

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 292
3248619

BETWEEN	JENNIFER HELDENS- ULRICH Applicant
AND	KAURI PARK NURSERIES LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Liz Jarret, the Applicant's mother Robert Thompson, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and information received:	29 February and 14 March 2024 from the Applicant 12 February 2024 from the Respondent
Determination:	17 May 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the issue that this preliminary determination resolves?

[1] Jennifer Heldens-Ulrich applies for leave from the Authority to raise her personal grievance of unjustified disadvantage outside the applicable employee notification period of 90 days.¹ The grievance concerns alleged workplace bullying and a breach by the employer, Kauri Park Nurseries Limited (the company or the employer), of Ms Heldens-Ulrich's ACC Stay at Work plan and failure to provide a safe workplace.

[2] The events are understood to have occurred from 24-26 October 2022. However, Ms Heldens-Ulrich says that she was so affected or traumatised by them that she was unable to properly consider raising her grievance with her employer until

¹ Employment Relations Act 2000, s 114(7)(b).

16 March 2023, some seven weeks after the expiration of the applicable employee notification period on or about 24 January 2023.

[3] The employer does not consent to the personal grievance being raised after the expiration of this period and further submits that it would not be just for leave to be granted because the company will be disadvantaged by the passage of time as recollections have faded and that one of its potential witnesses has since passed away.

[4] For completeness, Ms Heldens-Ulrich has raised an unjustified dismissal grievance which was raised with the employer in time. However, for the purposes of this preliminary determination, it is not necessary that I consider the unjustified dismissal grievance any further.

How did the Authority investigate?

[5] A case management conference was held on 25 January 2024 following which submissions were lodged and considered. An oral submissions hearing was to be held but I was advised by Ms Jarret, Ms Heldens-Ulrich's mother, that she wished me to proceed on the papers which I have done. As permitted by s 174E of Employment Relations Act 2000 (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 background

[6] On 3 May 2021, Ms Heldens-Ulrich commenced full-time employment (40 hours per week) for the company as a Propagator. Her employer is in the business of supplying cuttings and small plants to various customers. It has a large nursery in Waipu and a second operation in Kaiwaka. There are multiple workstations which include conveyor belts for the seeding line and fertilising line. Items (mainly weighing under five kilograms) are placed on and taken off the belt as required.

[7] On 27 June 2022, Ms Heldens-Ulrich suffered a workplace injury in which she fell while walking upstairs with a tray of seedlings and inverting her right ankle and foot as a result.

[8] Ms Heldens-Ulrich was medically examined and made an ACC claim that was approved. Timesheets from the company show that she was away from work on ACC from 30 June to 29 July 2022. She resumed her employment on 29 July until 26 October 2022. During this three-month period, Ms Heldens-Ulrich provided her employer with several ACC medical certificates that record a gradual improvement with her fitness to work from two to five hours per day.

[9] The last of these certificates (27 September 2022) state that there was to be no lifting or forceful movements, no heavy physical work, no prolonged sitting, walking or standing and that Ms Heldens-Ulrich could tolerate 4 to 5 hours' work before her foot became painful. If she could avoid standing on the same spot for long periods and do some work while seated, this would be preferable. The certificate further stated that Ms Heldens-Ulrich was worried that her employer would dismiss her.

[10] An ACC "Stay at Work – Initial Progress Report" from Ms Heldens-Ulrich's physiotherapist (14 October 2022) confirmed the availability of light duties for her which included making cuttings with hand tools, dispatch work, and other light work from bench height.

[11] On 24 October 2022, Ms Heldens-Ulrich's manager, Grant Hodges, is alleged to have said to her that she needed to "push through the pain" and that he would get a box from the top shelf for her because "we don't want our princess to fall over again." In addition, it was claimed that Ms Heldens-Ulrich was required to drive the Kubota for the day which put pressure on her right ankle. Finally, on 25 and 26 October 2022, it was alleged that she was required to be on her feet all day at the seedling line.

[12] Ms Heldens-Ulrich has not worked for her employer since 26 October 2022 because of alleged workplace bullying and a breach of her ACC stay at work plan which has meant that she has not been provided with a safe work environment as required by the Health and Safety at Work Act 2015.

[13] On 27 October 2022, Ms Heldens-Ulrich attended a scheduled appointment with an orthopaedic surgeon and was diagnosed as having Complex Regional Pain Syndrome (CRPS) with her affected foot. An ACC medical certificate (27 October 2022) noted her inability to work for the rest of the year.

[14] On 10 January 2023, Ms Heldens-Ulrich emailed an updated medical certificate to her employer. The email ended with a relieved face emoji. The attached medical certificate stated that she was fully unfit for work from 1 January to 1 February 2023.

[15] On 11 January 2023, the decision was made to terminate Ms Heldens-Ulrich's employment on the grounds of medical incapacity. Based on all the information before the employer, it considered that she was medically incapacitated from performing the role for which she was employed.

[16] On 16 March 2023, Ms Heldens-Ulrich raised a personal grievance of unjustified disadvantage and unjustified dismissal.

Relevant law

[17] Ms Heldens-Ulrich accepts that she did not raise her personal grievance of unjustified disadvantage with her employer within the employee notification period of 90 days as required by s 114 of the Act. The action alleged to amount to her personal grievance occurred on or about 24 to 26 October 2022. At the latest, she had until 24 January 2023 to raise these matters with her employer. However, she did not raise her unjustified disadvantage claim concerning workplace bullying and an alleged breach of her stay at work plan until 16 March 2023, some four-and-a-half months later.

[18] Because her employer does not consent to the unjustified disadvantage claim being raised out of time, Ms Heldens-Ulrich requires leave from the Authority for it to proceed. The Act requires me to be satisfied that her delay in raising the personal grievance was occasioned by exceptional circumstances,² and that it is just for leave to be granted.³

[19] What may constitute exceptional circumstances is not limited to those prescribed at s 115(a) to (d) of the Act. Here, Ms Heldens-Ulrich relies on the first of these statutorily recognised grounds which refers to a circumstance where the employee has been so affected or traumatised by the matter giving rise to the grievance that they

² The Act, s 114(4)(a).

³ Section 114(4)(b).

are unable to properly consider raising the grievance within the applicable employee notification period.⁴

[20] Section 115(a) suggests that a causative link is required between the grounds of the grievance and the exceptional circumstances. In *Telecom New Zealand Ltd v Morgan*,⁵ Judge Colgan ‘deconstructed’ the subsection and stated that consequences of the dismissal or other matter giving rise to the grievance must be severe;⁶ that the effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to “properly consider” raising the grievance,⁷ and that the incapacity needed to exist for the whole 90-day period and not for only part of it. With this in mind, his Honour went on to observe:⁸

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 the 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 3 months, most cases are unlikely to meet that test ...

[21] *Telecom v Morgan* was a 2004 judgment and the first to consider ss 114 and 115 of the Act, following its enactment in 2000. In *Hokotehi Moriori Trust v Prater*, a decision from 2019, the Employment Court followed the Supreme Court’s interpretation of exceptional circumstances as a circumstance which is “out of the ordinary course, or unusual, or special, or uncommon.”⁹

Discussion

[22] Ms Jarret submits that her daughter was unable to even consider a grievance due to the mental trauma which was not only brought on by the injury to her foot but also by the bullying and treatment she received at work. The ACC medical certificates and the physiotherapist’s report noted above make a compelling connection between Ms Helden-Ulrich’s CRPS and her 27 June 2022 workplace accident. However, there is a lack of medical or psychological evidence that connects her severe depression to her personal grievance of unjustified disadvantage as described above at [11]-[12].

⁴ Section 115(a).

⁵ *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9.

⁶ At [23].

⁷ At [24].

⁸ At [25].

⁹ *Creedy v Commissioner of Police* [2008] ERNZ 109 at [31]-[32].

[23] Ms Jarret refers me to an undated letter from a registered psychologist that records that she has seen Ms Heldens-Ulrich as part of her pain management programme. The purpose of that meeting was for the psychologist to provide Ms Heldens-Ulrich with strategies to better manage her anxiety, stress and pain. During the initial session, it was determined that she was experiencing panic attacks related to the accident and symptoms of trauma.

[24] However, the psychologist does not expressly state in her letter that Ms Heldens-Ulrich's depression is also attributed to her alleged workplace bullying or the employer's breach of her ACC stay at work plan. Nor is there evidence from the psychologist that substantiates the position that Ms Heldens-Ulrich's unjustified disadvantage claim was such that she was incapacitated from properly considering raising it with her employer for the entirety of the 90-day period.

[25] Before the Authority is an ACC Pain Management Services Triage Report (8 November 2022) and an ACC Pain Management Plan, Review, Update and Completion Report (13 December 2022) both of which post-date the matters giving rise to Ms Heldens-Ulrich's personal grievance (24-26 October 2022). Neither of the ACC reports make mention of the alleged bullying or breach of her stay at work plan which I would reasonably expect Ms Heldens-Ulrich to have mentioned to her key worker as a contributing or aggravating factor and obstacle to her rehabilitation from injury.

[26] However, both reports record that Ms Heldens-Ulrich was struggling with anxiety around not being able to work and the amount of pain she was in. On its face, these reports by an independent third party count against Ms Heldens-Ulrich being so affected or traumatised by matters if she was still thinking about returning to work. In addition there is the email Ms Heldens-Ulrich sent her employer on 10 January 2023 in which she sent a relieved face emoji. If she was so affected or traumatised by the matter giving rise to her personal grievance, smiling emojis do not convey to the reasonable person that something is wrong with her and the company's employment relationship.

Conclusion

[27] When I consider the support documents to Ms Heldens-Ulrich's statement of problem, there is an evidential gap between the claimed personal grievance and her severe depression. I acknowledge that Ms Heldens-Ulrich is suffering from CRPS

which is impacting on her mental, emotional and psychological health. However, for the reasons given, based on the information and evidence before the Authority, the ongoing anxiety, stress and pain is the result of her workplace accident and not the personal grievance.

[28] Ms Heldens-Ulrich has not demonstrated that she was so affected or traumatised by the alleged workplace bullying and breach of her return to work plan, that she was unable to properly consider raising her grievance within the 90-day period beginning 26 October 2022 and ending 24 January 2023.

[29] For the reasons given, and as s 115(a) of the Act was the only ground relied on by Ms Heldens-Ulrich for leave to extend time for bringing her personal grievance, she has not established that there are "exceptional circumstances" for leave to be granted. As the first of the two limbs to s 114(4) has not been satisfied, it is not necessary that I consider the second limb of whether it would be just for leave to be granted. The application for leave is unsuccessful and is dismissed.

What about costs for this preliminary determination?

[30] The question of costs is reserved.

Peter Fuiava
Member of the Employment Relations Authority