IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 95/09
5139790

	BETWEEN	AARON WAITAI, MOTUSAGA ESE and DAVID KENNEDY Applicants
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	G J Wood
Representatives:	Tony Snell for the Applicants Karen Spackman for the Respondent
Investigation Meeting:	26 May 2009
Submissions Received:	9 June 2009
Determination:	15 July 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants are members of the Corrections Association of NZ (CANZ), a union representing prison officers in the respondent's (the Department of Corrections) facilities. The applicants claim that they raised their personal grievances within the 90 days required by law. Corrections denies this. No application for leave to raise the grievances out of time has been made.

[2] The parties have usefully agreed on a statement of facts, which is set out below.

> 1. *On 22 March 2007 the applicants were provided with a written report for an employment investigation which had been conducted by the respondent into alleged serious misconduct.*
>
> 2. *Submissions were subsequently made on the employment investigation report by the applicants' (then) representative, the Corrections Association of New Zealand (CANZ).*
>
> 3. *A letter from the respondent dated 30 May 2007 responded to the submissions made by CANZ, and invited further and final submissions on the findings and conclusion of the employment investigation report by 11 June 2007.*
>
> 4. *On 14 June 2007 CANZ sought an extension of the 11 June deadline for further submissions. The respondent granted an extension of that deadline until 11 July 2007, however no further submissions were made by CANZ.*
>
> 5. *On 20 July 2007 the respondent wrote to CANZ, advising that the findings and conclusions of the employment investigation report were accepted by the respondent.*
>
> 6. *On 27 July 2007 Mr AJS Snell, Barrister, wrote to the respondent making final comments on behalf of the applicants in relation to the employment investigation.*
>
> 7. *On 25 September 2007 the respondent wrote to Mr Snell, advising of the respondent's decision to interview another Corrections Officer. Under cover of a letter dated 18 October 2007, a copy of the transcript of that interview was sent to Mr Snell. Comments on the interview were sought by 24 October 2007.*
>
> 8. *Following an interim letter dated 5 November 2007, the respondent received a letter dated 21 November 2007 from Mr Snell, responding to the 25 September letter.*
>
> 9. *On 20 December 2007, meetings were arranged by the respondent with the applicants for the following day.*
>
> 10. *The applicants were dismissed for serious misconduct by way of letter dated 21 December 2007.*
>
> 11. *In early January 2008, the CANZ President, Mr Beven Hanlon, spoke with the respondent's Human Resources Manager for Prison Services, Ms Michelle Kortegast, by telephone. [*The contents of this telephone discussion are disputed*.]*
>
> 12. *On 18 January 2008, the Department of Labour in Wellington was contacted by the Applicants' representative and asked to arrange mediation.*
>
> 13. *Mediation between the parties was arranged by the Department of Labour in mid-February 2008, and was scheduled to take place on Friday 28 March 2008.*
>
> 14. *On Wednesday 26 March 2008, Minter Ellison Rudd Watts wrote to Mr Snell stating that the firm had been instructed to represent the respondent and that the respondent would not be*

attending the scheduled mediation because there was nothing between the parties about which to mediate.

15. *On Thursday 27 March 2008, Mr Snell wrote to Minter Ellison Rudd Watts asserting that personal grievance issues had been raised.*

16. *On 15 May 2008, Minter Ellison Rudd Watts responded to the facts asserted by Mr Snell and denied that personal grievances had been raised.*

17. *On 14 October 2008, the applicants filed a Statement of Problem in the Employment Relations Authority, seeking a finding that a personal grievance for unjustified dismissal was raised in time.*

18. *On 29 October 2008, the respondent filed a Statement in Reply, denying that personal grievances had ever been raised.*

19. *On 9 December 2008, Mr Snell wrote to Minter Ellison Rudd Watts raising personal grievances on behalf of the applicants in relation to the termination of their employment by the respondent.*

[3] As can be seen, the sole factual dispute relates to the disputed telephone conversation between Beven Hanlon and Michelle Kortegast in January 2009. The sole issue for determination is whether or not the applicants' claim for personal grievances for unjustified dismissal was raised within 90 days from the date of their dismissal in accordance with s.114 of the Act.

The Disputed Conversation

[4] Ms Kortegast is a Human Resources Manager in the Organisational Development Team of Corrections. She is responsible for 123 staff, including two human resources advisers based at Rimutaka Prison, where the applicants worked. Mr Hanlon is a Corrections officer, but for the last five years has also been President of CANZ. It is clear that Ms Kortegast and Mr Hanlon communicated by email several times a week and a similar number of times per week by phone. It is also clear that Mr Hanlon uses extravagant, colourful and rude language in both his oral and his written communications, which Corrections has cautioned him against.

[5] While Mr Hanlon believes he spoke more than once to Ms Kortegast and/or other managers in Corrections about the applicants' case, the only specific evidence

relates to one email and one phone call. The email states, verbatim:

> ***Subject:*** *Union days*
>
> *Michelle,*
>
> *Firstly can you, get back to me in regard to the email I sent 2 days ago in regard to use of staff at HB prison and my release. I would just like to add that this was just 1 units roster. There is another entire unit that is closed and about 9 staff used elsewhere until the 28th of Jan. There are about 10 more units after that.*
>
> *Secondly can you please confirm dates for the meetings that we are supposed to be having with the ops team and GM.*
>
> *My days are filling up fast and I also have a mediation that is yet to be confirmed. It will be at short notice but as soon as I know I will contact you.*
>
> *It is in regard to the 2 officers at Rimutaka prison dismissed recently.*
>
> *CANZ are disgusted at the behaviour of PPS management over this matter. The complete pig headedness of local management to clear the books before Christmas is astounding.*
>
> *I thought I had seen the depths that PPS would sink to when reading affidavits from Managers for PPS during the Tawhiwhirangi case. But it seems I am yet to see the worst of it.*
>
> *I believe that the local managers were acting against the advice of the local HR people. I cannot confirm this but I was given a very clear impression that this was the case.*
>
> *No representation was present and we raised this as a very serous issue. But still progress was sort.*
>
> *PPS have since sent me a letter about one of the officers they are yet to contact. I suggest that any thoughts about stopping this officers pay are given serious consideration. He is still unaware of his situation.*
>
> *CANZ will be seeking some accountability over this matter. It seems no one was held accountable for the quarter of a million dollar shambles that was the Tawhiwhirangi appeal.*
>
> *If as I believe we will be CANZ are right again and are successful at getting these officers there jobs back and very healthy compensation for their treatment so close to the most stressful time of the year.*
>
> *We will then be vocally seeking heads to roll. It is time managers put their jobs on the line as CO's have to every day.*

[6] The email was sent about four weeks before the key telephone call, which it is now accepted took place on 4 February 2008. While that conversation covered a number of issues before that of the three applicants was discussed, it took up a significant part of the conversation. Ms Kortegast was the only one to take notes of the conversation. One issue was about a staff member who was about to be dismissed and the other on which notes were taken was headed *Sonia* (who was the human

resources officer involved in the dismissal of the applicants). It states as follows:

> - *Three officers PG filed*
> - *Basis of PG is had no right*
> - *Process added 20k to compo claim*
> - *Gave Beven less than a day's notice. CANZ guy was a support person. Lawyer not there.*
> - *Instant dismissal after end of 20 months investigation with no wages made*

[7] Ms Kortegast gave evidence, which I accept, that when making notes she writes in as verbatim a fashion as she can, but of course it is not possible to take notes verbatim without advanced shorthand skills, which Ms Kortegast did not attest to possessing. I accept that to Ms Kortegast this was just another conversation in which Mr Hanlon was venting his dissatisfaction against actions of Corrections. However, she thought personal grievances had already been filed and it was not until later, after she began to prepare for mediation, that she realised that Corrections had nothing in writing to that effect.

[8] As a result of the conversation and the email, Ms Kortegast accepted in evidence that she was aware that the employees were, through their union, dissatisfied with their dismissals. While she stated that she was not aware that they were dissatisfied with the justification for that dismissal, she was aware of concerns over the process adopted in the dismissals, such as alleged inadequate representation. She also claimed that other than $20,000 for a poor process increasing any claim for compensation, she was not aware of the remedies now sought, particularly reinstatement. This may be because she did not link her conversation with the earlier email.

[9] Ms Kortegast was aware of mediation being sought by the union over this matter, but also knew that Corrections often go to mediation without formal papers. When Corrections assessed, however, that no grievance had ever been formally raised it believed there was no purpose to mediation and declined to attend. Ms Kortegast noted also that while she accepted that she was on notice that the mediation was over the dismissals and the employees wanting their jobs back, Mr Hanlon never informed her how this would be achieved and that in the past this had been by other methods than personal grievance, such as publicity, going to the Chief Executive and raising hazard notices.

[10] I also accept that Mr Hanlon had assumed that personal grievances had already been formally raised in writing by the union's solicitor, who he had instructed to do so.

[11] It was therefore clear that the parties were talking at cross purposes. What is also clear, however, is that Ms Kortegast, on behalf of Corrections, was aware that the employees were dissatisfied with their dismissal. She was also aware that the employees were dissatisfied with the justification for the dismissal, even if only in relation to process rather than cause, and that mediation was in the pipeline. Ms Kortegast had also been informed by email that at the very least the applicants were seeking reinstatement and by phone that compensation well in excess of $20,000 was being sought.

[12] Looking at the conversation as a whole, I conclude that what occurred was that, in the course of the conversation where another matter was initially raised, Mr Hanlon raised the issue of the applicants. Mr Hanlon told Ms Kortegast that personal grievances for the three applicants had been raised and that the two of them went on to have a conversation about the applicants' situation. Mr Hanlon told Ms Kortegast at least that Corrections had no right to sack them, particularly as he had been given less than a day's notice of the dismissal meeting and their lawyer could not be there, and that it was unfair that they were paid no wages, i.e. instantly dismissed at the end of a twenty month investigation. Mr Hanlon also added that the process had added $20,000 to the compensation claim. Ms Kortegast assumed that grievances had been or were in the process of being formally raised in writing. Both parties stated that it was unfortunate the matter appeared to be heading to litigation and that as personal grievances had been raised both would have to just await the outcome. Mr Hanlon did not specifically say, during the course of the conversation, that he was raising personal grievances on behalf of the applicants.

The Law

[13] A personal grievance cannot be raised in anticipation of dismissal, so therefore submissions raised on behalf of the applicants as to why they should not be dismissed can not be seen as the raising of a personal grievance. Furthermore, even if the applicants had indicated that they intended to bring personal grievances if they were to be dismissed, that would not be relevant. In any event, there was no evidence of that in this case.

[14] The test for raising a personal grievance has been held to be substantially the same as submitting a grievance under the Employment Contracts Act 1991, so pre-Employment Relations Act judgments remain relevant.

[15] In *BOT of Te Kura Kaupapa Motuhake O Tawhiuau v. Edmonds* [2008] ERNZ 139, the relevant cases under the Employment Contracts Act were summarised at pp.149-151:

> *[44]* … *In* Winstone Wallboards Ltd v. Samate *[1993] 1 ERNZ 503, at p509 the Court adopted the definition of the word in the* Concise Oxford Dictionary *(10th ed), Oxford, Oxford University Press, 1999, "to present for consideration or decision". The essential requirement was that the employer was to be given some positive notice of the bringing of a claim.*
>
> *[45] The test for determining whether there had been the submission of a grievance was said to be whether, from an objective standpoint, the employee had presented a grievance to the employer for consideration. In that case (*Samate*), the grievant's representative had written to the employer requesting reasons for dismissal and advising that should these not be provided in the statutorily required period, the representative had instructions to commence proceedings in view of the unlawfulness of the dismissal. The Court had no hesitation in finding that this communication amounted from the outset to a request for justification of the dismissal and, viewed objectively, should have made it clear to the employer that the employee was submitting a grievance about his dismissal. However, a request for reasons for dismissal alone did not constitute the submission of a grievance:* Houston v Barker, (T/A Salon Gaynor) *[1992] 3 ERNZ 469, at p478. In* Liumaihetau v. Altherm East Auckland Ltd *[1994] 1 ERNZ 958, at p963 it was held that against a background of other communications with the employer and in light of the employer's subsequent conduct in requesting an employee's written statement in terms of cl 4 of the standard procedure under the statute, a request for reasons for dismissal amounted to the submission of a grievance. The case was authority for the proposition that where there had been a series of communications, not only would each be examined as to whether it might constitute a submission, but the totality of those communications might also constitute a submission.*
>
> *[46]* Wilkinson v. ISL Computer Systems Ltd *[1993] 1 ERNZ 512, at p524 dealt with the situation of protests made by an employee at the time and these were found capable of amounting to the submission of a grievance provided they were of sufficient strength and purpose to alert the employer to make a response as envisaged in the statutory grievance procedure. The same Judge as decided* Wilkinson, *however, remarked in a subsequent case* Start v. Forster, (T/A The Hutt Pet Centre) *[1994] 2 ERNZ 200, at p211 that the proviso in* Wilkinson *did not go far enough and that in order to submit a grievance "the employer must be given some positive notice of the bringing of a claim …".*
>
> *[47] Cases on the point decided under the current Act include, for present purposes, three judgments. First in time was* Ruebe-

Donaldson v Sky Network Television Ltd (No 1) *[2004] 2 ERNZ 83. In addition to concluding that the substitution of the word "raise" in s411(1) for the former "submit" in s33(2) of the Employment Contracts Act 1991 did not make a material difference, the Court held that a combination of a letter from the plaintiff herself and a first letter from her solicitor made it clear that she was complaining that she had been disadvantaged by the employer's conduct. While there was no characterisation of a grievance as such, the correspondence was treated clearly by the employer as indicating an employment relationship problem. The Court found, therefore, that the plaintiff had taken reasonable steps by way of this correspondence to raise a disadvantage grievance and that this had been done in the 90 days.*

[48] Next is the judgment in Creedy v Commissioner of Police *[2006] 1 ERNZ 517. In that case the grievant's lawyer wrote to the employer stating: "by this letter [the grievant] serves notice that he commences a personal grievance with you pursuant to section 103 of the Employment Relations Act 2000. It is claimed that one or more of [the grievant's] conditions of employment is or are affected to his disadvantage by the unjustified way in which you, as his employer have applied the disciplinary process to him."*

[49] The employer's immediate response was to seek specific details of the unjustified actions that had allegedly disadvantaged the grievant but there was no response to that request. The Court found that the lawyer's communication did not constitute the raising of a grievance and held:

> *[36] 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 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 the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*
>
> *[37] … It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, 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.*

[50] Finally, in Coy v. Commissioner of Police *unreported, Chief Judge Colgan, 19 November 2007, CC23/07 the Court concluded that an oral statement by the employee to the employer that "I can tell you now I am going ahead with a Personal Grievance because I think I have been personally treated very badly" did not meet the test of raising a grievance and indeed the employee did not so contend.*

> *Rather, the following written communication was found to have met the test for the raising of a grievance, albeit by a narrow margin and when read in conjunction with the oral statement set out above:*
>
> *As per our conversation of the 4th of December 2002, I wish to formally advise you that I intend to proceed with personal grievance against the department.*
>
> *My personal grievance will be based on:*
>
> - *Harassment*
> - *Denial of Procedural fairness*
> - *Intimidation*
> - *Victimisation*
> - *Professional Mismanagement:*
>
> *My submission is currently being prepared and I anticipate it will be forwarded to you some time in the New Year, after Association input and other professional advice has been obtained. [Para 14]*

[16] To this summary may be added *Goodall v. Marigny (NZ) Ltd* [2000] 2 ERNZ 60, where it was held that while a letter did not expressly state the remedies sought, for example by having the warning removed from a personal file, in substance that was what the worker was asserting when he claimed a warning was invalid. The Court went on to hold at [70]:

> *The statements contained in the letter are thus in the nature of allegations or claims. He complains about the treatment he has received. He raises issues which have been recognised by the Tribunal, the Employment Court and the Court of Appeal as claims that warnings were both procedurally and substantively unjustified. The letter raises the complaint. It provides clear reasons for that complaint and it challenges the validity of the warning itself.*
>
> *Objectively viewed the letter constituted the challenge to which the employer could have responded by endeavouring to settle the complaint. …*

[17] The Judge then went on to hold, in para [71], that a later letter was capable of being construed as a submission of disadvantage grievances.

> *Although that is not expressed, the warnings are dealt with in considerable detail and it is confirmed that they were formally disputed in writing. Although no separate remedy is sought for them, it is to be noted that the Tribunal has wide powers under s.34 to allow findings that a personal grievance was of a type other than that alleged …*

[18] In *Tu'itupou v. Guardian Healthcare Operations Ltd* (unreported, Perkins J, AC50/06, 6 September 2006), the Court dealt with whether grievances were raised within time, viewed in relation to the period of three years since the grievance had been raised. The issues are the same as here. The Judge noted that the applicant's representative had said something to the effect that a personal grievance would be brought and the next day wrote as follows:

> *As indicated to you yesterday Mrs Tupou Tu'itupou will be lodging a personal grievance action against Havencare Hospitals Limited. I have firm instructions from Mrs Tu'itupou to pursue a personal grievance action against Havencare. I had intended to notify Havencare of this today, but will now await the receipt of the information requested below before doing so.*
> *As requested yesterday, can you please send a copy of all information on Mrs Tu'itupou's personal file. I would like to obtain all the information relating to the investigation of the complaint by Ray Farrell …*
> *Once I receive the information requested and the letter confirming Mrs Tu'itupou's dismissal, then I will formally notify Haden Care Hospitals Limited of Mrs Tu'itupou's personal grievance.*

[19] The Judge stated at paras.[50] ff:

> *…It seems to me that what Ms Schaaf stated at the conclusion of the dismissal meeting and confirmed in writing the following day, fits clearly within these criteria.*
>
> *[51] Ultimately the Court is required to stand back and objectively observe the alleged submission or raising of the grievance against the entire factual background. Sometimes the position will be clearly stated. On other occasions the position may be clouded and equivocal. Sometimes the raising of the grievance will be by way of a mere oral statement. It may on occasion be the briefest reference in correspondence as, for example, the statement in* Liumaihetau*…*
>
> *[52] Judging the present matter as an objective observer, it seems to me that the tenor of the letter from Ms Schaaf of 14 June 2002 in the context of her oral statement the previous day will have clearly alerted the employer that it was facing a personal grievance. Sufficient information was available by then to address the grievance with a view to resolving it … For these reasons I decide that the grievance was clearly raised on 13 June 2002 or at the latest in the letter the following day.*

[20] In *Edmonds* it was held at p.152:

> *[52] Looking at it from the kura's point of view, can it be said that it was both aware that Mr Edmonds considered that his dismissal was unjustified and that it had sufficient knowledge of relevant events to deal with that allegation, either in an attempt to settle the grievance or, if that was not possible, to take steps to defend its position if*

> *Mr Edmonds was to refer his grievance to the Employment Relations Authority for settlement?*
>
> *[53] There can be no doubt that the kura was aware that Mr Edmonds was dissatisfied with his dismissal and with the justification for it. Nor can there be any doubt that the kura was also aware that the fairness and reasonableness of the way in which it went about dismissing Mr Edmonds was challenged by him by way of personal grievance. The remedies Mr Edmonds sought from the school were known to it, albeit not in the precise detail that might have subsequently emerged in a statement of problem to the Employment Relations Authority. …*
> *[55] That it was able to do so was illustrated by the fact that the employer agreed to mediation of Mr Edmonds' personal grievances. … the fact that the kura agreed to and attended a mediation in an effort to settle those grievances means that it must have been sufficiently aware of Mr Edmonds' complaints that it could prepare to address them in that forum. …*
>
> *[58] The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problem. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every "i" to be dotted and "t" to be crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient. This is not one of those cases …*
>
> *[60] This is a case of a summary dismissal for misconduct made by the employer after an inquiry … Those factors together must have meant a very substantial level of knowledge about what had gone on leading to Mr Edmonds' dismissal so that the threshold requirement for raising a grievance in his case would not be high. Additionally, the communications from the grievant's representative were made directly to the employer's solicitor who was very experienced in the field of employment law. It is unlikely that the kura could have been inadequately informed of Mr Edmonds' complaint …*
>
> *[61] Finally, as a matter of equity and good conscience, the plaintiff's preparedness to agree to resolve the grievance by mediation, counts against its subsequent decision that Mr Edmonds had not raised his grievance beforehand.*

[21] In *Clark v. Nelson Marlborough Institute of Technology* (unreported, Couch J, CC12/08, 19 August 2008), it was held at para.[37]:

> *In deciding whether the effect of the plaintiff's letter of 22 July 2005 was to raise a personal grievance, it does not matter what she intended her complaint to be or her preferred process for dealing*

> *with it in the first instance. Equally it does not matter whether the defendant, through Mr Cox, recognised the plaintiff's complaint as a personal grievance or not. The only issues are whether the nature of the plaintiff's complaint was a personal grievance within the meaning of s.103 and, if so, whether the letter complied with s.114(2) by conveying the substance of the complaint sufficiently to the defendant.*

[22] Finally, in *Dickson v. Unilever New Zealand Ltd* (unreported, Shaw J, WC9/09, 22 April 2009), it was held at para.[23] that:

> *… The 19 April 2007 notice did not give enough information to enable Unilever to address the personal grievance. It contained no particulars of the merits of the grievance. I do not accept that Ms Tane or any other representative of Unilever would have been able to deduce the grounds relied on by Ms Dickson from the pre-termination discussions with her and Mr Petterson. In relation to the unjustified disadvantage grievance it is the plaintiff's case that this was raised after she was told that Unilever was going to terminate her employment. Mr Smith submitted that Mr Petterson had raised an unjustified grievance by telling Ms Tane that they would fight for Ms Dickson's job.*
>
> *There is no requirement in law for a personal grievance to be raised in writing. However, whichever way a grievance is raised the same requirements of particularity apply to oral and written notices of grievance. Mr Petterson's statement was simply insufficient to raise a grievance under s.114. It does not give any particulars at all about the nature of the grievance or that it was an unjustified disadvantage. The Employment Relations Authority noted the unjustified disadvantage grievance was not included in either the statement of problem or the letter to the defendant from the plaintiff's lawyer on 11 July 2007 nor was any reference made to it in the 19 April 2007 note. I agree with the Authority that Mr Petterson's statements only showed an intention to raise a grievance rather than the actual raising of the grievance at that time. I also agree with the Authority that it was unreasonable to expect Unilver to have understood what the grievance was when there were no remedies sought, no identification of the problem, and no proposals made to resolve the problem.*

Determination

[23] The sole issue for determination is whether or not the complaints made on behalf of the applicants constituted personal grievances within the meaning of s.103 and, if so, whether the communications complied with s.114(2) by conveying the substance of the complaints sufficiently to Corrections. All communications must be considered as a whole, rather than separately. What is key is whether or not the communications, viewed objectively, showed an intention to raise grievances for unjustified dismissal (as Corrections argue), or whether they actually constituted the raising of grievances in and of themselves (as the applicants argue).

[24] I conclude that there are three relevant communications, namely the email, the conversation between Ms Kortegast and Mr Hanlon and the offer and acceptance of mediation in relation to the three applicants. In this regard, it is relevant that Mr Hanlon was the chief operative of CANZ and Ms Kortegast was a senior operative in Corrections (*Edmonds*). Both were or should have been aware of the background to the dismissals. However, while Corrections was aware that the applicants had previously made extensive submissions through their representative that they ought not to be dismissed, that is not relevant. What is relevant is what took place after their dismissals (C*reedy*).

[25] Analysing the email, first Ms Kortegast was made aware that the matter was going to mediation. Second, she was made aware that CANZ believed that Corrections' actions were worse than that in the *Tawhiwhirangi* case, where Mr Tawhiwhirangi was ordered to be reinstated both by the Authority and the Court. Third, CANZ complained that the dismissals took place against the advice of human resources. Fourth, CANZ complained that the applicants were dismissed despite them not having any formal representation and this having been raised as a very serious issue at the time. Fifth, it was made clear that the union wanted the applicants to get their jobs back, plus *very healthy* compensation.

[26] I conclude that this email did not constitute the raising of grievances in and of itself. However, it does clearly put Corrections on notice that the union on behalf of the applicants intended to raise personal grievances.

[27] I turn to consider the phone discussion. I conclude that it is not relevant that Ms Kortegast had forgotten about the email in her subsequent discussion with Mr Hanlon. This is certainly the case in terms of whether or not a grievance has in fact and in law been raised, rather than Corrections' perceptions, which are not determinative (*Samate* and *Clark*). Similarly, just because Mr Hanlon does not always follow through with the full grievance process every time he brings up concerns about the treatment of CANZ members it does not mean that in airing such concerns he is not raising personal grievances on his members' behalf. That will depend on an objective analysis of his communications with Corrections.

[28] The discussion built on the email and it ranged over a number of issues relating to the applicants' dissatisfaction with their dismissals and the justification for them. Significantly, there was discussion of previous issues of a similar nature. The

conversation ranged over similar ground to the email except that it was conducted on the mutual mis-understanding that the grievances had already been raised. While this was not the case, the facts remain that Corrections was informed that it *had no right*, which can only have meant that it had no right to dismiss the workers in the circumstances that it did. Mr Hanlon focused again on the process by which the dismissals were effected and also the fact that the dismissals were summary. New information in relation to what the applicants would claim was that the process alone would add $20,000 to any claim. That makes it clear that there were other claims for compensation, and Ms Kortegast had already been made aware that reinstatement would be sought. The parties then discussed their mutual concern that the matter appeared to be heading to litigation and thus that (as both assumed personal grievances had been raised) they would just have to await the outcome.

[29] Again I conclude that this conversation on its own would not constitute the raising of grievances. However, when taken in combination with the email, the communications did constitute, from an objective standpoint, the presentation of grievances to Corrections for consideration.

[30] Although the grievances were raised specifically only in relation to the process adopted by Corrections and not necessarily the cause, it is not relevant whether or not a grievance of any particular type was raised (*Goodall*).

[31] Corrections was informed that grievances had been raised. It was informed that the applicants believed that at the very least the process adopted and the manner in which the dismissals were effected was unfair. That constitutes a personal grievance claim in law. Corrections was also informed that compensation and reinstatement were being sought. There was thus sufficient information, therefore, at least on the grounds of procedure, for Corrections to be able to address the grievances.

[32] In fact, Corrections had determined to address the grievances by way of mediation, until it later came to the view that the grievances had never, in fact, been raised. While Corrections' agreement to attend mediation does not mean that a grievance has been raised by the applicants, nor that it had impliedly consented to a late raising of the grievance, it is evidence that Corrections was aware that the applicants had a grievance and that they were able to address it in mediation, at least at the time it agreed (*Edmonds*). No further details were sought at that point, unlike in *Creedy*.

[33] Looking at the matter overall objectively, it is true that Mr Hanlon's actions were based on the assumption that formal grievance letters had been filed by CANZ's lawyer. However, the totality of his communications were sufficient to make it clear to a disinterested observer that the applicants considered that their dismissals were unjustified and that sufficient knowledge of relevant events had been imparted for an employer to deal with the allegations of procedural unfairness at least. Further details on the matter could have been provided in mediation and/or when filing with the Authority.

[34] In all the circumstances of this case, therefore, I conclude that the applicants had raised their grievances with Corrections within the 90 days required by law and declare accordingly.

G J Wood
Member of the Employment Relations Authority