

Attention is drawn to the permanent order that the names of the parties and information identifying either party in this determination are not to be published.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 84
5374286

BETWEEN A
 Applicant

A N D B LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Advocate for Applicant
 Human Resources Manager, for Respondent

Investigation Meeting: 7 March 2013 at Auckland

Date of Determination: 12 March 2013

DETERMINATION OF THE AUTHORITY

A. A permanent order is made that the names of the parties and information identifying either party in this matter are not to be published.

B. A's application for leave to raise a personal grievance against B Limited after the expiration of the 90 day period as specified in s114 of the Employment Relations Act 2000 is not granted.

Employment relationship problem

[1] The issue in this case is whether the applicant, A is able to pursue a personal grievance against the respondent, B Limited, her former employer, for sexual harassment.

[2] B Limited's position is that this claim has been raised out of time. B Limited says there are no exceptional circumstances under s115 of the Employment Relations Act 2000 (the Act), which would enable the Authority to grant A leave to raise the grievance after the expiration of the 90 day limitation period prescribed in s.114 of the Act.

[3] In February 2012, at the time B Limited was undertaking an investigation into A's performance which ultimately led to her dismissal on 23 February 2012, A raised a personal grievance of sexual harassment against B Limited.

[4] The claim of sexual harassment relates to an incident which allegedly occurred on 29 May 2008, almost 4 years before A raised it with B Limited and well outside the 90 day period. B Limited does not consent to this grievance being raised after the expiration of the 90 day period within which A should have raised the matter pursuant to s114 of the Act.

[5] A has therefore applied under s.114(3) of the Act for the Authority to grant her leave to bring her personal grievance after the expiration of the 90 day period.

[6] A says that she was sexually harassed by the Managing Director of B Limited on 29 May 2008. Her allegation is vehemently denied by the Managing Director of B Limited. Following the alleged incident, A spoke to the Distribution Manager of B Limited. A did not report to the Distribution Manager but went to him as a friend and told him what had happened. The Distribution Manager encouraged A to put a complaint in writing to the General Manager. A was not confident her complaint would be properly considered by the General Manager and was worried about the effect such a complaint would have on her job. A did not want to risk losing her job as she had children to raise and enjoyed the job. A did not raise the matter with her own Manager nor did she raise it with any other manager at B Limited. Further, A did not raise the matter with the new Human Resources Manager who started at B Limited in March 2011.

[7] A says that following the incident in May 2008, she became distant and tried to avoid the Managing Director if at all possible. This evidence is disputed by both the Managing Director and the General Manager who say A continued talking to them as normal and indeed engaged in private discussions with both of them about surgery that she had undertaken which had not gone well.

[8] A did not seek legal advice nor did she seek any medical assistance following the alleged incident in May 2008. The first time A took such steps were following her dismissal in February 2012 at which time she felt she could raise the sexual harassment claim.

The law

[9] Personal grievance claims must be raised with an employer within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later. Otherwise, unless the employer consents to the personal grievance being raised after the expiration of that 90 day period, an employee must apply to the Authority for leave to raise the grievance. The Authority may grant leave under s114(4) of the Act if satisfied the delay in raising the personal grievance “ ...a)...*was occasioned by exceptional circumstances ... and (b) considers it just to do so*”. Section 115 of the Act states:

115. 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,) ...”*

[10] A gave no evidence of being *so affected or traumatised* by the alleged sexual harassment that she was unable to properly consider raising the grievance within the 90 day period. Her evidence was that she did in fact properly consider raising the grievance within the 90 day period. A spoke with the Distribution Manager who encouraged her to put her complaint in writing. A decided not to because she felt this may jeopardise her employment. A gave no evidence of being *affected or traumatised*. A sought medical assistance only after B Limited began an investigation into her performance which resulted in her dismissal in February 2012.

[11] It is my finding that A has not satisfied me that her delay in raising the personal grievance was due to being *so affected or traumatised* by the alleged sexual harassment that she was unable to properly consider raising the grievance. A’s

application for leave pursuant to s.114(3) of the Act to raise the personal grievance after the expiration of the 90 day period is not granted.

Costs

[12] Costs are reserved.

Anna Fitzgibbon
Member of the Employment Relations Authority