

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Bryan Wild (Applicant)  
**AND** Auckland City Council (Respondent)  
**REPRESENTATIVES** Stephen Tee, Counsel for Applicant  
Carl Blake, Counsel for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 22 August 2005  
**DATE OF DETERMINATION** 23 August 2005

PRELIMINARY DETERMINATION OF THE AUTHORITY

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- A. Mr Wild's application for leave to raise his personal grievance out of time is declined.**
- B. The parties are encouraged to resolve costs between them, but failing agreement, Mr Blake is to lodge and serve a memorandum within 14 days of the date of this Determination. Mr Tee is to file a memorandum in reply thereafter but within 28 days of the date of this Determination.**
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## The Problem

[1] The applicant Mr Bryan Wild (“Mr Wild”) applies for leave to raise a personal grievance out of time. The respondent Auckland City Council (“Auckland City”) opposes the application.

## The Facts

[2] Mr Wild worked for Auckland City from 8 April 1991 until he was dismissed on 7 April 2004. At the time of his dismissal he was employed as a Street Trading Officer.

[3] Mr Wild’s dismissal arose out of a pornographic attachment to an email that was sent to him.

[4] Mr Wild says he was so traumatised and affected by his dismissal that he was unable to raise a personal grievance until 26 January 2005. He calculates that period as 294 days after the date of his dismissal.

[5] He says that he was in a state of shock after he was dismissed and that he had no idea he would be dismissed and was not prepared for it. He says the reason for his dismissal gave him an acute sense of embarrassment and shame.

[6] Mr Wild believes his shame and embarrassment prevented him raising any matters in his defence. He says he just wanted to run and hide.

[7] In the days and weeks following his dismissal, Mr Wild says that he did not tell friends and family that he no longer had a job. He stayed at home alone each day so that he would not meet any family or acquaintances. He wanted to maintain the impression that he was still employed. He lived off his savings.

[8] During April and May 2004, Mr Wild says that he could not face up to what happened and he could not bring himself to deal with his dismissal and he was unable to face the prospect of looking for a new job.

[9] He began to drink more heavily than usual and had difficulty sleeping. He became very depressed and found it increasingly more difficult to find activities he could enjoy.

[10] He says that the situation reached crisis point in June 2004. His savings began to run out and he forced himself to confront the prospect of finding new employment.

[11] He eventually successfully made application for employment as a Tele-operator with Stagecoach. When he was advised he was required to provide details of his previous employment he withdrew his application. He could not face having to disclose the fact and details of his dismissal from Auckland City.

[12] There followed a period during which Mr Wild says he reached his lowest point. He fell into a deep state of depression staying home and seeing no one. He continued drinking. He could not sleep properly. He lost all sense of motivation and found it difficult to get up in the morning. He felt increasingly ashamed and confused.

[13] He says his mental state remained this way from June 2004 until January 2005. He withdrew into himself and his state of depression, anxiety and stress remained to the point that he could not properly function.

[14] In January 2005 he says that he began to think differently about what had happened to him and instead of feeling embarrassed and ashamed, he began to question whether he had been treated fairly. As a result, he saw a lawyer on 24 January 2005. On 26 January 2005, the lawyer sought Auckland City's consent to raise Mr Wild's personal grievance out of time.

[15] Mr Wild was not clinically assessed after his dismissal until May 2005 when he was referred by his GP to Dr H G McCormick for the purposes of this present application.

[16] Dr McCormick gives this evidence to the Authority:-

*Mr Wild describes symptoms of psychological stress following his dismissal which lasted over 2004. Mr Wild was not clinically assessed during that period but he does describe symptoms which suggest that he was either suffering from an Adjustment Disorder with depressed and anxious mood or that he was clinically depressed during that time. Mr Wild describes feeling low, sad and self-reproachful, he slept poorly, he became relatively reclusive and anhedonic and he became relatively confused and overwhelmed by his situation, not recognizing that he had any avenue to address or correct his situation. If I had reviewed Mr Wild in the second half of 2004, I suspect that I would have recommended that Mr Wild be treated with antidepressants given the biological symptoms of depression listed above which suggest that he was clinically depressed. I would have certainly recommended that he receive psychological support/therapy to address his conflicted feelings.*

[17] Auckland City calls rebuttal evidence from Dr Ian Pogson ("Dr Pogson"). Dr Pogson works primarily as a corporate physician and a medical advisor for insurance companies and trained in psychiatry for five years from 1990 – 1994. He has a diploma in Occupational Medicine. He runs employee assistance programmes and provides training in stress management for corporates and second opinion assessments for employers in relation to workplace stress issues.

[18] Dr Pogson says that Mr Wild's acute sense of embarrassment and shame suggests a normative response to an embarrassing situation. He says Mr Wild's reclusive behaviour is "face-saving" behaviour rather than social withdrawal indicative of illness.

[19] Dr Pogson quite rightly points out that Mr Wild was not clinically assessed in the 90 day period following his dismissal. He says that Dr McCormick's opinion must be read in light of the fact that it is based purely on Mr Wild's description of his alleged symptoms during the relevant time. Dr Pogson states the obvious when he says that an assessment during the 90 day period would be more accurate than an assessment nearly a year after relevant events.

[20] Dr Pogson concludes that Mr Wild's successful application for employment at Stagecoach required at least as much motivation and cognitive integrity as raising notification of a personal grievance. He says that there is a lack of clinical evidence that Mr Wild suffered trauma or any form of substantial injury as a result of his dismissal until June 2004. It appears to him that Mr Wild suffered embarrassment and shock following his dismissal for viewing pornographic material. Dr Pogson classifies this as a normal and expected reaction.

## **The legal principles**

[21] Section 114 of the *Employment Relations Act 2000* ("the Act") provides in part:-

(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 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 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.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

[22] Section 115(a) of the Act provides that 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 section 114(1); or

[23] The threshold for leave is very high. The consequences of the dismissal or other matter giving rise to a grievance must be severe. The phrase “... *has been so affected or traumatised* ...” has been held to connote very substantial injury. In the psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.

[24] Section 115(a) requires that the effects of the dismissal giving rise to the grievance must have caused the employee to be unable to properly consider raising the grievance. It is the inability to “*properly consider*” raising the grievance that is required. That incapacity is apparently required to exist for the whole of the 90 day period.

[25] The application of the above principles has been said to mean that most cases are unlikely to satisfy the test for leave.

## Discussion

[26] I am satisfied that Mr Wild’s situation does not meet the test for leave to be granted.

[27] Principally, I consider that the circumstances that Mr Wild describes are consequential upon the fact of termination itself rather than being due to the matter giving rise to that termination.

[28] The enactment in context requires a distinction between the personal grievance itself (or termination) and the factual matters leading up to it. The effects or trauma must be an ingredient or component of the factual situation leading up to the dismissal and not as may result from the fact of termination itself.

[29] I have apprehended the embarrassment and shame Mr Wild felt resulted from the fact of his termination and not as a result of any matter giving rise to a personal grievance for unjustifiable dismissal. Indeed his evidence is that “*the reason for my dismissal gave me an acute sense of embarrassment and shame*” and further “*I could not face up to what happened and I could not bring myself to deal with the issue of my dismissal nor could I face the prospect of looking for a new job.*”

[30] The effects or trauma Mr Wild alleges arise out of the decision to terminate his employment and not as a result of the factual matters which led to that termination.

[31] Considering matters this way, I am unable to find that there are exceptional circumstances within the meaning of section 114(a) which occasioned delay in raising a personal grievance.

[32] If I am wrong in my views above, I also consider that the effects Mr Wild and Dr McCormick described are not sufficiently severe or substantial as to amount to exceptional circumstances.

[33] I consider too that there was not a continuing incapacity over the entire 90 day period. In successfully making application for further employment, Mr Wild cannot be said to have been unable to consider raising his grievance. I agree that the efforts required to make application for further employment are more intensive than those required to give consideration to raising a personal grievance.

[34] I have given consideration to whether there might be other exceptional circumstances which might be said to have occasioned the delay. I have concluded there are not.

[35] I determine that there are no exceptional circumstances which occasioned Mr Wild's delay in raising his personal grievance and it would not be just to grant leave. **Mr Wild's application for leave to raise his personal grievance out of time is declined.**

### **Costs**

[36] In the event that costs are sought, the parties are encouraged to resolve that question between them, but failing such agreement, Mr Blake is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Tee is to file a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson  
**Member of Employment Relations Authority**