

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Sandra Ford

AND Metallic Sweeping (1998) Ltd

REPRESENTATIVES Robert Thompson, advocate for the applicant
Tim McGinn, counsel for the respondent

MEMBER OF AUTHORITY Philip Cheyne

INVESTIGATION MEETING Christchurch, Monday 30 October 2006

DATE OF DETERMINATION 24 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sandra Ford worked for Metallic Sweeping (1998) Limited from April 2001 until she was summarily dismissed on 11 July 2005. By a letter dated 8 November 2005, Ms Ford's representative asked Metallic Sweeping (1998) Limited to consent to the late raising by her of a personal grievance about that dismissal. Following some correspondence, the company's solicitor confirmed that it would not consent. In May 2006, Ms Ford lodged a statement of problem with the Authority requesting leave to raise her personal grievance out of time.

[2] For the most part, the relevant facts are not contested. Ms Ford was diagnosed with cancer shortly before the dismissal and underwent treatment for that cancer between the dismissal and 8 November 2005. For the company, it is said that the circumstances, even as portrayed by Ms Ford, do not amount to exceptional circumstances. The company also says that there is an element of exaggeration on the part of Ms Ford about the extent of her incapacity to properly raise the grievance within time. Finally, the company says that Ms Ford delayed providing details of her alleged grievance until shortly before the investigation meeting.

[3] To resolve the problem about leave to raise a grievance, I must explain in greater detail the circumstances of Ms Ford's illness, resolve the disputed evidence of its effect on her incapacity to raise a grievance and apply the law relating to leave.

Ms Ford's illness

[4] Ms Ford is a solo parent with responsibility for a secondary school aged daughter. She has no other family in Christchurch.

[5] In late June 2005, Ms Ford visited her nurse and her doctor. She was found to have a lump in her breast and was referred for an urgent mammogram. Ms Ford was off work for several days but returned to work on 27 June 2005 before the mammogram. She had the mammogram on 6 July 2005 and was referred for a needle biopsy that evening. In the meantime, Ms Ford had been called to attend a disciplinary meeting to be convened on 7 July

2005. The company knew that there were some current health problems for Ms Ford but did not know any of the details.

[6] At the meeting on 7 July 2005, Ms Ford was suspended. The company subsequently sent a fax on 11 July 2005 to Ms Ford's representative advising of its decision to dismiss her. The representative immediately phoned Ms Ford to tell her about the dismissal. At that time, Ms Ford was driving home after an urgent doctor's appointment. Ms Ford had just been told that the lump in her breast was malignant and that she would require immediate surgery.

[7] The representative arranged to meet Ms Ford on the roadside in order to collect her work keys and fuel card to return them to the company. In the dismissal fax, the managing director had asked the representative to contact him to arrange for the urgent return of company property. The required items were collected by the representative, returned as requested and Ms Ford was paid her final pay.

[8] On the evening of 11 July 2005, Ms Ford had her first appointment with her surgeon. An operation was scheduled for 20 July 2005. Ms Ford attended hospital that day as an in-patient, had the operation to remove the tumour and was discharged the same day. Friends assisted Ms Ford at home in her recuperation. Ms Ford had to wait about 10 days to receive pathology results that would help indicate the efficacy of the surgical treatment. Ms Ford was then at the hospital as an out-patient on 1 August, 8 August and 12 September 2005. On one of those occasions, probably one of the August dates, Ms Ford was told that samples would be sent to England for further analysis because the local pathology result indicated the possibility of a more invasive cancer.

[9] Ms Ford's evidence is that she received test results from England in September confirming the original diagnosis as to the type of cancer. However, she required further surgery to remove more tissue around the tumour site and to sample the lymph nodes because not all of the abnormal cells had been removed during the first surgery. The hospital records show that Ms Ford was admitted as an in-patient on 28 September and discharged on 30 September 2005 for that further surgery. Following the discharge, Ms Ford's sister took her to Kaikoura for about a week.

[10] There was a further wait for pathology results which Ms Ford says she received about mid-October 2005. Hospital records show that Ms Ford was seen as an out-patient on 25 October 2005. At that stage, Ms Ford was told that the pathology test was clear but that she would need 16 sessions of radiation therapy. Hospital records show that Ms Ford was seen 16 times as an out-patient between 8 November 2005 and 1 December 2005.

[11] During these events, Ms Ford's representative had attempted to contact her by phone to find out whether she wanted to pursue a personal grievance claim about the dismissal. Mr Chappell's evidence, which I accept, is that he phoned to speak to Ms Ford several times after 11 July 2005 but his calls were either unanswered or were diverted to a message. He did receive several text messages from Ms Ford, at least one of which made no sense. Mr Chappell did not receive any instruction to raise a grievance claim until he was able to speak with her on or shortly before 8 November 2005.

[12] Mr Chappell is a Union organiser and has other dealings with the company in that capacity. Clive Peter is the company's managing director. On 17 August 2005, there was a meeting between Mr Chappell and Mr Peter about negotiations for a collective agreement. Mr Peter's evidence is that, because he had heard nothing about Ms Ford's pursuing a grievance since a threat to that effect prior to the dismissal, he took the opportunity to ask Mr Chappell what was happening. He says that Mr Chappell told him that he had been in contact with Ms Ford who had indicated that she was not going to pursue a grievance. Mr Chappell's evidence is that he did not say this and that he had not been given any such instructions. I prefer the evidence of Mr Chappell.

Leave to raise a grievance

[13] Section 114(4) of the Employment Relations Act 2000 permits the Authority to grant leave for a grievance to be raised after 90 days if satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and if the Authority considers it just to do so. Section 115 then sets out four different situations which amount to exceptional circumstances. Ms Ford says that s.115(a) is applicable.

[14] Ms Ford says that she was so traumatised by the dismissal that she was unable to properly consider raising a grievance within time. She also relies on the impact of the cancer preventing her from being able to properly consider raising a grievance within time. Both Ms Ford and the company refer to *Telecom NZ v. Morgan* [2004] 2 ERNZ 9 as an analogous case. That case confirms that Parliament did not intend by enacting the Employment Relations Act 2000 to relax the established test for granting leave. It also confirms that s.115 of the Act is only illustrative of what amounts to exceptional circumstances.

[15] Ms Ford's evidence is that there were days during the first three months following her dismissal and diagnosis that she was not able to function in a normal state and did not get dressed, remaining in bed while her daughter was at school. There were friends who helped her and her daughter with basic daily living issues. Ms Ford's sister assisted her to apply for an unemployment benefit after the dismissal. She says that most of this time is a blur, that she could not make rational decisions and was not strong enough to deal with any stress other than her medical requirements. Ms Ford describes this now as a state of extreme depression. The medical evidence available from Ms Ford's surgeon describes Ms Ford as experiencing *considerable anxiety* and *considerable stress*, which the surgeon feels may well have impacted on her ability to make rational decisions about issues in her life. There is no medical evidence, much less specialist evidence, of a diagnosis of clinical depression. However, I accept Ms Ford's evidence that she did receive some counselling from a hospital social worker and the cancer society. Ms Ford also ruled out the use of anti-depressant medication because she was concerned it might affect the treatment for her cancer. Ms Ford concedes that the medical advice was to the contrary.

[16] I find that Ms Ford limited her contact with and sometimes hid from the outside world and dealt only with the necessities of living (sometimes with help) in order to conserve her emotional strength for the fight against her cancer. This state continued throughout the 90 day period for a grievance to be raised. What emerges from the evidence is a picture of someone suffering from emotional shock as a result of stressful events. I find that the stressful events causing this state were primarily the cancer and to a lesser degree, the dismissal. A comparison of Ms Ford's capacity to properly consider raising a grievance with that of the employee in *Telecom NZ v. Morgan* leads to the conclusion that Ms Ford should succeed in reliance on s.115(a). She took none of the preparatory steps in respect of a grievance dismissal that were taken by Mr Morgan. I find too that she was unable to *properly consider raising the grievance* (my emphasis) for most if not all the 90 day period.

[17] While Ms Ford has established exceptional circumstances under s.115(a), I find that she also succeeds under s.114(4)(a). Counsel submits that the test under that section must be at least as high a threshold as the test under section s.115(a). In particular, the submission is that *Telecom NZ v. Morgan* found that the incapacity appears to be required to exist for the whole 90 day period and may need to be as significant as a long term neurosis. However, I do not accept that s.114(a) should be read as if it included the words contained in s.115(a). All the s.115 circumstances are connected to the employment relationship. If s.114 was limited in the way argued for, then exceptional circumstances could not include an external supervening event such as in this case. That result would be nonsense. I find that the words in s.114 as interpreted by cases under this and the previous Act must be applied.

[18] There is no doubt that Ms Ford's diagnosis and treatment for a potentially life-threatening cancer during the three months under scrutiny amounts to an exceptional circumstance. That circumstance falls well within the words of the Court of Appeal in *Wilkins & Field Ltd v. Fortune* [1998] 2 ERNZ 70 which held that exceptional circumstances are *circumstances which are unusual, outside the common run, perhaps something more than special and less than extraordinary*.

[19] That leads on to the question of whether it is just to grant leave. I should not be taken as indicating any findings in respect of the issues for the substantive investigation, particularly as there is very little evidence from the company's perspective about the reasons for the dismissal. What is clear is that Ms Ford has a prospect of success with a grievance because its resolution will depend significantly on resolving some evidential disputes between her and Mr Peter about what happened in the lead up to the dismissal. The grievance claim merits just consideration.

[20] The company refers to *Creedy v Commissioner of Police* 23/5/06, Colgan CJ, AC 29/06 and advances the argument that the grievance was only truly raised in the present proceedings when Ms Ford explained in evidence the details of her grievance. As in *Creedy* a grievance is raised when an employer is given sufficient information to address it by responding to it on its merits. In the present case, the company was in a position to do that as soon as it received the 8 November 2005 letter. Notably, there was no request in the several letters from the company's solicitor after 8 November for details of the grievance as there had been in *Creedy*. The only request was for information about the reasons for the delay. In any event, I do not see that it advances the company's case any further even upon a finding that the grievance was not properly raised until during these proceedings.

[21] Mr Peter was expecting a grievance. It had been signalled before the dismissal that there would be a challenge if that was the decision. It is clear that there have been previous disputes and grievances between the company and Mr Chappell on behalf of union members. In those circumstances, one would expect the company to preserve evidence such as notes and other relevant material. There is no evidence that the company will be prejudiced by the granting of leave except to the extent that it will no longer be able to rely on the limitation as a defence to a grievance.

[22] I conclude that the delay in raising the grievance was occasioned by exceptional circumstances and that it is just to grant leave.

[23] Costs are reserved.

[24] As required by section 114 (5) there will be a direction to mediation.

Philip Cheyne
Member of Employment Relations Authority