

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2019] NZERA 83  
3034011

BETWEEN            LEANNE TIRAHA  
                                 Applicant  
  
AND                    SAVEMART LIMITED  
                                 Respondent

Member of Authority:    Trish MacKinnon  
  
Representatives:         Andrew Gibson, advocate for the Applicant  
                                 Peter Kemps, counsel for the Respondent  
  
Investigation Meeting:    On the papers  
  
Submissions and further Information Received:    19 October and 7 November 2018 from the Applicant  
                                 30 October 2018 from the Respondent  
  
Date of Determination:    15 February 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Leanne Tiraha was dismissed from her employment with Savemart Limited (Savemart) in Whanganui on 10 April 2018. Ms Tiraha sought advice from Community Legal Advice Whanganui (CLAW) on 25 June 2018. CLAW sent a formal notice of personal grievance dated 7 July 2018 to her employer at its registered office. It is accepted by Ms Tiraha that Savemart did not receive this until 14 July 2018. This was outside the 90-day timeframe for raising a personal grievance<sup>1</sup> and Savemart declined consent to Ms Tiraha raising the grievance out of time.

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<sup>1</sup> Section 114 of the Employment Relations Act 2000.

[2] Ms Tiraha seeks leave from the Authority to raise her grievance for unjustifiable dismissal and unjustifiable disadvantage out of time. Savemart resists the application and asks the Authority to decline it.

[3] In the course of a telephone conference with the parties on 5 October 2018, it was agreed the issue of whether leave would be granted would be determined on the papers by way of submissions and affidavits.

[4] This determination has been issued outside the timeframe set out at s 174D(2) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174D(3) to do, are exceptional.

### **Relevant law**

[5] Section 114 of the Act provides that a personal grievance must be raised with the employer within a 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 the period.

[6] The grievance is raised with the 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.<sup>2</sup>

[7] 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.

[8] Section 115 makes further provision regarding exceptional circumstances under s 114(4) as follows:

For the purposes of section 114(4)(a), exceptional circumstances include—

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<sup>2</sup> Section 114(2) of the Act.

- (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.

[9] Ms Tiraha asks the Authority to find that exceptional circumstances exist, such that it would be just to allow her to raise her grievance out of time. She relies primarily on medical grounds, but has also referred to having taken advice about her situation from her representative within the 90 day time frame and on her personal grievance having been sent by post to her employer within that time frame.

[10] Ms Tiraha has described the reason for her delay in engaging CLAW to provide advice and act for her. She says that five days before her dismissal she pricked her finger on a needle during the course of her work with Savemart. This exposed her to the risk of the AIDS disease. Ms Tiraha describes this as being a very distressing time for her in which she sought medical advice and had to undergo numerous blood tests and examinations every two weeks, as well as taking prescribed medication which made her ill. It is her evidence that she was not cleared of the risk of AIDS until 6 July 2018.

[11] Ms Tiraha sought advice from CLAW on 25 June 2018. She says she spoke with Mr Andrew Gibson about the issues she was facing and he advised that he would be unable to act due to his office moving premises and being closed between 27 June and 3 July 2018. Ms Tiraha says Mr Gibson attempted to find alternative representation for her while she was in his office, but he was unable to find a representative who could act within the short timeframe required.

[12] It is Ms Tiraha's evidence that Mr Gibson then advised he would take her case and do his best to ensure her personal grievance was raised with the employer within the 90 day

timeframe. As noted earlier, the letter raising Ms Tiraha's personal grievance was posted on 7 July 2018 but not received by the respondent until 14 July 2018.

[13] In submissions made on Ms Tiraha's behalf, Mr Gibson submits his client had been dealing with medical issues that could have seriously affected her health and wellbeing for the rest of her life, and it was due to this that there was a delay in her engaging the services of his office.

[14] Mr Gibson submits the delay was understandable given the serious medical issues Ms Tiraha was dealing with. He notes her personal grievance was sent to the employer within 90 days of the date of her dismissal, although it was not received until six days outside that timeframe.

[15] Thomas Doonan, who is a Director of Savemart, provided an affidavit on behalf of the respondent. It is Mr Doonan's evidence that Savemart went to "extreme lengths" to ensure Ms Tiraha had a fair process with regard to her dismissal. He says that process and subsequent events had taken a significant amount of resources and effort on the respondent's behalf.

[16] In Mr Doonan's view the "needle prick incident" of 5 April was irrelevant to Ms Tiraha's application for leave to raise her personal grievance out of time because it was not relevant to her personal grievance for unjustifiable dismissal. He claims that incident arose from a failure by Ms Tiraha to follow required procedures and to wear the required personal protective equipment. He noted that the incidents that gave rise to her dismissal also involved a refusal to follow instructions.

[17] Mr Doonan expressed the belief that Ms Tiraha had not acted in good faith towards Savemart and its staff. For that reason the employer opposed her application for leave to raise her grievance out of time. In his view the delay occurred due to neglect on Ms Tiraha's part and not due to exceptional circumstances.

[18] Counsel for Savemart, Mr Peter Kemps, submits Ms Tiraha's situation does not meet the exceptional circumstances of s 115. He submits s 115(a) requires that matters giving rise to the grievance must have caused trauma or distress in order for those matters to constitute

exceptional circumstances. He notes the section does not refer to other distressing matters being used to justify exceptional circumstances.

[19] Mr Kemps submits that the incident which occurred at work on 5 April had no bearing on Ms Tiraha's dismissal on 10 April and was not "a matter giving rise to the grievance". In his submission it was not, therefore, a ground for establishing exceptional circumstances.

[20] With regard to s 115(b), Mr Kemps submits that both Ms Tiraha and Mr Gibson acknowledged they were aware of the time constraints for raising Ms Tiraha's personal grievance. Despite this, and despite knowing Mr Gibson was not able to address her personal grievance until close to the expiry date for raising it, neither Ms Tiraha nor Mr Gibson gave notice of the grievance within the required timeframe. Echoing Mr Doonan's words, Mr Kemps submits the delay in raising Ms Tiraha's personal grievance was not occasioned by exceptional circumstances but by neglect.

#### **Are there exceptional circumstances?**

[21] The list of examples of exceptional circumstances in s 115 of the Act is not exclusive or exhaustive.<sup>3</sup> Therefore I do not accept the submission made for the respondent that any trauma or distress caused to Ms Tiraha by the needle prick incident that occurred on 5 April cannot be taken into account in a consideration of exceptional circumstances.

[22] I accept Ms Tiraha's evidence that the anxiety caused by the incident, and the subsequent testing she underwent, caused a delay in her seeking advice on her situation. However, I find that did not impact on her ability to raise a personal grievance within 90 days.

[23] It is clear from Ms Tiraha's evidence that she was aware at least from 25 June 2018 when she first met with Mr Gibson that there was a 90 day limitation for raising her personal grievance. This was 77 days after her dismissal. She was also aware that Mr Gibson was initially unwilling to act on her behalf because of the imminent closure of his office for a week while it moved premises. When he was unable to find alternative representation for

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<sup>3</sup> *Creedy v Commissioner of Police* [2008] NZSC 31at[26]; *McMillan v Waikanae Holdings (Gisborne) Ltd (trading as McCannics)* (2005) 7 NZELC 97,859 (EmpC).

her, he told her he would take her case and, in Ms Tiraha's words "do his best to ensure the Personal Grievance was sent within the 90 day time frame".<sup>4</sup>

[24] Ms Tiraha has not claimed this is a situation that falls within s115(b), i.e. where she made reasonable arrangements to have the grievance raised on her behalf by an agent who unreasonably failed to ensure it was raised within the required timeframe. I have considered, nonetheless, whether her situation does fall within that category and find it does not.

[25] Mr Gibson was frank with Ms Tiraha about the practical difficulties he faced in raising her personal grievance in a timely manner and could not be described as unreasonably failing to do so. His best endeavours resulted in the personal grievance being sent by post to the employer on Saturday 7 July, which was day 89 of the 90 days allowed for making the employer aware of Ms Tiraha's personal grievance.

[26] While I do not find Mr Gibson to have unreasonably failed to ensure Ms Tiraha's grievance was raised in time, I note that he, and Ms Tiraha, must have known that a letter posted in Whanganui on day 89 of the statutory timeframe had only a minimal chance of being received by the employer, which is based in Auckland, on day 90. When, as in this case, the day of posting was a Saturday and there is no mail delivery on Sundays, that chance reduces to zero.

[27] Ms Tiraha was aware of the timeframe on day 77 of the 90 days, and was also aware that, because of the circumstances advised to her by Mr Gibson, there was no guarantee that he would be successful in assisting her to comply with the statutory timeframe.

[28] Ms Tiraha accepted the risk that her representative would not be able to raise her grievance within the 90 days. There is no evidence she actively instructed him to do so and it is clear she did not attempt to raise the grievance herself. Her evidence is that, following her meeting of 25 June 2018 with Mr Gibson, she met with him again on 4 July when she sighted the personal grievance document he had drafted and accepted his advice that he would send it "once drafting/formatting was completed".

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<sup>4</sup> Applicant's affidavit at paragraph 10.

[29] There appears to have been no sense of urgency on Ms Tiraha's part and I do not find her reasons for raising her grievance out of time meet the criterion of "exceptional circumstances" required by the Act. Accordingly I decline her application.

### **Costs**

The issue of costs is reserved.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**