

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 280
3022864

BETWEEN WILLIAM LANG
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Marcus Khal, for the Applicant
 Kevin Thompson, for the Respondent

Investigation Meeting: Determined on the papers

Additional documents
received: 16 July 2018, from the Applicant
 03 August 2018, from the Respondent

Determination: 03 September 2018

DETERMINATION OF THE AUTHORITY

- A. The Applicant's personal grievances were not raised within the statutory 90 day time period.**
- B. The applicant has failed to establish the existence of exceptional circumstances under s 115(b) of the Employment Relations Act 2000. The Authority therefore declines the Applicant's application to raise his personal grievances outside the statutory 90 day time period.**
- C. The Applicant's claim for breach of the individual employment agreement was raised outside of the statutory 6 year time period. The Applicant is therefore statute barred from pursuing this claim.**
- D. Costs are reserved.**

Employment Relationship Problem

[1] William Lang commenced employment with Air New Zealand Limited (Air NZ) in or about 1989 as a pilot. By correspondence dated 23 June 2010 Mr Lang resigned.

[2] Mr Lang alleges that during his employment with Air NZ one or more of his conditions of employment were affected to his disadvantage. He also claims he was constructively dismissed, Air NZ breached its duty of good faith and Air NZ breached the express or implied terms of his individual employment agreement (IEA).

[3] Air NZ denies Mr Lang's allegations. In addition, it argues that Mr Lang did not raise a personal grievance within the time limit for doing so as permitted by Section 114(1) and (6) of the Employment Relations Act 2000 (the Act). It does not consent to any extension of time for doing so.

The issues

[4] With the consent of the parties the Authority has agreed to investigate and determine the following preliminary issues on the papers:

- a) When did Mr Lang raise a personal grievance with Air New Zealand?
- b) If the raising of Mr Lang's personal grievance was outside the timeframe permitted by s 114(1) of the Act, should leave be granted to Mr Lang to raise a personal grievance out of time?
- c) Was Mr Lang's claim commenced in the Authority more than 3 years after the date on which his personal grievance was raised?

Investigation

[5] A notice of application for leave to file a personal grievance outside the statutory time limit, together with an affidavit in support, was filed by Mr Lang on 1 June 2018. Affidavits from Air NZ were filed on 28 June 2018 from Gregory Liddy, a Senior Fleet Manager and Captain on Air NZ's A320 Aircraft fleet, Ian Mackie, a

former Fleet Manager on Air NZ's 767 fleet and Captain on Air NZ's 777 aircraft, and Ben Johnston, Air NZ's Chief Medical Officer.

[6] Representatives for both parties were provided with the opportunity to file written submissions in relation to the issues before the Authority and did so.

[7] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

Background against which issues are to be determined

[8] Mr Lang commenced employment with Air NZ in or about 1989 as a pilot on Air NZ's domestic fleet of B737 aircraft operating out of Christchurch.

Events between 1990 and 1998

[9] In or about 1990 Mr Lang started to experience difficulties at work. He said he was forced to accept a variation to his employment agreement in fear that to do otherwise would result in his dismissal. This led to him being labelled a "scab" by other pilots who were members of the NZ Airline Pilots Association and who had refused to accept the variations.

[10] In late 1990 Mr Lang relocated to Auckland. By this time he was operating Air NZ's international fleet of B767 aircraft. He said despite moving the difficulties he was experiencing with his colleagues continued.

[11] In or about 1992 Mr Lang separated from his wife. He said he suffered a nervous breakdown. Thereafter, at various periods of time from the late 1990's and through the 2000s, Mr Lang was unable to work for various reasons. For some of this time he did not hold a medical certificate. A medical certificate issued by the Civil Aviation Authority of New Zealand (CAA) is a necessary prerequisite to a pilot's ability to exercise the privileges of his or her pilot's licence.

[12] In 1998 Mr Lang was involved in an altercation with a colleague. Following this he accepted an overseas secondment to Scotland where he remained for a period of approximately 18 months. He returned to New Zealand in December 1999.

Events from 2005

[13] In January 2005 Mr Lang suffered further depression and anxiety. I understand from documentation I have viewed that the cause of Mr Lang's condition was related in large part to his consumption of alcohol and his personal situation. Eventually Mr Lang's condition led to a CAA medical practitioner requiring him to stop flying for a period of 6 months. This was later extended to 2 years.

[14] During this period, Mr Lang was party to various agreements around his control and abstinence from alcohol. One of these agreements was dated 26 June 2008. This set out a summary of the main facets of the rehabilitation program that Mr Lang had agreed. These conditions included total abstinence from alcohol, regular follow-up visits with various doctors and external specialists, blood tests and other no-notice tests to confirm sobriety, active participation in appropriate support groups, satisfactory reports from Mr Lang's case manager or any of the Air NZ medical team and continued progress to the satisfaction of the Company.

[15] Fulfilment of these conditions was required to enable Mr Lang to continue to receive salary continuance payments whilst not working. These payments were made to Mr Lang pursuant to an insurance scheme, administered by independent trustees, which provided income protection to pilots who lost their licence and therefore their ability to work.

[16] On 5 February 2010 a further agreement was entered into with Mr Lang. Pursuant to this agreement Mr Lang agreed to abide by various conditions in consideration of the CAA issuing him with a Class 2, private pilot, medical certificate and his loss of licence payments continuing. These conditions included, inter alia, his ongoing maintenance of abstinence from alcohol, provision of test results, written reports from sponsors and an identified addiction specialist. In addition, he had to contact his Fleet Manager or HR Manager every month to provide an update as to his general well being and progress regarding his adherence to the agreed conditions.

The incident in May 2010 and the events that followed

[17] On 3 May 2010 Mr Lang was involved in an incident at Auckland International Airport upon his return on an international flight. The incident was brought to Air NZ's attention by both MAF and Auckland Airport police.

[18] The concerns raised with Air NZ related to allegations that Mr Lang had engaged in unacceptable and aggressive behaviour. This included an allegation that he had sworn at a MAF officer, he was intoxicated, and had improperly used his aviation security identification card, being a formal document issued by Aviation Security.

[19] By letter dated 15 June 2010 Ian Mackie, Mr Lang's fleet manager, wrote to Mr Lang advising of Air NZ's concerns and attaching the information received in relation to the incident on 3 May 2010. Mr Lang was asked to attend a meeting to discuss the allegations. It was made clear that Air NZ considered the matter serious and, depending on the outcome of the investigation, disciplinary action may be taken up to and including the termination of Mr Lang's employment.

[20] On 23 June 2010 Mr Lang emailed Mr Mackie declining Air NZ's request to meet to discuss the incident and resigning from his employment. This email advised (verbatim):

After serious consideration I wish to decline your request for me to attend the meeting this friday. This incident has highlighted the amount of frustration and consequent anger that has built up recently and as a result I have decided finally to move out of New Zealand for good.

I intend going to a warmer, calmer and less confrontational environment and reengage myself in the music industry for a living.

Consequently this email constitutes my resignation from Air New Zealand Ltd and ask you to accept it forthwith.

I acknowledge the fact that several parties within the company have supported me in my endeavour to regain flying status and I wish to thank them for that .. I was confident upon signing the Insurers document that I could adhere to the conditions outlined however as you are all aware I was unable too for a variety of reasons.

I request that consideration is given to the small outstanding amount owing for my Loss of Licence, this would assist me in my relocation and rebuilding my life again.

My company ID has just expired and unfortunately my 767 manuals are hidden deep in my storage in Taupo. I will endeavor to return them asap.

Please pass on my best wishes to all the guys on the 767 fleet and also to anyone who knew me in Flt Ops .

I wish you and all at Air New Zealand the very best for the future , unfortunately as I have indicated I will not be part of it.

[21] Mr Lang's last day of employment with Air NZ was 23 June 2010.

Events following Mr Lang's employment ending

[22] On 2 July 2010 Mr Mackie wrote to Mr Lang. He advised that as a result of Mr Lang's decision not to meet with him to discuss matters, and Mr Lang's breaches of the agreed conditions for his loss of licence insurance, a decision had been made by the trustees of the insurance scheme that there would be no further payments to Mr Lang under the loss of licence scheme.

[23] On 26 July 2010 Mr Lang emailed various managers of Air NZ including Mr Mackie:

This letter is an unacceptable reply. I would ask that you consult with the Air NZ medical staff to obtain accurate criteria regarding my Loss of Licence claim.

Failure to overturn the Trustees conclusion will result in legal challenge. I await your reply within seven days.

Regrettably this will involve serious scrutiny of both the Air NZ and NZ CAA medical units.

[24] On 14 October 2010 Mr Lang emailed Air NZ.

With regard to your letter dated 2/7/10 my lawyers have requested the Air NZ legal contacts to discuss this matter in full.

[25] On 29 December 2011 Mr Lang emailed Air NZ again advising (verbatim):

On the advice of my lawyers I require the following.

All files pertaining to.

Initial interview

All training records. Line / Simulator

Medical files Including Counsellor Reports (in particular David Challenor/Garrett Oconnor/Hazeldon etc)

Union contract's during my career

Documents related to my resignation

It is my intention to examine in detail my career path and associated Air NZ Ltd contractual / medical misgivings leading to my resignation June 2010.

I require this information to be forwarded asap to ...

[26] Mr Mackie responded on 1 January 2012:

Your request for information is very vague and would be very difficult for me to comply with. That is not only because of the breadth of the information that you request but also because I am not sure what if any information is kept by the company (given that you resigned quite a long time ago now) and whether that information is readily available. Neither am I certain whether the company is required to provide this or any information to you, but I will take advice on the issue once our legal teams return from their summer break.

It is not entirely clear why you are requesting this information – your email suggests that you are (considering) embarking on a legal process concerning the circumstances of your resignation. You will already have much if not all of the information being requested, along with a clear recollection of the circumstances leading to your choice to resign. In any event, my understanding is that there could be no challenge or issue now, in relation to your employment with Air NZ or your resignation.

[27] Air NZ did not hear from Mr Lang again until 13 October 2014. On this date Mr Lang emailed the Administration Assistant, for Air NZ's Fleet Management office, asking for the email address for both the current 767 Fleet Captain and Air NZ's Legal contact "with regard to my forced resignation from ANZ in 2010".

[28] Having not received a response, Mr Lang wrote to the Administration Assistant again on 29 July 2016 (verbatim):

Thank you for your non replies to my previous emails as below.

Please be advised and convey to all concerned that, it is not IF I arrive with my legal team, it is only WHEN, to put my forced resignation scenario in front of a judge and the legal system and expose the failings of my contract signed in good faith at the beginning of my employment with ANZ.

I have a complete dossier of emails / letters of support etc from professionals to assist to my case so please take this seriously.

[29] Then on 16 July 2017 he wrote again advising (verbatim):

I will be returning to NZ soon and as I have alluded to before, I intend to conduct an intensive investigation into my career, or lack of it for that matter with ANZ that began in 1989.

Starting with the lies fed to me at the interview regarding my career path, moving on to the contract signing against the union that ultimately cost me my marriage & family .

Several union pilots also interfered with my personal life and caused me a lot of angst as a result..

As a result my lawyer will consult with police regarding this slander / defamation matter..

In addition the stagnant promotion due to the Job's for the boys / Freemasons syndrome will be examined in depth..

I will leave no stone unturned.. If it takes me the next 10 years this will be a relentless investigation against ANZ who have no regard for people such as myself who studied hard at great expense and put my family through many international moves only to have my career stopped by greedy management.

To conclude, ANZ's ridiculous 330 minute Etops operation in the south pacific we not be excluded from this investigation..

Regrettably National & International press will be involved.

[30] On 13 November 2017 Mr Lang wrote to Air NZ through his legal representative. The opening paragraph advised (verbatim):

Mr Lang claims that in the last two days, he has now come to notice that actions of his previous Employer (ANZ) amounts to a Personal Grievance.

Mr Lang is therefore, raising a personal grievance (PG) in accordance with section 114 subsection (1) and (2) of Employment Relations Act 2000.

[31] The letter went on to particularise Mr Lang's personal grievance.

Issue One: When did Mr Lang raise a personal grievance with Air New Zealand?

[32] Section 114 (1) of the Act states:

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.

[33] Section 114(2) of the Act provides that a personal 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.

[34] In *Creedy v Commissioner of Police* Chief Judge Colgan held:¹

[36] ... it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC).

or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ...

[37] ... an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[35] The Chief Judge noted that the personal grievance procedures in the Act are:²

...aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...

[36] In *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* the Court made the following comments about the level of detail required to raise a grievance:³

[58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every “i” to be dotted and “t” to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as “I have a personal grievance” or “I have been unjustifiably disadvantaged and want compensation and an apology” will usually be insufficient...

[59] In cases where the employer may be less aware, or even unaware, of a grievance, the onus on an employee will be greater to inform the employer of the complaint. So, for example, where an employee alleges sexual harassment by a customer or a work colleague, an employer may be unaware of that problem or at least not well informed about it. Similarly, where a resignation is said to amount to an unjustified constructive dismissal, an employer may likewise be unaware of the background and the information raising the grievance may have necessarily to be more detailed.

² At para [39].

³ [2008] ERNZ 139 (EmpC).

Analysis

[37] Mr Lang's statement of problem pleads a raft of allegations that he claims resulted in one or more of his conditions of employment being unjustifiably disadvantaged. These include allegations that he was discriminated against on the grounds of his age⁴, race⁵ and non-membership of a union⁶. He also claims that he was bullied⁷, Air NZ failed to carry out its promise to move him up the seniority list for pilots⁸, failed to provide him with a safe work place⁹ and failed to provide him with support or to put in place adequate systems and procedures to assist him to retain his position¹⁰. Mr Lang also claims a breach of good faith by Air NZ.¹¹

[38] The correspondence Mr Lang sent to Air NZ prior to 13 November 2017 did not specify the nature of the grievances that Mr Lang was pursuing. Nor did it provide any information to put Air NZ on notice that Mr Lang was pursuing any of the grievances outlined above. Air NZ was not given information to enable it to address the grievance and to "respond to it on its merits with a view to resolving it soon and informally".¹²

[39] I am satisfied Mr Lang did not raise a personal grievance until 13 November 2017. This was outside of the date on which the action alleged to amount to a personal grievance occurred. I am also satisfied it was outside of the date on which the action alleged to amount to a personal grievance came to the notice of Mr Lang.

Issue Two: Should leave be granted to Mr Lang to raise a personal grievance out of time?

[40] Air NZ does not consent to Mr Lang's personal grievance being raised out of time. At all material times it has maintained this position.

[41] Section 114(3) and (4) of the Act provides:

⁴ Statement of Problem, Clause 2.

⁵ Statement of Problem, Clause 55(b)(i).

⁶ Statement of Problem, Clause 55(b)(i).

⁷ Statement of Problem, Clause 2.

⁸ Statement of Problem, Clause 7.

⁹ Statement of Problem, Clause 9 and 10.

¹⁰ Statement of Problem, Clause 11.

¹¹ Statement of Problem, Clause 6 and 55(a)(iii).

¹² *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at[35]

- (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.

[42] For the purposes of section 114(4)(a), exceptional circumstances are defined in Section 115 of the Act as including:

- 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; or
- c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or
- d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[43] In *Telecom New Zealand v Morgan* the Employment Court found that the following elements must be necessary to meet the “exceptional circumstances” test in s 115(a)¹³.

- a) Firstly, the consequences of the dismissal or other matter giving rise to a grievance must be severe. That is illustrated by the use of the phrase “...

¹³ [2004] 2 ERNZ 9 (EmpC) at [23]-[24].

has been so affected or traumatised... ”. Although being “affected” may encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of “trauma” connotes very substantial injury. In a physical sense, this means shock following a physical wound or injury characterised by a drop in body temperature and mental confusion. In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.

- b) Next, it is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s 115(a).
- c) Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not for only a part of it by use of the phrase “ ... within the period specified ... ”.

[44] The Court noted that this interpretation of the statutory test was a difficult test to satisfy and that the high standard of proof meant the majority of cases will fall short.¹⁴

Analysis

Disadvantage and breach of good faith claims

[45] Mr Lang’s evidence was that he was affected “emotionally and personally” when Air NZ changed rules “which were not agreed resulting in unexpected change”. I understand Mr Lang to be referring to the events that took place in or about 1990. He said that he also suffered anxiety and depression in June 1992, when he separated from his wife, in May 2002 and in or about 2005 when he was asked to stand down from flying.

[46] Other than these occasions, there is no evidence before me that Mr Lang suffered any incapacity at any other times throughout his employment such that he was unable to properly consider raising a personal grievance. There is also no evidence satisfying me that the effect of the ending of his employment was so serious

¹⁴ At [25].

it prevented proper consideration of the raising of a grievance within the whole of the 90 day statutory timeframe and beyond that three month period.

[47] I find that Mr Lang was not so affected or traumatised by the matters giving rise to his personal grievance for unjustified disadvantage that he was unable to properly consider raising the grievance within the period specified in section 114(1).

[48] I decline to grant Mr Lang leave to raise a personal grievance out of time in relation to his claims for unjustified disadvantage.

Constructive dismissal claim

[49] I am satisfied from the evidence before me that Mr Lang was affected by the ending of his employment. However, I am not satisfied that this led to Mr Lang being unable to properly consider raising his grievance for the whole of the 90 day period that followed.

[50] The email correspondence I have viewed shows that within the 90 days following his resignation Mr Lang had the ability to consider and then to write to Air NZ regarding the Insurer's decision to stop paying his loss of licence insurance payments. In this email he advised "failure to overturn the Trustees conclusion will result in legal challenge". Shortly after the expiry of the 90 day timeframe Mr Lang wrote to Air NZ advising "my lawyers have requested the Air NZ legal contacts to discuss this matter in full". On balance, if Mr Lang had the ability to consult with lawyers and to consider pursuing a claim for non-payment of his insurance then he had the ability to properly consider raising a personal grievance.

[51] In these circumstances, Mr Lang has not demonstrated that he was unable to properly consider raising a personal grievance for unjustified disadvantage for the whole of the 90 days following his grievance arising.

[52] I decline to grant Mr Lang leave to raise a personal grievance out of time in relation to his claims for constructive dismissal.

[53] For completeness, even if I had found that exceptional circumstances existed, I would not have granted leave to Mr Lang to file a personal grievance out of time for any of his personal grievances. To do so would, in all the circumstances be unjust.

[54] Mr Lang's employment came to an end over 7 years before he raised his personal grievance. During that period of time a number of material witnesses for Air NZ have passed away or left Air NZ. Even if those witnesses that are still alive can be located, their memories are likely to be affected by the passage of time. In addition, a number of relevant documents no longer exist.

[55] There is also no medical explanation for Mr Lang's delay. The assessment by Jacqui Gregory, Clinical Psychologist, of Mr Lang was carried out on 26 May 2018. It was based on Mr Lang's self-reporting of his state of mind at various times over nearly 40 years. Ms Gregory records that it was not possible for her to offer any retrospective definitive diagnosis.

Other Issues: Breach of the IEA claim

[56] For completeness, I also considered whether Mr Lang's remaining claim for damages from Air NZ for its breach of the express or implied obligations contained in his individual employment agreement was raised within time¹⁵.

[57] The breaches allegedly occurred during Mr Lang's employment with Air NZ. The latest any breach of the IEA could have occurred therefore was 23 June 2010.

[58] Mr Lang did not file proceedings in the Authority until 29 November 2017. This is more than 6 years from the date his cause of action arose.

[59] I find Mr Lang is statute barred from pursuing a claim against Air NZ for breach of his IEA.

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[61] If they are not able to do so and an Authority determination on costs is needed Air NZ may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Lang will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave

¹⁵ Statement of Problem, Clause 4 and 8 and 55(iv).

to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[62] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁶

Jenni-Maree Trotman
Member of the Employment Relations Authority

¹⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].