IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 249
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	BETWEEN	KATHLEEN CRONIN-LAMPE First Applicant
	A N D	RONALD CRONIN-LAMPE Second Applicant
	A N D	BOARD OF TRUSTEES OF MELVILLE HIGH SCHOOL Respondent

Member of Authority:	James Crichton
Representatives:	Mary Wilson, Counsel for Applicants Paul White, Counsel for Respondent
Investigation Meeting:	10, 11, 13, 19 December 2012 at Hamilton
Date of Determination:	12 June 2013

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By determination issued on 2nd May 2013 as [2013] NZERA Auckland 162 (the first determination), the Authority dealt only with the question of whether the second applicant, Mr Roland Cronin-Lampe (Mr Cronin-Lampe), was entitled to access the medical retirement provisions contained in the collective agreement covering the employment of teachers in New Zealand secondary schools. The present determination (the second determination) deals with the balance of the employment relationship problems raised by the first applicant, Ms Kathleen Cronin-Lampe (Ms Cronin-Lampe), and Mr Cronin-Lampe.

[2] Both Mr and Ms Cronin-Lampe allege that they have suffered an unjustified disadvantage in their employment as joint guidance counsellors at Melville High School in that Melville High School has failed to provide a safe workplace, breached its obligations under the Health & Safety in Employment Act 1992 (the 1992 Act) and generally caused them such significant emotional damage that they now are afflicted by post-traumatic stress disorder (PTSD) and, in consequence, have limited work opportunities especially in their chosen field.

[3] Melville High School resists those claims, first by denying that any personal grievance was ever raised while the employment was on foot, second by alleging that the matters pleaded are essentially historical in nature, third by claiming that Melville High School complies with its statutory and contractual obligations and provides a safe workplace, and fourthly by pleading the statute bar in s.317 of the Accident Compensation Corporation Act if work-related mental injury has been suffered.

[4] Counsel helpfully consented to both the applicants' claims being heard and dealt with together. With very few exceptions, the claims are mirror images of each other and can be conveniently heard and determined together.

[5] Ms Cronin-Lampe commenced employment with Melville High School in 1996 as a guidance counsellor and Mr Cronin-Lampe joined her in the same capacity the following year.

[6] It seems common ground that when Mr and Ms Cronin-Lampe (the Cronin-Lampes) were first employed, the school *"had many at risk students"* and there were a number of traumatic events, particularly suicides of students, which the Cronin-Lampes had to deal with.

[7] There was a cluster of student suicides from September 1997 through to January 1998 and in the balance of 1998, significant numbers of attempted suicides of students as well as other traumatic events which the Cronin-Lampes were involved in.

[8] In the following year (1999), Melville High School became the pilot school for the Restorative Project, but there was another student suicide.

[9] In 2001, a new principal was appointed and the Cronin-Lampes were involved in three deaths in the school community although none of them were student suicides.

[10] In the following year (2002), there were four deaths that the Cronin-Lampes were involved with from the school community and in 2003 there were three student suicides.

[11] Two former students committed suicide in 2004 and there were six deaths that the Cronin-Lampes were involved with in the school community in 2005.

[12] In 2006, the Cronin-Lampes were involved in two deaths from the school community.

[13] In 2010, there was another student suicide and in 2011 a further student suicide and the death of a staff member after a long illness.

[14] It is common ground between the parties, and accepted by the Authority, that the events briefly summarised above provided a harrowing context for the employment and the Authority's investigation meeting was a most affecting experience for all of the participants.

[15] The Cronin-Lampes say that they were expected to be on call 24 hours a day, seven days a week; were required to deal with at-risk students without proper support or facilities; and were also required to assist the staff of the school in any personal issues that they might have. Those claims are resisted by the School, at least to the extent that none can be demonstrated now.

[16] It is accepted that both the Cronin-Lampes have suffered either PTSD or in the alternative have a psychiatric illness which has the same symptoms. Having heard the Cronin-Lampes' evidence over a number of days in a lengthy investigation meeting, the Authority is satisfied that both Mr and Ms Cronin-Lampe are unwell. The issue in this determination is whether that evident unwellness is justiciable.

[17] Personal grievances were raised on behalf of both Mr and Ms Cronin-Lampe on 26 January 2012. The employment relationship problem was mediated unsuccessfully and the matter came before the Authority in the usual way.

Issues

[18] The focus of this determination, as the Authority has just observed, is on the justiciability of the Cronin-Lampes' claim. To comply with orders made by the Authority during the course of its investigation, this determination avoids naming any

student or indeed any other party who received assistance from either Mr Cronin-Lampe or Ms Cronin-Lampe.

[19] The Authority will need to consider and decide the following questions:

(a) Have the Cronin-Lampes suffered disadvantage by unjustified actions of the school;

(b) Is the Accident Compensation Corporation Act 2001 a bar;

(c) Are there other matters which require determination?

Have the Cronin-Lampes suffered disadvantage by unjustified action?

[20] It is trite law that for a disadvantage grievance to succeed, there must be both a disadvantage to the claimant and unjustified action or series of actions causing that disadvantage. In the present case, the Cronin-Lampes' claim rests squarely on satisfying the Authority that they can bring into consideration, events which are plainly outside the 90 day ambit. The personal grievance for each of the Cronin-Lampes was raised with Melville High School on 26 January 2012. It follows that the events which are automatically able to be considered in that regard are any events on and from 22 September 2011, unless the Cronin-Lampes can argue that time should run from the date the matters of concern came to their notice.

[21] On this footing, the Cronin-Lampes would need to contend that they were unaware of the circumstances giving rise to the personal grievance until the point at which it was raised with Melville High School. The Authority is satisfied, on the evidence it heard, that neither Mr Cronin-Lampe nor Ms Cronin-Lampe put the School on notice that they were unwell or in any sense not coping with the work assigned to them, until the personal grievances were raised on 26 January 2012. Mr Clive Hamill told the Authority that the Cronin-Lampes *"…never raised any issues with me regarding feeling unsafe in their workplace or struggling with the demands of their work…."*..The Authority accepts that evidence as truthful.

[22] But reliance on the alternative leg of s. 114(1) of the Employment Relations Act 2000 (the Act) does not avail the applicants either since, on the evidence, the School was not aware there were any issues of the sort raised in this proceeding, until the personal grievance was notified. So time can only run from the date the personal

grievance was first brought to the attention of the School. However, it is central to the Cronin-Lampes' claim that they bring into consideration events which happened well before that date.

[23] This is because, although it is common ground that the Cronin-Lampes were materially adversely affected by tragic events in the early part of their employment, Melville High School does not concede that those tragic events are within what we might call the justiciable period, that is, the period from 22 September 2011 down to the raising of the grievance on 26 January 2012. It follows that unless the Authority is persuaded either to allow the events prior to the justiciable period into consideration or, in the alternative, is persuaded that events in the justiciable period were unjustified actions, then the Cronin-Lampes' claim must fail.

[24] Their only claim is one of personal grievance; there is no breach of contract claim or any other form of proceeding before the Authority and it is not within the Authority's remit to manufacture claims which have not been pleaded, save for the specific statutory power in s160(3) of the Act to find that the nature of a matter as described by the parties is actually a different kind of matter. That sub section goes on to provide that the Authority must concentrate on *"…resolving the employment relationship problem, however described…"*

[25] The Authority is not persuaded that the above mentioned sub section can be construed so as to add causes of action to a claim as filed, given that the parties have argued the case on the basis of the original pleadings. In the Authority's view, the Cronin-Lampes have argued their case through the prism of personal grievance and it is not for the Authority to add new causes of action to that pleading. Not only do the statements of problem seek declarations of personal grievance but the remedies sought are personal grievance remedies. That then is the basis of the Authority's consideration of this matter.

[26] It is easiest to deal with this issue in chronological order and on that footing the Authority now addresses the question whether the law allows matters falling outside the justiciable period to be brought into consideration. The first point to make is that there are a number of decisions of the Employment Court which allow evidence before the justiciable period to be pleaded to provide context. That was essentially the footing on which counsel for the Cronin-Lampes dealt with the issue

when counsel for Melville High School protested the inclusion in evidence of material that pre-dated the justiciable period.

[27] However, if the material in question is only advanced for the purposes of context, that is not enough, of itself, to allow the Authority to consider that evidence as part of the cause of action, in the sense of being able to support, on an evidentiary basis, the personal grievance claims.

[28] It is only where the earlier material can be shown to be part of *"a continuous cause of action"* that the Authority is able to consider that earlier material for the purposes of demonstrating the elements of the personal grievance.

[29] Counsel for the Cronin-Lampes refers to *Premier Events Group Ltd v. Malcolm James Beattie* [2012] NZEmpC 79 where Chief Judge Colgan decided that:

> *... earlier events connected with those events in the last days of employment, may fall for consideration if these amount to a course of conduct leading and linked to the events within the 90 day period.*

[30] Applying that dictum then, the Authority must consider whether the events in the earlier part of the employment, prior to the justiciable period, lead to and are linked to the events within the 90 day period so that they amount to a course of conduct.

[31] Later on in the same judgment, His Honour, after remarking that it is impracticable to require an employee suffering an ongoing disadvantage to raise a grievance every 90 days, goes on to say:

> *Rather one raising of a personal grievance should be sufficient to cover one related and continuous cause of action, provided the events complained of outside the 90 days all relate to events contained within the 90 day period and form a continuous course of related conduct.*

[32] It is necessary then for the Authority to analyse the nature and extent of the events over the whole of the employment to establish if in fact there is *"a continuous course of related conduct"* or not.

[33] This is a challenging analysis because there seems, on the evidence before the Authority, to be a wealth of difference between the nature and quality of the employment in its earlier years and the employment during the justiciable period. Counsel for Melville High School argues that there are in fact three separate periods

during the employment, the first being the period prior to the employment of the current principal, Mr Hammill, the second being the period from Mr Hammill's appointment down to 2011 when according to counsel for Melville High School, the third and final period emerges.

[34] It seems more straightforward from the Authority's standpoint to simply compare events in the justiciable period with events prior to the justiciable period.

[35] Looked at in that way, it seems to the Authority fair to summarise the employment relationship during the justiciable period as somewhat strained because of difficulties between the Cronin-Lampes and Mr Hammill. Prior to 2011, the relationship between Mr Hammill, on the one hand, and the Cronin-Lampes on the other, was warm and supportive. What changed in 2011 was Melville High School's determination to regularise the irregular nature of the employment between the school and the Cronin-Lampes. The Authority is satisfied that that process caused a deterioration in the previously warm relationship between the principal and the Cronin-Lampes.

[36] The Cronin-Lampes say that a number of events arose during this period which they rely upon to prove their personal grievance.

[37] These events include a failure by the school to agree to professional development training for the Cronin-Lampes, an argument about leave without pay for an international conference in Canada, and a number of interpersonal issues between one or other of the Cronin-Lampes and other staff.

[38] The Authority will consider shortly whether these matters constitute evidence for the Cronin-Lampes' personal grievance. What the Authority wishes to establish at this point is whether the nature and character of those events just briefly sketched is similar to the events in the earlier part of the employment.

[39] The earlier part of the employment was characterised by very appreciable numbers of traumatic events, particularly suicides or attempted suicides of students, and there is little doubt that the clinical evidence supplied to the Authority about the present health status of the Cronin-Lampes supports the conviction that it was these earlier traumatic events which caused the Cronin-Lampes' present unwellness.

[40] More importantly though for present purposes, it seems to the Authority axiomatic that the nature and extent of the events in the early part of the employment were not just different in degree from the events during the justiciable period but fundamentally different in kind.

[41] Tragically, there were a spate of student suicides and a significant number of other deaths within the school community, whether by disease or accident, all of which, of necessity, put a huge strain on the guidance counselling service. That strain was plainly overwhelming and it is difficult to see how anyone could have coped with those tragic events.

[42] However, the issue for present purposes is the relationship between that early trauma and the disputes between the parties to the employment relationship in the justiciable period. The Authority is satisfied that there is no similarity at all between those two periods and as a consequence, the Authority is simply unable to find *"a continuous course of related conduct"*.

[43] First, the spate of suicides had mercifully slowed, second, despite the differences between the parties to the employment relationship, the whole focus of the employment had changed from what might be called "crisis mode" to a more measured consideration of the place of guidance counselling in the school community. No doubt that change caused some stress and strain for the Cronin-Lampes, as is evident from their briefs of evidence, but for present purposes, the point the Authority is striving to make is that there was a fundamental difference between the pre-justiciable period and the period within the 90 days. There is nothing in the matters complained of within the 90 day period that links those complaints back to the tragic events of the early part of the employment in the way that His Honour the Chief Judge was suggesting that the law required in *Premier Events*.

[44] The Authority must conclude therefore that the tragic events of the earlier part of the employment are not up for consideration as evidence to support the personal grievance claim.

[45] Now, the Authority must consider whether the material identified by the Cronin-Lampes from within the justiciable period supports their personal grievance claim or not.

[46] In fact, the Authority must give the Cronin-Lampes some latitude by including the material it has as being within the justiciable period. This is certainly consistent with the Cronin-Lampes' own claim, and in particular counsel for the Cronin-Lampes' letter of 26 January 2012 but carefully analysed, it is difficult to see how all of the events complained of could actually have occurred within the justiciable period. Some of the events though, commenced before the justiciable period and concluded after it, particularly some of the issues around interpersonal difficulties.

[47] Looked at in its totality, while on a narrow view it might be possible to conclude that the Cronin-Lampes had suffered disadvantage by, for example,not being granted conference leave, what is very difficult to establish is that such an action was in any way unjustified. The evidence in this particular case is there simply was not enough money to do everything that the school wanted to do and the Cronin-Lampes missed out. That is not an unjustified action.

[48] Similarly, complaints around the handling by Melville High School of interpersonal conflicts between other staff members and one or other of the Cronin-Lampes do not disclose any impropriety on the part of the school. Certainly there are differences of opinion between the Cronin-Lampes and Mr Hammill about how these matters ought to have been dealt with but nothing before the Authority suggests anything other than that disagreement. The school complied with its policy in trying to resolve the matter in each case and the fact that one or other of the Cronin-Lampes was unhappy with the result does not make the school's action unjustified.

[49] Furthermore, in relation to two of these interpersonal issues, if there can be any criticism levelled at one of the parties in terms of the justifiability of their action, the criticism would have to be levelled at Mr Cronin-Lampe or Ms Cronin-Lampe because of their apparent disinclination to engage restoratively with the colleague that they had the disagreement with.

[50] But that is a minor issue really in the scheme of things; the short point is that the Authority is not persuaded that the school has done anything wrong in the way in which it has dealt with the matters that were within the justiciable period. Even allowing some latitude for events to contribute to *"a continuous course of related conduct"*, there is still not enough there in the Authority's judgment to ground a personal grievance. This is because even with the extension that the Authority has granted to the facts in issue, the Authority is still not persuaded that there is any aspect

where Melville High School has acted unjustifiably. In each case, Melville High School has acted in accordance with its policy, has not acted capriciously, and indeed all the evidence suggests that Mr Hammill in particular has taken every care to try to look after people who he plainly valued.

[51] It is the Authority's conclusion then that the Cronin-Lampes have not met the test for a personal grievance of unjustified disadvantage and that being their only claim before the Authority, their case must, of necessity, fail.

Does the Accident Compensation Corporation Act create a statute bar?

[52] Because of the Authority's conclusion in the last section of this determination, it is unnecessary for the Authority to deal with this aspect of the case although the Authority does observe that it is not attracted by the reliance Melville High School placed on the statute bar. This is because it seems to the Authority that the relevant provisions of the 2001 Act are framed so as to create the statute bar only in respect of a single event.

[53] The relevant section is s.21B styled *"Cover for work related mental injury"*. Subsection (1)(b) requires that that mental injury is *"caused by a single event"*. In subsection (7), "event" is defined to include a series of events arising from the same cause or circumstance and *"together comprise a single incident or occasion"*.

[54] Emphasising again that the Authority does not need to decide this issue, it is nonetheless the Authority's view that those words create a statutory bar only in respect of a single event or a series of events that inter alia *"together comprise a single incident or occasion"*. In the Authority's view, a series of tragic suicides of young people cannot fit within that definition, especially because, no matter how you look at it, a series of suicides do not *"together comprise a single incident or occasion"* but rather constitute a distressing series of discrete events.

Are there other matters for decision?

[55] The only matter the Authority desires to deal with in this section is the counterclaim. The only matter extant from the counterclaim as filed is a claim from Melville High School for the cost of the materials of a stainless steel artwork. The value of the materials is apparently $400. The school seeks payment of that sum.

[56] In all the circumstances, the Authority declines to make an award requiring payment of that sum.

Determination

[57] For reasons the Authority has already enunciated, the Cronin-Lampes' claim against Melville High School fails in its entirety.

Costs

[58] Costs are reserved but the Authority feels obligated to indicate that given the outcome of this case, and the known circumstances of the applicants, both in terms of their health status and their limited ability to work, Melville High School should consider whether it needs to seek a contribution to its costs.

James Crichton
Member of the Employment Relations Authority