

accordance with the requirements of s.114(1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

[2] In the event that it is determined that Mr Mensah failed to raise his personal grievances within the statutory 90 day period, Mr Mensah seeks leave to raise his grievances outside the 90 day time period pursuant to s114(3) of the Act.

Issues

[3] The issues for determination by the Authority are:

- (a) Did Mr Mensah raise a personal grievance of unjustified disadvantage relating to “*workplace harassment, bullying and intimidation*” and failure by Ward to “*provide a safe work environment*” within the statutory 90 day time period? and
- (b) Did Mr Mensah raise a personal grievance of unjustified constructive dismissal within the statutory 90 day time period?
- (c) If the answer to (a) and (b) is “no” should leave be granted pursuant to s.114(4) of the Act for Mr Mensah to raise his personal grievance(s) outside the statutory 90 day time period.

First issue

Did Mr Mensah raise a personal grievance of unjustified disadvantage and/or unjustified constructive dismissal within the statutory 90 day time period?

[4] Mr Mensah was employed by Ward as a driver on 24 May 2012. Mr Mensah was provided with an individual employment agreement to sign on 20 August 2012 approximately three months after he commenced employment. Mr Mensah is from Africa and his primary language is Ashanti. Mr Mensah says after a few months of working he was asked by Mr Steve Caie, Ward’s Resources Manager to sign an employment agreement on the pages marked. Mr Mensah says the employment agreement was not explained to him and he was not made aware that if he had an employment relationship problem he would need to raise it within a 90 day period.

[5] Mr Caie says he did not explain the employment agreement to Mr Mensah because he believed Mr Mensah’s English both in written and verbal form, to be

satisfactory and that at no stage did Mr Mensah say he was unable to understand the employment agreement.

[6] The employment agreement contains in Schedule 3 a fairly standard process for resolving an employment relationship problem. It provides, amongst other things, as follows:

In the event of a personal grievance the Employee or their representative must tell the Employer about the grievance and that the Employee wishes to have something done about it within 90 days of when the action causing their grievance arose.

[7] Issues arose between Mr Mensah and Mr Tony Loretz in mid-February 2013 which culminated in Mr Mensah's resignation on 27 March 2013. Mr Mensah says Mr Loretz abused and threatened him, swore at him in a racist manner and physically assaulted him on more than one occasion. A further incident of physical and verbal abuse occurred on 26 February which Mr Mensah reported. Mr Mensah indicated his intention to resign but was persuaded by Mr Caie not to. Mr Mensah was asked by one of Ward's managers, Mr Chris Harrison to write a letter of complaint which he did on 4 March.

[8] The letter of complaint was addressed to "the Ward Demolition Group big boss and the other bosses". In the first paragraph, Mr Mensah says:

I would like to make an appeal to the Ward Demolition Group big boss Peter Ward, and the other bosses, Steve Caie, Chris Harrison, Randall Owles that Tony Loretz has been abused and threatening me very seriously on several occasions which I am not happy and understand the reason why he is keeping to do this to me ...

[9] Mr Mensah describes the incidents of concern to him and closes the letter stating:

However I am making an appeal to the Ward Demo "bosses" that to take the necessary action about this matter or I let police get involved.

[10] It is agreed between the parties that this letter was sent and received by Mr Caie on behalf of Ward. Mr Caie says at a meeting between him, Mr Mensah and Mr Loretz, Mr Mensah and Mr Loretz resolved issues between them and he understood the matter had been resolved.

[11] On 22 March a further violent incident occurred between Mr Loretz and Mr Mensah. Mr Mensah says that following this incident, he did not return to work, was not contacted by anyone from Ward and so he and his partner, Ms Vhen Ibouana, went into the office on 27 March and he hand wrote his resignation and presented it to Mr Harrison. Mr Mensah says he resigned because of the issues with Mr Loretz, and because Ward did not appear to be doing anything. Mr Mensah says he felt forced to resign.

[12] Mr Caie says he undertook an investigation following the 22 March incident which lead to Mr Mensah's resignation. Mr Caie says he believed it was a police matter and he was waiting for the police report. Mr Caie says while he was conducting his investigation Mr Mensah resigned and he was surprised a number of months later, to receive a letter from Mr Mensah claiming that his resignation constituted an unjustified constructive dismissal.

[13] I found Mr Mensah to be a credible witness whose evidence was consistent and reliable. I find that Mr Mensah complained about the treatment he was receiving from Mr Loretz to both Mr Harrison and Mr Caie, both of whom are in management positions. He complained immediately following the incidents which occurred in February 2013. Mr Mensah then complained in writing about the treatment he was receiving and sought help from the managers at Ward. It is my finding that Mr Mensah did raise grievances relating to bullying and harassment with Ward within 90 days of them occurring. I do not accept that the bullying and harassment complained of by Mr Mensah was resolved by Ward.

[14] Following the investigation, Mr Mensah and his partner, Ms Ibouana, found themselves in difficult financial circumstances. On 20 May 2013 Mr Mensah approached Work & Income New Zealand (WINZ) for financial assistance. The WINZ case officer explained to Mr Mensah that because he had resigned from his previous employment, he would not be eligible for a benefit until the expiry of a stand down period. Mr Mensah explained the circumstances of his resignation to the case officer and was referred to the Waitakere Community Law Centre (Law Centre) for legal assistance. Mr Mensah says when he explained what had occurred at Ward and the circumstances leading up to his resignation, he was informed by a law clerk at the Law Centre that he had a case. On 20 May, a letter was written on his behalf to WINZ by the law clerk at the Law Centre stating:

We are assisting Mr Mensah in raising a personal grievance in relation to this. We believe this action is justified. In light of this we request the stand down period of 13 weeks be waived.

[15] Mr Mensah says he was told by the representative from the Law Centre that someone from the Law Centre would be in contact with him about his case and what to do next. On 23 June, Mr Mensah received a phone call from the Law Centre's receptionist asking him to pick up a letter which was addressed to Ward and raised a personal grievance on his behalf. Mr Mensah says he went in to the Law Centre the following day, collected the letter, signed it and his partner, Ms Ibouana, posted it for him that day or the next day. The undisputed evidence is that the letter was received and date stamped by Ward on 28 June.

[16] Mr Mensah did not receive a reply from Ward and so with the assistance of the Law Centre sent a further letter to Ward attaching the previous letter of 24 June and asking for a response by 19 July. Mr Mensah says he did not receive a response.

[17] Ms Delys Tansley, HR consultant to Ward, says she saw Mr Mensah's letter of 24 June when it was referred to her by the receptionist on 28 June. Ms Tansley spoke to Ward's financial adviser about the letter and also spoke with Ward's director, Mr Peter Ward. Ms Tansley says she advised Mr Ward that in her view, the personal grievance claim being raised by Mr Mensah that he had been unjustifiably constructively dismissed was "*out of time*". According to Ms Tansley, the letter from Mr Mensah was received by the company some four days outside the statutory 90 day time frame. Mr Mensah says he understood the Law Centre had submitted his grievance within the statutory 90 day timeframe.

[18] The parties have attempted to resolve the matters between them at mediation but were unsuccessful.

[19] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss.114(1) and (2) of the Act which state:

Raising a personal grievance

- (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 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.*

[20] The grievance occurred on 27 March and Ward received the letter from Mr Mensah raising the grievance on 28 June. I find that the letter raising the grievance was received by Ward 4 days outside the statutory 90 day timeframe. Ward does not consent to the grievance being raised after the expiration of the 90 day period and so Mr Mensah seeks the leave of the Authority under s114(3) and (4) of the Act to do so.

[21] I will now consider whether the delay by Mr Mensah in raising the personal grievance was occasioned by “*exceptional circumstances*” as set out in s.115 of the Act and further whether I consider it just to grant Mr Mensah leave to raise his grievance out of time in any event.

[22] Mr Caie and Mr Harrison had both been aware of the incidents which led to Mr Mensah’s resignation on 27 March. Mr Mensah says these were raised directly with Mr Harrison. It is my view that Mr Mensah did raise his personal grievance of unjustifiable constructive dismissal with Ward on 27 March when he resigned. It is my finding that Mr Mensah told Mr Harrison he was resigning because of the actions of Mr Loretz and his view that Ward was failing to take sufficient steps.

[23] If I am incorrect in this, Mr Mensah had 90 days from the date on which the action alleged to amount to a personal grievance came to his notice, or occurred. On that basis, Mr Mensah had from 27 March until 24 June 2013 to raise a personal grievance. Mr Mensah's letter raising the personal grievance was sent by Mr Ward's partner on the 24 or 25 June and was received by Ward on 28 June, four days after the 90 day period had expired.

Second issue

If the grievance was raised outside the 90 day period, should Mr Mensah be granted leave pursuant to s.114(4) of the Act to raise his personal grievance outside the statutory 90 day time period?

[24] In a situation where an employee has not raised a personal grievance within the statutory 90 day time limit and the employer has refused to consent to the grievance being raised out of time, they may apply to the Authority for leave to raise the personal grievance out of time as set out in s.114(3) of the Act. The Authority may grant leave in such circumstances if it is satisfied that the delay in raising the personal grievance is occasioned by exceptional circumstances and it considers it just to do so.

[25] Further provisions regarding "*exceptional circumstances*" are set out in s.115 of the Act:

115. Further provision regarding exceptional circumstances under s.114

For the purposes of s.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; or*

(c) *Where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by s.54 or s.65, as the case may be;*

...

[26] Mr Mensah consulted the Law Centre and signed a terms of engagement with it on 20 May. Mr Mensah was not contacted by the Law Centre again until 23 June. The significant lapse of time between Mr Mensah taking legal advice, being told he had a case and being provided with a letter raising his grievance did constitute, in my view, an “*exceptional circumstance*”.

[27] I determine that the “exceptional limb” in s.114(4) of the Act has been met pursuant to s.115(c) of the Act and I therefore proceed to consider whether it is just in all the circumstances to grant Mr Mensah leave to raise his grievance out of time.

[28] Mr Mensah’s employment agreement did contain the explanation as to resolution of employment problems as required by s.115(c) of the Act. However, it is undisputed that Mr Mensah did not have this dispute resolution process explained to him. Mr Mensah’s evidence was that he did not understand the employment agreement as he is not proficient in the English language. In that regard, Mr Mensah was assisted during the course of the Authority’s Investigation Meeting by an interpreter. This is a factor I consider should be taken into account when considering whether it is just to grant leave.

[29] Other relevant considerations are that even if Mr Mensah did not raise his grievance on 27 March when he resigned, his letter of 24 June was received by Ward just 4 days after the statutory 90 day timeframe had expired. The delay was minimal.

[30] Mr Mensah took immediate steps when he did not receive a response from Ward to the raising of his grievance and wrote a letter and hand delivered it to Ward on 16 July. Mr Mensah met with the Mr Ward and Mr Caie when he hand delivered the letter to them.

[31] The other relevant issue is whether Mr Mensah’s case is meritorious. The facts as presented are that there were three incidents which occurred between Mr Mensah and Mr Loretz. Mr Caie witnessed one of the violent episodes between Mr Mensah and Mr Loretz. Mr Caie gave evidence that following his investigation into the third and final incident which culminated in Mr Mensah’s resignation, he demoted Mr Loretz because such behaviour from a manager was not acceptable.

[32] The onus will be on Mr Mensah to establish that he was forced to resign and that such resignation was a constructive dismissal which, in the circumstances, was

unjustified. If Mr Mensah is able to do so, he may have grounds to support an unjustifiable dismissal personal grievance.

[33] Finally, in *Gibson v. GFW Agri-Products Ltd*¹ the Court suggested that unless the employer can show that it would be substantially disadvantaged by the granting of leave, it would normally be just to grant leave. Ward has not shown this to be the case.

Determination

[34] Taking all these considerations into account, I determine if the grievance was not raised on 27 March, the day of Mr Mensah's resignation, it was raised when Ward received his letter on 28 June, and it is just to grant Mr Mensah leave to raise the personal grievance of unjustified constructive dismissal out of time. I have already found that the personal grievance of bullying and harassment had been raised within the statutory 90 day time period.

[35] The Authority will shortly contact Mr Mensah and Mr Molloy for Ward for a telephone conference to progress this matter.

Costs

[36] Costs are reserved pending the final determination of this matter.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹ [1994] 2 ERNZ 309