

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 43
5498604

BETWEEN DEAN LESLIE RUSSELL
Applicant

A N D TRANSFIELD SERVICES
(NEW ZEALAND) LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Melissa Russell, Counsel for the Applicant
Richard Upton, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 22 January 2015 from the Applicant
30 January 2015 from the Respondent

Date of Determination: 10 February 2015

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

- A. The unjustified dismissal claim was not raised within the statutory 90 day time period;**

- B. Mr Russell failed to establish the existence of *exceptional circumstances* under s.115(a) of the Employment Relations Act 2000;**

- C. Costs are reserved.**

Employment relationship problem

[1] This determination addresses the preliminary issue of whether the applicant, Mr Dean Leslie Russell (Mr Russell), raised his personal grievance with his employer, Transfield Services (New Zealand) Limited, (Transfield) within 90 days of the grievance occurring in accordance with the requirements of s.114(1) of the

Employment Relations Act 2000 (the Act), so that he is able to pursue his grievance before the Authority.

[2] In the event that it is determined that Mr Russell failed to raise his personal grievance within the statutory 90 day period, Mr Russell seeks leave to raise his grievance outside the 90 day time period pursuant to s.114(3) of the Act.

[3] In seeking leave under s.114(3) of the Act, Mr Russell seeks the Authority's leave to raise his grievance outside the 90 day period, citing exceptional circumstances, namely 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 90 day time period. In seeking leave on this basis, Mr Russell relies on s.115(a) of the Act.

The legislation

[4] Section 114 of the Act states:

- (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 sub-section (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 one or more of the circumstances set out in s.115); and*
 - (b) *Considers it just to do so.*

[5] As stated above, Mr Russell seeks to rely on the following grounds:

Section 115

Further provision regarding exceptional circumstances under s.114

For the purposes of s.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 s.114(1) ...*

Issues

- [6] The issues for determination by the Authority are:
- (a) Did Mr Russell raise a personal grievance of unjustified dismissal within the statutory 90 day time period?
 - (b) If the answer to (a) is “no”, should leave be granted pursuant to s.114(4) of the Act for Mr Russell to raise his personal grievance outside the statutory 90 day time period on the basis that he was so affected or traumatised that this amounted to exceptional circumstances in terms of ss.114 and 115 of the Act?
 - (c) In the event that the answer to this question is “yes”, is it just to grant leave pursuant to s.114(4) of the Act?

Investigation meeting

[7] Counsel for Mr Russell and for Transfield requested that this preliminary matter be determined by the Authority on the papers, on the basis that there is very little in dispute between the parties on the facts.

[8] Affidavits were filed by Mr Russell and Mr Russell’s brother, Mr Shaun Russell, and by Ms Karissa Marsom for Transfield.

First Issue

Did Mr Russell raise a personal grievance of unjustified dismissal within the statutory 90 day time period?

[9] Mr Russell commenced employment with Transfield on 7 February 2011 in its infrastructure division based at Puketona, as a quarries supervisor.

[10] Mr Russell signed an individual employment agreement on 7 February 2011. Schedule D to the employment agreement sets out the procedure for resolving employment relationship problems. On page 2 of Schedule D it states:

... an employee who believes they have a personal grievance must bring the alleged grievance to the attention of the company within ninety (90) days of the alleged grievance arising (or the employee becoming aware that they have a grievance).

[11] While carrying out his duties for Transfield on 24 January 2014, Mr Russell was issued with a speeding infringement for driving at a speed of 144km per hour in a 100km speed area. Mr Russell was suspended from driving for a period of 28 days.

[12] Following a disciplinary process, Mr Russell was dismissed by Transfield on 5 March 2014 for serious misconduct. The decision to dismiss was confirmed in writing by Transfield on 19 March 2014.

[13] It appears that Mr Russell attempted to file a statement of problem in the Authority on 30 June 2014. However, the statement of problem did not contain the information required, and was not able to be processed. On 6 August, the statement of problem was correctly filed in the Authority by Mr Russell.

[14] Upon service of the statement of problem, Transfield filed its statement in reply (dated 18 August) in the Authority on 25 August.

[15] Mr Russell says the grievance was raised orally, through his brother/representative, Mr Shaun Russell, at the disciplinary meeting held with Transfield on 24 February 2014. Ms Marsom gave evidence for Transfield that she came away from that meeting with the view that Mr Russell and Mr Shaun Russell would challenge whatever decision Transfield might eventually make.

[16] At a subsequent disciplinary meeting on 5 March 2014 at which Mr Russell was dismissed, Mr Shaun Russell says:

At the conclusion of that meeting I confirmed verbally with both Mike Grimshaw and Karissa Marsom that Dean was officially putting them on notice that he would be filing a personal grievance for unjustified dismissal. Both Mike and Karissa acknowledged and accepted this.

[17] Ms Marsom agrees that at the meeting on 5 March, a preliminary decision was conveyed to Mr Russell that he was to be dismissed. As this was being worked through, Mr Shaun Russell said that he was putting them on notice that Dean “*would file a personal grievance ...*”. Ms Marsom says nothing specific was provided about the grievance, it was simply that Transfield was being *put on notice* by Mr Russell that he was going to take a personal grievance. A decision was made at the conclusion of the meeting to dismiss Mr Russell.

[18] The timeframe within which Mr Russell was to raise his grievance under the Act ran until 3 June, being 90 days from the date of dismissal on 5 March. Mr Russell says his personal grievance was verbally raised with Transfield on 5 March.

[19] Transfield says that by putting it “on notice” at the meetings on 24 February and 5 March, Mr Russell did not raise a grievance as required by s.114 of the Act. Transfield says the grievance was not raised with it until it was served with Mr Russell’s statement of problem, well outside the 90 day timeframe.

[20] I do not accept that “*putting Transfield on notice*” constitutes a raising of a grievance as required by s.114 of the Act. From the evidence filed, it is my view that Mr Russell did not raise his personal grievance at the meetings on 24 February or 5 March as required by s.114 of the Act. Rather he suggested, through Mr Shaun Russell that he “*intended*” or was “*giving notice*” that he intended to raise a personal grievance.

[21] I accept the submissions of counsel for Transfield that the law is settled in relation to what constitutes the raising of a personal grievance under s.114 of the Act. The leading case is *Creedy v. Commissioner of Police*¹, in which the Court stated:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising 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 ... As the Court determined in cases under previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[22] This statement of the law was recently cited with approval by Judge Ford in *Snowdon v Radio New Zealand Limited*².

[23] There is no evidence of any detail provided by Mr Russell or Mr Shaun Russell as to the personal grievance, other than a claim that Mr Russell had been unjustifiably dismissed. There was no detail as to why Mr Russell considered he had been unjustifiably dismissed or what Transfield was required to do to address the alleged grievance.

¹ [2006] ERNZ 517

² [2014] NZEmpC45at para.[54]

[24] The answer to the first issue is “no”.

Second issue

If the answer to the first issue is “no” should leave be granted pursuant to s.114(4) of the Act for Mr Russell to raise his personal grievance outside the statutory 90 day time period on the basis that he was so affected or traumatised that this amounted to exceptional circumstances in terms of ss.114 and 115 of the Act?

[25] Mr Russell seeks the leave of the Authority to raise his grievance out of time pursuant to s.114(4) of the Act on the grounds that his delay in raising the personal grievance was occasioned by exceptional circumstances.

[26] Mr Russell relies on the circumstances outlined in s.115(a) of the Act to support his application for leave, namely that he was “*so severely affected or traumatised by the matter giving rise to the grievance that [he] was unable to properly consider raising the grievance*”.

[27] The Court in *Telecom New Zealand Ltd v. Morgan*³ considered the interpretation and effect of s.115(a) of the Act. The Court in addressing the application of s.115(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. The Court stated in relation to s.115(a) that:

*Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissal or other matters giving rise to grievances.*⁴

[28] The Court further commented at paras.[23] and [24]:

[23] Deconstructing the subsection, the following elements appear necessary to meet the exemplar “exceptional circumstances” test under section 115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. That is illustrated by the use of 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 a physical sense, this means shock following a physical wound or injury characterised by a drop in body temperature and mental confusion. In the more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long- term neurosis.

³ [2004] 2 ERNZ 9

⁴ Ibid at para.[22]

[24] *Next, section 115(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 a grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s.115(a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not for only a part of it by use of the phrase “... within the period specified ...”.*

[29] There are two assessments that are to be made when applying the test under s.115(a) of the Act. The first is to establish that the trauma had the effect that the employee was unable to properly consider raising the grievance for the entire 90 day period. The second is that the trauma must have been occasioned by the matter giving rise to the grievance.

Medical evidence

[30] Mr Russell provided the Authority with a letter dated 26 November 2014 from his General Practitioner, Dr Charlie Dundas, as medical evidence that he had been suffering symptoms of major anxiety. In the letter, Dr Dundas referred to appointments with Mr Russell on 4 February 2014 in which he had been acutely stressed after having been caught speeding, lost his driving licence and feared the loss of his job and an appointment on 25 February 2014 following the postponement of a meeting with Transfield.

[31] These two appointments took place prior to Mr Russell’s dismissal on 5 March and before the commencement of the 90 day timeframe. Mr Russell consulted Dr Dundas on one further occasion on 21 March after failing a drug test.

[32] Dr Dundas refers in his letter of 26 November to Mr Russell’s admission to the Bay of Islands Hospital on 25 June after having taken a drug overdose. Dr Dundas says:

From the clinical discharge notes he stated he had been feeling very low for several months. The cumulative stress from losing his job and the impact this had on his life had brought him to a very low point resulting in him taking an overdose of medication.

[33] Dr Dundas appears in my view to have drawn a conclusion about the reasons for Mr Russell's overdose from the clinical discharge notes rather than from any consultation that he had with Mr Russell.

[34] Mr Russell's evidence is that his overdose was a result of increasing depression, stress and insomnia due to his employment problems and his feelings of worthlessness. Mr Russell refers to an argument with his partner about financial matters on the day of his overdose.

[35] The discharge notes from the Bay of Islands Hospital dated 25 June provide a clinical management summary in relation to Mr Russell's admission on 25 June. It states:

Mr Russell woke on Tuesday morning, felt sore and fed up with life, had an argument with his wife, and says he wanted to go to sleep for a while and start the day over. ... [He] rates his mood low for the past several months. Has feelings of worthlessness and guilt and some thoughts of not wishing to be alive almost daily for a number of weeks.

[36] From the evidence, it appears Mr Russell consulted with his General Practitioner on 4 and 25 February exhibiting signs of anxiety. There was a further consultation on 21 March, the details of which are sketchy. The overdose took place on 25 June after the expiration of the 90 day time frame.

[37] Mr Russell also produced emails dated 8 April with a Dr Matthew Brick with regard to scheduled right knee surgery. It appears that in December 2013 Mr Russell obtained approval from ACC for right knee surgery and in March 2014, Mr Russell was in email correspondence with Dr Brick in relation to the operation scheduled for April.

[38] The knee surgery took place on 8 April. Mr Russell's evidence is that he was bedridden for a couple of months following his surgery. Mr Russell says he was in considerable pain and taking pain killers. Mr Russell says being bedridden gave him more time to think about the issues with Transfield and his loss of employment which made his depression even worse. This depression subsequently led he says, to his drug overdose on 25 June.

[39] According to Mr Shaun Russell when he contacted Mr Russell in early June, he asked Mr Russell “*whether he had filed his claim with the ERA and he said that he and his partner had been working on it and that it was almost ready to go*”.

[40] I am not satisfied, on the balance of probabilities, that Mr Russell was so affected or traumatised by his dismissal and the circumstances giving rise to it, that he was unable to properly consider raising his grievance during the 90 day period beginning on 5 March 2014. The standard is a high one.

[41] Mr Russell consulted his general practitioner about anxiety as a result of events prior to his dismissal including the loss of his licence as a result of speeding. Mr Russell was able to and did liaise with Dr Brick about his knee surgery and had the operation in April. Mr Russell was on painkillers as a result of his knee surgery and spent time in bed thinking about his dismissal. Mr Russell and his partner worked on his claim for the Authority, it seems, during the 90 day period. Mr Russell’s drug overdose occurred on 25 June, after the expiration of the 90 day time limit.

[42] Section 115(a) of the Act being the only ground relied on by Mr Russell for leave to extend the time for bringing his personal grievance under s.114(4), he has not established the existence of exceptional circumstances which is the first step for the granting of such leave.

[43] Mr Russell is refused leave to bring his personal grievance to the Employment Relations Authority.

Costs

[44] Costs are reserved. The respondent has 14 days within which to file a memorandum as to costs. Mr Russell has 14 days upon receipt of the memorandum as to costs within which to respond.

Anna Fitzgibbon
Member of the Employment Relations Authority