

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Simone Joy Corbett (Applicant)

AND The Chief Executive, Department of Corrections (Respondent)

REPRESENTATIVES Joan Forret for applicant
Christina Inglis for respondent

MEMBER OF AUTHORITY Janet Scott

CONSIDERATION OF PAPERS Submissions received 9 & 23 March and 4 April 2006

DATE OF DETERMINATION 1 June 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

This determination involves resolution of a preliminary issue. Did the applicant notify the respondent of her alleged grievance within the 90 days allowed for raising a personal grievance pursuant to s.114 (1) of the Act?

On 30 November 2005 the applicant lodged a Statement of Problem in the Authority in relation to disciplinary action (a written warning) given to her on 30 September 2004 during her employment as a Corrections Officer at Waikeria Prison.

The applicant submits she notified her grievance within the time allowed under s.114 (1).

The respondent submits the grievance was not notified within the statutory time frame and it does not consent to the grievance being pursued out of time.

General Background

In June 2001 the applicant commenced employment as a Corrections Officer at Waikeria Prison. On 18 January 2005 she was dismissed from her employment on one months notice. The applicant lodged an application with the Employment Relations Authority on 25 January 2005. The problem the applicant sought to have resolved was:

“Unjustified dismissal from the position of Corrections Officer, Waikeria Prison.”

On 24 June 2005 Authority held an investigation into the problem lodged by the applicant and on 3 November a determination was issued in the matter. The Authority declined the application stating *“Ms Corbett does not have a personal grievance and hence the remedies that she seeks are not available to her”*.

On 30 November 2005 the applicant filed a challenge to the Authority’s determination. The election relates to the whole of the Authority’s determination.

On the same day the challenge was filed with the Court, the applicant lodged the current application with the Authority in relation to the warning issued to her on 30 September 2004. The applicant also sought the removal of the matter to the Court pursuant to s.178.¹

Background to the current application

In the application filed with the Authority on 30 November the applicant asks the Authority to find that the warning issued to her on 30 September was unjustified. She also seeks to have the warning removed from her personal file.

By way of background it is important to canvass the history/outcomes of investigations into Ms Corbett’s conduct during her employment with Corrections. Broadly speaking, all the matters which gave Corrections concern in respect to Ms Corbett’s conduct related to her interactions with inmates and/or her actions in prompting her father Mr Sonny Anderson as a spiritual advisor operating within prisons.² For the sake of convenience I have adopted the history described by my colleague Ken Anderson in his determination (AA 434/05).

“First Investigation

In early 2003, an investigation was conducted into the actions of Ms Corbett and another Corrections Officer, Mr William Corbett.³ The investigation concerned the use of the Waikeria Prison internal email system by the two officers over the period 23 October 2002 to 24 November 2002, for the purpose of promoting an invitation to Ms Corbett’s father, Mr Sonny Anderson, a Kaumatua with Kaiwhakamana status with the Public Prisons Service, to spiritually cleanse and re-bless the Te Ao Marama Unit at the Prison.

The outcome of the investigation was that via a letter dated 3 November 2003, from the Site Manager, Ms Liz Nielsen, Ms Corbett received two specific instructions as follows:

“You are to cease all activity in the workplace surrounding the re-blessing of the Te Ao Marama Unit” and;

“You are to cease all activity in the workplace surrounding the role of Sonny Anderson at Waikeria Prison, and generally within the Department of Corrections.”⁴

The letter also conveyed to Ms Corbett that:

“The investigation found that many of the behaviours that were investigated had their origins in advocacy and support for Mr Anderson and it is seen as a necessary safeguard for you and the Department of Corrections that this activity at work and advocacy cease.

¹ That matter remains to be determined.

² At the time in question Mr Anderson was a Kaumatua with Kaiwhakamana status within the Public Prisons Service.

³ Ms Corbett was not married at that time: Her surname was Anderson.

⁴ Mr William Corbett also received these instructions.

It is appreciated that strong family links exist for you and Mr Anderson and this instruction therefore applies to matters that pertain to the personal advocacy of Mr Anderson in the workplace.”

Ms Corbett was also informed that:

“It is important to note that failure to follow these written instructions may, if proven, constitute a serious misconduct which could result in an employment related warning or dismissal. If you are in doubt that any activity you wish to undertake might compromise the instructions please discuss it with me before undertaking the activity or action.”

The second investigation

The evidence of Ms Nielsen is that in June 2004, she became aware of concerns relating to alleged telephone contact between Ms Corbett and an inmate between 2 April 2004 and 30 May 2004. A subsequent investigation revealed that Ms Corbett had given the phone numbers of herself and her father to an inmate and that inappropriate direct telephone contact had occurred between the inmate and Ms Corbett on 2 April, 26 April and 30 May 2004.

The outcome of the investigation and the disciplinary process was that in a letter dated 30 September 2004, it was conveyed to Ms Corbett by Ms Nielsen that:

“You were invited to provide submissions on the proposed disciplinary action by 24 September 2004. In the absence of any submission from you this letter serves as formal confirmation of the written warning.

It is important to understand that any further misconduct of this or any nature could, if proven, result in disciplinary action including dismissal.

As a Corrections Officer you should recognise the vulnerability of people under the Department’s care and control and be clear it is your professional responsibility to maintain appropriate boundaries at all times. You must inform your manager immediately if you are placed in a situation where you cannot comply with this requirement.””

Background to the Current Application

It is the warning issued on 30 September 2004 that is the subject of the applicant’s current application in the Authority and this determination on the preliminary matter as to whether or not it was notified to the respondent within the 90-day statutory time frame allowed for the submission of a grievance.

By way of background, following the investigation into Ms Corbett’s telephone contacts with inmate Jan Yorke, she was advised by the Acting Site Manager, Mr Pike⁵ on 22 September 2004 that it was the respondent’s view that misconduct had occurred and that the proposed disciplinary action was a written warning. Mr Pike continued:

“However before reaching a final decision on the appropriate course of action you are invited to make submissions on the proposed disciplinary action. Please provide your submission in writing by 4pm on 24 September.”

⁵ Acting for Site Manager, Ms Nielsen.

Ms Corbett did not respond to the request for submissions in the manner requested by the respondent. Events overtook her and on 23 September she was suspended pursuant to an investigation conducted by the Department into allegations (among others) that she had coerced an inmate. (The outcome of into these new allegations was that the applicant was dismissed for serious misconduct).

These latter allegations were investigated by an independent investigator, Ms O'Connell and it was to her that Ms Corbett first attempted to submit a grievance during a meeting with Ms O'Connell held on 29 September 2004. That meeting had been called for the purpose of allowing Ms Corbett to respond to the new allegations. At that time Ms Corbett chose not to respond to the new concerns. Instead she verbally raised advised her intention to instigate personal grievance proceedings. She asked to discuss her alleged grievance at this meeting but this was declined. She then submitted her grievance in writing to Mr Hawthorne in writing on 29 September 2004.

Relevant parts of the submission of grievance are recorded below:

I am formally advising of my intention to instigate Personal Grievance proceedings on the basis that my employer has acted justifiably and in a way that disadvantages me and threatens my continued employment. The grounds for my Personal Grievance are set out below.

Employment Investigations

Two formal investigations have been carried out for my alleged serious misconduct, the first in September 2003 and the second began in July 2004 with the outcome of the investigations yet to be advised to me. Issues arising out of these investigations have led me to believe that I am being harassed and that my continued employment is in jeopardy. At the very least the ongoing investigations for matters that can be dealt with in a manner that is conducive to resolution rather than conflict.

.....

Employment Investigation – Telephone Calls from Inmate Jan Yorke

I have had the opportunity to read the report of the investigation that was carried out arising from my alleged serious misconduct through establishing an inappropriate relationship with an inmate in my custody. Points I would make about this investigation are⁶:

- *the results of the investigation are ambiguous at best, and dishonest through omission at worst;*
- *despite the ambiguity of the investigation results, disciplinary proceedings continue, albeit for the lesser misconduct of failing to advise my Unit Manager of receiving a phone call from Jan Yorke;*
- *that the investigator failed to interview Mr Browning who received the phone call immediately prior to transferring to me and who also failed to advise the Unit Manager of my receiving that call; and*
- *that I have yet to be informed of the final outcome of this investigation. All that I have (presumably on my file) are a series of memoes (sic) about the allegations and the report.*

⁶ By way of an aside, the comments that follow are in essence submissions that Ms Corbett was asked on 22 September to make on the proposal to issue a written warning in relation to telephone contact with Jan Yorke.

Ms Corbett goes on to detail her concerns relating to her suspension and a third investigation into allegations that she had coerced an inmate to undergo spiritual guidance and a pending investigation into the will of another inmate. Ms Corbett summarised her alleged grievances:

Summary of Grievances

I believe that I have a strong case for Personal Grievance in that my employer has:

- *instigated employment investigations for matters that should have been dealt with at a lower level, and as such has escalated these situations unnecessarily. This is in my view a direct breach of Section 3(i)(iv)(v) and (vi) of the ERA 2000 vis promoting good relationships between employers and employees in good faith;*
- *acted in a manner that has disadvantaged me and caused me to be humiliated amongst my colleagues;*
- *failed to show in the earlier two investigations that due regard was given to my submissions, the ambiguity of the results and erring in favour of a negative outcome.*

Remedies Sought

The remedies I seek are:

- *Immediate reinstatement.*
- *Expunging all written documentation from my personal file relating to the matters discussed above⁷.*

On 5 October 2004, Mr Hawthorne responded to Ms Corbett's submission of grievance. Relevant parts of that response are recorded below:

"I am responding to your letter received in the Regional Office on Thursday 30 September which is undated and that sets out your intention to raise a personal grievance. As you have set out the grounds of your alleged grievance in some detail in the letter, I take that you have in fact raised a personal grievance and I therefore respond as follows.

Firstly you state in your letter that you consider the outcomes of the two previous employment investigation (sic) carried out in September 2003 and July 2004 have not been advised to you. This is not correct.⁸

.....

In respect of the second investigation in July 2004, you have stated that you have not had an opportunity to read the report".

Mr Hawthorne goes on to explain the timeframe in which Ms Corbett was provided with the report and requested to make submissions on it. (I note Mr Hawthorne's statement that Ms Corbett had said in her submission of grievance she had not had the opportunity to read the report seems to be wrong as it is clearly communicated by Ms Corbett in her 29 September letter "*I have had the opportunity to read the report of the investigation*").

In the event however Mr Hawthorne goes on:

⁷ The applicant goes on to ask for apologies and payment of her adviser's fees.

⁸ In fact at the time of submitting her grievance in relation to the 2nd investigation Ms Corbett had not been notified of the outcome of that investigation. A written warning had been the proposed outcome and this was communicated to Ms Corbett on 22 September. However, that outcome had been communicated to Ms Corbett by the time Mr Hawthorne was writing on 5 October (warning confirmed on 30 September).

“I am aware the investigation process has been completed and that you have been made aware of the recommendation that you be issued with a warning. This was confirmed in a letter to you dated 22 September 2004. This letter also provided you with an opportunity to provide submissions to the Manager by 24 September 2004. I understand no submissions have been received and therefore the Manager confirmed that final outcome to you in a letter dated 30 September 2004.

Although I have not been the decision maker in respect of either of these investigations I am not aware that you have previously raised any concerns with either the process followed or the outcomes of these two matters. I am clear from reviewing the letters referred to above that you have had the opportunity to participate in the processes and provide submissions. In particular at no time have you raised any allegation that you have been harassed or that your employment has been placed in jeopardy. If you have evidence or information to clarify or support these allegations then please provide this.

.....

For the reasons outlined, the remedies you seek will not be granted”

Position of the Parties

Applicant’s position

Ms Corbett submits that she raised the issue of disadvantage resulting from the investigation and written warning verbally at her meeting with Justine O’Connell on 29 September and she submitted her grievance in writing to Mr Hawthorne, Regional Manager on the same day. It was her belief the warning had already been decided and she had been advised of it. She responded to it before the warning letter was written and as a result she believes she took all reasonable steps to advise the Department of her grievance at the earliest she was made aware of the disadvantage to her.

The applicant also points to the para 18 of the evidence of Mr Hawthorne (given at the investigation meeting) where he notes that she raised a personal grievance during the 29 September meeting with Justine O’Connell.

Ms Corbett submits the Department chose not to respond to her submission of grievance relating to the investigation and disciplinary action in question.

Legal submissions were made for the applicant supporting her position that the grievance was submitted in time.

Respondent’s Position

The respondent does not dispute that the applicant raised a personal grievance in her letter to the Department on 29 September 2004. However, it is the respondent’s position that that letter only raised a grievance about the Department’s investigation (up to the date of the letter) into complaints about the applicant’s conduct including the investigation into the applicant’s telephone contacts with Jan Yorke.

It is the respondent’s position that the disciplinary action in this case, a warning, is of a distinct and independent character to any investigative process and therefore it gives rise to a separate potential

grievance and the applicant was therefore required to give notice of any claim relating to the warning within 90 days of having been advised of it.

The respondent submits that the Department wrote to Ms Corbett on 30 September advising her she was to be issued with a formal written warning. That letter stated advised her of her right to raise a personal grievance. The applicant did not notify a personal grievance in relation to the warning or take any steps to advise the respondent that she was dissatisfied with the action taken against her.

It was also noted that when the respondent attended mediation in relation to the unjustified dismissal grievance it did so without prejudice to the respondent's ability to argue that aspects of the applicant's complaints were being pursued out of time.

The respondent made legal submissions in support of its position that the claimed grievance was not submitted within 90 days.

Discussion and Findings

In arriving at my determination I have considered the affidavits submitted along with supporting documentation. I have also considered the legal submissions and have had regard to relevant case law including among other cases Goodall v Marigny (NZ) Ltd [2000] 2 ERNZ 90; Ruebe-Donaldson v Sky Television Ltd AC 44/04; New Zealand Automobile Association Inc v McKay [1996] 2 ERNZ 622 and Creddy v Commissioner of Police AC 29/06.

The relevant parts of S.114 Raising personal grievance provide:

- (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 employer, whichever is the later, unless the employer consents to the personal grievance being raised after the expiry of that period.*
- (2) *For the purpose 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.*

There is no dispute between the parties that Ms Corbett raised a personal grievance on 29 September 2004. That was confirmed by Mr Hawthorne in a letter to Ms Corbett dated 5 October 2000 where he said:

"I am responding to your letter received at the Regional Office on Thursday 30 September which is undated and that sets out your intention to raise a personal grievance. As you have set out the grounds of your alleged grievance in some detail in the letter, I take it that you have raised a personal grievance and I therefore respond as follows.

While there is no dispute that Ms Corbett raised a personal grievance there is, however, a dispute between the parties as to the nature of the grievance raised by Ms Corbett. It is appropriate, therefore to examine the submission of grievance and to consider what the nature of the grievance raised was.

An examination of Ms Corbett's letter of 29 September shows she prefaced her statement as to the grounds for her grievance as follows:

“I am formally advising of my intention to instigate Personal Grievance proceedings on the basis that my employer has acted unjustifiably and in a way that disadvantages me and threatens my continued employment.” (Emphasis mine).

Ms Corbett goes on to state the grounds for her grievance. In summary they encompass:

- **The two formal investigations into her alleged misconduct.** She addresses issues relating to the outcome of the first investigation. She states she has had the opportunity to read the report into the second investigation and raises concerns in relation to that investigation noting she has not yet been advised of the final outcome.
- **Suspension pending Employment Investigation – Coercion of Moana Filemohaia to Undergo Spiritual Guidance and Impending Investigation into the Will of Patricia Mahuto.**

Ms Corbett summed up her grievances in the following words;

“I believe I have a strong case for Personal Grievance in that my employer has:

- *instigated employment investigations for matters that should have been dealt with at a lower level, and as such has escalated these situations unnecessarily. This is in my view a direct breach of Section 3(i)(iv)(v) and (vi) of the ERA 2000 vis promoting good relationships between employers and employees in good faith;*
- *acted in a manner that has disadvantaged me and caused me to be humiliated amongst my colleagues;*
- *failed to show in the earlier two investigations that due regard was given to my submissions, the ambiguity of the results and erring in favour of a negative outcome.”*

Ms Corbett goes on to seek remedies, which include reinstatement, removal of documentation from her file, apologies and costs.

In his response of 5 October Mr Hawthorne:

- Acknowledges that Ms Corbett has raised a personal grievance
- Notes (in respect of the second investigation) that no submissions were received from Ms Corbett in relation to the proposal to issue her with a written warning and that the Manager confirmed that outcome to her in a letter dated 30 September.

He also says:

“Although I have not been the decision maker in respect of either of these investigations⁹ I am not aware that you have previously raised any concerns with either the process followed or the outcomes of these two matters”.

He also asks Ms Corbett for evidence or information to clarify her allegations of harassment/actions by the respondent that have put her employment in jeopardy.

So what is the nature of the grievance raised by Ms Corbett and responded to by Mr Hawthorne? Taking an overall view it is clear that Ms Corbett sees a series of past and continuing investigations

⁹ The first two investigations.

and outcomes imposed by the Department as disadvantaging her and putting her employment in jeopardy. Mr Hawthorne responded and in doing so specifically acknowledged that Ms Corbett had raised a personal grievance.

But was the warning raised and recognised as being encompassed by the correspondence between Ms Corbett and Mr Hawthorne? Ms Corbett did not say specifically “*I take issue with the warning/proposed warning*”. However, I note, that we know as a matter of fact that at the time Ms Corbett raised her personal grievance she had been advised of the *proposed* outcome of the investigation i.e. that misconduct had been identified and that the proposed disciplinary action was a written warning. I also note that Mr Pike’s 22 September letter states that the proposal to give Ms Corbett a written warning was subject only to any submissions Ms Corbett might provide by 24 September – submissions that might cause the respondent to change its mind about the proposed penalty.

In light of this and on a close reading of Mr Hawthorne’s reply, I find he is impliedly accepting that Ms Corbett has raised a grievance that includes a grievance relating to the outcome of the second investigation. He says “*I am not aware you have **previously** raised any concerns with either the investigation followed or the outcomes of these two matters*”. This implies an acceptance on his part that Ms Corbett is *now* raising a concern over these investigations and the outcomes. This interpretation is, I find, confirmed by a wider reading of this part of Mr Hawthorne’s response where he prefaces the above statement with a specific reference to the warning and follows up with a request for Ms Corbett to provide evidence or information to clarify or support her allegations.

If I am wrong on this point, I would also rely on the case law recently spelled out by the Chief Judge in *Creddy* (cited above). There it is confirmed that the raising of a personal grievance is something the statute contemplates after the grievance comes into effect. This rule is, however, modified (p 9) where the Chief Judge notes that the words of the legislation (referring to the raising of a grievance) contemplate an event “*that has occurred or is occurring*”. As of 29 September the warning the Department proposed to give Ms Corbett was inevitable (the deadline for submissions that might change the employer’s mind having passed on 24 September). In this regard the warning was an action that was occurring at the point the personal grievance was raised by Ms Corbett and clearly had occurred by the time Mr Hawthorne responded. As an action that was “*occurring*” at the time the grievance was submitted, the grievance raised can be said to encompass the outcome of the respondent’s investigation i.e. the warning and pursuant to s.114 (1) the warning (being inevitable after 24 September because the applicant had not provided submissions on the proposed penalty) was certainly an event that had come *to the notice of the employee* albeit the action had not yet been confirmed.

I would also note that in line with *NZ Automobile Assoc. Inc.* (cited above) the issues going to the justification for the warning are inextricably bound up with the issues arising from the investigation leading to the warning and commonsense would dictate that the Authority take the wider view and say it is entitled to address the matter in its entirety. There is, however, no need to rely on s.122 of the Act to find the grievance is of a type other than that alleged. This raises an important issue relating to how the applicant’s alleged grievance should be addressed. I am raising this in the separate memorandum to the parties that accompanies this Determination.

Determination

In reliance on the above reasoning I find the applicant raised a personal grievance in relation to the warning given to her on 30 September 2004 within the time frame required pursuant to s.114 of the Act.

Note: I accept that this determination is contrary to Mr Anderson's statement at paragraph 27 of his determination. On this, I note, that it is correct that Ms Corbett made no explicit reference to the warning when she raised her grievance. I note, too, that Mr Anderson was not scrutinising the communications between the parties for the purposes of determining the matter with s.114 (1) in mind. My determination, on the other hand, is the culmination of extensive consideration of the affidavits, legal submissions, the relevant communications between the parties and applicable case law on this point alone.

Costs

Costs are reserved. I will confer with counsel in relation to this issue.

Janet Scott
Member of the Employment Relations Authority