**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**TE WHANGANUI-A-TARA**

**[2019] NZEmpC 67**
**EMPC 261/2018**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | HOKOTEHI MORIORI TRUST<br>Plaintiff |
| AND | DAVID JAMES PRATER<br>Defendant |

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| Hearing: | 2 April 2019<br>(heard at Wellington) |
| Appearances: | B Scotland, counsel for plaintiff<br>D Prater, in person |
| Judgment: | 30 May 2019 |

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] The issue for resolution is whether exceptional circumstances exist warranting the grant of leave to raise a personal grievance after the expiration of 90 days following dismissal.

## Background

[2] Mr Prater was employed in the Chatham Islands by the Hokotehi Moriori Trust (the Trust) as General Manager of Operations.

[3] After presenting the Executive Chairman of the Trust, Mr Mau Solomon, with a medical certificate on 17 May 2017, confirming he had been advised to avoid high stress situations, Mr Prater was suspended on health and safety grounds on 26 May 2017. At the same time, a personal grievance was raised with regard to the suspension by Christchurch lawyers on Mr Prater's behalf, whom he had instructed from a distance.

[4] Then the Trust proposed that Mr Prater attend a medical appointment for assessment by a doctor, and counselling.

[5] Subsequently, Mr Prater declined to attend the medical examination. However, the Trust met his travel expenses and he did attend counselling in Wellington on 13 June 2017. On 18 June 2017, he also attended the Wellington Hospital after suffering migraine headaches over previous days.

[6] In the meantime, Mr Scotland, acting for the Trust, wrote to Mr Prater's lawyer asserting he had made derogative remarks concerning Mr Solomon in early June 2017. A meeting was proposed for Mr Prater to address the Board of the Trustees in Wellington on 16 June 2017; he and his lawyer attended the offices of the Trust's lawyer. A further allegation was raised on 22 June 2017. Correspondence between the lawyers followed.

[7] Ultimately, in a letter of 18 July 2017, the Trust said it considered Mr Prater had made several derogatory comments which raised trust and confidence issues such that Mr Prater's employment with the Trust should be terminated with immediate effect, with the last date of employment being that day.

[8] Separately, Mr Prater was also advised by the Trust that he also had 90 days to vacate accommodation owned by it in which he had resided for some, but not all, of the period of his employment. He was required to give vacant possession no later than 16 October 2017.

[9] After the termination, there were email exchanges between Mr Prater, then back in the Chatham Islands, and his two lawyers; by this time, he was expecting them

to take further steps on his behalf. They did not – nor did they state they were no longer acting for him or render an invoice for the services they had incurred.

[10] Eventually, Mr Prater decided he would have to file a statement of problem in relation to his dismissal, himself, believing that the last day for doing so was 16 October 2017.

[11] Mr Prater sent his statement of problem by email to the Employment Relations Authority (the Authority) in Christchurch. That document and its attachments totalled some 214 pages. The volume was such that he sent it by means of four emails, just after 9.00 pm on 16 October 2017. He said he subsequently learned that the emails had been received by the Authority at 1.00 am on 17 October 2017.

[12] The statement of problem asserted there was a "constructed dismissal which led to unfair dismissal", and a "failure to provide safe working environment", all as outlined in the various attachments to that document; in essence two personal grievances were pleaded.

[13] On 17 October 2017, the Authority emailed the Trust's lawyer, Mr Scotland, to establish whether he was authorised to accept service. He indicated he was, with a copy of the statement of problem being sent to him by the Authority on 18 October 2017. The Trust did not consent to the grievance being raised after the expiration of the 90-day period, so that it was necessary for Mr Prater to show there were exceptional circumstances justifying leave being granted because the personal grievance had not been raised within 90 days of the dismissal, but 92 days.

## The Authority's consideration of the issue

[14] In due course, the Authority decided that the issue of whether leave should be granted should be determined on the papers as a preliminary matter, by way of submissions and affidavits.

[15] In a determination of 3 August 2018,[1] the Authority noted Mr Prater had chosen to raise a personal grievance by commencing proceedings in the Authority, and that there was no issue with his ability to do so, having regard to dicta of the Court in *Premier Events Group Ltd v Beattie (No 3)*.[2]

[16] In that case it had been observed that this particular method of raising a personal grievance ran the risk that service on an employer may occur outside the 90-day limitation period.[3] The Authority noted that this was such a case.

[17] Two grounds for a finding of exceptional circumstances were considered. The first was whether Mr Prater had been so affected or traumatised that he was unable to properly consider raising his grievance within the 90-day window. He relied on a letter he had obtained from a locum general practitioner (GP) who had worked in the Chatham Islands, Dr Brent Maxwell, who stated Mr Prater's mental health and impaired ability to focus at the time "could have made it highly likely he could make mistakes while undertaking even day to day tasks let alone those that were more complex".[4]

[18] The second related to the question of whether Mr Prater had made reasonable arrangements to have his grievance raised on his behalf by an agent, and that the agent unreasonably failed to ensure that the grievance was raised within the required time. On that topic, Mr Prater had produced an email dated 3 August 2017 from one of his lawyers answering questions and comments made by Mr Prater about his situation, which concluded with a statement that the only thing required was for him to raise a grievance within 90 days of the dismissal decision. In the email, the lawyer also said he should refrain from contacting his lawyers, until he had been provided with the substantive response from them, which would be given.[5]

[19] The Authority also referred to other emails which showed Mr Prater's anxiety at not being able to contact his lawyer or obtain any response to his calls. The

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1 *Prater v Hokotehi Moriori Trust* [2018] NZERA Wellington 67.
2 *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79.
3 At [10].
4 At [22].
5 At [23].

Authority recorded that in one of those emails he had asked a third party to contact the lawyer on his behalf to inform her of his "extreme anxiety" and to pass on his request that she "tell us the plan". He said he was "left totally abandoned" by his former lawyers.

[20] On these facts, the Authority concluded, in light of Dr Maxwell's assessment, that Mr Prater's mental health and inability to focus, as a result of the matters giving rise to the personal grievances, were very likely to have resulted in his failure to meet the time requirements, and that this constituted an exceptional circumstance.[6]

[21] On the second ground, although the email from his lawyer contained no advice as to how a grievance was to be raised, the Authority found that Mr Prater did know that a grievance had to be raised within 90 days. The Authority considered that if this had been the sole ground, leave would not have been granted.[7]

[22] The Authority went on to consider whether it was just for the grievances to be raised out of time. Since they were brought to the attention of the Trust only two days outside the statutory period, the Authority concluded the delay was minor, and that the Trust would not be unduly prejudiced if leave was granted.[8]

[23] In summary, the Authority found that Mr Prater should be given leave to raise his two personal grievances out of time. It also directed the parties to mediation as required under the statute when such leave is granted.[9]

## The challenge

[24] The Trust brought a de novo challenge to this determination. The essence of its pleading is that there are no exceptional circumstances which would justify Mr Prater being permitted to pursue personal grievances in respect of his dismissal or that there was an unsafe workplace, out of time.

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6 At [32] and [33].
7 At [25] and [29].
8 At [36].
9 At [37] and [38].

[25] Mr Prater, continuing to be self-represented, filed two statements of defence, both of which, in essence, contest these assertions.

[26] The focus of the Trust's case was directed to the finding made by the Authority as to Mr Prater's state of mind at the time the personal grievance was raised.

[27] In the first instance, the Trust sought disclosure of several categories of documentation: documents relating to casual mechanical work he had undertaken relating to applications for membership of trust boards and community organisations, and for the documents relied upon by Dr Maxwell, including GP and counselling notes, when he prepared his opinion. Such documents as Mr Prater possessed on these topics were ultimately disclosed.

[28] The challenge was then progressed towards a hearing. It was initially scheduled to take place on the basis of affidavit evidence, documents to be included in an agreed common bundle, and submissions given in writing; the parties would address these at a submissions-only hearing by telephone scheduled for 22 February 2019.

[29] After these directions were made, several issues arose. First, there was not complete agreement as to the documents which would be before the Court. It became apparent Mr Prater wished to rely on factual assertions contained in his statements of defence, which the Trust would wish to contest.

[30] Secondly, the Trust wished to introduce evidence from Dr Patrick Daniels, a consultant psychiatrist, to comment on the medical records that had been obtained. His proposed evidence was that Mr Prater had not indicated any features of a psychiatric order, or functional limitations, in the period 19 July to 16 October 2017. He also intended to state he disagreed with Dr Maxwell's opinion as considered by the Authority. In response, Mr Prater wished to rely on a further opinion from Dr Maxwell, who would acknowledge his original view had been somewhat speculative but would say that Mr Prater's account of his mental health could not be dismissed out of hand. It also became clear Mr Prater wished to ask questions of Dr Daniels.

[31] I determined in light of these developments it was no longer appropriate for the challenge to be dealt with as had originally been directed. I ruled that the hearing for the taking of evidence and giving of submissions should take place; and that this would be at the Chatham Islands, unless the parties chose to agree that a hearing in Wellington would be preferable. Such an agreement was in fact reached, with the Trust meeting Mr Prater's travel and accommodation costs involved in attending the hearing.

[32] When the hearing proceeded on 2 April 2019, the first witness was Mr Prater, who gave detailed evidence concerning his circumstances following the termination of his employment, focusing on the events which preceded the filing of his statement of problem. In particular, he referred to the circumstances which led him to attend a health practitioner, interactions with his existing lawyers and his attempt to obtain alternate advice; a description of the work he carried out in this period; an application he completed to become a Board member of the Chatham Islands Enterprise Trust; the logistics of filing his statement of problem; and the circumstances relating to the vacating of the Trust's property.

[33] Mr Prater introduced in evidence an affidavit from Dr Maxwell, confirming his two opinions. He was not required for cross-examination.

[34] Then Dr Daniels gave evidence for the Trust. He adhered to the opinion described earlier; he did not agree with Dr Maxwell's views.

[35] In a supplementary affidavit filed by the Trust with leave after the hearing, Dr Daniels said he had reviewed the transcript of Mr Prater's evidence; he considered there was no additional information given by Mr Prater as to his circumstances which would lead him to reach the conclusion Mr Prater had been experiencing any "psychiatric disorder or clinically significant emotional condition" during the period 19 July to 16 October 2017. Records of orders made by the Tenancy Tribunal were also produced.

## Overview of the parties' cases

[36] Mr Scotland, in summary, submitted:

a) In light of the dicta of the Supreme Court in *Creedy v Commissioner of Police,* Mr Prater had to establish to the Court's satisfaction that exceptional circumstances existed; to meet this threshold the reasons must be unusual, and not regularly routinely or normally encountered.[10]

b) It was accepted that the Supreme Court may have tempered the threshold; even if the circumstances described in s 115(a) of the Employment Relations Act 2000 (the Act) were not precisely met, they would provide assistance in determining the present case.

c) Relying on earlier dicta from this Court in *Telecom New Zealand Ltd v Morgan*, it was argued that to qualify as "trauma" under the subsection, an employee would need to have suffered a "substantial injury" so that he or she was unable to properly consider raising the personal grievance.[11] Further, the incapacity should exist for the whole of the 90-day period, and not for a part-only of it.

d) The medical evidence before the Court did not disclose evidence of trauma, ill health, or Mr Prater being in any way affected so that he could not raise a grievance within time.

e) This was confirmed by Dr Daniels who had considered the medical records, and other evidence. Mr Prater was able to undertake tasks that required adherence to detail, meet a deadline in the case of the application for Board membership, and perform tasks requiring care and attention such as driving trucks, building work and servicing vehicles.

f) Dr Maxwell had not examined Mr Prater but had reviewed his medical and counselling notes. His evidence was entirely speculative in nature, as he had conceded.

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10 *Creedy v Commissioner of Police* [2008] NZSC 31, [2008] NZLR 7 at [31].
11 *Telecom New Zealand Ltd v Morgan* [2004] 2 ERNZ 9 at [23].

g) Applying the criteria of s 115(a), as explained in *Telecom New Zealand*, the test was not met.

[37] In his submissions, Mr Prater submitted in summary:

a) The evidence showed that at the time he filed the statement of problem in the Authority, there was a misunderstanding due to significant stress; and he had been let down and abandoned by his legal team.

b) He referred to dicta of former Chief Judge Colgan in *Austin v Silver Fern Farms Ltd*,[12] that it was permissible to consider a range of factors to assess whether the circumstances were exceptional, as interpreted by the Supreme Court in *Creedy*. Such circumstances may not fit neatly within any of the four examples given in s 115, but in combination they could. All relevant circumstances needed to be considered.[13]

c) Approached on that basis, the Court should conclude that there had been a set of circumstances that were in combination exceptional, which had led to the delay in raising the personal grievances.

[38] In reply, Mr Scotland submitted:

a) The circumstances in *Austin* were clearly distinguishable, as was a second case to similar effect to which Mr Prater had referred.[14]

b) Any established exceptional circumstances needed to have a causative effect upon the delay in submitting the grievance, which was not the case here.[15]

c) Mr Prater knew how to raise a personal grievance, because his lawyers had raised a disadvantage grievance by letter addressed to the Trust;

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12 *Austin v Silver Fern Farms Ltd* [2014] NZEmpC 30.
13 At [67] and [68].
14 *Roy v Board of Trustees of Tamaki College* [2014] NZEmpC 153.
15 Relying on *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323, at 330.

Mr Prater had prior experience on how to raise a personal grievance within time.

## Legal principles

[39] The material legislative provisions for present purposes are found in ss 114 and 115 of the Act, which state:

> **114 Raising personal grievance**
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> (1) 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.
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> (2) For the purposes of subsection (1), a grievance is raised with an 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.
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> (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—
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> (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
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> (b) considers it just to do so.
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> (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.
>
> (6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.
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> **115 Further provision regarding exceptional circumstances under section 114**
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> For the purposes of section 114(4)(a), 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

(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.

[40] A convenient summary of the applicable principles, post-*Creedy*, was given by former Chief Judge Colgan in *Austin v Silver Fern Farms Ltd*, as follows:[16]

> [54] As already noted, by confining its considerations only to the four examples of exceptional circumstances set out in s 115 of the Act, the Authority erred in law and failed thereby to consider whether there were the exceptional circumstances referred to in s 114(4)(a). The s 115 examples are non-exhaustive because of the reference to them in s 114(4)(a) to "… exceptional circumstances (*which may include* any 1 or more of the circumstances set out in section 115) …" [emphasis added].
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> [55] This interpretation was confirmed by the Supreme Court in *Creedy v Commissioner of Police.* The Court found that the contents of s 115 are not a comprehensive schedule of what will constitute "exceptional circumstances" but rather:
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> > … assist in determining when such circumstances exist and when they do not. More particularly, Parliament has specified in s 115(b) that reliance on an agent will result in "exceptional circumstances" if the requirements of that paragraph are met. It would tend to negate the purpose of that paragraph if other situations where an employee had mistakenly relied on an agent to ensure that a grievance was notified in time were readily treated as establishing "exceptional circumstances".
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> [56] Referring to the earlier judgment of the Court of Appeal in *Wilkins & Field Ltd v Fortune* in which the phrase appeared in materially the same form, the Supreme Court in *Creedy* noted:
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> > In *Wilkins & Field*, 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". This formulation appears to combine two different meanings, the first 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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16 *Austin v Silver Fern Farms Ltd*, above n 12, (footnotes omitted).

> [57] That first meaning of "exceptional circumstances" provided in *Wilkins & Field* is "unusual (the "exception to the rule")". This meaning was said to have accorded with ordinary English usage. The Supreme Court expanded on this meaning by reference to the judgment of Lord Bingham in *R v Kelly* when construing a reference to "exceptional circumstances", albeit in another context:
>
> > 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.
>
> [58] The Supreme Court in *Creedy* said that such an interpretation will be easier to apply. It concluded that the interpretation of the phrase by the Court of Appeal in *Wilkins & Field* implied uncertainty (by the use of the word "perhaps") and lack of precision (by use of the words "something more than special and less than extraordinary").
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> [59] The Supreme Court added:
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> > 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.
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> [60] The Court went on to say, however, at [33]:
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> > Having said that, we also emphasise that Parliament has imposed a 90 day limit to ensure that employers are notified promptly of alleged grievances. Time should therefore be extended only if exceptional circumstances are truly established and, in addition, the overall justice of the case (which includes taking account of the position of an employer facing a late claim) so requires.

[41] In the same judgment, the Court emphasised that circumstances in combination, akin to the statutory examples of s 115 of the Act, may be considered.[17]

[42] In *Roy v Board of Trustees of Tamaki College*, the Court again emphasised that s 115 of the Act gave examples of extraordinary circumstances and "if there are other circumstances which are extraordinary as the courts have defined that adjective, then these may be relied on also".[18]

[43] As noted earlier, Mr Scotland relied on dicta expressed by the Court in *Telecom New Zealand*, a 2004 judgment, and the first to consider ss 114 and 115 of the Act

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17 At [68].

18 *Roy v Board of Trustees of Tamaki College*, above n 14, at [30].

following its enactment in 2000.[19] In its analysis, the Court referred to *Wilkins & Field Ltd v Fortune*, cited above.[20] The Court followed the more strict threshold to which the Court of Appeal had referred.

[44] The Supreme Court in *Creedy* explained that the formulation set out in *Wilkins & Field* contained two different meanings; it favoured the first and not the second more stringent interpretation.

[45] This Court is now bound by that finding, one which must apply to any assessment of exceptional circumstances, including under s 115(a) of the Act.

[46] That subsection requires the employee to have been "so affected or traumatised by the matter giving rise to the grievance", that the person was unable to properly consider raising the grievance within the limitation period. In my view, these words have to be understood in light of the threshold described by the Supreme Court, and not according to the stringent standard discussed in *Telecom New Zealand*. Matters giving rise to the grievance must have affected or traumatised the employee so he or she was unable to properly consider raising the grievance. If s 115(a) is the sole ground relied on, that effect or trauma must be an exception "which is out of the ordinary course, or unusual, or special, or uncommon".

## Analysis

[47] The events which are the focus of the challenge relate to steps taken by Mr Prater late on the last day of the time limitation period. As he acknowledged, he made a mistake by not understanding that the personal grievance had to be raised with the employer.

[48] The first problem which arose was a delay in transmission, which meant his four emails sent at about 9.00 pm on 16 October 2017 were not received by the Authority until 1.00 am the following morning.

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19 *Telecom New Zealand Ltd v Morgan,* above n 11, at [1].
20 At [40].

[49] It appears Mr Prater proceeded on the basis there would be compliance with the time limitation period if it was conveyed to the Authority on the last day, even outside business hours. That was his focus at the time.

[50] However, in doing so, he misunderstood what was required of him by the statute. He needed to raise his personal grievances with the Trust within 90 days. Whilst that statutory requirement can be met by the serving of a statement of problem on the employer, that step must take place within the limitation period.[21] Obviously this did not occur; in the result, there was a delay of two days.

[51] Mr Prater says this particular procedural misunderstanding was due to the stress of the circumstances which flowed from the events which resulted in termination of his employment, and his lack of understanding through want of legal support.

[52] Of the range of matters raised, the first concerns Mr Prater's state of mind from mid May 2017. The relevant medical records, on this topic, begin with an attendance by Mr Prater on his GP on 17 May 2017. He outlined circumstances that he says created "high stress" at work, some of which he would anticipate occurring over the next few weeks. However, he wished to remain at work. Appropriate medication was prescribed, and two letters were prepared. The first was a referral to counselling. The second was for his employer, which he duly presented to Mr Solomon. It stated he was to avoid high stress situations at work, albeit he could remain in his normal work at his discretion. The stress to which he referred, according to a letter sent soon after the consultation, related to violent incidents associated with his work, including a threat to kill him, as well as bullying and other threats, and that there had been a lack of support and protection of him, with possible retribution should he escalate his concerns.

[53] Mr Solomon met with Mr Prater and his wife on 22 May 2017 to discuss the letter from Mr Prater's GP. Then, he wrote to Mr Prater the next day, proposing suspension for health and safety reasons. A response to that letter was requested within a short timeframe.

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[21] *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [13] and *Pollard Contracting Ltd v Donald* [2014] NZEmpC 137; [2014] ERNZ 318 at [10]-[15].

[54] Mr Prater engaged lawyers on 24 May 2017, who wrote immediately to Mr Solomon. The following day, Mr Prater told his GP that he was feeling very positive about the step of having obtained legal advice. Obviously, he regarded such support as important.

[55] As noted earlier, counselling was arranged and took place on 13 June 2017; the counsellor recorded a history of workplace stress, in terms similar to that which had been noted by the GP.

[56] Mr Prater also attended the Emergency Department of Wellington Hospital with regard to migraine headaches he had suffered over the previous four days. Two days earlier, he had attended the meeting which took place between the parties and their lawyers. There was a report of "some stress at work currently".

[57] To this point, Mr Prater's medical records confirm a significant stress reaction to, on his account, serious physical and other work-related conflict including bullying and threatening behaviour which was directed towards him.

[58] However, Mr Prater did not attend his GP for further medical treatment or advice on this issue from then on, up to the date of termination, 18 July 2017, or in the 90 days which followed.

[59] Dealing with the first of these periods, it is evident from the correspondence between the lawyers that the significant tensions between the parties continued, with a meeting between the parties in mid-June, and multiple letters being exchanged over the question of whether Mr Prater should be dismissed for abusive remarks he had allegedly made in early June about Mr Solomon.

[60] But the focus of the challenge is on the circumstances which followed the termination. Did Mr Prater's pre-termination stress continue?

[61] Both parties point to the post-termination circumstances to support their respective cases. Mr Prater says that the issues which then arose relating to his legal representation were very stressful and left him without legal support; he also had to

find replacement work in difficult circumstances; and he was faced with an ongoing issue with the Trust as to their repossession of his accommodation. He says all these factors contributed to his inability to raise his personal grievance properly.

[62] The Trust says an analysis of these factors confirm he was functioning properly, and that he made a simple mistake when filing his statement of problem that was not exceptional.

[63] First, it is necessary to consider the issue of legal representation in more detail. Mr Prater had retained two barristers in Christchurch. It is clear there were significant attendances, where he was supported with regard to his employment situation. That engagement commenced soon after Mr Prater presented the medical certificate to his employer, after which it was proposed that he be suspended for an indefinite period of time; and continued until he was dismissed. On any view, significant legal services were rendered.

[64] Following the termination, Mr Prater sent an email to his lawyers, asking for an urgent response as to the intended process which could be expected to follow.

[65] The lawyers responded on 3 August 2017, discussing the steps which had been taken by the Trust, and the consequences of it. Mr Prater had indicated he understood it would take about nine months for a case in the Authority to be heard from filing; he wished to know how he was to survive that period without any income, and no housing after the three months' grace which the Trust had given him to remain in its property, post-dismissal. After discussing these issues, the lawyers stated that given the dismissal had now occurred, the only thing that was required was "that you raise a grievance within 90 days of that decision". The lawyer asked Mr Prater to refrain from contacting him, or his colleague, until a substantive response to Mr Prater's various queries was given by the colleague. No timeframe for the provision of this advice was given, but there was a clear statement that it would be given.

[66] As recorded by the Authority, Mr Prater then sent emails to a third party to contact his lawyer on his behalf to inform her of his extreme anxiety, and to pass on his request that she advise him as to what was intended. He confirmed this to the

Court, stating a friend who was in Christchurch had rung one of the lawyers who confirmed they would write to him, and not to bother them again.

[67] Mr Prater says that he heard nothing further from his lawyers. No invoice was rendered. In early August 2017, he was sufficiently concerned to have his wife contact an advocate, but it appears that person was not prepared to act for him. An obvious difficulty was that he was forced to obtain such advice at a distance.

[68] He ultimately decided that he would need to file his own statement of problem. He plainly devoted a considerable amount of attention to this step, preparing not only a statement of problem, but multiple attachments with annotations relating to particular events that evidenced the significant tensions he says had occurred, and a close analysis of alleged breaches of his individual employment agreement. He undertook this preparation alongside other activities.

[69] He was also able to obtain miscellaneous employment with several persons or agencies, which included a small building job that extended from 20 August to 20 October 2017 and repairing a number of motor vehicles. Modest income was obtained from these activities.

[70] In addition, as mentioned earlier, Mr Prater had to deal with issues concerning accommodation. He told the Court that he was given three months to vacate the Trust's accommodation, and that he had nowhere to go in a situation where alternate housing was difficult to obtain for himself and his family. Ultimately, he said, the Tenancy Tribunal eventually made a possession order against him, on 23 November 2017. He said he knew this would happen, which contributed to his stress.

[71] It is evident from the evidence before the Court that there was a continuing correspondence between Mr Prater and the Trust on both this issue (2 August 2017) and on another issue, concerning confidentiality of Trust information (10 August 2017). In short, there were ongoing interactions between the parties following the termination of Mr Prater's employment.

[72] Reliance was placed by the Trust on the fact that Mr Prater, on 3 October 2017, signed a trustee election nomination form, a document which was sent three days before the final date for doing so. Mr Prater said that the part of the form he filled out related to his address and communication details, and the ticking of several boxes with regard to certain formalities.

[73] I turn to the medical evidence. Dr Maxwell provided a short report, undated but apparently prepared on 9 March 2018, which stated:

> ... [Mr Prater's] mental health and impaired ability to focus at the time he made his application could have made it highly likely that he could make mistakes while undertaking even day-to-day tasks let alone more complex and demanding things such as I'm sure these applications can be. A momentary lapse in his attention resulting in a serious error is very likely given his state of mind at the time.

[74] Subsequently, as already mentioned he wrote a second letter for the purposes of the challenge, in which he confirmed his opinion was "somewhat speculative", but he also said that he was "not convinced Mr Prater's account of his mental health at the time can be dismissed out-of-hand even given Dr Daniels opinion". He expressed the view that his lack of engagement with the medical services over the time in question did not necessarily infer that he was "well" at the time.

[75] Dr Daniels' opinion was, as recorded earlier, that there was no diagnosable psychiatric disorder or emotional condition which it could reasonably be thought was of sufficient severity to limit his capacity to make decisions, or impact on his functional capacity after 23 May 2017. He confirmed this view after considering the transcript of Mr Prater's evidence as to the various matters he had referred to.

[76] Dr Daniels was referring to psychiatric disorders as found in the Diagnostic and Statistical Manuals of Mental Disorders (IV and V). In answer to questions from Mr Prater at the hearing, Dr Daniels said that stress in and of itself is a factor, but not a condition. An assessment of stress could involve a range of personality, social and other stress-related factors, all of which could influence a person's emotional condition. He said he could not comment on these factors because he had not examined Mr Prater.

[77] I accept Dr Daniels' evidence that there was no formally diagnosed psychiatric condition on the basis of the materials he reviewed.

[78] That all said, I do not regard the fact that there was no formally diagnosed condition as being the end of the matter. Mr Prater's case was that he continued to suffer significant stress following the termination of his employment, there being a range of contributing factors.

[79] Standing back, I am satisfied that throughout the time limitation period Mr Prater did continue to suffer significant stress. I accept Dr Maxwell's opinion that Mr Prater's continual lack of engagement with medical services did not necessarily mean he was well and that his account cannot be ruled out.

[80] However, that was not the only cause for Mr Prater's failure to comply with the procedural requirements. Mr Prater was clearly expecting further assistance from his lawyers, and without any explanation, none was given. He was, as he put it, abandoned. On the basis of the evidence before the Court, the lawyers unprofessional conduct was itself "extraordinary"; and it forced Mr Prater to proceed without any legal assistance.

[81] Although reference had been made by one of the lawyers to the necessity of raising a personal grievance within 90 days, no explanation was given as to how this should be undertaken.

[82] Whilst it is correct that a previous personal grievance had been raised at the time of Mr Prater's suspension by way of a lawyer writing to another lawyer some months earlier, I do not in the particular circumstances which developed thereafter, regard that as meaning Mr Prater knew what he needed to do. His focus was naturally on attempting to have his case heard as soon as possible to relieve financial issues. He thought that meant a proceeding needed to be initiated in the Authority, and within 90 days. I accept his evidence that he was very anxious about these matters.

[83] Mr Prater had expressed concern as to how he could obtain an income until a hearing occurred. I do not doubt that this was not straightforward in his circumstances,

given the relatively small community in which he was residing; that it was an aspect of his ongoing anxiousness.

[84] I do not regard the minor step of signing an application for election as a Board member as assisting the Court with regard to the valuation it must make in the circumstances.

[85] Standing back, I am satisfied that Mr Prater's pre-termination stress was escalated by the range of contributory events which occurred post-termination. By the expiration of the 90-day period, he continued to be affected by significant stress which he believed was triggered by workplace events; and he had not been properly advised as to what he needed to do despite seeking legal assistance from two barristers. As a result, he was unable to properly raise his personal grievances.

[86] This is an example of a case which does not fit neatly into the four examples of extraordinary circumstances set out in s 115 of the Act. The delay was multi-factorial; there was a combination of factors which together amounted to being extraordinary. On the basis of all the evidence before the Court, the circumstances were quite unusual. These factors arose from the situation giving rise to the dismissal grievance. As a result, Mr Prater was unable to correctly carry out the steps he needed to, so as to comply with the statutory requirements.

[87] Finally, I must consider whether it is just to allow the two grievances raised by Mr Prater.

[88] Relevant to this assessment are not only the factors already reviewed, but other broader considerations.

[89] First, the delay was inadvertent and minor. The Trust will not unduly be prejudiced by the granting of leave.

[90] I make no comments as to whether the termination of Mr Prater's employment was unjustified. But I do note that the circumstances relating to it may well be linked

to the circumstances giving rise to the disadvantage grievance, which was commenced in time, and which it is likely will be dealt with by the Authority in any event.

[91] It was submitted to the Authority on behalf of the Trust that Mr Prater had not included a claim for unjustifiable disadvantage arising from his suspension, in the statement of problem which he filed. That appears to be the case, but it is not fatal providing that grievance is raised prior to the expiration of the three-year period referred to in s 114(6) of the Act.[22]

[92] In summary, then, I consider it just for leave to be granted.

## Disposition

[93] Leave is granted to raise the defendant's two personal grievances out of time.

[94] The challenge is dismissed.

[95] This judgment replaces the Authority's determination, since the Court has considered a wider range of evidence than that which was placed before the Authority.

[96] I direct the parties to attend mediation, as required under s 114(5) of the Act.

[97] I reserve costs, which should follow the event. Although Mr Prater did not incur costs of representation in the challenge, there may be disbursements which should properly be considered. Any application in that regard must be filed and served by Mr Prater within 21 days of this judgment; any response from the Trust is to be filed and served 21 days thereafter.

B A Corkill
Judge

Judgment signed at 10.00 am on 30 May 2019

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[22] As recently discussed in *Blue Water Hotel Ltd v VBS* [2018] NZEmpC 128 (FC).