

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 299
5627165**

BETWEEN

MAREE PAULSON
Applicant

AND

RIVERDALE SCHOOL BOARD
OF TRUSTEES
Respondents

Member of Authority: Eleanor Robinson

Representatives: Raewyn Tretheway, Counsel for Applicant
Grant Hay, Advocate for Respondent

Investigation Meeting: On the papers

Submissions received: 3 August 2016 from Applicant
22 & 31 August 2016 from Respondent

Determination: 2 September 2016

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Ms Maree Paulson, raised a personal grievance against the Respondents, Riverdale School Board of Trustees (the Board), on 23 December 2015 for constructive dismissal.

[2] Ms Paulson suffered a workplace injury on 19 March 2015 during the course of her employment; as a result of which she suffered concussion. Ms Paulson did not return to work following her injury and on 24 June 2015 she resigned from her employment at Riverdale School.

[3] A letter raising a personal grievance for constructive dismissal was sent by Ms Paulson to the Board on 23 December 2015.

[4] The Board claim that the letter dated 23 December 2015 was sent after the statutory 90 day time limit set out in s 114 of the Employment Relations Act 2000 (the Act), and it does not consent to the raising of a personal grievance after the statutory 90 day period.

[5] Ms Paulson consequently applies for leave to raise a grievance, on the basis that either:

- a) the statutory 90 day time period should start from the date of resignation on 24 June 2015 and therefore the first letter she wrote to the Board which was dated 27 July 2015 was within the statutory time period; or
- b) she was so traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the statutory time period pursuant to s. 114(4)(a) of the Act; or
- c) she was not provided with information on how to deal with employment relationship problems as stated in the letter of appointment dated 12 December 2014 pursuant to s. 115 (c) of the Act.

[6] The Board opposes the raising of Ms Paulson's personal grievance which it states was raised in the letter dated 23 December 2015 outside the statutory 90 day time period specified in the Act, on the grounds that it does not accept that Ms Paulson's delay in raising the grievance was caused by exceptional circumstances, or that it failed to provide Ms Paulson with the necessary information for addressing with employment relationship problems.

The Legislation

[7] Section 114 Employment Relations Act 2000 provides:

(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*

[8] Ms Paulson seeks to rely on the following ground:

Section 115 Further provision regarding exceptional circumstances under section 114

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

- 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)*

Issues

[9] The issues for determination are therefore whether or not :

- i. the statutory 90 day time period should start from the date of resignation on 24 June 2015

If this claim is determined in the affirmative: whether or not

- ii. the letter dated 27 July 2015 raises a personal grievance;

If this issue is determined otherwise, whether or not:

- iii. Ms Paulson was so affected or traumatised by the matter giving rise to the personal grievance that this amounts to exceptional circumstances in terms of sections 114 and 115 of the Act;

If this issue is determined otherwise, whether or not:

- iv. Ms Paulson was not provided with information on dealing with employment relationship problems

- v. If so, whether it is just to grant leave pursuant to section 114(4)(b) of the Act;

[10] The parties agreed to the Authority determining this issue ‘on the papers’ based on the Statements of Problem and in Reply and on the written submissions from the parties.

Background Facts

[11] Ms Paulson was a Support Staff Teacher Associate working at Riverdale School (the School). Ms Paulson was appointed on the basis of fixed term employment, the most recent offer of continued employment having been made on 12 December 2014 for the period 28 January 2015 until 9 December 2015.

[12] Ms Paulson was injured in an accident in the classroom on 19 March 2015 as a result of which she suffered concussion, and was certified as unfit to attend work. Ms Paulson was unable to resume work from the time of the injury due to resulting medical complications.

[13] Ms Paulson resigned from her employment at the School by means of a letter dated 24 June 2015 addressed to the School Principal, Ms Yvonne Williams.

[14] The Board received a letter of complaint from Ms Paulson on 27 July 2015 informing it that she had made a complaint to the Ministry of Education about the Manager at the School as a result of intimidation and bullying with regards to the incident on 19 March 2015, and: *“lack of care and consideration of my head injury and the lack of getting any medical attention for me on the day the accident...”*

[15] The letter from Ms Paulson was tabled and considered by the Board at the next Board meeting after receipt on 27 August 2015, but despite the Board stating that a letter of acknowledgement having been drafted, it was not sent to Ms Paulson.

[16] Ms Tretheway wrote to the Board by letter dated 23 December 2015 in which she stated that she had been instructed by Ms Paulson to raise a personal grievance on her behalf for constructive dismissal.

[17] The address to which the letter was sent was the School address, and was received whilst the School was closed for the summer school holiday period.

[18] Ms Tretheway wrote a further letter to the Board on 12 February 2015 noting that there had been no response to the personal grievance letter dated 23 December 2015.

[19] The Chairman of the Board responded to Ms Tretheway by letter dated 25 February 2016 noting that the letter dated 23 December 2015 was attempting to raise a personal grievance for Ms Paulson outside the 90 day statutory period set out in s.114 of the Act and that the Board did not consent to the personal grievance being raised outside that time period.

Determination

[20] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to s 114(1) of the Act which states:

1. Raising a Personal Grievance

(1) Every employee who wishes to raise a personal grievance must ... 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.

Does the statutory 90 day time period start from the date of resignation on 24 June 2015?

[21] In accordance with s.114(i) of the Act, I find that the 90 day statutory limitation period begins on the day: *“on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee”*.

[22] Ms Paulson was injured on 19 March 2015 whilst at work. She resigned on 24 June 2015, stating in the resignation letter that she was resigning with effect from 8 July 2016 and would not be working her two week notice period because she was in receipt of ACC as a result of an injury.

[23] The explanation for the resignation was provided to Ms Williams dated 25 June 2015. In that letter Ms Paulson she stated: *“I have been back to the doctor, and things still are not the best for me, as still getting bad headaches etc, and I do not know how long it is going to take me to recover fully from the accident, as I have been told that they can not give me a time frame for recovery. I have decided to resign from my position”*.

[24] Ms Paulson also emailed Ms Williams that evening, 25 June 2015 requesting a reference and stating: *“I have enjoyed working for you, the kids are great and I will miss them, it’s just a shame that the accident happened”*.

[25] There is no indication in either the resignation letter or the emails sent the following day that Ms Paulson had felt compelled to offer her resignation as a result of an action of the employer or that she intended to raise a personal grievance.

[26] On that basis I find that it is necessary to examine when the action alleged to be a personal grievance came to the notice of Ms Paulson.

[27] In the Employment Court case *Drayton v Foodstuffs (South Island) Ltd*¹ Judge Travis accepted a submission that²:

The words “came to the notice of the employee” are synonymous with knowledge of the action on the part of the employee

[28] Ms Paulson sent a letter to the Board dated 27 July 2015 in which she notified it that she had made a complaint to the Ministry of Education: “*against one of your staff members at Riverdale School*”. Ms Paulson referred to intimidation and bullying by the Manager of the Special Needs Unit: “*with regard to this incident*”. In particular Ms Paulson referred to: “*The lack of care and consideration of my head injury and the lack of getting medical assistance for me on the day of the accident ...*”

[29] The letter of complaint addressed to the Minister of Education and dated the same date, 27 July 2015, advises that Ms Paulson wished to make a complaint against the Manager of the Special Needs Unit at the School, and outlines in detail the behaviour of the Manager on the day of the accident sustained by Ms Paulson

[30] I find that the grounds for Ms Paulson’s personal grievance arose as a result of the alleged behaviour of the Manager of the Special Needs Unit at the School on the day of the incident on 19 March 2015.

[31] I determine that the statutory 90 day time period commenced 19 March 2015 and that Ms Paulson had 90 days from that date on which to raise a personal grievance.

If the statutory 90 day time period does commence on 24 June 2015, does the letter dated 27 July 2015 constitute the raising of a personal grievance?

[32] I have determined that the statutory 90 day time period commenced on 19 March 2015.

[33] Section 114(2) of the Act states:

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.”

¹ [1995] 2 ERNZ 523

² Ibid at page 529 lines 22-24

[34] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.³ (*Creedy*) In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[35] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer⁴.

[36] In the letter to the Board dated 27 July 201 Ms Paulson claims that the basis for making a formal complaint is: a “*Lack of compassion and care after an incident involving a serious head trauma*”, and also set out that she felt she had been intimidated and bullied by the Manager of the Special Needs Unit at the School.

[37] Ms Paulson does not state that she is raising a personal grievance in the letter, nor that she intends to do so. However she states in the formal letter of complaint which she attached to the letter addressed to the Board and dated the same date, 27 July 2015 that the behaviour of which she complains had left her with: “*no other option but to resign from my position*”.

[38] In *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*⁵ the Employment Court acknowledged the low threshold of information required to raise a personal grievance. In this case I find that the combined letters dated 27 July 2015 conveyed to the Board that Ms Paulson had a grievance she wanted the Board to address.

[39] I find that the letters dated 27 July 2015 constituted the raising of a personal grievance.

³ *Creedy v Commissioner of Police* [2006] ERNZ 517

⁴ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

⁵ [2008] ERNZ 139

Was Ms Paulson so affected or traumatised by the matter giving rise to the grievance that this amounts to exceptional circumstances in terms of sections 114 and 115 of the Act?

[40] I have determined that the statutory 90 day time period commenced on 19 March 2015, and the letters dated 27 July 2015 raising a personal grievance fell outside the statutory 90 day limit for raising such a claim.

[41] I turn to examine whether or not there were exceptional circumstances pursuant to s.114 (3) and (4)(a) and s.115 of the Act which occasioned the delay in Ms Paulson raising the personal grievance.

[42] Section 114 Employment Relations Act 2000 provides:

....

(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

[43] The Supreme Court considered the meaning of ‘exceptional circumstances’ in *Creedy v Commissioner of Police*⁶ in which the Court held that ‘exceptional circumstances’ means unusual, in the sense that it is the exception to the rule⁷, rejecting the view held by the Court

⁶ [2008] ERNZ 109

⁷ Ibid at [31]

of Appeal in *Wilkins & Field Ltd v Fortune*⁸ that ‘exceptional circumstances’ may mean: “... something more than special and less than extraordinary”.

[44] Ms Paulson claims ‘exceptional circumstances’ in reliance on the following ground:

Section 115 Further provision regarding exceptional circumstances under section 114

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

- 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)*

[45] The leading case on the interpretation and effect of section 115 (a) of the Act is *Telecom New Zealand Limited v Morgan*⁹. The Court in addressing the application of s115(a) considered that Parliament had not intended to relax the tests for extending the limitation period when enacting ss 114 and 115 of the Act, and went on to observe in relation to s115 (a) that “Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals or other matters giving rise to grievances”¹⁰

[46] The Court further commented at paragraphs 23 and 24:

[23] Deconstructing the subsection, the following elements appear necessary to meet the exemplar “exceptional circumstances” test under s115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. This is illustrated by the phrase “... 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 the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.

⁸ [1998] 2 ERNZ 70 (CA) at [76]

⁹ [2004] 2 ERNZ 9.

¹⁰ Ibid at para [22]

[24] Next, s115 (a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to the exceptional circumstances. It is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s115 (a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not only a part of it by use of the phrase “ ... within the period specified ...”

[47] It is necessary to consider whether the trauma had been occasioned by the matter giving rise to the grievance and whether that trauma had the effect of rendering the employee unable to properly consider raising the grievance for the whole of the 90 day statutory period.

(i) Medical Evidence

[48] Ms Paulson supplied a medical certificate from Dr Michael Macleod dated 15 July 2015 stating that Ms Paulson had suffered from symptoms: “*consistent with concussion and post-concussion syndrome. These include headaches, poor concentration, nausea, blurry vision, tinnitus and fatigue*”. Dr Macleod also noted that it: “*is likely to be quite some time before these symptoms resolve completely*”.

[49] A report by Dr Rod Nicholson, Occupational Medicine Specialist, dated 26 July 2015, noted that Ms Paulson as stating that she continued to suffer from daily headaches, and that whilst her memory had improved: “*she still has difficulty at times remembering people’s names, pre-accident events, and comments she has made*”.

[50] I find it is established on the basis of these reports that Ms Paulson suffered post-concussion syndrome as a result of the incident on 19 March 2015, with on-going symptoms including headaches and poor concentration.

[51] However to qualify as ‘exceptional circumstances’ pursuant to s 115(a) of the Act it is necessary that the trauma prevented Ms Paulson from considering raising the grievance for the whole of the 90 day statutory period.

(ii) For the whole of the 90 day period

[52] As observed by the Employment Court in *Telecom New Zealand Limited v Morgan*¹¹, the threshold for claiming exceptional circumstances has been set high by Parliament.

¹¹ [2004] 2 ERNZ 9.

[53] An applicant seeking leave on the basis of exceptional circumstances must be able to establish that during the whole of the 90 statutory time period he or she was unable to consider raising a personal grievance. If an applicant is shown to have been able to undertake actions during that period that indicate that he or she was able to process information and make rational decisions accordingly, that will mitigate against the proposition that exceptional circumstances affected the applicant's ability to raise a personal grievance during the whole of the 90 day statutory period.

[54] As observed in *Creedy v Commissioner of Police*,¹² it is sufficient when an employee is raising a personal grievance that the employer knows what to address when an employee raises a personal grievance. However as noted in that case, no particular form of words or complexity is required, and in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*¹³ a low level of information will suffice.

[55] During the 90 day period from 19 March 2015 I note that Ms Paulson was able to communicate with her Manager and the Principal at the School regarding her absence and the obtaining and provision of medical certificates.

[56] The resignation letter dated 24 June 2015 sets out the fact that Ms Paulson is resigning from her position as Teacher Aide at the School, the reason for the resignation, that she is in receipt of ACC benefit and as a result will not be performing any duties in her two week notice period. I find the resignation letter to be clear and unambiguous in nature.

[57] Further in the emails sent to Ms Williams on 25 June 2015 Ms Paulson elaborates in further detail the reasons behind her decision to resign and subsequently requests a written reference, and stating: "*I have enjoyed working for you, the kids are great and I will miss them, its just a shame that the accident happened*".

[58] I find the ability of Ms Paulson to be capable of emailing and updating the School on a regular basis throughout the 90 period, and to be considering alternative employment as suggested by the request for a reference, to be inconsistent with a person too emotionally traumatised to consider raising a personal grievance within the same period.

[59] Whilst not minimising the effects of the injury suffered by Ms Paulson as the result of the unfortunate accident on 19 March 2015, I do not find in the circumstances that the evidence submitted substantiates the claim that Ms Paulson was so traumatised by the events

¹² *Creedy v Commissioner of Police*[2006] ERNZ 517

¹³ [2008] ERNZ 139

of 19 March 2015 that she had been unable to turn her mind to properly consider raising a personal grievance during the whole of the 90 day statutory period.

[60] I determine that the delay in Ms Paulson raising her personal grievance within the 90 day statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances lasting at least the whole of the 90 day period.

Was Ms Paulson not provided with information on dealing with employment relationship problems?

[61] Ms Paulson was notified by letter dated 12 December 2014 that her fixed term employment as a Support Staff Teacher Associate would be continued with a commencement date of 28 January 2014 and a termination date of 9 December 2015.

[62] That letter stated under the heading; Terms and Conditions of Employment' that: *"The work to be undertaken is covered by the NZEI Support Staff Collective Agreement (which is attached).*

[63] Ms Paulson claims that she was not provided with information on dealing with employment relationship problems as set out in that letter. The Board submit that she was provided with a copy of the NZEI Support Staff Collective Agreement and this met the requirements of ss 114 & 115 of the Act.

[64] There is no claim by Ms Paulson that the NZEI Support Staff Collective Agreement was not an effective collective agreement in terms of s.54 of the Act. In accordance with s.54(3)(ii) a collective agreement must contain:

a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised;

[65] Ms Paulson accepted the offer of continued employment contained in the letter dated 12 December 2014 on a form headed 'Acceptance' which she had signed on 2 February 2015. On the Acceptance form she confirmed that she had had the opportunity to seek independent advice in connection with the offer made by the Board.

[66] Ms Paulson also agreed on the Acceptance form to the Board advising the union, NZEI, that she had been employed.

[67] There is no evidence that Ms Paulson raised an issue with the Board relating to her not having received the collective agreement referred to in the offer letter dated 12 December 2012, despite the fact that she did not sign the Acceptance form until nearly 2 months later, on 2 February 2015. She therefore had sufficient time to seek independent advice and confirmed on the Acceptance form that she had had such an opportunity.

[68] Following that opportunity I find that Ms Paulson did not raise with the Board, nor is there any evidence provided confirming that the NZEI did so on her behalf, that she had not received a copy of the collective agreement.

[69] On that basis I find it more likely that, as claimed by the Board, that Ms Paulson did receive a copy of the NZEI Support Staff Collective Agreement containing information on dealing with employment relationship problems as indicated in the offer letter dated 12 December 2012.

[70] I determine that there are no exceptional circumstances for allowing Ms Paulson to raise a personal grievance pursuant to s. 115(c) of the Act.

Is it just to grant Ms Paulson leave pursuant to section 114(4)(b)?

[71] On the basis that I have not found the delay in Ms Paulson in making an personal grievance application to have been caused by exceptional circumstances pursuant to s 114 (4) and s 115(a) of the Act, I do not have to determine whether it would have been just to grant Ms Paulson leave to proceed with her personal grievance

[72] Ms Paulson's application for leave to raise a personal grievance with the Respondents is declined.

Costs

[73] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

