

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

**[2020] NZERA 215
3081672**

BETWEEN

GEORGIA ROGERS
Applicant

AND

WELLINGTON TOYS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Allan Halse, advocate for Applicant
Phil Mitchell, counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 14 May 2020 from Applicant:
15 May 2020 from Respondent

Determination: 29 May 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Georgia Rogers, seeks leave to raise a personal grievance that she was constructively dismissed and unjustifiably disadvantaged by the Respondent, Wellington Toys Limited (WTL) outside of the statutory time frame set out in s 114(1) of the Employment Relations Act 2000 (the Act).

[2] WTL does not consent to the personal grievance being raised outside of the statutory time frame.

[3] This determination addresses the preliminary issue of whether or not Ms Rogers raised a personal grievance with WTL within 90 days of the grievance occurring or coming to her notice, whichever is the later in accordance with the requirements of s114 (1) of the Act, such that she is entitled to pursue her grievances before the Authority.

Note

[4] The parties agreed to the Authority determining this issue based on the papers currently before the Authority including the Application for leave,, the Statement in Reply, documents submitted by the parties, and submissions from the parties.

[5] The evidence has as a consequence not been tested at this preliminary stage.

Brief Background Details

[6] Ms Rogers commenced employment with WTL on 18 June 2018 in the position of Duty Manager.

[7] Ms Rogers resigned from her employment with WTL on 17 May 2019 and her final day of work was 3 June 2019.

[8] Ms Rogers subsequently engaged the services of CultureSafe NZ Limited, an advocacy firm, which emailed a letter to WTL on 29 August 2019 advising WTL that Ms Rogers wished to raise a personal grievance in respect of constructive dismissal and unjustifiable disadvantage.

[9] Ms Rogers is claiming constructive dismissal. A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[10] Ms Rogers resigned on 17 May 2019 is claiming constructive dismissal. On that basis the action alleged to amount to a personal grievance came to the notice of Ms Rogers on 17 May 2019 and the 90 day statutory time frame operates from that date.

[11] On 12 February 2020 Ms Rogers filed an Application for Leave to Raise a Personal Grievance out of time on the basis of exceptional circumstances pursuant to s 115 of the Act in the Authority.

[12] WTL filed a Statement in Reply on 2 March 2020 opposing the raising of Ms Roger's personal grievance outside the time period specified in the Act on the grounds that it does not accept that Ms Rogers' delay in raising the grievance was caused by exceptional circumstances.

Raising a personal grievance out of time

[13] In circumstances in which an employee seeks leave to raise a personal grievance outside of the statutory time frame, s 114 (4) of the Act provides that the Authority may grant leave 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

[14] Ms Rogers seeks to rely on the following exceptional circumstances as set out in s 115(a) and (b) of the Act:

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)
- 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;

Was Ms Rogers so affected or traumatised that she was unable to raise her personal grievance within the 90 day statutory time frame?

[15] The leading case on the interpretation and effect of section 115 (a) of the Act is *Telecom New Zealand Limited v Morgan*¹. 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*”²

[16] 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.

[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

¹*Telecom New Zealand Limited v Morgan* [2004] 2 ERNZ 9.

² Ibid at para [22]

the whole of the 90 day period and not only a part of it by use of the phrase “ ... within the period specified ...”

[17] 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 Ms Rogers unable to properly consider raising the grievance for the whole of the 90 day statutory period.

[18] The trauma must be such that it flowed from the matter giving rise to the personal grievance. Ms Rogers is claiming constructive dismissal and unjustifiable disadvantage arising from a situation of bullying in the workplace.

[19] Before the Authority is a copy of Ms Rogers’ letter of resignation which states:

Dear Phil and Kimberley,

It is with much sadness that I will be handing in my two weeks’ notice ...

I would like to thank you both for the many great opportunities and experience you have provided me with over my time here at Toyworld. It has been an amazing journey that has filled me with pride and I would like to wish you both the very best for your futures.

[20] Whilst I accept that an unhappy employee may wish to resign, and may be reluctant to express their concerns or reasons for doing so in writing, this letter of resignation expresses more than a mere statement of the fact of resignation.

[21] On the contrary I find it is indicative of the employment experience being a very positive one. I find there is no indication of trauma occasioned by the matter giving rise to the grievance as expressed in this letter.

[22] Ms Rogers also continued working at WTL throughout the two week notice period, there is no evidence that she was so traumatised that she was unable to carry out her duties as Duty Manager effectively during those two weeks.

(ii) For the whole of the 90 day period

[23] As observed by the Employment Court in *Telecom New Zealand Limited v Morgan*³, the threshold for claiming exceptional circumstances has been set high by Parliament.

[24] Having found trauma arising from the employment situation not established, I find no evidence of trauma rendering Ms Rogers was incapable of properly considering the personal grievance for the whole of the 90 day period.

³ [2004] 2 ERNZ 9.

[25] Moreover it is submitted on behalf of Ms Rogers that she: “tried on several occasions to raise her concerns with her employers”. This submission undermines the assertion that Ms Rogers was ‘so affected or traumatised’ occasioned by the matter giving rise to the grievance that she was unable to consider raising a personal grievance for the whole of the 90 day period.

[26] I determine that the delay in Ms Rogers raising her personal grievance within the 90 day statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances caused by trauma which prevented her properly considering raising her personal grievance for the whole of the 90 day period .

Did Ms Rogers make reasonable arrangements to have an agent raise her personal grievance and it unreasonably failed to do so?

[27] Ms Rogers letter of resignation was dated 17 May 2019.

[28] It is stated at paragraph 6 of the Statement of Problem that Ms Rogers sought the assistance of CultureSafe in August 2019, and that CultureSafe raised a personal grievance for constructive dismissal and unjustifiable disadvantage on her behalf on 29 August 2019.

[29] There is no date provided establishing when in August 2019 Ms Rogers engaged CultureSafe. Moreover there is no evidence that CultureSafe failed to act promptly once instructed by Ms Rogers.

[30] I determine that the delay in Ms Rogers raising her personal grievance within the 90 day statutory time limit pursuant to s 114 of the Act was not occasioned by exceptional circumstances caused by an unreasonable failure of the agent to raise her personal grievance.

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

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

[32] Ms Rogers application for leave to raise a personal grievance with the Respondent is declined.

Costs

[33] Costs are reserved. Should the parties seek costs, they are encouraged to try to resolve any issue of costs between themselves.

[34] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[35] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority