counsel for the parties.

### **The statutory provisions**

[10] Where a grievance is not raised within the statutory 90 days and the employer does not consent to the employee raising the matter after the expiry of that period, the employee may apply to the Authority for leave to raise the grievance outside the statutory timeframe. The Authority may, after giving the employer the opportunity to be heard, grant leave if it is satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances and if it considers it just to do so.<sup>3</sup>

[11] The Act provides examples of exceptional circumstances at s.115 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 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.

### **Background**

[12] Mrs Lowe was employed on a casual basis on Waimapu Station for some years and then worked off the farm as a registered nurse. Following her retirement from general nursing she again took up casual employment on the farm in May 2012<sup>4</sup>. From that date she was paid \$800 per month, or \$9,600 per year, which was based on an average of 10 hours per week at \$20 per hour.

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<sup>3</sup> Section 114(4) of the Act.

<sup>4</sup> Statement of problem at 2(c) & (f).

[13] WSP says it knew of her casual employment for seasonal work but had no knowledge of this regular fixed payment arrangement that had been agreed between Mr and Mrs Lowe.

[14] The disadvantage Mrs Lowe claims to have suffered relates to an incident on 30 June 2014. Tim Martin, son of the sole director of WSP, John Martin, brought visitors to Waimapu Station that day. Mrs Lowe says he did so without disclosing that they were a prospective new farm manager and his wife. Mrs Lowe says she was given to believe the visitors were doing an appraisal of the farm. When she realised the woman she was showing around the farm house was looking at it as a potential home and that her partner was looking at Mr Lowe's job she says she felt "gutted" and "ambushed" as well as being "gobsmacked".<sup>5</sup>

[15] Mrs Lowe raised a personal grievance 112 days after that farm visit. In relation to the delay in raising it she says she was sad and distressed by the breakdown in the relationship with the Martin family. She was concerned about the effect of the breakdown on her husband's health and says they were "both physically and mentally exhausted by the increasing conflict and hostility from the owners of the farm".

[16] Mrs Lowe testified to the anger she felt at "the employer's conduct and because of hostile conduct by Tim Martin to Gene". She was "offended and appalled that our integrity and reputation has been questioned by Tim Martin...alleging that somehow Gene and I have acted illegally".<sup>6</sup> She also made claims of intimidation and threatening behaviour which she alleges occurred in August and September 2014. Some of those claims relate to actions between Mr Lowe and WSP, while others concerned the actions of Messrs Tim and John Martin respectively driving and flying over the Lowe's property.

[17] In her witness statement of 22 October 2014 Mrs Lowe stated the reason for raising a grievance in these terms:

"I have raised a personal grievance because I am offended by Tim Martins (sic) untruthfulness and his inference of 24 September (in the Respondent's Statement in Reply) that I have lied about what happened in June and July 2014.

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<sup>5</sup> Affidavit of Margaret Lowe of 1 September 2014 at para 2(c).

<sup>6</sup> Affidavit of 20 November 2014 at para 4.

Tim Martin's belief from June 2014 until 24 September 2014 that the (sic) Eugene ("Gene") had resigned and their refusal to accept otherwise is an action that also affected me.

I have filed a claim seeking a finding that this refusal by the Respondent to accept otherwise caused significant unjustified disadvantage to me when leaving the farm on 15 August 2014. Leaving the farm and our lifelong accommodation under accusations of extortion caused a fatal breakdown in the employment relationship between me and the Martin family and causes me significant grief, hurt and humiliation.

TM communicated to me prior to a visit to the farm on or about 3 July. He failed to disclose to me that the visitors were prospective employees. I now seek a finding in my own right that Tim Martin's denials (in the Respondent's Statement in Reply, dated 24 September 2014) of the facts of OUR conversation are an action accusing me of untruthfulness. That alone causes me unjustified disadvantage as leaving the farm under these circumstances caused me extreme embarrassment, hurt and humiliation, and injury to my feelings.

In the same way I seek a finding that Tim Martin's denial of 24 September of the facts of his discussion with prospective employees in front of me (of the alternative recruitment conversation on 3 July 2014) is also an action accusing me of untruthfulness and caused me further embarrassment, anger and distress and was an action causing me significant hurt and humiliation".

[18] Having decided on or about 27 September 2014 to raise a personal grievance, Mrs Lowe says her counsel was away in the school holidays from 29 September to 8 October 2014 and was then away at a law conference. She says she was unable to discuss her claim with Ms Angus Burney until 16 October. This accounted for the delay between deciding to raise a personal grievance and actually doing so.

#### **Are there exceptional circumstances?**

[19] The Supreme Court in *Creedy*<sup>7</sup> considered *exceptional circumstances* as treated by the Court of Appeal in *Wilkins and Field Ltd v. Fortune*<sup>8</sup> as those which are *unusual, outside the common run, perhaps something more than special and less than extraordinary*. The Supreme Court preferred the first part of that meaning, ie *unusual, outside the common run, or the exception to the rule*.

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<sup>7</sup> *Creedy v. Commissioner of Police* [2008] ERNZ 109 at 119.

<sup>8</sup> [1998] 2 ERNZ 70.

[20] The Employment Court has stated in *Austin v Silver Fern Farms Ltd*<sup>9</sup> that the examples of exceptional circumstances in s.115 are non-exhaustive. This is evident from the wording of s.114(4)(a), which refers to the delay in raising the grievance being "occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115)...".

[21] Mrs Lowe is primarily relying on s.115(a) of the Act, attributing the delay in raising her grievance to having been so affected or traumatised by the matter giving rise to the grievance that she was unable properly to consider raising it within the 90 day time frame. She says the breakdown in such a long lasting and conflict free employment relationship caused her, and her husband, "immense sadness, distress, anguish, sleeplessness, and anger".

[22] She says she was overwhelmed by the all the activities related to the breakdown in the relationship between herself and Mr Lowe with their employer. She has evidence of consulting a doctor on 12 August 2014.

[23] In *Telecom New Zealand Ltd v. Morgan*<sup>10</sup> Colgan J, as he then was, stated that the following elements appeared necessary to meet the exemplar "exceptional circumstances" test under s.115(a):

[23] First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. That is illustrated by the use of the phrase "has been so affected or traumatised ...". Although being "affected" may encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of "trauma" connotes very substantial injury. In a physical sense, this means shock following a physical wound or injury characterised by a drop in body temperature and mental confusion. In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long term neurosis.

[24] Next, section 115(a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to "properly consider" raising the grievance that is required to be established by an applicant for leave relying on section 115(a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not for only a part of it by use of the phrase "within the period specified ...".

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<sup>9</sup> [2014] NZEmpC 30 at [54].

<sup>10</sup> [2004] 2 ERNZ 9 (EmpC)

[25] So interpreted, the statutory test for the exceptional circumstance requires a high standard of proof to be met by an applicant. Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than three months, most cases are unlikely to meet that test. ...

[24] I find that Mrs Lowe's situation falls short of meeting the test as outlined by (now) Chief Judge Colgan. While I do not doubt that Mrs Lowe was shocked to find she was showing a potential replacement around the farmhouse she and Mr Lowe had occupied for many years, I do not accept this so affected or traumatised her that she was unable to properly consider raising a grievance within 90 days.

[25] It is clear from Mrs Lowe's evidence that in the time between 30 June and 20 October 2014 she was able to turn her mind to drafting an affidavit in relation to her husband's personal grievance as she completed that document on 1 September 2014. She was actively involved in preparing documents in relation to his grievance and other claims against WSP.

[26] She notes in her affidavit that this was a very stressful time for her as she and Mr Lowe were preparing witness statements in relation to his claim. Mr Lowe's personal grievance was raised by letter dated 11 August 2014 and it is apparent that Mrs Lowe had participated in discussions with legal counsel from before that date. I do not find it credible that Mrs Lowe was able to focus on Mr Lowe's claims, and on her evidence in relation to those claims, but was incapable of properly considering raising her own grievance.

[27] In submissions Ms Angus Burney noted that the Authority may decide that one or more of the circumstances set out in ss. 114 and 115 apply. She submitted that there had been exceptional circumstances since 30 June that did not fit neatly into the circumstances provided in the legislation. These included the lack of an employment agreement; the applicant's lack of awareness of the statutory 90 day requirement for raising a grievance; the ill health of Mr Lowe; serious allegations made by WSP against a business owned by Mrs and Mr Lowe; and the hurt, humiliation and distress caused by the breakdown in the longstanding relationship with the Martins.

[28] I have considered those factors but do not accept that they constitute exceptional circumstances under ss114 or 115 of the Act. I note from Mrs Lowe's

evidence that she does not claim to have been unaware of the 90 day limit for raising a grievance: rather, she claims she did not decide that she wanted to raise a grievance until 27 September 2014. She relates her decision to WSP's response to Mr Lowe's statement of problem and to the offence and umbrage she took to what she saw as an accusation from WSP of her being untruthful.

[29] I find Mrs Lowe's decision to raise a personal grievance related to her anger at the respondent's version of the events of 30 June, rather than to the events of the day itself or its effect on her. The statement in reply that triggered her decision mentioned Mrs Lowe only in relation to Mr Lowe's employment of her on a casual basis. It did not refer to her at all in relation to the farm visit on 30 June 2014. It is evident that Mrs Lowe did not consider she had a grievance arising from the events of 30 June 2014 until she read this document relating to Mr Lowe's claims against WSP. She inferred from that document that her veracity had been slighted. I do not consider this constitutes exceptional circumstances such that it would be just to grant leave to Mrs Lowe to raise her grievance out of time.

[30] In any event, I have reservations over Mrs Lowe's claim to have been acting in her capacity as a casual employee on 30 June. The statement of problem filed on her behalf described her duties as a casual employee of WSP as assisting Mr Lowe with a wide variety of farm tasks as and when required, including attending to "off-farm" business with rural suppliers, moving stock in Mr Lowe's absence from the farm, or on those "rare occasions" when he was too ill to work.

[31] It seems more likely that Mrs Lowe was acting in her capacity as the partner of the farm manager when she showed the visitor's wife around the farm house on 30 June 2014, than as a casual employee of WSP. Any shock and dismay she felt was linked to her husband's employment situation more than her own and any disadvantage she suffered was linked to Mr Lowe's employment relationship with WSP rather than to her own casual employment relationship.

### **Determination**

[32] For the reasons given above I am not satisfied that Mrs Lowe was so affected or traumatised by the events of 30 June 2014 that she was unable "to properly consider" raising her personal grievance within the statutory 90 day period specified

in s.114(1) of the Act. Nor do I find any other circumstances she has cited to be "exceptional" in terms of ss114 (4) and 115 of the Act.

[33] Mrs Lowe's application for leave to raise the grievance out of time is accordingly dismissed.

**Costs**

[34] The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**