

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 144  
5548029

BETWEEN                      ELIZABETH WILSON  
Applicant

A N D                              MAORI HILL MONTESSORI  
PRESCHOOL LIMITED  
Respondent

Member of Authority:        David Appleton

Representatives:              Phillip de Wattignar, Advocate for the Applicant  
Rachel Brazil, Counsel for the Respondent

Investigation Meeting:        10 September 2015 at Dunedin

Submissions Received:        17 September and 2 October 2015 from the Applicant  
25 September 2015 from the Respondent

Date of Determination:        6 October 2015

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**DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE**

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- A.        I decline to grant leave to allow Ms Wilson to raise her personal grievance for unjustified constructive dismissal outside of the statutory 90 day time limit for the reasons set out in this determination.**
- B.        Costs are reserved.**

**Employment relationship problem**

[1]        Ms Wilson claims unjustified constructive dismissal from the respondent. The respondent denies that Ms Wilson was unjustifiably constructively dismissed.

[2]        However, in order for the Authority to have the jurisdiction to consider Ms Wilson's claim, it must be satisfied that she either raised her personal grievance

with the respondent within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred, or it must grant Ms Wilson leave to raise such a personal grievance outside of that 90 day period unless the respondent consents to it being raised after that period. These are requirements set out in s.114 of the Employment Relations Act 2000 (the Act).

[3] It is common ground that Ms Wilson's personal grievance in relation to her complaint of unjustified constructive dismissal was not raised within the 90 day statutory period and that the respondent does not consent to it being raised outside of that period. This determination therefore considers whether to grant leave to Ms Wilson to raise her grievance outside of the statutory time limit.

**Brief account of the facts leading to the raising of Ms Wilson's personal grievance**

[4] Ms Wilson achieved full registration to hold a practising certificate from the Teachers' Council in 2013, when she commenced employment with the respondent. The director of the respondent is Jo Wilsher. It is not necessary or appropriate to set out in detail the issues that arose between Ms Wilson and Ms Wilsher, as well as other teaching staff at the respondent, save to say that Ms Wilson's evidence is that she encountered what she calls animosity from one of her teaching colleagues over a period of time as well as difficulties with another colleague and says that she began to feel stressed about coming to work.

[5] On 1 November 2013, one of Ms Wilson's colleagues wrote a formal complaint about Ms Wilson and Ms Wilsher instigated a formal investigation process as a result. As part of this investigation, a third party was engaged by the respondent to prepare a report which was received by Ms Wilson on 21 December 2013. Amongst other things, this report stated that Ms Wilson no longer met the required competence level referred to in the registered teacher criteria published by the Teachers' Council and that the respondent would therefore need to make a mandatory report to the Teachers' Council. This report was later made to the Teachers' Council by Ms Wilsher on 30 April 2014. The Teachers' Council subsequently assessed Ms Wilson as competent on 9 December 2014 so that no further action was required.

[6] Ms Wilson spent the 2013/2014 Christmas and New Year break responding to the investigation report and engaged Mr de Wattignar who wrote to Ms Brazil on

22 January 2014 raising *an employment relationship problem*. In this letter, Mr de Wattignar requested mediation.

[7] Prior to the 2014 school term commencing, Ms Wilson attended a planning meeting with one of her co-workers but later received a communication from the co-worker which she interpreted as intimating that Ms Wilson did not understand about term time planning. It is understood that Ms Wilson regarded this as a final straw and, on 2 February 2014, tendered her resignation in writing, addressed to Ms Wilsher. The resignation letter stated as follows:

*This is to inform you that I find it necessary to tender to you my resignation. This has become necessary as I no longer feel safe working for you.*

*As the time to return to work has come closer, my stress levels have become unbearable. The pressure of the past few months has had a serious impact on my health and well being.*

*I have felt bullied and intimidated and have felt pressured into leaving Maori Hill Montessori Preschool.*

*I am giving you 4 weeks notice as per my contract. However, as I no longer feel safe working for you, I am taking 4 weeks stress leave from 02/02/14.*

*Regards  
Elizabeth (Liz) Wilson*

[8] The mediation that had been arranged to take place on Friday, 7 February 2014 between Ms Wilson and the respondent was then cancelled.

[9] Ms Wilson's four weeks' notice expired on Sunday 2 March 2014, when the 90 days within which she should have raised her personal grievance for unjustified constructive dismissal started to run. The 90th day fell on Saturday 31 May 2014.

[10] Mr de Wattignar wrote a letter to Ms Wilsher raising a personal grievance on behalf of Ms Wilson for unjustified constructive dismissal by way of a letter dated 29 January 2015. This was 243 days after the statutory 90 day period had expired.

### **The issue to be determined**

[11] The issue to be determined by the Authority in this preliminary matter is whether the Authority should grant leave to Ms Wilson to raise her personal grievance for unjustified constructive dismissal after the expiration of the statutory 90 day period.

[12] Section 114(1) of the Act provides as follows:

*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.*

[13] Section 114(4) of the Act provides that the Authority, after giving the employer an opportunity to be heard, may grant leave for a personal grievance to be raised after the expiration of the 90 day period, 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 one or more of the circumstances set out in s.115); and
- (b) Considers it just to do so.

[14] Up to the day of the investigation meeting, it was understood that the only exceptional circumstance relied upon by Ms Wilson is that set out in s.115(a) of the Act. However, at the investigation meeting Mr de Wattignar said that Ms Wilson also relies on exceptional circumstances created by the context in which events arose. I understand that this does not relate to one of the four listed exceptional circumstances set out in s.115, but that is permissible as that section does not provide an exhaustive list. I shall examine s.115(a) first.

[15] This exceptional circumstance is stated as follows:

*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).*

[16] The Employment Court has examined the question of what is meant by the words in s.115(a) in the case of *Telecom New Zealand Ltd v. Morgan*<sup>1</sup>. In this case, Judge Colgan as he then was stated, at para.[22], the following:

*... Focusing on the first example of exceptional circumstances set out under s115(a) ... Parliament has established a high threshold for employees seeking to rely upon the effects on them of their dismissals*

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<sup>1</sup> [2004] 2 ERNZ 9

*or other matters giving rise to grievances. If anything, it is arguable that Parliament has made the “exceptional circumstances” test a more difficult one to satisfy, at least where circumstances such as those here are relied on.*

[17] In paras.[23] and [24] of the judgment, His Honour Judge Colgan says the following:

[23] *Deconstructing the subsection, the following elements appear necessary to meet the exemplar “exceptional circumstances” test under s115(a). First, the consequences of the dismissal or other matter giving rise to a grievance must be severe. That is illustrated by the use of the phrase “has been so affected or traumatised ...”. Although being “affected” may encompass a range of effects from relatively minor to very serious, the accompanying use of the derivative of “trauma” connotes very substantial injury. In a physical sense, this means shock following a physical wound or injury characterised by a drop in body temperature and mental confusion. In a more psychological sense, it connotes emotional shock following a stressful event, sometimes leading to long-term neurosis.*

[24] *Next, s115(a) requires that these effects of the dismissal or other matter giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. It is not an inability to raise the grievance that Parliament has said may contribute to an exceptional circumstance. It is the inability to “properly consider” raising the grievance that is required to be established by an applicant for leave relying on s115(a). Finally, that incapacity appears to be required to exist for the whole of the 90 day period and not for only a part of it by use of the phrase “within the period specified ...”.*

[18] His Honour Judge Colgan goes on to say that, so interpreted, the statutory test for this exceptional circumstance requires a high standard of proof to be met by an applicant. He then said:

*Although it is not impossible to conceive of cases where the consequences of employment events giving rise to a grievance will be so serious and the resulting incapacity to properly consider raising the grievance will last for more than 3 months, most cases are unlikely to meet that test.*

[19] In her written evidence before the Authority, Ms Wilson stated that, after she sent her resignation letter, she saw her GP, Dr Salil Elias, and that he advised her to take four weeks stress leave in lieu of notice. Ms Wilson said that she *just felt relief*.

[20] During her oral evidence to the Authority Ms Wilson said that she started her new job, with Sport Otago, on 14 February 2014. This was obviously during her

notice period. She said that she had found the new job hard to adjust to at first, but, as she is still employed there, and has clearly received the support of the CEO of Sport Otago, she clearly adapted to the new role.

[21] Ms Wilson's brief went on to say that, even after resigning, she still carried the *weight of the threat to report her to the Teachers' Council*. She said that she tried not to think about it, but it was constantly there, worrying her. However, she also stated that, when she applied for the new job with Sport Otago (which may have been before she resigned) she also said that she *felt devastated* that she could not apply for a teaching job without a teaching reference and with the threat of a report hanging over her.

[22] On 22 April 2014, a letter was sent to Ms Wilson's new employer from an anonymous source (but purportedly written by *A concerned citizen and ratepayer*) essentially referring to the outcome of the investigation report and questioning Ms Wilson's integrity.

[23] Whilst the receipt of the anonymous letter to her employer undoubtedly would have caused Ms Wilson considerable anxiety, it cannot be taken into account in considering whether s.115(a) has been satisfied as the wording of that subsection makes clear that it must be the matter giving rise to the grievance that so affected or traumatised the employee so that he or she was unable to properly consider raising the grievance within the period specified in s.114(1). In other words, events that happened during the 90 day period following a dismissal or alleged constructive dismissal cannot be taken into account under s.115(a) as such matters cannot, by definition, have given rise to a grievance.

[24] In her written evidence, however, Ms Wilson did not explain exactly how she was so affected or traumatised that she was unable to properly consider raising her grievance at any point within the statutory 90 days. In her oral evidence, Ms Wilson was able to explain this more clearly. She explained that she was very concerned that her competency would be found wanting by the Teachers' Council. She said that she coped on a day to day basis at her new work by boxing her worries off, but when she was away from work her worries came back to the fore.

[25] Ms Wilson explained that she had gone to see her GP after she had sent her letter of resignation, but did not go back again. When asked why she had waited so

long to raise the personal grievance, she said she felt that *everything had been rubbished* by the respondent and that, when the Teachers' Council finally confirmed on 9 December 2014 that they would take no action, and that the concerns about Ms Wilson were related to her employment condition, and not conduct and competence issues, she felt that, finally, *they* [the Teachers' Council] *were agreeing with me*.

[26] Ms Wilson said that she had been aware of the need to raise a personal grievance within 90 days in general terms because she had wanted to raise a grievance in respect of a meeting she had had with Ms Wilsher during her employment in which she had felt ambushed, but had subsequently learned that she was out of time. She said, however, that she had believed that the 90 days within which she had to raise her grievance with regard to her concerns which had led to her resignation had not started to run while the issue of the mandatory report to the Teachers' Council was still unresolved. I understood Ms Wilson to be saying that she did not believe the 90 days would start to run until she had received the outcome (and possibly until she had received vindication) from the Teachers' Council.

[27] When asked why, even after she had received exoneration from the Teachers' Council on 9 December 2014, she waited until 29 January 2015 to raise the grievance, she said that her representative's office was closed over the Christmas and New Year period. Without express evidence on that point, though, I do not accept that it would have been closed from as early as 9 December.

[28] Ms Wilson's husband, Murray Wilson, also submitted a written brief of evidence which referred to the strain that Ms Wilson and he had been under during her employment, and afterwards, and stated the following:

*Dealing with the immediate problems in front of Liz and I, and surviving those, was our only focus during that time. Had we not been under such strain, and the threat of a report to the Teachers' Council hanging over us, I feel certain we would have looked to take a personal grievance case against the preschool much sooner.*

[29] In his oral evidence he said he was not sure he was aware of having to raise a personal grievance and that everything else had been so absorbing that raising a personal grievance was not part of their train of thought. He believed that they first thought of doing so when they had a bit of clear space.

[30] A brief of evidence was also given by a friend of Ms Wilson, Caroline Dore, whose brief of evidence stated the following:

*Upon leaving her position at the Montessori, it took many months for Liz to recover both emotionally and physically this [sic] was aggravated by the ongoing threat of deregistration which took a long time to resolve.*

[31] However, it emerged on the day of the investigation meeting that Ms Dore was not available to attend and, as her evidence was not contained in affidavit form, and her brief was not even signed, it can carry very little probative weight.

[32] Oral evidence was taken from Dr Elias, who confirmed that Ms Wilson had consulted with him around the time of her resignation, and was anxious, tired, teary and upset, and not coping anymore. He said that they had had a long chat and that Ms Wilson attributed her symptoms to what was happening in her workplace. He prescribed a short course of a sedative. He confirmed that Ms Wilson did not consult with him after that occasion about her stress, and the prescription for the sedative was not renewed.

## **Determination**

### *Section 115(a)*

[33] I will first examine the question of whether Ms Wilson has satisfied s.115(a) of the Act. As I indicated to the parties in my oral indication at the conclusion of the evidence on the day of the Authority's investigation meeting, I am not persuaded that Ms Wilson has satisfied the very high hurdle imposed by s.115(a) of the Act. This is primarily because she managed to start new employment prior to the 90 day period commencing and maintained it throughout the 90 days.

[34] In addition, there is no evidence that Ms Wilson suffered *very substantial injury* (to cite the words used in *Morgan*) which prevented her from being able to properly consider raising the grievance. Ms Wilson did not seek any further medical help after her first consultation during the 90 days and did not have her prescription for the sedative renewed. I also take into account the fact that Ms Wilson was diagnosed as suffering from situational stress. The situation in question was working for the respondent. However, she did not work there anymore during the 90 day period and so it is reasonable to conclude that the stress was alleviated.

[35] It is worth adding that Ms Wilson, who competes in masters running competitions at an international level, took part in two competitions during the 90 day period. Ms Wilson said that running helped her deal with her stress, which I entirely accept, but this does indicate in my view that she cannot have fulfilled the very high threshold of trauma required to satisfy s.115(a).

[36] Therefore, I do not accept that the exceptional circumstance described at s.115(a) is made out.

*Were there other exceptional circumstances which occasioned the delay?*

[37] I now turn to whether there are any other exceptional circumstances which occasioned the delay in Ms Wilson raising her personal grievance within the 90 day period. The threat of an adverse finding by the Teachers' Council with regard to her competency as a teacher appears to be the main plank of Ms Wilson's argument.

[38] The threat predated her resignation, when the investigation report made reference to a report to the Teachers' Council needing to be lodged, and was strengthened by Ms Wilsher actually lodging the Mandatory Report Form on 30 April 2014, two thirds of the way through the 90 day period.

[39] My understanding is that this threat acted as a distraction for Ms Wilson. Both she and Mr Wilson gave evidence of Ms Wilson not being able to focus on other issues. Clearly, however, she did manage to do so because she held down a new job in a field she had never done before (assisting families to achieve a healthy lifestyle through Sport Otago's Active Families Programme) which she described as *a huge change*. She also competed in running competitions at an elite level in her age category.

[40] When I analyse what Ms Wilson's argument boils down to, it is essentially of the same character as that envisaged in s.115(a) of the Act; namely, being affected by circumstances so as to prevent properly considering the raising of the grievance. Being distracted by her understandable concerns in regard to the Teachers' Council's process is of the same character, save that the cause of the distraction is something other than the matter giving rise to the grievance. However, as it is of the same character, it must be the case that Ms Wilson has to satisfy the same high threshold as s.115(a) demands. I have already found that she has not done so.

[41] My conclusion of what actually occurred is that Ms Wilson did not even think of raising a personal grievance about unjustified constructive dismissal until much later. This was because, as Ms Wilson said in her oral evidence to the Authority, she was not thinking of constructive dismissal at the point she resigned, and was not even aware of constructive dismissal at that time. She also said that she did not know that the 90 day rule applied to constructive dismissals.

[42] This evidence, which I accept, does not fit in, however, with Ms Wilson's later evidence that she believed that the 90 days would not start until the Teachers' Council had investigated the mandatory report. If she did not know about constructive dismissal, and did not know she had a claim, she could not have believed that the 90 days would not have started running until later. I accept, though, that this may have been a conclusion she had reached later on, after obtaining advice about constructive dismissal, in the hope that she could raise her grievance in February 2015.

[43] Given that I find that the real circumstance that occasioned the delay in Ms Wilson raising her personal grievance was an unawareness of her legal right to claim constructive dismissal at the time she resigned, and within the 90 days that followed the end of her notice period, I must consider whether that amounts to an exceptional circumstance.

[44] Section 114(1) of the Act makes clear that the 90 days start to run from 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. However, Ms Wilson was clearly aware of the actions that she now says amount to her personal grievance by the time her notice had expired. That is not the same as her legal rights coming to her notice.

[45] It has been very well established by case law for some time that ignorance of one's rights does not amount to exceptional circumstances. I refer, for example, to the Employment Court case of *Thomson v Thomson*<sup>2</sup> in which it was held that a lack of knowledge about rights does not constitute exceptional circumstances.

[46] I have not heard any other evidence that could account for the considerable delay in raising the personal grievance and which would amount to an exceptional circumstance.

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<sup>2</sup> [1992] 2 ERNZ 84

[47] Accordingly, I cannot find that exceptional circumstances occasioned the delay in Ms Wilson raising her personal grievance for unjustified constructive dismissal. The test in s.114(4) is a two stage test, both of which stages must be satisfied. Therefore, it is not necessary for me to go on to consider whether it would be just to allow Ms Wilson to raise her personal grievance out of time.

### **Conclusion**

[48] I decline to grant leave for Ms Wilson to raise her personal grievance outside of the statutory 90 day period.

### **Costs**

[49] Costs are reserved. The parties are to seek to agree how costs are to be dealt with between them. However, if they cannot agree within 21 days of the date of this determination, then the respondent will have a further 14 days within which to serve and lodge a memorandum of counsel setting out what contribution towards its costs it is seeking from Ms Wilson. Ms Wilson or Mr de Wattignar will then have a further 14 days within which to serve and lodge a memorandum in reply.

David Appleton  
Member of the Employment Relations Authority