Attention is drawn to the
non-publication order
at paragraph [24]

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 414
3169882

	BETWEEN	KYLIE WILSON Applicant
	AND	EAST COAST CLEANING LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Ashleigh Fechney, advocate for the Applicant Deepak Badhwar, for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	26 July 2022 from the Applicant 9 August 2022 from the Respondent
Date of Determination:	24 August 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Kylie Wilson, claims she was unjustifiably dismissed by East Coast Cleaning on 21 October 2021.

[2] More importantly for the purposes of this determination, and perhaps to cover all eventualities, she accepts her grievance was not raised within the required 90 days and seeks leave to proceed pursuant to s 114(4) of the Employment Relations Act 2000 (the Act). It is that preliminary issue this determination addresses.

[3] East Coats Cleaning's position was unknown till recently as it failed to participate in the Authority's process until 9 August 2022. Suffice to say it accepts Ms Wilson was dismissed but considers that justified given her serious misconduct.

The Authority's investigation

[4] As a result of East Coast Cleaning's failure to participate I made a decision to address the s 114(3) application on the papers, albeit giving the company an opportunity to participate notwithstanding its potential exclusion pursuant to regulation 8(3) of the Employment Relations Authority Regulations 2000.

[5] I also gave it a conditional opportunity to defend the substantive matter should it proceed.

[6] Ms Fechney has since provided written submissions along with an affidavit from Ms Wilson. East Coast Cleaning has met the conditions which allow it to defend the substantive claims should the grievance be allowed to proceed but failed to address the s 114(3) application other than to note the grievance was not raised within 90 days.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[8] As already said Ms Wilson was dismissed by East Coast Cleaning on 21 October 2021. She subsequently sought assistance and, as a result, resolved to pursue a personal grievance. On 21 December Ms Fechney forwarded a draft letter of grievance for Ms Wilson's consideration.

[9] On 23 December Ms Wilson replied saying "Received, thank you. Sounds good Ashleigh." It is Ms Wilson's evidence that in saying this she understood she approved the letter and was instructing Ms Fechney to raise the grievance.

[10] Ms Fechney, however, did not interpret the response that way in what she describes as a miscommunication and that is clear from the fact she then proceeded to send e-mails to Ms Wilson advising the later of the 90 day requirement and asking for Ms Wilson's views on the draft letter.

[11] Ms Wilson says she did not see any of these e-mails. Indeed, she says she did not look at any e-mails until 25 January 2022 as her time was totally subsumed dealing with a traumatising family event. When she saw the e-mails she immediately responded advising Ms Fechney "I replied that that the draft was ok to send Ashleigh."

[12] The letter was sent on 26 January 2022 and included a request the respondent attend mediation. Accompanying that letter was another advising East Coast Cleaning that 97 days had passed since the dismissal; the fact that raised the possibility of a s 114(3) application and the grounds that would be relied upon should such an application be necessary. The second letter ends with the statement:

> If East Coast Cleaning Limited does not agree to the personal grievance being raised out of time, please let me know immediately, as Kylie will be required to seek leave from the Employment Relations Authority.

[13] Further exchanges occurred with East Coast Cleaning explaining its justification for the dismissal and asking questions about the mediation process. I also note that within Ms Fechney's replies is the suggestion the company seek legal advice.

[14] Ultimately East Coast Cleaning agreed to attend mediation and at no point did it respond to the paragraph cited in [12] above by advising it did not agree to the grievance being raised out of time.

Analysis

[15] First I question whether or not this application is even required and in saying that I am cognisant of the Courts decision in *Turner v Talley's*.[1] In *Turner* the Court concluded that by not raising lateness in its initial reply but instead commenting on the substantive issues *"[Ms Turner] was entitled to assume that there was no problem with any delay"* and Talley's had given implied consent.[2] The same must surely be the case here given East Coast Cleaning replied to the substantive claims and did not oppose the late raising of the grievance despite being advised of the issue by Ms Fechney and it being suggested the company seek advice.

[1] *Turner v Talley's Group Limited* [[2013] NZEmpC 31; [2013] ERNZ 12
[2] Above n 1 at [82] and [83]

[16] Furthermore, East Coast Cleaning then agreed to attend mediation and did so without commenting on the 90 day issue which had been brought to its attention. Here I note the comments Judge Palmer in *Jacobsen Creative Surfaces Limited v Findlater* that if an employer:

> **…** purposefully seeks to resolve the contended personal grievance through, say, a process of negotiation or mediation with the affected employee of his representative, then such an employer has plainly consented, I hold, to the submission of the stale grievance to him. [3]

[17] For these reasons I conclude Ms Wilson's grievance has been accepted and the s 114(3) application is unnecessary.

[18] For the sake of completeness and had I not concluded the grievance had been accepted I would have found exceptional circumstances existed and Ms Wilson should be allowed to have her grievance heard. In saying this I note *Wilkins & Field Limited v Fortune* where 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."[4] This was upheld by the Supreme Court in *Creedy v Commissioner of Police* which expressed a preference for the less stringent application.[5]

[19] In this case I would have concluded such circumstances existed given I accept Ms Wilson thought she had instructed Ms Fechney raise the grievance but was then denied knowledge this had not occurred due to an unfortunate traumatising event which might actually be considered to have met the extraordinary threshold. When she became aware of the situation, she acted to have the issue addressed and it was. Add to that the fact the delay was relatively short and East Coast Cleaning are yet to raise an argument as to why leave should not be granted had that been required.

Non publication

[20] Ms Wilson also asks there be an order preventing the publication of any information relating to the traumatising event referred to above. The order is not opposed.

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[3] *Jacobsen Creative Surfaces Ltd v Findlater* [1994] 1 ERNZ 35, at 54, also applied in *Phillips v Net Tel Communications* [2002] 2 ERNZ 340

[4] *Wilkins & Field Limited v Fortune* [1998] 2 ERNZ 70, at 76

[5] *Creedy v Commissioner of Police* [2008] NZSC 31

[21] Having considered the evidence as it relates to these events; the fact third parties not involved in the grievance are likely to be adversely affected by any publicity and that there is no apparent public interest in knowing the details, I agree.

Conclusion and orders

[22] For the above reasons I conclude that while Ms Wilson raised her grievance out of time East Coast Cleaning has accepted it and it may proceed. Even if that had not been my conclusion, I would have granted leave for it to proceed pursuant to s 114(3) of the Act.

[23] Given East Coast Cleaning has complied with the condition that entitles it to defend the substantive claim that shall proceed in accordance with the timetable specified in my Directions notice of 28 June 2022.

[24] There is an order prohibiting the publication of anything concerning the traumatising events referred to in this determination.

[25] Costs are reserved but I consider it appropriate they await consideration along with those that might arise as a result of the substantive investigation.

Michael Loftus
Member of the Employment Relations Authority