

[2] This determination deals with the question of whether Ms Hutchison's delay in raising a personal grievance for unjustified dismissal within 90 days of her dismissal on 13 December 2011 was *occasioned by exceptional circumstances*. If I accept that the delay was occasioned by exceptional circumstances I also need to decide whether it is just to give Ms Hutchison leave to raise the personal grievance out of time.

Background facts

[3] Ms Hutchison was dismissed by her employer the Nelson City Council on 13 December 2011. She was advised of the dismissal by letter dated 13 December 2011. Therefore, the 90-day period which she had to raise a personal grievance for unjustified dismissal ran out on 13 March 2012.

[4] On 1 March 2012, Mr Zindel, Ms Hutchison's solicitor, wrote to NCC on Ms Hutchison's behalf. The letter opened with:

Ms Hutchison previously engaged Anjela Sharma on this employment personal grievance, notification of which is formally given to you although there is an extensive history already.

[5] Mr Zindel then went on to explain what he called the *nature of the grievance* and set out Ms Hutchison's view of her employment history with NCC. His letter ended:

After the second mediation, the disciplinary process gathered momentum and, very soon after the admissions were made at what was a second disciplinary meeting, Ms Hutchison was summarily dismissed. There is a letter of 13 December 2011 to this effect.

... Accordingly, we are writing to you direct to provide the necessary formal notification of the personal grievance for unjustified dismissal. We include in this matter the earlier actions in terms of an unjustified disadvantage grievance in relation to the bullying and other conduct that had occurred, when Ms Hutchison had done nothing out of order and otherwise had provided good and faithful service.

[6] On 5 March 2012, Ms Maree Kirk, counsel acting for the NCC, responded to Mr Zindel via email. She noted that the NCC did not accept his letter of 1 March 2012 amounted to formal notification of two personal grievance claims. In relation to the claim of unjustified dismissal she wrote:

The statement that "Ms Hutchison was summarily dismissed" was a fact known to NCC. That statement does not provide any detail, let alone "sufficient detail", for NCC to address.

This is not accepted as a properly raised personal grievance complying with section 114(2) Employment Relations Act 2000 as interpreted and applied by the Employment Court in Creedy v Commissioner of Police [2006] 1 ERNZ 517 (EC) at paragraph 36.

[7] In relation to the unjustified disadvantage grievance referred to in Mr Zindel's letter, Ms Kirk wrote:

The reference here is "the bullying and other conduct that had occurred" and that presumably is a cross reference to the preceding paragraphs where a version of the background is presented. All of the alleged matters going to an unjustified disadvantage claim are not only insufficient in detail but also outside the 90 day time limit under section 114(1) Employment Relations Act 2000.

All of the allegations pertain to events prior to Robyn's suspension on or about 20 October. The 90 days therefore expired well before 18 January 2012. To purport to raise a personal grievance on 1 March 2012 is outside the statutory time limit and NCC do not consent to a personal grievance being raised out of time.

[8] Ms Kirk clearly signalled that there was a 90-day limit for raising a personal grievance with the employer. Ms Hutchison does not wish to pursue the unjustified disadvantage claim.

[9] As I made clear in my earlier determination neither Mr Zindel nor Ms Hutchison responded to the NCC and properly raised a personal grievance within 90 days of the dismissal.

[10] NCC has not consented to the personal grievance being raised outside the 90-day period. Once I received Ms Hutchison's application for leave to raise the grievance outside of 90 days I gave NCC an opportunity to respond. Both parties have made written submissions and agreed that I can determine the matter on the papers.

[11] Ms Hutchison's submissions appear to be on two different bases. First, she submits that she made reasonable arrangements to have her personal grievance raised on her behalf by Mr Zindel and that he unreasonably failed to ensure the grievance was raised within the required time. Secondly, in arguing that it would be just for the Authority to grant leave to raise the grievance out of time Ms Hutchison submits that she:

... was suffering from trauma, anxiety and sleep deprivation relating to her employment/financial circumstances and events relating to

[X's] death for much of the 90 day period following her dismissal and continued to present to her medical practitioner for the treatment of ongoing symptoms. While this did not ultimately prevent her from taking steps to raise the personal grievance, it did affect, for a significant period of time, her ability to properly consider her position.

[12] Ms Hutchison also argues that she has taken active steps to prevent any further undue delay in raising her personal grievance.

Issues

[13] The issues the Authority needs to resolve are:

- (a) Whether Ms Hutchison made reasonable arrangements to have the grievance raised on her behalf by Mr Zindel, and whether Mr Zindel unreasonably failed to ensure that the grievance was raised within the required time;
- (b) Whether Ms Hutchison was so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the required time;
- (c) If either of those grounds is met is it just to allow Ms Hutchison to raise her personal grievance outside of the 90 day period?

[14] Section 114 of the Act sets out the requirements for raising a personal grievance and for an employee to apply to the Authority for leave to raise the personal grievance outside of the 90-day period:

- (1) *Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
- (2) *For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.*
- (3) *Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day*

period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) *On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—*

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and

(b) considers it just to do so.

[15] The relevant part of s.115 of the Act provides:

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

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or

(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.

Did Ms Hutchison make reasonable arrangements to have Mr Zindel raise her grievance?

[16] Ms Hutchison submits that the following facts show that she made reasonable arrangements to have Mr Zindel raise her grievance within 90 days but that he unreasonably failed to do so:

- On 23 February 2012 Ms Hutchison engaged Mr Zindel and told him she intended to raise a personal grievance. She advised Mr Zindel that the 90-day period expired on 13 March 2012¹. She also instructed Mr Zindel to apply for legal aid;
- The NCC sent its letter of 5 March 2012 notifying that it did not accept that the letter of 1 March sent by Mr Zindel constituted sufficient raising of a personal grievance. Mr Zindel forwarded a copy of the letter to Ms Hutchison;

¹ Page 5 of Ms Hutchison's submissions

- She responded to Mr Zindel on 5 March 2012 asking him *what now?...*
Awaiting your advice;

- On 12 March 2012 Ms Hutchison emailed to Mr Zindel with the subject heading *Personal Grievance Action R A Hutchison NCC*. She sent the message with high priority. She wrote:

I am eagerly awaiting the next steps in this matter. If it is necessary for us to meet, I can be available either today or tomorrow.

- Mr Zindel replied on the same day:

I'm waiting to hear back from legal aid about funding, so as not to run up too many costs in the meantime if legal aid refused.

- On 30 March 2012 legal aid was refused. Legal Aid Services requested more information about Ms Hutchison's financial situation.
- On 4 April Ms Hutchison emailed Mr Zindel that she was awaiting his:

... advice with respect to whether or not to put any further time and effort into the application for Legal Aid. ...please can you advise the options that are still available to me and, indeed, whether I am still within the time deadline for pursuing personal grievance action.

- On 4 April 2012 Mr Zindel advised Ms Hutchison to *give it a go as it gives you general protection against costs orders if you lose.*
- On 5 April 2012 Ms Hutchison replied that she would *find a way to self-represent*. On 11 April 2012 Ms Hutchison received Mr Zindel's account.

[17] Ms Hutchison says the chain of communications with Mr Zindel proves that she took reasonable steps to instruct him to raise her personal grievance within time.

[18] It is clear that in late February 2012 Ms Hutchison instructed Mr Zindel that she intended to raise a personal grievance for unjustified dismissal. She and Mr Zindel intended the letter of 1 March 2012 to do that. However, the matter is less clear once the NCC responded on 5 March 2012 that it did not consider that a personal grievance for unjustified dismissal had been adequately raised.

[19] In *Melville v Air New Zealand Ltd*² the Employment Court found that to satisfy the criteria in s.115(b) the employee must establish that:

- she made reasonable arrangements to have the grievance raised on her behalf; and
- the agent unreasonably failed to ensure that the grievance was raised within the required timeframe.

[20] On the face of it Mr Zindel, as Ms Hutchison's agent, failed to respond to Ms Hutchison's request for advice sent on 5 March 2012 and to her e-mail that she was awaiting the next steps in the matter.

[21] The respondent says that Ms Hutchison did not instruct Mr Zindel to raise the personal grievance even though she knew by 5 March 2012 that the respondent did not accept that the grievance had been adequately raised.

[22] The respondent also submits that there were no exceptional circumstances, in the sense that the circumstances were unusual or an exception to the rule³.

[23] The NCC's letter of 5 March 2012 said it considered the problem with the letter of 1 March 2012 was a lack of sufficient detail to understand Ms Hutchison's allegation of unjustified dismissal. However, the documents supplied by Ms Hutchison do not show that she supplied Mr Zindel with any further details or information about the reasons she considered that she had been unjustifiably dismissed.

[24] Once Ms Hutchison received a copy of the 5 March 2012 letter from the NCC she asked Mr Zindel for advice. However, she did not specifically instruct Mr Zindel to raise the grievance within the 90-day limit. In effect, she omitted to act despite being aware of the 13 March deadline.

[25] Ms Hutchison's email to Mr Zindel on 4 April 2012 showed that she was aware that there was a time-limit for raising a personal grievance and that she was also aware that she may have already been outside of that limit.

² [2010] NZEmpC 87

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

[26] Applying the tests outlined in *Melville* and the way they were interpreted I consider that Ms Hutchison did not make reasonable arrangements to have her personal grievance raised on her behalf by Mr Zindel.

Did Mr Zindel unreasonably fail to raise the personal grievance within 90 days?

[27] In case I am incorrect in concluding Ms Hutchison did not make reasonable arrangements to have the grievance raised in time I now consider whether Mr Zindel unreasonably failed to raise her grievance within 90 days.

[28] Mr Zindel was acting on Ms Hutchison's instructions and appears to have acted for her until 5 April 2012; about three weeks after the 90 day period had expired.

[29] Because the documents and Ms Hutchison's submissions do not disclose any instruction to Mr Zindel after 5 March 2012 to raise the personal grievance adequately before 12 March 2012 I am unable to conclude that Mr Zindel failed to do so unreasonably. He did fail to do so but that was not unreasonable of him in the circumstances since he had no specific instructions from Ms Hutchison to do so after he had sent the 1 March 2012 letter. Both Mr Zindel and Ms Hutchison appeared to me more concerned with Ms Hutchison's eligibility for legal aid. Ms Hutchison did not respond to Mr Zindel's e-mail of 12 March directing him to properly raise the personal grievance despite the legal aid situation not being resolved.

[30] Therefore, I find that Ms Hutchison's failure to ensure her personal grievance was raised within 90 days was not occasioned by the exceptional circumstance of her agent unreasonably failing to raise the grievance despite her reasonable arrangements to have the grievance raised.

Was Ms Hutchison so affected or traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within 90 days?

[31] Ms Hutchison says that she was *suffering from trauma, anxiety and sleep deprivation* for much of the 90-day period. However, she concedes that those circumstances did not ultimately prevent her from taking steps to raise her grievance within that period. Ms Hutchison clearly was able to take some steps within the 90-day period after her dismissal to raise the grievance because she started that

process when she instructed Mr Zindel in late February 2012. Therefore, Ms Hutchison's circumstances do not fall within s.115(a) of the Act.

Determination

[32] Ms Hutchison's delay in raising the personal grievance for unjustified dismissal was not occasioned by exceptional circumstances of the kind set out in s.115. For that reason I do not now have to consider whether it is just to grant Ms Hutchison leave to raise her personal grievance outside of the 90-day period. Ms Hutchison's application for leave fails.

Costs

[33] Costs are reserved. Generally a losing party is required to make a reasonable contribution to the other party's costs. The parties are encouraged to agree on costs. If that is not possible NCC may have until 25 January 2013 to file a memorandum on costs. Ms Hutchison will then have a further 14 days to respond.

Christine Hickey
Member of the Employment Relations Authority