

Act. But in any event, Ms O'Brien says that Ms Blakeney-Williams has not met the requirements of s.114(1) of the Act as she has filed her personal grievance outside the 90 days time limit and the respondent does not consent to the grievance being raised after the expiry of that period. The applicant accepts that her grievance was raised outside the 90 days period, by approximately 19 days.

The preliminary matter

[3] On 20 February 2013, the Authority received an application from the applicant pursuant to s 114(3) of the Act; seeking leave to raise the personal grievance "out of time" on the grounds that exceptional circumstances exist pursuant to s.115(a) of the Act. The parties agree that the matter should be decided "on the papers" and written submissions have been received accordingly.

[4] The relevant provision of the Act is that:

- (a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she is unable to properly consider raising the grievance within the period specified in section 114(1); ...

The submissions for the applicant

[5] The applicant says that pursuant to s 115(a) of the Act she was affected or traumatised by the withdrawal of the alleged offer of employment, to such a degree, that she was unable to properly consider raising a personal grievance within the 90 days period. Notwithstanding that the respondent is adamant that an offer of employment was never made to the applicant, she says that she is a person prone to depressive behaviour and there is a family history of such illness. The applicant says that her depression was aggravated by the alleged withdrawal of an offer of employment, in that an "acute bout of depression" culminated in her attempting suicide, by taking an overdose of prescription medications and alcohol. A medical report dated 19 October 2012, from a locum psychiatrist working with the Lakes District Health Board, and a further opinion dated 30 April 2013, from another psychiatrist, have been provided.

[6] The Lakes District Health Board report records that:

Last year [2011] she suffered panic attacks and anti-depressants were prescribed. She has been working long hours and working hard to improve sales. Furthermore, she was drinking heavily; this combination of factors may have led to panic attacks.

[7] The report informs that Ms Blakeney-Williams has been on medication “for the past six months” i.e. since approximately April 2012. That is three months before the meeting with Ms O’Brien. Other matters are recorded in the report (and the document dated 30 April 2013) but given that the determinations of the Authority are public documents; I have taken a judicious approach as to what should be reproduced.

[8] In summary, it is submitted for the applicant that the alleged withdrawal of the purported offer of employment had such an effect on her that she was unable to properly consider raising a personal grievance within the 90 days required by s.114(1) of the Act.

The submissions for the respondent

[9] The primary position for the respondent is that Ms Blakeney-Williams was never offered employment and hence it follows that the arguments advanced by her cannot be sustained. The respondent accepts (as does the applicant) that the test to apply to a consideration under s.115(a) is as set out in *Telecom New Zealand Limited v Morgan*¹. In this case, Colgan J (as he then was) held that there are three elements necessary to meet the “exceptional circumstances” test under s.115(a). The first element is that the consequences of a dismissal, or other matter giving rise to the grievance, must be severe. This is illustrated by the use of the phrase: “has been so affected or traumatised”. And the use of the word “traumatised” denotes very substantial injury. The second element is that the effects of the dismissal or other matter giving rise to the grievance must have caused the employee to be unable to properly consider raising a grievance. And the final element is that the incapacity is required to exist for the whole of the 90 day period and not for only a part of it. As evidenced by the use of the phrase: “within the period specified”. Judge Colgan held that the statutory test for the exceptional circumstances under s.115(a) requires a high standard of proof to be met by the applicant.

¹ [2004] 2 ERNZ 9

[10] The submissions for the respondent refer to the Lakes District Health Board report showing that the applicant had a pre-existing condition prior to the events of 21 June 2012. I accept that on the strength of the medical report, this most probably is so. The submissions for the respondent also refer the Authority to other stressors that existed within the applicant's life and hence it cannot be said that her grievance was the only causative stressor that existed.

[11] It is also submitted that the psychiatric evidence produced to the Authority post-dates the expiry of the 90 day period and hence the applicant has not presented any evidence that is relevant to the 90 days period, when she claims to have suffered trauma to the extent that she was unable to properly consider raising the grievance.

[12] The respondent says that it is also significant that the applicant acknowledges that she continued to work at her employment at Hamilton and that her duties there required high levels of skill and accuracy associated with her clients involving the use of hot wax and laser hair removal treatments. The applicant says that she: "was finally asked to leave".

[13] The attention of the Authority is also drawn to the applicant's apparent capacity to email the General Manager of the franchisor involved, on 27 June 2012, whereby a rational summary of the discussion with Ms O'Brien is set out, along with a summary of her views on other relevant matters at that time.

[14] The submissions for the respondent also refer to the psychiatric report of 19 October 2012 whereby it informs that Ms Blakeney-Williams "has been unemployed over the last month" therefore it can be taken that she was working in some capacity until some time in September 2012.

Determination

[15] As established by *Telecom New Zealand Limited v Morgan*, there is a high standard of proof to be met by the applicant and on the weight of the evidence, I am not satisfied, on the balance of probabilities, that Ms Blakeney-Williams was so affected or traumatised by the (alleged) events of 21 June 2012, that she was unable to properly consider raising a personal grievance within the 90 days period required by s 114(1) of the Act. I am satisfied that the various stressors that existed in Ms Blakeney-Williams life were pre-existing and independent of any alleged action by the respondent.

[16] I find that Ms Blakeney-Williams has failed to satisfy the essential criteria set out above and hence leave to raise her grievance outside the 90 days is declined.

[17] I also make the observation that even if I am mistaken about that (and I think not), on the basis of the available evidence, it would be difficult for Ms Blakeney-Williams to persuade the Authority that an offer of employment was made to, and accepted by her; and that she was a person intending to work.

Costs

[18] Costs are reserved. The parties are invited to resolve this issue if they can by discussion between them. In the event that a resolution regarding costs cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions, with the applicant having a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority