

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 117/07  
File Number: 5038584

BETWEEN                      Lyn Temby  
   Applicant

AND                              ACC  
   Respondent

Member of Authority:        P R Stapp

Representatives:              Sarah Le Page for the Applicant  
   Graham Phillips for Respondent

Determination:                22 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant is trying to pursue a personal grievance. The Respondent has replied that the personal grievance has been raised out of time both in terms of the 90 day requirement to raise a grievance and the 3 years to file it in the Authority. The respondent has opposed the Applicant's subsequent claim for exceptional circumstances.

[2]     The parties have agreed for the above matters to be dealt with first. By consent the matter has been dealt with on the papers.

**The Issues**

[3]     Did Ms Temby raise/submit a personal grievance within the required 90 days and has the grievance been filed in the Authority in the 3 years required under the Employment Relations Act? Have personal grievance claims relating to 2004 been raised with ACC properly?

[4]     Since the statement of problem was filed, and the objection made by the respondent, the Applicant has also applied to raise her grievance outside the time required due to exceptional

circumstances. Thus there are issues as to whether there are exceptional circumstances and was any delay occasioned by the exceptional circumstances.

## **The Facts**

[5] Lyn Temby was employed by ACC as branch manager in Masterton. On 12 May 2000 she made some complaints about the conduct of two managers. She deposed that she was unable to submit a grievance as she was worried about losing her job because of a threat that if she made a “fuss” she would be “fired” and was told to “shut [her] mouth and that nothing would appear on her personal file”. She made no complaint over this at the time, although she was being assisted with the complaint about the two managers (correspondence produced in the statement of problem).

[6] On 19 December 2000 she sustained a serious head injury in a car accident. She was off work for three months. She returned to work. She started working in another role of marketing advisor, in Wellington, but after a further three months could not continue working as a result of her injuries. Her hours were reduced. She deposed that she found, as the days passed, working was too much, as she alleged that she was made to travel over 200 kilometres a day (to and from the new position) and she had to look after her daughter, bearing in mind the time it took her to travel daily, and that that she could not deal with the legalities because of her situation.

[7] On 24 August 2004 Ms Temby suffered another accident when she was hit on the head by a soccer ball and has been unable to work since. She filed a statement of problem in the Authority on 8 May 2006. She has complained in that statement of problem that:

- ACC humiliated her by failing to investigate her complaints about other staff in May 2000.
- ACC did not take her concerns seriously, treated her like a “whistle blower”, and bullied her into taking the marketing manager role in Wellington that involved an ultimatum that if she did not take it she would be “fired”. She says she made no request to change her role. She alleged that a person, she named, told her to “*shut [her] mouth and that nothing would appear on [her] personal file*”.
- ACC did not meet its obligations under the “partnership agreement” lacking communication and care with her in regard to her injury.
- ACC refused to allow her to see a Psychologist under the ACC system.
- ACC refused to assist her in regard to her injury and refused to pay a psychologist’s account for her.

- ACC humiliated her by sending her a card game in October 2000 when she asked for career support.
- ACC demoted her to a part time position.
- ACC's Human Resources department failed to contact her in a timely manner and did nothing to help and forgot about her and did not assist her with any further education to complete a Masters in Business Management.
- ACC did not inform her about a personal grievance case that concerned her.
- Ms Temby says she did not receive a response to an email dated 22 March 2000 requesting support and documents for the mediation of that case.
- ACC discriminated against her as a result of her injuries.
- Her complaints about events after her second injury are in the 90 days time allowed.
- ACC reduced her salary to 80% after August 2005 and applied the wrong contract.

[8] Ms Temby was medically retired by the ACC in February 2006.

### **Determination**

[9] One of the difficulties is that Ms Temby has made many claims in regard to her employment with ACC in her statement of problem without adequate documentation and evidence of raising them with the ACC earlier in an employment context. She has deposed that she intended to raise a personal grievance, but did not do so within 90 days of the conduct she alleged took place in 2000, before her first accident, and 2001. There is no evidence that she actually submitted or raised a grievance within 90 days of the events she has complained about above until the statement of problem was filed. That means her claims are all well outside the time required to raise them.

[10] She says she raised matters with some different people at ACC. What she has deposed is too vague to be sufficient to have "raised or submitted" a personal grievance (applying under either the Employment Contracts Act until 1 October 2000 or the Employment Relations Act after 2 October 2000). Furthermore, Ms Temby's deposed evidence leaves it open for me to conclude that while she may have "*felt*" certain things about her treatment that falls short of properly raising or submitting a personal grievance under the relevant Act.

[11] Ms Temby's allegations that ACC reduced her salary and applied the wrong contract have been raised for the first time as a grievance in the statement of problem. Without drawing any concluded view on this there may well be a reasonable explanation in regard to the usual practice

that where sick leave and leave entitlements have expired payments are reduced to 80% of earnings. Nevertheless if there is a problem that exists on this then other causes of action exist to remedy any under payments if they are due. The statement of problem would need to be amended accordingly, or if there is any issue on any ACC compensation payment (different to wages entitlement) it would need to be pursued elsewhere.

[12] I accept Ms Temby may have had some discussions with another person/persons from ACC Human Resources about many of the matters she has complaints in regard to, but her evidence does not satisfy me that she raised a grievance properly within 90 days on them.

[13] There has been no issue made that all these events became known to the applicant to raise any grievance at a later time.

[14] Another difficulty is that there is a mix of issues of an employment nature and complaints about the ACC in its role under the “partnership programme” concerning Ms Temby’s rehabilitation. I have no jurisdiction on the latter.

[15] Ms Temby now relies upon an application made on her behalf for exceptional circumstances to continue with her employment related complaints. Ms Temby did not acknowledge that there was any issue on submitting or raising her grievance until it was opposed by ACC. The application for exceptional circumstances was raised for the first time after the statement of problem was filed which causes me some doubt about its genuineness, although I accept Ms Temby does have genuine medical problems.

[16] She is relying upon being so affected and traumatised by the events giving rise to the grievance and the stress of the new position that she was unable to properly consider raising the grievance within the time required. As such her ability to raise concerns on various matters with different people at ACC (not any employment issues) and that she has included another reason for the delay (being her work travel and looking after her child) negated her evidence of trauma and stress relating to the events giving rise to the personal grievance to be the reason for the delay. She also deposed that she was unable to submit a grievance as she was worried about losing her job because of a threat that if she made a “fuss” she would be “fired” and was told to “shut [her] mouth and that nothing would appear on her personal file”. Her evidence implied that she understood that there were legalities that needed to be met at the time. I conclude that the above represent other

reasons existing that account for the delay. They have not been relied upon for exceptional circumstances.

[17] Medical information has been provided on behalf of the Applicant that she sustained two significant closed head injuries on 19 December 2000 and in August 2004 that deeply and significantly affected her. I accept that these had a significant impact on her. The first accident was a motor vehicle accident that may have related to her change of position, involving Ms Temby travelling more distance to and from work. However, the applicant has not satisfied me that she was not able to raise or submit a grievance on the initial issues that she claims are personal grievances before the accident in 2000 given the period of time involved and her continuing in work with ACC before the accident.

[18] The second accident involved her getting hit on the head with a soccer ball. Indeed Ms Temby says she approached ACC personnel during the time following that accident on various matters, but not employment matters in any detail. That means that she could if she had wished obtained advice and given instructions at a much earlier stage. The length of time between the events and the filing of the statement of problem that raised many of these issues remains unsatisfactorily explained.

[19] Also there is evidence that there were other stress related issues in Ms Temby's life that could have compounded her problems and could have been associated in the delay in raising her grievance that were unrelated to her work. I conclude there has been no complaint made about Ms Temby's medical retirement in any correspondence at the time or the statement of problem. I have taken it to mean that it is not an issue.

[20] I am satisfied that there is no issue in regard to extending any time under s 114 (6) of the Act for the Applicant to file in the Authority any personal grievance within 3 years.

[21] Even if there were exceptional circumstances established, those matters that go back to 2000 and 2001, after the commencement of the Employment Relations Act, would require consideration for an extension of time under s 114(6) of the Act. To grant any leave for any delay occasioned by exceptional circumstances, and an extension of time beyond the 3 years for filing in the Authority (after 2 October 2000), would give rise to some prejudice to the respondent with the passage of time and the ability of witnesses to recall events. Further ACC says it could be difficult to be able to

locate parties involved as some people are no longer employed by ACC and their whereabouts is unknown.

### **Conclusion**

[22] The personal grievance was not raised or submitted in 90 days as required under the Employment Contracts Act and Employment Relations Act applying at the relevant time. The subsequent application for exceptional circumstances after filing the statement of problem by Ms Temby supports this. Many of the claims being made by Ms Temby have been raised for a personal grievance for the first time in the statement of problem filed in the Authority on 8 May 2006. I accept that a number of the issues had been discussed but any discussions at the time fell short of the requirement to raise a grievance.

[23] It is a fact the applicant suffered two injuries of a very serious nature. However, I have not been satisfied that the injuries and consequences of the injuries on the applicant were the cause for the delay. Moreover the events complained about by the applicant occurred initially before her first accident while she was at work. After the first accident she returned to work, and the terms of her return to work were not complained about, even before she had a second accident. I accept she tried to obtain better conditions in taking up a new role but the negotiation of any terms is a different matter to raising a personal grievance.

### **Orders of the Authority**

[24] The applications for leave from the applicant are dismissed.

[25] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority