

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2018] NZERA Wellington 67  
3021161

BETWEEN                      DAVID JAMES PRATER  
Applicant

AND                              HOKOTEHI MORIORI TRUST  
Respondent

Member of Authority:      Trish MacKinnon

Representatives:            David Prater, representing himself  
Blair Scotland, counsel for Respondent

Investigation Meeting:     On the papers

Submissions and             27 March and 6 June 2018 from the Applicant  
Affidavits Received:       13 April 2018 from the Respondent

Determination:              3 August 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]     David Prater was employed by the Hokotehi Moriori Trust (the Trust) from early August 2016 until he was dismissed with immediate effect by letter from his employer dated 18 July 2017. Prior to that Mr Prater had been suspended on pay from his employment from 26 May 2017, a matter over which he raised a personal grievance for disadvantage arising from an unjustifiable action of his employer.

[2]     Mr Prater claims his dismissal was unjustified and the Trust failed to provide him with a safe working environment. He also claims his employer failed to pay monies owed to him.

[3] The Trust denies Mr Prater's claims. It also says he failed to raise personal grievances for unjustifiable dismissal and failure to provide a safe working environment within the statutory 90 day timeframe. It does not consent to those grievances being raised out of time. It says he has not included a claim for unjustifiable disadvantage arising from his suspension in these proceedings.

[4] In the course of telephone conferences with the Authority Mr Prater acknowledged he had not raised a personal grievance for unjustifiable dismissal within the statutory time frame. While the focus was primarily on the dismissal grievance, I take Mr Prater's acknowledgement to include his grievance in relation to the Trust's failure to provide a safe work environment.

[5] Mr Prater notified that his wish to apply for leave to raise the grievances out of time on the basis that exceptional circumstances existed and it would be just to allow him to do so.

[6] It was decided the issue of whether leave would be granted would be determined on the papers as a preliminary matter, by way of submissions and affidavits. Mr Prater's personal grievance relating to his suspension from employment, and the question of whether he wishes to pursue this, will be placed on hold pending determination of whether he is also able to pursue an action for unjustifiable dismissal and unjustifiable disadvantage in relation to work environment safety. There is no disagreement that a personal grievance for unjustifiable disadvantage, arising from his suspension from employment, was raised within time.

### **Relevant law**

[7] Section 114 of the Employment Relations Act 2000 ("the Act") provides that a personal grievance must be raised within a period of ninety 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 the period.

[8] Under s. 114(4) of the Act the Authority has the discretion, after giving the employer an opportunity to be heard, to grant an employee leave to raise a personal grievance out of time. This may be subject to any conditions the Authority sees fit to impose, if it:

- (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.

[9] Section 115 of the Act makes further provision regarding exceptional circumstances under s. 114(4) as follows:

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.

[10] Mr Prater asks the Authority to find that exceptional circumstances exist such that it would be just to allow him to raise his grievances out of time. He relies on medical grounds and abandonment by the lawyers who had been acting on his behalf.

### **Relevant background**

[11] Mr Prater was the General Manager Operations for the Trust. Maui Solomon is the Executive Chairman of the Trust. Tensions arose in the relationship between the parties within months of the employment commencing. On 17 May 2017 Mr Prater provided a medical certificate to his employer in which his General Practitioner (GP) at the time noted she was concerned over Mr Prater's health and stated he should avoid high stress situations.

[12] A meeting was held, at the Trust's request, with Mr Prater in which he was asked to disclose the nature of the high stress situations. His declining to do so led to the Trust suspending Mr Prater on health and safety grounds, a decision it confirmed by letter dated 26 May 2017.

[13] Mr Prater, through his solicitors at the time, raised a personal grievance by letter dated 25 May 2017. Despite this appearing to pre-date the Trust's letter of suspension, the contents of the personal grievance letter make it clear he had already received confirmation from the Trust of his suspension.

[14] The suspension continued in force until Mr Prater's dismissal occurred with immediate effect on 18 July 2017 following a disciplinary investigation that started on 9 June 2017.

[15] Mr Prater's dismissal was conveyed by letter dated 18 July 2017, emailed to his legal representatives at the time.

[16] Mr Prater raised a personal grievance over his dismissal by way of the Statement of Problem received in the Authority on 17 October 2017. The Authority Officer contacted the respondent's legal representative, Blair Scotland, that day querying whether he had instructions to act on the Trust's behalf. Mr Scotland confirmed on 18 October 2017 he was authorised to accept service of the proceedings, noting this was without prejudice to the Trust's right to object to any personal grievance being raised outside statutory timeframe. The Statement of Problem was served the same day.

[17] In its Statement in Reply the respondent stated the Trust was unaware Mr Prater intended to challenge his dismissal until receiving service of the Statement of Problem on 18 October 2017. It noted this was 92 days after Mr Prater's employment with the Trust had ended, and outside the statutory time frame for raising a personal grievance.

[18] The Trust did not consent to this grievance, or a grievance for disadvantage in relation to the alleged unsafe work environment, being raised out of time.

[19] I note that Mr Prater's statement of problem refers to "constructed dismissal which led to unfair dismissal". It is clear from the documentation attached to his application that he is referring to actions taken by his employer that he considered unfair, which ultimately led to his unjustifiable dismissal.

**Should leave be granted to Mr Prater to raise his personal grievances out of time?**

*Are there exceptional circumstances?*

[20] Mr Prater has represented himself since shortly after his dismissal by the Trust. In support of his application for leave to raise his personal grievances out of time Mr Prater submitted an affidavit with attachments. These included a letter from his current GP in support of his application.

[21] Although undated, the letter must have been written between 16 February 2018 and 26 March 2018. The former of the two dates is when the parties were advised this preliminary matter would be determined on the papers, and the latter is the date of Mr Prater's affidavit attaching the GP's letter and other documents.

[22] The GP, Dr Brent Maxwell, stated he had retrospectively reviewed Mr Prater's GP and counselling notes from the relevant periods of time. He confirmed Mr Prater's mental health and impaired ability to focus at the time could have made it highly likely he could make mistakes while undertaking even day to day tasks let alone those that were more complex.

[23] Another of the attachments to Mr Prater's affidavit was an email to him dated 3 August 2017 from his former legal representative answering questions and comments made by Mr Prater about his situation. The email concluded with the following:

Given that you have been dismissed and that the only thing required is that you raise a grievance within 90 days of that decision, I would ask that you refrain from contacting either myself or Ms (other lawyer) until she has provided the substantive response I have asked her for.

[24] Other emails attached to Mr Prater's affidavit sent by him show his anxiety at not being able to contact his lawyer and at or obtain any response to his calls. In one of those emails he asked a third party to contact the lawyer on his behalf to inform her of "extreme anxiety" and to pass on his request that she "tell us the plan".

[25] In his affidavit Mr Prater referred to being "left totally abandoned" by his former lawyers. As I have no evidence from them, I make no comment on that claim. I do note, however, the email cited above shows that his former legal representative

made Mr Prater aware there was a time frame of ninety days within which a personal grievance for his dismissal should be raised. The email contained no advice as to how that might be done.

[26] Mr Prater chose to raise his personal grievance by commencing proceedings in the Authority. There is no issue with his ability to do that as the Employment Court confirmed in *Premier Events Group Limited v Beattie (No 3)*<sup>1</sup> where former Chief Judge Colgan stated:

"...both the statute and the principles of long established case law allow a personal grievance to be raised by lodging a statement of problem in the Authority if such claim is served on the employer within the 90 day limitation period..."

[27] The former Chief Judge noted, however, that:

"...this method of raising a personal grievance runs the risk that service may occur outside the 90 day window..."<sup>2</sup>

[28] Mr Prater has indeed run foul of that risk. Whether he miscalculated the 90 day timeframe or was unaware he needed to allow sufficient time for the Authority to process his application and serve it on the respondent is unclear. Neither circumstance, however, constitutes exceptional circumstances.

[29] In the absence of Dr Maxwell's letter I would have dismissed Mr Prater's application for leave to raise his personal grievances out of time. However, I must consider the medical evidence provided by Mr Prater, in the form of a letter from his current GP. I cannot ignore the conclusion Dr Maxwell reached following his review of the notes of Mr Prater's former GP and of counselling notes from the period of time when he lodged his application.

[30] Dr Maxwell's assessment was that Mr Prater's mental health and impaired ability to focus at that time could have made it highly likely he could make mistakes in carrying out simple tasks let alone tasks of a more complex and demanding nature. He confirmed that a momentary lapse in Mr Prater's attention resulting in a serious error was very likely given his state of mind at the time.

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<sup>1</sup> [2012] NZEmpC 79 at [13].

<sup>2</sup> N1 at [10].

[31] This is not a situation that sits within any of the examples of exceptional circumstances at s. 115 of the Act despite having elements of s.115(a). The list of examples is not exclusive as confirmed by the Supreme Court in *Creedy v Commissioner of Police*.<sup>3</sup>

[32] Mr Prater's situation is not one in which he was unable to turn his mind to the raising of his grievances. He did turn his mind to that matter and attempted to raise his grievances. He did not do so within 90 days and I must consider whether his state of mind at the time prevented him raising his grievances in accordance with the statutory requirements.

[33] I conclude from Dr Maxwell's assessment that Mr Prater's mental health and inability to focus as a result of the matters giving rise to his personal grievances are very likely to have resulted in his failure to raise his grievances within the 90 day timeframe. I find this constitutes exceptional circumstances under s. 114(4) of the Act.

***Is it just that leave be given for the grievances to be raised out of time?***

[34] In *Creedy* the Supreme Court, in considering s. 114(4), observed that the second of the two conditions for the grant of leave to raise a grievance after the expiration of the 90 day period was that "the justice of the case must require an extension of time".<sup>4</sup> Later in the judgment the Court stated that the overall justice of the case included "taking account of the position of the employer facing a late claim".<sup>5</sup>

[35] Former Chief Judge noted in *Austin v Silver Fern Farms Limited* that the test:

[73] ... amounts essentially to a balancing of the justices and injustices to the parties of permitting a late raised grievance to proceed.<sup>6</sup>

[36] In this instance the grievance was raised only two days outside the statutory time frame by the respondent's reckoning. The delay was minor and the Trust will not be unduly prejudiced if Mr Prater is granted leave to raise his grievances out of time. I consider it would be just to allow him to do so.

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<sup>3</sup> [2008] NZSC 31 at [26]

<sup>4</sup> N3 at [25].

<sup>5</sup> N3 at [33].

<sup>6</sup> [2014] NZEmpC 30.

**Determination**

[37] For the reasons given above I am satisfied exceptional circumstances exist pursuant to s. 114(4) of the Act and it is just that Mr Prater be given leave to raise his two personal grievances out of time<sup>7</sup>.

[38] In accordance with s. 114(5) of the Act, I direct the parties to mediation under the auspices of the Mediation Service of the Ministry of Business, Innovation and Employment to seek to resolve Mr Prater's grievances.

**Costs**

[39] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority

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<sup>7</sup> For unjustifiable dismissal and for unjustifiable disadvantage arising from his employer's alleged failure to provide a safe work environment.