IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 30
ARC 88/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	STUART CLIVE AUSTIN Plaintiff
AND	SILVER FERN FARMS LIMITED Defendant

Hearing:	6 December 2012 (Heard at Hamilton)
Appearances:	Alex Hope, counsel for plaintiff Tim Cleary, counsel for defendant
Judgment:	26 February 2014

JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] The issue for decision on this challenge to a determination[1] of the Employment Relations Authority is whether Stuart Austin should have leave to raise unjustified disadvantage and unjustified dismissal grievances after the expiry of the 90 day period for doing so. The case turns particularly on the likely merits of the plaintiff's grievance involving the employer's conclusion that he could not return to full duties after suffering personal injury by accident.

[2] The plaintiff was injured undertaking work for Silver Fern Farms Limited (SFFL) which is what is known as an accredited employer for accident compensation purposes. This means essentially that the employer assumes what would otherwise be the rights and obligations of the Accident Compensation Corporation (ACC) in respect of its employees' work-associated accidents. In the course of treating Mr Austin for the effects of his injury, bruising was seen on his body that suggested an

[1] [2011] NZERA Auckland 467.

earlier accident. Some nine days earlier, there had indeed been a non-work incident which caused the bruising but the plaintiff had not then visited his doctor about this, had not then made any claim for accident compensation benefits, and had worked normally for more than a week until the workplace accident occurred.

[3] Mr Austin was initially off work completely after his workplace accident and was then certified to return to light duties. The employer initially accepted the obligations of compensating and rehabilitating him and did so although his condition deteriorated. SFFL then persuaded the plaintiff to relinquish his coverage with it for earnings related compensation and other benefits, and to claim these from ACC on the basis that his incapacity was caused by the earlier non-work "accident". ACC accepted cover initially but then acted upon the report of an expert medical assessor whose opinion was that the plaintiff's incapacity had been caused mainly, if not entirely, by the work related accident. ACC ceased earnings related compensation payments to Mr Austin. The employer continued to assert that the plaintiff was no longer its responsibility and eventually suspended and/or dismissed him because of his incapacity to carry out even the light duties that he had formerly been able to perform.

[4] Mr Austin did not raise a personal grievance with the employer within the period of 90 days beginning with the date of his dismissal. Several months later, however, when documents on his personnel file were delivered to his lawyer, a handwritten file note about the way in which the plaintiff's accident compensation claim to the company was dealt with, emerged for the first time.

[5] Although personal grievances were then raised with the employer, the Authority found against the plaintiff on three preliminary issues. The first was that the personal grievances had not been raised with the employer within the period of 90 days starting on the date on which they occurred. Second, the Authority concluded that the grievances were not raised within the period of 90 days starting with the date on which the plaintiff became aware that he could raise a personal grievance. Third, the Authority dismissed the plaintiff's application for leave to bring his grievance late because of an absence of exceptional circumstances and that it would not be just to do so.

[6] Those are the circumstances which bring the parties before the Court.

[7] The case raises complex and difficult issues about employment relationships between employers and employees where the employer also assumes the role of accident compensation insurer to, and rehabilitator of, the employee. Apart from this being a peripheral issue in one other case decided by this Court (coincidentally involving the same employer),[2] these issues for decision are unique and involve the application of a complex inter-relationship of different statutes with complex particular facts.

[8] Mr Austin challenges both the Authority's determinations that he did not raise his personal grievance in time and declining his application for leave to bring his personal grievance to the Authority even if he did not raise it within the 90 day period. As to the former, the plaintiff says that he raised his grievances within 90 days of becoming aware that he could do so. As to the latter, Mr Austin says that there were exceptional circumstances including a breach of good faith duties by SFFL and his lack of understanding of the accident compensation scheme in place for SFFL employees. He says that it is just and fair to allow him to bring his grievance late.

[9] The remedies that Mr Austin seeks include a finding by the Court that he is entitled to pursue his personal grievance against SFFL for unjustified disadvantage and unjustified dismissal, and costs.

Non-publication order

[10] At the request of the defendant, without opposition from the plaintiff and because of its commercial sensitivity, I make an order prohibiting publication of the contents of the agreement between SFFL and ACC by which the defendant is an accredited provider. Further, no person is to search the court file for a copy of this document without the leave of a Judge. Because this judgment does not contain that information, there is no restriction on the publication of the judgment.

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[2] *Silver Fern Farms Limited v North* [2010] NZEmpC 79.

Relevant facts

[11] Mr Austin was a meat worker at SFFL's Te Aroha meat processing plant. On 4 January 2009 he was go-karting with his grandson but stopped when he felt the ground was too rough to continue. It appears likely that his backside became bruised subsequently. He received no medical treatment for this incident although it appears that Mr Austin made an accident compensation claim (to ACC) on 23 January 2009, some 10 days after his subsequent work injury. Mr Austin continued to work normally at the SFFL plant but injured his back at work on 13 January 2009. He was certified by his general medical practitioner on 19 January 2009 to be fit for "light duties" on a limited basis.

[12] On 5 February 2009 SFFL accepted Mr Austin's claim for accident compensation coverage for a work related injury as defined by the then applicable s 28 of the Injury Prevention, Rehabilitation, and Compensation Act 2001. He began on light duties but the company then advised him on 21 April 2009 that it considered that his incapacity arose from his 4 January 2009 non-work related injury and not his 13 January 2009 work related injury. SFFL came to know about Mr Austin's backside bruising because this was seen and reported by the company first-aider who assisted him following his 13 January 2009 accident.

[13] Mr Austin worked intermittently on light duties until, by early May 2009, his condition precluded him from working at all.

[14] At about the same time, in early May 2009, Mr Austin and a union representative met with SFFL's Te Aroha plant manager, Felix O'Carroll, to discuss his situation. Mr O'Carroll's advice to Mr Austin was that due to SFFL's conclusion that his incapacity was caused by what SFFL considered was the 4 January 2009 accident rather than the 13 January 2009 accident, he should apply to ACC for earnings related compensation. Mr Austin was also advised that he would be "better off" being on ACC compensation rather than on the company's compensation scheme. Mr Austin's uncontradicted evidence was that he was told that if he did not discontinue his claim against the company in respect of his work related injury on 13 January 2009, he would not be able to retain his employment.

[15] Consequently Mr Austin visited his doctor on 6 May 2009 as a result of which he was "transferred" to ACC earnings related compensation payments which were necessarily tied to the 4 January 2009 non-work related incident.

[16] On 8 May 2009 at a further meeting with Mr O'Carroll, Mr Austin was prevailed upon to sign a letter addressed to SFFL on its letterhead and pre-prepared by the company, agreeing to discontinue his claim on its scheme and to make a claim on ACC's scheme in respect of the 4 January 2009 event.

[17] Unsurprisingly, ACC then investigated the circumstances of Mr Austin's incapacity. On 5 June 2009 Mr Austin met an ACC case manager and was subsequently examined by Dr Christopher Milne who prepared a comprehensive report for ACC. This included Dr Milne's assessment that the 13 January 2009 work related accident had brought about Mr Austin's incapacity. The doctor conceded that "there may have been some minor triggering" of Mr Austin's condition on 4 January, but essentially he was able to perform all his normal work duties prior to 13 January and "…on balance, I would conclude that the majority of the trauma occurred on that date [13 January]." Dr Milne invited ACC to explore that issue in more detail with SFFL.

[18] As a consequence of Dr Milne's report, on 22 June 2009 ACC advised Mr Austin that his entitlement to compensation payments from ACC would cease as from 5 July 2009. That was because, in its view, his incapacity was caused by the work related accident on 13 January 2009, in which case SFFL's accredited employer partnership programme meant that the company was obliged to take responsibility for managing the consequences of this injury. Mr Austin's compensation payments from ACC ceased on about 5 July 2009. He did not receive any more compensatory payments from either ACC or SFFL.

[19] On about 23 July 2009 Mr Austin sought a review of ACC's decision to terminate his entitlements. The outcome of that application for review is unclear on the evidence but it seems that it did not produce for Mr Austin a resumption of ACC's coverage for his incapacity.

[20] On 21 August 2009 Mr O'Carroll wrote to Mr Austin advising him:

> This letter is [to] formally notify you that due to you being unable to attend work due to your non work injury we have suspended your services at Silver Fern Farms Te Aroha site until further notice. All your entitlements owing will be paid out to you, however once you are fit to return you will be reinstated into the employee list with all service.

[21] Mr O'Carroll's letter quoted cl 17(c) of the collective agreement which I set out subsequently in this judgment. The letter continued:

> Hence if you are off work for a period exceeding four weeks for a non work injury or sickness your employment will be suspended (terminated) until such time as you are medically certified as fit to resume work.
>
> This letter is a formal notice of your termination, on behalf of the Company I hope to see you in the new season and wish you a full recovery of your injury.

[22] SFFL's suspension/dismissal of Mr Austin's employment arose from his inability to work which was attributed by it to his non-work injury.

[23] In late August 2009 Mr Austin consulted his union about his situation but was told that there was nothing it could do for him. He had done so at least once previously with the same result, and Mr O'Carroll had also told him that the union could not assist him. That advice from Mr O'Carroll had been given in the presence of a union representative who did not demur. The union's advice to Mr Austin in August 2009 was consistent with its earlier position. In these circumstances Mr Austin did nothing more about his employment with SFFL.

[24] In early February 2010 Mr Austin consulted his lawyer, Mr Hope, who, by letter dated 8 February 2010, wrote to SFFL requesting all company information about Mr Austin's injuries and the suspension from or termination of his employment.

[25] Amongst the information provided by SFFL in response (on a date that is unclear but was clearly some time between 8 February and 23 March 2010), the defendant provided a handwritten file note dated 29 June 2009 as follows:

> Bob
>
> Claimant withdrew our claim so whilst ACC dropping him and telling him its ours that is not our concern. File away. R. 29/6/09

[26] It is agreed that the addressee "Bob" was Bob Wright, an SFFL accident case manager and the author "R" was Ross Harland, a company legal adviser on accident claims.

[27] By letter dated 23 March 2010, Mr Austin's lawyers wrote to SFFL raising two personal grievances on his behalf. The first was that the employer had disadvantaged him unjustifiably by suspending him from his employment on 21 August 2009 and by failing to pay him compensation for a work related injury. Also alleged was a failure to advise Mr Austin of the company's decision not to pay him compensation. The second notified grievance was that the plaintiff had been dismissed unjustifiably on 21 August 2009.

[28] The company responded promptly by letter dated 25 March 2010 saying it did not accept that the grievances had been raised within 90 days as required by s 114 of the Act and asserting that, in any event, Mr Austin had been suspended and subsequently dismissed justifiably by the employer.

[29] By letter to Mr Austin dated 21 May 2012, SFFL accepted liability for compensation payments to Mr Austin for the period from the cessation of ACC's payments on 5 July 2009 until receipt of a specialist's report on 17 July 2009, a period of some 12 days. SFFL declined any further entitlement because it concluded that Mr Austin's ongoing dysfunction was no longer linked causally to his accepted claim for cover for a work related injury. It said that the medical evidence established that his dysfunction was thereafter caused by degeneration rather than accident. The Court was not provided with a copy of this report relied on by SFFL although it has an earlier report provided by the same specialist to ACC.

[30] Mr Austin's condition seems to have improved somewhat since that time, at least to the extent that at the time of the hearing he undertook about four hours general farm work a day to pay for his house rental. At age 58 years Mr Austin, who

now cares for his wife who suffered a stroke after these events, has little or no income.

The Employment Relations Authority's determination

[31] Mr Austin's challenge is by hearing de novo so that it is not an appeal against the Authority's determination based on its reasoning. The Court must make its own decision on the evidence heard. I nevertheless summarise briefly the determination because it contains some observations that may be relevant to the matter now.

[32] The Authority concluded[3] that the file note disclosed to Mr Austin for the first time after 8 February 2010 did not have "any particular relevance in regard to making Mr Austin aware that he had grounds to raise a personal grievance." The Authority found that there were two possible dates when a grievance may have arisen. The first was SFFL's persuasion of Mr Austin to sign away his accident claim on the company's scheme on 8 May 2009, which the Authority described as being "a matter that could be subjected to further scrutiny." The second date was that of the receipt by the plaintiff of the company's letter dated 21 August 2009 in which he was informed that his employment was "suspended / terminated." If this letter had made Mr Austin aware of his entitlement to raise a personal grievance, the 90 days within which to have done so would have expired in late November 2009. The Authority found, however, that Mr Austin did not raise his grievance with his employer until 23 March 2010 so that he had not complied with s 114(1) of the Employment Relations Act 2000 (the Act) requiring that a grievance be raised within 90 days of its occurrence or its coming to the plaintiff's notice.

[33] Turning to whether, in these circumstances, Mr Austin should have leave to pursue his personal grievance, the Authority looked at ss 114(4) and 115 of the Act but concluded:[4] "... unfortunately for Mr Austin, his circumstances do not fit within any of the criteria (a–d) of s.115 of the Act." The Authority had, earlier in that paragraph, noted that Mr Austin's case did not identify any specific "exceptional

[3] At [17].
[4] At [19].

circumstances" on which he relied, although it appears to have addressed only those under s 115(a)-(d).

[34] As the statute and case law addressed subsequently make clear, however, these are only examples and not an exhaustive or closed list of "exceptional circumstances" that the Authority may consider on applications such as this. As the Authority itself set out in its determination, the statute says that exceptional circumstances "may include" one or more of the circumstances set out in s 115. That does not limit the exceptional circumstances to those set out. They are, rather, examples and, in individual cases, there may be others which, together with a determination of justness in all the circumstances, may persuade the Authority to grant leave.

[35] The Authority added an unusual and, in view of the outcome of its determination, enigmatic comment at [20]. It said:

> In conclusion, I have to say that I am somewhat troubled by the action of SFFL in regard to the plant manager, Mr O'Carroll, persuading Mr Austin to sign away his claim in regard to the work place accident that occurred on 13th January 2009, and the rather cavalier tone of the note referred to earlier. Indeed, it strikes me that if Mr Austin had been properly advised, the outcome for him may have been different; given the medical view (of Dr Milne), that the injury was work related. If indeed this is so, then it seems that Mr Austin may have been entitled to be paid by SFFL. However, Mr Austin says that when he became aware of the suspension / termination of his employment, he did consult with his union and was advised that there was nothing that could be done for him. While I cannot say for sure, it does seem to me that if the union had looked into the overall circumstances of Mr Austin, perhaps a different conclusion may have been reached. Nonetheless, there is no evidence that Mr Austin made any "reasonable arrangements" for the union to raise a grievance on his behalf, as is required to satisfy s.115(b) of the Act.

[36] In reaching that conclusion about s 115(b), the Authority relied on the judgment of the Court of Appeal in *Melville v Air New Zealand Limited*.[5]

[37] Mr Cleary, counsel for SFFL, did not disagree that the Authority erred in its application of s 114(4) as set out above. But, he said correctly, having elected to challenge by hearing de novo, Mr Austin must now persuade the Court that there

[5] [2010] NZCA 563.

were exceptional circumstances in which he omitted to bring his grievance in time which may or may not include the examples given in s 115.

Relevant legislative and contractual provisions

[38] Mr Austin's employment was subject to the Silver Fern Farms Te Aroha Collective Employment Agreement 2008-2009. At para 17 "SICK LEAVE", the following appears:

> **Supplying a Medical Certificate:**
>
> Where an employee claims sick pay, and is absent from work due to illness/injury for 3 consecutive days or more the employer is entitled to request that worker [to] provide a medical certificate from the relevant health provider as proof of absence due to such illness/injury.
>
> Notwithstanding the above if the employer has reasonable grounds to suspect that the sick leave being taken by the employee is not genuine the employer shall have the right to require that worker to provide proof of genuine absence due to illness or injury providing:
>
> (a) the employer informs the worker as early as possible after the employer forms the suspicion that the sick leave being taken is not genuine, and that proof of genuine absence from work is required and
>
> (b) the employer agrees to meet the employee's reasonable costs in obtaining the proof.
>
> (c) Workers who are unable to work due to injury or sickness and who have a medical certificate to that effect shall continue to hold their start date ranking.
>
> However, where workers are absent from work due to injury or sickness for a period of more than 12 (twelve weeks), for a work injury or four weeks for a non-work injury or sickness, their employment may be suspended to avoid the accrual of holiday entitlement until such time as they are medically certified as fit to resume work.
>
> There shall be a review after three months of absence or incapacity to consider their medical suitability for continued employment. Where workers recommence work after such periods of extended absence, there shall be no loss of seniority or of employment related benefits or entitlements.
>
> **NOTE:** All leave is inclusive of and not in addition to the entitlements of the Holidays Act 2003
>
> (d) Workers unable to perform work due to injury may be employed on alternative or selective duties provided:

(i) They have a medical certificate clearing them for such work, the work is compatible with the nature of the injury, they are capable of competently performing the work required, and the work is available on a full time basis.

(ii) They are paid not less than they would have earned on their normal job including normal overtime in the case of work related injuries or the pay rate for the job in the case of non-work related injuries.

(iii) The company may at its discretion cease to offer alternative work at which time the employee shall return to accident compensation (where appropriate), until they are cleared for full normal duties.

(iv) Where delayed determination of cover occurs, employees shall receive interim payment of 40 hours at base hourly, subject to them signing a deduction authority for return of any money paid should the claim not [be] accepted.

(v) Rehabilitation programs shall include overtime unless precluded by the medical certificate.

(e) In all cases of sickness or non-work related injury workers shall have the right to consult a doctor of their choice.

[39] This is a poorly drafted, confusing and illogical provision which does not achieve the results that the employer would no doubt have wished in this case. Read as well as it can be in an attempt to achieve what was probably the parties' intention, this provision allows SFFL to suspend the employment of an employee absent from work for more than 12 weeks due to injury or sickness (or four weeks where these conditions are not work related), but such suspension is to be for the purpose of avoiding the accrual of holiday entitlements. The provision does not permit "termination" of the employee's employment (dismissal) in these circumstances, even with an assurance of re-engagement, without a formal review taking place.

[40] There is no suggestion in this case that Mr Austin's suspension or termination was undertaken for the purpose of avoiding the accrual of holiday entitlements: rather, he was laid off but with an expectation that, upon his return to sufficient satisfactory health, he might be taken on again at the plant. In any event, the collective agreement provides, in the case of such a suspension, for a review after three months of absence or incapacity which did not happen in this case. The collective agreement also provides (at (d) above) for the placement of employees unable to work due to injury on alternative or selected duties subject to certified medical clearance for such work and other like factors. Subclause (d)(iii) provides

that the company may cease to offer alternative work but at which time an employee shall return to accident compensation (where appropriate) until cleared for normal duties.

[41] The other relevant documents are the statute and associated regulations governing the accident compensation accredited employer arrangements in this case and SFFL's agreement with ACC which specified its obligations including to its affected employees. Mr Cleary submitted that examination and analysis of this material crosses a jurisdictional boundary into the exclusive preserve of the accident compensation scheme which excludes not only the provision of remedies by the specialist employment institutions but also the reliance by affected employees of the rights and obligations of them and their employers in employment law.

[42] Among other things, determining eligibility for, and if so the amounts of, earnings related compensation for employees who have suffered personal injury by accident (as defined in the accident compensation legislation) is the exclusive preserve of the institutions set up under that statute. These include ACC (or, in the case of an accredited employer such as SFLL in this case, the employer) and the statutory review process including access to the Accident Compensation Appeal Authority, the High Court and so on. On the other hand, the more broadly described rights and obligations of employers and employees under the Employment Relations Act permits examination by the institutions set up under that legislation of such open textured questions as whether an employer has treated an employee fairly and reasonably in the process of disadvantaging that employee's employment or leading to dismissal of the employee. Such treatment in relation to accidents, compensation for them, and rehabilitation from them, may affect employment rights and obligations, particularly where these result, as here, in dismissal.

[43] I conclude, however, that the fields of employment and accident compensation law are not so neatly and absolutely ring-fenced, at least so far as the ability of the employment institutions to consider the accident compensation regime in determining matters properly within the province of employment law adjudication. That is particularly so where, as here, the employer has assumed the role of insurer and rehabilitator of its employees who have suffered workplace

accidents. So long as the Court's examination of these documents and their application to the facts of the case that are relevant for personal grievance considerations and any decisions about them are for those purposes and not to decide compensation entitlements, those issues are not out of bounds.

Compliance with 90 day limit?

[44] It is necessary first to identify the justiciable grievance or grievances that Mr Austin wishes to bring to the Authority. Next, it is a matter of determining when these arose or, if they did not come to Mr Austin's notice when they arose, when the circumstances which would have enabled him to raise a personal grievance with his employer first came to his notice. Finally, it is a matter of determining whether either of those relevant dates fell within the period of 90 days immediately before 24 March 2010, by which date Mr Austin's lawyer purported to raise those grievances with SFFL.

[45] Mr Austin claims two personal grievances. The first in time is said to be an unjustified disadvantage grievance including the plaintiff's unjustified suspension from his employment and matters leading to that. The second grievance asserts that Mr Austin was dismissed unjustifiably from his employment by SFFL's letter dated 21 August 2009. Assuming Mr Austin's receipt of this letter within a few days of its writing, the period of 90 days within which he had to raise this grievance ran from about 24 August 2009 and so expired in late November 2009.

[46] So it follows that Mr Austin's first advice to SFFL at the end of March 2010 raising his grievances was almost four months after the first alternative limitation period (the suspension and dismissal) had expired.

[47] In these circumstances, Mr Austin must (and does) rely on the alternative limitation period under s 114(1), that is the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance came to his notice. It is not only that an employee realises that he or she was dismissed but that the circumstances of the dismissal may lack justification for this alternative limitation period to commence. So, in terms of Mr Austin's case, the second alternative

limitation period of 90 days began not when he knew of his dismissal (which was when he received notice of it in August 2009) but when it came to his notice that the dismissal may have lacked justification. Counting back 90 days from 24 March 2010, Mr Austin must establish that his grievance or grievances only came to his notice after about 25 December 2009. The only event to which Mr Austin can point, which occurred between 25 December 2009 and 25 March 2010, was the receipt by him, in response to his solicitor's letter of 8 February 2010, of the handwritten file note of 29 June 2009 set out at [25] of this judgment. Indeed, it is the receipt of this memo that he relies on for his grievance(s) to be in time.

[48] What did this file note mean? I have already identified the author and recipient. They were company accident claims personnel. It appears to say:

- that Mr Austin had withdrawn his accident compensation claim on the company's scheme;

- that ACC was in the process of discontinuing his earnings related compensation paid by it;

- that ACC had told Mr Austin that responsibility for compensating him for his accident was SFFL's;

- that this attribution of responsibility by ACC was not SFFL's concern; and

- that SFFL's claim file should be closed, that is that there would or should be no more dealings on it.

[49] If Mr Austin is entitled to have his grievance or grievances heard on their merits, there will no doubt be evidence about this file note including, potentially, from its author and recipient. In these circumstances, all the Court can do at this stage is to draw inferences from the words but solely for the purpose of determining whether those might provide Mr Austin with grounds affecting the statutory test under s 114(1).

[50] Mr Austin says that it was only when he received that handwritten file note that he realised:

- that SFFL, aware that ACC had declined to continue to cover his compensation payments and knowing that ACC considered that SFFL was liable, was not prepared to reconsider its liability;

- that relevant information had been concealed from him by SFFL; and

- that SFFL had decided to cut him adrift irrespective of his accident compensation difficulties and where liability for coverage lay.

[51] I agree with the Authority that although Mr Austin may not have known of the existence of this memorandum or of its contents during the 90 day period commencing in late August 2009, knowledge of those contents did not cause him to move from a position in which he could not have had sufficient grounds to bring a personal grievance to one where these existed.

[52] I agree with the Authority that Mr Austin failed to raise his grievances with SFFL within the period of 90 days after it came to his notice that his suspension and subsequent dismissal may have been unjustified. That is not the end of the matter, however, because there remains Mr Austin's application for leave to raise a grievance out of time on the assumption, as I have concluded, that his grievances were not raised within time.

Leave to bring grievance out of time

[53] The final issue to be determined is whether the circumstances in which Mr Austin failed to raise his personal grievances with his employer are "exceptional circumstances" within the meaning of s 114(4)(a) and if so, whether it is just to permit his grievance to be dealt with on their merits.

[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].

[55] This interpretation was confirmed by the Supreme Court in *Creedy v Commissioner of Police.*[6] The Court found that the contents of s 115 are not a comprehensive schedule of what will constitute "exceptional circumstances" but rather: :[7]

> … 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".

[56] Referring to the earlier judgment of the Court of Appeal in *Wilkins & Field Ltd v Fortune*[8] in which the phrase appeared in materially the same form, the Supreme Court in *Creedy* noted:[9]

> 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.

[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*[10] 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

[6] [2008] ERNZ 109 at [26].
[7] At [28].
[8] [1998] 2 ERNZ 70 (CA).
[9] At [31].
[10] [2000] QB 198; [1999] 2 All ER 13.

> 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").

[59] The Supreme Court added:

> 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.

[60] The Court went on to say, however, at [33]:

> 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.

[61] In this case, Mr Austin does not rely solely, even principally, upon his union's advice to him that there was nothing he could do about his complaints against SFFL. It is one constituent of his claimed "exceptional circumstances" but this is clearly a case which is distinguishable from *Creedy* in the sense that the earlier case dealt with by the Supreme Court relied on the representative's default to a much greater degree (perhaps even wholly) than does Mr Austin in this case. Mr Austin's claim embraces a collection of circumstances which, he says, are exceptional.

[62] The Authority itself felt sufficiently moved by its disquiet at the employer's tactics to express this, although finding ultimately against Mr Austin.

[63] Although the Authority did not refer to s 4 of the Act in particular, its provisions are relevant to the employer's conduct towards its employee and in the

consideration of whether there were exceptional circumstances. Section 4 required SFFL to deal with its employee, Mr Austin, in good faith and, in particular, not to mislead or deceive him or to do anything that was likely to mislead or deceive him, whether directly or indirectly. In particular, SFFL was required to be "active and constructive in establishing and maintaining [the parties'] productive employment relationship and, among other things, to be responsive and communicative …"

[64] Section 4(1A)(c) was also engaged in this case because SFFL's decisions about ceasing Mr Austin's accident compensation coverage under its own scheme and then suspending/terminating his employment, were decisions that were likely to have an adverse effect on the continuation of his employment. In these circumstances, SFFL was obliged to provide all relevant information to Mr Austin and to give him an opportunity to comment on that before it took those steps.

[65] The accredited employer accident compensation and rehabilitation arrangements, of which SFFL was a member, require more than superficial examination of, or lip service to be paid to, those arrangements in cases such as this. Parliament has permitted some employers, in effect, to self-insure against the consequences of work related accidents instead of being a part of the broader ACC scheme in which important decisions as to causation of incapacity and its consequences for the employee and the employer are dealt with independently by ACC. In a situation such as this, there are more direct links between an employee's incapacity as a result of accident and the employment relationship, including potentially its termination. SFFL had the dual role of employer and insurer of the plaintiff and its obligations of good faith were more acute in these circumstances.

[66] Although Mr Austin's request of his union for advice and assistance that it turned down without apparent inquiry may or may not have constituted exceptional circumstances under s 115(b) of the Act, it may nevertheless be one of a number of relevant circumstances which, together, constitute exceptional circumstances for the purposes of s 114(4)(a). For example, it explains why nothing was done by Mr Austin for a period. He was led to believe by his union, an organisation that he might reasonably have expected to be knowledgeable about circumstances such as his, that he had no grounds for complaint about his treatment by his employer.

However unreasonable that assessment by the union may have been with the benefit of hindsight and when examined by lawyers, it was reasonable for Mr Austin to have accepted his union's advice at face value at the time it was given to him.

[67] I am satisfied that, taken together, the relevant circumstances in which it took Mr Austin about six months after his dismissal to raise his grievances with his employer (the "delay in raising the grievance"), were exceptional in the sense required by s 114(1) as interpreted by the Supreme Court in *Creedy*. Those factors included:

- the defendant's strategy to divest itself of its responsibility for the management of Mr Austin's rehabilitation and compensation arising out of his work accident on 13 January 2009;

- the defendant's persistence in that strategy after learning that ACC had concluded, based on expert medical evidence, that Mr Austin's incapacity was caused predominantly, if not wholly, by his work accident;

- the defendant's failure or refusal to deal fairly and in accordance with its obligations of trust and confidence towards Mr Austin in these circumstances resulting in Mr Austin believing that there was nothing he could do about his employment situation;

- Mr Austin's reliance upon the advice of his union that there was nothing that could be done about his situation as it was known to him at the time; and

- the defendant's actions in what the Authority described as having Mr Austin sign away his claim to compensation, rehabilitation, and other rights under the company's accredited employer accident compensation scheme in the knowledge of expert medical advice that his incapacity resulted from a work related accident.

[68] Whilst not necessarily fitting neatly within any of the four examples of extraordinary circumstances set out in s 115, these circumstances in combination are akin to the statutory examples and, indeed in my assessment, make for a more compelling case of extraordinary circumstances than do some of the particular statutory examples. All relevant circumstances must be considered and, combined, they amount to extraordinary ones.

[69] For the foregoing reasons I am satisfied that the delay in raising the personal grievances was occasioned by exceptional circumstances pursuant to s 114(4)(a).

Is it just to allow the grievances to proceed?

[70] Having established the existence of exceptional circumstances under s 114(4)(a), the Court must also be satisfied that it is just to grant leave to allow Mr Austin to have his grievances decided on their merits. Many of the factors going to that consideration are those making up the "exceptional circumstances" assessment, but it is a broader inquiry than that under s 114(4)(a).

[71] As I have already noted, cl 17 of the collective agreement is poorly drafted and confusing. As well as I can interpret it in relation to Mr Austin's circumstances, however, it provided:

- After he had been absent from work for more than 12 weeks as a result of a work injury or absent for more than four weeks as a result of a non-work injury, Mr Austin's employment was able to "be suspended to avoid the accrual of holiday entitlement until such time as [he was] medically certified as fit to resume work".

- After three months of absence or incapacity there was to be a review to assess Mr Austin's medical suitability for continued employment.

- If Mr Austin had resumed work after a period of extended absence in these circumstances, he would not lose seniority or employment related benefits or entitlements.

- Had Mr Austin been unable to perform work due to injury SFFL could have employed him on alternative or selective duties provided that he was medically certified for such work, provided that the work was compatible with the nature of his injury, provided that Mr Austin was capable of performing competently the work required, and provided that work was available on a full-time basis.

- At SFFL's discretion it was entitled to cease to offer Mr Austin alternative work and in such circumstances he would resume receiving ACC payments (where appropriate) until he was cleared for full normal duties.

[72] As Mr Hope submitted, Mr Austin's employment was arguably "terminated" rather than simply suspended for the purpose of ensuring that holiday entitlements would not accrue. Nor, as Mr Hope submitted, does there appear (at least at this stage) to have been the review of Mr Austin's medical suitability for continued employment as the collective agreement requires in such circumstances.

[73] This test amounts essentially to a balancing of the justices and injustices to the parties of permitting a late raised grievance to proceed. The justice of doing so in Mr Austin's case speaks for itself in the facts outlined above. SFFL has not suggested any injustice that it might suffer if leave is granted. Instead, SFFL has relied on contesting the exceptional circumstances (the first) limb of the test. I am satisfied that, in all the circumstances, it is just to allow Mr Austin to have his grievances determined on their merits.

Result

[74] For the foregoing reasons, Mr Austin has leave to bring his grievance to adjudication on its merits. The effect of the Authority's determination was to bring Mr Austin's proceedings there to an end. Following the judgment of the full Court in *Abernethy v Dynea New Zealand Ltd*[11] this means that Mr Austin's revived grievances must now be heard and decided in this Court. There is no statutory

[11] [2007] ERNZ 271.

mechanism by which they can be remitted to the Authority, however desirable that course may be.

[75] To the extent that one of Mr Austin's identified personal grievances challenges the justification for the company's failure or refusal to pay any earnings related compensation, I agree with Mr Cleary that this issue is the exclusive preserve of the accident compensation legislation, the rights and obligations of affected persons under that, and recourse to the dispute mechanism created for that purpose. So, too, is any issue of compensation for unpaid earnings related compensation.

[76] However, Mr Austin's claims to have been suspended and/or dismissed unjustifiably, even although related to his employer's treatment of his accident compensation issues, are matters within the jurisdiction of the employment legislation and the institutions created under it, the Employment Relations Authority and the Employment Court. Although any remedies to which Mr Austin may be entitled cannot include earnings related compensation, there may be other remedies available to him provided for in the Act. The manner of the employee's treatment by the employer in the course of that relationship is likewise governed by the Act and simply because it touches on, or even involves, issues of accident compensation coverage, cannot be excluded thereby.

[77] So it follows, in my conclusion, that not all, at least, of Mr Austin's intended claims will be unavailable to him as the defendant has asserted if he is either found to have raised his grievances within the statutory period or, if he did not, that leave should be granted to enable them to be considered on their merits.

[78] Before doing so, however, I am required to refer the parties to mediation or further mediation unless there are persuasive reasons why that should not occur. I consider that this is a case that should go to mediation and so direct.

[79] In the meantime, Mr Austin should file and serve a statement of claim addressing the merits of his grievances and the defendant should file and serve a statement of defence to this. If mediation is to no avail, counsel should so advise the Registrar who should then arrange a telephone directions conference to timetable the substantive case to a hearing.

[80] Mr Austin (who is legally aided) is entitled to an order for contribution to his costs in both the Authority and on this challenge, the amounts of which can be determined by the Court deciding the substantive grievances on their merits. They are formally reserved.

GL Colgan
Chief Judge

Judgment signed at 3.30 pm on Wednesday 26 February 2014