

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2025] NZERA 16
3288419

BETWEEN STACEY HOOD
Applicant

AND SUMMERSET GROUP
HOLDINGS LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Machrus Siregar, counsel for the Applicant
Leanne Walton and Tabitha Alexander, for the
Respondent

Investigation Meeting: 23 September 2024 by AVL

Submissions received: On the day

Last information received: 23 October 2024

Determination: 16 January 2025

DETERMINATION OF THE AUTHORITY

[1] This is an application lodged on 5 April 2024 by the New Zealand Nurses Union (the union) in Ms Hood's name as applicant.

[2] Ms Hood asks for leave to raise a personal grievance against her former employer, the respondent (Summerset), outside of the 90-day timeframe. Her application is based on 'exceptional circumstances' that caused the delay in raising the grievance under ss 114 and 115(b) of the Act.

[3] If successful in this application Ms Hood seeks to bring a claim that she was constructively unjustifiably dismissed based on a series of unjustified actions starting in September 2021 and culminating in her feeling she had to resign on 10 November

2022, finishing her employment on 5 January 2023. Her claims relating to nonpayment of commission payments are no longer pursued.

[4] Ms Hood resigned on 10 November 2022, but a grievance was not raised until 10 July 2023. This was eight months after Ms Hood resigned and approximately five months after the 90 days to raise a grievance under s 114 of the Employment Relations Act 2000 (the Act). Summerset does not consent to the raising of the grievances outside of the time frame to do so.¹

[5] Ms Hood relies on s115(b) as a definition of ‘exceptional circumstances’ in that she says she made reasonable arrangements to have the grievance raised on her behalf by her agent, in this case the union representative, and the agent unreasonably failed to do so. If I find this unreasonably occurred and caused the delay, I must then consider whether it is also ‘just’ to grant leave for Ms Hood to now bring her grievances out of time². It is submitted for Ms Hood that it is just to grant leave, that the Act provides the only recourse for her grievance claim, that her claim is significant to her, that the delay of five months beyond the time that the 90 day time frame passed is not a delay that would prejudice Summerset, that any costs to it in relation to the delay would be likely minimal because Summerset is ‘a very large and well-resourced employer.’

[6] Summerset opposes the application to bring the grievance out of time. It says Ms Hood was employed under an employment agreement that sets out a process for granting a personal grievance including that it must be raised within 90 days. It says that when Ms Hood resigned on 10 November 2022 she did not refer to an intention to raise a grievance and that while Ms Hood may have drafted a ‘complaint’ on 20 January 2023 this was not received by Summerset. It says that the personal grievance letter received on 10 July 2023 was too late, that Ms Hood’s own evidence shows she knew about the time frame to raise the grievance and did not make reasonable attempts to follow up with her union or provide enough information to raise a personal grievance to the agent and or draft her own complaint with sufficient detail, within time.

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

² Employment Relations Act 2000, s 114(4)(b).

[7] Summerset further says it would be unjust to grant leave because it would cause undue prejudice to Summerset because two of the people referenced in the complaint have now left the employ of Summerset.

[8] This determination deals only with the application to grant leave for Ms Hood to bring her personal grievance for constructive dismissal out of time.

[9] Under s 114(5) of the Act in the event that I grant leave I then ‘must direct the employer and employee to use mediation to seek to mutually resolve the grievance.’

The Authority’s investigation

[10] I held an investigation meeting by AVL and heard evidence from Ms Hood under affirmation. Representatives (Mr Siregar counsel for Ms Hood, and Ms Alexander, a human resources’ employee of Summerset) had the opportunity to ask Ms Hood questions after which each gave oral submissions previously lodged and served. I asked for more information to give me clarity about information attached to emails in relation to the grievance. This material finally provided, I reserved my determination.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions before me but set out my findings, conclusions and any orders made so as to dispose of this preliminary matter.

Issues

[12] The issues are:

- a. Has Ms Hood shown ‘exceptional circumstances’ in that she made reasonable arrangements to raise a grievance through an agent who unreasonably failed to do so?
- b. If so, did this cause the delay in bringing a personal grievance?
- c. If so, is it just to grant leave for Ms Hood to now bring her personal grievances?
- d. Should either party pay a contribution towards the costs of the other?

Legal framework and principles

[13] Section 114(4) allows the Authority upon application to grant leave to bring a grievance outside the 90-day timeframe if it is satisfied the delay is caused by ‘exceptional circumstances’ which may include one or more of those specified in s 115 of the Act, and then if ‘it is just to do so.’

[14] The Supreme Court³ has made it clear that leave should be extended, in terms of section 114, only if exceptional circumstances are truly established and, in addition if the overall justice of the case (which includes taking account of the position of an employer facing a late claim) requires it. It considered the definition of ‘exceptional circumstances’ preferring the meaning that they are ‘unusual’ and ‘the exception to the rule’. The Court further considered that,

...the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[15] Section 115 provides a non-exhaustive definition of specific ‘exceptional circumstances’ for the purpose of s 114(4).

[16] The exceptional circumstance that Ms Hood relies on is one that is expressly defined under s 115(b) of the Act:

For the purposes of section 114(4)(a), exceptional circumstances include-

(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time.

[17] The Employment Court has explained that while the grievance process is ‘designed to be informal and accessible’ the raising of a grievance needs to be done

³ *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

in such a way that enables the employer ‘to respond, with a view to resolving it *soon* and informally, at least in the first instance.’⁴

Has Ms Hood shown ‘exceptional circumstances’ in that she made reasonable arrangements to raise a grievance through an agent who unreasonably failed to do so?

[18] Ms Hood resigned from her employment in writing to her manager on 10 November 2022.⁵ She did not refer to any issues with her employment or the reason for leaving.

[19] Ms Hood contacted her union on 23 December 2022 and her union representative emailed Summerset on 23 December 2022 indicating simply that Ms Hood ‘may have grounds for a personal grievance and we will be in contact early in 2023 to formally raise this with the employer.’ That email was copied into the human resources ‘partner’ for Summerset. There is no dispute that this communication was received. The email had no other details as to why there may have been grounds for a personal grievance, or the type of grievance. It is not in dispute, and I am also satisfied, that the email carried nothing capable of being responded to by Summerset to any grievance raised. I have nothing before me to show Summerset responded to this email.

[20] On 30 January 2023 Ms Hood asked for and received confirmation from her union representative that he had received her ‘finalised complaint and supporting evidence’ from her. I take this ‘finalised complaint’ to be what I have before me which is a 23 page document that includes a detailed explanation of a series of interactions with her manager.

[21] On 2 February 2023 Ms Hood emailed her union representative questioning the time frame to raise her grievance. The response that day from the union representative was to say that the time frame ran from when she resigned because ‘this is when the situation became untenable’. Ms Hood’s response that day was to acknowledge this

⁴ *Chief Executive of Manukau institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].

⁵ The Statement of Problem at paragraph 2.9 also states that Ms Hood resigned on 5 January 2023. I take this to be an error as this was the final day of employment and not the date of her resignation as confirmed in evidence and her emailed resignation dated 10 November 2022.

and note that the time frame to raise would be the following week. It is reasonable to take this to be 9 February 2023.

[22] On 8 February 2023 Ms Hood emailed her union representative saying she hoped everything was on track to raise the grievance. Again, on 8 February 2023 Ms Hood emailed again expressing concern about the raising of the grievance. She gave times for the union representative to call her that day to discuss.

[23] On 13 February 2023 Ms Hood emailed her union representative noting the time had passed to raise the grievance and asking what could be done to keep the grievance 'alive'. In response the union representative said they had discussed this with 'my lead organiser' that the main grievance was for constructive dismissal, that the union would review the case to 'establish if it meets the criteria for a constructive dismissal' and come back to Ms Hood. The email also said that there were 'exceptions' to the 90 day time frame and 'the union not raising the claim is one of the reason[s] PGs can be lodged outside the 90 day period.'

[24] On 28 February 2023 Ms Hood asked her union representative for an update on the 'review' and received no response. On 13 March 2023 Ms Hood again emailed and noted that it had been two months since the union representative had informed Summerset of an intention to raise a personal grievance. When told in a further email that the union was waiting for someone from 'legal' to return from leave, Ms Hood asked when that was likely to be. On 24 March 2023 Ms Hood noted again in an email that she had not received a response.

[25] On 24 April 2023 Ms Hood received a response to say there would be a meeting with the union's legal representative, and proposed 1 May 2023 by AVL given by then Ms Hood was no longer in New Zealand. Ms Hood's evidence is that a meeting occurred on 8 March 2023 and while she says she thought after this that some progress would occur, apart from her providing some more information on 22 May 2023, nothing much happened. On 19 June 2023 Ms Hood emailed the union representative and the union's lawyer with the following:

Can you please provide an update on this matter. It has now been six months since you advised Summerset of the intention to bring a personal grievance, and I do need a resolution to this matter.

[26] On 10 July 2023 the union's then legal representative who had, with the union representative, met with Ms Hood on 8 May 2023, wrote to Sommerset with a letter raising a personal grievance for constructive dismissal. The letter did not reference the lateness of the raising of the grievance.

[27] Summerset replied to acknowledge receipt of the personal grievance letter and referred to needing to take time to read the material. It then replied on 18 July 2023 that the claims raised were out of time and did not reply to any of the substantive matters.

[28] On 10 October 2023 Mr Siregar, by then the new lawyer for the union, wrote to Summerset referring to the grievance 'raised' on 10 July 2023, noted that the matter remained unresolved, and invited Summerset to attend mediation. That letter did not refer to the grievance having been raised out of time.

[29] Summerset did not agree to attend mediation in response to Mr Siregar's request. It has maintained its position that the matter remains out of time.

[30] On 5 April 2024 this application for leave was lodged in the Authority.

[31] I find there were exceptional circumstances here that caused the delay in Ms Hood raising her grievance. The ongoing failure of her union is clear, unreasonable, and unusual. It was acknowledged to her in the union representative's above mentioned email dated 13 February 2023 when he also explains he had spoken to his 'organiser' and that there could be an exception granted for the delay.

[32] I find that Ms Hood has shown that exceptional circumstances existed here in that she made reasonable arrangements to have her grievance raised through the union representation she relied upon.

Did the exceptional circumstances cause the delay in bringing a personal grievance?

[33] Ms Hood was let down by her union representative when the time to raise her grievance came and went. She further consistently emailed for update and did not go elsewhere to get assistance with raising her grievance. Summerset submits she ought to have taken her own steps. I find Ms Hood's explanation to this plausible. She was conscious of a legal process and did not want to get it wrong herself. She had been a long term union member and had previously found the union supportive and reliable including responsiveness from the union representative who had let her down. In this context she also formed an understandable assumption from the union representative's 13 February 2023 email that being given an exemption because of the Union's failure to raise her grievance would be straight forward. I find this likely influenced Ms Hood's then focus on simply getting the grievance raised for her own need to do so. This was not a situation where the 'agent' was an independent practitioner that she was incurring fees with. It would not be a wrong assumption to make that Ms Hood was relying on the representation as part of her paid up union membership rather than paying privately outside of the union's representation for members.

[34] In this context, the time having come and gone to raise her grievance I accept that Ms Hood then continued to regularly contact the union representative for updates to get things moving which included attending the meeting with the then union's lawyer. She then asked for further updates when nothing was forthcoming in a timely way. Summerset says that Ms Hood did not take reasonable steps because she made no effort to supplement her communications with phone calls. I find this does not persuade me she did not make reasonable continued attempts to have the grievance raised.

[35] Summerset also says Ms Hood did not provide sufficient information to the union representative to raise her grievance. I do not accept this. I accept Ms Hood's evidence that in January 2023 she likely supplied to the Union representative the 23 page document that in detail includes (with some broader issues) the substance of what she was aggrieved about and what she claimed caused her to resign. I accept as likely that this document was then attached to the eventual personal grievance letter on 10 July 2024 which Summerset received, with a large amount of supporting email communications from throughout 2021 and 2022.

[36] I find that the exceptional circumstances here caused the approximately five month delay in Ms Hood raising her personal grievance on 10 July 2023.

Is it just to grant leave for Ms Hood to now bring her personal grievance?

[37] As noted above, it is submitted for Ms Hood that she has a serious grievance and one that she would not otherwise be able to address if her matter could not proceed. I accept that submission. While the substance and merits of Ms Hood's grievance remain to be tested I accept she has detailed claims about a series of interactions that had an adverse human effect on her decision to leave her employment. She was in a senior professional position in her employment. She addressed concerns about how her manager had communicated with her in an email during her notice period which included she was taking time off for stress. The manager replied at length. This, with the union representative's email to Summerset on 23 December 2022 foreshadowing a grievance, would have been some notice to a large well-resourced employer that Ms Hood had issues in her employment in relation to her manager, the focus of the grievance she wants to have heard here.

[38] I have considered whether Summerset will be prejudiced in this matter proceeding. I do not find anything before me to show this. Its stated concern that two employees mentioned in Ms Hood's grievance have left their employment is not in my view, an impediment. It is not uncommon for past employees to be witnesses even remotely if by the time of an investigation they may have relocated. I also note that much of the evidence supporting Ms Hood's grievance appears to be concentrated in emails and on a manager that I do not understand is one of those no longer in Summerset's employ.

[39] I find it just to grant leave.

Outcome and next steps

[40] I grant leave to Ms Hood under s114(4) and 115 of the Act to continue her grievance for constructive dismissal against Summerset Group Holdings Limited.

[41] The parties are now directed to mediation under s 114(5) of the Act.

Costs

[42] To the extent that costs may be sought and in the event that mediation does not resolve matters and Ms Hood seeks to continue this matter in the Authority, I reserve costs until after any substantive matter is heard.⁶

Antoinette Baker
Member of the Employment Relations Authority

⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1