

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 359

3213959

BETWEEN

KELLY DRAKE  
Applicant

AND

MANIOTOTO HEALTH SERVICES  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Allan Halse, advocate for the Applicant  
Brenda Thom, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 4 May and 5 June 2023 from the Applicant  
29 May 2023 from the Respondent

Date of Determination: 6 July 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] There is a substantive investigation meeting scheduled for three days from 10 October 2023 in Dunedin for this employment relationship problem. The employment relationship is ongoing.

[2] Ms Drake raised personal grievances on 23 November 2022 and 23 January 2023 alleging that there had been unjustified actions that caused her disadvantage due to failures to provide a safe working environment following the raising of concerns about bullying.

[3] The parties have asked the Authority to resolve as a preliminary matter whether in addition to these raised grievances a letter of 16 October 2021 from Ms Drake to Maniototo

Health Services Limited (Maniototo Health) raises a further personal grievance. The letter and concerns about the investigation that followed were referred to in the letter of 23 January 2023.

[4] It was agreed that the matter should be determined on the papers and the Authority has received submissions from both parties directed to this issue.

### **The issues**

[5] The Authority needs to determine the following issues:

- (a) The material legal framework to assess whether a personal grievance is raised.
- (b) Does the letter of 16 October 2021 raise a personal grievance that Ms Drake was unjustifiably disadvantaged?
- (c) If so, did the letter sufficiently convey the concerns to Maniototo Health?
- (d) If the letter did not raise a grievance are there exceptional circumstances for raising the personal grievance outside of the 90 day period?
- (e) Are the issues raised in the 16 October 2021 letter and the events raised by the November 2022 and January 2023 grievances sufficiently related to form a course of related conduct.

### **What is the legal framework to assess whether a personal grievance is raised?**

[6] Section 114 of the Employment Relations Act 2000 (the Act) provides for raising of a personal grievance. The material sections for current purposes are as below:

- (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.

[7] The question of what constitutes the raising of a grievance was considered by the Employment Court in *Clark v Nelson Marlborough Institute of Technology*.<sup>1</sup>

[8] In that case, Ms Clark sent a letter to her employer which raised complaints that her employer did not tell her that she was still on probation and what she needed to do to complete the probationary aspect of her employment. Other issues were referred to, including pay in the letter. These were categorised by Ms Clark in her letter as mismanagement. The focus for the Employment Court was whether the effect of the letter was to raise a personal grievance. Judge Couch stated in deciding the letter did raise a personal grievance that it did not matter, what the employee intended her complaint to be, or the preferred process for dealing with it in the first instance. It was 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...<sup>2</sup>

[9] Section 103(1)(b) of the Act provides as follows:

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

### **Does the letter of 16 October 2021 raise a personal grievance?**

[10] I need to consider whether Ms Drake's letter dated 16 October 2021 was in the nature of a personal grievance within the meaning of s 103 of the Act.

[11] Ms Drake states in her letter that it is written about a lack of professional standards by another employee who I shall refer to as S.

[12] The letter refers to four incidents that Ms Drake says she has witnessed. For each incident Ms Drake primarily raises concerns about S's behaviour compromising patient/residents' care, privacy, and enjoyment. There is amongst the concerns some interactions referred to between S and Ms Drake that she was unhappy about, but in the context of patient care.

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<sup>1</sup> *Miriam Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628.

<sup>2</sup> Above n 1 at [37].

[13] At the end of the letter, Ms Drake advises that she has spoken to another person to ask for some advice as she was too scared to lay a complaint as she would be “targeted and bullied by S”. She refers to putting her “selfishness aside” and thinking of the “patients/residents and my other colleagues.”

[14] I have considered the elements in s 103 (b) of the Act to assess whether a disadvantage personal grievance was raised. Ms Drake had concerns about S’s behaviour however it was not clear from the letter that she considered her employment, or one of more conditions thereof, had been affected. The focus of Ms Drake’s letter is on concerns for patients and residents because of S’s behaviour. This can be contrasted with the situation in *Clark* where employment issues such as remaining on probation and pay were referred to.<sup>3</sup>

[15] The letter does not raise concerns about the actions of Maniototo Health or corresponding disadvantage to Ms Drake that flows from its actions or omissions. This can be contrasted with the situation in *Barnes v Canterbury Westland Kindergarten Association Incorporated* where a grievance was found to have been raised in a letter advising of concerns.<sup>4</sup> Ms Barnes set out in her letter that there had been bullying and harassment by her Head Teacher. She set out that she had told a representative of the employer about the concerns but there had been no change in the behaviour. Ms Barnes referred to the effect on her physically and emotionally and asked for an independent review to achieve proper process. She set out that she had become unwell and was not able to return to the workplace.

[16] I do not find in conclusion that the nature of Ms Drake’s letter was a personal grievance within the meaning of s 103 of the Act. Having so found I do not need to determine whether the letter complied with s 114 (2) of the Act.

**Are there exceptional circumstances for raising the personal grievance outside of the 90 day period?**

[17] The exceptional circumstances advanced on behalf of Ms Drake are not those set out within s 115 of the Act. It is submitted on behalf of Ms Drake that “bullying behaviour” must be regarded as an exceptional or unusual circumstance because its definition requires it to be repetitious in nature and taking place over time.

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<sup>3</sup> Above n 1.

<sup>4</sup> *Barnes v Canterbury Westland Kindergarten Association Incorporated* [2018] NZERA Christchurch 31.

[18] I am not satisfied that the failure to raise a grievance about bullying within the statutory timeframe is inevitably exceptional or unusual. Exceptional circumstances should be considered in the matter under consideration. In this matter the letter, as set out earlier, is primarily about a concern of adherence by a co-worker to professional standards. There is a reference about bullying but as an anticipated consequence of a complaint which nevertheless was made because of patient/resident concerns.

[19] I do not find that there are exceptional circumstances so that leave should be granted to raise the grievance after the expiration of 90 days. I do not conclude that it would be just to grant leave.

**Are the issues raised in the 16 October 2021 letter sufficiently related/connected to those grievances raised within 90 days?**

[20] Mr Halse refers to two Employment Court judgments where the Court has allowed evidence to be admitted of events that occurred sometime before the grievance was raised.<sup>5</sup>

[21] He has asked, should the Authority conclude the grievance was not raised within the 90-day period and leave is not granted to, that the issues in the October letter should be considered with the events for which grievances were raised as a “continuum of conduct” to support the grievance was raised within the 90-day period.

[22] Ms Thom does not accept in submissions that the evidence about the 16 October 2021 letter should be considered because she says that it is not part of a continuing course of conduct as it was a complaint about a co-worker and not about Maniototo Health.

[23] It is clear from the Employment Court judgments that the acts or omissions alleged to constitute unjustified disadvantage are only able to be determined if they occurred within the period of 90 days preceding the raising of the grievances.<sup>6</sup>

[24] The Authority may consider evidence that is not confined to the 90-day period to provide context to a personal grievance rather than as an “independent personal grievance”<sup>7</sup>

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<sup>5</sup> *Premier Events Limited v Beattie* (No 3) [2012] NZEmpC 79 at [14] to [20] and *Davis v Commissioner of Police* [2013] NZEmpC 2265 at [46] to [52].

<sup>6</sup> Above n 5 in *Premier* at [15] and *Davis* at [46].

<sup>7</sup> Above n 5 in *Premier* at [15].

[25] The evidence must be of a nature to constitute a continuous cause of conduct. If it is of such a nature then it may inform whether there has been an unjustified disadvantage within the 90-day period. Remedies are confined to the events in the relevant 90-day period but if there is a continuous cause of action outside of the relevant period, then the broader background could inform their nature and scope.<sup>8</sup>

[26] These are matters for the Authority to hear evidence about at the substantive investigation rather than for determination at this time.

[27] Finally for completeness, Mr Halse refers to the statement in *Premier* that an employee who alleges an on-going and related disadvantage should not be required to raise a personal grievance every 90 days.<sup>9</sup> This refers to ongoing related disadvantage after a grievance is raised and is not directly relevant to the situation before the Authority in this matter.

### **Conclusions**

[28] The letter of 16 October 2021 did not raise a personal grievance and exceptional circumstances have not been established. The Authority will hear evidence about the letter of 16 October 2021 and what happened after it was sent, to determine whether it is part of a continuing course of conduct with the grievances raised within the 90-day period.

### **Costs**

[29] Costs are reserved and will be determined in the substantive determination.

Helen Doyle  
Member of the Employment Relations Authority

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<sup>8</sup> Above n 5 in *Davis* at [47].

<sup>9</sup> Above n 5 in *Premier* at [20].