

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ruth Hawea (Applicant)

**AND** The Attorney General in respect of The Chief Executive Officer of the  
Child Youth & Family Services of Wellington (Respondent)

**REPRESENTATIVES** Rodney J. Hooker, Advocate for Applicant  
Joanna Holden, Counsel for Respondent

**MEMBER OF AUTHORITY** Dzintra King

**INVESTIGATION MEETING** 18 July 2006

**DATE OF DETERMINATION** 22 August 2006

**DETERMINATION OF THE AUTHORITY**

The applicant, Ms Ruth Hawea, has submitted a number of personal grievances to the respondent, the Attorney-General in respect of the Chief Executive Officer of Child Youth and Family Services. The respondent accepts that some of the personal grievances have been raised within the 90 day period but says that others have not. The applicant says that all the personal grievances have been raised within 90 days; and if they have not, then seeks special leave.

Although the applicant's closing submissions referred to two grievances only, the Amended Statement of Problem raised three other grievances. I have dealt with all five potential grievances.

March 2003 Incident 1

The applicant says that Ms Andrea Nichols, her supervisor, questioned her, asking "Are you sure you have done a social work degree?" and "Where did you do your degree?" Ms Nichols knew that Ms Hawea had undertaken her social work placement at the Waitakere office and had been on the interview panel when Ms Hawea applied for a job and so was well aware of Ms Hawea's qualifications. The manner in which the questions were put was sarcastic and Ms Hawea felt belittled and humiliated and stripped of her mana. Ms Hawea said she told Ms Shirley Takare, another supervisor, what Ms Nichols had said and how it had made her feel. Ms Takare said she told Ms Hawea that she would speak to Ms Nichols and did so. She understood that Ms Nichols had subsequently spoken to Ms Hawea and believed the matter was at an end. Ms Hawea at no stage asked her to raise it with a manager nor did she come back and say it had not been resolved.

March 2003 Incident 2

Ms Hawea had prepared an investigation plan. Ms Nichols came into the open plan office, holding Ms Hawea's report. She made a comment along the lines of "Like hell you're going to use this", then tore the plan up and put it in the rubbish tin. Ms Hawea said Ms Karen Young, her senior

practitioner, had witnessed the incident. Ms Hawea said she went to Ms Young to speak to her about the incident but Ms Young raised her hands and indicated to Ms Hawea that she was not available to discuss the matter. Ms Hawea said that Ms Young was aware of the incident and its effect on her and that if she was unwilling to hear her complaint there was no-one else to complain to. This assertion totally ignores the respondent's management hierarchy. Ms Young denied that she had witnessed the incident or that Ms Hawea had made any sort of approach to her.

#### May 2004 to September 2004 Workload Issues

Ms Hawea said that in May 2004 she joined the newly established critical team. Her existing caseload was supposed to be redistributed to other social workers or taken over by her supervisor. This did not happen and she was left with three cases on top of her critical workload. Between May and September she repeatedly raised the fact that her workload was unmanageable with her supervisor in the critical team, Mr Mark Postow, and Mr Lloyd Lundon, who had been her previous supervisor. She said Mr Postow told her he had been told by Ms Nichols not to reallocate her cases. She told him that they needed to be taken over by someone else but he failed to organise it. Mr Lundon and Mr Postow had simply passed the issue between them without its ever being resolved.

Mr Lundon agreed that he had been approached by Ms Hawea and that he left it to her supervisor, Mr Postow to handle the matter and he suggested that she talk to Mr Postow about the workload carry over.

Mr Postow said that the cases left on Ms Hawea's workload at the time of transfer required that she update case notes and prepare a handover summary, both of which Ms Hawea did not seem to want to do. He denied that she had raised the matter with him as an issue that needed addressing and said she had been told that the cases would not be reallocated until she had finished the updating and the summary. He accepted she was not happy with being told that but he saw it simply as a management issue and not the raising of a personal grievance.

Ms Hawea was given the opportunity to state whether she disagreed with anything in the respondent's witnesses' briefs and did not dispute what Mr Postow had said.

#### August 2004 Training Programme

Ms Hawea complained that she had made an application to attend a training course and it had been declined. She had overheard Ms Nichols talking to another social worker whose application had also been declined about the decision to decline her. Ms Hawea joined in the conversation and asked Ms Nichols why she had been declined. She said Ms Nichols' tone changed immediately and she said Ms Hawea had not done the prerequisites. Ms Hawea said that when she told her she had done them and produced the certificates to prove it Ms Nichols brushed her off.

Ms Nichols said she had been talking to Ms Green when Ms Hawea joined in and that Ms Hawea had made no complaint about not being accepted or about the conversation until the current proceedings had been filed. Ms Nichols said only one applicant had been accepted, that it was not her decision and she was told that only one applicant met the prerequisites. A number of applicants told her that they had in fact met the prerequisites and she asked the training unit to check their records.

#### September 2004 Tauranga 'whanau feast'

Her application to attend this had been declined with no reasons given but there was no evidence that Ms Hawea had ever raised this as an issue with anyone.

### Exceptional Circumstances

Although exceptional circumstances had not been originally pleaded the issue was raised at the Investigation. The respondent agreed to have this issue dealt with as part of the investigation.

### Raising a personal grievance

A personal grievance is an unjustified dismissal or disadvantage. Section 114(2) provides that:

*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.*

In Creedy v Commissioner of Police, 23 May 2006, AC 29/06, Colgan CJ said at para 32 that “cases under the previous legislation required a minimum level of sufficiency of detail for the complaint. The position is no different now...”. At para 36 he said:

*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. ...the employer must know what to address. ... What is important is that the employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates...*

An employer should be given sufficient information to enable it to address the grievance. The information should allow it to respond to the grievance on its merits with a view to resolving it soon and informally, at least in the first instance.

The test is whether to an objective observer the communication was sufficient to elicit a response from the employer: Goodall v Marigny (NZ) Ltd [2000] 2 ERNZ 60 at 70. Travis J stated that “the communication must be such as to enable the employer to remedy the grievance, or for the parties to settle it in discussions”.

Not every complaint or upset in the workplace constitutes the raising of a personal grievance. It was confirmed in Tarawhiti v Mainland Products [2002] 2 ERNZ 708 that what is needed is some “positive statement” of the submission of personal grievance [para 29]. Mr Tarawhiti asked for his job back after he was given written notice of dismissal. There was a subsequent meeting between the union and the employer at which a personal grievance being an option was discussed but “discussion, in the abstract, of Mr Tarawhiti’s entitlement to take a personal grievance ... was not the same thing as submitting a personal grievance.” [para 29]. Mr Tarawhiti saying he wanted his job back did not equate to the raising of a personal grievance. At para 31 Colgan J referred to the fact that there had been no follow up by either Mr Tarawhiti or the union and said that that lack was significant.

Neither did Ms Hawea make any attempt to follow her any of the complaints she said she had raised as personal grievances. The submission of her two later grievances was in direct contradiction to the alleged submission of the earlier grievances.

In Farmers Trading Co Ltd v Opuariki [1998] 1 ERNZ 313 the union delegate advised the employer that the matter would be taken further and the grievant refused to sign a counterpart of the dismissal letter.

In Bryson v Three Foot Six Ltd 10 Feb 2006, WA20/06, P.Stapp, the applicant's annoyance with his supervisor was raised but taken no further. In Scott v Chief Executive Department of Corrections, 20 Feb 2006, WA29/06, D.Asher, the applicant's complaints about time off in lieu and the requirement that she be Wellington-based were raised but taken no further.

These cases indicate that the mere expression of dissatisfaction does not constitute the submitting of grievance.

## **Determination**

### Raising of personal grievances

#### March 2003 Incident 1

The respondent was not aware that there was anything to be responded to. Ms Takare felt that she had dealt with the matter by talking to Ms Nichols.

#### March 2003 Incident 2

Whether Ms Hawea's or Ms Young's recollection of this incident is correct is not a matter which needs to be resolved. On the strength of Ms Hawea's evidence alone there was no raising of a personal grievance: she said nothing to Ms Young.

Ms Hawea attempted to speak to Ms Young but felt Ms Young was unwilling to accept the complaint. No grievance can possibly have been raised in such circumstances. If Ms Hawea judged from Ms Young's body language that she was not interested in listening to her she had the choice of going to a manager or to Human Resources. There is no way Ms Young can have intuited that Ms Hawea wanted to raise a personal grievance.

### Workload

This issue was raised in the context of a supervisor/management issue. Ms Hawea took no steps to inform anyone that she felt aggrieved about this so there was nothing to respond to. A general comment or complaint about workload cannot in itself constitute the raising of a personal grievance.

Furthermore, Ms Hawea did not dispute that Mr Postow had told her what needed to be done in order for caseload reallocation to take place.

### Training Course

On Ms Hawea's evidence alone such a general discussion could not constitute the raising of a personal grievance.

### Whanau Feast

There was not even the communication of dissatisfaction about this matter so no personal grievance was raised.

### Exceptional Circumstances

Section 115 provides that:

*For the purposes of section 114 (4 )(a), exceptional circumstances include—*

*(a)*

*where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1)*

In Telecom NZ Ltd v Morgan [2004] 2 ERNZ 9, the Court held that Parliament did not intend to relax the tests for extending the limitation period when it enacted ss 114 and 115 Employment Relations Act 2000; and that it was arguable Parliament had made the “exceptional circumstances” test in s 115 more difficult to meet. The Court held that “so affected or traumatised” connoted substantial injury and that an inability to “properly consider” raising the grievance meant the employee must suffer the inability for the entire 90-day period. If an employee was able to “properly consider” raising the grievance at some point during the 90 day period means the test will not be satisfied. were required to meet the test for exceptional circumstances.

Ms Hawea says she was traumatised by the employer’s failure to respond to her first grievance in March 2003 that she was unable to consider raising the others. No medical or supporting evidence of this claim was provided. The exceptional circumstances test is not met.

### Costs

If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent’s memorandum.

Dzintra King  
Member Employment Relations Authority