

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2025] NZERA 258
3300700

BETWEEN	PRAKASH MISTRY Applicant
AND	GOODMAN FIELDER LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Ken Nicolson, counsel for the applicant Liz Coats and Zoe Fong, counsel for the respondent
Investigation Meeting:	On the papers
Submissions and information received:	18 December 2024 and 10 February 2025 for the applicant 17 February 2025 for the respondent
Determination:	9 May 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Prakash Mistry was dismissed by Goodman Fielder Limited (GFL), with his employment formally ending on 19 April 2023. His counsel raised a dismissal grievance by email on 21 July 2023, three days outside the prescribed time period for raising the grievance. He applies for leave to raise his grievance after the expiration of 90 days.¹

[2] Mr Mistry's application relies on two grounds he says amount to exceptional circumstances causing the delay in raising his grievance.

¹ Employment Relations Act 2000, sections 114(1), (3) and (4).

[3] GFL has not consented to the raising of a personal grievance in relation to the alleged unjustified dismissal outside the 90-day period. GFL submits the requirements for leave to be granted under s 114(4) of the Employment Relations Act 2000 (the Act) are not met.

The Authority's process

[4] The parties agreed this preliminary issue could be heard on the papers. Mr Mistry has provided an affidavit and the parties have lodged written submissions.

[5] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received in this determination. The Authority has set out relevant facts and law, then based on these expressed conclusions on issues as necessary to dispose of the matter.

Background

[6] Mr Mistry commenced employment with GFL in December 1997. He held the role of Sales Merchandiser and in this role, he visited grocery retailers to, among other things, fill and replenish GFL products and interact with store employees and others.

Incident and investigation process

[7] In July 2022, GFL says it received information from a retailer about an alleged incident on 25 July 2022, involving Mr Mistry and other contractors/employees at a supermarket. In short, the alleged incidents included allegations that Mr Mistry had a verbal altercation with a delivery driver involving him swearing and calling the driver a name, refusing to leave the store when asked to do so and making a race-based remark about the Store Manager.

[8] The owner of the store issued a trespass notice on Mr Mistry applicable for two years, which GFL says meant he could not perform his usual duties at that customer site. A long investigation/disciplinary process took place, throughout which Mr Mistry was represented by a barrister (counsel). The process eventually resulted in Mr Mistry's dismissal. He was advised of that outcome by letter dated 30 March 2023, which stated:

...After fully considering all the circumstances, including the allegations and your response, we have decided the appropriate outcome is to terminate your employment on the grounds of serious misconduct, effective Wednesday 19 April 2023.

You will be paid your weekly wages until 19 April 2023 but not work in the field in the capacity as a merchandiser for Goodman Fielder. Your final pay, along with any leave entitlements will be made on the week of 24 April 2023. You are also required to return all Company property you may have in your possession Wednesday 19 April 2023.

[9] An email attaching the letter stated Mr Mistry's last paid day of work would be 19 April 2023, his final pay would be paid the week of 24 April 2023 and property returned on or before 19 April 2023.

Mr Mistry's evidence about contact with counsel after dismissal

[10] In his affidavit Mr Mistry says after the dismissal he was very unhappy he had been dismissed as he felt it was unfair and not justifiable after 25 years of faithfully doing his job as a merchandiser. He says his counsel advised they had 90 days to raise the grievance with GFL and there was no rush and so he left it to counsel to raise the grievance. Mr Mistry also says he was told to wait a while in case he changed his mind, but that he did not and contacted counsel to remind him. He says counsel was always busy but told him it would be done.

[11] In his affidavit Mr Mistry says he was unsure when the 90 days began, whether it was the day he was given the letter or the day he was paid up to. He says counsel advised he was still effectively employed for as long as the notice period was in force but there was confusion what date that expired. He says he was confused but gave counsel clear instructions to submit the grievance, and that counsel said he would and initially in the first weeks, Mr Mistry left it to counsel to do as he did not want to bother him.

[12] Mr Mistry says after six weeks and a meeting with counsel and two phone discussions where he made it clear he wanted to submit a personal grievance, counsel assured him it would be done. Mr Mistry then went overseas with his family for two weeks. When he came back, about the middle of June 2023, he says he contacted counsel and asked if the grievance was raised, and counsel advised it had not, but he intended to raise it before the 90 days expired. Mr Mistry says counsel asked him again if he was sure he wanted to pursue the grievance and Mr Mistry assured him he did.

[13] Mr Mistry says he reminded counsel that GFL had become his life and was important to his self-esteem. He says he did not think his dismissal was fair and wanted

his job back so again told counsel to raise the grievance. Mr Mistry says this was at the beginning of July 2023.

[14] As time went by, Mr Mistry reports becoming concerned about the 90-day time limit so checked in again with counsel a week later. Mr Mistry says counsel assured him he was keeping an eye on the passing of time, but this is when counsel became unwell requiring hospitalisation.

[15] Mr Mistry says when he discussed it with him, counsel seemed to think they had plenty of time. He says he was not aware when the 90 days expired and did not know counsel had thought that the 90 days ran from 24 April 2023, the day Mr Mistry's final pay would be paid. Mr Mistry says counsel had not done the calculation correctly which is clear in retrospect, but that he did not know that at the time and he had to trust him that he had got the calculation right as he knew more than Mr Mistry did.

[16] Additionally, Mr Mistry says he did not know the procedure for submitting a personal grievance and had no idea how to raise one as he is not very good with putting sentences together or setting things out in an orderly manner or spelling, so he had to rely on counsel.

[17] As the time drew close to what he thought was about the 90 days Mr Mistry says he rang counsel again and was advised they still had time and not to worry about it. Mr Mistry says the last time they spoke, counsel said he would get the grievance in on time. This was said to be about four days before the grievance was submitted.

Grievance email sent on 21 July 2023

[18] Mr Mistry states he called counsel on 21 July 2023 and asked him if he had submitted the grievance expecting him to tell him he had and he said "No" and he would "get onto that right now". Soon after they spoke, Mr Mistry states counsel advised an email had been sent to GFL submitting the grievance. Mr Mistry reports counsel said he thought that was right on the 90th day to raise the grievance.

[19] On 21 July 2023, Mr Mistry's counsel sent an email to GFL stating he was raising a personal grievance for unjustified dismissal on Mr Mistry's behalf, stating reinstatement, loss of remuneration and compensation was sought. He further advised it would be lodged in the Authority and that mediation would be sought to resolve the matter in the first instance.

[20] GFL replied to counsel by email on 25 July 2023, noting that Mr Mistry's personal grievance had been raised after the end of the 90-day period, and that GFL did not consent to Mr Mistry pursuing that personal grievance out of time. On that basis, GFL advised the requests for remedies and mediation were denied.

[21] Mr Mistry states that after receiving GFL's reply saying the grievance was three days out of time, he and counsel both examined it closely and realised it was and Mr Mistry was very upset by this and felt let down. Mr Mistry says the confusion in the calculation seemed to be about when the notice expired, which is "more a legal thing" that he did not understand.

[22] Mr Mistry says he had given very clear instructions to submit a personal grievance within the 90 days and had done his best to keep counsel on track and as he could not do it himself, and he had to rely on him.

[23] Mr Mistry thereafter delayed lodging an application in the Authority until 27 May 2024. The parties were directed to mediation which was unsuccessful in resolving any matters between the parties.

[24] It is common ground that Mr Mistry's counsel had represented him on employment issues arising over a number of years prior to the July 2022 incident and the disciplinary process that followed.

Grounds for exceptional circumstances

[25] Where an employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the grievance out of time. The Authority may grant leave if it is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and it considers it just to do so.

[26] While the exceptional circumstances set out in s 115 of the Act are not exhaustive, meaning there could be exceptional circumstances that do not fit within any of the four examples given in s 115, Mr Mistry relies on two of the grounds as the basis for his application:

- (a) Where the employee made reasonable arrangements to have the grievance raised on their behalf by an agent of the employee and the agent unreasonably

failed to ensure that the grievance was raised within the required time (s 115(b) of the Act); and

(b) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal (s 115(d) of the Act).

Mr Mistry's submissions

[27] Mr Mistry accepts his dismissal grievance was raised three days late through his counsel, and with GFL not consenting to it being raised out of time, he seeks leave to raise it on the basis of exceptional circumstances based on the above two grounds.

Section 115(b) of the Act

[28] Mr Mistry submits that exceptional circumstances apply because under s 115 (b) Mr Mistry made very reasonable arrangements to have his counsel raise the personal grievance. It is submitted that Mr Mistry made every effort to ensure his grievance was raised and submitted, and although Mr Mistry has difficulties and challenges he was doing more than making reasonable arrangements - he was almost “annoying his representative who was always giving assurances that things were under control” and the grievance would be raised within the 90 day limit.

[29] Counsel referred me to *Davies v Dove Hawkes Bay Inc* in which the Court commented that where a dismissed employee engages a qualified, knowledgeable and experienced agent to advise on and protect the grievant's interests following a dismissal with which the employee is dissatisfied, it is reasonable to expect such an agent to do so.² This is said to be certainly the case for Mr Mistry.

[30] Counsel says he also was fully up to speed with the case and therefore he had sufficient information to carry out Mr Mistry's instructions as he had been involved fully throughout the investigation/disciplinary process. While counsel did as instructed finally, he had failed to do it within good time or within the 90 days. It was submitted this was not due to any fault of Mr Mistry and therefore it is just and right that he be granted leave to bring his grievance out of time.

² *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83, (2013) 10 NZELC 79-027.

[31] It was also submitted that the time of three days was not so long so as to cause GFL any disadvantage especially as it had been warned that a grievance was likely to be raised.

Section 115(d) of the Act

[32] Counsel submitted exceptional circumstances existed on the basis GFL failed to state the true reasons for the dismissal. It is said the alleged misconduct was not the actual reason for the dismissal in the end - it was Mr Mistry's failure to sign a consent form to allow GFL to review his personal medical records. Counsel points to an email dated 22 March 2023 in which counsel requested GFL state the truth about why Mr Mistry was being dismissed, which counsel submits GFL failed to do.

GFL's submissions

Section 115(b) of the Act

[33] GFL submits Mr Mistry has not satisfied the requirements for leave to be granted under s 114(4) of the Act, because:

- (a) the evidence given by Mr Mistry is vague, unsupported by contemporaneous documents, and not specific enough to show:
 - (i) he "made reasonable arrangements" to have the personal grievance raised on his behalf by his counsel prior to the expiration of the 90-day period; and therefore
 - (ii) the delay in raising the personal grievance was occasioned by exceptional circumstances under s 115(b);
- (b) Mr Mistry's affidavit appears to include some content that is not drawn from his own personal recollection;
- (c) section 115(d) does not apply, because Mr Mistry never requested a statement of reasons for dismissal.

[34] In short, it was submitted the affidavit lacks sufficiently detailed evidence about:

- (a) the nature of the steps taken by Mr Mistry to inform his counsel that he wished to raise a grievance;
- (b) precisely when those steps were taken; and

(c) why it can therefore be described as “unreasonable” that counsel did not in fact raise the grievance within the 90-day period.

[35] GFL raised concerns as to the extent of Mr Mistry’s personal involvement in preparing this affidavit, and his knowledge and understanding of its contents, mirroring the content of the submissions lodged on his behalf, rather than reflecting a personal account of relevant facts and key dates. To the extent that counsel was able to provide evidence which may assist the Authority in determining whether leave ought to be granted under s 114(4), this ought to have been provided through an affidavit provided by counsel as deponent. No such affidavit was provided.

[36] GFL submitted that any hearsay evidence provided from Mr Mistry ought to be given little weight in the Authority’s assessment of this preliminary issue.

[37] In summary, there was insufficient evidence to support that Mr Mistry did in fact make reasonable arrangements with counsel to have his grievance raised within the 90-day period, and his counsel unreasonably failed to ensure the grievance was raised within the required time, without hearing from his counsel. As such, GFL does not have enough information to comment as to whether this delay was “occasioned by” (i.e., caused by) the alleged exceptional circumstances.

Section 115(d) of the Act

[38] GFL denied that s 115(d) could apply. It says there is no evidence of Mr Mistry having ever requested that GFL provide him with a statement of reasons for his dismissal under s 120 of the Act.

[39] GFL further submits it would be unjust to grant leave for Mr Mistry to raise and pursue his personal grievance outside the 90-day period, as the evidence is not sufficient to establish that “exceptional circumstances” caused the delay in raising the unjustified dismissal claim.

Mr Mistry’s submissions in reply

[40] Counsel for Mr Mistry lodged submissions in reply. By way of submissions counsel raised issues about Mr Mistry’s communication skills and that he “constantly contacted counsel for everything while making it clear that he wanted to take a

grievance” and referred to his “constant contact by phone, text and email” without regard to costs.

[41] Counsel says although Mr Mistry’s instructions were rather confusing, it was always clear that he wanted to oppose the dismissal, bring a grievance and wanted it done within the 90 days. To add weight to this submission without a supporting affidavit, email correspondence from Mr Mistry to counsel accompanied the reply submissions, stating they would give insight into Mr Mistry’s mindset at the time and why it would be unjust not to “give him his day in court”.

Relevant law

[42] On an application for leave to raise a personal grievance after the expiration of 90-day period under s 114(3) of the Act, subsection (4) says:

...the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, 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.

Section 115(b) of the Act

[43] To qualify as “exceptional circumstances” under s 115(b), Mr Mistry must establish that:

- (a) he made reasonable arrangements to have his grievance raised; and
- (b) his agent unreasonably failed to ensure that his grievance was raised in time.

[44] If both of the first preliminary questions are satisfied and, therefore, the delay was occasioned by exceptional circumstances, the Authority can go on to consider whether, in those exceptional circumstances, it is just to grant leave to raise the grievance out of time.

[45] As noted in *Davies v Dove Hawkes Bay Inc*, although leave to appeal the Employment Court’s decision in *Melville v Air New Zealand Ltd* was declined, the Court of Appeal said it could not accept, as a matter of law, that there must always be

an express instruction by a claimant to the agent to bring a claim in time.³ Then Chief Judge Colgan observed:

The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.

[46] As in that case, and although not determinative, Mr Mistry's counsel has in submissions conceded responsibility for the dismissal grievance not being raised in time.

[47] As noted by GFL, there are no records of file notes or meeting notes between Mr Mistry and counsel, and no records relating to counsel's own health and how this might have impacted his ability to raise the grievance on Mr Mistry's behalf. There is also no direct evidence from counsel as to when Mr Mistry instructed him to raise a grievance, how that instruction was given, and the reasons for counsel's delay in raising the grievance on Mr Mistry's behalf. However, the belatedly lodged email correspondence goes some way in addressing that insufficiency in respect of written correspondence between Mr Mistry and his counsel.

[48] Although confusingly expressed, over four emails to counsel between 31 March 2023 to 2 June 2023, Mr Mistry refers to himself as having a "personal grievance"; asks whether taking medication would get him "back into merchandising", asks what he is going to do, having been "fired" and getting "the sack"; denied swearing at the relevant employees; and denied bringing GFL into disrepute. The correspondence must be judged in light of Mr Mistry's inexperience in dealing with a post-dismissal situation, having worked for GFL for most of his working life (some 25 years).

[49] A fifth email Mr Mistry sent to counsel on 20 July 2023 states:

one i do not have a good report from any employer
two in the meeting Prakash said i go to employment court
three Ken you would fill in the form in the 90 days
ken can I phone you now 750pm Thursday

³ *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83 at [20] and *Melville v Air New Zealand Ltd* [2010] NZCA 563, (2010) 8 NZELR 190 at [27].

[50] By the time the email of 20 July 2023 was sent, the 90 days had expired by two days. It is of note the email specifically refers to the 90-day issue showing that Mr Mistry was concerned about it and bringing it to counsel's attention. Counsel raised the grievance the next day on 21 July 2023, three days outside of the 90 days. It is clear from the emails that Mr Mistry was in regular contact with counsel or trying to contact counsel about the dismissal.

[51] Mr Mistry and counsel also had a long-standing relationship, during which counsel had represented the former in employment matters that arose with GFL. Counsel was accustomed to Mr Mistry's communication style and would have known Mr Mistry was talking about an unjustified dismissal and ought reasonably to have known to raise it as a grievance with GFL, counsel having signalled to GFL during the disciplinary process that a dismissal would be challenged.

[52] It is also relevant that counsel is an experienced barrister who practices in employment law. He was also fully aware of the circumstances leading to the dismissal, having attended the relevant meetings as Mr Mistry's representative and having access to the relevant documents. He was in possession of sufficient information that would enable him to take the protective steps of raising a grievance.

[53] For completeness, I am willing to accept based on Mr Mistry's evidence that he and counsel likely had at least one phone discussion during the 90-day period, during which Mr Mistry discussed the approaching 90-day expiry and the raising of a grievance.

[54] Taking these matters in account, as well as Mr Mistry's acknowledged issues with communicating with others, the Authority finds he made reasonable arrangements to have his dismissal grievance raised within the 90-day period.

[55] There is some information before the Authority about why counsel failed to act, which relates to a miscalculation of the 90-day period of counsel and health issues of counsel. That information is not well-supported by the sworn evidence, nor is it supported by documentary evidence. If counsel did miscalculate the 90-day period, a representative experienced in the employment jurisdiction would have been or ought to have been aware of the time from which the 90 days should be calculated from. It was unreasonable for counsel in the circumstances to fail to raise the grievance within time, particularly in light of Mr Mistry's regular communications to and with him.

[56] If I were to take any note of the relevant health issues of counsel, I understand from Mr Mistry's limited evidence of this in the affidavit that these arose close to the 90-day period expiring, and as such may not have been a material factor in the delay.

Finding on s 115(b) of the Act

[57] The Authority is satisfied Mr Mistry made reasonable arrangements to have his dismissal grievance raised within the 90-day period and that counsel unreasonably failed to ensure Mr Mistry's grievance was raised in time. As such, I am satisfied the delay in raising the personal grievance was occasioned by exceptional circumstances under s 114.

Section 115(d) of the Act

[58] Given the above finding, it is not necessary to make a finding in relation to the claimed exceptional circumstance under s 115(d) of the Act. For completeness, however, I would not have been satisfied Mr Mistry's request for the "actual" reason for dismissal constituted a request for a statement of reasons for his dismissal under s 120 of the Act. GFL provided its statement of reasons in the letter of termination. Leave has not been granted on this ground.

Whether it is just to grant leave

[59] It is necessary now to consider whether it is just in all the circumstances to grant Mr Mistry leave to have his grievance heard on its merits. The relevant considerations will include the extent of the delay, the reasons for the delay, the ascertainable strength of Mr Mistry's claim, whether there will be any prejudice to GFL, and the overall justice of the case.

[60] The delay of three days was minimal. I have already noted that the delay was caused by exceptional circumstances.

[61] I am unable to ascertain the strength or otherwise of Mr Mistry's claim at this stage with any certainty.

[62] No prejudice can be asserted by GFL that would not have been there had the grievance been raised within time, although I acknowledge the time that has passed since may pose difficulties in terms of its ability to respond to the claims. However, GFL has been on notice from at least 21 July 2023 that Mr Mistry intended to challenge

his dismissal. Denying Mr Mistry the opportunity to bring his unjustified dismissal claim in the particular circumstances of this case will, in my opinion, outweigh any prejudice to GFL.

[63] In all the circumstances I consider it just for leave to be granted to Mr Mistry to raise his personal grievance for unjustified dismissal outside the 90-day time period.

Outcome

[64] The Authority grants leave to raise the personal grievance in relation to Mr Mistry's dismissal. In accordance with s 114(5) of the Act, there will now be a direction to the parties to attend further mediation.

Costs

[65] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority