

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mark Creedy (Applicant)
AND New Zealand Police (Respondent)
REPRESENTATIVES Alex Hope, Counsel for Applicant
Christina Inglis, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 7 July 2004
SUBMISSIONS RECEIVED From applicant, 10 February and 3 March 2005
From respondent, 24 February 2005
DATE OF DETERMINATION 27 April 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr Mark Creedy, seeks the leave of the Authority to raise personal grievances regarding what he says was his dismissal from the NZ Police on 13 December 2001 and regarding a claim that he was disadvantaged in his employment during the course of a disciplinary investigation. He says there are exceptional circumstances that were causative of the delay and that it would be just in the circumstances for the leave to be granted. These are that:

1. He misunderstood the effect of raising a personal grievance and the times when the grievance was required to be raised;
2. He was so affected or traumatised prior to the termination of his employment that he was unable to properly consider raising the grievance within the 90 day period; and
3. His employment agreement did not contain the explanation required by s.54 Employment Relations Act 2000 and s.67 of the Police Act.

Mr Creedy also claims that:

1. The respondent affirmed the late raising of the grievance by attending mediation; and
2. The personal grievance cause of action did not arise until 21 August 2003 in which case the grievance would not be time-barred.

The law

I must decide whether there are exceptional circumstances and whether the delay was occasioned by one or more of those circumstances and, should that be so, whether it is just to grant the leave sought.

In Telecom NZ Ltd v Morgan, unreported, 12 July 2004, AC 38/04 Judge Colgan stated that the consequences of the dismissal would have to be severe (para 23) and that the consequences of the dismissal or other matters giving rise to the grievance would have had to cause the employee to be unable to properly consider raising the grievance. Judge Colgan said that it was the inability to “properly consider” raising the grievance that the applicant was required to establish. He also stated that the incapacity needed to exist for the whole of the 90 day period and not only for part of it (paras 23 and 24). He went on to say at para 25:

So interpreted, 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 the resulting incapacity to properly consider raising the grievance will last for more than three months, most cases are unlikely to meet that test.

Were there exceptional circumstances?

1. Misunderstanding of the 90 day issue

This is the crux of Mr Creedy’s case. He says he misunderstood the advice given him by Mr Barrowclough. I accept that that is so and that he thought a personal grievance had been raised.

However, I do not think that a mistaken belief, any more than ignorance of the law, can constitute an exceptional circumstance. In Bruce v Rio Beverages Ltd 16/4/02, Y S Oldfield, AA105/02 the Authority found that a mistaken belief that a personal grievance could not be brought until criminal proceedings in the District Court were completed did not constitute exceptional circumstances.

2. Trauma

Mr Creedy presented evidence from a psychologist who had not examined the applicant. Her opinion was based on documents provided to her by his solicitor and she agreed that her evaluation was not a comprehensive one of Mr Creedy’s past psychological state. It is clear from the evidence of Mr Schnabel, who carried out an examination of Mr Creedy at the time that he applied to disengage from the Police, that Mr Creedy had suffered from depression dating back to 1994. As Ms Curran-Tietjens noted, this had not prevented him from pursuing personal grievances.

Mr Schnabel’s examination of Mr Creedy and his report were made for the purpose of determining whether he should be permitted to “perf”. In his 31 October 2001 report Mr Schnabel said Mr Creedy suffered from “decision making problems” but his 2004 June evidence indicated that he was of the view that Mr Creedy had been capable of making sound and proper decisions. I accept the submission that the 31 October report has to be read with Mr Schnabel’s evidence that Mr Creedy was not incapacitated from making decisions regarding his future with the Police.

Around the time of the disengagement Mr Creedy sought legal advice from a barrister, Mr Paul Barrowclough, and also from Mr Rob Towner. Although the advice sought related to the decision whether or not to disengage it is clear that Mr Creedy was capable of making a decision in that regard. He could therefore make decisions about his employment and his future. In September 2001 he saw Towner.

I am not convinced that Mr Creedy was so affected or traumatised that he could not properly consider raising the grievance.

In any event, the claim relating to ill health does not satisfy the requirement that it must have been causative of the delay. Mr Creedy's mistaken belief that the grievance had already been filed was the sole causative element in his not notifying the grievance within the 90 day period.

3. Section 54 Employment Relations Act 2000

Whether or not Part 6 of the Employment Relations Act 2000 is incorporated into the Police Act does not matter. Even if it were, it would not be sufficient to entitle Mr Creedy to a grant of the leave he seeks. It does not meet the requirement for there to be a causative link between the omission and the failure to raise the grievance. Mr Creedy said he knew of the 90 day requirement. Any delay cannot therefore have been caused by the lack of an explanation of the 90 day requirement.

Other Issues

1. Waiver issue: attendance at mediation

There was no waiver. The Statement in Reply expressly referred to the respondent's position that the claim had been notified outside the requisite time period and that the respondent did not consent to the grievance being pursued out of time: Phillips v Net Tel Communications [2002] 2 ERNZ 340. The respondent did not give either express or implied consent.

2. Cause of action

Section 114 provides that notification must be made within 90 days of the alleged incident giving rise to the grievance occurring or coming to the notice of the employee. Mr Creedy says the 90 day period runs from August 2003 when he became aware of Mr Stonyer's affidavit. What is required is "sufficient knowledge" of the circumstances giving rise to the grievance: Drayton v Foodstuffs (South Island) Ltd [1995] 2 ERNZ 523, 530. Mr Creedy was well aware of the actions which he claims gave rise to his grievances long before he had knowledge of the Stonyer affidavit. He knew about the September 2000 investigation and the way it was conducted, his isolation from his fellow employees and the alleged targeting. He also said he believed that lies had been told in the Police Tribunal and during the course of the investigation. Mr Creedy had instructed Mr Hope to file personal grievance proceedings on 23 January 2003, months before the Stonyer affidavit came to his attention.

Decision

The only claimed exceptional circumstances that was causative of his failure to file grievance proceedings within the 90 day period was his mistaken belief that a grievance had already been filed. This was not an exceptional circumstance.

The application for leave fails.

Costs

The parties should attempt to resolve the issue of costs. If they are unable to do so the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum

Dzintra King
Member of Employment Relations Authority