This determination includes an order prohibiting publication of certain information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE

[2024] NZERA 599
3281779

	BETWEEN	PXW Applicant
	AND	QLZ Respondent

Member of Authority:	Antoinette Baker
Representatives:	Ashleigh Fechney, advocate for the Applicant Naoimh McAllister, counsel for the Respondent
Investigation Meeting:	30 August 2024 by AVL
Submissions received:	On the day
Final information received:	4 September 2024
Determination:	8 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed by the respondent on a fixed term contract crewing on its passenger vessels from late December 2022 until 31 March 2023. I accept the role fell into the category of 'safety sensitive' work. Just after the employment started the applicant failed a 'pre employment' drug test. The failure related to a level of 'THC[1]' that was above the screen test limit used by the respondent for testing for the role. The applicant agreed to provide (and did provide) to the respondent, information from two doctors one of whom prescribed cannabis remotely (no face to face

[1] Delata-9-tetrahydrocannabinol.

consultation) to the applicant for a condition the applicant suffered from. That doctor expressed an opinion that they did not consider the applicant would be impaired from doing their role. The applicant continued to work but when they failed a second drug test, the respondent suspended them from the workplace on 9 February 2023. The respondent said it could only accept a test that did not go over the standard screen level set for 'THC' levels and when other options were not taken up in land based roles (or as the applicant alleges, options offered to them came too late before the end of the fixed term) the respondent dismissed the applicant allowing them to remain on pay until the end of the fixed term some weeks later.

[2] In their claim the applicant says the process towards dismissal was unfair and that the reason for being prescribed medicinal cannabis was a disability. The applicant says that not being able to pass the respondent's required screen level test for THC (rather than being able to undertake an impairment test which they considered they would pass) meant that the respondent discriminated against them for having the disability.

[3] The Applicant seeks to challenge the respondent through personal grievances, unjustified actions during the employment, and that the dismissal was unjustified.

[4] The last day for the applicant to have raised the grievance for unjustified dismissal was 1 August 2023 based on the 90 day rule to raise grievances.[2] For the disadvantage grievances the last day to raise was likely earlier than this. The applicant did not raise personal grievances until 14 February 2024, approximately six months beyond the date they should have raised the grievance for the unjustified dismissal. The applicant seeks leave to bring the grievances outside of time based on the delay being caused by 'exceptional circumstances' in that the applicant took reasonable steps to raise the grievance through an advocate (not the current one), and the advocate unreasonably failed to do so. [3] It is submitted that any further delay beyond this to raise the grievances was all part of the context of the applicant suffering from adverse triggering effects of various contextual factors including family violence, things that happened when working for the respondent, and conditions that they suffer from.

[2] Employment Relations Act, s114.
[3] Employment Relations Act, ss114(3) & (4) and 115(b).

[5] The respondent does not consent to the grievances being raised outside of 90 days and opposes the application. It says that 'exceptional circumstances' do not apply or if they do it is unjust to now allow the grievances to continue given the amount of time passed and the effect this has on being able to reliably access recall evidence in dispute. It does not agree with the applicant's position that there is little evidence in dispute. The respondent says it is unjust to grant leave.[4]

[6] The respondent further says that any grievance challenging its process and dismissal rests on what a fair and reasonable employer could have done in the circumstances at the time[5] and not the grounds brought by the applicant as to discrimination for disability. It also challenges the reasons for the further delay by the applicant *after* their advocate failed to raise a grievance. The respondent submits that the reason given for this delay (a form of inability due to the effect of psychological conditions affecting the applicant) is either not supported by medical evidence, and is inconsistent with the applicant's ability to do other things at the time. In short, the respondent says it would be unjust to grant leave for the grievances to continue.

[7] The applicant seeks nonpublication of their name. This is opposed by the respondent. This determination deals only with the non-publication application and then whether the grievances can be raised out of time.

Non-publication

[8] This determination is subject to non-publication orders for reasons that follow.

[9] The Authority has the discretion to prohibit publication of matters before it.[6] The exercise of that discretion is based on a principled basis with a starting point of open justice.[7] The applicant asks that her name be subject to non-publication. This is because she has been subject to family violence, and also that exposure to her medical information which may include her prescribed use of cannabis may expose her to unwanted and adverse public comment affecting her mental health and employment prospects. She says this is unfair because her cannabis use is not illegal.

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[4] Employment Relations Act, s114(4)(b).
[5] Employment Relations Act 2000, s103A.
[6] Employment Relations Act 2000, schedule 2, clause 10 (1).
[7] *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney- General* [2022] NZEmpC 27.

[10] For the respondent it is submitted that there is a high threshold of 'open justice' that is not met and or that non-publication for the applicant and not the respondent would be unfair.

[11] I find it is not a stretch to see that if the applicant's name is publicised it may likely have adverse consequences for them. The applicant is young. I accept as likely that the applicant's medical information is something that may cause her to be exposed to adverse social media comment about her taking what appears to be (based on what is before me) legitimately prescribed medicinal cannabis. However, the main reason I accept there should be non-publication is because the applicant has been the victim of family violence of a nature where the perpetrator was criminally convicted. In the complicated and risk context of such circumstances, I lean on the side of finding that the applicant's name is not to be publicised. I find support for this approach from the Employment Court[8] case, that has been brought to my attention for the applicant. While the respondent refers to the high starting point of 'open justice,' the content and reasoning of this matter as it relates to circumstances of raising a grievance out of time remains available to provide the public with its interest in the decision about that.

[12] I also include the respondent in the non-publication of this matter. This is based on the workplace being in a discrete geographical area in an identifiable job in that area. It would not be difficult to trace the applicant to their job in these circumstances.

[13] Based on the above, this determination is subject to non-publication orders which are that the names of the applicant and the respondent are to be anonymised to the randomly selected letters of PXW for the applicant and QLZ for the respondent.

[14] The advocate who provided evidence in this matter to support that they unreasonably did not raise a grievance on PXW's behalf is simply anonymised to 'the advocate.' This is because even though their acknowledged unreasonable failure to raise grievances is far from admirable, they are not a party to these proceedings.

The Authority's Investigation process

[15] I held an investigation meeting by AVL that concluded just after midday. I heard from PXW and the advocate who PXW had engaged to raise a grievance. Representatives were given the opportunity to ask questions of witnesses. I then heard

[8] *JKL v Stirling Andersen Limited* [2022] NZEmpC 107, at [51].

submissions. I asked for further confirmation about payroll to be provided after the investigation meeting which confirmed that during the period of employment PXW was unpaid for 54 hours between 19 April and 29 April 2023. Otherwise PXW was paid as if working for the rest of the period of the fixed term of their employment whether working or not. This further material being provided by agreement as to its meaning, I then reserved my determination.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

Is leave to be granted for PXW to raise grievances outside of the 90 day time frame?

[17] An employee who fails to raise a personal grievance within the 90 day time to do so and where the employer refuses consent to it being raised out of time (as is the case here) may apply to the Authority under s 114(4) of the Act to have the matter heard if the Authority:

a. is satisfied that the delay in raising the personal circumstance is 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.

S114(4)(a) Exceptional circumstances

[18] The Supreme Court [9] considered the definition of 'exceptional circumstances' preferring the meaning that they are 'unusual' and 'the exception to the rule'. The Court further considered that,

> …the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113 on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[9] *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

[19] Section 115 provides a non-exhaustive definition of specific 'exceptional circumstances' for the purpose of s 114(4). It has been submitted for PXW that the context of her medical conditions and the effect of them also related to 'exceptional circumstances,' however I understand this relates to PXW's explanation as to why there was an apparent further delay *after* the 90 day period had expired.

[20] The exceptional circumstance that PXW relies on is one that is expressly defined under s 115(b) of the Act:

> For the purposes of section 114(4)(a), exceptional circumstances include-
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> (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.

[21] Based on what is before me, including messaging from PXW to their then advocate on either side of the 90 day time frame date, and the advocate's own affirmed evidence (in their own words) that they unreasonably 'dropped the ball,' I am satisfied this is a situation where I should accept that the agent unreasonably failed to raise a grievance for unjustified dismissal and this caused a delay to just beyond the time frame of the 90 days. It is less clear to me that the instructions from PXW also involved a grievance that included disadvantage, but any benefit of the doubt does not assist me here as my considerations below will conclude. I am further satisfied that by the time the 90 day timeframe expired, PXW had made reasonable attempts to have the agent raise the grievance (at the very least) for unjustified dismissal. Their messages to the agent clearly ask for updates about raising the grievance and connect this to the timeframe to do so. The date came and went.

[22] Based on the above I am satisfied that exceptional circumstances under s115(b) can be defined here for the purpose of the first limb of s114(4)(a) of the Act.

S114(4)(b) is it just to do so (grant leave to bring grievances out of time)

[23] While I have found exceptional circumstances caused the delay to raise by the date the 90 days expired, I am not satisfied that it is just to grant leave under the second limb of s 114(4) for reasons I now set out below.

[24] While I am satisfied that PXW made reasonable arrangements to have the grievance relating to her challenge to the end of her employment raised by an agent who did not reasonably do so, there was then a further considerable delay before they sought to obtain advice and instruct a different representative to raise the grievances. I accept the submission for QLZ that it would be out of line with other cases to then consider such a length of time to be acceptable to now grant leave.

[25] For PXW I have been asked to consider a recent Authority decision[10] that granted leave for a delay of eight months after the 90 days had expired in circumstances where an advocate had unreasonably failed to raise a grievance of constructive dismissal. For QLZ it is submitted that this case is 'problematic'. I find that it was determined on the facts before the Member who considered the importance of vulnerability of the employee for whom English was not their first language, and likely cultural aspects of not challenging someone in the status role of a 'lawyer.' The Member also described the decision as an 'outlier'.[11]

[26] PXW explained to me that they were incapacitated by their mental health issues partly caused from trauma related to family violence. This they explained was happening in a triggering fashion during the time they had stopped following up with the advocate or seeking a different and obviously more reliable advocate to raise the grievance for them. I note here that while PXW periodically tried to contact the advocate during this time they did nothing to follow up when they did not get a response. QLZ submits that inconsistent with this inaction is that during this time, PXW formally challenged the police in relation to matters of disclosure of information relating to family violence matters. An email also shows that PXW communicated articulately with a lawyer, during this time, to progress the reopening of a sensitive claim with ACC. I agree with the submission for PXW that for me to accept a level of incapacity so paralysing that PXW could not have taken steps to find a more reliable advocate to raise their grievances would need supporting medical evidence.[12] There is none. PXW under cross examination explained that any psychologist could explain the effects they suffered. If they could then this is not something I have before me.

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[10] *Acierto v Allied Concrete Limited* [2024] NZERA 370 (Member Beck).
[11] As above at [40].
[12] Cases considering incapacity to raise a grievance within time based on mental illness require a high standard of preluded medical documentation and evidence: Telecom New Zealand Ltd v Morgan [2004] 2 ERNZ at [25];

[27] It is submitted for PXW that further context for the delay after the advocate had failed to meet the 90 day deadline was that PXW has been 'sexually harassed' in the QLZ workplace. I have before me a letter of apology from PXW's senior co-worker. I find this to be a likely response to PXW's complaint to QLZ about the co-worker's inappropriate behaviour and comments. PXW refers to the matter having been dealt with reasonably well in their further communication to the lawyer they sought assistance from to reopen their ACC sensitive claim. I am not satisfied this factor can be taken as one of the reasons why PXW delayed raising the grievances beyond the point that the advocate let them down. It would be inconsistent with s115(a) of the Act which has a high threshold for this type of case when considering exceptional circumstances and in turn this must be a cause linked to the grievance raised.[13] It would not then seem just to say that this matter, which appears to have been resolved by the employer at the time, and which PXW has not raised as a grievance for, even out of time, should now be considered a reason for considering they were impaired by it to the extent there was a delay in taking further steps to raise the grievance after the advocate failed to do so.

[28] It is further submitted for QLZ that the time lapse beyond when the 90 days expired means that the respondent is disadvantaged from being able to answer to the factual claims made about what may have been said or done in the process of appointment and then throughout the testing and lead up to the dismissal. It is submitted for PXW that the evidence is largely based on what is already available in terms of written communications.

[29] While it is submitted for QLZ that there is a time frame of '292' days from when PXW finished their employment to when the grievances were raised, I find the time lapse counts from the time that the 90 days expired (1 August 2023) being approximately six months.

[30] I prefer the position of QLZ about the nature of the evidence that would be necessary. I find that the claim as it stands would need to include a consideration of what was said or done at the interview stage when PXW says she told the interviewers

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[13] *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [25]; *Cronin-Lampe v Board of Trustees of Melville High School* [2003] NZEmpC 144 at [399] and [429]

that she would fail a drug test. There is dispute that PXW did not disclose her medical condition(s) at this stage and the nature of what was said may be relevant. PXW includes in their claim what was said in relation to matters relating to the negative tests and options going forward. What was said would more easily have been recalled nearer the time that PXW ought to have realised their advocate had let them down in or around 1 August 2023 and not 14 February 2024. I accept this puts QLZ at a disadvantage having not been given the opportunity to better respond closer to the time of occurrence, something the 90 day rule is intended to account for. The Employment Court has explained that while the grievance process is 'designed to be informal and accessible' the raising of a grievance needs to be done in such a way that enables the employer 'to respond, with a view to resolving it *soon* and informally, at least in the first instance.'[14]

[31] Part of what is submitted for PXW as a reason to grant leave is because this is a significantly important case for PXW, and others interested in the disability sector who may rely on medical cannabis to treat conditions.

[32] But for the employer seeming not to abide by its own process of testing PXW pre employment and deciding to start PXW before the test was done, PXW would arguably not have started their employment. For QLZ, as noted above, it is submitted that the matter is simply one that would be tested under the factors of justification, s 103A of the Act. Based on what is before me, I agree.

[33] PXW's claim also includes that they say the screen test was unfair even though this was part of the employer's policy. Based on what is arguably before me PXW knew this before she commenced her employment. Whether it is fair for an employer to screen test rather than test impairment in this context of safety sensitive work has been investigated by the Authority previously and was not a successful challenge albeit in relation to non-prescribed cannabis use.[15]

[34] I find that the above dints the arguable strength of the substantive claim that PXW brings, or the apparent reason for it.

[35] PXW was also employed on a fixed term agreement and paid during the whole

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[14] *Chief Executive of Manukau institute of Technology v Zivaljevic* [2019] NZEmpC 132, [36] to [38].
[15] *PEX v Lyttleton Port Company Limited* [2022] NZERA 353.

period of that employment except for 54 hours of unpaid leave, 2.5 months of this was unworked time that included the time from their dismissal on 3 May 2023 to the last day of the fixed term which was 31 May 2023.[16] I find that this impacts the breadth of remedy that could be awarded for lost wages and arguably compensation if the dismissal was found to be unjustified. This also points away from it being just to grant leave when PXW took approximately six months to rectify the situation of poor advocacy when I am not satisfied I have sufficient to accept that she was so incapacitated that she could not have done so.

Summary of outcome

[36] Based on the above, while I find 'exceptional circumstances' under s 115(b) occurred that caused PXW not to raise her grievance by the time the 90 days came and went, I decline PXW's application because the second part of my consideration leads me to conclude it would not be just to grant leave under s114(4)(b) of the Act.

Costs

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

[38] If the parties are unable to resolve costs, QLZ may lodge and serve a memorandum on costs within 28 days of the date of this determination. PXW will then have 14 days to lodge any reply. An extension of time to negotiate costs may be granted.

[39] The Authority determines costs on a 'daily tariff' basis unless factors require an adjustment upwards or downwards, or that costs lie where they fall.[17]

Antoinette Baker
Member of the Employment Relations Authority

[16] Confirmed after the investigation meeting by the parties.
[17] www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1