IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 119
5442040

	BETWEEN	MURRAY KERR Applicant
	A N D	AIR NELSON LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Greg Lloyd, Counsel for Applicant Tim Cleary, Counsel for Respondent
Investigation Meeting:	Determined on the papers by consent
Submissions Received:	4 and 23 July 2014 from Applicant 18 July 2014 from Respondent
Date of Determination:	7 August 2014

DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE

A. The Applicant's personal grievance dated 21 March 2013 in respect of a meeting with his manager was lawfully raised. His personal grievance raised by the EPMU on 12 June 2013 in respect of a final warning was not lawfully raised, and so the Authority does not have the jurisdiction to consider his claim of unjustified disadvantage in respect of that warning.

B. Costs are reserved.

Employment relationship problem

[1] Mr Kerr has lodged a personal grievance in the Employment Relations Authority in respect of his dismissal from the employment of the respondent on

29 November 2013. The dismissal was for *aggressive, confrontational and intimidating behaviour towards work colleagues.* The respondent partly relies upon a final warning that was issued to Mr Kerr on 4 June 2013 (confirmed in writing on 11 June 2013) for *confrontational and inappropriate behaviour* towards managers of the respondent (the final warning).

[2] After a case management conference discussion between the parties and the Authority on 5 June 2014, Mr Lloyd confirmed that Mr Kerr was also raising an unjustified disadvantage claim in respect of the issuing of the final warning.

[3] The respondent contends that Mr Kerr failed to raise a personal grievance in respect of the final warning within the statutory 90 day time limit set down by s.114 of the Employment Relations Act 2000 (the Act) and, further, does not consent to the personal grievance being raised after the expiration of the 90 day period. The respondent also argues that, if no valid personal grievance was raised by Mr Kerr in respect of the written warning, Mr Kerr cannot then argue that the written warning was invalidly issued and could not be relied on by the respondent in dismissing Mr Kerr.

[4] The Authority must therefore investigate as a preliminary issue whether or not Mr Kerr properly raised a personal grievance in respect of the final warning, and it was agreed by consent that the Authority would determine that question on the papers. Accordingly, submissions were directed to be lodged and served.

[5] It is noted that, in Mr Lloyd's written submissions dated 4 July 2014, he submits that another personal grievance was raised by Mr Kerr on 21 March 2013 in relation to a heated discussion that he had with his manager earlier that day. It was this heated discussion that led to the final warning being issued**.**

[6] Although the respondent argues that a personal grievance was not validly raised in respect of the issuing of the final warning, the respondent neither consents nor opposes the first claim that a disadvantage grievance was raised by Mr Kerr on 21 March 2013 in respect to the heated discussion with his manager.

Brief account of the events giving rise to the issuing of the final warning

[7] On 19 March 2013 Mr Kerr sent an email to senior executives of the respondent company, including the Chief Executive of the Air New Zealand Group of

Companies, which was critical of the respondent's handling of flight delays and cancellations at Nelson airport due to weather. On 21 March 2013 Mr Kerr met with Mr Burdekin, Manager Technical, in respect of his email. Mr Kerr says that, at the meeting, Mr Burdekin *berated and threatened him with dismissal*. The respondent says that Mr Kerr became angry and annoyed and exhibited *demeanour* [which was] *intimidating, standing over Mr Burdekin and waving his arms.* Mr Kerr's position is that he raised a personal grievance later that day in relation to the way he had been spoken to by Mr Burdekin, but that personal grievance was never addressed by the respondent.

[8] The respondent issued Mr Kerr with a final warning in respect of the altercation with Mr Burdekin on 4 June 2013 which was confirmed in writing by way of a letter dated 11 June 2013.

[9] Mr Kerr relies on two communications to support his contention that he raised personal grievances in respect of the meeting with Mr Burdekin and the subsequent final warning. The first was an email from Mr Kerr to Mr Gavin Carter, HR Manager, dated 21 March 2013 which stated as follows:

> *Hello Gavin*
>
> *I went to your office today only to find you are out of town.*
>
> *The reason I needed to catch up is in regards to a meeting I had with Rob Burdekin at his request at this meeting things were heated and things were said.* [sic]
>
> *Rob had taken it upon him self to take things out of content* [sic] *and there* [sic] *meanings and has accused me of calling him a dog.*
>
> *I would expect a little more intelligence and open mindedness from some one in his position in the Company.*
>
> *I wish therefore to put in a personal grievance against Rob Burdekin and have this matter dealt with FAIRLY.*
>
> *Murray Kerr*
> *Store Supervisor*

[10] Mr Kerr relies upon a letter written by the NZ Amalgamated Engineering, Printing and Manufacturing Union Inc. (EPMU) to argue that he raised a personal grievance in respect of the final warning. The text of this letter was as follows:

11th June 2013

… Attention: Gavin Carter

Dear Gavin

Re Murray Kerr

This letter is sent in regard to the investigation and subsequent disciplinary of the above member of the EPMU.

This letter is by way of notification that neither Mr Kerr nor the EPMU accept or recognise the outcome of a final written warning issued as a result of the above process and we require this document to be held in Mr Kerr's personal file at Air Nelson NZ Limited.

We also notify that any attempt by the employer to raise a final written warning and any other process, other than the warning's removals or cancellation, at any time in the future, would be actively disputed by Mr Kerr and this union.

Please contact me if you need clarification on any of matters [sic] *raised in this letter.*

Yours sincerely

George Hollinsworth

The Issues

[11] The Authority must determine the following:

(i) Whether Mr Kerr's email to Mr Carter dated 21 March 2013 constitutes the raising of a personal grievance in relation to his meeting with Mr Burdekin;

(ii) Whether the EPMU's letter dated 11 June 2013 to Mr Carter constitutes the raising of a personal grievance in respect of the final warning.

The law

[12] Sub sections 114(1) and (2) of the Act provide as follows:

114 Raising personal grievance

(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.*

[13] The Employment Court in *Creedy v. Commissioner of Police* [2006] ERNZ 517 examined how specific a person raising a personal grievance needed to be in order to satisfy s.114(2) of the Act. At para.[36] of *Creedy,* the Employment Court stated the following:

> *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. So it is insufficient, and therefore not a raising 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 employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

Mr Kerr's email of 21 March 2013

[14] Mr Kerr lodged a sworn affidavit which annexed to it a copy of his email dated 21 March 2013, together with notes of an interview he had with the respondent on 16 April 2013 and another note of an interview between the parties on 10 May 2013.

[15] Section 103 of the Act defines a personal grievance, which includes the following in respect of an unjustified disadvantage:

> *For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim –*
>
> *(b) that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment*

> *that has since been terminated) affected to the employee's disadvantage by some unjustified action by the employer.*

[16] By itself, it is doubtful that the contents of the email of 21 March 2013 satisfy the requirement of specificity required by *Creedy.* The second sentence of the email says that, at this meeting with Mr Burdekin, *things were heated and things were said.* That does not specify in any way what Mr Kerr's complaint was, and, indeed, implies that there could have been blame on both sides. The third sentence accuses Mr Burdekin of taking things out of context (it is assumed that is what was meant when Mr Kerr typed the word *content*). That, again, lacks specificity. However, there is also a direct allegation that Mr Burdekin accused Mr Kerr of calling him a dog; presumably, falsely. However, it is debatable whether this allegation is specific enough in the absence of a direct complaint that the accusation was false.

[17] The penultimate sentence of the email states that Mr Kerr expected *a little more intelligence and open mindedness* from Mr Burdekin. This, again, lacks specificity. The final sentence states that Mr Kerr wished to put in a personal grievance against Mr Burdekin and to have the matter dealt with fairly. When one steps back and reads this email in isolation, but in its entirety, one can infer that there was an argument between Mr Burdekin and Mr Kerr, and that Mr Kerr feels that he has been treated unfairly. That, in itself, in my view, does not sufficiently specify the grievance that Mr Kerr wanted the respondent to address.

[18] However, looking at the notes provided by Mr Kerr in his affidavit of the meeting on 16 April 2013, which occurred within 90 days of the argument with Mr Burdekin, more details emerge about Mr Kerr's unhappiness. It appears that Mr Kerr complains that Mr Burdekin's first words at the meeting were *I am p*ssed off.* Mr Kerr also complains that Mr Burdekin was *a couple of times … close to saying 'f*ck'.* It also appears from these notes that Mr Burdekin said to Mr Kerr that *I could sack you, I could demote you.*

[19] It would appear from the notes of the interview that took place on 16 April 2013, which are somewhat difficult to interpret in places, that much more detail was given by Mr Kerr than he wrote in his email of 21 March 2013. There is nothing in s.114 of the Act that requires a personal grievance to be raised all in one go. Similarly, *Creedy* does not suggest that that must be the case. Indeed, given the

infinite variety of ways in which human beings express themselves, especially when they are under stress, it would be unjust to impose such a requirement upon a grievant.

[20] Therefore, I am satisfied that, with respect to the meeting between Mr Kerr and Mr Burdekin on 21 March 2013, Mr Kerr had, by 16 April 2013, raised a personal grievance with sufficient specificity to enable the respondent to address it.

The final warning

[21] Mr Lloyd, on behalf of Mr Kerr, submits that the complaint raised by the EPMU was that the respondent's disciplinary investigation and its outcome (a final written warning) was unfair, and that an allegation that a disciplinary investigation was both unfair in its process and its outcome fits squarely within the scope of the s.103(1)(b) definition of a personal grievance.

[22] Mr Hollinsworth, the author of the EPMU's letter dated 11 June 2013, swore an affidavit which explained that he and Mr Kerr believed that Mr Kerr had been treated very unfairly by being issued with a final written warning and that, on the same day, he drafted a personal grievance letter on behalf of Mr Kerr and sent it to Mr Carter on 12 June with a covering email. A copy of that email was annexed to the affidavit. The text of the email was as follows:

> *Subject: Personal grievance on behalf of Murray Kerr*
>
> *Gavin,*
>
> *Please find attached a document to be placed on Murray's file in regard to the above and note that we dispute the outcome of your investigation as being a fair and reasonable one given all the circumstances.*
>
> *The original of the above document will follow by post and I will put a letter of dispute to you on Monday morning.*
>
> *Regards*
>
> *George*

[23] In his affidavit Mr Hollinsworth sets out an explanation of what he meant to convey by the email and letter of grievance. Mr Hollinsworth deposes as follows:

> *Basically what I was saying was – here is a personal grievance in relation to the final written warning and the circumstances leading to that, we don't recognise it but so long as you don't try to rely on it we*

> *will park the personal grievance. And the personal grievance will only become a live issue if the company tries to rely on it in the future.*

[24] Mr Hollinsworth deposes that that approach was never challenged or questioned by the company, which led him to believe that they had agreed. Mr Hollinsworth also says that he is not sure what he was thinking about at the time when he referred to a *letter of dispute*, but he did not give Mr Carter another letter. Instead, a few days later, he asked Mr Carter during a meeting if he had received the letter of 11 June 2013 and if he had put it on Mr Kerr's file. He deposes that Mr Carter confirmed that he had. He deposes that Mr Carter did not raise any concerns about the content or the intent of the letter and email that Mr Hollinsworth had sent him.

[25] Finally, Mr Hollinsworth deposes that, when Mr Kerr was ultimately dismissed, and Air Nelson relied on the final written warning to justify the dismissal, the personal grievance that he and Mr Kerr had hoped would lay dormant was triggered.

[26] Mr Carter also swore an affidavit on behalf of the respondent. Mr Carter confirms that, at the conclusion of the investigation into Mr Kerr's conduct towards Mr Burdekin (and another employee, Ms Reid), a final warning was given to Mr Kerr orally by the respondent's *Manager Business Performance*, Rick Schuyl. Mr Carter deposes that he then assisted Mr Schuyl in drafting up a letter recording the final warning. That is the letter dated 11 June 2013.

[27] Mr Carter deposes that he received an email and attachment from Mr Hollinsworth on 12 June 2014 but did not take the email or attached letter as raising a personal grievance. Mr Carter refers to Mr Hollinsworth's reference to a *letter of dispute* to be given to him the following Monday morning. He says that he would have expected the letter of dispute to be like the letter he subsequently received, raising a grievance over Mr Kerr's dismissal. Mr Carter deposes that he knew that Mr Kerr was not happy about his decision to issue a final warning but that was not enough to raise a grievance because many people who are issued with disciplinary sanctions expressly disagree with those decisions but do not take action over them.

[28] Mr Carter also confirms that he put the letter and email on Mr Kerr's file, but did not think that the email or letter required anything other than that, including any clarification.

[29] On behalf of the respondent Mr Cleary submits that a personal grievance is a statutory cause of action established by the Act which has specific statutory requirements that must be met. He submits that, as a statutory cause of action, a personal grievance is a type of legal action against an employer. He refers to s.152 of the Act (although he must, presumably, mean, s.102) which uses the term *pursue*,[1] which reinforces the notion of taking legal action and also implies an active role in taking such action.

[30] He also refers to the need to raise a personal grievance with the employer, as is mandated in s.114(2). Mr Cleary also refers to s.101(ab)[2] which recognises that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship. They may, of course, also invoke Mediation Services to try and resolve the grievance.

[31] Mr Cleary's submission is that the communications (the email together with the letter) sent by Mr Hollinsworth fail the statutory test in s.114(2) because they did not convey the idea that Mr Kerr wanted the respondent to address any personal grievance. Mr Cleary submits that, on the contrary, Mr Kerr wanted simply to notify that he disagreed with the decision but to leave that disagreement un-addressed and un-resolved.

[32] Mr Cleary submits that the use by the legislator of the term *address* must mean for the employee to be open to try and resolve the dispute, but Mr Kerr, expressly, was not open to such a process of resolution. He did not want the disagreement addressed (except to remove or cancel the warning), only left in abeyance. Mr Cleary

---

[1] *An employee who believes that he or she has a personal grievance may pursue that grievance under this Act.*

[2] *The object of this Part is.... to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship.*

submits that this is confirmed by Mr Hollinsworth in his affidavit in which he refers to the situation as *parking a grievance* and that *any dispute would lay dormant.*

[33] Mr Cleary submits that the email and letter did not raise a live grievance but simply gave notice of an intention to actively dispute the warning if it was later relied upon. Mr Cleary submits that Mr Kerr's stance was not an active one but simply notification of a dispute and that such a stance was not consistent with a reference to early discussions in the object section of s.101(ab) or to prompt resolution as mentioned in s.143(b) of the Act. In other words, Mr Cleary submits, Mr Kerr's stance did not permit the respondent to respond as the legislative scheme mandates.

[34] In reply, Mr Lloyd submits that a pragmatic suggestion by an employee that the resolution of the grievance should be deferred does not invalidate the raising of the grievance, especially given that the statutory timeframe within which to pursue a grievance in the Employment Relations Authority, under s.114(6), is three years.

[35] Mr Lloyd also takes issue with the submission of Mr Cleary that Mr Kerr's stance did not permit Air Nelson to respond as the legislative scheme mandates. Mr Lloyd submits that Mr Kerr's view of how the grievance might be resolved did not in any way prevent the respondent from taking whatever steps it considered appropriate in addressing the grievance. He says that the respondent could have suggested an alternative resolution and that to say and do nothing is almost certainly not in keeping with the statutory good faith obligation to be, amongst other things, responsive and communicative[3].

[36] Mr Lloyd says that the use of the words *personal grievance on behalf of Murray Kerr* as a subject matter of the 12 June 2013 email offers a clear indication of what the subject matter of the accompanying email and letter is. Mr Lloyd also submits that Mr Cleary confuses two separate issues: the raising of the grievance, which the applicant has a statutory obligation to do, and a proposed resolution to the grievance, which the applicant has no statutory obligation to do and which has no bearing on the validity of the raising of the grievance.

[37] Mr Lloyd also submits that the respondent's refusal or failure to address the grievance is an indication of wrong doing on the part of the respondent rather than the part of Mr Kerr.

---

[3] Section 4(1A)(b).

Determination

[38] This is an unusual case, in that the contents of Mr Hollinsworth's letter and email clearly did not unconditionally require the employer to carry out an investigation into the concerns of Mr Kerr. This is confirmed by Mr Hollinsworth in his affidavit where he refers to *parking the personal grievance provided the respondent did not try to rely on it.* The issue for the Authority to determine, therefore, is whether such a conditional expression of a personal grievance satisfies the statutory definition of a personal grievance in s.103 of the Act and the statutory requirements for raising a personal grievance in s.114 of the Act.

[39] First, however, it is necessary to also determine whether Mr Kerr's concerns were addressed with sufficient specificity as required by *Creedy.* The email from Mr Hollinsworth refers to Mr Kerr and he disputed the outcome of the investigations being a fair and reasonable one given all the circumstances. The letter then states that neither Mr Kerr nor the EPMU accept or recognise the outcome of a final written warning issued as a result of the respondent's investigation and subsequent disciplinary process.

[40] This certainly does not go as far as Mr Lloyd submitted when he stated that an allegation that a disciplinary investigation was both unfair in its process and its outcome fitted squarely within the scope of the definition of a personal grievance. The email and the letter together do not state that the investigation was both unfair in its process and its outcome, although it does state that the outcome was not a fair and reasonable one.

[41] On balance, I believe that the contents of the two documents, when taken together, do explain with sufficient specificity Mr Kerr's concern at having been issued with the final warning to have allowed the respondent to understand what the subject matter of the grievance was. This satisfies the definition of grievance in s.103 of the Act therefore.

[42] However, I must now turn to the question of whether the respondent could reasonably have understood that the EPMU was raising a personal grievance which Mr Kerr wanted the respondent to address, as contemplated by s.114(2) of the Act.

[43] It is clear from *Creedy* that the whole purpose of the requirement of specificity is to enable the respondent to be able to address the concerns contained in the

grievance. That is the principal purpose of raising a personal grievance; in order to encourage the employer to resolve the grievance without the need for institutional intervention. The fact that the statutory scheme requires the raising of the grievance with the employer before the Authority will investigate it underlines this purpose.

[44] At the point when the EPMU submitted its email and letter on behalf of Mr Kerr, the respondent did exactly what was required of it by the EPMU; namely, placed the documents on Mr Kerr's file. It had no further disciplinary action against Mr Kerr in mind at that point, it is understood, and so no further action in relation to Mr Kerr's non-acceptance of the warning was triggered. If Mr Kerr or the EPMU had stated that they fundamentally disagreed with the fairness of the investigation and its outcome, and wished the final written warning to be overturned, the respondent would have had a duty to have considered that. However, no further action was required of the respondent at the point when the email and letter from Mr Hollinsworth were received.

[45] According to the EPMU, the respondent's duty to consider overturning the final written warning was triggered when the respondent sought to rely on it in the later disciplinary investigation which resulted in Mr Kerr's dismissal. However, it appears from documents lodged with the statement of problem that the events giving rise to his dismissal first occurred on 1 and 2 October 2013. Mr Kerr was first written to regarding the respondent's concerns about these events on 22 October 2013. This letter makes reference to the final warning issued on 4 June 2013. The decision to dismiss Mr Kerr appears to have been communicated to him, after extensive investigatory meetings, on 29 November 2013.

[46] All of these events occurred more than 90 days after the issuing of the final written warning, even if one takes the date of the warning as 11 June 2013, and not 4 June, when it was communicated orally.

[47] It would appear to be the case that the effect of Mr Lloyd's submission is that an employee should be allowed under the Act to raise a conditional grievance which lies dormant for an indeterminate length of time, but which he or she can invoke at a later date, after the expiry of the statutory 90 day period, and then require the respondent to address it. I do not accept that this falls within either the spirit or the letter of the statutory requirements set out in s.114 of the Act. When Mr Hollinsworth

wrote his email and letter to Mr Carter, he specifically did not want the employer to address it. He wanted the employer to keep it on file.

[48] Whilst I recognise that the EPMU was perhaps attempting to be pragmatic when it wrote the letter and email it did, such an attempt does not accord with the requirements of the Act and it would not be just, in my view, for the respondent to be expected to address a personal grievance at an indeterminate time in the future, after the statutory time period set down in s.114 has expired, and if certain conditions unilaterally imposed by the employee are triggered. The statutory scheme does not envisage that an employee may create conditions in raising a personal grievance which could result in a circumvention of the 90 day statutory limit.

Conclusion

[49] Accordingly, the first personal grievance raised by Mr Kerr in respect of his meeting with Mr Burdekin is accepted as having been raised lawfully in accordance with the Act.

[50] The second personal grievance raised on behalf of Mr Kerr by the EPMU on 12 June 2013 in respect of the final warning does not satisfy the requirements of the Act. As no application has been received under s.114(3) of the Act for leave to raise the personal grievance after the expiration of the 90-day period, the Authority does not have the jurisdiction to investigate an alleged unjustified disadvantage claim in respect of that final warning.

[51] Mr Cleary had indicated during the case management conference call that, if the Authority found that the second personal grievance in respect of the final warning was not raised in accordance with the Act, that would preclude Mr Kerr from arguing that the respondent could not rely on that written warning in its decision to dismiss Mr Kerr. However, as neither Mr Lloyd nor Mr Cleary have addressed that proposition in their written submissions, I reach no conclusions on it. No doubt, the parties will address that proposition in their respective submissions at the conclusion of the substantive investigation of this matter, which is set down to be heard between 21 and 24 October 2014.

Directions to Mediation

[52] In view of the fact that the first personal grievance has been accepted and the second declined by the Authority, I believe that there would be positive benefit for the parties to attend mediation again and I therefore direct the parties to mediation which should take place within the month of August if possible.

[53] At this stage, the dates set down in October for the substantive investigation shall remain.

Costs

[54] Costs are reserved until the conclusion of the substantive investigation into this matter.

David Appleton
Member of the Employment Relations Authority