

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Andrew Morgan (Applicant)  
**AND** Telecom New Zealand Limited (Respondent)  
**REPRESENTATIVES** John Burley, for Applicant  
Samantha Turner, for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**INVESTIGATION MEETING** 20 February 2004  
**SUBMISSIONS** 24 February 2004, 26 February 2004.  
**DATE OF DETERMINATION** 5 March 2004

DETERMINATION OF THE AUTHORITY

The applicant lodged an employment relationship problem with the Employment Relations Authority on 6 October 2003. In a statement in reply dated 23 October 2003 the respondent (*Telecom*) declined to respond to the substance of the alleged grievance. It claimed that the applicant sought to raise a grievance outside the 90 day time period specified in the Act and advised that the respondent did not consent to this.

I informed the parties that I would deal with this issue as a preliminary matter. I also suggested to Mr Burley that if (in the alternative) he anticipated lodging an application for leave to raise a grievance out of time, it would be helpful for me to be able to address that together with the first preliminary matter. Mr Burley accepted this suggestion and lodged such an application on 23 January 2004.

*First issue: was the grievance raised in accordance with the requirements of s.114 of the Employment Relations Act 2000?*

The time and manner of the raising of the grievance is not in dispute. Mr Burley did this on the applicant's behalf by letter dated 14 March 2003 which advised:

"We have been instructed by Mr Morgan regarding the termination of his employment on 31 December 2002 following receipt of a notice letter dated 11 November..."

Mr Morgan had indeed received a letter giving notice of the termination of his employment on 31 December 2003, and had made this available to Mr Burley as part of his initial instructions to him. However, what is also not in dispute is that because of ill health in the period following receipt of the letter of 11 November, Mr Morgan requested that the employer release him from the obligation to work out his notice. Mr Morgan never returned to work after making this request, and in due

course received his final payments including redundancy compensation. Initially it was Mr Morgan's hope that he would receive payment in lieu of the full period of notice. However the employer was not prepared to agree to this. Instead Mr Morgan received a redundancy payment (in two instalments because of an initial miscalculation) some sick leave, and some annual leave. He told me that he remained unsure what his termination date officially was if not 31 March. His own calculations of the period his holiday pay and sick pay would cover led him to believe that the likely alternative was 16 December 2002. However he conceded that he could not recall Mr Forman confirming this with him.

The respondent disputes any suggestion that 16 December was ever mooted as the termination date. It has furnished several pieces of documentary evidence showing the final day of employment to be 6 December 2002. These are as follows.

1. In a letter to Mr Morgan dated 18 November 2002 Mr Matt Forman stated:

“Dear Andrew,

As you have requested to have your notice period reduced from 7 weeks to 4 weeks I have reviewed our business requirements and can agree to your request. Your notice period commenced on 11/11/02 (as per the letter dated 11/11/12) and now has a revised termination of your employment on 6/12/02.

The company will endeavour to redeploy, second or appoint you to another similar role pursuant to your employment contract. You are also able and encouraged to apply for redeployment, secondment or appointment to vacant positions within Telecom....”

The foot of the letter bore Mr Morgan's signature below the statement:

“I Andrew Morgan understand and accept the above stated reduction in my notice period.”

2. In a letter dated 6 December 2002 a Mr Ready who was responsible for payroll for the respondent wrote:

“Dear Andrew

A total net amount of \$6,433.16 was credited to your bank account on 17-12-02 as your final pay from Telecom New Zealand Ltd.

Please find attached your final payslip...”

3. I was also provided with copies of the final payslips, which record 6 December 2002 as the “ceasing date.”

Mr Morgan does not dispute the authenticity of these documents. Although he claims to have completely forgotten even sighting, let alone signing, the letter of 18 November, he agrees that it bears his signature. Finally he does not dispute that received no ordinary or sick pay for the period beyond 6 December 2002.

## **Conclusions**

There appears to be no dispute between the parties that the grievance arose on Mr Morgan's last day of employment, what ever that was. Nor is there any dispute that the grievance was raised on 14 March 2002. The issue for me was therefore to establish when the employment ended. As I indicated to the parties at the end investigation meeting, I consider the evidence provided by the respondent to be conclusive of this issue.

**I accept that the employment ended on 6 December 2002. Ninety days from that date takes us to 5 March. It follows that when the grievance was raised on 14 March 2003, it was out of time.**

*Second issue: should the Authority grant leave to the applicant to raise the grievance out of time?*

Section 114(4) provides:

“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.”

Mr Morgan says he genuinely believed that he was dismissed on 16 December and this was the basis of his instructions to Counsel. This led to the grievance being raised on 14 March on the misunderstanding that it was within the statutory timeframe. He contends that if he made a mistake about the date on which his employment ended it was as a result of a state of mind induced by the circumstances of his dismissal.

Mr Morgan’s doctor provided a brief statement to the Authority in which he records that towards the end of 2002 Mr Morgan began to suffer symptoms of depression as a consequence of extreme stress relating to his redundancy. He reports that Mr Morgan had a poor and interrupted sleep pattern, difficulty concentrating and appeared to be suffering from the preliminary symptoms of depression. He therefore prescribed a low dose tricyclic antidepressant from 11 November onwards. This was ultimately successful in addressing the symptoms but caused side effects of drowsiness and some confusion, and Mr Morgan was advised not to drive while taking the medication.

Mr Morgan says that any confusion about the date of dismissal was caused by the trauma of the dismissal coupled with the effect of the medication, and that all this amounts to exceptional circumstances in terms of s. 114 of the Employment Relations Act 2000.

The respondent also provided a report from another medical practitioner, Dr Culpan who stated that while the medication might cause early morning drowsiness in up to 10% of cases this usually settled within a week. This report also stated that the medication alone would not cause the sort of memory loss the applicant had experienced in relation to the letter of 18 November 2002, nor does it cause confusion in the strict medical sense of the term.

The respondent argues in submissions that in order for the Authority to grant leave, it must be satisfied that there were exceptional circumstances (circumstances which were unusual or outside the common run) and these must be causative of the delay. The respondent also reminds the Authority that it is not unusual to experience some turmoil at a dismissal but that more is needed to constitute exceptional circumstances. It says that a mere miscalculation does not amount to exceptional circumstances.

## **Conclusions**

It is reasonable to assert that redundancy is never an easy process for anyone involved. However, I consider the level of reaction exhibited by Mr Morgan (as evidenced by his inability to work out his notice and his need for anti-depressant medication) to be amongst the more serious of the responses I have observed in cases coming before me. Put simply, I consider a reaction like his to be the

exception, rather than the norm and that because of its severity it constitutes exceptional circumstances.

In recording this conclusion I note that I place less significance on the differences between the reports of the two medical practitioners than does the respondent. The letter of 18 November was signed approximately one week after the applicant commenced taking the medication and it would be consistent with Dr Culpan's report for the applicant to be experiencing some drowsiness at this time. I also reconcile the apparently different comments about confusion by noting that the applicant might well appear confused in a general way as a result of stress, sleeplessness and drowsiness without being confused in the strict clinical sense. I accept that this was the case here as indicated in the statement provided by his own doctor, who had of course had the benefit of examining his patient. I am satisfied that the applicant was suffering from poor health at the time his employment ended and that his inability to concentrate was compounded by the effects of the medication.

That takes me to the question whether the ill health Mr Morgan suffered at the time of his dismissal was causative of the delay in raising the grievance. I am satisfied that his failure to establish accurately the date upon which his employment terminated was due to the exceptional circumstances of his poor health, which arose out of his termination. The failure to correctly identify the date of dismissal then led to the failure to raise the grievance within the 90 days. In a two step process therefore his state of mind (the exceptional circumstance) led to an error over the date of dismissal which led in turn to a failure to raise the grievance in time. Whilst not the direct reason, the exceptional circumstance was nonetheless causative of the delay.

Finally, in all the circumstances, including the short period between the expiry of the 90 day period and the raising of the grievance, I am satisfied that it is just to grant leave.

**In summary then I grant leave to the applicant to raise his grievance after the expiration of the 90 day period.**

Y S Oldfield  
Member of Employment Relations Authority