IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAURAU ROHE

[2022] NZERA 23
3026417

	BETWEEN	ANGELA WARD Applicant
	AND	EDENVALE HOME TRUST BOARD Respondent
Member of Authority:	David G Beck	
Representatives:	Applicant in person Nathan Tetzlaff, counsel for the Respondent	
Investigation Meeting:	On the papers	
Submissions Received:	22 and 26 November 2021 from the Applicant 24 November 2021 from the Respondent	
Date of Determination:	31 January 2022	

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Angela Ward, a registered nurse, worked for the Edenvale Home Trust Board (EHT) in a part-time position commencing 20 October 2016 and ending by way of a dismissal communicated in a letter from EHT on 16 November 2016 that signalled the employment would end on 15 December 2016. In the event, Ms Ward worked eight shifts in her period of employment. The positon was the subject of a 90 days trial period.

[2] Dissatisfied by the way her employment relationship ended, Ms Ward by email of 16 November 2016, advised EHT's general manager that she was contemplating pursuing a personal grievance related to her perception that the process of dismissal had been unfair and she also sought payments for three shifts and 30 minutes for attending work for orientation. Correspondence between the parties continued with Ms Ward also identifying that she

considered the employment agreement she had entered into entitled her to a rostered part-time position rather than being treated as a 'casual' for shift allocations. The correspondence ceased in early February 2017 after EHT provided a certificate of service confirming Ms Ward had been employed by EHT "between 22 October 2016 and 15 December 2016" as a registered nurse.

[3] Ms Ward sought advice and by way of a letter she produced to the Authority of 8 December 2016, her then advocate raised a personal grievance described as "her unjustified dismissal and a breach of good faith for failing to provide her with adequate training to perform her role as a registered nurse". EHT's counsel acknowledged the grievance by a letter to Ms Ward's advocate of 16 December 2016.

[4] On 15 January 2017, Ms Ward received a letter from the Nursing Council of New Zealand providing a copy of a report from EHT to the Council in the form of a "Competence Notification". Ms Ward took issue with a comment the EHT general manager had provided to the Council suggesting her practice competency be reviewed due to her "displaying signs of memory loss".

[5] Ms Ward did not at the time raise her concerns with EHT about the general manager's comments, preferring to deal directly with the Nursing Council.

[6] Dissatisfied with progress on her personal grievance, Ms Ward indicated to EHT by email of 29 May 2017, that the advocate author of the 8 December 2016 letter was no longer acting for her. It would appear from documentation disclosed, Ms Ward did nothing further about her grievances until she then instructed a barrister, who in a letter of 15 January 2018 to EHT re-framed the grievance and confined it to an unjustified breach of Ms Ward's employment agreement, alleging a unilateral action had been effected by EHT to change the status of Ms Ward's role from part-time to casual. No other issues were alluded to.

[7] Utilising the same barrister, Ms Ward filed her first statement of problem with the Employment Relations Authority on 17 April 2018. The problem Ms Ward sought assistance with was a claim for unpaid wages in the amount of $673.75 and compensation for the distress she says she had experienced as a result of the alleged unilateral altering of her role. No other claims were identified.

[8] The parties attended mediation in June 2018 but this failed to resolve matters.

[9] After mediation, Ms Ward engaged another counsel and although maintaining contact with the Authority it was not until 8 October 2020 that Ms Ward's new counsel by email (copied to EHT's counsel), communicated that Ms Ward wished to restart the Authority investigation. Counsel noted in the email that Ms Ward's Nursing Council issue had been resolved and that Ms Ward remained a registered nurse. Counsel then obliquely alluded to EHT's complaint to the Nursing Council and expressed an opinion that "if the complaint is found to have been made in bad faith, that will be an aggravating factor that should be taken into account when considering the harm suffered and the amount of compensation payable".

[10] The matter was then a subject of some delay that the parties were not responsible for until a case management conference of 1 April 2021 was convened. This led to a Directions Notice from the Authority requiring Ms Ward's counsel file an amended statement of problem to clarify Ms Ward's claims and remedies sought. During the conference, Ms Ward's counsel confirmed that no unjustified dismissal was being claimed as it was accepted that the dismissal had been enacted within a valid 90 days trial period.

[11] EHT's counsel alluded to Ms Ward having not raised her additional disadvantage grievance within 90 days following her dismissal (as per s 114 (1) of the Employment Relations Act 2000 (the Act)) and that in attending mediation EHT had done so without prejudice to this stance.

[12] An Investigation Meeting was scheduled for 22 July 2021 in Auckland.

[13] In an amended statement of problem filed 16 April 2021, Ms Ward's counsel detailed claims that in addition to the alleged unilateral variation from part-time to casual status and a claim for payment of notice in lieu, a new claim that EHT's general manager had made a "malicious and/or unjustified claim to the Nursing Council in retaliation for the applicant having raised a personal grievance". Ms Ward sought compensation under s 123(1)(c)(i) of the Act for the new claim, citing the complaint to the Nursing Council as an unjustified action causing Ms Ward disadvantage.

[14] In a statement in reply dated 25 May 2021, EHT's counsel advanced a defence of the general manager's notification to the Nursing Council, claiming it was not "malicious, unjustified or made in retaliation" but made:

- As required, pursuant to section 34(3) of the Health Practitioners Competence Assurance Act 2003 (HPCAA) and on advice from the Nursing Council of New Zealand; and that

- Section 34(4) HPCAA "prohibits any civil proceedings being taken against the respondent in respect of the notification …".

[15] An Authority investigation meeting took place on 22 July 2021 in Auckland but it was adjourned part heard as EHT's general manager did not give evidence. It was the Authority's intention to resume the investigation by video link on 13 August 2021. However, Ms Ward sought and was granted an adjournment due to her then counsel withdrawing at late notice. Ms Ward indicated she was seeking alternative legal advice.

[16] The Authority was then contacted by Ms Ward on 14 September 2021, citing the Covid-19 level 4 Lockdown in Auckland as being an impediment to her obtaining representation. On 16 November 2021 Ms Ward indicated she had decided to represent herself and stated: "I will contact you again soon with any further decisions relating to this matter."

[17] On 22 November 2021, Ms Ward filed an application for her personal grievance to be heard out of time pursuant to s 114(4)(a) of the Act. EHT's counsel filed a response opposing the application on 24 November.

[18] A further case management conference proceeded on 29 November and a Notice of Direction indicated that the 'out of time' application would be dealt with 'on the papers' without further submissions and the adjourned investigation meeting is scheduled to take place on 17 February 2022 in Auckland or by televisual link if travel restrictions prevent a physical hearing.

The preliminary issue

[19] Pursuant to s 174E of the Act, I make findings of fact and law and outline a conclusion on a single issue but I do not record all evidence and submissions received.

[20] The sole question to be addressed is whether Ms Ward has established sufficient exceptional circumstances to make it just that I grant her leave to have her additional disadvantage grievance proceed on the narrow issue of her concerns about EHT's referral of a matter to the Nursing Council.

The law and what Ms Ward has to establish

[21] An employee failing to raise a personal grievance within the 90 day time limit where the employer has refused to grant leave for it to be raised, may apply to the Authority to have the matter heard out of time as set out in s 114(3) of the Act. The Authority may grant leave pursuant to s 114(4) of the Act if it:

i. is satisfied that the delay in raising the personal circumstance is occasioned by exceptional circumstances
ii. considers it just to do so

[22] The meaning of exceptional circumstances was set out in *Wilkins v Field & Fortune* [1] as being those which are "unusual, outside the common run, perhaps something more than special and less than extraordinary".

[23] The Supreme Court in *Creedy v Commissioner of Police* [2] addressing the definition of "exceptional circumstances" stated:

> "[31] In Wilkins & Field, the Court of Appeal treated 'exceptional circumstances' as those which are 'unusual, outside the common run, perhaps something more that 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.
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> [32] First, it accords with ordinary English usage. *As Lord Bingham of*

[1] *Wilkins v Field & Fortune* [1998] 2 ERNZ 70.
[2] *Creedy v Commissioner of Police* [2008] 1 ERNZ 109.

> *Cornhill said in R v Kelly* [1999] 2 All ER 13 (CA) , when construing a reference to 'exceptional circumstances':
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> '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.
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> "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 on challenging a dismissal otherwise than by a personal grievance reinforces this point."

[24] The exceptional grounds upon which Ms Ward seeks to rely are set out in s 115(b) of the Act which states:

> ***Section 115 Further provision regarding exceptional circumstances under section 114***
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> For the purposes of section 114(4)(a), exceptional circumstances include-
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> (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

[25] In addition, given that it has been held by the Employment Court that s 115 of the Act is not an exclusive list of factors [3] the Authority can take into account any other relevant matters that Ms Ward has identified.

Did Ms Ward make reasonable arrangements?

[26] There are two limbs to the test in s 115 (b) of the Act. The first limb concerns whether Ms Ward made reasonable arrangements to have the matter raised by an agent on her behalf and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit.

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[3] *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30 at [67].

First Limb

[27] Ms Ward has indicated that during the 90 days period that commenced on 15 January 2017 when she first became aware of the notification, she was essentially consumed by responding to the complaint which she did without legal assistance and too traumatised by the personal nature of the complaint to instruct her then representative to specifically raise the issue. Ms Ward also alluded to difficulties in communicating with her then advocate.

[28] Ms Ward then alluded to 20 July 2018 being when she first drew the issue of her concern about the Nursing Council complaint to EHT's attention. Ms Ward provided documentation to establish that EHT had not opposed the raising of the additional matter in the form of a partial extract from a proposed settlement document and some correspondence between counsel that I have to disregard as privileged and not admissible pursuant to s 148 of the Act as they clearly arose from mediation proceedings.

[29] Ms Ward did not address why the additional grievance was not alluded to in her then counsel's personal grievance letter of 15 January 2018 and the 17 April 2018 statement of problem filed in the Authority. I observe that even if I could accept Ms Ward's evidence that EHT was made aware of the additional grievance, it would by that point in the proceedings, have been already some 18 months out of time.

[30] I consider first whether the above demonstrates that Ms Ward made reasonable arrangements to have her grievance raised by her agent (being her first counsel) and find objectively she did not do so in a timely manner.

Second limb

[31] The second limb of the test in s 115 (b) concerns whether Ms Ward's counsel having been properly instructed, failed to raise the grievance within the requisite time limit. Given the 90 days time limit had already expired by the time the first counsel was made aware of a potential personal grievance I find that counsel could not be held responsible for a delay in raising the personal grievance within the required time frame.

[32] For the above reasons, I find that Ms Ward cannot rely upon s 115(b) of the Act as she did not make reasonable arrangements for her first counsel to raise her grievance within 90

days and the first counsel she consulted cannot be held responsible when they were not instructed within the 90 days period.

Other exceptional circumstances

[33] Ms Ward has sought to rely on an assertion that she was too traumatised and pre-occupied in defending her nursing registration during the 90 days, that she did not instruct her counsel to formally link the complaint made against her to the circumstances of her dismissal.

[34] On balance given Ms Ward's resources and compelling personal circumstances, I am just prepared to accept without any medical evidence, in equity and good conscience, that Ms Ward's understandable pre-occupation with the Nursing Council complaint and the personal nature of it given her vast previous nursing experience, is an exceptional factor to explain the delay in raising her additional personal grievance but I also need to consider whether further extra contextual matters exist and whether it is just to grant the leave.

Is it just to grant leave?

[35] In finding that an exceptional circumstance exists, s 114 (4)(b) of the Act requires that I also have to be sure that in granting the leave for Ms Ward to be heard that I consider "it just to do so". In this respect I need to look at a number of factors that I group under the following headings:

The length of the delay and prejudice to EHT

[36] Ms Ward became aware of the Nursing Council complaint on 15 January 2017 but EHT were not formally placed on notice of the specific nature of the disadvantage grievance until Ms Ward filed an amended statement of problem with the Authority on 16 April 2021. I accept this delay is significant but the reasons for such have been explored above.

Merits of Ms Ward's claim

[37] Whilst the Employment Court in *Austin v Silver Firm Farms* granted leave for Mr Austin to raise a grievance where ACC matters were at issue it did so after carefully analysing a situation where the employer had deceived him of his ACC entitlements and

adopted a strategy to divest itself of rehabilitation responsibilities. [4] Here I do not see a parallel situation as EHT had legitimate statutory reasons for making the Nursing Council aware of their concerns.

[38] A significant and perhaps insurmountable hurdle Ms Ward faces is essentially contesting what is a mandatory reporting obligation under s 34 HPCAA, of a matter to a statutorily endorsed professional body. The disputed point of law involved has already been addressed by the Authority in a number of cases that do not assist Ms Ward [5] and decided by the Employment Court in *Evans-Walsh v Southern District Health Board.* [6]

[39] In *Evans*, a case where a nurse sought to prevent a report to the Nursing Council claiming a mediated settlement agreement containing confidentiality provisions prevented such, Judge Smith affirmed a competency referral could not in principle amount to an act of disparagement as it was a statutory duty. This finding is a significant barrier to Ms Ward's disadvantage grievance unless there is compelling evidence of the matter being a referral for bad faith reasons. I find that on the evidence provided that Ms Ward's prospects of establishing that she was unjustifiably disadvantaged by the Nursing Council referral are so remote as to make it unjust to allow this matter to proceed. In concluding this, I am mindful that Ms Ward is entitled to feel aggrieved by the overall circumstances of her engagement with EHT but this matter is only one component of such and Ms Ward's other grievances are still to be investigated.

Finding

[40] Whilst I have found that Ms Ward has demonstrated that it was more than likely that her ongoing distress at the personal nature of her referral to the nursing council prevented her from raising a specific additional component of her personal grievance for unjustified disadvantage within 90 days, I find that in the totality of these circumstances, including the lengthy delay, it would not be just to grant Ms Ward's application for leave to have this matter proceed further.

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[4] At [67].
[5] Including *Perrott v Rotorua Boy's High School Board of Trustees* [2019] NZERA 74.
[6] *Evans-Walsh v Southern District Health Board* [2018] NZEmpc 46.

Conclusion

[41] Angela Ward's application under s144 of the Act is declined

Costs

[42] Whilst I have found in favour of EHT I suggest that the parties explore settling costs by agreement. If no agreement can be reached, I invite EHT to make a costs' submission within 14 working days of this determination being issued and I will provide Ms Ward a further 14 days to respond.

David G Beck
Member of the Employment Relations Authority