

Attention is drawn to the order prohibiting publication of certain information referred to in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 289
3108632

BETWEEN	KAWAA TE WIKI Applicant
AND	GXP First Respondent
AND	BLUE SKY MEATS (N.Z.) LIMITED Second Respondent
AND	NEW ZEALAND MEAT WORKERS AND RELATED TRADES UNION INCORPORATED Third Respondent

Member of Authority:	Philip Cheyne
Representatives:	Cindy Bragg, advocate for the Applicant No appearance for the First Respondent Janet Copeland, counsel for the Second Respondent Mary-Jane Thomas, counsel for the Third Respondent
Investigation Meeting:	8 April 2021 at Invercargill
Date of Determination:	7 July 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination resolves whether personal grievance claims were raised with the employer within time and can now be investigated by the Authority. It is necessary to describe what happened in more detail, but I should not be taken as determining other issues.

[2] Blue Sky Meats (N.Z.) Limited (BSM) operates a meatworks processing plant near Invercargill. BSM employed Kawaa Te Wiki there as a seasonal worker from January 2018 until the end of the 2019 season. Following an incident on 10 May 2019, Ms Te Wiki made a formal written complaint about a co-worker (GPX) about that incident. BSM appointed an external investigator. During that investigation, Ms Te Wiki complained about GPX's conduct several weeks before the 10 May incident. The investigator later concluded that the co-workers' conduct on 10 May did not amount to misconduct or sexual harassment and that there was insufficient evidence to corroborate the earlier incident. This was reported to Ms Te Wiki on 12 June 2019. By that time the season had ended. The new season commenced about November 2019. Ms Te Wiki did not return to work.

[3] These proceedings were commenced in June 2020. The statement of problem sets out claims against the co-worker (GPX), Blue Sky Meats and the New Zealand Meat Workers and Related Trades Union Incorporated (MWU).

[4] The claims against the New Zealand Meat Workers and Related Trades Union Incorporated (MWU) and GPX were withdrawn during the investigation meeting. I had indicated my view that the Authority had no jurisdiction to investigate and determine the claim against GPX and that no personal grievance claim or personal grievance remedies as claimed could result from Ms Te Wiki's proceedings against the MWU. It is not necessary to say more about these matters. However, I make an order prohibiting the publication of the name of the first respondent. Ms Te Wiki was offered but expressly declined an order prohibiting the publication of her name.

[5] Ms Te Wiki also withdrew the sexual harassment personal grievance claim made against BSM. In light of undisputed facts, Ms Te Wiki accepted that s 117 and s 118 of the Employment Relations Act 2000 (ERA) meant that she could not establish a sexual harassment personal grievance against BSM.

[6] There remain a range of grievance claims against BSM:

- (a) Ms Te Wiki says she was constructively dismissed. I am referred to s 103(1)(c), s 104(1)(a) – (c) and s 104(2) of the ERA.

- (b) There is a claim that BSM discriminated against Ms Te Wiki by placing her, not the co-worker, in another work area during the dispute. I am referred to s 103(1)(b) and (c), and s 105(a) and (k) of the ERA.
- (c) Ms Te Wiki says that BSM failed to ensure her health and safety by moving her to work alongside female, rather than male colleagues. I am referred to s 103(1)(d) and s 105(1)(a) and (k) of the ERA.
- (d) Ms Te Wiki says that BSM discriminated against her by use of her interview transcript in the 12 June 2019 letter. I am referred to s 4(1D), s 104(1) and s 105(1)(k) of the ERA.
- (e) Ms Te Wiki says she was discriminated against by BSM referring to the cost of the independent investigation in the 12 June 2019 letter. I am referred to s 104(1) and s 105(k) of the ERA.
- (f) Ms Te Wiki says she was misled and discriminated against as BSM did not comply with the statement in its 20 May 2019 letter about actions before the conclusion of the investigation. I am referred to s 4(1)(b), s 104(1)(a) and s 105(k) of the ERA.
- (g) Ms Te Wiki says she was discriminated against by BSM saying in its 12 June 2019 letter that it wished to meet with her prior to the new season. I am referred to s 4(1)(a), s 104(1) and s 105(k) of the ERA.
- (h) Ms Te Wiki says that she was discriminated against by BSM, it failed to ensure her health and safety and it attempted to pre-determine the investigation by stating that the incident was not sexual harassment. I am referred to s 3(a)(2), s 104(1)(a) and s 105(k) of the ERA.
- (i) Ms Te Wiki says she was discriminated against and BSM failed to ensure her health and safety by telling her to inform her direct supervisor if she felt unsafe. I am referred to s 4(1)(a), s 104(1) and s 105(k) of the ERA.

[7] BSM says that Ms Te Wiki did not raise any personal grievances with it within time.

[8] Following a case management conference, I decided to investigate as a preliminary issue whether Ms Te Wiki had raised grievances with BSM within time. Ms Te Wiki was directed to lodge and serve statements of evidence and any additional relevant documents prior to the date set for the investigation meeting. A date was set for BSM then to lodge any evidence. The document lodged by Ms Bragg for Ms Te Wiki was mostly submissions, not evidence. It included requests for specific documents. BSM sought to have the claim struck out, as Ms Te Wiki had not lodged evidence. I declined to strike out the claim, deferred the document requests as they were not relevant to the preliminary issue for investigation, observed that it would be helpful if Ms Bragg arranged for a statement of evidence to be lodged, but indicated that Ms Te Wiki's evidence would be taken orally if a statement was not provided. BSM was asked to lodge statements of evidence, to the extent possible given the non-compliance by Ms Te Wiki was the earlier arrangements.

[9] The following issues arise:

- (a) When did actions alleged to amount to personal grievances occur or come to Ms Te Wiki's attention?
- (b) When did Ms Te Wiki raise concerns about those actions with her employer?
- (c) Did Ms Te Wiki raise any grievances within time?

[10] Before turning to these issues, I deal with two contextual points.

[11] There is an argument for Ms Te Wiki that she was not covered by the terms of an expired collective agreement. The agreement had a term from 1 January 2016 to 31 July 2017. However, the expiry date was extended because the MWU initiated bargaining for a replacement collective. By effect of s 53 of the Employment Relations Act 2000, the agreement was in force as a collective agreement when Ms Te Wiki was first employed. As a union member, Ms Te Wiki came within its coverage. For the 2019 season, the terms of the agreement applied to Ms Te Wiki as an individual agreement by effect of s 61(2) of the of the Employment Relations Act 2000. Clause 29 outlines how employment relationship problems are to be resolved. While Ms Te Wiki did not comply with clause 29, such as by submitting a written

notice covering the details, why she felt aggrieved and the solution that she sought, the issue remains whether Ms Te Wiki raised any grievances in accordance with s 114 of the Employment Relations Act 2000.

[12] BSM has a comprehensive Workplace Harassment and Bullying Policy. It says that employees are entitled to respectful treatment in their workplaces. A respectful workplace extends to a working environment free of inappropriate behaviour and harassment. It makes provision for complaints about breaches of the policy and investigations. Investigations are to be treated “very seriously”.

When did actions alleged to amount to personal grievances occur or come to Ms Te Wiki’s attention?

[13] Ms Te Wiki worked nightshift. The 10 May incident involved GXP pushing a bucket against Ms Te Wiki’s bottom as he moved past her. In the earlier incident, Ms Te Wiki says that GXP pressed part of a sheep’s carcass against her breasts when they were working together hanging carcasses onto the chain.

[14] The earlier incident occurred in about late April 2019. Ms Te Wiki spoke directly to GPX at the time, but did not report it to BSM. The later incident happened at about 2.30am on Friday 10 May 2019. Ms Te Wiki promptly reported it to her supervisor (Paul Plank). Mr Plank viewed the CCTV footage. He had a second discussion with Ms Te Wiki, during which they viewed the footage. Mr Plant told Ms Te Wiki that he would report it to his manager (Billy Wells), so there would need to be a further meeting.

[15] Nothing further of relevance happened until Ms Te Wiki’s shift on Monday 13 May. She met with Mr Wells during the shift. He told Ms Te Wiki that a written complaint was required for BSM to investigate the incident. Ms Te Wiki wrote out her complaint on 14 May after work. It was given to the manager with HR responsibilities (Brett Jenkins) later that day. Ms Te Wiki’s evidence is that she was sent to work in a different area at some point in the exchanges during that shift.

[16] Mr Jenkins decided to engage an independent investigator (Bayley Orr). Terms of reference were set. Mr Jenkins wrote to Ms Te Wiki on 20 May to explain those steps. Ms Te Wiki was interviewed by Ms Orr on 21 May. During the interview, Ms Te Wiki spoke about

the earlier incident. Ms Orr reported to Mr Jenkins by 12 June 2019. A summary of Ms Orr's conclusions, but not the report, was provided to Ms Te Wiki by Mr Jenkins in his 12 June 2019 letter.

[17] On 20 May, Mr Jenkins also sent an email to Ms Te Wiki. The email stated that during their conversation on 14 May, Ms Te Wiki had told Mr Jenkins that she was "happy" with GPX continuing to work on the slaughter-board and that it was not necessary for him to work in a different area of the plant. Ms Te Wiki left a message for Mr Jenkins, who called her back. Ms Te Wiki disputed having said that she was "happy".

[18] On 21 May, Ms Te Wiki was offered and accepted paid special leave starting 21 May for several days.

[19] The season ended for Ms Te Wiki before she returned from that leave. Ms Te Wiki was in her off-season when she received the 12 June letter. Mr Jenkins summarised Ms Orr's conclusions:

- There is insufficient evidence to corroborate your allegation that [GPX] pushed a sheep carcass into your breast;
- [GPX] did tap you on the backside with a bucket but that [GPX's] action were an attempt to notify you of his desire to pass you in a narrow walkway and was not of a sexual nature.
- Ms Orr concluded that [GPX] conduct was not capable of being characterised as misconduct or serious misconduct as it occurred in circumstances where there is a general acceptance that staff need to physically touch one another when in close proximity to prevent potential accidents.

[20] Actions by BSM that Ms Te Wiki says amount to personal grievances occurred between 10 May 2019 and 12 June 2019. A number of the grievance claims are focussed on Ms Te Wiki's interactions with Mr Plank, Mr Wells and Mr Jenkins on and before 20 May. Other grievance claims arise from the outcome of the investigation, notified to Ms Te Wiki by the 12 June 2019 letter.

When did Ms Te Wiki raise concerns about those actions with her employer?

[21] There are notes of various exchanges between Ms Te Wiki and BSM's supervisors/managers dated 14 May, 20 May and 21 May. Ms Te Wiki is noted as saying that she felt GXP invaded her personal space, violated her and humiliated her. Ms Te Wiki disputed

saying she was “happy” that GXP was working on the slaughter board while she was there, but accepted that she was “OK” if he kept his distance. Ms Te Wiki told BSM that it was “hard” to talk to the investigator. She also said that she did not want to see GXP.

[22] Ms Te Wiki was interviewed by the investigator on 21 May. Ms Te Wiki told the investigator that she was angry with GXP and wanted to physically hurt him; that her complaint was that she felt violated and robbed of dignity; that BSM (“some supervisors”) had not considered it an “act” because GXP had not touched her with his hands; that she did not want to “go back” as BSM had not handled the complaint professionally; that she thought BSM was “two faced”; that she was “shoved” in offal and had to “tolerate” GXP in several locations during work; and that she would be leaving if the complaint did not work out.

[23] Mr Jenkins in his 12 June letter referred to parts of the interview. Ms Te Wiki had told the interviewer that she wanted to leave BSM as she thought it was “two faced”, had not handled the situation professionally, that BSM had punished her by segregating her and GXP; and that it had no interest in looking after her. In his letter, Mr Jenkins assured Ms Te Wiki that this was not the case. Mr Jenkins asked to meet with Ms Te Wiki before the start of the next season, likely to be in November 2019, to discuss BSM’s concerns in relation to her comments that she did not feel she could go back to work because she was “still angry” and wanted to “physically hurt” GXP. The letter said that BSM would be in touch with Ms Te Wiki before the season start.

[24] On 6 September 2019, BSM received a request from Ministry of Business, Innovation and Employment to attend mediation with Ms Te Wiki to discuss an employment relationship problem. Mr Todd was BSM’s CEO at the time. His evidence is that BSM had no idea what the mediation request was about, so it declined the mediation request. Mr Jenkins says that BSM was not aware of the employment relationship problem in respect of which Ms Te Wiki sought mediation assistance.

Did Ms Te Wiki raise any grievances within time?

[25] To paraphrase s 114 of the Employment Relations Act 2000, Ms Te Wiki must show she raised her grievances with BSM within the period of 90 days beginning with the date on which the action alleged to amount to a grievance occurred or came to her notice. There is an

argument that the time commenced from August 2019 when Ms Te Wiki sought and obtained advice that she could take legal action. However, time started for Ms Te Wiki when the actions alleged to amount to a personal grievance occurred or came to her attention (whichever was later), not when she obtained legal advice about the potential consequences of those actions. Ms Te Wiki needs to show she raised grievances within 90 days starting from 10 May, 14 May, 20 May, 21 May and 12 June, depending on which action is said to give rise to a grievance.

[26] A grievance must relate to an event which has occurred or is occurring, not in relation to an anticipated future event. To constitute the raising of a personal grievance, the communication must make the employer sufficiently aware of the grievance to be able to respond and how to address the claim. Sufficient detail must be provided.¹ This can comprise individual communications or their totality. It does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a grievance within the statutory definition and whether the communication was sufficient to convey the substance of the complaint to the employer.²

[27] Ms Te Wiki in her written complaint expressed concern about her ongoing safety. Ms Te Wiki wanted the matter to be “dealt with accordingly”. Ms Te Wiki made known her dissatisfaction about the steps taken by BSM in her exchanges with managers and supervisors before her interview with the investigator. Ms Te Wiki’s dissatisfaction about BSM’s steps was repeated and enlarged on in the 21 May interview. BSM knew of Ms Te Wiki’s dissatisfaction because Mr Jenkins referred to some aspects of the dissatisfaction in his 12 June 2019 letter. I find that Ms Te Wiki’s communications between 10 May and 21 May 2019 were sufficient to raise a personal grievance. The claims are characterised as discrimination. I make no comment on that at this point. At least arguably, Ms Te Wiki’s safety concern and the dissatisfaction about BSM’s response to her complaint could be a claim that her employment, or conditions of her employment, were affected to her disadvantage by unjustifiable actions by BSM regarding its steps to investigate her complaint. I find that a grievance claim based on these concerns is properly before the Authority for investigation and determination. However, I should not be taken as expressing any view about the merits of such a grievance.

¹ *Creedy v Commissioner of Police* [2016] ERNZ 517 (EmpC).

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at [36] and [37].

[28] Ms Te Wiki was seasonally laid off. Ms Te Wiki had a right under the terms of the collective agreement to be contacted for re-engagement for the following season in accordance with her seniority. That was expected to be in about November 2019. However, Ms Te Wiki did not return to work and took no steps from then until these proceedings were commenced to raise a grievance of constructive dismissal. A grievance as defined by s 103(1)(a) of the Employment Relations Act 2000 is not part of the proceedings properly before the Authority.

[29] A number of grievances are said to arise from Mr Jenkins' 12 June 2019 letter: use of the interview transcript, reference to the cost of an independent investigation, not complying with statements in the 20 May 2019 before concluding the investigation and requesting a meeting with Ms Te Wiki before the new season. The only communication to BSM after 21 May was the early September request from MBIE, asking BSM to participate in mediation regarding Ms Te Wiki's employment relationship problem. That on its own was not sufficient to allow BSM to respond to or know how to address these concerns now said to give rise to these grievances. I find they are not properly before the Authority for investigation and determination.

Conclusion

[30] The claims against GPX and MWU were withdrawn. Only claims against BSM remain. Actions by BSM on and before 21 May 2019 in relation to the 10 May incident and Ms Te Wiki's 14 May complaint are properly before the Authority for investigation and determination.

[31] Leave was not sought to raise grievances out of time.

[32] An Authority Officer will contact advocate and counsel for Ms Te Wiki and BSM to arrange a case management conference. This may include a direction to mediation and a direction to lodge an amended statement of problem.

[33] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority