IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2023] NZERA 516
3218863

	BETWEEN	CLAIRE IDDON Applicant
	AND	KINDERCARE LEARNING CENTRES LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Ronald Jones, representative for the Applicant Sheridan Climo, representative for the Respondent
Investigation:	On the papers
Evidence and submissions received:	31 May 2023 from the Applicant 28 June 2023 from the Respondent
Date:	11 September 2023

DETERMINATION OF THE AUTHORITY

Background

[1] Claire Iddon was summarily dismissed from her employment as an Early Childhood Education Teacher on 21 October 2022. This is a determination on a preliminary matter about whether Ms Iddon raised a personal grievance with her former employer Kindercare Learning Centres Limited (Kindercare) in accordance with s 114 of the Employment Relations Act 2000 (the Act).

[2] Ms Iddon relies on an email she sent Kindercare on 11 January 2023 telling her employer that she would take legal action against them. Ms Iddon says the email was sent within the 90-day period under the Act, and the email - in connection with earlier meetings, correspondence and her actual dismissal – made it plain to Kindercare that she was aggrieved by the situation and would be seeking further assistance to take a grievance.

[3] Kindercare says the 11 January 2023 email was the first correspondence it received after Ms Iddon's dismissal, and the email was not sufficient to raise a personal grievance. Kindercare's view is that Ms Iddon raised a personal grievance on 14 February 2023 through her representative which was after the expiry of the 90-day timeframe.

[4] The Authority convened a Case Management Conference on 16 May 2023 with the parties. The parties consented to this matter being determined on the papers, and I received evidence from Ms Iddon, two affidavits from Kindercare,[1] and submissions from both parties. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

Relevant background

[5] Ms Iddon was employed by Kindercare pursuant to an Individual Employment Agreement dated 12 August 2020.

[6] On 13 October 2022, Ms Iddon arrived at work late, and the Centre Director raised with her that she looked unwell. On 17 October 2022, two teachers raised an issue with the Centre Director that Ms Iddon appeared unwell and Kindercare commenced an investigation into Ms Iddon's conduct. The Centre Director met with Ms Iddon to discuss the teachers' concerns. Later that day, Ms Iddon was invited to a disciplinary meeting on 20 October 2022 and placed on paid suspension.

[7] Following the disciplinary meeting on 20 October 2022, Kindercare sent Ms Iddon a preliminary decision letter at 4:59 pm proposing summary dismissal. Following further communications, Ms Iddon was summarily dismissed by Kindercare on 21 October 2022, which was confirmed in a decision letter emailed to her at 5:19pm.

[8] Between the date the investigation commenced on 17 October 2022, and the date of Ms Iddon's summary dismissal on 21 October 2022, Ms Iddon (or her

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1 From the Centre Services Manager and Centre Director.

representative) sent Kindercare multiple emails, all of which were received by Kindercare.

[9] The points raised by Ms Iddon in the relevant emails are summarised below:

(a) Email dated 20 October 2022 (2:21pm) – A disciplinary meeting is disciplinary action. Ms Iddon expected that an investigation had already been completed. The intention of the meeting was not clearly communicated to Ms Iddon in advance and the meeting covered personal health issues that had already been discussed before the meeting.

(b) Email dated 20 October 2022 (2:28pm) – Kindercare has not followed its own process and has not followed a fair or reasonable process.

(c) Email dated 20 October 2022 (5:20pm) – Request made by Ms Iddon for evidence of the allegation made against her.

(d) Email dated 20 October 2022 (7:37pm) – Kindercare was asked to provide specific examples of two allegations made against Ms Iddon.

[10] Kindercare acknowledged Ms Iddon's feedback in a letter dated 20 October 2022, and noted that her feedback was based on concerns regarding the process (specifically that an investigation had not been conducted). Kindercare also responded to Ms Iddon's emails on 21 October 2022 at 10:45 am to clarify some issues raised by Ms Iddon and provide her with copies of documentation she had requested.

[11] In a response email of 21 October 2022 at 11:25am, Ms Iddon denied the allegations. Ms Iddon raised an issue about the way that the serious misconduct interview had been conducted, and advised Kindercare she would be getting legal representation and she would expect them to be in contact with Kindercare shortly. That was the last communication between the parties until Kindercare sent Ms Iddon a confirmation of summary dismissal at 5:19pm that day.

[12] On 11 January 2023 Ms Iddon sent Kindercare an email stating:

> Due to statutory obligations I thought I should make it clear I intended legal action resulting from a personal grievance. This relates to having my employment terminated unlawfully, many of the specifics have already been provided in earlier communications.

Submissions

[13] Ms Iddon's employment was terminated by way of summary dismissal on 21 October 2022. The 90-day period for raising a personal grievance for unjustifiable dismissal therefore ended on 19 January 2023.

[14] Ms Iddon says her email of 11 January 2023 informed her employer that she would take legal action and conveyed the substance of her complaint, including her reliance on "specifics" that had already been provided in earlier communications.

[15] The essence of Kindercare's submission is that the 11 January 2023 email and "specifics" were not collectively sufficient to constitute the raising of a personal grievance because the communications did not provide any information to specify the nature of Ms Iddon's concerns or matters giving rise to the personal grievance, nor the remedies that she was seeking.

[16] Kindercare further says:

(a) The use of the word "intended" in the email implies past tense consideration, and that Ms Iddon was no longer contemplating raising a personal grievance.

(b) Kindercare was not provided any information concerning the nature of a personal grievance.

(c) Kindercare did not receive any prior communication that would indicate a grievance had been raised or to make it aware that there was a grievance to be addressed. It was therefore unaware of the "specifics" Ms Iddon had raised.

[17] Kindercare says the first time it became aware that Ms Iddon was intending to raise a grievance was when it received an email meant for Ms Iddon's legal representative on 27 January 2023, 98 days after her dismissal. Kindercare says that Ms Iddon actually raised a personal grievance on 14 February 2023 which was well after the expiration of the 90-day statutory period.

[18] Kindercare also says Ms Iddon has not applied to the Authority for leave to raise the personal grievance after the expiration of the 90-day time frame. Such application would require consideration of whether the Applicant has shown "exceptional circumstances".

Analysis

[19] A personal grievance must be raised with the employer within a 90-day period that the action alleged to give rise to the grievance occurred or came to the notice of the employee.[2] A personal grievance can only be raised outside that time with the employer's consent, or with the leave of the Authority which can only be granted in exceptional circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.[3]

[20] The case law supports that the grievance process is designed to be informal and accessible. A grievance can be raised orally or in writing and there is no particular formula of words that must be used. In some cases, the totality of communications might constitute raising a grievance.[4]

[21] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.[5] This is because the employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to resolving the complaint informally and as soon as practicable. It is not necessary for the employee to state how they would like the matter resolved. Raising an employment relationship problem might constitute raising a personal grievance.[6]

[22] Based on these principles, and the information before the Authority, I find that Ms Iddon raised a personal grievance for unjustifiable dismissal with Kindercare on 11 January 2023.

[23] The email on 11 January 2023 was the only email Ms Iddon sent Kindercare after being summarily dismissed from her employment on 21 October 2022. In the email, Ms Iddon referred to "statutory obligations", used the words "personal grievance" and related the complaint to "having my employment terminated unlawfully". I do not accept the submission that the words "I intended legal action" related only to a past stated intention that was no longer in existence at the time of the 11 January email. That would be an overly strict and technical interpretation of the

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2 Section 114(1) and (2) of the Employment Relations Act 2000.
3 Section 114(6) of the Employment Relations Act 2000.
4 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.
5 *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).
6 *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

word “intended” and contrary to the principle of informality and accessibility which applies to the raising of personal grievances. Reading the 11 January 2022 email objectively, I find the most reasonable interpretation of the email is that Ms Iddon was raising a personal grievance with Kindercare relating to her dismissal.

[24] I also find Ms Iddon took reasonable steps to make Kindercare aware of the specifics and substance of the grievance. The “specifics” that Ms Iddon referred to in the 11 January 2023 email had been communicated in her emails on 20 and 21 October 2022. This is a case where the totality of communications convey the substance of the complaint. Reading the evidence in totality, it is clear Ms Iddon took issue with the processes that Kindercare followed leading up to and including her summary dismissal and conveyed that feedback to Kindercare. It is also clear that Kindercare received and considered that feedback, albeit it did not (and does not) agree with Ms Iddon’s view of its processes. I find the foundation of Ms Iddon’s personal grievance claim for unjustifiable dismissal is an allegation of procedural unfairness which has clearly and consistently been conveyed to Kindercare.

[25] Ms Iddon’s personal grievance for unjustifiable dismissal was raised within the period of 90 days from her summary dismissal in accordance with s 114(1) and s 114(2) of the Act.

[26] The parties have not attended mediation pending resolution of this jurisdictional matter. The Authority must direct mediation be used before the Authority investigates the matter. There are limited exceptions, and I do not consider that any of the exceptions apply in this case.[7]

[27] For the sake of completeness, I note Ms Iddon’s Statement of Problem (SOP) also raises related personal grievance issues of unjustified disadvantage, bullying, and breach of good faith. The unjustifiable disadvantage claim appears to also be founded on alleged actions or omissions relating to the procedure followed by Kindercare, and to the extent that there is any duplication of claims, this may impact remedies. If the parties are unsuccessful at resolving their employment relationship problem at

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7 Section 159(2) of the Employment Relations Act 2000; *Proctor v Airways Corp of New Zealand Ltd* ERA Auckland AA 188/02, 19 June 2002.

mediation, the Applicant should revise her SOP so that claims clearly relate to the unjustifiable dismissal personal grievance that has been raised within time.

Findings

[28] On the preliminary issue, I find that Ms Iddon has been successful in that her personal grievance for unjustifiable dismissal was raised in time.

Orders

[29] I direct the parties to attend mediation within 28 days of the date of this determination.

[30] If the matter remains unresolved after mediation:

(a) The Applicant is granted leave to lodge and serve an amended Statement of Problem. Following receipt, the Respondent will have 14 days to lodge and serve a revised Statement in Reply.

(b) A Case Management Conference (CMC) will be convened to set the matter down for an Investigation Meeting.

[31] Costs are reserved pending the hearing of the substantive matter, or on earlier application by either party.

Natasha Szeto
Member of the Employment Relations Authority