

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 123  
5414955

BETWEEN                      MARK PETRIE  
   Applicant  
  
AND                                      RAINBOW PRINT LIMITED  
   Respondent

Member of Authority:     David Appleton  
  
Representatives:           Philip James, Counsel for Applicant  
   Sarah Townsend, Counsel for Respondent  
  
Investigation Meeting:    25 June 2013 at Christchurch  
  
Submissions received:    25 June 2013 from Applicant  
   25 June 2013 from Respondent  
  
Determination:              26 June 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.     The Applicant’s application for leave to raise his personal grievance for unjustified dismissal is declined.**
- B.     Costs are reserved.**

**Prohibition from publication**

[1]     Evidence was heard during the investigation meeting of Mr Petrie approaching a solicitor seeking his assistance. The nature of the evidence is set out below but this solicitor did not appear before the Authority and, it seems, is not even aware that his name has been cited in support of Mr Petrie’s claim. As Mr Petrie’s evidence amounts to a criticism of this solicitor, and the solicitor did not have the opportunity to reply to those criticisms, it would not be appropriate to publish this solicitor’s name. I therefore prohibit from publication any information, other than that already given in this determination, which could lead to the identification of that solicitor. In this determination he is referred to as Mr X.

[2] In addition, evidence was heard about certain health conditions suffered by Mr Petrie, the nature of which is not material to this determination. I therefore prohibit from publication any information about these health conditions. I do refer to Mr Petrie having suffered from depression, as that is material to part of his application.

### **Employment relationship problem**

[3] Mr Petrie claims that he was unjustifiably dismissed by the respondent when an offer of employment was made to him, which he says he accepted, and which was then withdrawn before Mr Petrie was able to commence his duties with the respondent.

[4] This determination deals with a preliminary issue; namely, whether the Authority should grant leave for Mr Petrie to raise his personal grievance after the expiration of the period of 90 days from the date on which he was advised that the respondent could no longer employ him. Mr Petrie makes his application pursuant to s114(3) of the Employment Relations Act 2000 (the Act) and argues that there are exceptional circumstances which justify the Authority granting him leave to raise his personal grievance out of time.

[5] The respondent resists the application. It has not, and does not, consent to the applicant pursuing his personal grievance claim out of time and argues that there are no exceptional circumstances which entitle the Authority to grant leave to Mr Petrie to raise his personal grievance out of time.

### **Brief account of the events**

[6] In this account I refer occasionally to the respondent terminating Mr Petrie's employment. This is a shorthand expression only, and is not to be taken that any findings have been made about the substantive claims raised by Mr Petrie.

[7] Until November 2012 Mr Petrie had been working for a Maori mental health trust carrying out general account clerk duties in a management role. On 11 November 2012 he saw an advertisement on the Seek website placed by the respondent. The role being advertised was that of Finance Manager for the Christchurch office of the respondent company.

[8] Mr Petrie made an application, received a reply from one of the directors of the company, Mr Boyle, and arrangements were made for Mr Petrie to meet with Mr Boyle together with another director, Mr Duncan. Over the coming weeks Mr Petrie met with Mr Boyle and Mr Duncan on at least two occasions and, on 28 November 2012 received an email from Mr Boyle indicating that the company wished to employ him. The email attached a copy of an employment agreement with a job specification and other documents. By way of an email dated 4 December 2012, Mr Petrie wrote to Mr Boyle and Mr Duncan stating:

*I have had look through the documentation you forwarded. Employment Agreement looks fine, I will sign and return next time I head out your way.*

[9] On 6 December 2012, Mr Boyle sent the following email to Mr Petrie:

*Hi Mark*

*When you are available can you call me on my cell phone – [number omitted].*

*I am restricted by a confidentiality agreement but Rainbow has had a proposal to sell.*

*At a Board/Shareholders meeting last night this proposal has been accepted and signed this morning.*

*The effect of this is that new Shareholders/Directors will take over the running of the company and the complete accounting function of the company will be outsourced.*

*The accounting position that was advertised will now not happen.*

*Our sincere apologies but this proposal came completely out of the blue and fits with the current personal circumstances of the Shareholders and Directors.*

*Call me when you have time.*

*Kind regards  
John Boyle  
Director*

[10] A personal grievance was raised on behalf of Mr Petrie by way of a letter from Mr James of Saunders & Co dated 13 March 2013, which was seven days after the time limit within which to raise the grievance expired. By way of a letter dated 18 March 2013 Mr Wilson, of Duncan Cotterill, replied stating that Mr Petrie had failed to raise his alleged personal grievance claim with Rainbow Print Limited within the 90 day statutory time limit provided in the Act and that Rainbow Print did not

consent to Mr Petrie raising such a claim out of time and so would not entertain his claim further.

## **Issues**

[11] This determination addresses solely the question of whether or not leave should be granted to Mr Petrie pursuant to s114(3) of the Act to enable him to raise his personal grievance out of time. Sections 114 and 115 of the Act provide as follows:

### ***114 Raising 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 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.*

*(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.*

*(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this 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); or*

(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 section 54 or section 65, as the case may be; or

(d) where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.

[12] In his brief of evidence in support of his application under s114(3), Mr Petrie states that he believes that he failed to raise his personal grievance within the statutory 90 day period for four reasons:

- (a) His lack of experience in employment law;
- (b) The failure of a solicitor who never returned his telephone calls;
- (c) His health problems; and
- (d) Concentrating on trying to maintain a relationship with his former employer.

[13] He also states that he believes that it is important to take into account the fact that the 90 day period straddled the 2012 Christmas break.

[14] In considering Mr Petrie's arguments, it is to be noted that the list of exceptional circumstances referred to in s.115 of the Act is not exhaustive. This is clear from the wording of s.115 which states that *exceptional circumstances include ...* and was confirmed in the case of *McMillan v Waikanae Holdings (Gisborne) Limited* [2005] 7 NZELC 97 (EmpC). Therefore, the Authority may take into account factors other than those expressly listed in s115(a) to (d) and may also take into account one or more of those circumstances listed in s115(a) to (d).

[15] It is necessary to consider each of the circumstances relied upon by Mr Petrie in turn.

***Mr Petrie's lack of experience in employment law***

[16] Mr Petrie told the Authority in his oral evidence that he knew very soon after the respondent's email of 6 December 2012 that he had contractual rights which had probably been breached by the respondent. He referred to the concepts of offer,

acceptance and consideration which he had learned about in his accountancy training. However, he did not realise that he might have a personal grievance as he had not even commenced working for the respondent. It was only when he consulted Mr James on 12 March 2013 that he understood that possibility.

[17] I am able to deal with this point in short order. It is well established that ignorance of the law does not constitute an exceptional circumstance under s.115. There have been a number of cases in which vulnerable employees potentially have had personal grievances but in which ignorance of the law and/or the time limit for raising the complaint, have been held not to constitute exceptional circumstances for the purposes of s.114(3). For example, I refer to the Employment Relations Authority cases of *Walker v Heritage Hotel Auckland Limited* (ERA Auckland AA168/03, 6 June 2003) and *Kumar v Waikato Steel Fabricators Limited* (ERA Auckland AA317/10, 8 July 2010).

[18] In any event, the fact that Mr Petrie knew he possibly had a contractual claim against the respondent suggests that he was aware of the possibility of legal action from 6 December 2012. Mr Petrie also states in his brief of evidence that he *realised that I must have some rights but was unsure what I could do as I had not actually taken up the position.*

[19] Mr James submits that the Authority should take into account the fact that Mr Petrie had not even taken up employment with the respondent before it was terminated, which is unusual, and so is capable of constituting an exceptional circumstance. First, although unusual, that situation is not exceptional. Second, I am satisfied that Mr James is really referring to Mr Petrie's ignorance of s.6 of the Act and of the definition in s. 5 of *person intending to work.*

[20] In light of these factors, I am satisfied that the fact that Mr Petrie had not started work before the employment was terminated, together with Mr Petrie's lack of experience in employment law, do not, singly or together, constitute exceptional circumstances which would enable me to grant the leave Mr Petrie seeks.

### ***The failure of the solicitor***

[21] Mr Petrie states that he rang a solicitor that he knew, who I identify in this determination as Mr X. He states that Mr X did not immediately return his call. Mr Petrie rang on several occasions seeking advice but his calls were never returned.

Mr Petrie states that he was aware that Mr X concentrates mainly on taxation work and rest homes but he thought he would be able to give him some advice. Despite the numerous messages he left, Mr Petrie says that Mr X never returned his calls once. He states that he lost a considerable period of time waiting for Mr X to respond and that during this time he was not aware that there was any time limit.

[22] Dealing first with the lack of knowledge of a time limit, this is of course covered above in my conclusion that ignorance is not an exceptional circumstance. However, I am somewhat surprised that Mr Petrie did not think that some time limit would apply, given his training and considerable experience of accounting.

[23] Section 115(b) allows for a situation to be deemed as exceptional circumstances where:

- a. the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee; and
- b. the agent unreasonably failed to ensure that a grievance was raised within the required time.

[24] I do not accept that the situation described by Mr Petrie falls within s.115(b). The first limb of section 115(b) requires that Mr X was an agent of Mr Petrie. Mr Petrie had known Mr X from previous dealings with him through a previous employer. Mr X was not Mr Petrie's own solicitor. Given that Mr X never returned Mr Petrie's calls, and there was no interaction between them at all, Mr X cannot in any way be said to be Mr Petrie's agent, as he had never accepted instructions from Mr Petrie.

[25] Section 115(b) also envisages a situation where Mr Petrie knew that there was a grievance to raise. I refer to the use of the definite article in the phrase *the grievance*. This was not the case when Mr Petrie was calling Mr X. Finally, the second limb cannot be said to be satisfied because Mr X was not unreasonable in failing to ensure that the grievance was raised in time when he had never been instructed by Mr Petrie to raise it at all.

[26] In light of these factors, I do not accept that Mr Petrie's failing to instruct Mr X falls within the category of exceptional circumstance envisaged by s115(b).

***Mr Petrie's health problems***

[27] It is understood that, in giving evidence about his health, Mr Petrie is seeking to rely on the exceptional circumstance stated in s.115(a) of the Act that *he was so affected or traumatised by the matter giving rise to the grievance that he was unable to properly consider raising the grievance within the period specified in section 114(1)*.

[28] Mr Petrie appended a letter to his brief of evidence from Dr Sarah Metcalf, Consultant Physician of the Department of Medicine at Christchurch Hospital. Dr Metcalf did not appear before the Authority to give evidence or to answer questions about her letter.

[29] The letter states that Mr Petrie had been suffering from stress relating to his employment with his previous employer and that that stress was leading to symptoms associated with depression and risk behaviours. The following passage is material enough to be quoted in full:

*As a consequence he sought new employment and in late November 2012 he believed he had been appointed to a new position which he was extremely excited about. At this time he seemed a lot more upbeat and more on track with managing his medical problems, taking his medication and [deliberately omitted]. However, next time I reviewed him in my outpatient clinic in February 2013 he was once again struggling. He informed me the new position had never eventuated. He was able to continue in his previous role; however that was to come to an end approximately in March 2013. Once again he was exhibiting symptoms of depression and [deliberately omitted] and his medication compliance had deteriorated.*

[30] Dr Metcalf then refers to how she was very concerned about Mr Petrie in November 2012 (prior to the respondent changing his mind about his employment) and that she referred him to the Psychiatric Liaison Service who saw him in January 2013 (after the respondent had terminated the employment). Dr Metcalf states in her letter that the assessment by that Service was that Mr Petrie did not have a major depressive disorder and that he attended *a counselling session*. Mr James submitted that Dr Metcalf had made an error in her letter when she had referred to November 2012. However, I am not able to determine if that is correct, and so take the letter at face value.

[31] Dr Metcalf also states:

*This episode has had the potential to cause considerable harm to Mark's health and the full effects are yet to be determined. I would very much like to see him in a better frame of mind where he is once again enabled to prioritise his health and adhere to his medication and the outpatient follow-up.*

[32] Case law has established that the term *so affected or traumatised* in s.115(a) *connotes substantial injury* and that the employee must suffer the inability to properly consider raising the grievance for the entire 90 day period, and not just part of it. The fact that an employee is able to properly consider raising a grievance at some point during the 90 day period means the test would not be satisfied. *Telecom New Zealand Limited v Morgan* [2004] 2ERNZ 9 (EmpC).

[33] First, I note that Mr Metcalf refers to *the potential to cause considerable harm*. She does not say that he suffered considerable harm. Mr Petrie says in his evidence that he *was very upset at the way I had been treated by Rainbow Print Limited. This resulted in a reoccurrence of the depression which I had under control*. However, during his oral evidence Mr Petrie did not say that he had suffered any reaction after 6 December 2012 that could be said to amount to a *substantial injury*. He effectively said that he was fine while he was working, but *felt flat* when he got home. This evidence is corroborated by Dr Metcalf's reporting that Mr Petrie did not suffer from *a major depressive disorder*.

[34] I also note from Mr Petrie's brief of evidence that he stated that he immediately tried to rectify the situation he was in by approaching his previous employer which agreed to take him back in employment on a short term contract. His brief of evidence states that he managed to keep rolling over the contract with his previous employer and he confirmed during oral evidence that he works there still. In other words, throughout the period from 6 December 2012 to the date of the investigation meeting Mr Petrie has been able to work. That also does not suggest he suffered a *substantial injury*.

[35] In addition, Mr Petrie was able to make several attempts to contact a solicitor during the 90 day period. This does not suggest an inability to properly consider raising the grievance for the entire 90 day period.

[36] It is my clear view from the evidence before me that Mr Petrie was not so affected or traumatised that he could not properly consider raising a personal grievance at any time within 90 days of 6 December 2012. I am most persuaded that this is the case by the fact that Mr Petrie went back to his former employer and has

held down employment with them ever since. This was despite the fact that this employment was apparently, according to Dr Metcalf's letter, the source of *very high stress and an excessive workload*. If Mr Petrie was able to carry out his role for his former employer under such circumstances he most certainly would not have been so affected or traumatised by the matter giving rise to the grievance that he could not take some simple advice and raise a simple personal grievance.

***Concentrating on trying to maintain a relationship with his former employer***

[37] This is raised as an exceptional circumstance by Mr Petrie. Whilst I have no doubt that Mr Petrie had to secure work urgently in order to earn some money to pay his bills, this is the situation that the vast majority of employees who are unexpectedly dismissed have to face. The fact that Mr Petrie was able to continue working with his former employer before his notice expired does not cause me to think that his pending unemployment was such an onerous burden that it prevented him from seeking advice and raising a personal grievance. I acknowledge that Mr Petrie was put on a series of two week rolling contracts by his previous employer, which must have been a source of anxiety for him, but do not accept that that fact prevented him from seeking advice and raising a grievance at any time before 6 March 2013.

[38] Accordingly, I do not accept this as an exceptional circumstance which justifies me granting leave to Mr Petrie to raise his personal grievance out of time.

***The fact that the Christmas and New Year break occurred within the 90 day period***

[39] It is not clear exactly how this impacted on Mr Petrie's ability to raise a personal grievance, especially given that he states that, as soon as he had sought advice from Saunders & Co, a personal grievance was raised on his behalf the following day. The Christmas and New Year period would, at most, have taken up 10 days of those 90 days and I simply do not accept that they in any way constitute an exceptional circumstance which prevented Mr Petrie from raising a personal grievance within the requisite 90 day period.

**Determination**

[40] Having carefully considered Mr Petrie's evidence, I cannot see any cogent evidence that the test set out in the first limb of s.114(4) has been met. As both limbs

of the test must be met, accordingly, I decline to grant leave for Mr Petrie to raise a personal grievance outside of the statutory 90 day time limit.

**Costs**

[41] The parties are to seek to agree how costs should be dealt with between them. However, in the absence of such an agreement within 28 days of the date of this determination, the respondent may seek a contribution to its costs by way of counsel's memorandum. Mr Petrie may respond by way of counsel's memorandum within a further 14 days.

David Appleton

Member of the Employment Relations Authority