IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 409
5329175

	BETWEEN	VALERIE BARKER Applicant
	AND	IDEA SERVICES LIMITED (IN STATUTORY MANAGEMENT) Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Kerry Single, Advocate for Applicant Paul McBride, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	1 August 2011 from Applicant 9 August 2011 from Respondent
Determination:	19 September 2011

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether the Applicant, Ms Valerie Barker, raised her personal grievance with the Respondent, Idea Services Limited ("ISL") within 90 days, such that she is entitled to pursue her grievance before the Authority.

[2] Specifically the issue for the Authority to address is whether a verbal statement made by Ms Jacquie Hurst, Service and Food Workers Union ("SFWU") Organiser, on 17 October 2010 that Ms Barker would be bringing a personal grievance, and/or the letter from Ms Hurst dated 10 October 2010, and/or the letter from the Employment Relations Centre Ltd ("ERC") dated 16 November 2010, were sufficient to constitute the raising of a personal grievance with ISL for the purposes of s114 of the Employment Relations Act 2000 ("the Act").

[3] The parties agreed to the Authority determining this issue based on the Statements of Problem and in Reply, and on submissions from the parties.

Background Facts

[4] ISL is a business of IHC, an organisation which provides services to people with intellectual difficulties and their families. Ms Barker was employed by ISL as a Community Support worker.

[5] On 21 May 2010 Ms Barker had been issued with a Final Written Warning following an investigation into breaches of IHC Staff Policy and Service Standards. The warning was valid for 12 months. The Final Written Warning stated that further breaches of IHC Staff Policy or IHC Service Standards by Ms Barker prior to 18 August 2010 might result in action being taken which could result in the termination of her employment.

[6] On 8 August 2010 a non-resident of ISL's Punawai facility ("Punawai") stayed in Punawai overnight. Non-residents are not allowed to stay in an ISL residence overnight in accordance with IHC policies, unless there are exceptional circumstances, and there is approval from management and those resident in the ISL residence.

[7] On 16 August 2010 Ms Barker received a letter from Ms Linda Hudson, ISL Community Service Manager, inviting Ms Barker to a meeting on 20 August 2010. The purpose of the meeting was stated to be an opportunity for Ms Barker to provide an explanation in connection with two areas of concern on the part of ISL, these being the events involving the non-resident's overnight stay at Punawai, and an incident form which Ms Hudson had received concerning the alleged neglect of the personal care of a service user by Ms Barker.

[8] The meeting took place on 25 August 2010. Ms Hurst was present at this meeting as Ms Barker's representative; present with Ms Hudson was Ms Merepeka Raukawa-Tait, ISL Area Manager.

[9] Following the meeting, Ms Barker was advised that there would be a formal disciplinary investigation of the issues raised. On 15 September 2010 Ms Hudson wrote to Ms Barker outlining findings from the preliminary investigation process, advising that dismissal was being seriously considered as an appropriate outcome, and inviting Ms Barker to provide further input, prior to a final decision being made. ISL state that on that same day, 15 September 2010, Ms Barker advised it that she would be pursuing a personal grievance against Ms Hudson personally.

[10] On 16 September 2010 Ms Barker replied in writing to Ms Hudson. A meeting was held on 17 September 2010 to consider Ms Barker's input. Ms Barker, Ms Hurst, Ms Hudson and Ms Merepeka Raukawa-Tait were present, with Ms Hellen Fox acting as note taker.

[11] Following her response to the issues raised, Ms Barker was informed by Ms Raukawa-Tait that her employment was to be terminated with immediate effect and that she would be paid two weeks notice. This was confirmed in a letter to Ms Barker dated 17 September 2011.

[12] At the stage in the meeting following confirmation of Ms Barker's dismissal, Ms Hurst stated, and Ms Hudson and Ms Raukawa-Tait confirmed, that she had advised them that Ms Barker would be bringing a personal grievance.

[13] On 10 October 2010 Ms Hurst wrote to Ms Raukawa-Tait and Ms Hudson. After confirming that the SFWU had been authorised to act on her behalf by Ms Barker, Ms Hurst wrote:

> *We take this opportunity to invoke, facilitate and submit a personal Grievance. We confirm in writing our verbal submitting of a Personal Grievance on the 17 August 2010 at 11.35 a.m.*

Ms Hurst confirmed in the letter that Ms Barker would be seeking remedies in accordance with s 123 of the Employment Relations Act 2000 ("the Act"), and requested mediation on Ms Barker's behalf.

[14] Mediation did not take place as requested and on 16 November 2010 ERC wrote to ISL referring to Mr Barkers' personal grievance and suggesting that a meeting take place.

[15] The suggested meeting not having taken place as requested by ERC, a Statement of Problem was submitted to the Authority.

Determination

[16] Section 114(2) of the Act states:

> *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."*

[17] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police.*[1] In this case, Chief Judge Colgan stated:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[18] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer[2].

The Verbal Raising of a Personal Grievance

[19] Ms Hurst referred in the letter of 10 October 2010 to having raised a personal grievance on Ms Barker's behalf verbally on 17 August 2010. ISL submitted in the Statement of Reply that no personal grievance could have been raised on 17 August 2010 since no dismissal had occurred until the expiry of Ms Barker's notice period two weeks later.

[20] In *Melville v Air New Zealand Limited*[3] Judge Travis, referring to *Creedy v Commissioner of Police*, stated:[4]

> *Chief Judge Colgan observed that the wording of the section clearly referred to the raising of a grievance about an event that has occurred or is occurring. It does not allow for a known or even anticipated future event, let alone a speculative future event, such as a dismissal.*

[21] Ms Barker was dismissed with notice. A dismissal with notice can take two forms, one being a dismissal in which the employee is given notice, but is made a payment in lieu of having to work the notice period, the other being an immediate dismissal with a payment being made to recompense the employee for being deprived of the right to work the notice.

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[1] *Creedy v Commissioner of Police*[2006] ERNZ 517
[2] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503
[3] [2010] NZEmpC 87
[4] Ibid at para [14]

[22] The letter of 17 September 2010 which confirmed the termination of Ms Barker's employment stated: "*Your dismissal with two weeks paid notice will take effect immediately (17th September 2010).* The then Chief Judge Goddard observed in *Candle New Zealand Limited v Riley*[5] that "*It has long been recognised that payment of wages in lieu of notice, accompanied by a sending away, is a dismissal.*

[23] I find that Ms Barker's dismissal was effective 17 September 2010 and therefore it was open to Ms Hurst to raise a personal grievance on behalf of Ms Barker on that date. However the grievance must be specified sufficiently to enable the employer to address it.

[24] By way of affidavit evidence, Ms Hudson and Ms Raukawa-Tait submit that Ms Hurst stated that Ms Barker would be bringing a personal grievance, but provided no details as to the substance of the grievance, or what remedies Ms Barker would be seeking.

[25] In *Coy v Commissioner of Police*[6] the Court's view was that a statement by the employee in the case that "*I can tell you now that I am going ahead with a Personal Grievance because I think I have been personally treated very badly*" did not raise a grievance until joined by a fuller statement much later.

[26] Assessed objectively, the statement by Ms Hurst that Ms Barker would be bringing a personal grievance I do not find is sufficient of itself to fulfil the statutory requirements of s 114 (2) in that it does not serve to make the employer sufficiently aware of the nature of the grievance or the remedies for resolving the grievance.

The Letter of 10 October 2010:Raising of a Personal Grievance

[27] An emailed copy of a letter dated 10 October 2010 was sent from Ms Hurst to Ms Hudson and Ms Raukawa-Tait on 10 October 2010 which stated:

> *Dear Merepeka and Linda,*
>
> *Re: Val Barker*
>
> *On instructions from our union member Val Barker, who we are authorised to represent and act for pursuant to Section 236 of the Employment Relations Act and Amendments 2000.*

[5] [1999] 1 ERNZ 251 (EMC)
[6] CC 23/07, 19 November 2007

We take this opportunity to invoke, facilitate and submit a Personal Grievance. We confirm in writing our verbal submitting of a Personal Grievance on the 17 August 2010 at 11.35 a.m.

We invoke the Personal Grievance as follows:

a. Section 103(1)(a) of the Employment Relations Act and Amendments 2000 unjustifiable dismissal.
b. Section 103(1)(b) of the Employment Relations Act and Amendments 2000 disadvantage by the unjustifiable actions of the employer (Idea Services)
c. Clause 18 of the Collective Employment Agreement between IHC New Zealand Incorporated and Service and Food Workers' Union nga ringa tota.
d. Section 2 A of the Health and Safety in Employment Act 1992.
e. Section 6 of the Health and Safety in Employment Act 1992.

Our union member Val Barker will be seeking remedies under Section 123 of the Employment Relations Act and Amendments 2000.

Our union member, Val Barker confirms that she wishes to attend mediation.

Please respond within 14 days of your indication that you are prepared to attend mediation.

Please feel free to contact the writer if you so desire.

Yours sincerely,

Jacquie Hurst.
Organiser.
Service and Food Workers Union nga ringa tota.

A hard copy of the communication will be posted.
…

[28] The Statement of Problem filed by the Applicant includes at paragraph 4.7 in the list of attachments a note stating:

> *7) Personal Grievance notification form Union Representative dated 10th October 2010. This was the front page of a 24 page submission plus attachments which the Respondent had received when the Grievance was filed. This submission extends beyond the period that the PG is relevant to and will be submitted if required prior to Mediation or a substantive hearing is heard.*

[29] The 24 page submission document was filed with the Authority on 1 August 2011. The copy filed in the Authority is a bound copy with the letter dated 10 October 2010 as frontispiece. The submission document is comprehensive and includes details of the remedies claimed by Ms Barker in relation to the personal grievance.

[30] If the submission document had been provided to ISL in conjunction with the letter dated 10 October 2010, I consider that together they would constitute the raising of a personal grievance. However by way of affidavit, Ms Hudson and Ms Raukawa-Tait confirm receiving a hard copy receipt of the letter of 10 October 2010, but deny that there were any enclosures or attachments accompanying it.

[31] There is no evidence that Ms Hurst posted the submissions document, and the statement at the conclusion of the 10 October 2010 letter that a '*hard copy of the communication will be posted*" I find to be ambiguous in circumstances in which the letter itself makes no reference to a submissions document or to attachments or enclosures to accompany a hard copy of the letter.

[32] Although the body of the letter refers to a personal grievance and cites sections of the Employment Relations Act 2000 ("the Act") by way of statutory authority, I do not find this to be sufficient in itself without supportive details to constitute the raising of a personal grievance, as was held by the Chief Judge in *Creedy*[7]*: ""So it is insufficient, and therefore not a rising of the grievance, … even by specifying the statutory type of the personal grievance.*

The Letter of 16 November 2010: Raising of a Personal Grievance

[33] The letter dated 16 November 2010 from the ERC to Ms Raukawa-Tait advises that ERC represents two employees, one of which is Ms Barker. The letter is headed "**without Prejudice"** but has been held by Member Oldfield[8] to have been validly submitted in evidence before the Authority.

[34] The letter states at paragraph 3:

> *You would be aware that Valerie has raised a personal grievance which was sent to you by Jacquie Hurst of the SFWU on the 10th October 2010. To date this has not been acknowledged by Idea Services and I would advise that I have been instructed to raise those matters and the Grievance with the Employment Relations Authority for an Investigation Meeting.*

[35] The letter refers to the two employees having been disadvantaged and at paragraph 6 refers to the issues being related to: "*the manner in which your Community Service Manager,*

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[7] *Creedy v Commissioner of Police*[2006] ERNZ 517 at para [36]

[8] Member's Minute dated 13 July 2002

Linda Hudson has been treating both our clients in a way which can only best be described as bullying and harassment." However there is no reference to a personal grievance related to the dismissal of Ms Barker, or to the method of resolving that or the disadvantage grievance, and although a meeting is suggested, it did not take place.

[36] I do not find that this letter specifies sufficiently the personal grievance such as to enable the employer to address it.

Totality of communications

[37] I consider it valid to address the question of whether the communications taken as a whole and viewed objectively might suffice as the raising of a grievance.

[38] At the meeting on 17 August 2010 when Ms Barker was dismissed, Ms Hurst stated that Ms Barker would be bringing a personal grievance. Although there was no detail given about the nature of the personal grievance or the remedies sought, I consider that an objective bystander would have concluded that the personal grievance was connected to the dismissal of Ms Barker.

[39] The verbal statement was followed up by the letter dated 10 October 2011. In this letter Ms Hurst specifies *inter alia* that the personal grievance as being invoked in connection with unjustifiable dismissal and disadvantage by the unjustifiable actions of the employer, and states that Ms Barker will be seeking remedies under s 123 of the Employment Relations Act 2000 ("the Act"), albeit these remedies are not specified in any further detail. I note for the sake of completeness that there is no evidence to prove that the fuller submissions documentation alleged to have been sent supporting this communication was received by ISL.

[40] This communication was in turn followed by the letter dated 16 November 2010 from ERC, which referred in paragraph 3 to the raising of a personal grievance by Ms Hurst on 10 October 2010.

[41] There is a legislative imperative pursuant to s.4 of the Act that the parties to an employment relationship deal with each other in good faith. Despite the good will requirement, I consider that ISL would not reasonably have been expected to have responded to the verbal statement raising a personal grievance at the meeting on 17 August 2010.

[42] However in the letter of 10 October 2010, Ms Hurst specifies that a personal grievance is being invoked under a number of statutory heads and requests mediation on

behalf of Ms Barker, with a response requested within 14 days. ISL made no response to this letter.

[43] In the letter to ISL dated 16 November 2010 referring to Ms Barker's personal grievance, ERC also requested a meeting with ISL, but it is alleged that there was no response to this letter.

[44] It would be reasonable to expect that ISL, as an employer who had been verbally informed in the context of a disciplinary dismissal meeting that Ms Barker would be bringing a personal grievance, who subsequently received a letter from Ms Barker's union representative confirming the verbal raising of a personal grievance, and who further received a letter from ERC referring to the raising of Ms Barker's personal grievance by way of the letter of 10 October 2010 to have, consistently with a duty of good faith and have responded to these two letters by requesting specific details if unsure of the nature of the grievance.

[45] The verbal raising of a personal grievance by Ms Hurst on 17 August 2010 standing alone did not suffice as the raising of a grievance. Without the supporting documentation the letter of 10 October 2010 I have found insufficient to constitute the raising a personal grievance, and the letter of 16 November 2010 standing alone also did not suffice. However in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*[9] Chief Judge Colgan cited the case of *Liumaihetau v Altherm East Auckland Ltd*[10] as authority for the proposition*:*

> *… that where there has been a series of communications, not only would each be examined as to whether it might constitute a submission, but the totality of those communications might also constitute a submission.*

[46] In respect of the raising of a personal grievance by Ms Barker, I find the verbal statement on 17 August 2010, and the letters dated 10 October 2010 and 16 November 2010, taken in conjunction with each other, and viewed objectively, to form a totality of communications.

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[9] *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139
[10] *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958,963

[47] The letters do not specify in the detail later set out in the Statement of Problem the facts upon which the grievance is based nor the exact nature of the remedies sought but as observed in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*[11]

> *Although what is raised must be more than bare advice of a personal grievance or even the type of grievance, the requirement is certainly not for the sort of detail that may be required subsequently when lodging a statement of problem with the Authority.*

[48] I determine on the basis of the totality of communications between the parties, that Ms Barker had specified sufficiently the personal grievance to enable ISL to address it.

[49] For this reason I determine that Ms Barker has raised her personal grievance within time. The Authority will arrange a conference call shortly to progress the investigation.

Costs

[50] Costs are reserved

Eleanor Robinson
Member of the Employment Relations Authority

[11] At [24] per Colgan CJ