

Attention is drawn to the order prohibiting publication of certain information.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 171
3024932

BETWEEN	XHZ Applicant
AND	BOARD OF TRUSTEES OF BSR COLLEGE Respondent

Member of Authority:	Christine Hickey
Representatives:	Paul King, advocate for the Applicant David Beck, counsel the Respondent
Investigation Meeting:	28 and 30 November 2018
Submissions Received:	30 November and 17 December 2018 from the Applicant 30 November and 5 December 2018 from the Respondent
Date of Determination:	22 March 2019

PRELIMINARY DETERMINATION OF THE AUTHORITY

Prohibition from publication order

[1] This case involves some health information about XHZ, which she wishes to keep private. The information is of an inherently confidential type and it is not necessary for the details to be publicised, although they are partially relevant to the issue to be determined. Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), I make an order prohibiting publication of XHZ's real name, as well as any details about the information of a personal nature put before the Authority by her. XHA remains unwell, and

any publication of the type of material considered for this claim could exacerbate her illness. In addition, the publication of identifying information associated with this case could limit her future work opportunities.

[2] As well, because of the serious (and untested) nature of some allegations that XHZ makes against the principal of BSR College (the College), I prohibit from publication the name of the College and the principal's name. No information leading to the identity of the applicant or the respondent or the respondent's principal may be published.

[3] In this determination I have limited my consideration of sensitive and personal material to that which I needed to consider to properly resolve the issues of whether XHZ had raised certain personal grievance claims within 90 days, or whether she should be granted leave to do so outside of the 90 day period.

[4] This determination has been issued outside the timeframe set out at s 174C(3)(b) of the Employment Relations Act 2000 because the Chief of the Authority has decided exceptional circumstances exist.¹

Employment Relationship Problem

[5] XHZ was employed by BSR College in August 2015 on a one year fixed term appointment to cover a period of maternity leave. BSR's Board of Trustees says that her employment ended in line with the fixed term agreement.

[6] XHZ has made an application to the Authority claiming a number of unjustified disadvantages and constructive, or otherwise unjustified, dismissal. One of her claims is that the fixed-term appointment was not genuine and not enforceable because it did not comply with s 66 of the Act.

[7] The investigation meeting I held sought to resolve the preliminary question of which grievances were raised within 90 days and if some of them were not, whether the Authority should grant leave to allow them to be raised outside of the 90 day period.

[8] However, at the investigation meeting Mr King and XHZ did not limit their evidence, comments or submissions only to the preliminary issues I had indicated I intended to

¹ Under s 174C(4) of the Act.

investigate. The College had an opportunity to respond to Mr King's submissions on all issues, not just preliminary issues.

[9] In submissions presented on 30 November 2018 it is argued that XHZ's union representative "failed in her role as a legal representative and failed unreasonably". During the numerous case management calls prior to the investigation meeting XHZ's union representative was identified. I gave XHZ the opportunity to ask her to attend the investigation meeting so I could assess through her evidence whether XHZ made reasonable arrangements to have grievances raised on her behalf. If so, then XHZ could have argued that the union representative unreasonably failed to ensure the grievances were raised within 90 days. However, it appears that neither XHZ nor Mr King asked her to attend the proceedings as a witness. XHZ did contact her although it is unclear what she told her as the union representative's response was simply a "thank you" for letting her know. Nor did XHZ or Mr King ask me to issue a witness summons for the union representative. Therefore, I have not heard any evidence from her. I dismiss the allegation against her, which was made for the first time in submissions.

Background Facts

[10] XHZ is a primary school trained teacher. At the time she accepted employment at the College, teaching year 7 and 8 classes, she was provisionally registered and needed further experience in order to become fully registered as a teacher. This aspect of her professional needs was acknowledged by the College.

[11] In the beginning it appeared that by the end of her engagement XHZ would have completed all the requirements for registration. However, she says that relatively early in the role she was subject to bullying and harassment by other teachers and the principal. She says that caused her to become mentally unwell and to have to take a significant period of time off work because of that.

[12] XHZ's engagement was from 17 August 2015 until 16 August 2016. On 24 September 2015 XHZ gave written notice of resignation to the College's principal. However, after discussions with him she felt able to continue working and did not proceed with her resignation.

[13] On 21 January 2016, XHZ and two union representatives attended a meeting with the College principal and a staff member of the New Zealand School Trustees Association during which they discussed XHZ's illness, and how she could successfully complete the programme she needed to complete in order to get registration.

[14] At that meeting, XHZ presented a letter from her doctor saying that she was now fit to return to work. However the doctor suggested that certain things should be avoided in her employment; that she should not teach a boy whose relative had committed suicide, and that perhaps she should not be teaching maths.

[15] The principal indicated that he would see if it was possible to avoid XHZ teaching maths and teaching the particular student however, he could make no promises about that. The principal was not able to remove the student from XHZ's class but did provide some support in teaching maths from another teacher.

[16] The College agreed that XHZ could leave during school hours to attend medical appointments if necessary. The College principal emphasised that all staff were supportive of XHZ and her return to school. XHZ mentioned one particular staff member who had not been supportive of her and the principal agreed to talk to that person specifically.

[17] The parties acknowledged that if XHZ was to achieve her goal of being fully registered by the end of her engagement in August 2016, certain steps needed to be put in place to ensure that this happened. XHZ was supported throughout discussions with the College by her union representative at the time.

[18] The meeting concluded with the College stating that it had XHZ's best interests at heart.

[19] A further meeting was held on 1 February 2016 between XHZ and her union representative, the principal and a New Zealand School Trustees Association representative, who attended by telephone. This meeting covered the arrangements that had been put in place since the January meeting and noted aspects that XHZ found useful. The arrangements were "fine-tuned". It was noted that the programme to achieve teacher registration:

will now be back on track. What is expected of [XHZ] will be detailed clearly. It is possible to be completed this term.

[20] There was another meeting later in February 2015, with the same focus.

[21] However things did not go as planned. XHZ says there were further and worse escalations of the bullying and harassment she had already faced, including that the principal was sexually harassing her. At the investigation meeting she also gave evidence of an alleged physical assault on her by the principal.²

[22] As the year went by XHZ had to take more and more time out of work because of her declining mental health. In June 2016, XHZ made contact with an experienced employment law advocate, Robert Thompson, who is not representing her in these proceedings, but appeared as a witness after the Authority asked him to appear.

[23] As a result of XHZ having engaged Mr Thompson, her union representative informed XHZ she was no longer able to represent her in relation to any issues with the College.

[24] XHZ had not achieved what she required to progress beyond provisional registration when the fixed term engagement came to an end in August 2016.

[25] XHZ lodged her statement of problem with the Authority on 27 February 2018, the College says this attempted to raise a number of grievances out of time.

What do sections 114 and 115 mean in practice?

[26] Section 114 of the Act provides that an employee must raise a personal grievance with their 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.

[27] XHZ says her grievances were all adequately raised within 90 days. However, the College says none of them have been adequately raised in time.

[28] If personal grievances were not raised in time, without the employer consenting to them being raised outside of the 90 days, the Authority has no jurisdiction to hear XHZ's claims. The College does not consent to XHZ's claims being raised after the relevant 90-day periods.

² I write 'alleged' because there was no prior claim with the College or the Authority of physical assault. However, XHZ understood that the Authority and the College's representatives should have been able to infer that was what happened from documents produced for her claims.

[29] In order to resolve these preliminary issues, the Authority needs to decide which, if any, of the personal grievance claims were raised with the College within 90 days of the date on which the action alleged to amount to a personal grievance occurred, or came to the notice of XHZ, whichever is the later.

[30] The policy behind s 114(1) is to ensure that personal grievance claims can be addressed and resolved speedily³.

[31] If any of the personal grievances were raised within the 90 day period, then I will order the parties to attend mediation to try and resolve the matter/s, if that is not possible I will set down an investigation meeting to investigate the substance of the grievance claim/s.

[32] However, if I decide that any of the personal grievance claims were raised outside of the 90 day statutory period I then need to consider whether there were any exceptional circumstances that occasioned the delay in raising the personal grievances.

[33] The exceptional circumstances that XHZ claims fall into two categories set out in s 115 of the Act.

[34] First, as her main claim, XHZ says that she made reasonable arrangements to have grievances raised on her behalf by her then advocate Mr Thompson, and Mr Thompson unreasonably failed to ensure that the grievances were raised within the required time.

[35] In the alternative, XHZ says she was so affected or traumatised by the matter giving rise to the grievances that she was unable to properly consider raising the grievances within the 90-day period.

[36] Even if the delay or delays in raising the personal grievances outside of 90 days were occasioned by exceptional circumstances the Authority still needs to examine whether it is just to allow the personal grievances to be raised late.

[37] XHZ's application to the Authority was lodged on 28 February 2018, which is more than 18 months after what XHZ contends was her constructive, or otherwise unjustified, dismissal. Therefore, any personal grievances raised for the first time in the application are well outside of the 90-day period.

³ *Blue Water Hotel Limited v VBS* [2018] NZEmpC 128 at [28].

[38] Any personal grievance claims made after the application was made are also well outside of the 90-day period.

Claimed personal grievances

[39] There are a number of personal grievances that XHZ claims:

- (i) There were Novopay deductions from her pay, her pay was overpaid at times and her KiwiSaver was not correctly paid. In addition, debt collectors chased XHZ to get her to pay back overpayments. She was unjustifiably disadvantaged by her employer failing to pay her correctly;
- (ii) The College caused XHZ's provisional teacher registration to lapse in August 2018 and she was unjustifiably disadvantaged by this;
- (iii) The fixed term agreement was coming to an end. However, the acting principal verbally offered her an extension of her agreement. She turned it down due to her ill-health that was caused by the College. Therefore, she was constructively dismissed. Alternatively, XHZ says she was unjustifiably dismissed at the end of the fixed term agreement because it was not a valid fixed term agreement in the first place. There was an incorrect calculation of the school roll and the College wanted to get rid of her so she could not tell the Education Review Office about that;
- (iv) She was unjustifiably disadvantaged by not being provided with registration within the two month period from January 2016 when there was a meeting between the applicant, her union representative and the principal. The principal failed to perform the necessary training and assessment required. The College used her as cheap labour instead;
- (v) She was bullied, sexually harassed and subjected to discrimination. Despite bullying and sexual harassment being raised by her then advocate, the College did not carry out any investigation into the bullying allegations made during her employment. The College failed to ensure a safe working environment and caused her to suffer from post-traumatic stress disorder. ACC accepted this claim, therefore, it is proved that the principal sexually harassed XHZ.

Issues

[40] In order to determine whether the Authority has jurisdiction to investigate and determine XHZ's claims, the Authority needs to resolve the following questions:

- (i) Are any claims outside the Authority's jurisdiction for reasons other than the 90-day period for raising personal grievances?
- (ii) Did XHZ raise any claims within 90 days? As part of that issue, I need to establish when the actions amounting to personal grievances arose, or on what dates did they come to XHZ's notice?
- (iii) If not, should the Authority grant leave to allow her to raise them outside of 90 days on the grounds of exceptional circumstances?
- (iv) Did XHZ make reasonable arrangements with Mr Thompson to have the grievances raised on her behalf within the 90 days, and did he unreasonably fail to raise them within 90 days?
- (v) If not, was XHZ so affected or traumatised by the matters giving rise to the grievances that she was unable to properly consider raising the grievances within 90 days?
- (vi) If either of the exceptional circumstance exists should the Authority grant leave to raise the grievances outside of 90 days?
- (vii) Costs

Are any claims outside the Authority's jurisdiction for reasons other than the 90-day time limit?

Pay issues

[41] Claim (i) above is not within my jurisdiction because at the investigation meeting it was established that the Ministry of Education's payroll provider, Novopay, was the cause of XHZ's overpayments, underpayments and underpayment of her KiwiSaver. I do not accept that the College was responsible for or caused any problems XHZ had with her pay, including the use of debt collectors by the Ministry of Education to recover overpayments.

Lapse of provisional registration

[42] Claim (ii) above was made after August 2018. At the outset, I made it clear that the Authority does not have jurisdiction to deal with this claim because the employment

relationship ended in August 2016, and the claim has been made significantly later than 90 days after any action or inaction of the College.

[43] In addition, although the lapse in provisional registration affects XHZ's career, the removal of her from the register was not an action of her employer and nor did it cause her any disadvantage within her employment with the College. It could not have, as it happened two years after that employment relationship ended.

What, if any, grievances were adequately raised within the 90-day time limit?

The parties' views on whether the grievances were raised within 90 days.

[44] XHZ submits that the College was very well informed about the concerns she had and that she raised a number of them during her employment, both personally and via letters sent by Mr Thompson. On her behalf, Mr King also wrote that she had told her union representative about them and that during one meeting with the school XHZ had raised her concern about the "stunning" comment. It is XHZ's view that she did what was sufficient to inform the College what her grievances were and how she wished them to be addressed by it.

[45] By contrast, the College submits that although personal grievances were mentioned in Mr Thompson's correspondence, insufficient detail was given to amount to the standard necessary to raise a grievance. The College responded seeking details about the claims of bullying, sexual harassment and discrimination but it did not receive any details until after XHZ lodged her application in the Authority, which was far outside of the 90-day period.

Were the claims of unjustified constructive/unjustified, dismissal raised within 90 days?

[46] Mr Thompson first mentioned the possibility of an unjustified dismissal claim in his 19 July 2016 letter, in which he advised that it was "likely" that XHZ would "take a claim for an unfair dismissal".

[47] He also wrote that XHZ had been offered an extension to the fixed term agreement but "refused this offer due to the working conditions."

[48] However, the 19 July letter did not raise a grievance of constructive or otherwise unjustified dismissal for two reasons. First, XHZ's employment had not ended at that stage and an unjustified dismissal grievance cannot be raised that is conditional on the future ending of the employment.

[49] Secondly, Mr Thompson only signalled what was likely in the future.

[50] The next mention that could be construed as referring to the concept of unjustified dismissal, specifically constructive dismissal, is in Mr Thompson's letter of 16 August 2016 in which he says XHZ:

- Does not accept that she is on a genuine fixed term agreement that complies with s 66; and
- She had been treated so poorly that if the employer was not terminating the employment it "would have ceased due to a fundamental loss of confidence and trust".

[51] No grievance of constructive dismissal was raised because XHZ did not resign.

[52] XHZ's employment ended on 16 August 2016. Therefore, the 90-day period after that ended on 14 November 2016.

[53] After Mr Thompson's letter of 16 August 2016, there was no further correspondence or contact with the College raising a personal grievance of unjustified dismissal until the application for these proceedings was lodged with the Authority in February 2018.

[54] I conclude that no personal grievance of unjustified dismissal was raised either by XHZ, or Mr Thompson within 90 days of the termination of XHZ's employment by the College.

Was a personal grievance that XHZ was disadvantaged by the College failing to assist her to gain her full registration raised within 90 days?

[55] The College understood XHZ aimed to gain her teacher registration during her fixed term employment. It is clear in the minutes from the 21 January and 1 February 2016 meetings that both parties aimed to get XHZ's programme leading to registration back on track.

[56] XHZ says that the College, particularly the principal, made it impossible for her to complete what was necessary for her registration by bullying etc., which resulted in her being too unwell to attend work. She and Mr King say that the principal promised that XHZ would be able to be registered within the first part of 2016.

[57] The College says that it had every intention of assisting XHZ to achieve her registration and had a programme that would have assured that occurred if XHZ had been well enough to attend work during 2016. The only reason that did not occur was simply that XHZ was not able to attend work often enough to allow all the registration prerequisites to be achieved before her fixed-term expired.

[58] There is evidence of the parties agreeing that they would work towards enabling XHZ to achieve her registration. However, I have no evidence that the College's failure to enable her to do that was raised as a personal grievance by XHZ or her union representative.

[59] The only allegations that XHZ sent to Mr Thompson which he included in his 19 July 2016 letter that may have related to XHZ's failure to attain registration while employed by the College are the allegations of:

- no help being given in Maths,
- no access to resources, particularly textbooks, and
- no help "at all, [they] just made my job hard to do by changing all the times of my meetings and not telling me what I needed to bring to meetings."

[60] I do not consider that a personal grievance about XHZ's failure to gain registration during her employment was raised by Mr Thompson in his letters. His letters contain no mention of that issue. Nor was such a grievance raised within 90 days of the end of XHZ's employment.

[61] The claim that the College failed to assist XHZ to gain her registration was first raised in the Statement of Problem on 28 February 2018. Therefore, it was raised well and truly outside of the 90-day period within which it needed to be raised.

Were personal grievances of bullying, sexual harassment and discrimination raised within 90 days of the actions relied on?

When did the alleged sexual harassment/assault occur?

[62] The most obvious allegation of sexual harassment was in Mr Thompson's letter of 19 July 2016 in which he quoted from an email from XHZ who wrote "he told me I was stunning and was wearing a see through dress." In her email to Mr Thompson making that

allegation the inference that naturally flows from XHZ's expression is that the "stunning" comment and the "see-through dress" comment were both verbal and said at the same time.

[63] It was not until a case management conference I held after these proceedings were commenced that it became clear to me that "he" was the principal. It was not until the investigation meeting that the College and I were shown an email from the principal making it clear that the comment that XHZ had worn a see-through dress was made in an email from the principal to XHZ, based on another (anonymous) teacher's report of XHZ's dress.

[64] XHZ says that in about October 2015 the principal told her she was "stunning". She thought nothing of that at the time, and was not sure what he was referring to, but thought it could refer to her teaching. On another occasion she says the principal was talking in the staff room about the upcoming school swimming sports and said he was going to buy a new bathing suit for the occasion and to "watch him."

[65] On 19 February 2016 the principal sent her an email saying that another teacher had told him that XHZ had worn a see-through dress to school one day. He asked her if she wanted to discuss it further with him.

[66] On 21 February 2016, XHZ replied "thanks for the feedback", and that she appreciated being let know about the dress because she had not been aware she had worn a see-through dress. She said she did not feel any need to discuss it with him but asked him to help by identifying the dress, so she did not inadvertently wear it again. He responded that he was not sure but thought it was a cream coloured dress. He wrote that the teacher who mentioned it to him was a little embarrassed when they told him, and he would ask another female teacher to discuss it with her, if she wanted.

[67] XHZ brought this exchange up with a psychologist from whom she was receiving treatment in February 2016. XHZ said that since that email exchange she had been thinking about another couple of interactions with the principal, including the occasion he said she was stunning and on another occasion before the school swimming sports in the staff room when he said he was going to buy new swimming togs for the sports and to "look out for him". The psychologist wrote to XHZ's GP that XHZ:

has jumped to some conclusions and has made some assumptions about this man and this has triggered some feelings of vulnerability and feeling unsafe. I challenged the way she had jumped to conclusions.

[68] XHZ also says that there was an understanding that after the email about the see-through dress she was not to be required to meet with the principal alone. She says that this was because she had accused him of sexual harassment. I accept that XHZ refused to meet alone with the principal during 2016, but the College does not accept that there was an understanding that she could not meet with him alone. There are no documents recording such an understanding. In addition, there is no evidence that XHZ had accused the principal of sexual harassment prior to Mr Thompson's letters in July and August 2016.

[69] For the first time in these proceedings, XHZ gave evidence during the investigation meeting, that the principal followed her around school, for example, he waited for her outside of women's toilets.

[70] XHZ also says that the principal assaulted her on 27 January 2016 by pushing her up against a wall in a corridor and holding her there. I have treated this allegation as part of XHZ's allegation of sexual harassment by the principal, although I acknowledge it could equally have been considered a part of the bullying allegation.

[71] XHZ wrote in an email to Mr Thompson on 4 July 2016 that the principal had physically assaulted her, attaching what she considered as proof an email the principal sent to her union representative about the event. That email is dated 27 January 2016:

After our briefing this morning I had a meeting with [XHZ] and the teachers who will be working with her ... were also present in the meeting.

I am very concerned at the way she presented. I asked if she was OK she said she was.

...

Both the other teachers were very concerned about her. AS AM I.

(On the way to my office she walked against the wall along each of the corridors, not sure what this means but it concerned me too.)

[72] XHZ's email to Mr Thompson on 4 July 2016 stated:

approx 5 mins before this meeting [the principal] harassed me in the staffroom. They then group bullied me in the meeting. [The principal] guided me down the hall so he pushed me to the wall. ...

[73] XHZ says that she told her union representative that she considered the principal was sexually harassing her before a meeting they had with the College and the representative told her not to talk about that in the meeting. XHZ says that she decided to take her representative's advice. I am satisfied she did not raise the issue of sexual harassment with the College or instruct her union representative to do so. The first time the allegation of sexual harassment was made is in Mr Thompson's letters in July and August 2016.

[74] According to XHZ's evidence, all the events alleged to amount to sexual harassment began a number of months before Mr Thompson raised them with the College as one of XHZ's concerns. Therefore, Mr Thompson's letters attempting to raise personal grievances of unjustified disadvantage in the form of sexual harassment in July and August 2016 were clearly outside of the 90-day period after the events in January and February 2016.

When did the bullying occur?

[75] XHZ's evidence is that the bullying began as soon as she started working at the College. She says it was not just the principal bullying her but a number of other teachers as well. There is documentary evidence that XHZ reported anxiety to a medical professional and began to be treated for it in August 2015, which is the month she began working at the College.

[76] XHZ says that the bullying lasted all the time she was employed; it was relentless and orchestrated. That being the case XHZ could have raised a personal grievance of bullying any time during her employment and within 90 days after it ended, so long as the grievance was raised within 90 days of an occurrence of bullying.

[77] On 21 June 2016, the College's acting principal wrote an email to XHZ asking her to come to a meeting to clarify a comment XHZ wrote in meeting minutes:

This was intimidation as discussed ...

Please refer to Health and Safety guidelines, bullying causing illness.

[78] XHZ consulted Mr Thompson who, on 23 June 2016, wrote the following response:

We will attend this meeting with our client as her representative. Prior to us attending the meeting we need to know the specifics of your request.

Our client has raised that she is the subject of bullying and intimidation. Your letter is insufficient on detail and what the meeting proposed to resolve or

discuss. Our client will not attend a meeting where she may well be subjected to further stress and humiliation.

[79] XHZ approved the letter and asked Mr Thompson to send it to the acting principal. She also sent him a follow up email to see whether he had any response. On 27 June 2016 Mr Thompson replied that he had not had any response to date.

[80] On 29 June 2016, Mr Thompson sent an email to the College asking for an urgent response to his email of 23 June 2016. Later that day Peter Hall, from the NZSTA who was by then representing the College, responded that he would be able to respond the following day.

[81] On 1 July 2016, Mr Hall replied to Mr Thompson that the acting principal's email:

... on the face of it looks a fairly innocuous request and the kind of conversation a principal ought to be able to have with a staff member when they want to know more about a reference made in internal staff minutes. However your email to the Principal suggests that there have been earlier meetings that have not gone well. You refer to your client having raised that she is the subject of bullying and intimidation so I am expecting to find that she has expressed this allegation in sufficient detail that would enable the matter to be investigated. I have arranged to meet with the Principal on Monday late afternoon so I can get more information; after that I will write again.

[82] On 1 July 2016, Mr Thompson forwarded the response to XHZ. She emailed back that she could send evidence and that her previous union representative had:

1500 emails, many written by them, showing bullying plus there are medical reports from many people saying the school is responsible for my illness. In the meantime they are trying to get rid of me.

[83] By way of reply, Mr Thompson asked if she had "one or two [emails] to show that you have outlined your issues".

[84] On 2 July 2016, XHZ sent Mr Thompson emails containing extracts from earlier emails she had been sent by the College or had sent to her union representative.

[85] On 5 July 2016, XHZ asked Mr Thompson to write another email to the College.

[86] On 8 July 2016, Mr Hall sent a further email stating that the principal had simply been trying to have a conversation about the comment made in minutes taken by XHZ to:

...ascertain if there is something that needs to be investigated from a health and safety perspective or otherwise.

[87] Neither XHZ nor her representatives raised a personal grievance of bullying with the College prior to Mr Thompson's involvement.

[88] The College responded to Mr Thompson's letter attempting to raise grievances, including the one of bullying, by asking for specific details.

[89] XHZ forwarded that response to Mr King. He replied to her, writing that it was "bullshit" that she "did not raise those issues already" about the "stunning" comment and about "issues like having the sibling of the student who died in your class". He wrote that she had also emailed the issues to her "union representative and spoken to doctors."

[90] What an employee is required to do to raise a personal grievance is more than mentioning an issue in a meeting and asking an employer to deal with it.

[91] XHZ also identified the following as examples of bullying in an email to Mr Thompson, which he copied to the College on 19 July 2016:

... your client is well aware of our clients concerns. Our client states:

Examples of bullying:

1. *He said I was stunning and I was wearing a see through dress (email evidence).*
2. *No help was given in maths. I had to pay for help outside of school and employed my own tutor who has written evidence that the school deliberately made me teach the students at the wrong level (email evidence). This person is a qualified specialist maths teacher and a registered teacher.*
3. *They started to get rid of me once the first email from you (Robert Thompson) was written (my own email evidence sent to you). They kept asking if I was ok and saying I was not sick; however, now the tone of the email is that I am too sick??*
4. *My contract ends in week 4, not the beginning of week 3 when ERO comes. ERO is coming in weeks 3 and 4 and they wish to hide all the mistakes.*
5. *[the principal] tried to get rid of me last year when he found out he was a class less in the roll for the following year. He has given me a contract for a year, August to August.*
6. *They would not allow me access to resources to do my job, textbooks.*
7. *They used mirroring of a student with anxiety frequently to tease and bully me about my condition.*

8. *They did not help me at all, just made my job hard to do by changing all the times of my meetings and not telling me what I needed to bring to meetings.*

Our client has not been able to return to the school due to the unfair treatment she has received. This has caused her to suffer an unjustified disadvantage. No full or proper investigation has taken place.

[92] The College responded to Mr Thompson's email asking for details of the bullying (and of the sexual harassment) such as, who the perpetrators were and when the events took place and where, what requests for help in maths had been denied, and who the person XHZ engaged to help her was. The College said that when it had such details it would consider investigating the claims. However, the College thought it was difficult to see how an investigation could be completed within the remainder of her fixed term engagement.

[93] XHZ and Mr Thompson did not supply the College with the specific details it sought.

[94] Apart from the dates set out above in my consideration of the sexual harassment personal grievance claim, even after the investigation meeting I have not been given any dates of the alleged bullying events in order to assess when the 90-day period began to run from. At the latest, any personal grievance would have had to be raised within 90 days after the termination of XHZ's employment.

[95] At paragraph [104] onwards I consider whether Mr Thompson's letter raised a personal grievance of bullying.

[96] The issue about teaching a child whose sibling had committed suicide was raised in a January 2016 meeting with the College undertaking to see whether it could accommodate XHZ's preference not to teach that child. However, the College reported back to XHZ's union representative that it was unable to do so. That particular issue was not raised again during XHZ's employment as a problem for XHZ. It certainly was not raised by Mr Thompson in his letters to the College.

[97] XHZ also says one teacher "made her" teach hangman type maths games with her class, when that was clearly inappropriate in light of the former student who had committed suicide, especially with XHZ teaching a relative of that student.

[98] Both those claims were made in the Statement of Problem in February 2018. Therefore, they were raised outside of the 90 day period.

When did the College's action/s amounting to discrimination against XHZ occur?

[99] 'Discrimination' as a personal grievance is defined in s 104 of the Act as being an action or actions of the employer if the employer treats the employee in a way that negatively impacts on the employee's terms of employment, conditions of work or opportunities for training and promotion because of any of the prohibited grounds of discrimination. Prohibited grounds of discrimination are the same grounds as set out in the Human Rights Act 1993.

[100] XHZ has not outlined which prohibited ground of discrimination she alleges the College treated her to her disadvantage under. There are no submissions from Mr King in relation to this allegation. This claim has not been pursued.

Did Mr Thompson's letters raise personal grievances of sexual harassment and bullying?

[101] XHZ's evidence is that she relied on Mr Thompson to adequately raise her grievances within 90 days.

[102] A leading Employment Court case on raising grievances within 90 days - *Creedy v Commissioner of Police*⁴ sets out what the raising of a grievance requires. Chief Judge Colgan stated:

The legislative purpose of requiring a grievance to be raised was ... to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin ... Although done orally or in writing, to have enabled an employer to know of the complaint and to address it by way of remedy, cases ... required a minimum level of sufficiency of detail of the complaint.⁵

[103] In the *Creedy* case, the employer replied to Mr Creedy's representative stating that there was insufficient detail of what employer actions Mr Creedy alleged had disadvantaged him in his employment. The employer expressly sought details of the specific unjustified actions alleged to have been committed by it. Mr Creedy's representative considered that he had already adequately raised Mr Creedy's grievances and did not reply to the employer with the specific details sought.

[104] Chief Judge Colgan decided that Mr Creedy's representative had not raised the grievance because:

⁴ [2006] ERNZ 517.

⁵ Note 4, at [32].

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. ...

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.

...

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.**⁶

[Emphasis added]

[105] Chief Judge Colgan decided that:

The best indication of Mr Creedy's barrister's failure to meet the minimum requirements of s 114(1) was Superintendent Cox's immediate response putting the plaintiff on notice that the employer did not accept that a grievance had been raised but, responsibly, seeking further information to enable the complaint to be addressed. Mr Barrowclough's deliberate decision not to provide that information, or even to respond to the reply, confirms in my conclusion that Mr Creedy's grievance was not raised in April 2001 as the statute required.⁷

[106] XHZ's case is similar to the *Creedy* case. The College, via Mr Hall's letter, let XHZ know that it required details to allow it to investigate her concerns. That put XHZ on notice that she would have to supply further details to adequately raise her personal grievances.

[107] I disagree with XHZ and Mr King that the letter of 19 July 2016 contained sufficient detail of the allegations of bullying, discrimination and sexual harassment to allow the College to begin an investigation into XHZ's concerns.

⁶ Note 4, at [36].

⁷ Note 4, at [38].

[108] Mr Thompson sent the College a further letter on 16 August 2016, the day after XHZ's fixed-term employment ended, raising a personal grievance of unjustified disadvantage because of the:

manner that she has been treated. Further our client has been subjected to discrimination and sexual harassment causing her to suffer a disadvantage.

Of course our client is of the primary view that her employer has failed to initiate any proper investigation or process causing her to lose income and suffer humiliation.

[109] However, that letter contained no further specific detail of the allegations.

[110] Neither XHZ nor Mr Thompson followed up with the College when no reply was received to that letter.

[111] I conclude that Mr Thompson's correspondence on 19 July and 16 August 2016 did not give sufficient detail to allow the College to respond adequately to XHZ's concerns and therefore did not amount to raising personal grievances of sexual harassment or bullying.

Was any delay in raising the personal grievances occasioned by exceptional circumstances?

[112] Given that no personal grievances were raised within 90 days, I now need to consider XHZ's application for leave to raise the grievances out of time, because the delay in raising them was "occasioned by exceptional circumstances".

[113] In *Creedy*, Chief Judge Colgan defined "exceptional circumstances" as circumstances that are:

less than "extraordinary" but clearly more than the circumstances in most cases.⁸

[114] XHZ relies on two alternative grounds.

Did XHZ make reasonable arrangements for Mr Thompson to raise personal grievances on her behalf and did he unreasonably fail to do so?

[115] XHZ says that she made reasonable arrangements for Mr Thompson to raise personal grievances on her behalf and that he unreasonably failed to do so. She says because of those exceptional circumstances, the Authority should grant leave allowing her to raise personal grievances out of time.

⁸ Note 4, at [47].

[116] Mr Thompson says that he struggled to get adequate instructions from XHZ, and despite making two appointments to meet with her in person and to see the documents she told him she had that were evidence of her concerns, XHZ failed to meet with him. Therefore, after sending letters on her behalf in June, July and August 2016 Mr Thompson says that he told her that he could not act for her anymore. He says he was not given reasonable instructions to raise personal grievances on her behalf and therefore, did not unreasonably fail to raise them.

[117] On 4 August 2016, Mr Thompson sent XHZ an email:

I have left a couple of messages for you. Can we arrange a time to chat.

[118] On 11 August 2016, the College emailed XHZ and Mr Thompson a letter giving notice that the fixed term agreement would expire on 15 August 2016.

[119] On 12 August 2016, XHZ emailed Mr Thompson “could you please send me a copy of the statement.” And on 15 August she emailed him:

Tomorrow is my last day of employment – could we please write a statement before 3 pm tomorrow, while I am still employed.

[120] Mr Thompson emailed the College again on 16 August 2016:

The purpose of this email is to advise that our client has a personal grievance for an unjustified disadvantage resulting from the manner that she has been treated. Further our client has been subjected to discrimination and sexual harassment causing her to suffer a disadvantage.

Of course our client is of the primary view that her employer has failed to initiate any proper investigation or process causing her to lose income and suffer humiliation. Finally our client does not accept that she is on a genuine fixed term agreement that complies with s 66.

Further our client has been treated so poorly that if the employer was not terminating the employment relationship her employment would have ceased due to a fundamental loss of confidence and trust.

[121] It appears the College did not respond to Mr Thompson’s email and that was not followed up during 2016.

[122] Mr Thompson attended the investigation meeting. His evidence is that after his email of 16 August 2016 to the College he tried to arrange meetings with XHZ. He says he told her that if he was to continue to act for her she had to come in and meet him face to face, and bring the written evidence she claimed to have with her so:

That we could then draft a proper grievance notifying the Respondent of the claims and providing any supporting documents ...

Despite repeated attempts to engage the Applicant I was unable to be successful in doing so, she never attended a meeting with me and never supplied me with the information.

I recall having a very robust discussion with the Applicant. I advised that I was not prepared to act for her, that without providing me with information which would include dates, times and any supporting documents, that I would not be able to continue to act for her. I expressed she would need to seek alternative advice ... as a gesture of good faith to enable her to progress the claims, that I would not be billing her for the services to date.

[123] XHZ says that Mr Thompson never told her in 2016 that he would not act for her anymore. She says that his evidence in this case is a lie.

[124] XHZ says that she did not hear from Mr Thompson, or from the College, after he wrote the 16 August 2016 email. She says she understood that Mr Thompson had done all that was necessary for her to take personal grievances against the College.

[125] There is no evidence of XHZ having tried to contact Mr Thompson after her last day of work on 16 August 2016 until she started to send emails in February 2017. XHZ sent the following emails to Mr Thompson, which he says he did not receive:

(i) On 14 February 2017:

Thanks for your work last year. I wondered what you had heard? I am writing to tell you that [the] College are trying to recover \$964 from me through Novopay.

(ii) On 15 February 2017:

I also have in writing:

- my doctor saying he (principal) caused illness
- private psychologist saying he caused illness
- canterbury district health board psychologist saying he caused illness

(iii) On 5 May 2017:

I wondered if you had heard anything, because this really needs to get moving?

(iv) On 25 July 2017:

The first round of paperwork is done – sensitive claim accepted.

(v) On 22 August 2017:

Could you please forward your communication of this now being Sexual Assault with the ERA.

[126] On 7 September 2017 XHZ emailed the Christchurch High Court:

I have a personal grievance – [principal’s name, College’s name/ XHZ]

There is an ACC sensitive claim and over 1500 emails.

This was lodged in August 2016 and [principal’s name] is refusing to come to mediation. It is now over a year on and I believe this has been stalled.

This is serious as it is a sexual assault case against a school principal.

Could you please tell me why this case had been stalled and when it will go through the courts?

[127] On 7 September 2017 a Deputy Registrar of the Christchurch High Court replied to XHZ that he could not see any case filed in either the criminal or civil jurisdiction.

[128] On the same day XHZ emailed Mr Thompson asking him to explain why the claim had not been lodged. XHZ did not get any reply from Mr Thompson.

[129] On 11 December 2017, XHZ emailed Mr Thompson to let him know:

that [his] work on this case is cancelled, and taken up by another lawyer, due to inactivity and numerous attempts to contact you with no reply.

[130] Mr Thompson received that email and replied the same day:

Thank you for your email, however I had told you twice by phone and a further time by Carren that this was not a case that we wanted to pursue on your behalf. However I do wish you the best of luck with your action.

[131] On the same day XHZ emailed Mr King that Mr Thompson “did not communicate at all.”

[132] Mr Thompson’s evidence is:

Just before the email of 11 December 2017 the Applicant contacted me again and I told her the same thing, no instructions, non-attendance at meetings and concerns over the prospect of success we would not be proceeding.

On 11 December 2017 I received an email from the Applicant, this was [a] peculiar email to me and I responded to it setting out our previous conversations with myself and Carren McDonald.

From the period of August 2016 up until this point of December 2017 I had not heard from the Applicant ...

I received the email to which I believe may have been manufactured in an attempt to suggest that I remained active with this file.

[133] Mr Thompson has no written records of his involvement with XHZ apart from copies of the emails sent by her and received by him in June to August 2016 and on 11 December 2017. He gave oral evidence that his business file management system changed between 2016 and now and he regrets he no longer has access to calendar appointments that may have shown dates he tried to get XHZ to come and meet him and bring the documents she said she had that he needed to see.

[134] Mr Thompson does not know why he did not get the emails sent to him during 2017 prior to the 11 December email.

[135] Carren McDonald, Mr Thompson's then case manager, also gave evidence in the investigation meeting. She says she heard two voice messages from XHZ in mid-2017 for Mr Thompson. She tried to follow up to see if she could assist XHZ as Mr Thompson had a very high workload at the time. She says the only emails that she could find at that stage "were months old". When she spoke to Mr Thompson he told her that he had told XHZ:

repeatedly that he was not going to act for her as her representative. I called the Applicant on the number left on her messages and reminded her that Robert had said he was not acting for her.

Sometime after my discussion with the Applicant, she called the office again and spoke with Robert directly. Robert and I share an office and I was privy to nearly all of his calls. I recall Robert being very blunt with the Applicant and telling her he was not acting for her.

Both these events occurred prior to the email of 11 December 2017.

[136] In the face of conflicting evidence about XHZ's professional engagement of Mr Thompson, I need to assess whose evidence I prefer.

[137] XHZ says she did not hear from Mr Thompson at all between 16 August 2016 and 11 December 2017.

[138] Despite XHZ having sent six emails to Mr Thompson in February, May, July and August 2017 Mr Thompson says he did not receive those. That would be congruent with the fact XHZ did not receive any response to her emails to him.

[139] However, XHZ says that when he did not reply to her emails she rang and left messages for him. Ms McDonald's evidence supports the fact that XHZ left two voice messages for Mr Thompson during 2017.

[140] I consider it more likely than not that Ms McDonald called XHZ back at least once in mid-2017 and told her that Mr Thompson was no longer acting for her, and that Mr Thompson also spoke to her and told her that during mid-2017.

[141] Mr Thompson says that in 2016 XHZ did not instruct him to raise a personal grievance of unjustified dismissal; constructive or otherwise. I accept his evidence of that.

[142] I also accept Mr Thompson's evidence that during 2016 he told XHZ over the phone that he could no longer act for her because he was unable to get adequate instructions.

[143] XHZ did not contact Mr Thompson within 90 days after her employment ended.

[144] XHZ did not give reasonable instructions to Mr Thompson to raise a personal grievance of unjustified dismissal for her within 90 days after her employment ended. Therefore, she cannot rely on Mr Thompson's failure to raise an unjustified dismissal grievance to gain leave to allow her to raise it out of time.

[145] In relation to claims of sexual harassment, discrimination and bullying, I accept Mr Thompson's evidence that he attempted to gain more information from XHZ after his letters to the College in July and August 2016, however, he was unable to get her to meet with him and to bring the written evidence with her so he could assess whether he wished to continue to act for her and to properly raise her unjustified disadvantage grievances. Mr Thompson did not have the details the College sought from XHZ that could have allowed him to adequately raise personal grievances of sexual harassment, discrimination and bullying in 2016.

[146] I consider XHZ believed that she had already raised such grievances with the College and that Mr Thompson had also raised them. However, those grievances had not been adequately raised.

[147] In the *Creedy* case, the Employment Court found that Mr Creedy's personal grievances were not raised within the 90 days because of exceptional circumstances. The exceptional circumstances were that Mr Creedy's barrister unreasonably failed to seek further

specifics of the claim from Mr Creedy having been informed by the police that it required more information.

[148] I do not consider that XHZ made reasonable arrangements for Mr Thompson to raise those grievances on her behalf, because she did not provide the kind of detail necessary to raise them.

[149] XHZ's application for leave to raise grievances out of time because of exceptional circumstances under s 115(b) of the Act (being that Mr Thompson unreasonably failed to raise those grievances for her) does not succeed.

Was XHZ so affected or traumatised by the matters giving rise to her grievances that she was unable to properly consider raising them within 90 days?

[150] There is evidence that during her employment from 17 August 2015 to 16 August 2016 XHZ was absent on sick leave for 88 days. That is a total period of about 17 weeks. However, in itself that is insufficient evidence that XHZ was so affected or traumatised by the matters giving rise to the grievances that she was unable to properly consider raising the grievances within the relevant periods.

[151] In the *Creedy* case, Chief Judge Colgan considered this type of exceptional circumstance to be:

... one of very high threshold. ... the consequences of the dismissal or other matters giving rise to the grievance must be severe. Reference to being "traumatised" connotes very substantial injury, physical or psychological or indeed psychiatric although, in this case, it is psychological impairment alone that is in issue.

... trauma in a psychological sense connotes emotional shock following a stressful event, sometimes leading to long-term neurosis. Next, a potential grievant must establish that the effects of the dismissal or other relevant matters giving rise to the grievance caused the employee to be unable to properly consider raising the grievance. ... this is not an inability to raise the grievance but, rather, to properly consider raising the grievance. And, of course, that inability must exist for the whole of the 90-day period.⁹

[152] XHZ does not claim that she suffered any physical injury that affected or traumatised her. Her evidence is that from the start of her employment with the College the bullying and harassment was so bad that she suffered from significant anxiety and went on to develop post-traumatic stress disorder.

⁹ Note 4, [51] – [52].

[153] I have been provided with some parts of XHZ's ACC file and some medical certificates for times that she was off work.

[154] The College accepts that XHZ has been significantly unwell. However, the College says that none of its actions, or those of its staff, have been the cause of XHZ's illness.

From 17 August 2015 to 16 August 2016

[155] XHZ had the support of her union and was represented by it during 2015 and early 2016. Despite being off work at times with medical certificates and being treated for anxiety, there is no objective psychological evidence from that period to establish that XHZ was so affected or traumatised by the matters giving rise to the grievance/s that she was unable to properly consider raising a grievance or grievances within 90 days of the occurrence of any of the events she relies on to found grievances.

[156] From at least 23 June 2016 until 16 August 2016 XHZ was represented by Mr Thompson, not her union. There is no evidence to suggest that she was so affected or traumatised by the matters giving rise to the grievance/s during that time that she was unable to properly consider raising a grievance or grievances, despite being off work. Instead, she engaged with Mr Thompson to a certain extent.

From 17 August 2016 to 14 November 2016

[157] XHZ has provided a letter from a registered clinical psychologist, dated 22 November 2016, that says she treated XHZ since July 2016 for anxiety and depression, initially being in the "severe" range. That period includes the months that XHZ engaged with Mr Thompson and in August 2016 XHZ continued her engagement with him.

[158] The psychologist records that by 22 November 2016 XHZ was:

... feeling very future focused and excited about her career and education.

We have had our final session together. On review of [XHZ's] current functioning together we agree she has done very well and is now best to focus on practising strategies she has learned.

[159] The psychologist wrote that:

many of [XHZ's] difficulties were triggered through situational factors in a previous stressful work environment. [XHZ] has recognised that this was not a

healthy place for her to be and has proactively taken time to work on things she finds challenging ...

[160] The letter shows that XHZ had “difficulties” over that time. However, I do not consider that evidence meets the high threshold for XHZ being either so “affected or traumatised” by situational factors in her work with the College during that time that she was unable to properly consider raising a grievance or grievances from 17 August to 14 November 2016.

[161] Mr Thompson’s correspondence foreshadowed that she was considering raising a grievance of unjustified dismissal. XHZ was supported by her treating psychologist and by Mr King while she engaged with Mr Thompson, and subsequently. There is insufficient evidence of how XHZ’s psychological difficulties could have rendered her unable to properly consider raising a grievance over that time. XHZ’s application for leave to raise grievances out of time because of exceptional circumstances under s 115(a) of the Act does not succeed.

[162] I have no evidence of XHZ’s state from 22 November 2016, when she was functioning well, until in July 2017, almost a year after her employment ended she sent an email saying that her sensitive claim had been accepted by ACC. A sensitive claim is a claim for mental or physical injury following an incident of sexual violence.

[163] XHZ says that ACC’s acceptance of her claim proves that the principal sexually harassed her and was violent towards her. ACC’s acceptance of her claim means it would pay for ongoing treatment for the ongoing psychological effects of what XHZ says was the principal’s treatment of her.

[164] The proceedings in the Authority are preliminary ones to establish whether the Authority has the jurisdiction to hear a grievance of sexual harassment amongst others. Whether XHZ can prove the principal sexually harassed her is not the issue at this stage. Instead, the issue is whether XHZ raised her grievances within the relevant 90 day periods. And, if she did not, whether it is just to grant her leave to raise them late because of exceptional circumstances.

[165] Any evidence of ACC’s acceptance of a sensitive claim and any ill health XHZ suffered after 22 November 2016 and during 2017 does not assist her to prove that she was so traumatised by the matter giving rise to the personal grievances that she was unable to properly consider raising the grievances within 90 days.

Conclusion

[166] XHZ has not proved that either category of exceptional circumstances applied to her. Therefore, I do not have to go on to consider whether it is just to grant leave for her to raise personal grievances out of time. The Authority has no jurisdiction to investigate XHZ's claims of unjustified disadvantage and unjustified dismissal. Her claims are dismissed.

[167] Even if XHZ had proved one of the exceptional circumstances applied to her, in considering whether it was just to grant leave to allow her grievances to be raised by way of the February 2018 statement of problem the Authority would have to have been satisfied that sufficient reason existed preventing XHZ from raising her grievances between 14 November 2016 and February 2018. That would have been a very difficult hurdle to overcome because she would have had to explain the considerable delay from the end of the 90-day period, and 28 February 2018, when the statement of problem was lodged.

Costs

[168] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's legal costs.

[169] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$4,500 for the first day and \$3,500 for each subsequent day. The investigation meeting lasted one day and a part day.

[170] If the parties cannot reach an agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

[171] If XHZ wishes the Authority to consider her financial circumstances she needs to submit an affidavit outlining her financial situation in as much detail as possible.

Christine Hickey
Member of the Employment Relations Authority