IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 145
5413562

	BETWEEN	CHRISTINE ELIZABETH FRANCIS Applicant
	A N D	REAL HEALTH LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Applicant in person Paul Robertson, Counsel for Respondent
Investigation Meeting:	On the papers
Date of Determination:	14 April 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] By Statement of Problem filed on 14 March 2013, the applicant (Ms Francis) alleges she was unjustifiably dismissed for redundancy in December 2009, that she was bullied in the employment and that she had various functions removed from her during the employment.

[2] The respondent employer (Real Health) denies any wrongdoing, but also contends that Ms Francis is unable to proceed with her personal grievance claim because the matter is statute barred. As I discern the argument, this is either because she raised a personal grievance over three years ago and failed to prosecute it within that time, thereby being caught by s 114 (6) of the Employment Relations Act 2000 (the Act), or she has failed to raise a personal grievance until now and accordingly requires leave to do so before she can proceed, whereby s 114 (3) of the Act applies.

[3] On 26 April 2013 my colleague, Member Monaghan, conducted a telephone conference with the parties and indicated that she needed further and better particulars from Ms Francis before the matter could proceed further. In particular, the Member indicated that Ms Francis would need to formally apply for consent to progress her alleged personal grievance out of time and provide detailed reasons why such an application should be granted.

[4] Nothing further was heard from Ms Francis for several months after the telephone conference just referred to and accordingly by email dated 14 October 2013, the Authority's support officer prompted Ms Francis and sought clarification as to whether she was intending to proceed or not.

[5] The application from Ms Francis was finally filed on 29 October 2013 and a response from Real Health was filed and served on 21 January 2014.

[6] Member Monaghan then issued a Minute dated 28 January 2014 in which she indicated that she required further material from Ms Francis in order to justify her application and an indication from Ms Francis as to whether she was going to take up the opportunity of providing that further information or not and how long she proposed to take to attend to that requirement. The Minute made clear that in the event that Ms Francis did not take up the opportunity given to provide further and better particulars, *"her employment relationship problem will not proceed …"*.

[7] By email dated 31 January 2014, Ms Francis indicated she would provide the information sought in the Authority's Minute and this was filed on 19 February 2014.

[8] The Authority then confirmed its earlier advice that it would determine the matter on the papers and the present determination attends to that task, Member Monaghan having referred the file to me to deal with.

The purpose of this determination

[9] This determination is concerned exclusively with the question whether Ms Francis ought to be granted the opportunity to progress her employment relationship problem in the Authority in terms of the Authority's power under s.114 of the Act. For the avoidance of doubt, I emphasise that the substance of Ms Francis' claim against Real Health is not in issue in this determination; that subject area will

only come into focus if I am satisfied that Ms Francis ought to be allowed to progress her employment relationship problem.

Employment Relationship Problem

[10] The factual background is relevant to the issues currently before the Authority. Ms Francis was employed by Real Health and that employment came to an end by redundancy in December 2009. A personal grievance was either raised or at least intimated in a letter from Ms Francis to Real Health dated 1 March 2010. I note that there is an argument for the view that, rather than raising a grievance, the letter threatens to raise one in the event certain conditions are not met, and as a consequence, it may be able to be argued that that letter does not fully meet all of the terms required to raise a legitimate personal grievance.

[11] In any event, shortly after the 1 March 2010 letter was received by Real Health, there was a full and final settlement entered into by Real Health and Ms Francis dated 9 March 2010 which is described in the Statement in Reply as *"a full and final settlement of all employment issues …"* between the parties.

[12] Again, I pause to note that on the face of it, a second hurdle Ms Francis must overcome in getting her employment relationship problem heard is the fact that it appears the parties have already settled *"all employment issues"* in their settlement agreement of 9 March 2010 and that as a consequence the law relating to accord and satisfaction would apply. The effect of the accord and satisfaction rule is to preclude either party raising new matters which were covered by the terms of the original settlement agreement which, as the Authority discerns it, was *"all employment issues"* between Real Health and Ms Francis.

[13] Again, in order to deal appropriately with the application before the Authority, I do not propose to dwell on the question whether accord and satisfaction precludes Ms Francis from bringing any claim because it seems appropriate to deal with the matter on the basis the parties have chosen to argue it but for the sake of completeness I refer to the relevance of the accord and satisfaction principle.

[14] It seems that there was no contact whatever between these parties after the settlement agreement for fully three years. Then, on 14 March 2013, Ms Francis filed a Statement of Problem in the Authority initiating the present proceedings.

[15] The Statement in Reply proceeded on the footing that Ms Francis was barred from proceeding in the Authority in respect of any matter raised as part of her alleged personal grievance letter of 1 March 2010 as she was in breach of s.114(6) of the Act. That subsection says simply that no action may be commenced in the Authority to prosecute a personal grievance more than three years after the date that the personal grievance was raised. On that basis then, so the argument goes, if the personal grievance was raised on 1 March 2010 and the first steps to prosecute that grievance are made on 14 March 2013, then that latter date is more than three years after the first date and so the proceeding is statute barred.

[16] In relation to any new matters which were not raised in the original purported personal grievance letter of 1 March 2010 and which are now referred to for the first time in the Statement of Problem filed in the Authority on 14 March 2013, those matters are well outside the 90 day window in which a personal grievance must be raised and accordingly those matters are also statute barred save with the consent of the Authority.

[17] Finally, for the avoidance of doubt, Real Health confirms that, as it is entitled to do, it does not consent to the raising of any such matters out of time and so, if a personal grievance was never raised by Ms Francis in her letter of 1 March 2010, then she may proceed with her matter only with the consent of the Authority and then only if the exceptional circumstances rule applies and the Authority considers it just to grant the relief sought.

Issues

[18] The Authority will need to consider the following questions:

(a) Was a personal grievance ever raised in 2010;

(b) Should the Authority grant exceptional circumstances ;

(c) Was the matter settled in 2010;

(d) What about the three year rule?

Was a personal grievance ever raised in 2010?

[19] The view that I have formed of the 1 March 2010 letter is that it was not the raising of a personal grievance at all but was a letter setting out an employment relationship problem which Ms Francis sought to be addressed by Real Health and that what the letter contemplated was that a personal grievance might be raised in the future if certain conditions were not met.

[20] On that basis then, if there was no personal grievance ever raised in 2010, then she may only proceed with her personal grievance if the Authority is satisfied there are exceptional circumstances and that it is just to do so.

Should the Authority grant exceptional circumstances?

[21] As I have just noted, the Authority has power under the Act to consider and, if it thought fit, grant leave for an employee to progress a personal grievance which has not been raised within 90 days of the events complained of and, pursuant to the Act, the Authority may do that where it is satisfied that the delay in raising the personal grievance is occasioned by exceptional circumstances and where it considers it is just to do so. For present purposes , the exceptional circumstances that Ms Francis relies upon, is the situation where she has been *"so affected or traumatised by the matter giving rise to grievance"* that she was unable to deal with the matter within the justiciable period.

[22] There is nothing before the Authority that would suggest Ms Francis was in that position. Indeed, as counsel for Real Health correctly identified, the evidence about Ms Francis' unwellness post-dates the justiciable period. Put another way, there is no evidence to suggest that Ms Francis was unwell in the 90 days after her dismissal for redundancy and so there is nothing that would allow the Authority to conclude that she was so affected by illness that she was unable to act.

[23] The evidence that Ms Francis has suffered from a depressive and anxiety disorder does not place the diagnosis of that illness within the relevant timeframe, nor does it identify with sufficient particularity the extent to which that illness, as it presented in Ms Francis, was so severe as to prevent Ms Francis from taking steps to pursue her legal rights.

[24] It is a truism that the Parliament has established *"a high threshold"* in this matter and in the leading case of *Telecom New Zealand Ltd v. Morgan* [2004] 2 ERNZ 9, the Employment Court identified the following factors as being necessary. The first was that the consequences of the dismissal had to be severe. Then, those consequences had to be causative of the employee's inability to consider the raising of the grievance and third that causative factor had to apply for the whole of the 90 day period.

[25] Here, there is simply no evidence of any incapacity over the justiciable period, and therefore no ability to identify that illness as causative of the inability to consider raising the grievance and no evidence at all that that state of affairs was maintained over the whole of the justiciable period.

[26] While it is apparent that Ms Francis did suffer from a depressive anxiety state that post-dated the justiciable period, there is simply no evidence available, to enable the Authority to conclude that Ms Francis would have been incapable of contemplating pursuing her legal rights over any part of the justiciable period.

[27] In consequence, I am not persuaded that the consequences of the dismissal were so severe as to prevent Ms Francis from considering raising the grievance during any time in the justiciable period and I reach that conclusion because the evidence before me prevents any other conclusion.

[28] That being the conclusion that I have reached, it is unnecessary for me to consider whether it would be just to grant leave but for the sake of completeness, I conclude that it would not have been just to grant leave even if I had been satisfied that Ms Francis had met the high standard required by the law of the exceptional circumstances test.

[29] My conclusion about the justice of the case is based on a number of factors of which the most important is timeliness. That factor itself breaks down into two subsets.

[30] The first of those is simply that the passage of time since the matters complained of occurred is such as to create real prejudice to the respondent employer should the matter proceed. I am satisfied that it would be extremely difficult for Real Health to defend its position because of the passage of time. Witnesses have moved

away and are now not available to Real Health, documents have been innocently destroyed, and witnesses have genuinely forgotten what happened.

[31] Moreover, the sheer passage of time suggests a lack of urgency on the part of Ms Francis and that very want of prosecution is one of the reasons that the Parliament was so clear that personal grievances needed to be raised within a short period after the events complained of in order that they had the best chance of resolution. In the present case, not only has Ms Francis not sought to raise the matter until fully three years after her last contact with the employer, but then, having engaged with the Authority's process, she took a further six months to commence providing the information that the Authority required her to provide, in order to progress her claim.

[32] A second reason for my conclusion that it would be unjust to allow the matter to proceed is that it appears, on the basis of the evidence before me at the present, that Ms Francis' claim against Real Health is entirely without merit. As to the claim around the redundancy, the evidence is graphic that Real Health was in serious financial difficulty and if there was any unfairness in the consultation process (which itself seems doubtful), there was a settlement. On the bullying allegation, the evidence is that Ms Francis and another staff member had a personality conflict. None of the evidence before me suggests Ms Francis was a victim of bullying; just that she and another staff member did not get on.

[33] The final basis on which I would conclude that it would be unjust to allow the matter to proceed, were that conclusion necessary, is that Ms Francis entered into a settlement agreement with Real Health over four years ago now in which she bound herself to a settlement of all matters pertaining to the employment, and notwithstanding that, she now seeks to reopen those same matters. That is inherently unfair and an abuse of process.

[34] My conclusion then is that I should not grant leave for Ms Francis to progress her purported personal grievance in terms of s.114(4) of the Act.

Was the matter settled in 2010?

[35] If, as it appears on the papers before the Authority now, the parties completed a settlement of all employment issues between them on 9 March 2010, then Ms Francis is precluded from proceeding further with any matter to do with the employment relationship, because she has agreed not to.

[36] That is the effect of the accord and satisfaction principle, the essence of which is that when parties bind themselves to a full settlement of all matters, they are not then able to unpick that earlier agreement and seek to revisit aspects of it in the future.

[37] On the face of it, if, as the Authority discerns, there was a full settlement of all matters between the parties, then what Ms Francis is endeavouring to do in the present proceeding is to reopen that settlement, and that she cannot do.

What about the three year rule?

[38] Pursuant to s.114(6) of the Act, no person may commence a proceeding in the Authority more than three years after the personal grievance was raised. That is a mandatory provision and it is not capable of being reviewed or abrogated by decision of the Authority.

[39] On that basis then, if, contrary to my earlier conclusion, Ms Francis did successfully raise a personal grievance in 2010, and setting aside for a moment the question whether she is caught by the accord and satisfaction rule because of a concluded settlement, the fact that she has not commenced her prosecution of her personal grievance until more than three years after she raised her personal grievance, means that by force of statute law, her claims simply cannot proceed.

[40] If Parliament has determined that a personal grievance cannot be prosecuted unless that prosecution is commenced within three years of the raising of the personal grievance, and Ms Francis did raise a personal grievance on 1 March 2010, then the matter is out of time and there is nothing that the Authority is able to do to address that issue.

Determination

[41] I am satisfied on the basis of the arguments that I have advanced in this determination already, that Ms Francis has no basis on which she can continue her action. As I have indicated in this determination, the number of hurdles that she must overcome in order to bring her proceeding on are so great as to be insuperable.

[42] First, looked at simply as an example of the Authority's discretion under s.114(4) of the Act to grant leave to proceed with a grievance outside of the 90 days rule, I am not persuaded that Ms Francis has met the high threshold necessary to be

granted leave to bring her proceedings on. For the avoidance of doubt I have also indicated that I do not think that, given the extensive passage of time particularly, it would be just to grant leave, even if I were satisfied that Ms Francis had met the exceptional circumstances test, which I am not.

[43] Moreover, I consider that that conclusion is supported by my sense of the evidence before me to the effect that the parties entered into a concluded settlement agreement on 9 March 2010 covering all matters to do with the employment and if my sense of that is correct on the evidence, then Ms Francis is precluded from bringing any proceeding relating to the employment after that date because of the effect of the rule of accord and satisfaction.

[44] If, contrary to my conviction that a personal grievance was not actually raised in Ms Francis' letter of 1 March 2010, and there was a personal grievance raised in that letter, then it is out of time anyway because of the effect of s.114(6) of the Act which requires personal grievances to be pursued in the Authority within three years of them being raised and it is apparent on the face of the documents that the personal grievance, if raised, was raised on 1 March 2010 and the present proceedings were initiated on 14 March 2013, outside the statutory three years. Moreover, there is no ability for the Authority to vary that statutory provision unlike the ability the Authority has to grant leave where no personal grievance has been raised at all within the 90 days required.

[45] I am satisfied then that Ms Francis' present proceedings cannot be taken further and the matter is now at an end.

Costs

[46] Real Health has been completely successful in its defence of Ms Francis' claims. If it wishes to pursue costs, it should first endeavour to settle the matter with Ms Francis by agreement. If that proves impossible, it should file and serve an application in the Authority for costs to be fixed here.

[47] Once Ms Francis receives such a submission from Real Health, she has 14 days to respond by filing submissions of her own in the Authority.

James Crichton
Member of the Employment Relations Authority