

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 384
5583735

BETWEEN	TONY SCHICKER Applicant
AND	GEA PROCESS ENGINEERING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	David Grindle, Counsel for the Applicant Stephen Langton, Counsel for the Respondent
Investigation:	On the papers
Determination:	7 December 2015

DETERMINATION OF THE AUTHORITY

- A. The application by Tony Schicker for leave to raise a personal grievance after the expiry of the 90-day period specified by s 114 of the Employment Relations Act 2000 is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Tony Schicker sought leave under s114(4) of the Employment Relations Act 2000 (the Act) to raise a personal grievance out of time against his former employer GEA Process Engineering Limited (GEA). The application was, effectively, seeking leave to raise a counter claim in proceedings GEA has begun against him in Authority for alleged breaches of his contractual obligations during his employment. If granted leave to raise his grievance Mr Schicker asked for his case to being jointly investigated with GEA's claims against him.

[2] Mr Schicker worked for GEA from October 2002 to 30 January 2015. He

gave notice of resignation on 5 January 2015 and 14 days later was placed on garden leave. In a statement of problem lodged on 24 September 2015 Mr Schicker said the garden leave was imposed abruptly and without consultation at a meeting in Auckland to which he was called without warning. He said that on the same day he was put on garden leave GEA representatives had arrived at his home office in Whangarei and taken all GEA property in his possession.

[3] If given leave to raise his grievance he sought findings that GEA's actions breached good faith obligations owed to him and had unjustifiably disadvantaged him. If those findings were made he sought orders requiring GEA to pay him \$3500 distress compensation, a penalty for breaching his employment agreement and his legal costs.

[4] The earlier GEA application (which Mr Schicker asked be jointly investigated with his grievance if given leave to proceed) alleged he had breached terms of his employment agreement by developing a competing business with one of its clients and forwarding GEA's confidential business information to third parties. It sought findings to that effect and orders for Mr Schicker to comply with his on-going confidentiality obligations, for an injunction preventing him from assisting the competing business of the client, for a penalty to be imposed on him, and for an inquiry into damages to be carried out by the Authority.

[5] GEA's application was lodged in the Authority on 16 June 2015, some 137 days after Mr Schicker's employment was said to have ended.

[6] With his statement in reply to that application, lodged on 1 July 2015, Mr Schicker's lawyer sent a letter to GEA's lawyers raising a personal grievance and describing it as a matter to be addressed in mediation about GEA's application. The letter advised that if the matter was not resolved, Mr Schicker would seek leave from the Authority to formally raise the grievance out of time. He did so by an application lodged on 24 September 2015

[7] GEA opposed Mr Schicker's leave application on the grounds that the criteria for such leave, required under s 114(4) of the Act, were not met.

Investigation

[8] By consent the leave application was determined on the papers.¹ Mr Schicker lodged an affidavit in support of his application and the representatives of both parties provided written submissions.

[9] As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed a conclusion on the issue for resolution and specified the order made as a result but has not recorded all the evidence and submissions received.

The statutory requirements

[10] To raise a personal grievance under the Act Mr Schicker had to do so within 90 days of when the action alleged to amount to a grievance occurred or came to his notice. Unless GEA consented to the grievance being raised later than then, he could do so with the Authority's leave. Section 14(4) of the Act sets two thresholds for granting such leave. Firstly the Authority must have been satisfied the delay in Mr Schicker raising the grievance "was occasioned by exceptional circumstances", with four examples of such circumstances set out in s 115 of the Act. Secondly, if the threshold of exceptional circumstances was crossed, the Authority must have then considered whether it was "just" to grant the leave.

Exceptional circumstances?

[11] Having considered the parties' submissions and the evidence available through Mr Schicker's affidavit I was not satisfied his delay in seeking to raise a grievance was occasioned by exceptional circumstances.

[12] From his affidavit the event giving rise to the alleged disadvantage appeared to be what happened on 19 January, when he was said to have abruptly been placed on garden leave and company documents and other property taken off him. His submissions on the leave application framed the disadvantage more widely as having been denied (i) the ability to work out his notice, (ii) a dignified end to his employment of some 15 years length, and (iii) the right to be consulted about a significant and adverse event in his employment. On that basis the disadvantage

¹ Employment Relations Act 2000, s 174 D.

could, at its broadest, have been said to run to the last day of his employment so those actions alleged to amount to the basis of his personal grievance occurred up to that last day. In his affidavit and submissions Mr Schicker said that last day was 30 January 2015, counting the four working weeks from when he gave notice on 5 January. However his contractual term about resignation required not four weeks but one month's notice. On that basis he could be said to have remained in GEA's service until 4 February 2015.

[13] On my count, taken from 4 February, the ordinary statutory period for raising a grievance ran to 6 May 2015 at the latest. Mr Schicker, by affidavit, gave this evidence about why he had not raised a grievance within that 90-day period:

I didn't challenge the way I was treated at the time, although I knew it was wrong but I didn't want to be engaging GEA in litigation, and I didn't want to be reminded of the way my employer treated me, I was wanting to move on.

Although it was quite clear to me that their actions were in breach of the good faith obligation, and they had left me significantly disadvantaged in that I couldn't conclude my 15 years of employment with dignity, I hoped to move on without further confrontation.

[14] GEA's lawyers sent Mr Schicker a letter on 7 May about the issues over which GEA has now commenced proceedings in the Authority. For the purposes of this determination that date was of some significance as it was, coincidentally or otherwise, only one day after the expiry of the 90-day period during which Mr Schicker could have raised a personal grievance.

[15] Mr Schicker submitted GEA's pursuit of its claim against him from 7 May onwards was the 'exceptional circumstance' that occasioned his delay in raising the grievance. The implication in the submission was that GEA had waited in a deliberate and calculated way until just after the expiry of the 90-day period. Mr Schicker submitted he had not raised a grievance within that period because he was "traumatised" by GEA's actions after he gave notice of resignation and "wanted to walk away from further conflict".

[16] His submission sought to bring his application for leave within this example of exceptional circumstances given in s 115 of the Act:

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 with the [90-day] period specified in section 114(1).

[17] There was simply insufficient evidence to conclude, on the balance of probabilities, that whatever upset Mr Schicker may have felt about how he was treated in the last few weeks of his employment affected him so deeply that he was rendered – for the whole of the 90-day period – unable to properly consider raising a grievance. Rather, his affidavit evidence established that he simply preferred and decided not to think about it.

[18] None of the other examples of exceptional circumstances given in s 115 applied but as that list is non-exhaustive, the circumstances also needed to be considered to establish if they were sufficiently exceptional in some other way.

[19] On ordinary usage of the term, the question became whether an employer lodging a claim against an employee after the expiry of a grievance period was unusual, out of the ordinary and uncommon and not regular, routine or normally encountered.²

[20] GEA submitted it was not unusual for an employer to sue an employee but neither party addressed the question of whether it was out of the ordinary and not normally encountered for such proceedings to begin after the expiry of the grievance period.

[21] While GEA's timing may have been calculated, it was not under the same short limitation period that applied to Mr Schicker for the exercise of his rights to raise a grievance.

[22] Rather GEA had the ordinary limitation period of up to six years that applied under s 142 of the Act to commence its action on the employment relationship problem (being the alleged breach of terms of an employment agreement). It was not obliged to raise the issue with him sooner although it may be arguable (on a mitigation point) – if the Authority's investigation of GEA's own claim eventually required an assessment of damages – that whatever losses, if any, were established

² *Creedy v Commissioner of Police* [2008] ERNZ 109 (SC) at [31]-[32] applying *R v Kelly* [2000] QB 198 at 208 per Lord Bingham of Cornhill.

might have been avoided or reduced had GEA not delayed until 7 May in raising its concerns and allegations with Mr Schicker.

[23] Mr Schicker was in the same situation in respect of matters that he could raise – other than a personal grievance – within that same longer, general limitation period (such as a wage arrears claim). GEA could no more object to him raising such a claim outside the 90 day period than he could about when GEA raised its claim.

[24] While GEA was entitled to stand on its rights (and not raise its claim sooner than the expiry of the grievance period), the assessment might be different if an employer had acted in some way during the 90-day period to dissuade a former employee from raising a grievance before its expiry. For example, if the employer had suggested it would not pursue claims against a former employee if she or he did not lodge a grievance but then did so after the expiry of the 90-day period, such deceptive behaviour might be sufficiently unusual and not normally encountered that it could – depending on the circumstances – be deemed ‘exceptional’.

[25] That hypothetical situation did not apply in the present case but I have referred to it because I doubted a particular point made in GEA’s submissions on how s 114(4) should be interpreted. GEA submitted the circumstance that occasioned the delay must occur inside the time bar. While that appeared generally correct, the hypothetical situation described in the previous paragraph comprised both an event within the time bar and an event after that – together – might be sufficiently exceptional to warrant leave. There might be other such circumstances whether after-discovered information or post facto events were relevant.

Would it be just?

[26] Because of the conclusion that exceptional circumstances were not truly established in Mr Schicker’s application, it was not necessary to determine whether the overall justice of his case required leave to be granted.

[27] Accordingly, for the reasons given, I concluded Mr Schicker’s application for leave to raise a grievance out of time should be dismissed.

Costs

[28] Costs are reserved for determination, should it be necessary, in the context of whatever outcome is eventually reached in relation to GEA's application.

Robin Arthur
Member of the Employment Relations Authority