



[5] There is no dispute that after the expiry of the 90 day period it was a further 14 days before Tyco learned that Mr Manuel had wished to raise a grievance.

[6] Section 114(3) of the Act allows an employee to apply to the Authority for leave to raise a personal grievance after the expiration of the 90 day period. The Authority may grant leave, subject to any conditions as it thinks fit, if satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and if it considers it just to do so.

[7] Exceptional circumstances are defined by the Act to include any one or more of the situations set out in s 115. The application by Mr Manuel is based on the situation provided for at s 115(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;*

[8] Mr Manuel's evidence to the Authority was that about four weeks after his dismissal he had engaged an agent, Mr George Ngatai, to represent him but that Mr Ngatai failed to raise a grievance as instructed and later deliberately misled Mr Manuel as to what he was doing in that regard.

[9] Prior to the investigation meeting the Authority advised Mr Ngatai of the application before it from Mr Manuel, to provide him with an opportunity to attend at the meeting and give evidence or put any information forward he might wish to. Mr Ngatai was advised that the Authority might make and publish findings adverse to him, in determining the application for leave. He did not attend the investigation meeting and nothing has been heard from him.

[10] The Authority is quite satisfied from the evidence of Mr Manuel, his partner Ms Fiona Bennett and Mr Greg Cain, that reasonable arrangements were made by Mr Manuel to have his grievance raised through Mr Ngatai. He was engaged within about four weeks of the dismissal after Mr Manuel had first tried contacting 0800 SACKED, without success.

[11] An email dated 30 July 2008 indicates Mr Manuel seriously intended to pursue a grievance claim. In the email his partner advised a manager of Tyco (who had represented him during the disciplinary action) that information was going to be

passed to *“the Lawyer who is sending a letter off next week to get the mediation sorted.”*

[12] While it is not suggested that this email had the effect of raising a grievance, it did give at least one manager of Tyco more than an inkling that Mr Manuel wished to challenge his dismissal in some way.

[13] I am quite satisfied from the evidence of Mr Manuel, Ms Bennett and Mr Cain, that reasonable attempts were made to follow up with Mr Ngatai what action he had taken as instructed. Mr Ngatai proved difficult to contact and unfortunately he misled Mr Manuel and Ms Bennett that he was doing what he had been asked. Mr Manuel initially accepted Mr Ngatai’s word that a grievance had been raised in time but it is clear this was not correct and it was not purportedly raised until 20 October 2008, some 14 days outside of the 90 day period allowed.

[14] I accept from Mr Barlow that Tyco had no communication from Mr Ngatai before that time about any grievance claim.

[15] Exceptional circumstances are present, I find.

[16] Mr Manuel accepts that there was conduct on his part in relation to his swearing in the hearing of the young woman staff member which deserved a formal disciplinary warning. He accepts that if his grievance is able to be raised with the leave of the Authority and if the claim is successful, he is likely to have the monetary remedies he seeks reduced on account of contributory fault.

[17] Mr Manuel’s evidence is that in his three years of employment he had never received any warning of any kind and no disciplinary action had ever had to be taken against him for any misconduct. He has argued that Tyco wrongly viewed his bad language as amounting to abuse of the young woman staff member, whereas he says it was clear that his swearing was not directed at her personally and he could not reasonably be regarded as having harassed the employee in any sense.

[18] I consider that the merits of the grievance Mr Manuel wishes to raise are at least arguable and that his case is not a hopeless one. Also, there is no suggestion that the delay in raising the grievance has caused any prejudice to Tyco.

[19] I am satisfied as required that as well as exceptional circumstances being present it is also just to grant leave for the grievance to be raised out of time.

[20] Having determined the grant of leave the Authority is bound by s 114(5) to direct Tyco and Mr Manuel to use mediation and seek to mutually resolve the grievance. Accordingly, that direction is now given. Mr Manuel is to arrange for mediation to take place within 28 days of the date of this determination, which the parties must undertake in good faith with a view to resolving the grievance.

[21] If the matter is not resolved and if Mr Manuel wishes to have it investigated and determined by the Authority, further directions will be given for Tyco to lodge a statement in reply dealing with the merits of the grievance and responding to the statement of problem lodged on 26 February 2009.

[22] The question of costs will remain reserved but it should be noted that Tyco had no responsibility for Mr Ngatai's neglect that led to the application for leave being necessary.

A Dumbleton  
**Member of the Employment Relations Authority**