

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 31
3014600

BETWEEN JANE ROSEMARY BARNES
Applicant

AND CANTERBURY WESTLAND
KINDERGARTEN
ASSOCIATION INCORPORATED
Respondent

Member of Authority: Helen Doyle

Representatives: Allan Halse, Advocate for Applicant
Michael O'Flaherty, Counsel for Respondent

Investigation Meeting: 30 January 2018 at Christchurch

Submissions received: On the day from Applicant
On the day from Respondent

Determination: 28 February 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A The letter provided to Canterbury Westland Kindergarten Association Incorporated by Jane Barnes on 26 June 2015 raised a personal grievance within the statutory time frame under s 114 of the Employment Relations Act 2000.

B Costs are reserved until after the substantive matter has been resolved.**Employment relationship problem**

[1] This determination is to resolve whether Jane Barnes raised a personal grievance within time with her employer, Canterbury Westland Kindergarten Association Inc (the Kindergarten).

[2] It was agreed that this preliminary matter would be determined on the basis of the documentation lodged with the statement of problem and statement in reply and submissions.¹

Background against which the issue of whether the personal grievance was raised within the statutory timeframe is to be determined

[3] Ms Barnes has been on sick leave from the Kindergarten from 18 May 2015. Prior to this she had worked at the Kindergarten since 1 July 1993.

[4] Ms Barnes provided a letter dated 2 June 2015 to the Manager of Human Resources Karyn Willetts on 26 June 2015. In the letter she made a formal complaint about treatment she had received at her work place that she said was unacceptable. The letter referred to an earlier meeting with Ms Willetts on 15 May 2015. Ms Barnes set out in her letter that there were several incidents where she had been verbally bullied and threatened by another employee, her head teacher, who I shall call X. I prohibit from publication X's name. In the letter Ms Barnes noted that she had brought this to the attention of "our ESM" but there was no improved change. She set out in her 5½ page letter details of some of the incidents that she said were bullying.

[5] The letter provided Ms Barnes had experienced other incidents that she had not recorded. At the end of the letter Ms Barnes wrote:

These incidents have impacted me physically and emotionally to the extent that I cannot return to the workplace in my current condition. I would like to see X continue in her work, but I am concerned that there is a pattern of behaviour towards me that is unacceptable and needs to stop. For this to be successful it would need an independent review to achieve proper process.

¹ Emails between Mr Halse, Mr O'Flaherty and the Authority confirming how the investigation meeting would proceed.

[6] Receipt of the formal complaint was acknowledged by Ms Willetts. In a letter dated 2 July 2015 to Ms Barnes Ms Willetts stated that the complaint was taken seriously and an external investigator would investigate the complaint immediately.

[7] An investigation was undertaken and a report provided to Ms Willett and Chief Executive Sherryll Wilson. By letter dated 6 August 2015 Ms Wilson advised Ms Barnes of the findings from the investigation and the investigator's recommendations going forward. The finding as expressed in that letter was that none of the allegations of bullying by Ms Barnes were substantiated. One of the recommendations set out includes reference to Ms Barnes having made it clear that she did not feel safe or supported at the Kindergarten and cannot return and work with X. The letter contemplated a meeting. A further email from Ms Willetts to Ms Barnes dated 14 August 2015 supported that one was held on or about 13 August 2015. The email dated 14 August indicated that Ms Barnes was told to discuss her concern about the investigation process with the investigator directly.

[8] Ms Barnes continued to remain on sick leave and medical certificates were provided.

[9] In or about late September 2015 Mr Halse advised the Kindergarten he was representing Ms Barnes. There was continued communication in which Mr Halse amongst other matters referred to an unsafe work environment for Ms Barnes. That was not accepted by the Kindergarten. The Kindergarten attempted to establish Ms Barnes prognosis in terms of her returning to work and when that may be. In an email dated 1 December 2015 Mr Halse raised an issue that Ms Barnes does not believe returning to her place of employment is safe for her and therefore "there's a serious question mark over whether her designated workplace is "safe".

[10] The correspondence supports that there was mediation prior to 30 March 2016. Mr O'Flaherty was then instructed by the Kindergarten and wrote to Mr Halse on 30 March 2016 in relation to Ms Barnes' absence from her position and a return to the work place.

[11] By email dated 5 April 2016 from Mr Halse to Mr O'Flaherty he stated amongst other matters "our intention is to raise a personal grievance covering all matters".

[12] In a letter dated 18 April 2016 Mr Halse wrote that Ms Barnes wishes to raise a personal grievance of unjustified disadvantage on the basis of various incidents of workplace

bullying and failures by the Kindergarten to provide a safe work environment and the failure by the Kindergarten to properly investigate the bullying.

[13] A statement of problem was then lodged on 7 July 2017 and an amended statement of problem lodged on 31 July 2017.

Issues

[14] The issues for determination are:

- (a) Did the letter provided to Ms Willetts on 26 June 2015 raise a personal grievance that Ms Barnes was unjustifiably disadvantaged in her employment?
- (b) If it did then was it within the period of 90 days on which the action alleged to be a personal grievance occurred?

The letter provided to Ms Willetts on 26 June 2015

[15] Section 114 of the Employment Relations Act 2000 (the Act) provides:

- (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.
- (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.

[16] Mr O'Flaherty in his submissions says that the grievance was not raised until Mr Halse's letter of 18 April 2016. Mr O'Flaherty submits that both the alleged failure to ensure a proper and fair investigation of the bullying allegations, and the alleged failure to

provide a safe work environment came to the attention of the applicant more than 90 days earlier than the grievances were raised and therefore they are out of time.

[17] Mr O’Flaherty does not accept that the letter provided to Ms Willett’s on 26 June 2015 was the raising of a grievance. He submits that it was not intended to be notice of a personal grievance. He submits that the complaint was to address a break down in the relationship because of earlier comments that Ms Barnes and X had got along well rather than a personal grievance.

[18] The Employment Court in *Creedy v Commissioner of Police*² considered what was meant by the phrase “raise the grievance”. The then Chief Judge Colgan stated that “It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it.”³ It was stated in *Creedy* that a grievance could be raised orally and there was no particular formula of words required.⁴

[19] The Employment Court judgment of *Clark v Nelson Marlborough Institute of Technology*⁵ was also about a letter from an employee detailing complaints and seeking remedies and an issue whether that raised a personal grievance. Judge Couch stated in deciding whether the effect of the letter was to raise a personal grievance that “it does not matter what she intended her complaint to be or her preferred process for dealing with it in the first instance.” He further stated that “The only issues are whether the nature of the plaintiff’s complaint was a personal grievance within the meaning of s 103 and, if so, whether the letter complied with s 114 (2) by conveying the substance of the complaint sufficiently to the defendant.”

[20] I now consider whether the concerns raised in Ms Barnes letter fall within the definition of a personal grievance in s 103 (b) of the Act that:

(b) that the employee’s employment, or 1 or more conditions of the employee’s employment (including any condition that survives termination of the employment), is or are or was (during the employment that has since been

² *Creedy v Commissioner of Police* (2006) 3 NZELR 293, [2006] 1 ERNZ 517

³ *Creedy v Commissioner of Police* above n 2 at [36]

⁴ *Creedy v Commissioner of Police* above n 2 at [36]

⁵ *Miriam Clark v Nelson Marlborough Institute of Technology* (2008) 8 NZELC 99,483, (2008) 5 NZELR 628

terminated) affected to the employee's disadvantage by some unjustifiable action of the employee.

[21] The concerns were that Ms Barnes said she had been verbally bullied and harassed by X in her employment and notwithstanding bringing that to the attention of "our ESM" said there was no improved change in X's behaviour. Some incidents were set out as was a statement about the effect on her physically and emotionally. Ms Barnes wrote that she would not return to the workplace in her current condition. She asked for an independent review to achieve proper process.

[22] Whether a grievance has been raised has to be considered additionally with the object of Part 9 of the Act which is concerned with personal grievances, disputes and enforcement. Section 101 of the Act sets out the object of Part 9. That supports that in the resolution of employment relationship problems access to both information and mediation services is more important than adherence to rigid formal procedures. The object provision also recognises that problems are more likely to be resolved quickly and successfully if they are raised and discussed directly between the parties.

[23] I find that the letter provided on 26 June 2015 raised a personal grievance that Ms Barnes was unjustifiably disadvantaged in her employment. The key elements were that she alleged she had been subject to bullying and harassment and had become unwell and could not return to the workplace. There can be no doubt that the Kindergarten understood the nature of the complaint and promptly engaged an external investigator. The substance of the complaint was therefore clear to the employer. The Kindergarten knew in August 2015 after Ms Barnes was provided with the outcomes and recommendations from the investigation that she had concerns about it and she has remained on sick leave.

[24] Whilst Mr O'Flaherty submits that some of the incidents in the letter of alleged bullying fell outside of 90 days of the date of the letter several of them were about incidences within 90 days prior to the letter being written.

[25] Mr O'Flaherty has placed some weight on what Mr Halse said in various correspondences after he was instructed to represent Ms Barnes. Having found that the letter provided to the Kindergarten on 26 June constituted the raising of a personal grievance within

the statutory scheme of the Act those later statements and actions cannot change the effect of that.

[26] Finally Mr O’Flaherty raises different time frames about the two different elements of concerns, unsafe workplace and the concerns about the investigation. Having found Ms Barnes raised a personal grievance in her letter provided on 26 June to her employer within the statutory timeframe about bullying in the workplace the Authority can consider the fairness and reasonableness of the Kindergarten’s response. That includes the investigation.

Conclusion

[27] I find that Ms Barnes’ letter which was provided to the Kindergarten on 26 June 2015 raised a personal grievance within the statutory time frame in s 114 of the Act.

[28] An Authority Officer shall discuss the next steps in the process with Mr Halse and Mr O’Flaherty. It may be useful for the parties to consider further mediation.

Costs

[29] Costs are reserved until after determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority