IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 30/09
5124355

	BETWEEN	MARYANN ADLAM Applicant
	AND	NATIONAL ADVOCACY TRUST NATIONWIDE HEALTH & DISABILITY ADVOCACY SERVICE First Respondent
	AND	THE TRUSTEES OF THE AHIPARA HEALTH AND RESOURCE TRUST Second Respondent
	AND	ROSELIN LABAN Third Respondent
Member of Authority:	Alastair Dumbleton	
Representatives:	Ian Davidson, advocate for Applicant Jo Douglas, counsel for First Respondent Roselin Laban, advocate for Second Respondent Third Respondent Ms Laban in person	
Investigation Meeting:	7 and 8 October 2008	
Submissions Received	11 November 2008 from Applicant 3 December 2008 from First, Second and Third Respondents	
Determination:	3 February 2009	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] A confrontation involving Mrs Maryann Adlam at the premises of her former employer, the Ahipara Health and Resource Trust ("AHRT"), and an obnoxious message left there by Mrs Adlam on an answer-phone a short time later, led to dismissal by her new employer, the National Advocacy Trust ("NAT").

[2] Mrs Adlam initiated an investigation by the Authority of her dismissal, claiming NAT's action was unjustified. Further, she claimed that AHRT and the manager of its Health and Resource Centre, Ms Roselin Laban, breached a mediated settlement agreement by telling NAT about the confrontation and the telephone message left after it by her.

[3] Remedies available under the Employment Relations Act 2000 for an unjustified dismissal personal grievance are claimed by Mrs Adlam against NAT. Initially penalties for breach of a mediated settlement were also claimed by her under s 149(4) of the Act against both AHRT and Ms Laban but the claim against the former was subsequently withdrawn.

[4] In response to the claims NAT contends that Mrs Adlam did not raise her grievance claim within 90 days, as required by s 114(1) of the Act. The Trust contends that in any event Mrs Adlam's dismissal was justified within the meaning of s 103A of the Act.

[5] In a counterclaim both AHRT and Ms Laban allege that Mrs Adlam herself breached the mediated settlement and did so before either of them. They contend that any subsequent breach of theirs was excusable as an understandable response to offensive remarks Mrs Adlam had made to and about Ms Laban in breaching the settlement.

[6] AHRT and Ms Laban seek penalties against Mrs Adlam for each of three alleged breaches of the mediated settlement, pursuant to s 149(4) of the Act.

Breach of the mediated settlement

[7] Mrs Adlam was a founding trustee of the AHRT and became employed as the Manager of its Health and Resource Centre at Ahipara. The termination of that employment in September 2006 gave rise to an employment relationship problem which was resolved in February 2007 by mediation provided under the Act.

[8] As part of that resolution a mediator, expressly under s 149 of the Act, recorded and signed terms of settlement agreed to by AHRT and Mrs Adlam. Included among them was the following:

> *3. The parties agree not to make any derogatory comments about each other to any third party. The respondent* [AHRT] *also*

> *agrees not to say or do anything which could reasonably be held to inhibit* [Maryann Adlam's]*chances of obtaining and/or maintaining future employment.*

[9] In February 2008, a year after the settlement had been completed and recorded, Mrs Adlam visited the Health and Resource Centre of the AHRT during opening hours. She spoke to staff in the office before being attended to by Ms Laban who asked her to leave. Ms Laban drew Mrs Adlam's attention to a Trespass Notice that had been issued against her in September 2006. A copy of it attached to the office wall was taken down and shown to Mrs Adlam. When she did not leave the Police were called by Ms Laban. After they arrived Mrs Adlam left voluntarily.

[10] A short time later the same day Mrs Adlam rang the Centre where she had earlier been and left a message. She made it clear that the message was intended for Ms Laban, and she began it with:

> *Hi, This is a message for the Lesbian.*

[11] The message continued:

> *Just to let her know that while I was in there, I had my phone recording on and it says very clearly that all treatment that I was given when I walked in there. I asked nicely for my files, and its got all your voices recorded there, yelling at me. I'm going to take this to a lawyer, I want every photocopy, every file, My husband has a file there. Ian wrote out notes for him. I made up his file. Its sitting there. Alice knows that, so does all the other staff. You want to go to Court, we'll see you there. Bye.*

[12] Evidence was given to the Authority that when Mrs Adlam had first gone into the office of the Centre and spoken to staff about retrieving the medical files of herself and immediate family members, she had behaved peacefully, but that when Ms Laban came to see why she was there Mrs Adlam became agitated. That evidence of Ms Rebecca Vela, which I accept, was that Mrs Adlam then shouted at Ms Laban "*the community hates yous, especially the fact that this place is run by a dyke."* Ms Vela's evidence was that Ms Laban had said nothing to cause this outburst and that it had just come *"from nowhere."* Ms Vela concluded from the reference to *"yous"* that she was included among those Mrs Adlam said were hated by the community.

[13] When this confrontation occurred Mrs Adlam had only a fortnight earlier entered into an employment agreement with NAT to work as its sole Advocate for the Far North region. An advocate's function under s 30 of the Health and Disability

Commissioner Act 1994 is to support consumers of disability and health services, primarily by helping to resolve complaints made by the consumer against health providers. Mrs Adlam intended to start her new job with NAT on 3 March 2008.

[14] After receiving a telephone call and then an email from Ms Laban outlining in detail what had happened on 5 February 2008, NAT commenced a disciplinary inquiry in respect of the confrontation involving Mrs Adlam and also the telephone message she had left for Ms Laban after it.

[15] NAT concluded its disciplinary inquiry by deciding to dismiss Mrs Adlam from her employment as an advocate she had yet to commence. The decision was given in person to Mrs Adlam after a meeting at which members of her family also present had spoken on her behalf as whanau support.

[16] As remedies for her claim of unjustified dismissal, Mrs Adlam seeks reinstatement to the position of Advocate with NAT. She also seeks the reimbursement of wages lost in an amount quantified by her to the date of the investigation meeting and, under s 123(1)(c)(i) of the Act, she seeks compensation for hurt feelings, humiliation and distress caused by the dismissal she contends was unjustified in all the circumstances.

When was a grievance raised?

[17] NAT put this in issue, claiming that a personal grievance in respect of Mrs Adlam's dismissal had not been raised until service upon NAT of her Statement of Problem. That had occurred on 19 May 2008, service having been effected by the Authority itself as usual. The date of service was 91 days after the dismissal of Mrs Adlam, a period longer by one day than the 90 days permitted by s 114(1) of the Act.

[18] For Mrs Adlam it was submitted that the grievance had been raised on 18 February 2008, immediately upon her being told by NAT she was dismissed. Alternatively it was submitted that the time for raising a grievance had run not from 18 February but from the date about a fortnight later when NAT had rejected a request Mrs Adlam made to have the dismissal reconsidered or reversed.

[19] It was not contended that NAT had consented to a grievance being raised outside the statutory 90 day period.

[20] I accept that in some situations it may be open for the Authority to find that a grievance was raised gradually over a period of time by a series of words and actions or gestures. Their combined effect must however be clear enough to make the employer sufficiently aware of the grievance so as to be able to respond to it on its merits and with a view to resolving it as soon and as informally as possible; *Creedy v Commissioner of Police* [2006] 1 ERNZ 517.

[21] I accept in this case that what occurred on 18 February immediately upon Mrs Adlam being told of her dismissal, amounted to the first link in what could have become a chain of words and actions leading eventually to the raising of a grievance. On 18 February Mrs Adlam's husband and her daughters made utterances to NAT representatives which I find were clear expressions of their dissatisfaction and disagreement with the decision to dismiss. Although nothing was said then expressly about resolving the grievance in any particular way, within the following fortnight Mrs Adlam contacted NAT representatives and asked if the Trust would reconsider or reverse the dismissal.

[22] Clearly if NAT in response to that request had changed its mind and offered to continue the employment, any grievance about the dismissal would have been substantially, if not completely, resolved by that action.

[23] I find, however, that between 18 February and the date later that month when Mrs Adlam asked for reconsideration of her dismissal, another action of hers broke any chain that might have linked a series of words and actions to the eventual raising of a grievance.

[24] I find that on 19 February 2008, the day after dismissal, Mrs Adlam advised NAT in an email that she had no complaint to make about her dismissal. Implicit in that advice was an acknowledgement or acceptance that there was nothing the employer was requested to resolve. Mrs Adlam advised in the email:

> *Kia ora Kay,*
>
> *Firstly thank you for the time spent in our meeting on Monday 18 February 2008. I really do wish it was under better circumstances and ended with a more positive result. Never-the-less, I need to accept the decision that was reached by both you and Stacy.*

[25] In her email Mrs Adlam went on to explain the conduct of hers that had led to the dismissal and she then referred to Ms Laban as having breached the mediator's

settlement agreement of 2007. She said that her lawyers had been instructed to take court proceedings in respect of Ms Laban's breach.

[26] Near the end of her email she said:

> *Anyway Kay … I've had my "gripe" (lol) take care.*

[27] The clear message given by the email of 19 February, the day after her dismissal, was that Mrs Adlam would not be contesting or pursuing the decision to dismiss and was accepting of it, although she was intending to take action against a third party involved, Ms Laban. She described herself as having had her *"gripe,"* meaning she had put the decision of NAT behind her and was looking for accountability from someone else.

[28] Although subsequently, on 26 February, Mrs Adlam asked NAT whether it would change its mind and allow her employment to proceed, I do not consider in the circumstances that this amounted to a request to resolve a grievance. It was simply an understandable attempt at getting NAT to exercise forgiveness in relation to conduct Mrs Adlam had admitted and had expressed regret for.

[29] Mr Davidson for Mrs Adlam also submitted that a grievance had been raised within 90 days if that period of time was computed from the date NAT had declined her request for it to reconsider the dismissal. That submission however cannot stand against the clear provisions of the Act at s 103(1)(a), making the cause of this particular grievance the dismissal action of the employer, and at s 114(1), requiring the 90 day period to begin running from the date on which that action occurred or came to the notice of the employee, whichever is later.

[30] There is no dispute that Mrs Adlam knew on 18 February 2008 that she had been dismissed that day. She therefore had until 18 May to raise any grievance about that dismissal. I find that Mrs Adlam did not raise the grievance until the 91st day after her dismissal had been carried out by NAT. It was therefore raised outside the statutory time limit provided.

Application for leave to raise grievance out of time

[31] Although Mrs Adlam had not previously applied under s 114 of the Act for leave to submit a grievance out of time, she did so during the investigation meeting on

7 October 2008. This was to cover the possibility of a future finding (now made) that the grievance had not been raised in time.

[32] The exceptional circumstances relied upon by Mrs Adlam are of the kind provided for at s 115(b) of the Act. They cover the situation where there has been an unreasonable failure by an employee's agent to ensure that a grievance was raised within the 90 day period.

[33] NAT opposed the leave application, on the basis that there were no exceptional circumstances as required under s 114(4) of the Act before leave can be granted, and also that in the circumstances it was not just for leave to be granted.

[34] I accept that the delay of just one day beyond the 90 day period was minimal and caused no prejudice to NAT in the circumstances.

[35] In evidence given by him Mr Davidson explained that as Mrs Adlam's agent he had deferred commencing any particular claim on her behalf while he gave thought to taking an action in tort, presumably alleging interference in contractual relations against Ms Laban. No action was commenced and he was still thinking about this as the expiry of the 90 day period loomed nearer, so he lodged a Statement of Problem in the Authority rather than commencing different proceedings in the Employment Court, or more likely the civil courts. He did this in the belief that the Authority would serve the proceedings on NAT within the 90 day period, thereby raising a grievance on behalf of Mrs Adlam.

[36] In the circumstances Mrs Adlam or her advocate failed to write a simple letter or send a simple email to NAT raising a grievance that could have arrived well within 90 days. Instead they relied on a communication not intended for that purpose.

[37] It is to be emphasised that the Authority is not the agent of an employee for the purposes of raising a grievance and that reliance on the Authority to serve at any particular time documents lodged with it carries considerable risk as to when service will be effected or, in some cases, whether service will be possible at all. It is also to be emphasised that a Statement of Problem is not primarily intended to be a communication by an employee to an employer for the purposes of raising a grievance, although I accept that could be recognised as a consequence of service of the document.

[38] Mr Davidson accepted in his evidence that his failure had resulted in the delay of one day, although he said he had thought the Statement of Problem was lodged in the Authority in enough time to allow service within the 90 day period. He confirmed that Mrs Adlam had kept in touch with him about progress in her case and had acted diligently in that regard.

[39] As to situations where an employee has relied on an agent to raise a grievance and there has been a failure by the agent, the Supreme Court in *Creedy v. Commissioner of Police* [2008] NZSC 31 observed at paragraph [28] of the judgment that although s 115 is not a comprehensive schedule of what will constitute exceptional circumstances, those particular circumstances described by s 115(b) are effectively a complete code.

[40] Before the provisions of s 115(b) can apply, to begin with the employee must have made *"reasonable arrangements to have the grievance raised on his or her behalf by an agent."* In addition, s 115(b) requires that the agent *"unreasonably failed to ensure that the grievance was raised within the required time."*

[41] The evidence of Mrs Adlam and Mr Davidson is clear that the former engaged the latter as an agent a few weeks after her dismissal on 18 February 2008. Prior to that Mr Simon Punshon, a Northland solicitor, had been acting for Mrs Adlam.

[42] Mr Davidson continued to be the agent of Mrs Adlam when the 90 day period expired and has acted for her since. In evidence he accepted responsibility for failing unreasonably to ensure that the grievance was raised within the required time. He explained that he became preoccupied with considering whether liability existed in tort and allowed time to pass until he decided he should lodge a Statement of Problem in the Authority.

[43] The application lodged was for interim reinstatement, even although three months had gone by since the dismissal of Mrs Adlam.

[44] I find that if Mr Davidson had been asked by Mrs Adlam to raise a grievance on her behalf, he failed unreasonably, as he acknowledged in his evidence, to ensure that this was done within the required time.

[45] Ms Douglas, counsel for NAT, submitted that there was no evidence showing when, if at all, Mrs Adlam had clearly asked Mr Davidson to raise any grievance for her.

[46] I uphold that submission. Mrs Adlam and Mr Davidson had the opportunity to explain what instructions were given and taken to have legal proceedings of any kind commenced against any person in any particular court or tribunal. The Authority is not satisfied from the evidence that the first part of the requirements under s 115(b) of the Act have been met in this case.

[47] The evidence is clear enough that on 18 February 2008 after expressing disagreement and dissatisfaction with the decision to dismiss delivered to her that day, Mrs Adlam next day by email wrote to NAT to say she accepted the decision. Then a few days later she asked NAT to reconsider the decision but was promptly advised that it would not be reversed.

[48] It is clear that Mr Davidson, in considering tortious liability, had been looking beyond NAT at other parties such as Ms Laban and AHRT and was considering forms of action other than a personal grievance. As well as advising NAT on 19 February of her acceptance of the dismissal, Mrs Adlam in her email said that she and her lawyer were *"in a legal process of addressing Roselin's 'breach' of the mediators decision."* She also advised that she had instructed her lawyer to go directly to the Employment Court, a further indication from her that she intended taking action against Ms Laban rather than NAT.

[49] She confirmed in evidence that following her dismissal her biggest concern about it had been with the part played by AHRT and or Ms Laban. Even before her dismissal Mrs Adlam had received email advice on 17 February from Mr Punshon her lawyer that there had been a breach of the mediation agreement for which a *"punitive penalty"* and damages could be sought. *"Roselin"* is expressly referred to in that regard, and clearly Ms Laban had a closer connection to the settlement agreement than NAT which was not a party to it.

[50] I accept the evidence of Ms Stacia Wilson the national service manager of NAT that at the time of her dismissal and shortly afterwards Mrs Adlam had made it clear that she intended taking action against AHRT or Ms Laban rather than NAT.

[51] In the absence of clear evidence I am not prepared to infer that Mr Davidson was instructed by Mrs Adlam to raise a grievance or take any particular action against NAT. Unless he had been instructed to do so, there could not have been any failure on his part if he did not raise the grievance within the required time.

[52] For the above reasons, the Authority finds that there were no exceptional circumstances occasioning the delay in raising the grievance in this case. Leave to raise a grievance out of time must therefore be declined.

[53] Even if it had been found by the Authority that exceptional circumstances were present within the scope of s.115(b) there is still the additional requirement to meet before leave can be granted that the Authority considers it just to do so.

[54] As will be seen from the findings of the Authority in relation to the factual and legal merits of the contended grievance, I am of the view that the dismissal of Mrs Adlam was a justified dismissal and therefore her grievance is not a sustainable one. For those reasons it would not have been just to grant leave for the grievance to be raised out of time.

Justification for the dismissal

[55] Leave to bring the grievance claim out of time having been declined, the Authority is not required to determine the dismissal grievance, but the Authority is able to make the following findings as to the substantive and procedural merits of that claim from the evidence and submissions presented in relation to it.

[56] The legal test of justification which is to be applied by the Authority in reaching its determination at the end of an investigation into any grievance claim, is that contained in s 103A of the Act. How that test is to be applied has been explained by the Employment Court in *Air New Zealand Ltd v. Hudson* [2006] 3 NZELR 155.

[57] In its decision the Court noted that under s 103A justification for dismissal must be determined on an objective basis, the Authority being required to judge all of the relevant circumstances as they existed at the time the dismissal occurred.

[58] Accordingly, the Authority must objectively assess whether NAT's actions and how NAT acted, were what a fair and reasonable employer would have done.

[59] When the NAT wrote to Mrs Adlam requesting that she attend the disciplinary meeting held on 18 February 2008, the Trust set out in its letter a number of specific allegations of misconduct made against Mrs Adlam. The letter informed her that the allegations *"could constitute serious misconduct outlined in your employment agreement."* The allegations included dishonesty, conflict of interest and damaging the reputation of NAT. The Trust also noted in its letter that *"these allegations may also undermine the trust and confidence between employer and employee."*

[60] The disciplinary meeting duly took place on 18 February and was attended by Mrs Adlam together with her parents, husband, three daughters and others supporting her.

[61] At the end of the meeting NAT advised Mrs Adlam and her whanau support that a decision had been made to dismiss her with immediate effect. The reasons for that decision were not at any time formally recorded in writing by NAT, and no request for that to be done was made of the emplopyer.

[62] I accept, however, that the handwritten minutes dated 18 February 2008 and signed by Ms Kay Rose, the Regional Manager of NAT, are an accurate account of the way the meeting proceeded that day and in particular what was said during it.

[63] Those present at the meeting, including Mrs Adlam and Ms Rose, have given evidence to the Authority of what was said and, in the case of the NAT representatives, the thinking that led to the decision to dismiss.

[64] As to the content of the minutes of 18 February, I note in particular the following which gives some indication of the reasoning for the dismissal:

> *Stacy [Wilson] & Kay then retired to consider all that had been said.*
>
> *Stacy & Kay returned & Stacy recapped the issues that we had considered. Maryann admitted that she had made the phone call & was sorry for that.*
>
> *Stacy explained that Maryann would not be able to fulfil the role of advocate as she was not able to enter the Medical Centre and that the behaviour displayed in making the abusive phone call was unacceptable. This resulted in the Advocacy Service not being in a position to allow Maryann to take up her position as advocate. Stacy said that had we known about the Trespass Order we would not have offered her the position.*

[65] I accept that NAT was particularly concerned about the behaviour of Mrs Adlam in making an *"abusive phone call"* to the manager of the AHRT, Ms Laban, and that NAT regarded the existence of a Trespass Notice as placing a significant restriction on the ability of Mrs Adlam to perform some of the work of an advocate in the Far North region, the position to which she had been appointed.

[66] NAT's conclusions reached about the abusive nature of the phone call and the restrictions placed by the Trespass Notice were reasonable I find. The reference made at the beginning of the phone message to Ms Laban as a *lesbian* was offensive and had been intended to have that effect by Mrs Adlam. That is clear from the context of the message itself and I reject any suggestion that she simply used that word to identify, describe or distinguish the particular person to whom she was directing her phone message.

[67] Further, NAT was aware that Ms Laban was the manager of AHRT, a client, customer or service provider with which it was possible at some time Mrs Adlam would have to deal in the course of her work as a Health and Disability advocate. It was a reasonable conclusion that any professional relationship between these two women would be severely compromised by the offensive remarks deliberately made by Mrs Adlam. Her reference made in the 18 February statement to an *"unviable partnership"* was particularly apt and showed the awareness she had of the situation earlier created by her.

[68] I accept further that the NAT representatives reasonably regarded the making of this offensive phone call as reflecting badly on the character and the judgement of Mrs Adlam who had been employed in a position where good judgement and character were critical to the role of Health and Disability advocate.

[69] On Mrs Adlam's behalf a submission was made that NAT had not appreciated that the phone call had been made almost straight after the confrontation on 18 February. It was submitted that NAT had not therefore fully considered as a matter of procedural and/or substantive justification the question of *"provocation"* as an excuse or explanation for Mrs Adlam's conduct on 5 February.

[70] The time for considering justification is the time at which any decision to dismiss was made, not when submissions are formulated. The employers belief as to the time at which the call was made was not an issue when it reached the decision to

dismiss. Mrs Adlam had not denied making the call. She had apologised for her actions rather than raising the excuse that there had been provocation she had reacted immediately to. There was no evidence that Mrs Adlam had become so enraged during the confrontation as to lose her self control and make her act under compulsion. To the contrary it appears she waited for the Police to arrive at the centre and then had a clam conversation with the officer after which she voluntarily left. Apparently she was able to drive away in her vehicle with her daughters as passengers.

[71] The phone message indicates a careful and deliberate choice of words used by Mrs Adlam, rather than incoherent ravings of a disturbed person.

[72] I am satisfied that in relation to the Trespass Notice, a copy of which the NAT had in its possession by the time of the 18 February meeting, the decision to dismiss had more to do with the effect of that notice on the future performance of the employment contract than with any failure by Mrs Adlam, as alleged, to disclose the existence of the order. The written notice contained no qualifications or exceptions and required Mrs Adlam to stay away from the Ahipara Health and Resource Centre and its staff for two years from 22 September 2006.

[73] During the meeting of 18 February, Mrs Adlam explained that she had believed she was able to visit the Centre for certain purposes when accompanied by members of her family. She also explained that she believed the notice had been withdrawn as part of the mediated settlement reached in February 2007. I find that NAT listened to those explanations but that it was reasonable for NAT to reach the conclusion that the notice applied according to the terms written in it and that it had no ability to look into the discussion that had taken place during a confidential mediation to confirm whether or not the notice had been withdrawn by agreement. In my view, it was reasonable for NAT, in the circumstances, to reach a conclusion that the notice still applied and that it would be breached by Mrs Adlam if she visited the Centre even in the course of her employment with NAT.

[74] In this regard, I accept the evidence of Ms Rose that the two issues NAT was most concerned about were the existence of the trespass order which would prevent Mrs Adlam from attending the Ahipara Health & Resource Centre, and whether she had left an abusive phone message on the answerphone at that place. I accept that

Ms Rose and the NAT were only concerned about whether a professional relationship could be maintained with the Centre in the circumstances.

[75] I accept that Ms Rose and Ms Wilson reasonably concluded that there was a possibility of NAT receiving from a member of the public a complaint about the Centre in the future and, as the sole Advocate for the area, Mrs Adlam would have to be able to work with the Centre to resolve that complaint. On occasions she would also have to engage with the Centre for the purpose of providing educational services to its staff.

[76] It was also a reasonable conclusion that in the circumstances that there was no practicable way of isolating Mrs Adlam from having to work with the Centre and its Manager, if the course of the job required that. There was no other advocate nearby to fill in, and taking a member of her family to the premises was unacceptable given the sensitive and confidential nature of an Advocates work.

[77] It was a reasonable conclusion reached by NAT that Mrs Adlam would not be able to fulfil the role of advocate as she was not able to enter the Centre while the trespass order remained in place until September 2008. It was a reasonable further conclusion that, even if the trespass order was lifted or revoked, the behaviour of Mrs Adlam displayed in making an abusive phone message indicated that she was unable to have a professional ongoing relationship with the Centre and its staff or management. The behaviour in making the offensive phone call was reasonably regarded as unacceptable to the employer of Mrs Adlam. I accept that it was partly on this basis that the decision to dismiss was reached.

[78] It was clearly also a major concern of NAT that a person employed to be a rights advocate in the health sector had shown prejudice and ignorance in relation to lesbian or gay people who were part of the community she had been employed to serve. As Ms Laban pointed out, her sexuality whatever its nature was not put in issue by her in any way or made a matter for public comment, and it seems that calling her a lesbian and a dyke was an exercise in name-calling simply to be offensive and was carried out without any idea as to whether those terms, in whatever way they were used, were applicable to Ms Laban.

[79] In her evidence Ms Wilson referred to the loss of confidence by NAT in Mrs Adlam as being able to carry out her role in full. It is clear that NAT regarded

her conduct as being destructive or deeply impairing of the relationship of trust and confidence that is necessary to be maintained in any employment agreement. That situation may lead a reasonable employer to decide to dismiss.

[80] A further matter of concern is that the phone message was monitored by at least two other staff members of the Centre before Ms Laban herself heard it. Mrs Adlam must have known, from her time working at the Centre, that phone messages were likely to be heard by others. The message itself makes this clear at the start.

[81] This is a further matter that would have been relevant in considering contribution if leave had been granted for the grievance to be raised out of time and if the Authority had found that Mrs Adlam had been unjustifiably dismissed or that some other grievance had been suffered by her.

[82] The conclusion of the Authority is that NAT, in reaching its decision to dismiss, acted in the way that a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[83] The claim of grievance is therefore not sustainable and it would therefore not be just to allow the grievance to be raised out of time, even if exceptional circumstances had been present, which I have found they were not.

Penalty claim and counter-claim

[84] In addition to her claim of personal grievance, Mrs Adlam has sought to recover penalties against both the AHRT and its manager Ms Laban. The provisions relied upon in support of the claims are set out in the statement of problem as being ss 134, 135, 136(2) and 149(4) of the Act.

[85] In final submissions Mr Davidson withdrew the claim for penalty against AHRT, saying he did so because AHRT had been unaware at the time of Ms Laban's action in contacting NAT with her concerns about that trust employing Mrs Adlam.

[86] Section 134(1) provides that every party to an employment agreement who breaches that agreement is liable to a penalty. Ms Laban was not a party to any employment agreement between Mrs Adlam and NAT, AHRT, or anyone else.

[87] Section 134(2) covers any person who while not a party to an employment agreement, incites, instigates, aids or abets any breach of an employment agreement. While it might be argued that Ms Laban by contacting NAT about Mrs Adlam's contact had instigated or even incited the disciplinary enquiry that led to her dismissal, I have found there was no breach of an employment agreement arising from that dismissal.

[88] Section 149(4) of the Act provides that *"a person"* who breaches an agreed term of settlement reached under s 149 is liable to a penalty imposed by the Authority. The breach contended is of the mediated settlement and the particular terms of it requiring the parties to keep the mediation confidential, not to speak ill of each other and, on the part of AHRT, *"not to say or do anything which could reasonably be held to inhibit* [Mrs Adlam's] *chances of obtaining and/of maintaining future employment."*

[89] Ms Laban has admitted her actions which resulted in the disciplinary inquiry by AHRT and which in turn resulted in Mrs Adlam's dismissal. Ms Laban regards herself as having breached the settlement but in mitigation has asked the Authority to take it into account in her favour that she was only reacting to the derogatory reference and generally offensive remarks made about her by Mrs Adlam in the telephone message and during the face to face confrontation on 5 February immediately before it.

[90] In all the circumstances of this case it would be a truly unjust result if a penalty was imposed against Ms Laban, and more so if any of it was required to be paid to Mrs Adlam. More fundamental than the matter of mitigation is an issue as to whether Mrs Laban can be liable at all when she was not the employer of Mrs Adlam. Although Ms Laban accepted responsibility and admitted liability, I bear it in mind that she was not represented in this case and there was no argument about the legal position in this particular regard.

[91] A claim for a penalty however carries with it a higher standard of proof which, because of some uncertainty within the wording of s 149 itself, I am not satisfied has been met in this case. It is not clear to the Authority how a person can be said to breach an agreed term of a settlement when that person is not bound by the settlement. The terms of any mediated settlement are expressed by s 149(3)(a) to be *"final and binding on, and enforceable by, <u>the parties</u>."* Ms Laban was not herself a party,

although she was the agent of a party ARHT. The claim for penalties against that party was however withdrawn.

[92] I must find that for the above reasons no orders should be made in relation to the claims for penalties against either the AHRT or Ms Laban.

[93] In relation to the claims against Mrs Adlam by AHRT and Ms Laban for penalties, I find that the latter has no standing under s 135 of the Act to bring such a claim, as she was not herself a party to the employment relationship between AHRT and Mrs Adlam. Her interests are properly to be protected by her employer AHRT bringing the penalty claim and seeking to have some or all of any penalty paid to Ms Laban.

[94] Mrs Adlam did I find breach the settlement agreement entered into with AHRT when she made derogatory references to and about Ms Laban, as being a dyke and lesbian. These references were made in the context of Ms Laban being the manager of AHRT's Health and Resource Centre. They were also made in the hearing of others including employees of the Centre and to a member of the public who was a complete stranger to Mrs Adlam.

[95] Some penalty should be imposed for her breach of the terms of settlement because under them she had accepted a significant sum from AHRT to resolve her grievance and she had agreed at the same time not to make derogatory comments to any third party.

[96] The loss of her job with NAT was a considerable blow for Mrs Adlam to suffer as a result of her actions. I take that into account in fixing $500 as the penalty for the breach, $400 of which is to be paid to Ms Laban pursuant to s 136(2) of the Act.

Costs

[97] Costs are reserved. Application for an order may be made by NAT, the AHRT and/or Ms Laban. Any application is to be in writing filed with the Authority within 21 days of the date of this determination, or such other time as may be directed. A reply on behalf of Mrs Adlam is to be made within a further period of 14 days after the 21 day period for application, or such further time as may be directed.

A Dumbleton
Member of the Employment Relations Authority