

## Raising personal grievances out of time

### **A worker generally has a "90 day period" to bring a claim against their employer but there are exceptions to this rule. When would the court be likely to grant an exemption to the 90 day rule?**

Section 114 Employment Relations Act 2000 (Act) says that an employee has 90 days to notify their employer of a personal grievance. A personal grievance is one of the main ways that a worker can take a legal claim against their employer if they believe that their employer was unfair and unreasonable towards them.

The 90-day period begins on the date on which the action, allegedly amounting to a personal grievance, occurred or came to the notice of the employee (whichever is later). If the 90 day time period is missed then the employee must make an application for leave of the Employment Relations Authority to raise the personal grievance out of time. This will only be granted where exceptional circumstances are established.

For this reason, it is important that workers bring their claims in time.

#### **Immediate steps**

Where the 90 day time period is missed, as a practical first step, a worker (or an advocate or lawyer who acts on their behalf) can ask the employer to give their consent to raise a personal grievance out of time. Before the employer grants their consent, the employer would need to consider things like the likelihood of the worker bringing proceedings in the Employment Relations Authority (ERA) and the likelihood of the ERA granting leave.

If the employer does not consent, the worker may apply to the ERA for leave to raise the grievance out of time. The application can be raised as a standalone matter

although often the ERA will hear the application for leave as part of the substantive grievance application. For these reasons, it is wise to detail the grievance at the same time as making the application for leave.

#### **Exceptional circumstances**

The ERA will accept the worker's application to bring a personal grievance claim only if its satisfied that the delay in bringing the personal grievance claim was caused by exceptional circumstances, and that it is just and fair to grant an exemption.

Those 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.  
  
Generally, the court has said that "traumatised" means a "very substantial injury";<sup>1</sup>
- b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf and the agent (advocate or lawyer) failed to ensure that the grievance was raised within the required time;
- c) where the worker's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that are required by sections 54 or 65 of the Act;
- d) where the employer has failed to comply with the obligation under s120(1) of the Act to provide a statement of reasons for dismissal.

#### **Purpose of the exemptions to the 90-day rule**

It is important to note that the ERA will consider the purpose behind each of the exemptions before granting consent to bring a personal grievance out of the 90 day

<sup>1</sup> *Telecom New Zealand Ltd v Morgan*, EMC Auckland AC38/04, 12 July 2004.

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period. For example, the purpose of the inclusion of sections 54 or 65 of the Act is to inform the employee of their resolution process, so if the employee is already aware of that information (including, for example, obtaining legal advice on statutory timeframes) then the ERA may not grant consent to the worker bringing a personal grievance out of the 90-day period. For that reason, an employer may choose to ask whether the worker has received legal advice before giving their consent to bring the personal grievance out of time.

Employers should very carefully consider granting an employee consent to bring the grievance out of time. The same applies when agreeing to attend mediation. The employer should always preserve its position by attending mediation without prejudice to its position that the grievance has been notified out of time.

### **Personal grievance claims of sexual harassment**

If a worker brings a personal grievance of sexual harassment, workers may have 12 months to bring their personal grievance claim. As at the date of this article, this extension is not in force under the Act. Please see our discussion on this point further [here](#).

### **Want to know more?**

If this article raises any questions or concerns, please get in touch with one of our [Employment Team](#).