

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 556  
5435439

BETWEEN

NINA DANNATT  
Applicant

A N D

THE CHIEF EXECUTIVE OF  
THE DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person  
Elizabeth Coats, Counsel for Respondent

Investigation Meeting: 18 November 2013 at Hamilton

Submissions Received: 18 November 2013 from Applicant  
21 November 2013 from Respondent

Date of Determination: 04 December 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Dannatt is employed by the Department of Corrections. Ms Dannatt started work as a social worker on 4 April 2010. On 01 April 2011 she was appointed a Case Manager – Rehabilitation and Employment.

[2] Ms Dannatt is a member of The New Zealand Public Service Association (PSA) so she works under the Department of Corrections Front Line Staff (Non-Management) Collective Agreement (the agreement) with the PSA.

[3] On 01 February 2012 Ms Dannatt experienced a mini stroke so had a month off work recovering from it. Ms Dannatt says she recovered from the stroke after a month so could have returned to work from 01 March 2013 but for the stress she claims her work situation has caused her.

[4] Ms Dannatt claims she suffered so much work stress from 01 April 2011 to 01 February 2013 that it made her too unwell to return to work after she had recovered from her mini stroke. She has been away from work from 01 February 2013. This has been unpaid leave because she has no paid sick leave entitlement left.

[5] Ms Dannatt makes the following unjustified disadvantage claims in her Statement of Problem:

- (a) She has been sexually harassed in her employment and her employer failed to investigate adequately or inform her of the progress and/or outcome of its investigations in her sexual harassment complaint;
- (b) Her movements have been unfairly monitored;
- (c) Her July Performance Development Plan (PDP) review is unfair;
- (d) Her employer has unjustifiably deducted wages from her without authority;
- (e) Her employer has breached its good faith obligations by failing to be responsive and communicative;
- (f) Her employer's actions and failures have caused her significant and ongoing distress and she has been unable to attend work since 01 March 2013 (date she had recovered from her stroke) and has lost remuneration as a consequence.

[6] The Department of Corrections says the Authority does not have jurisdiction to investigate the unjustifiable disadvantage claims for (i) the alleged sexual harassment, (ii) the alleged unfair monitoring of her and (iii) the alleged unfair PDP review (together referred to as to "the complaints") because these claims were not raised as grievances within the 90 day time limit required by s.114(1) of the Employment Relations Act 2000 (the Act).

[7] The Department of Corrections says that Ms Dannatt did not raise any personal grievance claims with it until Ms Cook's letter of 29 November 2012.

[8] The Department of Corrections accepts Ms Dannatt's personal grievance claims in relation to the deduction from her wages which occurred to cover unpaid

sick leave and relating to her ongoing inability to work from 01 March 2013 were raised within 90 days.

[9] Ms Dannatt claims she raised personal grievances about the complaints in her correspondence and discussions with her employer prior to the 29 November letter. However, she says if the Authority finds she does not raise them herself then she seeks leave to raise these disadvantage grievances out of time under s.114(4) of the Act on the grounds that she made reasonable arrangements with her union representative to raise these grievances with the Department of Corrections within time and that the union unreasonably failed to do so.

[10] Evidence on the jurisdiction issue was heard from Ms Dannatt, Ms Nora Cook of the PSA and Mr John Costello, Senior Human Resource Adviser for Department of Corrections. During the Authority's investigation meeting Ms Dannatt said that her good faith claim could be dealt with as a statutory breach of good faith rather than as a personal grievance.

### **Issues**

[11] The following issues are to be determined:

- (a) What date did Ms Dannatt raise personal grievance claims for each of the complaints?
- (b) Were personal grievances for the complaints raised within 90 days?
- (c) If not, did Ms Dannatt make reasonable arrangements with PSA to raise personal grievances relating to the complaints on her behalf within 90 days?
- (d) If so, did Ms Cook unreasonably fail to ensure that Ms Dannatt's personal grievances were raised within 90 days?
- (e) If so, should Ms Dannatt be granted leave to raise personal grievances for all/any of the complaints out of time?

**What date did Ms Dannett raise personal grievance claims for each of the complaints?**

*Monitoring incident*

[12] The alleged monitoring issue occurred on 29/30 December 2011. Ms Dannatt's evidence at the Authority's investigation meeting was that she told Ms Wikitera-Reid in January 2012 she had a *personal grievance* that was impacting on her health. That evidence was not supported by any documentation and it was provided for the first time at the investigation meeting. I find that even if this comment was made it is insufficient in itself to have raised a personal grievance.

[13] The monitoring complaint was also raised by Ms Dannatt in an email to Mr Strickland. She describes it as an "*issue*" for his attention, not as a personal grievance claim.

[14] Ms Dannatt claims she told Ms Cook she had raised personal grievances "*every step of the way*" from the time of the monitoring incident onwards. Ms Dannatt also claims that she told Ms Cook to raise a "*serious grievance against my reputation*" after the monitoring complaint in January 2012. Ms Cook disputed this evidence.

[15] I have resolved this conflict in the evidence on the balance of probabilities in favour of Ms Cook because Ms Dannatt's evidence was not supported by the 150 pages of documents I reviewed. Even if I had accepted Ms Dannatt's evidence (and I did not) that is still not sufficient to establish that she had made reasonable arrangements with Ms Cook to raise a personal grievance on her behalf.

*Sexual harassment*

[16] This allegation arose from a comment a colleague made to another colleague at work on 16 February 2012 about a television show which had occurred the previous night. Ms Dannatt overheard the comment and was offended by it. She claims the exchange she overheard amounts to sexual harassment of her.

[17] Ms Dannatt says she spoke to Ms Cook in February 2012 about the alleged sexual harassment and received advice to think about her options. Ms Dannatt then

decided to address her concerns about this incident by emailing her manager Martin Strickland on 08 March 2012. Ms Dannatt believes that she raised a personal grievance by sending her email to Mr Strickland. I find that she did not.

[18] Ms Dannatt refers to her alleged sexual harassment complaint in her email to Mr Strickland as a “*serious matter*”, a “*complaint*” and a “*serious sexual harassment complaint*”. Her issue was couched as a “*complaint*” not as a grievance. Ms Dannatt’s communication with Mr Strickland was insufficient to have raised a personal grievance under the Act.

#### *August meeting*

[19] The parties had a meeting on 31 August 2012 to discuss Ms Dannatt’s various employment related issues. The notes of that meeting record her referring to having “*put in a PG*” which Ms Dannatt says was a reference to her sexual harassment complaint, raised by email to Mr Strickland. The parties agree there was no discussion during this meeting about Ms Dannatt referring to a ‘PG’. The reference in the meeting was to Ms Dannatt having “*put in a PG*” but there was no further detail provided.

[20] I find that Ms Dannatt did not use the term “*personal grievance*” or “*PG*” in any of her correspondence with her employer prior to the 31 August 2012 meeting. These terms were then not used again until Ms Cook of the PSA wrote to the Department of Corrections on 29 November 2012 raising grievances on Ms Dannatt’s behalf.

[21] I find Ms Dannatt’s comment at the 31 August meeting does not amount to the raising of a personal grievance.

#### *PDP review*

[22] Ms Dannatt in her Statement of Problem says that she “*raised a complaint*” regarding her PDP review. She also claims that when she received her PDP review in July 2012, she told Ms Cook “*straightaway*” that “*this is a PG*”. Ms Cook disputes that. I prefer Ms Cook’s evidence on the balance of probabilities as Ms Dannatt’s evidence was not supported by the documents I saw.

*PSA letter*

[23] Ms Dannatt's evidence at the investigation meeting was contradicted by the evidence given by Ms Cook. Ms Cook says that the first time Ms Dannatt advised her that she wanted to raise a personal grievance was after the meeting held on 31 August 2012.

[24] Ms Cook says she could not recall Ms Dannatt advising, instructing or informing her, whether in person or by email, that she wanted to raise a personal grievance claim before then. Ms Cook admits that she and Ms Dannatt had a number of discussions about "*a lot of issues*" during 2012 but that their discussions did not cover Ms Dannatt's wish to raise a personal grievance claim before 31 August 2012.

[25] Ms Cook says that she asked Ms Dannatt to provide her with further information to support her personal grievance claims which, at that point, Ms Cook thought was just going to relate to the alleged sexual harassment and the PDP complaints. Ms Cook told the Authority she understood as at 31 August that the monitoring issue had been resolved by agreement between the parties.

[26] Ms Cook wrote to the Department of Corrections on Ms Dannatt's behalf on 29 November 2012. The letter claims Ms Dannatt had been disadvantaged in her employment by unjustified action and it attached a narration provided by Ms Dannatt recording all of the issues of concern with her employment.

[27] Ms Cook accepts that the grievance letter she provided to the Department of Corrections did not identify exactly what disadvantage claims she was raising. It also failed to identify what remedies were sought. Ms Cook says she had asked Ms Dannatt for this information but it was not forthcoming.

*Finding*

[28] I find that Ms Dannatt did not raise any personal grievance claims until Ms Cook's letter of 29 November 2012.

**Were personal grievance claims for the complaints raised within 90 days?**

*Relevant law*

[29] Section 114(1) of the Act provides that a personal grievance should be raised with an employer within 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 employee, whichever is the later.

[30] Under s.114(2) of the Act a personal grievance is raised “*as soon as the employee has made, or has taken reasonable 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*”.

[31] Whether a personal grievance has been “*raised*” must be assessed objectively, based on the facts of each case.<sup>1</sup> There is no requirement for a personal grievance to be raised in writing but “*the same requirements of particularity apply to oral and written notices of grievance*”<sup>2</sup>.

[32] In *Creedy v Commissioner of Police*<sup>3</sup>, the Chief Judge held that:

*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. [...] For an employer to address a grievance as the legislation contemplates, the employer must know what to address ... An employer must be given sufficient information to address the grievance, that is to respond on its merits with a view to resolving it as soon and informally, at least in the first instance.*

[33] In *Idea Services Ltd (in Statutory Management) v. Barker*<sup>4</sup>, the Employment Court held that while the employer would have been aware that the employee “*took issue*” with her dismissal, it had no way of knowing why that was so as to enable it to address the employee’s concerns.

### *Monitoring incident*

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<sup>1</sup> *Winstone Wallboards Ltd v. Samate* [1993] 1 ERNZ 503.

<sup>2</sup> *Dickson v. Unilever New Zealand Ltd* WC9/09, 22 April 2009.

<sup>3</sup> [2006] ERNZ 517.

<sup>4</sup> [2012] NZEmpC 11.2

[34] The unfair monitoring allegation apparently occurred on 29/30 December 2011. Ms Dannatt appears to have become aware of the alleged monitoring on 04 January 2012, in which case the latest date on which the 90 day period elapsed was 03 April 2012. Ms Dannatt did not raise a personal grievance in relation to this issue until 29 November, so she is well outside the 90 day time limit.

[35] Although I accept that Ms Dannatt raised concerns with Mr Strickland about the alleged monitoring within 90 days of her becoming aware of it, the manner in which she did so did not amount to the “*raising*” of a personal grievance, whether under clause 12.4.1 of the Collective Agreement or under s.114(1) of the Act.

[36] Although the Department of Corrections would have been aware that she “*took issue*” with the monitoring, it was not clear that she was raising a personal grievance or intended to do so.

#### *Sexual harassment*

[37] The date of the alleged sexual harassment was 16 February 2012. If that is the incident to which Ms Dannatt is relying on as giving rise to a personal grievance, then the 90 day period for that elapsed on 16 May 2012.

[38] The alleged sexual harassment complaint was emailed to Mr Strickland on 08 March 2012. Ms Dannatt’s complaints about the way in which her complaint to Mr Strickland had been dealt with was raised with the Department of Corrections on 30 July 2012. Both of these events occurred well outside the 90 day time limit.

[39] The Department of Corrections’ investigation into her sexual harassment complaint was completed on 14 May 2012 and the outcome notified to Ms Dannatt on 01 August 2012. If 01 August 2012 is the date on which Ms Dannatt is relying for her personal grievance (in terms of her allegation that her employer failed to investigate adequately or to inform her of the progress and/or outcome of the investigation), then the 90 day period elapsed on 30 October 2012.

#### *PDP review*

[40] The results of Ms Dannatt’s PDP review were notified to her on 30 July 2012 so the 90 day period for raising a personal grievance arising from that review elapsed on 28 October 2012. Ms Dannatt claims she raised the unfair PDP review with the

Department of Corrections on 31 July 2012. I find that that did not amount to the raising of a personal grievance although it did involve her raising concerns about the review.

[41] I find that while Ms Dannatt complained about the outcome of her PDP in a 31 July email she did not do so in a manner that amounted to the “*raising*” of a personal grievance, rather she was notifying her employer of concerns she had with the outcome of the PDP (i.e. that she “*took issue*” with it).

[42] I find that Ms Dannatt did not raise a personal grievance about the PDP until 29 November 2012, so this is also outside the 90 day period.

#### *August meeting*

[43] I find that Ms Dannatt did not raise a personal grievance at the 31 August meeting, rather she used the term “*PG*” to describe the complaint she had submitted by email to Mr Strickland about the alleged sexual harassment on 08 March 2012. There was no other correspondence describing her complaint about the incident on 16 February in that way, and I accept that it was the understanding of the others involved in the meeting, that she had a complaint, not that she had a personal grievance.

[44] Ms Cook also confirmed her belief that no personal grievance had been raised regarding this complaint prior to November 2012.

#### **Did Ms Dannatt make reasonable arrangements with PSA to raise personal grievances relating to the complaints on her behalf within 90 days?**

[45] Ms Cook’s evidence was that Ms Dannatt did not instruct her to raise any personal grievance claims until after the meeting on 31 August 2012. I accept that evidence. The issue here is whether Ms Dannatt made reasonable arrangements with Ms Cook to raise any grievances on her behalf before the 90 day time limit expired.

[46] I find she did not. Ms Dannatt simply told Ms Cook on 31 August that she wanted grievances raised. She did not identify what grievances she wanted Ms Cook to raise on her behalf. Nor did she instruct Ms Cook about the remedies sought.

[47] Ms Cook told Ms Dannatt to provide her with more information about her grievances. As a result of that Ms Dannatt provided Ms Cook with a list of “*issues*

*and complaints*” on 26 November which Ms Cook then appended to her 29 November letter.

[48] By the time Ms Dannatt gave Ms Cook the information she had requested the 90 day time-limit for all of the complaints had already elapsed. I therefore consider that Ms Dannatt did not make reasonable arrangements with Ms Cook to raise disadvantage grievances on her behalf within 90 days of them arising.

**Did Ms Cook unreasonably fail to ensure that Ms Dannatt’s grievances were raised within the required time?**

[49] Section 115(b) of the Act provides that failure by a representative to ensure a grievance has been raised within time is an exceptional circumstance if the employee made reasonable arrangements with their representative for that to occur within 90 days of the grievance arising.

[50] I find that Ms Dannatt did not make reasonable arrangements to have Ms Cook raise personal grievances on her behalf. It follows that Ms Cook cannot have unreasonably failed to have raised grievances about the complaints within the 90 day time-limit.

**Should Ms Dannatt be granted leave to raise personal grievances for any of the complaints out of time?**

[51] Under s.114(4) of the Act the Authority may grant leave to an employee to raise a personal grievance after the expiration of the 90 day time-limit if it is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances and it considers it just to do so.

[52] Ms Dannatt is unable to establish that the delay in raising grievances about the complaints with her employer was due to exceptional circumstances. I find the requirements of s.114(4) have not been met and that it would not be just to allow Ms Dannatt to raise grievances about her complaints out of time. Her application to do so is therefore declined.

**Conclusion**

[53] The Authority does not have jurisdiction to investigate the complaints so these three alleged disadvantage grievances will not form part of the substantive

proceedings. This leaves the following substantive claims before the Authority to investigate:

- (a) An unjustified disadvantage grievance arising from the deduction from Ms Dannatt's wages to cover unpaid sick leave;
- (b) An unjustified disadvantage grievance arising from Ms Dannatt's inability to work from 01 March 2013 onwards;
- (c) A breach of good faith claim; and
- (d) A breach of contract claim.

### **Costs**

[54] Costs are reserved to be dealt with once the substantive matter has been resolved.

**Rachel Larmer**  
**Member of the Employment Relations Authority**