

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 370
5435885**

BETWEEN MICHAEL TALBOT
 Applicant

AND AIR NEW ZEALAND LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Richard McCabe, Counsel for Applicant
 David France, Counsel for Respondent

Investigation Meeting: 11 August 2014 at Auckland

Submissions received: 11 August 2014 from Applicant and from Respondent

Determination: 5 September 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the preliminary issue as to whether or not the applicant, Mr Michael Talbot, raised his personal grievances with his employer, Air New Zealand Limited (ANZL), within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that he is entitled to pursue his grievances before the Authority.

[2] In the event that it is determined that Mr Talbot failed to raise his personal grievance within the 90 day statutory limitation period he submits that his grievance was raised outside the statutory 90 time period with ANZL's consent.

[3] Alternatively, in the event that it is determined that Mr Talbot failed to raise his personal grievance within the 90 day statutory limitation period, he applies pursuant to s 114(3) of the Act for leave to raise a grievance outside the statutory 90 day time period on the basis that "*exceptional circumstances*" pursuant to s 114(4) and s 115 of the Act had occasioned the delay.

Issues

[4] The issues for determination are:

- whether or not Mr Talbot raised a personal grievance within the statutory 90 day time period, or
- In the event that it is determined Mr Talbot did not raise his personal grievance within the 90 day statutory limitation period, whether or not ANZL had consented to him raising his personal grievance outside of the 90 day statutory limitation period, or alternatively
- In the event that it is determined that ANZL did not consent to Mr Talbot raising his personal grievance outside the 90 day statutory limitation period, whether he should be granted leave to raise the personal grievance outside of the 90 day statutory limitation period pursuant to s 114(4) and s 115 of the Act

Brief Background Facts

[5] Mr Talbot is employed by ANZL as a pilot, and is a member of the New Zealand Airline Pilots Association Inc (ALPA). Mr Talbot's terms and conditions of employment are contained in the Collective Agreement between ALPA and ANZL (the CEA).

[6] ANZL is a contracting state to the International Civil Aviation Organisation (ICAO). In November 2006 ICAO issued a Standard that required a pilot under the age of 60 to occupy the left hand or right hand 747 aircraft seat for all critical phases of a flight.

[7] The ICAO Standard was adopted by the Federal Aviation Authority (FAA) and applies to a majority of territories to which ANZL's 747, 777, or 767 aircraft operate.

[8] The consequence of this Standard was that ANZL determined that it could not have a Pilot-In-Command (PIC) and First Officer (FO) rostered together on a 747 aircraft where both were 60 years of age or older (the Age Pairing Issue).

[9] Captain David Morgan wrote to all applicable ANZL staff by memorandum dated 8 March 2010 detailing the current regulatory pilot age requirements and providing details of the ICAO Standard. The memorandum detailed ANZL's position regarding the ICAO Standard, how it would be adopted, and how ANZL would comply as a result of it.

12 January 2011 Letter

[10] Mr Talbot reached the age of 65 years on 15 January 2012. Approximately one year prior to that date Mr Gus Gilmore, then GM Operations – International Airline, wrote to Mr Talbot by letter dated 12 January 2011 informing him of the impact of the Standard on his ongoing employment as an ANZL 747 PIC. The letter stated:

The following pilot positions are not affected by the age 65 restriction referred to above or are only affected to the extent stated:

- 1 737 and A320 Command positions ...*
- 2 First and Second Officer positions on the 777 or 767 aircraft*
- 3 First Officer positions on the 737 and A320 aircraft.*
- 4 Second Officer positions on the 747.*

As a consequence of these regulations, if you wish to continue in an operating pilot role after age 65, then you must be appointed to one of the above available positions...on or prior to attaining age 65. I suggest you either bid for one of these positions in the normal manner or discuss your intentions with your Fleet Manager, so a suitable arrangement can be made for your transition (eg: leave, training etc).

[11] At the time of receiving the letter Mr Talbot was PIC on the 747 aircraft. He considered that, as the letter specifically excluded his being allowed to stipulate being moved to a FO position on the 747 aircraft, this was contrary to clauses 3.2.3.1, 3.2.3.2. and 3.2.3.4 of the CEA which stated:

3.2.3.1. The Company shall seek from the Captain a stipulation as to the fleet and rank not sufficiently affected by the legislation to which he wishes he wishes to be transferred The pilot may elect to take all leave due to him from the age relevant to the legislation, being remaining annual leave followed by Retirement leave. In that case, the stipulation by the pilot shall be made by three months before the end of that leave. If no leave selection has been made, the pilot must make his stipulation by three months before reaching the age relevant to the legislation.

3.2.3.2 *The Company shall create a position, if no vacancy meeting the stipulation is available at that time, for the Captain in accordance with his stipulation. The position, whether created or by virtue of an existing vacancy, shall not constitute a “vacancy” for the purposes of bypass and bypass pay for any other pilot.*

3.2.3.4 *Should the Captain fail to stipulate by the date of his reaching the age relevant to the legislation, or should the Captain fail to successfully complete any training necessary to take up the stipulated position, the Captain shall be appointed to a First Officer position on the fleet on which he held his command and shall be paid at that applicable rate of remuneration.*

15 July 2011 Letter

[12] Mr Talbot did not respond to this letter, and Mr Gilmore again wrote to him by letter dated 15 July 2011 and entitled: “SIX MONTHS TO AGE 65”. In that letter Mr Gilmore referred to the earlier 12 January 2011 letter and requested a meeting with Mr Talbot in order to confirm his intention for the future.

[13] Mr Talbot responded to this letter on 3 October 2011 advising that he would be taking all leave due to him with effect from 14 January 2012. He also advised ANZL of his contractual interpretation of clauses 3.2.3.1 and 3.2.3.2. of the CEA, stating:

I refer to the second paragraph of your letter of 15th July 2011 wherein you refer to what my employment agreement enables me to do. There is no absolute contractual requirement in sub section 3.2.3.1. to ‘bid’ as you say. Pursuant to sub section 3.2.3.2 the company is required to create a position if no vacancy meeting the stipulation is available at the time. The ‘position’ whether ‘created’ or by “virtue of an existing vacancy” shall not constitute a vacancy etc.etc.

21 October 2011 Letter

[14] Mr Talbot wrote again to Mr Gilmore on 21 October 2011 confirming that he would be taking leave from 12 January 2012 until 27 August 2012 in accordance with his leave entitlements. In the letter Mr Talbot also stated his interpretation of the material clauses of section 3 of the CEA:

In the event that the date of 27th May 2012 passes without a stipulation being made by me then per Section 3.2..3.4. of the Air NZ/ALPA CEA I read the section (3.2.3.4) as that I shall be appointed to the First Officer position on the fleet that I am currently on – that is Boeing 747-400.

[15] Mr Gilmore said that he had understood from this letter that the employment relationship issue Mr Talbot had been raising at that time related to a contractual interpretation of the CEA.

25 October 2011 Letter

[16] On 25 October 2011 Mr Talbot wrote to Mr Gilmore by letter headed:

Employment Relationship Problem
Notice of Dispute and Advice of Potential Personal Grievance
Per section six (6) of the NZALPA Air New Zealand Limited
Pilots collective Employment Agreement, 6 August 2010

[17] Section 6 of the CEA is headed: “*RESOLUTION OF EMPLOYMENT RELATIONSHIP ISSUES*” and defines (i) what constitutes a personal grievance including: “*Disadvantage in employment*” and “*Discrimination in employment*”, (ii) how a personal grievance is to be raised; and (iii) the time period in which the personal grievance must be raised:

The grievance shall be submitted within the period of 90 beginning with the date on which the action alleged to amount to a personal grievance occurred or has come to the notice of the pilot (whichever is the later) so as to enable the Company to remedy the grievance rapidly and as near as possible to the point of origin.

[18] Section 6 of the CEA also defines what constitutes a ‘dispute’:

There can also be a dispute about entitlements or obligations under this Agreement such as:

- *Disputes about what the terms and conditions of employment mean and how they should apply;*
- *Disputes about the payment of salaries and allowances; and*

- *Claims that the duty of good faith behaviour in employment have not happened.*

[19] Mr Talbot wrote in the letter:

1. *Please be advised that per section six (6) of the NAALPA CEA, August 2010, I dispute what is characterised as “age pairing difficulties, have any difficulties, in substance, at all.*
2. *... mindful of the ninety (90) day limitation on advising the employer of a personal grievance I give notice to Air New Zealand of a potential personal grievance which would arise if Air New Zealand were to rely on the age-pairing issues or perceived difficulties as a reason to prevent the exercise by me of any entitlement I may have, and choose to exercise, per section 3.2.3 of the NZALPA Pilots Collective Agreement of August 2010, particularly in respect to any first officer position I may choose in the Boeing 747-400 fleet.*

[20] Mr Talbot said at the Investigation Meeting that he had referred to the personal grievance as a “*potential personal grievance*” because at the time he wrote the letter he had not turned 65 and ANZL’s letter dated 12 January 2011 had not come into effect, and said that it was in the nature of a “*heads up*”.

[21] Mr Gilmore said that his understanding was that the letter was raising interpretation issues under s 6 of the CEA and disputing the way in which ANZL was applying the CEA.

[22] On 26 October 2011 ANZL wrote to Mr Talbot confirming that the latest date by which he could make a stipulation was on 27 May 2012.

[23] On 8 December 2011 Mr Talbot wrote to ANZL. The letter was entitled: “Employment Relationship Problem as advised: age Pairing Issue” advising that he had received no reply to his letter dated 25 October 2011 and requesting a meeting.

[24] Mr Hugh Pearce, B747 Deputy Fleet Manager replied to Mr Talbot’s letter of 8 December 2011 on behalf of Mr Gilmore, and suggested dates for the requested meeting.

9 February 2012 Meeting

[25] The meeting took place on 9 February 2012. Mr Gilmore and Mr Pearce attended for ANZL and Mr Talbot was accompanied by his support person, Mr Ian Mackie. Meeting notes were taken of the meeting by Mr Mackie on behalf of Mr Talbot.

[26] During that meeting Mr Talbot stated that the age pairing issue had been discussed, the provisions of s 3.2.3 of the CEA and the fact that ALPA had also raised an employment relationship problem concerning the age pairing issue.

[27] Mr Talbot said that during the meeting ANZL had proposed that since ANZL and ALPA were intending to meet to discuss the age pairing issue that his employment relationship issue would be put on hold pending the outcome of that meeting.

[28] Mr Gilmore said that during the meeting they had discussed what Mr Talbot described as his employment relationship problem which he understood to be a dispute about ANZL's interpretation and application of the CEA, and had covered various issues relating to his dispute with ANZL about its application of the CEA upon his turning 65, including issues regarding age pairing and the application of ICAO standards.

[29] He said that there had been no discussion about Mr Talbot raising a personal grievance or a "*potential personal grievance*" during the meeting. Mr Gilmore disputed that it had been agreed at the meeting, or indeed on any other occasion, that a "*potential personal grievance*" could be put on hold until a meeting occurred between ALPA and ANZL.

[30] Mr Talbot in a letter to Mr Gilmore dated 20 April 2012 referred to the anticipated meeting between ALPA and ANZL legal representatives not having taken place and stated: "*You said that such a meeting was to be subsequently arranged and we agreed to await the outcomes of that meeting to further progress my employment problem.*"

21 May 2012 Letter

[31] Mr Talbot wrote again to Mr Gilmore by letter dated 21 May 2012 in which he made his stipulation as Captain, Boeing 737-300, and advised that he did so:

... without prejudice to any rights and remedies I have and may have that may arise (sic) from any mutual settlement of judicial decision(s) that are outcomes from the disputes and/or potential personal grievances previously and formally initiated by me with the company still extant and awaiting further information whether from meeting(s) with Mr R Harrison and Air New Zealand representatives or otherwise.

[32] On or about 27 August 2012 Mr Talbot commenced his role as PIC on ANZL's 737 fleet.

[33] Mr Gilmore said that received no further correspondence from Mr Talbot regarding his dispute regarding the CEA, or of his raising a personal grievance prior to his (Mr Gilmore) leaving his employment with ANZL on 31 December 2012.

[34] On 18 September 2013 ANZL received an email from Mr McCabe which stated:

Captain Talbot has raised an employment relationship problem with Air New Zealand concerning Air New Zealand's age pairing policy upon his turning 65 It is Captain Talbot's position that Air New Zealand not only breached material clauses in the applicable CEA to Capt Talbot's disadvantage, but also discriminated against him on the grounds of age.

Determination

Did Mr Talbot raise his personal grievance within the 90 day statutory limitation period?

The Law

[35] Section (1) of the Act states:

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.

[36] It must be a personal grievance as categorised in s. 103 of the Act which is raised with the employer and not some other action.

[37] In *Wyatt v Simpson Grierson (A Partnership)*¹ the Employment Court stated:²

¹ [2007] ERNZ 489

² Ibid at para [29]

... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.

[38] I find that the language of s 114(1) as applied by the Employment Court in *Wyatt v Simpson Grierson (A Partnership)*³ makes it clear that it is necessary that there is an action by the employer which gives rise to a personal grievance before the personal grievance is raised.

[39] Section 114(2) of the Act states:

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."

[40] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.⁴ In this case, Chief Judge Colgan stated:

[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising 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 in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[41] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer⁵.

³ [2007] ERNZ 489

⁴ *Creedy v Commissioner of Police*[2006] ERNZ 517

⁵ *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

[42] I therefore consider each interaction between the parties in light of these considerations.

25 October 2011 Letter

[43] The 25 October 2011 letter refers to a: “*Potential Personal Grievance*”. ‘*Potential*’ is defined in the Concise Oxford Dictionary⁶ as: “*Capable of coming into being or action*” or, as described by Mr Talbot, as a: “*heads up*” of a future event.

[44] In *Creedy v Commissioner of Police*⁷ the Employment Court observed⁸

The statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event.

[45] I find that the letter dated 25 October 2011 refers to a future event or action which might be taken by ANZL, as acknowledged by Mr Talbot in his evidence that it was a: “*heads up*” because he had not turned 65 and ANZL’s letter dated 12 January 2011 had not come into effect. Accordingly I find it does not raise a personal grievance in relation to any action taken by ANZL prior to the date of this letter.

[46] Moreover a personal grievance is required to be sufficiently specific in order to allow the employer to address it. However the letter dated 25 October 2011 does not identify the nature of the personal grievance. There is no explanation of what disadvantages would arise for Mr Talbot if ANZL should rely on: “*age pairing issues or perceived difficulties per section 3.2.3 of the CEA*” in the event that he were to choose: “*any first officer position in the Boeing 747-400 fleet*”. Nor does it clarify that Mr Talbot considered he would be discriminated against should ANZL rely on: “*age pairing issues or perceived difficulties per section 3.2.3 of the CEA* .

[47] I find these omissions significant, particularly in circumstances in which Mr Talbot had clear knowledge of s.6 of the CEA.

[48] Accordingly I find that the letter dated 25 October 2011 does not raise a personal grievance. On the contrary I find it to be notifying ANZL of a dispute relating to ANZL’s interpretation of s 3 of the CEA.

⁶ Sixth Edition, edited by J.B.Sykes

⁷ [2006] ERNZ 517

⁸ Ibid at para [29]

Meeting held on 9 February 2012

[49] Whilst Mr Talbot claims that it was agreed during the meeting held on 9 February 2012 that his 'potential personal grievance' would be put on hold, I find that the Meeting Notes, compiled on Mr Talbot's behalf by Mr Mackie, make no reference to Mr Talbot having a personal grievance, or to his having raised a personal grievance or a: "*potential personal grievance*". There is no reference to an agreement that such a personal grievance would be put on hold pending a meeting between ANZL and ALPA legal representatives to discuss the interpretation issue and contractual dispute.

[50] I further find that there is no evidence from the Meeting Notes to support Mr Talbot's having made clear his view that he would be disadvantaged by the actions of ANZL, or that he would suffer discrimination thereby. Rather the 5 issues discussed in the Meeting Notes are stated to be:

1. *Why MT's name appears in the bidding lists;*
2. *FAA/Air New Zealand Correspondence;*
3. *Joint Letter from Chris Peters and MT W.R.T. the briefing/comments that you (Gilmore) are making in meeting with pilots;*
4. *Appendix7, NZALPA/Air New Zealand CEA August 2010 and the breach and limit this appendix empowers the Longevity pay working party; and*
5. *Age pairing issue/section 3.2.3. of the NZALPA/Air new Zealand CEA*

[51] Having considered the evidence of Mr Talbot and Mr Gilmore and the Meeting Notes, I consider that the employment relationship issue discussed at the meeting on 9 February 2012 was the interpretation and application of the CEA and Mr Talbot's dispute in relation to this issue, rather than a personal grievance raised by Mr Talbot in relation to his suffering a disadvantage or discrimination in employment.

21 May 2012 Letter

[52] As with the letter dated 25 October 2011, I find that the wording of the letter dated 21 May 2012 and its reference to: "*potential personal grievances*" makes it clear that a future event or action is anticipated and that the action by ANZL which could constitute a personal grievance had not arisen. In addition I find that the letter does not in any event specify sufficiently the nature of the personal grievance.

[53] In consideration of the letter dated 25 October 2011, the meeting held on 9 February 2012, and the letter dated 21 May 2012, I find that Mr Talbot had not raised a personal grievance alleging unjustifiable disadvantage, nor had he raised a claim that the way in which ANZL was interpreting the CEA could give rise to a personal grievance on the basis of age discrimination.

18 September 2013 email

[54] Mr Talbot reached the age of 65 on 15 January 2012. He commenced his role as PIC on the ANZL 737 aircraft on or about 27 August 2012. I consider that these were events that could have given rise to personal grievance of disadvantage or discrimination on the part of Mr Talbot.

[55] The email from ALPA to ANZL dated 18 September 2013 was sent more than one year after the latest of these events. This is outside the statutory 90 day statutory limitation period in which to notify an employer of a personal grievance.

[56] It is submitted by ALPA that the personal grievance was based upon a breach of contract⁹ and as such remains extant such that the 90 day statutory limitation period continues to run until the breach is remedied or Mr Talbot is no longer covered by the CEA.

[57] No case law in support of this proposition was adduced in evidence. Section 114(1) of the Act it states that the 90 day statutory time period begins: “*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*”.

[58] I find on this basis that there are only two events which could have given rise to the action of the alleged personal grievance, these being either when Mr Talbot made his stipulation or when he was transferred as PIC on the 737 aircraft. From the date of either of those events Mr Talbot had the opportunity to raise his personal grievance; however he did not do so.

[59] I determine that Mr Talbot did not raise his personal grievance within the 90 day statutory limitation period.

⁹ *Shakes v Norske Skog Tasman Ltd* [2008] ERNZ 121

Did ANZL consent to Mr Talbot raising his personal grievance out of time?

[60] An employee must raise a personal grievance within the 90 day statutory limitation period in accordance with s 114(1) of the Act: *‘unless the employer consents to the personal grievance being raised after the expiration of that period.*

[61] The Act is silent on whether consent by the employer must be express or implied. However the Employment Court in *Jacobsen Creative Surfaces Ltd v Findlater*¹⁰ and *Phillips v Net Tel Communications*¹¹ held that whether or not an employer has consented to a personal grievance being raised outside the 90 day statutory limitation period will be a matter of fact and degree in each case, each case depending on its own particular facts.

[62] In *New Zealand Fisheries Ltd v Napier City Council*¹² the Court of Appeal stated¹³:

As the dictionary definition indicates, “consent” involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ...”

[63] In *Jacobsen Creative Surfaces Ltd v Findlater*¹⁴ the Court concluded that the employer had impliedly consented to the personal grievance as a matter of fact and degree by engaging with the applicant and his representative in correspondence and negotiation which expressly related to the stale personal grievance.

[64] The issue of whether consent could be given impliedly was considered by the Employment Court in *Hawkins v Commissioner of Police*¹⁵ which decided that ‘consent’ to a personal grievance being raised outside the 90 day statutory limitation period may be implied by the employer, and this decision was upheld on appeal by the subsequent Court of Appeal case,¹⁶ in which the Court of Appeal stated¹⁷

The real issue is not whether, in formal terms, the Commissioner “turned his mind” to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

¹⁰ [1994] ERNZ 35

¹¹ [2002] 2 ERNZ 340

¹² (1990) 1 NZ ConvC, 342

¹³ *Ibid* at pg 190

¹⁴ [1994] ERNZ 35

¹⁵ [2007] ERNZ 762

¹⁶ *Commissioner of Police v Hawkins* [2009] NZCA 2009

¹⁷ *Ibid* at para [24]

[65] Mr Talbot submits that he had put ANZL on clear notice that if it proceeded with its stated position, namely to prohibit stipulation for a Boeing 747-400 FO position/to not create a Boeing 747-400 FO position in the absence of a stipulation, then he would claim a personal grievance.

[66] It is his position that ANZL so conducted itself during the meeting held on 9 February 2012 that his understanding had been that his personal grievance had been put on hold pending the outcome of the meeting between ANZL and ALPA's legal representatives, citing the statements recorded in the Meeting Notes:

Gilmore: You saying we adopt your interpretation, not ours ...

Next step is, ALPA's (Mr R Harrison Q.C.) and our legal team get into this (to see if a view can be settled).

...

MT: See what ALPA/Air New Zealand legal meeting brings".

[67] As already addressed above, I find that during the meeting held on 9 February 2012 the employment relationship issue discussed was the interpretation and application of the CEA and Mr Talbot's dispute in relation to this issue, rather than a personal grievance. This is supported by Mr Talbot's statement as recorded in the Meeting Notes that: " ... A construction (company place) of an exemption is being used to create a difficulty with pilots contract and statutory rights".

[68] As I have found, there is no reference in the Meeting Notes to a personal grievance, or to an agreement by ANZL that it be put 'on hold' pending the outcome of the anticipated legal meeting between ANZL and ALPA legal representatives to discuss the interpretation issue and contractual dispute, which I note is still to take place.

[69] I do not find that during the meeting held on 9 February 2012 ANZL consented to Mr Talbot putting his personal grievance on hold. I further observe that at 9 February 2012 what had been raised with ANZL was only a "potential personal grievance" which had not been addressed in sufficient specificity for ANZL to address it.

[70] There is no evidence that Mr Talbot took any steps to raise a personal grievance after his stipulation on 27 May 2012, or after his commencing employment as a 737 pilot on 27 August 2012 until the email dated 18 September 2013, or that ANZL consented to his placing a personal grievance 'on hold' during this period.

[71] This is not a case in which Mr Talbot was unaware of the 90 day statutory limitation period. In fact in the letter dated 25 October 2011 Mr Talbot makes specific mention of s 6 of the CEA and the 90 day statutory limitation period. However despite this knowledge he failed to raise a personal grievance within 90 days of either 27 May or 27 August 2012.

[72] I determine that ANZL did not consent to Mr Talbot raising his personal grievance out of time.

Should Mr Talbot be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act?

[73] Mr Talbot submits that he should be granted leave to raise his personal grievance outside of the 90 day statutory limitation period on the basis of ‘exceptional circumstances’ in accordance with s 114(4) and s115 of the Act.

[74] Section 114 (4) of the Act states:

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 exceptional circumstances was occasioned by exceptional circumstances (which may include any i or more of the circumstances set out in section 115(; and

(b) Considers it just to do so.

[75] Section 115 of the Act provides some examples of events that could constitute ‘exceptional circumstances’, these include the personal circumstances of the employee being: “*so affected or traumatised*” as to be unable to raise the personal grievance within the 90 day statutory limitation period, failings of others instructed by the employee, or failure of the employer to comply with the obligations under the Act.

[76] I accept that the examples of exceptional circumstances provided in s 115 of the Act are examples only and: “*not an exhaustive or closed list of ‘exceptional circumstances’*”¹⁸.

¹⁸ *Austin v Silver Fern Farms Limited* [2014] NZEmpC 30 at [34]

[77] The meaning of ‘exceptional circumstances’ was set out in *Wilkins v Field & Fortune*¹⁹ as being those which are “*unusual, outside the common run, perhaps something more than special and less than extraordinary*”²⁰.

[78] The Supreme Court in *Creedy v Commissioner of Police*²¹ addressed the definition of ‘exceptional circumstances’ stating:²²

[31] In Wilkins & Field, the Court of Appeal treated ‘exceptional circumstances’ as those which are ‘unusual, outside the common run, perhaps something more than special and less than extraordinary’. This formulation appears to combine two different meanings, the first being that of being unusual (the ‘exception to the rule’) and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, we prefer the first meaning.

[32] First, it accords with ordinary English usage. As Lord Bingham of Cornhill said in R v Kelly [1999] 2 All ER 13 (CA), when construing a reference to ‘exceptional circumstances’:

‘We must construe “exceptional” as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered.’

Secondly, it will be easier to apply. The very language of Wilkins & Field implies both uncertainty (“perhaps”) and lack of precision (“Something more than special and less than extraordinary”). Thirdly, the short limit of 90 days, and the potentially serious consequences for employees of not being able to bring a grievance, support an interpretation which does not limit unduly the power to extend time. The prohibition in s 113

¹⁹ [1998] 2 ERNZ 70

²⁰ [1998] 2 ERNZ 70

²¹ [2008] 1 ERNZ 109

²² Ibid at para [31] and [32]

on challenging a dismissal otherwise than by a personal grievance reinforces this point.

[79] Mr Talbot submits that there are ‘exceptional circumstances’ such as to justify the Authority granting him leave to raise his personal grievances outside of that 90 day statutory limitation period in that:

- he raised his concerns early and in good faith, and in accordance with the letter and spirit of s 6 of the CEA;
- On 9 February 2012 ANZL proposed that he put his personal grievance ‘on hold’;
- In the letter dated 21 May 2012, he stipulated a captain position on the Boeing 737-300 without prejudice pending the outcome of the meeting between ANZL and ALPA legal representatives; and
- ANZL did not engage with him as he had been led to believe when he agreed to put his personal grievance on hold on 9 February 2012.

[80] Addressing these points in turn: I do not find that raising a concern early and in good faith constitutes an ‘exceptional circumstance’. Moreover Mr Gilmore’s evidence clarifies that the concerns were held by ANZL to relate to the CEA and ANZL’s interpretation and application of clause 3, and Mr Talbot’s own evidence was that prior to the meeting held on 9 February 2012 he had merely provided ANZL with a ‘heads up’ of a: “*potential personal grievance*”.

[81] I have not found the evidence to support the submission by Mr Talbot that ANZL agreed during the meeting held on 9 February 2012 to place his personal grievance ‘on hold’ pending the outcome of a meeting between ANZL and ALPA legal representatives which was to discuss the interpretation issue and contractual dispute.

[82] I do not accept that the letter dated 21 May 2012 in which Mr Talbot made his submission on a ‘without prejudice basis’ pending the outcome of the anticipated meeting between ANZL and ALPA legal representatives could preserve his rights in reference to any personal grievance since at that stage all that had been raised was a: “*potential personal grievance*” which in any event lacked sufficient specificity for the employer to address it.

[83] I do not find that ANZL failed to engage with him about a personal grievance when none had been raised prior to 18 September 2013 in circumstances in which Mr Talbot was fully cognizant of the s 6 of the CEA and the 90 day statutory limitation period.

Overall justice

[84] Mr Talbot submits that he did all he could reasonably be expected to do to establish and persevere his rights to bring a personal grievance, but he agreed to put that on hold at ANZL's proposal.

[85] In these circumstances it is submitted that it would be unconscionable to have him agree to put his personal grievance on hold pending that meeting between ANZL and ALPA legal representatives, and avoid those discussions and claim that he had raised his personal grievance outside the 90 day statutory limitation period .

[86] In consideration of this matter:

- I have already noted that Mr Talbot was well aware of the 90 day statutory limitation period, his letters to ANZL clearly indicate that he was fully conversant with the CEA including cl 6 of the CEA;
- Mr Talbot had all the information he needed for the basis of a personal grievance from the ANZL memorandum dated 8 March 2010;
- There is no evidence, including from the Meeting Notes compiled on Mr Talbot's behalf, that ANZL agreed to his putting his personal grievance 'on hold';
- Prior to 18 September 2013 Mr Talbot had only referred to a: "*potential personal grievance*" and
- He had 90 days in which to raise a personal grievance from either 27 May 2012 or 27 August 2012, and he was fully aware of the 90 day statutory limitation period, but failed to do so until 18 September 2013.

[87] In considering the overall justice of the matter, I observe that the legal representatives of ANZL and ALPA are still to meet to discuss ANZL's interpretation and application of s 3 of the CEA. In that respect Mr Talbot's claims in respect of the interpretation and application of s 3 of the CEA remain extant and may provide him with a remedy should a decision be made in favour of the contractual breach claims.

[88] Having considered all the circumstances, I determine that Mr Talbot should not be granted leave to raise the personal grievance out of time pursuant to s 114(4) and s 115 of the Act.

Costs

[89] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority