

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2024] NZERA 370
3246339

BETWEEN FRANCIS ACIERTO
Applicant

AND ALLIED CONCRETE LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Kevin Murray, advocate for the applicant
Jahna Greenfield, counsel for the Respondent

Investigation Meeting: By audio visual link on 28 May 2024

Submissions Received: 28 May 2024 from the Applicant
28 May from the Respondent

Date of Determination: 24 June 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Francis Acierto worked for Allied Concrete Limited (Allied Concrete) as a concrete truck driver in Wanaka from 11 July 2022 until the employment ended when he verbally resigned on 17 August 2022 in disputed circumstances. Mr Acierto is of the view that he was constructively dismissed, claiming he left because of his employer's unreasonable actions. In an email of 18 August confirming his resignation Mr Acierto detailed concerns about his treatment throughout employment by his immediate manager and cited the manager's insistence that he enter a confined drainage area when he says he suffered claustrophobia as a triggering factor for his resignation. The Allied Concrete Manager concerned had earlier on 18 August emailed a letter to Mr Acierto asking him to reconsider his resignation that he

acknowledged had been communicated the day before while Mr Acierto was in an “agitated state” but the letter also indicated should he return to work some performance issues needed to be discussed as part of a “three month probationary review period”.

[2] After resigning, Mr Acierto contacted a Queenstown based advocate on 20 August 2022 to get advice on his situation. Mr Acierto says after receiving encouragement from the advocate that he could do something about the circumstances of his employment ending he left the matter with the advocate trusting it would be advanced. Unfortunately, the advocate failed to raise a personal grievance with Allied Concrete. After failing to obtain any response from the advocate on the progress of his concerns, Mr Acierto met the advocate on 30 May 2023. The advocate advised he had neglected to raise the grievance with Mr Acierto’s employer for health and other personal reasons. Mr Acierto was referred to an associate of the advocate, Kevin Murray, who met him on 3 June.

[3] Mr Murray proceeded to raise a personal grievance with Allied Concrete by letter of 10 July 2023, indicating a view that Mr Acierto had been unjustifiably dismissed and unjustifiably disadvantaged by actions of the employer prior to his resignation. The letter accepted the personal grievance was being raised out of time and explained that Mr Acierto had given instructions to his previous advocate who had failed to raise the grievance in a timely manner.

[4] In a response letter of 17 July 2023, Allied Concrete indicated they would not attend mediation or consent to any element of the personal grievance being dealt with as it had been raised eight months outside of the 90 days’ time limitation. Subsequently, on 21 August 2023, Mr Acierto’s advocate made an application to the Authority seeking leave under s 114(3) of the Employment Relations Act 2000 (the Act) to have the matter heard after the expiration of the 90 days’ time limit for raising a personal grievance. Allied Concrete oppose the application. The parties were directed to and attended a mediation but the matter remains unresolved.

The preliminary issue

[5] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on a single issue but I do not record all evidence and submissions received.

[6] The sole question to be addressed is whether Mr Acierto has established sufficient exceptional circumstances to make it just that I grant him leave to have his personal grievance advanced.

The law and what Mr Acierto must establish

[7] An employee failing to raise a personal grievance within the 90-day time limit where the employer has refused to grant leave for it to be raised may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it:

- i. is satisfied that the delay in raising the personal grievance is occasioned by exceptional circumstances; and
- ii. considers it just to do so.

[8] The meaning of exceptional circumstances in *Wilkins v Field & Fortune*¹ is described as “unusual, outside the common run, perhaps something more than special and less than extraordinary.”

[9] The Supreme Court in *Creedy v Commissioner of Police*² addressing the definition of “exceptional circumstances” stated:

“[31] In *Wilkins & Field*, the Court of Appeal treated ‘exceptional circumstances’ as those which are ‘unusual, outside the common run, perhaps something more than special and less than extraordinary.’ This formulation appears to combine two different meanings, the first being that of being unusual (the ‘exception to the rule’) and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As *Lord Bingham of Cornhill said in R v Kelly* [1999] 2 All ER 13 (CA) , when construing a reference to ‘exceptional circumstances’:

‘We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.

¹ *Wilkins v Field & Fortune* [1998] 2 ERNZ 70.

² *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

“Secondly, it will be easier to apply. The very language of Wilkins & Field implies both uncertainty (‘perhaps’) and lack of precision (‘Something more than special and less than extraordinary’). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.”

[10] The exceptional ground that Mr Acierto seeks to rely upon is set out in s 115(b) of the Act:

Section 115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include-

- (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.

[11] In addition, given that it has been held by the Employment Court that s 115 of the Act is not an exclusive list of factors ³ the Authority can take account of any other relevant matters that Mr Acierto has identified.

Did Mr Acierto make reasonable arrangements?

[12] There are two limbs to the test in s 115(b) of the Act. The first limb concerns whether Mr Acierto made reasonable arrangements to have the matter raised by an agent on his behalf and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit.

First Limb

[13] Mr Acierto has indicated during the 90 days’ period that commenced on 18 August 2022 he promptly sought advice on 20 August in an appointment with an advocate at his place of residence. What occurred during this consultation was the subject of evidence given by Mr

³ *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30 at [67].

Acierto during the investigation meeting and a sworn affidavit from the advocate he consulted.

[14] Speaking of the consultation on 20 August, Mr Acierto says it lasted about an hour and was initially taken up with him explaining the problems he had been having with his immediate manager at Allied Concrete.

[15] As context, Mr Acierto is a Philippines national who has resided in New Zealand for thirteen years and has worked in various construction industry jobs. English is not Mr Acierto's first language. Mr Acierto's introduction to the first advocate was through a friend in the Philipino community who had suggested the advocate was known to act for Philipino workers and was recommended. Without checking, Mr Acierto believed the advocate was a lawyer and says he placed a great deal of trust, respect, and confidence in the advocate due to their reputation and assured manner. Mr Acierto explained that in his culture people tended to defer to 'professionals' and were reluctant to question them.

[16] The advocate's affidavit says that during the 20 August consultation they were "instructed to raise a personal grievance". However, Mr Acierto was less sure on this point and recalled relating his situation to the advocate and being asked to provide further information that he emailed to the advocate the following Monday. Mr Acierto also recalled asking about the cost of proceeding against his former employer.

[17] Mr Acierto's written brief of evidence indicates that the advocate upon reviewing the details of his situation "suggested it might be possible to initiate legal proceedings" and then they told Mr Acierto that the "legal process could last approximately three to six months." Mr Acierto also recalled discussing the legal fees involved and was advised of this being on a percentage contingency basis.

[18] No terms of engagement were produced but such evidence that was given is suggestive of the advocate resolving to take the matter further rather than Mr Acierto merely seeking advice on his options as suggested by counsel for Allied Concrete. In any case, as was found in the Court of Appeal decision of *Melville v Air New Zealand Limited* the inquiry is not always necessary to focus on whether an express instruction has been given but whether

on the facts, reasonable arrangements have been made with an agent, to have the grievance raised on a person's behalf.⁴

[19] In oral evidence, Mr Acierto says he just told the advocate to pursue 'justice' for him and although he could not recall them saying he had a personal grievance, the advocate assured him he had a good case and told him at the end of the consultation, "we are going to win."

[20] The Authority was provided with a copy of the advocate's authority to act pursuant to s 236(1) of the Act, signed by Mr Acierto and dated 20 August 2022. The document authorising the advocate as directed by the client, is silent on authorisation to lodge a personal grievance but indicates the advocate may refer the matter to mediation and the Authority and generally: "Represent me in any other required manner relating to the issues as advised by me in telephone conversations and/or meetings we have held".

[21] Mr Acierto says he just left the matter to the advocate to pursue and because they told him they were a lawyer he implicitly trusted them that his case would be advanced despite no further contact for a considerable period and no copies of correspondence being disclosed to Mr Acierto.

[22] Mr Acierto says he thought the advocate would let him know of progress in time and because he had said it would take three to six months, he did not think of seeking an update until this period elapsed.

[23] The advocate's affidavit did not elaborate on whether they briefed Mr Acierto on what would happen once a personal grievance was raised with Allied Concrete and Mr Acierto could only recall general assurances being given on the strength of his case. The advocate's disclosed consultation typewritten file note of the 20 August meeting, does not assist as it just relates disclosed background details were discussed and ends with: "? Constructive dismissal."

⁴ *Melville v Air New Zealand* [2010] NZCA 563 at [27].

[24] Mr Acierto produced a copy of a text message to the advocate of 13 February 2023 that says: “I just want to fallow (sic) up about my case update?? Thanks”. To which Mr Acierto received no reply. A further message of 13 April indicated:

How are you? Hope you are well. I would like to follow up what is going on in my case. Its been 8 months now an I did not hear anything from you. Please update me whats going on. Hoping to hear from you. Thank you.

[25] Mr Acierto says he also sent some Facebook messages to the advocate’s partner who he knew from the local Pilipino community but did not produce copies of such and was unclear about the time period in which they were sent.

[26] There was no response to the above messages until the advocate texted Mr Acierto on 20 May 2003, asking to meet him the next day. This meeting proceeded on 30 May at which Mr Acierto says the advocate apologised for the neglect of his case and introduced him to a closely associated advocate, Mr Murray, who he met on 3 June.

[27] When pressed why he had not sought alternative representation earlier or followed up his first advocate in a timely fashion, Mr Acierto repeated he knew nothing of the legal process and had been told a delay would occur and he just placed trust in the advocate and thought his case was being managed by them.

Assessment

[28] While it is apparent that Mr Acierto did not give specific instructions for the first advocate to raise a personal grievance with Allied Concrete, he may not have understood this subtlety, he described his concerns and was told by the advocate that a legal solution was possible. Thereafter despite not following up the lack of correspondence disclosed to him, I consider Mr Acierto reasonably believed he had entered a contract with the advocate to resolve his concerns about the way his employment with Allied Concrete had ended.

[29] I accept there were cultural factors involved in Mr Acierto placing trust in the advocate who had been recommended by his own community and had made a good first impression as to his stated competency and ability to resolve matters. Mr Acierto explained the concept of his community members being humble in their approach to people in positions of responsibility or apparent influence.

[30] What is more likely than not, is the advocate did not explain ‘step-by step’ how the process would evolve and how Mr Acierto would be involved in this or give any commitment to share correspondence with Mr Acierto or provide a written risk analysis of his advice that would have alerted him to concerns about a lack of progress. I accept Mr Acierto after being told his case would take 3-6 months, had in the circumstances, no reason from his perspective, to follow up matters with the advocate.

[31] I find in the circumstances prevailing, the above demonstrates that Mr Acierto made reasonable arrangements to have his grievance raised by an agent in a timely manner.

Second limb

[32] The second limb of the test in s 115 (b) concerns whether Mr Acierto’s advocate having been properly instructed, failed to raise the grievance within the requisite time limit.

[33] This limb is easily established. The first advocate manifestly failed to apprise Mr Acierto of the progress of his personal grievance and did nothing to advance it. More worryingly the advocate inexplicably failed to communicate with Mr Acierto for a significant period or seek to refer the grievance to another representative when it became apparent he had not fulfilled his responsibilities and obligations owed in contract to Mr Acierto.

[34] The advocate concerned claimed there were ongoing health and other related stressors (although no corroborating medical evidence was provided) impacting them but none cover the discourtesy shown when it must have been obvious to the experienced advocate that their lack of action would have consequences for their client. I thus due to lack of corroborating evidence, do not accept that the advocate sufficiently established by medical evidence they were at all the relevant time, incapacitated to raise the personal grievance on Mr Acierto’s behalf or to communicate this to him.⁵

[35] As explained above, Mr Murray in submissions is wrong to suggest the test in s 115(b) of the Act is centred upon an advocate’s incapacity. I also note that Mr Murray failed to identify the personal grievance in a timely manner as he allowed five weeks to elapse before

⁵ The Employment Court decision *FGH v RST* [2018] NZEmpC 145, was brought to my attention as an analogous case but in that case, the Judge was satisfied sufficient corroborating medical evidence had been provided.

contacting Allied Concrete. Mr Acierto has in terms of timeliness, been badly served by both advocates.

[36] On an application and further submission from the first advocate, I have chosen to not identify them in this case but the neglect involved in this matter is noted, has been evident in another prior matter before me and should the Authority be faced with similar applications without convincing evidence to support such, then further non-publication is unlikely.

Other exceptional circumstances

[37] Mr Acierto has sought to rely on his poor command of English language as being a factor that placed him especially in reliance on the first advocate's skill and experience, that he had at the time of his engagement of them, no reason to doubt their competence or reputation. Further, as traversed above, Mr Murray in a compelling oral submission asserted that cultural factors played a significant part in Mr Acierto not questioning the progress of his grievance in a timely manner (the first six months).

[38] On balance, having questioned and heard from Mr Acierto I accept he struggles with the subtlety of English expression and comprehension and it is more likely than not, he genuinely placed unquestioning trust in his first advocate after being recommended by a member of his community. I also consider that Mr Acierto would be unaware of how his personal grievance should have proceeded and naively left it up to the first advocate to advance.

[39] But for the exceptional circumstances ⁶ that I have found existed, it is clear Mr Acierto intended his personal grievance to proceed in a timely manner and that Allied Concrete in the circumstances of the strained employment relationship, would not have been surprised if it had been.

[40] I do accept that this case is somewhat of an outlier given the period that elapsed before Mr Acierto followed the advocate up once the initial 90 days had expired but having assessed Mr Acierto's demeanour and evidence, I consider there was a reasonable explanation of

⁶ See *Goldie v Chief Executive of the Department of Corrections* [2023] ERNZ 86.

cultural factors why he placed undue and unquestioning trust and reliance in his first advocate.

Is it just to grant leave?

[41] In finding that an exceptional circumstance exists, s 114(4)(b) of the Act requires that I must be sure that in granting leave, I consider “it just to do so”. In this respect I need to look at a number of factors that I group under the following headings:

The length of the delay and prejudice to Allied Concrete

[42] While Mr Acierto sought timely initial advice on 20 August 2022 and has established he communicated his intent that his grievance be pursued further, Allied Concrete were not formally placed on notice of the specific nature of the personal grievances until 10 July 2023. I accept this delay is significant but the reasons for such have been explored above. I am also conscious of the fact that the ending of Mr Acierto’s employment and its contested circumstances, were evident at the time, in the sense that both parties had issues in the employment relationship that had been expressed in mutual correspondence.

[43] Allied Concrete point to the significant delay impacting on witnesses’ recall of events that are now two years past but I balance that up, with it being a brief period of employment and the detailed statement in reply filed by Allied Concrete in the Authority recounts events in significant detail. In addition, there is sufficient correspondence between the parties at the ending of the relationship that I can easily and objectively assess.

Merits of Mr Acierto’s claims

[44] Whilst the Employment Court in *Austin v Silver Firm Farms* granted leave for Mr Austin to raise a grievance where ACC matters were at issue it did so after carefully analysing a situation where the employer had deceived him of his ACC entitlements and adopted a strategy to divest itself of rehabilitation responsibilities.⁷ Here I do not see a parallel situation as Allied Concrete evidently had some legitimate performance concerns to raise with Mr Acierto that arose in a short period of time of employment that had a rocky start and Mr

⁷ At [67].

Acierto chose to resign (albeit claiming he had some issues about how he was being managed).

[45] Mr Acierto is seeking to predominantly establish that he was constructively dismissed after a short period of employment which is a notoriously difficult claim to establish.

[46] I find on the albeit uncontested assertions made by Allied Concrete in their filed material, that even if Mr Acierto establishes he was constructively dismissed he may face some significant contribution issues. I however stress this is an observation without hearing all the evidence as no one from Allied Concrete provided a brief of evidence or appeared at the preliminary investigation meeting while conceding the branch manager responsible for Mr Acierto is still in their employ.

Finding

[47] While I have found that Mr Acierto has demonstrated he took reasonable and incidentally timely steps, to have his personal grievance raised on his behalf by an agent and that agent's neglect should not be imputed to Mr Acierto, I retain a concern that the personal grievance may not be compelling.

[48] I, however, find by a narrow margin, in the totality of these circumstances, that it would be just to grant Mr Acierto's application for leave to have this matter proceed further. I am obliged by the Act to direct the parties back to mediation and strongly suggest they utilise this opportunity to explore potential settlement options.

Orders

[49] I order the following:

- (i) Francis Acierto's application under s 144(4) of the Employment Relations Act 2000 is successful and leave is granted by the Authority for the personal grievance to proceed.
- (ii) Pursuant to s 144(5) of the Employment Relations Act 2000 the parties are directed to "use mediation to seek to mutually resolve the grievance".

Costs

[50] Costs are reserved.

[51] The parties are encouraged to resolve any issue of costs between themselves.

[52] If the parties are unable to resolve matters and an Authority determination on costs is needed, Francis Acierto may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Allied Concrete Limited will then have 14 days to lodge any reply memorandum. Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves, may be granted.

[53] The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

David G Beck
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1