

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 230
5558830

BETWEEN SHERINA SAHIB
 Applicant

A N D NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Steven Fraser, representative of the Respondent

Investigation Meeting: On the papers

Submissions Received: 27 July 2015 from the Applicant
 No submissions from the Respondent

Date of Determination: 05 August 2015

**DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE**

- A. The unjustified dismissal claim was not raised within the statutory 90 day time period;**
- B. The applicant, Ms Sherina Sahib, failed to establish the existence of *exceptional circumstances* under s.115 of the Employment Relations Act 2000 (the Act);**
- C. Given the Authority’s finding in B, it is not required to consider the question of whether it is just to grant Ms Sahib leave to raise her personal grievance claim after the expiration of the 90 day time period. However, the Authority does not consider it just to grant Ms Sahib leave, in the circumstances.**
- D. Costs are reserved.**

Employment relationship problem

[1] The applicant, Ms Sherina Sahib, failed to raise her personal grievance with the respondent (her employer), New Zealand Post Limited (NZ Post) within 90 days of the alleged grievance occurring, in accordance with the requirements of s.114(1) of the Act. NZ Post does not consent to the raising of the grievance out of time.

[2] Ms Sahib seeks leave to raise her alleged grievance outside the 90 day period pursuant to s.114(3) and (4) of the Act.

The legislation

[3] Section 114 of the Act states:

(3) *Where the 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 personal grievance after the expiration of that period.*

(4) *On an application under subsection (3) 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.*

[4] Section 115 states:

Further provision regarding exceptional circumstances under section 114

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 employment 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 ...*

Issues

[5] The issues for determination by the Authority are:

(a) Was the delay in raising Ms Sahib's grievance occasioned by "*exceptional circumstances*"? This will require the Authority to consider whether:

- Ms Sahib was so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising it;
- Ms Sahib made reasonable arrangements to have the grievance raised on her behalf by her agent and the agent unreasonably failed to ensure that the grievance was raised within the required time (s115(b));
- Ms Sahib's employment agreement did not contain the necessary explanation concerning resolution of employment relationship problems.

(b) In the event that the answer to question (a) is "yes", the Authority will be required to consider whether it is just to grant Ms Sahib leave pursuant to s.114(4) of the Act to raise her personal grievance outside the statutory 90 day time period.

Investigation meeting

[6] The parties agreed that the Authority could investigate and determine the issues in para.[5] above on the papers.

[7] Ms Sahib filed an affidavit in support of her application for leave, together with various documents.

[8] For NZ Post, Ms Lauren Thomson, Human Resources Business Partner, filed an affidavit in opposition.

[9] As permitted under s.174 of the Act, this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

First Issue

Was the delay in raising Ms Sahib's grievance occasioned by *exceptional circumstances*?

[10] This will require the Authority to consider the matters set out in para.[5] above.

Employment by NZ Post

[11] Ms Sahib was employed by NZ Post from 1 October 2001 until her resignation on 4 November 2013. Ms Sahib was initially employed as a Mail Officer and subsequently as a Customer Services Representative. An offer of employment was signed by Ms Sahib on 7 September 2001. The offer letter stated that Ms Sahib was a party to the New Zealand Post Collective Employment Agreement ("the collective agreement").

[12] On 27 August 2004, Ms Sahib signed a letter agreeing that from 1 August 2004, her employment agreement was to be brought into line with the collective agreement that had recently been agreed between NZ Post and the New Zealand Amalgamated Engineering, Printing & Manufacturing Union Incorporated (EPMU).

Resignation

[13] Ms Sahib resigned on 4 November 2013. Ms Sahib alleges she was coerced into resigning as a result of bullying by her manager, Ms Jessica Niemack, during the period 2010 until 2013. By email to NZ Post on 17 April 2015, Ms Sahib raised her personal grievance with it. This was approximately 18 Months after Ms Sahib had resigned and is well outside the 90 day time frame by which personal grievances must be raised with an employer, pursuant to s114(1) of the Act.

[14] NZ Post denies Ms Sahib has a personal grievance claim and does not consent to the personal grievance being raised out of time.

Statement of Problem

[15] In the Statement of Problem filed in the Authority, Ms Sahib claims she resigned from NZ Post as a result of bullying by her manager from 2010 to 2013. Ms Sahib claims the bullying resulted in depression, extreme stress and insomnia. Ms Sahib seeks remedies including reinstatement to the last position she held at NZ Post together with reimbursement of medical expenses incurred by her for treating her stress.

Statement in Reply

[16] NZ Post filed its Statement in Reply in the Authority on 4 June 2015. It refutes Ms Sahib's claims and says she resigned voluntarily on 4 November 2013. NZ Post says no issue as to bullying was raised at the time NZ Post says Ms Sahib resigned and her resignation letter stated that her "... *experience with Post has been a very positive one*".

[17] With regard to the allegations of bullying, NZ Post says there were complaints of workplace bullying made by Ms Sahib and others against Ms Niemack in 2010. Those complaints were formally investigated by NZ Post and dealt with at the time. Ms Niemack was moved to another store in July 2012 but in October that year Ms Sahib applied for, and was granted, a transfer to the same store as Ms Niemack. NZ Post says that following a period of sick leave in October 2013, Ms Sahib resigned on 4 November 2013 and no personal grievance claim was raised by her until April 2015.

Raising a personal grievance

[18] In her affidavit of 24 June 2015, Ms Sahib says that she was not aware of the 90 day timeframe within which she was required to raise her personal grievance. Ms Sahib says she was never informed about the 90 day time frame by her representative at the relevant time, Mr Chris Rigby from the EPMU.

[19] Ms Sahib also says that she was suffering from extreme work related stress due to bullying. Following her resignation, Ms Sahib had the opportunity to think about things further. Ms Sahib decided that she had been the victim of bullying and wanted her job back. It was at this point, in April 2015 that she raised her personal grievance. Ms Sahib appears to be relying on exceptional circumstances as set out in s115(a), (b) and (c) of the Act as the reasons for the delay.

Medical certificate - October 2013

[20] Ms Sahib provided the Authority with a medical certificate from East Tamaki Healthcare signed by Dr Prabhu Pandey and dated 25 June 2015. The medical certificate refers to a consultation on 21 October 2013 between Ms Sahib and Dr Priby De Fonseka. The notes of that meeting refer to Ms Sahib:

Feeling anxious and low mood, multiple issues, work related stress, has had panic attacks in the past, no suicidal thoughts currently, but had ideas in the past, no plans and attempts, very supportive husband, wanting to stay away from work as work place is too stressful and not having very good relationship with manager, has been EAP, no much help, sleeping very little ...

[21] The notes are just that, notes. No information is provided as to the cause of the stress or whether there was more than one factor causing it.

[22] Following her consultation with Dr De Fonseka, Ms Sahib provided NZ Post with a medical certificate dated 21 October 2013 which certified she was not fit to work for 14 days. There was no diagnosis or details of Ms Sahib's condition in the medical certificate.

[23] On 23 October 2013, Ms Sahib's husband rang and spoke with Ms Niemack about Ms Sahib's sick leave. Following a discussion with Mr Rigby at Ms Sahib's request, Ms Niemack was told Ms Sahib was suffering from stress. The email communications attached to Ms Thomson's affidavit show efforts by NZ Post to find out more about Ms Sahib's illness. On 23 October 2013, Ms Marie Snowball emailed Ms Niemack saying more information about what was causing Ms Sahib's stress was required "in order for us to assist her."

[24] NZ Post asked to meet with Ms Sahib on 4 November to discuss her condition. On 30 October 2013, Ms Niemack wrote to Ms Sahib as follows:

Although your medical certificate did not state the reason that you were unfit for work, as requested by you we have spoken with Chris Rigby (EPMU) who informed us that your period of absence was due to stress. As your employer your wellbeing is important to us and we are obligated to ensure that we are providing you with a safe working environment.

In addition, we also expect our employees to take all practical steps to look after their own health and safety. As such, the purpose of this meeting will be to discuss your current situation so that we can ensure we are taking all steps to effectively support you and also so

that we can seek reassurance that you are taking all practical steps to look after your own health. ...

Verbal resignation – 1 November 2013

[25] On 1 November, Ms Sahib informed Mr Rigby that she wished to resign and he rang and passed that message on to Ms Thomson. During the telephone conversation Mr Rigby confirmed Ms Sahib's wish to resign as of 4 November and said that Ms Sahib *...has a few things going on in her personal life at the moment and has some things to work through in terms of her wellbeing. He wished to reiterate that her decision to resign is not due to issues with her workplace.*

[26] Mr Rigby did not mention workplace stress or a personal grievance claim. Ms Thomson asked Mr Rigby if Ms Sahib would reconsider her resignation before the meeting on 4 November.

Written resignation- 4 November 2013

[27] On 4 November, Ms Sahib confirmed her resignation in writing and did not attend the meeting with NZ Post scheduled for the same day. The resignation letter stated:

Dear Ms Jessica Niemack

Re Resignation

It is with great regret that I offer my resignation effective from today from my position of Customer Services Representative with NZ Post.

My experience with NZ Post has been a very positive one. I have benefitted from the association with my colleagues here in ways that I cannot fully enumerate. My admiration for the philosophy of NZ Post and the opportunities afforded its employees is tremendous. Thank you for the opportunity to work alongside you. I learned a great deal which I am sure will be valuable to me in my future adventures. I leave with deep regret.

Yours sincerely

Sherina Sahib

[28] On 14 November 2013, approximately two weeks after Ms Sahib tendered her resignation, Ms Sahib asked Mr Rigby if she could withdraw her resignation. Mr Rigby's response was that it was probably too late but that he would check. Ms Sahib emailed Mr Rigby later the same day:

Thanks Chris I have been with the company for 12 years and this is the first time ever I have done something like this. I hope HR will understand. If all is ok by Hr I can resume my job in December, all is cleared by my doctor also please let them know I am really sorry to cause everyone such a trouble because I wasn't thinking straight.

[29] Mr Rigby approached Ms Lauren Thomson and asked whether Ms Sahib could withdraw her resignation. Ms Thomson in her affidavit says that Mr Rigby stated that Ms Sahib had resigned due to a number of *stressful issues in her life*. There was no mention of work related stressful issues or that Ms Sahib was resigning because of bullying by Ms Niemack. NZ Post did not agree to a withdrawal of Ms Sahib's resignation.

[30] Ms Thomson says that Ms Sahib applied for various roles within NZ Post in April 2014, July 2014 and again in April 2015. Ms Sahib was interviewed for a role in April 2014 but was unsuccessful for that position and was short listed for another role in April 2015 but did not attend the interview because it was not a full time position.

[31] Ms Sahib was one of the complainants in an investigation into alleged bullying by Ms Niemack in 2010. An investigation was conducted by NZ Post and completed in November 2010. Ms Sahib did not complain to NZ Post of work place bullying or about Ms Niemack following the conclusion of the investigation.

[32] In late October 2013, Ms Sahib was placed on sick leave. There is reference in the Doctor's consultation notes at the time that stress was a factor. There was very little detail provided. NZ Post attempted to explore the situation with Ms Sahib. However, Ms Sahib resigned on 1 November 2013 before it was able to do so.

[33] About 10 days after her written resignation on 4 November, Ms Sahib changed her mind and wished to withdraw her resignation. Mr Rigby approached Ms Thomson about this but NZ Post did not agree to a withdrawal of Ms Sahib's resignation. Ms Sahib then applied for other jobs within NZ Post.

The legal position

Section 115(a) of the Act

[34] Section 115(a) of the Act states that exceptional circumstances for not raising a personal grievance include an employee being *so affected or traumatised by the matter*

giving rise to the grievance that he or she was unable to properly consider raising the grievance.

[35] There was no evidence of any specific events which might have affected or traumatised Ms Sahib to such a degree that she was not able to properly consider raising a grievance within 90 days of her resignation. The medical information was not clear as to the causes of Ms Sahib's stress. Mr Rigby on Ms Sahib's behalf told NZ Post the stress was not work related. It is my view Ms Sahib did not resign because of work related stress.

[36] Ms Sahib was able to reconsider her resignation within 2 weeks and sought for it to be withdrawn. Ms Sahib has not satisfied me that the delay in raising her personal grievance within 90 days was due to "*exceptional circumstances*" under s 115(a) of the Act.

Section 115(b)

[37] Section 115 (b) includes as an exceptional circumstance, a situation where an employee has made reasonable arrangements to have a grievance raised within 90 days, by an agent but the agent unreasonably fails to do so.

[38] There is no evidence that Ms Sahib instructed Mr Rigby to raise a personal grievance on her behalf and that he failed to do so. Mr Rigby was asked to have Ms Sahib's resignation withdrawn, he attempted to do so but was not successful.

[39] It is my view that Ms Sahib did not make reasonable arrangements to have the grievance raised on her behalf by her agent, Mr Rigby.

[40] In the Employment Court judgment of *Davies v Dove Hawkes Bay Inc*¹ at para [29] Chief Judge Colgan stated:

If 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 former employee is dissatisfied, it is reasonable to expect such an agent to do so. 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.

¹ [2013] NZEmpC 83

[41] Ms Sahib took none of these steps.

Section 115(c)

[42] Section 115(c) requires employment agreements to contain an explanation concerning the resolution of employment relationship problems. Ms Sahib claims she did not know about the requirement to raise a personal grievance with NZ Post within 90 days.

[43] Section J of the collective agreement of 2000-2002 contains the “*Personal Grievance and Disputes Procedures*”. The procedures are comprehensive. There is a paragraph dealing specifically with initiating a personal grievance. Paragraph 4 states the personal grievance must be submitted within 90 days of the employee... “*becoming aware of the event or action alleged to amount to a personal grievance.*”

[44] Similarly, in the collective agreement of 2004-2006, Section J deals with “*Resolving Employment Relationship Problems*”. Paragraph 6 states:

- RAISING A PERSONAL GRIEVANCE*
6. *If an employee believes they have grounds for raising a personal grievance with the company, then the employee must do so within 90 days of the action occurring, or the grievance coming to the employee’s notice,. Otherwise the claim may be out of time which means it would be too late to be accepted as a grievance by the company.*

[45] Ms Sahib signed a letter of acceptance of employment conditions which clearly refers to the collective agreement. Ms Sahib was regularly in contact with her EPMU representative, Mr Rigby. In the circumstances, I do not accept Ms Sahib was not aware of her obligation to raise a grievance with NZ Post within 90 days. Ms Sahib has not established an exceptional circumstance under s 115(c), the collective agreement did contain the required explanation concerning the resolution of employment relationship problems.

[46] For the reasons above, I determine that the exceptional “limb” in s.114(4) of the Act has not been met pursuant to s.115(a)(b) or (c) of the Act. The answer to the first question is “No”.

Second Issue**Is it just to grant Ms Sahib leave pursuant to s.114(4) of the Act to raise her personal grievance outside the statutory 90 day time period?**

[47] Because Ms Sahib has not established the existence of “*exceptional circumstances*”, the Authority is not required to consider whether it is just to grant Ms Sahib leave to raise her personal grievances with NZ Post outside the 90 day time period.

[48] However, by way of comment, Ms Sahib did not raise her personal grievance claim with NZ Post until April 2015, approximately 18 months after resigning. This is a significant delay and one which in my view could be prejudicial to NZ Post in defending the matter.

[49] Further, I am not convinced of the merits of Ms Sahib’s claim. Ms Sahib alleges she resigned because of workplace bullying by her Manager. This is not what was communicated to NZ Post by Ms Sahib’s representative, Mr Rigby.

[50] Mr Rigby said the stress was not work related. NZ Post attempted to assist by meeting Ms Sahib, Ms Sahib resigned instead. Ms Sahib then sought her job back. Following a number of job interviews for roles within NZ Post for which Ms Sahib was unsuccessful for various reasons, Ms Sahib raised a personal grievance claim in April 2015. This conduct is unusual in the circumstances of Ms Sahib’s alleged grievance.

[51] In all the circumstances I do not consider it is just for leave to be granted to Ms Sahib to raise her grievance outside the 90 day time period.

Costs

[52] Costs are reserved. The parties are encouraged to agree costs themselves. If the parties are unable to agree costs, NZ Post has 14 days to file a memorandum as to costs and Ms Sahib has 14 days from the date of receipt of NZ Post’s memorandum to file her response.

Anna Fitzgibbon

Member of the Employment Relations Authority