



New Zealand Employment Relations Authority Decisions

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Chadwick v Serco New Zealand Limited (Auckland) [2016] NZERA 649; [2016] NZERA Auckland 346 (13 October 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 346
5638134

BETWEEN PAUL CHADWICK Applicant

A N D SERCO NEW ZEALAND LIMITED

Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person

H Wilson and J Traynor, Counsel for Respondent

Investigation Meeting: On the papers

Date of Determination: 13 October 2016

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 failed to establish the existence of *exceptional circumstances* under s.115(b) of the Employment Relations Act

2000 (the Act);

C. Accordingly, the Authority declines the applicant's application to raise his unjustified dismissal claim outside the statutory 90 day time period;

D. Costs are reserved.

[1] The applicant, Mr Paul Chadwick, failed to raise his personal grievance claim of unjustified dismissal with the respondent, Serco New Zealand Limited (Serco) within 90 days of the alleged grievance occurring, as required by s.114(1) of the Act.

[2] Serco does not consent to the raising of the grievance out of time.

[3] Mr Chadwick seeks the leave of the Authority to raise his alleged grievance outside the 90 day time period under s.115(a) of the Act on the grounds that he was:

... so affected or traumatised by the matter giving rise to the grievance that he ... was unable to properly consider raising the grievance within the period specified in s.114(1) ...

The legislation

[4] Section 114 of the Act states:

Raising personal grievance

(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 one or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[5] Section 115 of the Act 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) ...

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

(a) Was Mr Chadwick's delay in raising his grievance occasioned by exceptional circumstances? This will require the Authority to consider:

(i) Whether Mr Chadwick was so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within the statutory time period;

(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 Mr Chadwick leave pursuant to s.114(4) of the Act to raise his personal grievance outside of the 90 day time period.

Investigation

[7] The parties agreed that the Authority could investigate and determine the issues on the papers. A notice of application for leave to file his grievance outside the statutory time limit together with an affidavit in support was filed by Mr Chadwick on 19 September 2016.

[8] On 5 October 2016, Serco filed a notice of opposition to Mr Chadwick's application together with an affidavit by Ms Denise McGuigan, Serco's Interface Prison Director and Mr Chadwick's manager at the time of his dismissal.

[9] Representatives for both parties were provided with the opportunity to make submissions or to file written submissions in relation to the issues before the Authority but chose not to. The parties agreed that the matters could be dealt with by the Authority on the papers filed by them respectively.

[10] 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 by Mr Chadwick in raising his personal grievance occasioned by exceptional circumstances?

[11] This will require the Authority to consider whether Mr Chadwick was so affected or traumatised by the matter giving rise to his grievance that he was unable to properly consider raising the grievance within the statutory timeframe.

Mr Chadwick's employment by Serco Alleged unjustified dismissal claim

[12] Mr Chadwick was employed by Serco in the position of Assistant Director, Security and Operations at Mt Eden Corrections Facility (the Prison) under an individual employment agreement (employment agreement) signed by him on 14 January 2015. Mr Chadwick's employment with Serco started on 8 February 2015.

Trial period

[13] Paragraph 5 of the employment agreement states:

(a) You agree that your employment is subject to a 90 day trial period pursuant to the [Employment Relations Act 2000](#).

(b) The trial period shall start on the first day you commence with the company and will end on 90 days after commencement date of employment with the company.

(c) During the trial period the company may dismiss you by giving one week's notice (or at the company's sole discretion, payment in lieu of notice), in which case you will not be entitled to bring a personal grievance or other legal proceedings in respect of that dismissal.

[14] The employment agreement included confirmation that Mr Chadwick had been given a reasonable opportunity to seek and/or obtain independent advice on the terms and conditions prior to accepting the offer of employment.

[15] Mr Chadwick's employment was terminated for redundancy on 14 April 2015 following intervention by the Department of Corrections (the Department) into Serco's management of the Prison.

Events leading to termination of Mr Chadwick's employment

[16] In her affidavit, Ms McGuigan sets out the background to the termination of Mr Chadwick's employment. Ms McGuigan states that in July 2015, the Department issued a Step- in Notice to Serco and took control of the running of the prison. In

December 2015, the Department exercised its right to issue a Break Notice and terminate its contract with Serco to run the prison with effect from 31 March 2017.

[17] Ms McGuigan also states that following the Break Notice, Serco and the Department entered in to highly confidential and commercially sensitive negotiations on how Serco would disengage from its operations at the Prison. A disengagement agreement was subsequently entered into between Serco and the Department which meant that Serco was not required to provide and Assistant Director Security and Operations after 4 April 2016.

[18] As a result, on 14 April 2016, Mr Chadwick's employment was terminated by

Serco in reliance on the trial period contained in his employment agreement.

Mr Chadwick's personal grievance claim

[19] Mr Chadwick says that he was informed by Serco that his role was to cease from 4 April 2016 following the intervention by the Department. However, Mr Chadwick stated in his affidavit he was not too worried because he was under the impression that he would be considered favourably for the role of Assistant Director at the other New Zealand Serco site, Auckland South Corrections Facility. Mr Chadwick was unsuccessful in obtaining that role.

[20] Mr Chadwick did not take any steps to raise a personal grievance in relation to his dismissal until 21 July 2016, which was outside the 90 day period as specified in [s114](#) of the Act.

[21] Following the termination of his employment by Serco, Mr Chadwick was employed as an afternoon supervisor at Inghams Human Resources, Cambridge. This was in approximately June 2016.

Exceptional circumstances

[22] In para.18 of his affidavit, Mr Chadwick says that he previously suffered from depression and that his dismissal, was a trigger. Mr Chadwick says he was:

... not in a clear thinking headspace for several weeks and all I could

think about was how I was going to provide for my family.

[23] No medical certificates were provided to the Authority by Mr Chadwick. Mr Chadwick's evidence in my view is insufficient to establish he was so affected or traumatised by the dismissal that he was unable to properly consider raising a grievance.

[24] During the course of the 90 day period following his termination of employment by Serco, Mr Chadwick did contact his previous manager at Fonterra. This contact lead to his employment at Inghams Human Resources in about June 2016.

[25] Both Mr Chadwick and Ms McGuigan gave evidence in their affidavits that there were discussions between them about Mr Chadwick's dismissal in April and May 2016. Ms McGuigan says that during telephone conversations and text messages in April and May 2016, Mr Chadwick told her he was upset about his dismissal but did not take any steps to raise a grievance, nor did he ever say he was going to challenge his dismissal.

[26] From the evidence, it seems Mr Chadwick was upset by his dismissal and during the 90 day period following his

dismissal he discussed this with Ms McGuigan. That was as far as it went. Mr Chadwick actively sought other employment during this time.

[27] In the Employment Court judgment of *Telecom NZ Ltd v Morgan*¹, Judge Colgan considered [ss.114](#) and [115](#) of the Act. In relation to [s.115\(a\)](#), Judge Colgan stated:

The statutory test for this exceptional circumstance requires a high standard of proof to be met by an applicant. Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and result in incapacity to properly consider raising the grievance will last more than three months, most cases are unlikely to meet that test.

[28] In that case, Mr Morgan indicated to his manager the day after receiving advice of termination of his employment that he would be seeking legal advice. There were further communications between Mr Morgan with his own solicitor and further communications between Mr Morgan and his manager about the situation.

1 [\[2004\] NZEmpC 66](#); [\[2004\] 2 ERNZ 9](#)

[29] I am not satisfied on the balance of probabilities that Mr Chadwick was so affected or traumatised by his dismissal and the circumstances giving rise to it that he was unable to properly consider raising his grievance within the 90 day period beginning on 14 April 2015.

[30] It appears to me that [s.115\(a\)](#) is the only ground relied on by Mr Chadwick for leave to extend the time for bringing his personal grievance under [s.114\(4\)](#). Therefore, he has not established the existence of “*exceptional circumstances*” which is the necessary first step for the granting of such leave by the Authority.

Determination

[31] The Authority declines Mr Chadwick’s application to raise his unjustified dismissal claim outside the statutory 90 day time period.

Costs

[32] Costs are reserved. If the parties are unable to agree costs, Serco has 7 days from the date of this determination to file a memorandum as to costs and Mr Chadwick has 7 days in which to reply.

Anna Fitzgibbon

Member of the Employment Relations Authority