

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 308
3188199

BETWEEN JANE MAREE COOKSLEY
Applicant

AND DOGMAD GROOMERS
LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Joshua Pietras and Nicole Donaldson, counsel for the
Applicant
Christopher Bell, counsel for the Respondent

Investigation Meeting: 27 March 2023 at Wellington

Submissions received: At the investigation meeting

Determination: 13 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jane Cooksley was employed by Dogmad Groomers Limited (Dogmad) from early 2016 until approximately 7 May 2021. The circumstances surrounding the ending of the employment relationship are disputed. Ms Cooksley claims that she was unjustifiably dismissed, whereas Dogmad says that she abandoned her employment.

[2] Ms Cooksley seeks leave under ss 114 and 115 of the Employment Relations Act 2000 (the Act) to raise a personal grievance outside of the statutory 90-day period. This determination deals with a preliminary issue as to whether leave should be granted to Ms Cooksley to raise the personal grievance out of time based on exceptional circumstances.

[3] Ms Cooksley submits that leave should be granted because of exceptional circumstances including that she was not provided a written individual employment agreement (IEA), was otherwise unaware of the 90-day period, she suffered significant health issues, and suffered significant stress because of several other events following the end of the employment relationship.

[4] Dogmad oppose the application and have not consented to the raising of the personal grievance out of time. Dogmad submits that the absence of a written IEA did not prevent Ms Cooksley from raising a grievance and that she was aware of the 90-day period having regard to her involvement as a support person to another employee and having had the opportunity to seek legal advice.

The Authority's investigation

[5] A case management conference was held on 4 November 2022 and directions issued, including a timetable for the lodgement and service of statements of evidence.

[6] Witness statements were lodged from Ms Cooksley and Shirley Donoghue, another former employee of Dogmad, in support of Ms Cooksley's application. Susan MacWilliams, sole director of Dogmad, and Sarah Bray, contractor to Dogmad, provided statements in support of Dogmad's defence. An investigation meeting was held on 27 March 2023 in Wellington. The Authority heard from the relevant witnesses under oath or affirmation.

[7] Prior to submissions, also heard at the investigation meeting, counsel for Ms Cooksley advised that a claim that Susan MacWilliams, the sole director of Dogmad, should be joined to the proceeding as a Controlling Third Party was withdrawn. As such, her name has been excluded from the file as a proposed second respondent.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant principles relating to exceptional circumstances

[9] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the action alleged to amount to a personal grievance occurred or came to the notice of the employee. Section 114(3) provides that, where an employer does not consent to the raising of a personal grievance outside of that timeframe, the employee may apply to the Authority for leave to raise the personal grievance out of time.

[10] Section 114(4) sets out the basis for consideration of such a leave request:

- (4) On 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 1 or more of the circumstances set out in section 115); and
 - (b) considers it just to do so.

[11] Section 115 provides a non-exhaustive list of exceptional circumstances for the purposes of s 114(4)(a), including the following:

- (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); or
...
- (c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be...

[12] It is not contentious that Ms Cooksley did not have an IEA and that therefore her employment agreement did not contain the explanation concerning resolution of employment relationship problems specified, in her case, by s 65 of the Act. The absence of such provision is an exceptional circumstance.

[13] As per s 114(4)(a) of the Act, I must be satisfied that the delay was 'occasioned' by exceptional circumstances.

Was the delay occasioned by exceptional circumstances?

Trauma preventing proper consideration

[14] Ms Cooksley submits that she should be granted leave to raise her unjustified dismissal personal grievance based on exceptional circumstances. In doing so, she referred to a number of circumstances and events that she says constitute those exceptional circumstances.

[15] Ms Cooksley says she was affected and traumatised by the events surrounding her dismissal that she was unable to properly consider raising a grievance within the 90-day period. She says that, as such, exceptional circumstances for the purposes of s 155(a) of the Act have been made out. In summary, the following factors were raised by her in support of that submission:

- (a) Following the dismissal Ms Cooksley suffered severe mental health issues and was placed on a sickness benefit.
- (b) Legal proceedings, and threats of legal proceedings, relating to a property dispute meant that she was unable to give proper consideration to raising a personal grievance within the 90-day period.
- (c) Ms Cooksley was required to provide care for her elderly father.

[16] I do not consider the factors raised by Ms Cooksley to constitute exceptional circumstances for the purposes of 115(a). I find that the circumstances and events referred to by Ms Cooksley as causing trauma were not 'matters giving rise to the grievance', nor did they mean that Ms Cooksley would have been unable to properly consider raising the grievance within the relevant period.

[17] Whilst Ms Cooksley did not specifically make submissions as to the scope of exceptional circumstances that may be present outside of the scope of those specified at s 115 of the Act, I have considered whether any of the issues raised in relation to s 115 would otherwise amount to exceptional circumstances. Those issues include the property litigation considerations, mental health, and family circumstances.

[18] I am not satisfied that Ms Cooksley's delay in raising the personal grievance was occasioned by mental health issues. The evidence provided to the Authority does not establish that that was the case, albeit that I do not doubt that Ms Cooksley suffered

from mental health issues meaning that she was entitled to a sickness benefit. However, such an entitlement does not establish that Ms Cooksley was unable to raise her personal grievance. Indeed, I find that Ms Cooksley's evidence as to her dealings relating to litigation as to her property dispute indicates she was not prevented from raising a personal grievance based on health considerations.

[19] I am also not satisfied that Ms Cooksley's involvement in the property litigation amounts to an exceptional circumstance. Whilst the dispute related to one as between Ms Cooksley and Ms MacWilliams, I do not consider that is of any significant relevance. Although, as her evidence suggests, the property litigation may have been Ms Cooksley's focus, I do not consider the existence or processes involved in that dispute are exceptional in nature, nor that the delay was occasioned by those circumstances. Instead, and perhaps quite understandably, Ms Cooksley prioritised dealing with that issue over consideration of her employment related matters. That prioritisation in my view falls well short of establishing that the circumstances were exceptional.

[20] Having regard to the period time over which they occurred, and the timing of them, I am not satisfied that Ms Cooksley's delay in raising her personal grievance was occasioned by any other exceptional circumstances. I do not otherwise consider that the matters are ones that establish exceptional circumstances pursuant to s 114(4)(a).

Absence of employment relationship problem resolution explanation

[21] Ms Cooksley says she was never provided an individual employment agreement at all, and that the absence of a plain language explanation amounts to exceptional circumstances for the purposes of s 115(c) of the Act. Section 65(2)(a)(vi) provides that an IEA must include "a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised...".

[22] Ms Cooksley's evidence is that she was otherwise unaware of the 90-day period until 13 June 2022 when she received correspondence from Ms MacWilliams' lawyer stating that any personal grievance that she might raise would be well out of time. She says that once she had dealt with a separate High Court application, she then immediately turned her attention to raising a personal grievance out of time. She says

that on 11 August 2022 she received legal advice and that notification to Dogmad occurred on 25 August 2022.

[23] Dogmad accepts that exceptional circumstances exist given the absence of an IEA and plain language explanation as to the resolution of personal grievances. However, it says that the omission did not occasion the delay, and that even if it did, it would be unjust to allow the personal grievance to be brought now. Dogmad submits that the evidence suggests Ms Cooksley knew about the 90-day requirement and that the claim is brought as a method of exerting pressure on Ms MacWilliams. In terms of Ms Cooksley's supposed knowledge, Dogmad points to the following as being relevant:

- (a) Ms Cooksley's engagement of various lawyers, including an experienced employment lawyer.
- (b) Ms Cooksley's role as a support person for another employee that raised a personal grievance 3 days prior to the expiry of the 90-day period.
- (c) Ms Cooksley's conducting of her own research.

[24] In a letter dated 13 April 2022 sent by Ms Cooksley's lawyer acting in relation to her property dispute, reference was made to an "employment grievance action" and that another lawyer, and employment lawyer, would be acting for Ms Cooksley in relation to that matter. Ms Cooksley denies having engaged the employment lawyer at that time. She says that she instructed her lawyer at the time to advise of an intention to pursue an employment claim on 31 May 2022.

[25] Dogmad also refer to Ms Cooksley's involvement as a support person for Ms Donoghue, who raised a personal grievance shortly before the expiry of the 90-day period relevant to her grievance. Ms Donoghue's evidence is that she engaged an employment lawyer after hearing about Ms Cooksley's experience, and that Ms Cooksley attended a meeting with her employment lawyer as a support person. The employment lawyer used by Ms Donoghue was the same as that referred to as acting for Ms Cooksley in the letter of 13 April 2022.

[26] Ms MacWilliam's evidence is that Ms Cooksley helped another staff member who raised a personal grievance on the 89th day, and that she would therefore have been aware of the 90-day period. Ms Cooksley denies having held such knowledge at the relevant time and says that she was just supporting the other staff member rather than having been actively involved or having received any advice herself. There is no

evidence to suggest that Ms Cooksley was in a position whereby advice was provided that squarely put her on notice that any 90-day period applied to all personal grievances or to her circumstances in particular.

[27] I do not accept that Ms Cooksley's obtaining of legal advice regarding her property matters necessarily resulted in provision of advice regarding the 90-day period, regardless as to whether the dismissal may have been discussed in the context of the advice. Nor would the mere mentioning of a 90-day period, or generally as to a time limitation period, have been sufficient in my view to break the connection between the delay and the absence of the plain language explanation. I am not satisfied that Ms Cooksley received specific advice on the 90-day period, which I do accept would have 'broken the causal link' prior to 11 August 2022.

[28] Dogmad submits that Ms Cooksley's evidence as to having conducted some research and being aware of a three-year requirement logically means it is implausible that she did not read information as to the 90-day period at the same time. It also submits that Ms Cooksley's reading of any information as to the 90-day period from her own research, even if forgotten or misunderstood, is sufficient and that ignorance of the law is no excuse for not raising a grievance in time.

[29] The extent of Ms Cooksley's research as to personal grievances is not entirely clear, but she does recall a reference at some stage as to the three-year requirement for lodging a personal grievance in the Authority. It may be true that most internet searches would return results, or refer to websites, that also refer to the 90-period. However, I am not persuaded that necessarily means the delay was not occasioned by the failure to include the plain language explanation.

[30] Whilst it may be that in some cases the absence of the plain language explanation and reference means the delay is not occasioned by the absence, for example where an employee has otherwise squarely been put on notice about the requirement by the employer, that is not the case here. I am not prepared to infer that Ms Cooksley had actual knowledge of the requirement where she explicitly denies that to have been the case.

[31] The mere presence of such information in public forums, even if accepted that some reference to the 90-day period may have been read, is insufficient in my view.

The s 65 requirement makes it fundamentally clear that the 90-day period applies to the particular employee's employment.

[32] Having regard to the above, it is not necessarily the case that the absence of a plain language explanation in terms of s 65 is resolved by the reading of internet search results making mention of a 90-day period. The exceptional circumstance at s 115(c) relates to a requirement that is more significant and detailed than that. Put another way, a delay in raising a grievance may still be occasioned by the absence of the plain language explanation even where an employee has some information of a general nature suggesting the existence of a 90-day period.

[33] Once Ms Cooksley was given advice regarding the 90-day period steps were taken to raise the grievance. I find, on balance, that that would have occurred within the 90-day period had Dogmad included the plain language explanation of available services, including reference 90-day period, as required by s 65(2)(a)(vi). I am satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances, in terms of s 115(c) of the Act.

Is it just to grant the leave for the personal grievance to be raised?

[34] Ms Cooksley, in submissions as to the overall justice of the matter, submits that the 'appalling' manner of her dismissal is a factor as to the consideration of the overall justice of the matter. Additionally, Ms Cooksley's evidence records that the loss of her employment had significant long-lasting impact on her mental health, that she attended a GP within three days of losing her job and was certified as being unfit for work and was placed on a sickness benefit.

[35] Ms Cooksley submits that a long delay in raising a personal grievance will be justified where the circumstances are truly exceptional and in circumstances where there is no undue prejudice to the employer. She submits that the relevant delay was approximately one year and three months and that the delay is attributable to clear exceptional circumstances, and that there will be no prejudice to Dogmad.

[36] Ms Cooksley also submits that the "appalling" manner in which her employment was terminated is a significant factor as to overall justice. In terms of the alleged dismissal, Ms Cooksley says that she attended work on 7 May 2021 and that Ms MacWilliams dismissed her following an argument about a mobile account bill which culminated in Ms MacWilliams saying "just go, get out, fuck off". She then says

there was no further contact from Ms MacWilliams and that she received her final payslip two days later on 9 May 2021.

[37] Dogmad submits that, even if the absence of the plain language explanation caused the delay, that it would not be just to grant leave. In doing so, Dogmad refers to the decisions in *Creedy v Commissioner of Police*¹ and *Jenkinson v Board of Trustees of Bayview Primary School* as to overall justice and the impact of requiring an employer to defend the claim after a lengthy delay, and the weight to be given to exceptional circumstances diminishing with time.

[38] The relevant event giving rise to the grievance was a discussion in the workplace on or about 7 May 2021, and Dogmad were advised of the grievance on 25 August 2022. I consider the delay to be reasonably significant. However, I do not consider that delay to be seriously prejudicial to Dogmad.

[39] Dogmad provided submissions as to the events of 7 May 2021 and the problems that may be presented by evidence as to events that occurred some significant time ago. I am not persuaded by that submission. Both primary witnesses to the events of 7 May 2021, Ms Cooksley and Ms MacWilliams, provided evidence in these proceedings as to the events. Whilst it may be true that a witness's ability to recall the detail of events may diminish over time, I am not convinced that the time period involved here is out of the ordinary in any way such as might seriously prejudice Dogmad.

[40] Dogmad submits that Ms Cooksley's claim is motivated by other factors, including claims made in the Family Court. I accept that Ms Cooksley's prospects of success and potential remedies in her substantive claim may be limited by evidence produced as to what Dogmad describe as "undermining her employer", although I make no finding as to whether that occurred at this time. Such as the issues raised by Dogmad go to whether it is just to grant leave for the grievance to be raised out of time, I am not persuaded that they are of such significance as would warrant denying Ms Cooksley the opportunity to pursue her unjustified dismissal claim. Dogmad will have the opportunity to defend the claims and allowing Ms Cooksley to pursue her claim would not in my view do an injustice to Dogmad.

¹ *Creedy v Commissioner of Police* [2008] NZSC 31, at paragraph [33].

Conclusion

[41] Ms Cooksley's application for leave to raise the personal grievance after the expiration of the 90-day period is granted.

[42] In accordance with s 114(5) of the Act, the parties are directed to use mediation to seek to mutually resolve the grievance. The parties are directed to attend mediation within 20 working days.

Costs

[43] Costs are reserved pending any investigation and determination of Ms Cooksley's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority