

90 day issue

[3] Before an investigation meeting proceeded the Authority gave directions to the parties in relation to a 90 day issue raised by St John and which it wanted to have determined as a preliminary matter.

[4] In relation to that issue the Authority directed Ms Lomas to give particulars of when, how and to whom she had raised her contended grievances of disadvantage in employment and unjustified dismissal.

[5] Through Mr Ryan she responded by memorandum advising that in relation to the disadvantage grievance she had raised concerns by letter of 25 September 2006 to St John, and in relation to the termination of her employment a grievance was raised by Mr Ryan's letter of 29 May 2007.

[6] After conferring further with counsel, the Authority directed the parties to supply any witness statements of evidence they regarded as being relevant to the 90 day issue for it to be determined 'on the papers.'

Disadvantage grievance

[7] I am satisfied that the letter written by Ms Lomas on 25 September 2006 to Ms Vanessa Woodcock, who was then employed by St John as the Senior Human Resources Adviser for the North Island, raised a personal grievance.

[8] Ms Lomas began her letter by referring to numerous "*concerns*" she had in relation to the Area Manager of St John, Mr Pat Wynne, who was her supervisor at Opotiki. She stated that some of those concerns affected her directly, and she gave details of each one of the following examples of Mr Wynne's conduct:

- Bullying staff;
- Verbally attacking staff;
- Speaking untruths;
- Personal health and safety;
- Inappropriate behaviour;

- Inappropriate touching.

[9] Of particular significance when considering the nature of this communication to her employer is the ending of Ms Lomas' letter:

This man is intimidating. I don't feel we can talk to anyone in our region. I don't know how to help my staff. This man is destroying our area. Work is an awful place to be. Numerous staff are off and volunteers want to leave. We worry continually about getting audits and by not "playing the game" we worry we won't get our ATP either. (I wouldn't be surprised if this hasn't happened already, I would appreciate someone looking into it.)

Not only am I on stress leave but I am applying for other positions outside of this area.

This man needs to be stopped. Someone needs to come down and talk to our staff. Not just my station but others as well.

I can't work in this situation.

[10] I find that the letter clearly outlined various forms of unwelcome and unwanted conduct and behaviour on the part of Mr Wynne that had disadvantaged Ms Lomas to the point where she had become unwell through stress. The letter clearly advised of action Ms Lomas wanted her employer to take. She could not have made herself plainer in this regard, stating near the end of the letter; "*This man needs to be stopped.*"

[11] I find that through her letter Ms Lomas told her employer what the employment relationship problem was specifically and what she wanted St John to do about it. This meets the test of raising a grievance as discussed in *The Board of Trustees of Te Kura Kaupapa Motuhakeo Tawhiuau v. Edmonds* unreported, 16 May 2008, AC14/08, in which the Employment Court reviewed current case law about the requirements of s 114 of the Employment Relations Act 2000.

[12] In its decision the Court referred to an earlier judgment in *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517, where it had observed:

What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates An employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[13] Ms Lomas' letter of 25 September 2006 meets that test by complaining about specific conduct of her supervisor affecting her personally and by advising of the way she wanted the complaints to be addressed. To a neutral observer the letter would

have read as a complaint about widespread and deep seated problems in St John's Opotiki workplace brought about by the unreasonable behaviour and conduct of a St John manager and that was affecting Ms Lomas personally. The letter would have read as a plea by her for help to overcome those problems.

[14] The letter is able to stand on its own in this regard, but when it is also considered in the context of discussions that Ms Lomas subsequently had with Ms Woodcock and other St John managers about her concerns, it is even clearer that a grievance was raised and was addressed as such by St John soon afterwards. Although the words *personal grievance* are not expressed in the 25 September letter, as case law has shown, the use of those words is not determinative of whether a grievance has been raised. It is the substance of the communications between the parties and their content that must be looked at.

[15] In *Edmonds* (above) at paragraph [47], it was held not to be necessary in communications with the employer for the employee to characterise a grievance as such, if the correspondence is treated clearly by the employer as indicating an employment relationship problem, and if the correspondence makes it clear that the employee is complaining of being disadvantaged by the employer's conduct. I am satisfied that is how a reasonable and impartial observer would have read the 25 September letter, and it is also in fact how St John viewed the letter and responded to it.

[16] If the 25 September 2006 letter on its own was not clear enough, Mr Ryan's letter of 5 October 2006 to St John should have put beyond doubt the nature of Ms Lomas' concerns. Mr Ryan referred to his client's letter sent 10 days earlier as a letter "*raising an employment relationship problem,*" which, because of its seriousness, Mr Ryan said required "*urgent intervention by St John.*" He asked St John to advise of the steps it intended taking that would allow Ms Lomas to return from stress leave to a safe and healthy workplace.

[17] St John has not questioned when any instances of Mr Wynn's conduct and behaviour complained of by Ms Lomas' in her letter of 25 September 2006 had occurred. In any event I am satisfied from the way St John subsequently engaged with Ms Lomas to address her concerns, that the employer implicitly consented to the raising of a disadvantage grievance/employment relationship problem, if it was about conduct that had occurred more than 90 days before 25 September 2006.

[18] There were frequent meetings and discussions and memoranda exchanged about the complaints made by Ms Lomas, in the attempts made by the parties to resolve those complaints. There was mediation in February 2007, when Ms Lomas was still employed. Participating in mediation may in some cases amount to consent by the employer to the raising of a grievance out of time.

Dismissal of Mr Wynne

[19] It is revealing that St John investigated complaints of serious misconduct made against Mr Wynne and suspended him on 9 October 2006, barely three weeks after Ms Lomas had raised her concerns and asked for him to be “*stopped.*” The investigation resulted in the dismissal of Mr Wynne, about which shortly after her resignation Ms Lomas was advised by letter of 14 June 2007;

... .. her complaint that Pat had sexually harassed her was upheld by St John and St John regarded Pat’s sexual harassment of Tamara as serious misconduct.

[20] The letter went on to advise that Mr Wynne had been dismissed as from 8 June 2007. St John’s letter expressly acknowledges that a complaint of sexual harassment by her supervisor had been made by Ms Lomas. Clearly she had raised a personal grievance about that conduct before Mr Wynne was suspended in October 2006, many months before she lodged her statement of problem in December 2007. St John’s claim in its statement in reply (paragraph 2(e)) that no grievance was raised before then is sharply contradicted by its letter of 14 June 2007.

[21] I therefore uphold Mr Ryan’s submission that, in relation to the claim of disadvantage, the letter of 25 September 2006 raised a personal grievance.

Unjustified dismissal grievance

[22] I also uphold Mr Ryan’s submission that his letter advising of Ms Lomas’ resignation on 29 May 2007 was accepted by St John as the raising of a grievance, even although that particular terminology is not used in the letter. In it Mr Ryan states:

Our client is unable to return to work due to her employer’s repeated failures to address her concerns.

Accordingly, our client tenders her resignation from her position as ambulance officer in Opotiki.

Our client instructs that she is appalled at the lack of support from St John and believes that St John has failed her as an employer. She is of the view that St John has not taken every practicable step to ensure her safety at work and that this has become apparent when comparing Midland to other services.

[23] It is significant to consider the reply received from St John to that letter, especially the following part:

In inviting Tamara to discuss her concerns again and to have the opportunity to reconsider her decision St John is not agreeing that its inactions or actions have constituted a breach of any duty owed by St John to Tamara.

[24] It is clear from that passage that St John recognised the earlier letter as containing a complaint of breach of duty on the part of St John, although the employer was not acknowledging that such complaint was warranted.

[25] It is also clear from the correspondence that the resignation was linked to an alleged continuing failure by St John to address health and safety issues Mr Lomas had raised. The resignation letter refers to an earlier letter from Mr Ryan, on 18 May 2007, in which he had advised that Ms Lomas was “*unable to return to her workplace until St John provides her with written advice as to what steps they are putting in place to ensure she is not subjected to any further hazards in the workplace.*” He gave his view in the letter that St John had still not addressed her concerns.

[26] The resignation letter written 11 days later expressly refers to that earlier correspondence and to St John’s “*repeated failures to address her concerns.*” The tendering of resignation is expressed to be a direct consequence of repeated failure, being a continuing act or omission of the employer alleged to have occurred within 90 days of the resignation.

[27] Again, the parties were on the same wavelength about matters of concern that had caused the resignation of Ms Lomas and which she regarded as constituting breaches of duty by St John.

Determination

[28] For the reasons given I determine that both the disadvantage and the dismissal grievances were raised by Ms Lomas as contended by her. She is not time- barred from pursuing them against St John to resolution.

Further investigation

[29] With regard to the employment relationship problem as specified in the statement of problem, which includes the two personal grievance complaints, the focus of the Authority's investigation should become the sufficiency and reasonableness of St John's actions in addressing the complaints that I have found were raised. It is clear that St John management personnel did, seriously, genuinely and promptly, respond to her concerns once she had made them known by her letter of 25 September 2006. Whether it did enough, so that it could be found to have acted fairly and reasonably in the circumstances, must be a central question to decide in determining the grievance claims as well as those relating to health and safety and good faith.

[30] The steps St John took in this regard have been well documented and it may be that a determination can be made largely from the correspondence and other written material, about which there should be no dispute. I recommend to the parties that they return to mediation and concentrate on this question before an investigation meeting is held.

[31] Shortly the Authority will confer again with counsel, to consider the next steps in this investigation.