

Attention is drawn to the order prohibiting publication of certain information referred to in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 463  
3246139

BETWEEN                      OCO  
   Applicant  
  
AND                                ZUA  
   Respondent

Member of Authority:        Philip Cheyne  
  
Representatives:              Philippa Tucker, counsel for the Applicant  
   Mark Hammond, counsel for the Respondent  
  
Investigation Meeting:        26 March 2024 in Christchurch  
  
Submissions and  
Information Received:        Up to and including 22 July 2024  
  
Date of Determination:        30 July 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]        OCO says they were constructively dismissed so they have a personal grievance against their former employer ZUA. OCO sought to raise the personal grievance claim with ZUA by their solicitor's letter dated 9 June 2023.

[2] ZUA says that the employment ended in November 2022 when OCO resigned and was paid out in lieu of working four weeks' notice, so OCO did not raise a grievance within time.

[3] OCO seeks a determination that their employment did not end until March 2023 and that their grievance was raised within time; or alternatively the grant of leave to raise the grievance out of time.

### **The Authority's Investigation**

[4] It was agreed that the Authority would investigate the preliminary issues and determine when OCO's employment ended. If the employment was found to have ended in November 2022, the Authority would determine whether the delay in raising the personal grievance was occasioned by exceptional circumstances and whether it was just to grant leave.

[5] The parties helpfully assembled a common bundle of documents.

[6] Four witnesses including OCO gave evidence in support of OCO and two witnesses gave evidence for ZUA. Witnesses gave sworn evidence and were available to answer questions.

[7] Counsel both provided submissions.

[8] Some additional documents referred to during the evidence were produced later, as requested. Both sides made some further submissions. A further report was provided later, with counsel each having an opportunity to comment.

[9] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[10] It will be helpful to explain more about the context in which the issues arise. However, I should first deal with the issue of non-publication.

**Non-publication order**

[11] On my initiative and in light of the evidence about OCO's health and related matters, I earlier ordered non-publication of the parties' names, with the issue to be reconsidered as part of this determination. OCO says that open justice should prevail, while ZUA makes no submission on that point.

[12] Given the applicant's preference for open justice which is not opposed by the respondent, the current non-publication order will cease to have effect after 30 September 2024. It is extended until then for the parties to attempt to resolve matters through mediation or to challenge this determination. They should have the opportunity to agree on confidentiality as is often part of a resolution through mediation, or to challenge the determination.

**Context for the employment relationship problem**

[13] ZUA operates a nationwide transport business.

[14] OCO was employed based in Christchurch as a truck driver from late 2017.

[15] The following summary is based on the 2023 Complex Medical Case Review by a specialist occupational physician report on ACC's referral.<sup>1</sup>

[16] OCO suffered a left-shoulder work injury in July 2020. OCO saw a physiotherapist, received some treatment and undertook some light duties. Symptoms settled, so OCO returned to the pre-injury role.

[17] Symptoms recurred in November 2020. OCO saw the after-hours surgery, then a general practitioner (a GP). X-ray and ultrasound investigation followed. There was a referral to an orthopaedic surgeon. OCO received corticosteroid injections and was referred to a physiotherapist. Symptoms improved.

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<sup>1</sup> See Complex Medical Case Review from p 215 of the common bundle.

[18] By May 2021 OCO experienced increasing left-shoulder pain and was referred back to the orthopaedic surgeon. Further treatment did not resolve matters so there was a surgical procedure, followed by physiotherapy. OCO was cleared to work light duties.

[19] There was a further work injury to the left-shoulder in October 2021. OCO was seen by the surgeon in late October 2021 and again in February 2022. There was further surgery in April 2022 and follow-up appointments in May, June and July 2022. By September 2022 OCO was sent for an MRI scan. OCO was seen again by the surgeon in October and November 2022.

[20] OCO also had a pain management programme and was seen by a pain management specialist. OCO was prescribed and took strong pain relief medications.

[21] At various times after the initial injury OCO was certified as medically fully unfit for work, fit for light duties or fully fit for work. At the time of the following events, OCO was not certified as fully fit.

[22] The following summary is taken mostly from documents produced in evidence. It is for the purpose of further context.

[23] On 5 November 2022 OCO complained to ZUA about being threatened and subjected to an attempted assault by another employee on 3 and 4 November 2022. ZUA initiated an investigation. On 7 November 2022, in an exchange with a ZUA manager, OCO referred to thoughts of self-harm. That led to OCO contacting mental health professionals. On 8 November 2022 ZUA suspended OCO, based on an allegation that OCO attempted to manipulate its investigation into the 5 November complaint. OCO became distressed and threatened self-harm. ZUA says that OCO also threatened to set light to its office, but OCO says the threat was to self-harm in front of ZUA's building. OCO was seen by mental health professionals.

[24] OCO provided ZUA with a statement dated 10 November 2022 in support of the 5 November complaint.

[25] In its letter dated 21 November 2022, ZUA announced its decision not to uphold OCO's complaint. At the same time, ZUA also initiated a disciplinary process regarding allegations about OCO.

[26] I will summarise the allegations. ZUA said that other employees (who it would not name) had expressed concerns about OCO's behaviour; that OCO had said that they would set fire to themselves and ZUA's building, causing the site to be locked down for a day; and that OCO's injury mean that they would not be able to return to driving within a reasonable timeframe, with the present assignment of administrative tasks not being sustainable as a permanent solution. ZUA proposed to meet on 23 November 2023 to hear OCO's response to these matters. OCO was cautioned that disciplinary allegations may amount to serious misconduct, so that action up to summary dismissal might result.

[27] In the evening on 22 November 2022, OCO resigned by email. There followed a discussion between OCO and a ZUA manager. OCO then sent an email confirming an agreement for the resignation to be effective immediately due to not being able to drive for the next four weeks because of the injury.

[28] Payslips show ZUA paid OCO final holiday pay in the pay period ending 4 December 2022. However, ZUA continued to pay OCO "ACC Pay" each fortnight until 31 March 2023. ZUA had been part of the ACC accredited employers programme and was responsible for managing work injury claims including the payment of earnings-related compensation.

[29] OCO's injury treatment continued after the resignation.

[30] On OCO's instructions a lawyer wrote to ZUA on 9 June 2023 to raise a personal grievance about the termination of the employment. I will summarise the personal grievance claim. OCO says that the equipment assigned to their work caused and then exacerbated the injuries; that ZUA's managers and dispatchers did not adhere to OCO's light duty limitations when assigning work to OCO, despite OCO's complaints; that ZUA referred OCO to its GP who countermanded other medical practitioners' work restrictions; that ZUA's managers abused OCO; that other employees abused OCO without repercussions from ZUA; that another

employee assaulted OCO; that OCO complained about the assault; that OCO was suspended; that OCO's complaint was not upheld, but ZUA commenced a disciplinary process against OCO; that OCO was encouraged to resign; and that ZUA was aware of the powerful medications being used by OCO due to the injuries.

[31] In a response on 15 June 2023, solicitors for ZUA confirmed that it did not consent to the grievance claim being raised out of time. ZUA also denied liability for alleged breaches.

### **Issues**

[32] An employee who wishes to raise a personal grievance of unjustified dismissal must raise that grievance with their employer within 90 days beginning with the date on which the action alleged to a personal grievance occurred or came to their notice, whichever is later.<sup>2</sup>

[33] It is common ground that OCO's personal grievance was first raised with ZUA on 9 June 2023.

[34] OCO's grievance concerns the termination of the employment. There is a dispute about when that occurred. To be within the period of 90 days ending on 9 June 2023, the action alleged to amount to a personal grievance, would need to have occurred on or after 22 March 2023.

[35] An employer can consent to an employee raising a grievance out of time, but ZUA did not.

[36] The Authority may grant leave for a grievance to be raised after the expiration of the notification period if satisfied that the delay was occasioned by exceptional circumstances and if it considers it just to do so.

[37] The following issues arise:

- (a) When did OCO's employment end?

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<sup>2</sup> Employment Relations Act 2000 s 114(1).

- (b) If before 22 March 2023, was the delay in raising the personal grievance occasioned by exceptional circumstances?
- (c) If so, is it just to grant leave for the grievance to be raised after the expiration of 90 days?

### **When did OCO's employment end?**

[38] The employment agreement permitted either party to terminate the employment by four weeks' notice in writing. ZUA was entitled to pay OCO in lieu of requiring work during the notice period. Alternatively, it could assign different duties or not require OCO to attend the workplace. The agreement then said "In that event, you will ... remain an employee of [ZUAs]." In summary, the employment agreement provided that employment would end after the notice period, whether the employee was paid in lieu, assigned different duties or not required to work.

[39] OCO resigned in writing on 22 November 2022. The next morning OCO sent an email to ZUA's transport manager that says:

Hi ...  
As per our phone conversation we both agreed that resignation will effective immediately because i am unable to come do driving for last 4 weeks due to my injury.  
...

[40] The employment agreement provided for wages to be paid fortnightly by direct credit. ZUA paid OCO final holiday pay in the pay period ending 4 December 2022.

[41] ZUA was an accredited employer under the Accident Compensation Act 2001 and was required to continue to manage OCO's work-related personal injury claim and pay ACC entitlements to OCO.<sup>3</sup> From the pay period ending 18 December 2022, ZUA kept paying OCO. Each payslip described the payment as "ACC Pay". That continued up until 31 March 2023. The last payment OCO received from ZUA was for the pay period ending 9 April 2023.

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<sup>3</sup> Accident Compensation Act 2001 s 187.

[42] I accept the evidence that ZUA ceased to be part of the ACC accredited employer scheme in 2022 and OCO's claim was transferred back to ACC with effect from 1 April 2023.

[43] Counsel submits that OCO's understanding that the employment relationship was ongoing because ZUA continued to manage OCO's claim until 31 March 2023 was not unreasonable. However, OCO is reported on 29 December 2022 as having told a psychiatrist "I continue to struggle with ... loss of job".<sup>4</sup> I take from that comment that OCO understood in December 2022 that the employment relationship with ZUA had ended. ZUA's continued role in managing OCO's claim and paying earnings related compensation until 31 March 2022, in accordance with ZUA's obligations under the Accident Compensation Act 2001, did not affect the date the employment ended.

[44] I find that the employment terminated on 19 December 2022 being the end of OCO's four-week notice period, in accordance with the employment agreement.

[45] OCO first attempted to raise the grievance on 9 June 2023, outside the employee notification period. I must determine OCO's application for leave to raise the personal grievance out of time.

**Was the delay in raising the personal grievance occasioned by exceptional circumstances?**

[46] I may grant leave if satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and if I consider it just to grant leave.<sup>5</sup>

[47] In *Creedy v Commissioner of Police* the Supreme Court held that exceptional circumstances are those which are "unusual ("the exception to the rule")", not the more stringent meaning of circumstances somewhere between special and extraordinary.<sup>6</sup>

[48] One example of an exceptional circumstance is where the employee has been so affected or traumatised by the matter giving rise to the grievance that they were unable to properly

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<sup>4</sup> Common bundle p 265.

<sup>5</sup> Employment Relations Act 2000 s 114(4).

<sup>6</sup> *Creedy v Commission of Police* [2008] NZSC 31 at [33].

consider raising the grievance within time.<sup>7</sup> Before *Creedy*, the Employment Court had held in *Telecom New Zealand v Morgan* that these words connoted “very substantial injury”.<sup>8</sup> More recently, the Employment Court considered that the words used in s 115(2) of the Act must be understood in light of the threshold set by *Creedy*, not according to the more stringent standard discussed in *Telecom New Zealand v Morgan*.<sup>9</sup>

[49] In another recent case, the Employment Court confirmed that the Authority or the Court still must be satisfied that the exceptional circumstance existed during the notification period and from then until the attempt to raise the grievance.<sup>10</sup>

**OCO was so affected or traumatised by the matter giving rise to the grievance that they were unable to properly consider raising the grievance within time**

[50] OCO was significantly affected or traumatised by workplace events that were materially connected to but preceded the termination of OCO’s employment.

[51] When suspended on 8 November 2022, OCO said they would probably go home and commit suicide. That resulted in a GP referral to a psychiatrist. The same day OCO said either they would set fire to themselves at ZUA’s premises or would set fire to ZUA’s premises. The psychiatrist noted on 14 November 2022 that OCO’s voicing of suicidal and threatening behaviour appeared transient in nature. Nonetheless, the conduct indicates that OCO was significantly affected or traumatised by events that later gave rise to the termination of OCO’s employment.

[52] There are also some indications that OCO was less affected or traumatised by related events at various times. For example, the psychiatrist noted OCO’s view that things had “settled down considerably” and considered that there was no indication of “significant ongoing mental illness”. On matters unrelated to employment, OCO was supported by an organisation called Christchurch Resettlement Services (CRS). CRS notes record OCO was “feeling better and

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<sup>7</sup> Employment Relations Act 2000 s 115(a).

<sup>8</sup> *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [23].

<sup>9</sup> *Hokotehi Moriori Trust v Prater* [2019] NZEmpC 67.

<sup>10</sup> *Cronmin-Lampe v The Board of Trustees of Melville High School* [2023] NZEmpC 144 at [473].

stronger today” on 10 November 2022 and felt “well and balanced” and “more relaxed and more positive” on 15 November 2022. The 15 November note also records OCO saying that “90% of negative thoughts are off and 10% of them are still there” but “manages” them when they come.

[53] After ZUA’s decision not to uphold OCO’s earlier complaint and to initiate a disciplinary investigation into OCO’s conduct, OCO met with CRS. Case notes dated 21 November 2022 refer to OCO as “feeling overwhelmed from ... current condition (highly medicated, very low mood, suicidal)”. OCO resigned the following day.

[54] There are CRS notes dated 14 December and, 20 December and 21 December 2022. They indicate that there was no immediate escalation in the extent to which OCO was affected or traumatised in response to the 21 and 22 November 2022 events.

[55] However, the notes indicate a change by 21 December 2022. OCO is recorded then as mentioning “panic attacks”. The 23 December 2022 note reports OCO being taken to hospital by Police after OCO’s contact with Crisis Resolution (CR) about intending to suicide. Clinical notes dated 29 December 2022 record a further similar episode of that date but conclude “No evidence of thought disorder ... on this contact”.

[56] CRS notes from January 2023 indicate some lessening of this crisis. However, this was followed by further escalation. There is mention in a txt dated 21 May 2023 of “A more alarming suicidal note” by OCO. CRS notes on 12 June 2023 record new stressors are appearing” and on 15 June 2023 they detail OCO’s suicide attempt that day. Events in June 2024 indicate that the trauma experienced by OCO as a result of matters connected to the termination of the employment persisted, even after OCO’s solicitor purported to raise the personal grievance on 9 June 2023.

[57] Workplace matters including the termination of the employment were not the sole cause of the trauma experienced by OCO, but contributed materially to it. Overall, the evidence indicates that OCO was significantly affected or traumatised by events that then led on to the termination of the employment. OCO’s state following the termination lessened but then

escalated in late December and again in May and mid-June 2023. I am satisfied that OCO was affected or traumatised throughout.

[58] A CRS social worker gave evidence that OCO was completely traumatised after losing the job and was mentally unwell so not able to understand legal rights accurately and act on them. This is not evidence of a medical diagnosis, but it no doubt reflects a reasonable summary from a lay perspective of the events outlined above.

[59] OCO contacted WorkSafe in March 2023 about whether it had any record of the workplace accidents and the Health and Disability Commissioner in April 2023 about a complaint about the care received from a doctor. Proper consideration of raising a personal grievance would need to extend to the possibility of lodging a personal application in the Authority to commence civil proceedings, with associated risks. OCO's contact with regulatory authorities does not establish that OCO had capacity to properly consider raising the personal grievance at the time.

[60] I find that OCO was unable to properly consider raising their personal grievance within 90 days of the termination of their employment and that state persisted until June 2023. I further find that exceptional circumstances as set out in s 115(a) of the Employment Relations Act 2000 are made out.

### **It is just to grant leave**

[61] ZUA submits that it would not be just to grant leave. In particular, I am referred to the WorkSafe and HDC matters, an extract in the May 2023 complex medical case review and OCO instructing lawyers about ACC matters on 19 May 2023.

[62] The 9 May 2023 case review records OCO saying that they felt "forced to resign" and "has not issued a personal grievance against his employer at this time". Lawyers instructed for the ACC matter attempted to raise a grievance on OCO's behalf about three weeks later.

[63] I accept that OCO may have mistakenly thought that time for raising a personal grievance started from when ZUA stopped paying earnings related compensation and that dealing with ACC became their priority after that stopped.

[64] In June 2024 OCO was assessed for whether they had suffered a mental injury arising from the 2020 physical shoulder injury. The psychiatrist reported that OCO's "current depressive symptoms" began in 2020, a reference to the shoulder injury. OCO was diagnosed with an "Axis 1: Major depressive disorder with prominent anxious distress" arising from that physical injury. A number of factors contributed to OCO's depression, including some which would be considered if OCO was granted leave to raise the personal grievance about the termination of the employment.

[65] Given this June 2024 report, it would be just to grant leave for OCO's personal grievance claim regarding the termination of the employment to be considered and answered in accordance with its merits. ZUA's ability to marshal a factual defence to the constructive dismissal claim has not been lost to any material extent. The same is true with respect to the application of s 317 of the Accident Compensation Act 2001.

### **Summary and orders**

[66] Exceptional circumstances are established and it is just to grant leave for OCO to raise a personal grievance of constructive dismissal out of time.

[67] The parties are directed to mediation in accordance with s 114(5) of the Employment Relations Act 2000.

[68] Costs are reserved. I would expect to resolve any issue about costs following a substantive determination, if matters are not resolved through mediation.

Philip Cheyne  
Member of the Employment Relations Authority