IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 270
3071932

	BETWEEN	SANDRA YOUNG Applicant
	A N D	SPOTLESS FACILITY SERVICES (NZ) LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Mary-Jane Thomas, counsel for Applicant Rob Towner, counsel for Respondent
Investigation Meeting:	23 June 2020
Submissions Received:	23 June 2020 from the Applicant 23 June 2020 from the Respondent
Date of Determination:	6 July 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sandra Young worked for Spotless Facility Services (NZ) Limited from 1 July 2010, after her employment with the Department of Corrections had transferred to Spotless as part of an outsourcing process.

[2] In March 2018 Spotless announced that it had been unsuccessful in retaining the outsourcing contract it had with the Department of Corrections. Then in May 2018 Spotless began consulting with relevant employees over the implications arising out of the loss of the Department of Corrections contract.

[3] Ms Young was one of the employees impacted and through a period of seven months she engaged in consultation with Spotless over: firstly the possibility of her transferring to the new provider (Downer New Zealand Limited) under the Department of Corrections contract; then secondly redeployment for her within Spotless and then finally redundancy as no alternative employment was available.

[4] In a letter of 14 November 2018, Spotless advised Ms Young that her position had been disestablished and that her employment would end on 26 November 2018 by way of redundancy.

[5] Ms Young was unhappy with the way Spotless handled the restructure arising out of the loss of the Department of Corrections contract and her redundancy. In January 2019 Ms Young instructed a PSA representative, Peter Hodson, to raise a personal grievance on her behalf in relation to her complaints about the process of consultation and the redundancy payment she received.

[6] Throughout 2019, Ms Young tried to resolve her complaints with Spotless but was unable to do so. Ms Young then lodged a statement of problem for an employment relationship problem based on a personal grievance that she had been unjustifiably disadvantaged by the process adopted by Spotless in the restructuring.

[7] Spotless objected to the statement of problem on the basis that the personal grievance giving rise to the employment relationship problem had not been raised within the 90 day time limit[1] and therefore I did not have jurisdiction to investigate it.

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[1] Section 114(1) of the Employment Relations Act 2000.

[8] The parties agreed that I would resolve the question raised by Spotless of whether I have jurisdiction to investigate an employment relationship problem based on a personal grievance allegedly raised by Ms Young, as a preliminary matter.

[9] This determination resolves my investigation into this preliminary matter.

Issues for resolution of the preliminary matter

[10] The starting point for this preliminary matter is sections 114(1) and 114(2) of the Employment Relations Act 2000 (the Act). Section 114(1) of the Act requires any person wishing to raise a personal grievance to do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee. Section 114(2) sets out what constitutes the raising of a personal grievance.

[11] In this case the first thing I need to determine is when Ms Young's personal grievance was raised, if at all.

[12] Mr Hodson says he raised the personal grievance as he had been instructed to do by Ms Young, in a telephone call he had with Jit Rathod, of Spotless, on 15 January 2019 and then in a letter he sent by email to Mr Rathod on 4 February 2019. Ms Young relies on this.

[13] Spotless believes that neither of these communications raised a personal grievance. Specifically, Spotless says:

(a) The 15 January 2019 and 4 February 2019 communications did not outline a personal grievance in the terms set out in Ms Young's statement of problem.

(b) Further, and in any event, the concerns raised in the two communications were not expressed sufficiently to constitute a personal grievance of any kind.

[14] I am less concerned about whether Mr Hodson raised a personal grievance in the same terms as the employment relationship problem set out in Ms Young's statement of problem. This is because sections 122 and 160(3) of the Act make it clear that I am not bound by the

technicalities of the "pleadings" – in this case the statement of problem – when it comes to resolving an employment relationship problem.[2] It is open to me to resolve Ms Young's employment relationship problem by finding that her personal grievance, if one was raised in line with s 114 of the Act, is of a type other than as alleged in her statement of problem; and I am not bound to treat Ms Young's claim as being the type described by her, but rather I can concentrate on investigating and resolving the employment relationship problem however described. So my focus is on whether a grievance of any type was raised at all by Mr Hodson.

[15] If I accept that Mr Hodson's communications did raise a personal grievance for Ms Young then the second thing I will need to determine is whether the events complained of, which give rise to that grievance, occurred or came to Ms Young's notice within 90 days prior to the grievance being raised.

[16] Ms Young says the events complained of in her grievance are all part of the process by which the restructuring and her redundancy were effected. She says therefore that the event that gave rise to her grievance is the culmination of the process, being her termination by reason of redundancy and this was 26 November 2018, which is within 90 days of 15 January 2019 and 4 February 2019.

[17] Spotless, in contrast, says that if either or both of Mr Hodson's communications did raise a personal grievance then the events complained of as giving rise to the grievance are the consultation events that formed the process and these events are to be considered separately, with each of them occurring more than 90 days before Mr Hodson raised the grievance.

[18] If, as a result of my consideration of these two matters I determine that Mr Hodson did not raise a personal grievance for Ms Young in accordance with s 114 of the Act (either because he did not properly articulate the grievance or because it was outside of the 90 day period) then the final thing I need to determine is whether Spotless consented to the grievance being raised outside of the 90 day period by the way in which it responded to Ms Young's

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[2] *New Zealand Automobile Assoc v McKay* [1996] 2 ERNZ 622 (EmpC); *New Zealand Van lines Ltd v Gray* [1999] 1 ERNZ 85 (CA); *Nathan v C3* [2015] NZCA 350.

complaints, including a 12 July 2019 letter from Ms Young's counsel to Spotless, which did raise a grievance for Ms Young.

[19] So, in summary, based on the submissions of counsel for each party there are three steps to resolving this preliminary matter. The question of whether Mr Hodson raised a personal grievance for Ms Young within 90 days of the actions giving rise to the grievance is resolved by considering two steps:

(a) Was a personal grievance raised by Mr Hodson through either or both of the communications on 15 January 2019 and 4 February 2019?

(b) If a personal grievance was raised by Mr Hodson, did the events complained of occur within the 90 days preceding the personal grievance being raised?

[20] And then, if required, the third step is to answer the question of whether Spotless consented to the grievance raised outside of the 90 day period.

Did Mr Hodson raise a personal grievance for Ms Young in the communications of 9 January 2019 and/or 4 February 2019?

[21] Section 114(2) of the Act provides that:

> For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps 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.

[22] In *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic*[3] the Employment Court summarised the key principles for establishing if a grievance has been raised pursuant to s 114(2). Judge Holden said:

> [36] The grievance process is designed to be informal and accessible.[4] A personal grievance may be raised orally or in writing. There is no particular

[3] *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.
[4] *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112, [2012] ERNZ 454 at [40].

> formula of words that must be used.[5] Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.[6]
>
> [37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.[7]
>
> [38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it 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.[8]

[23] So a personal grievance can be raised in writing or orally and by a series of communications, with consideration being given to the totality of the communications. The communication or series of communications must convey the substance of the complaint such that the employer knows what it is responding to, allowing it to address the merits with a view to resolving the complaint.

[24] In this case there was a series of communications, starting with Ms Young's various communications with Spotless during the consultation over the restructuring and her possible redundancy and culminating with the telephone call between Mr Hodson and Mr Rathod on 9 January 2019 and Mr Hodson's letter to Mr Rathod on 4 February 2019.

[25] I will consider each relevant communication and the totality of the series of communications to assess if a grievance was raised.

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[5] *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36].
[6] *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958 (EmpC) at 963; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139 (EmpC) at [45]; *Idea Services Ltd (In Statutory Management) v Barker*, above n 4, at [41].
[7] *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37].
[8] *Creedy v Commissioner of Police*, above n 5, at [36]-[37].

[26] In a letter dated 12 May 2018 sent to Mr Rathod, Ms Young set out the following:

> As you can appreciate this is the second process I have been through with regards to this contract change and as such it is a stressful time for me, naturally I have a number of questions regarding the process and the interpretation of my employment agreement.
>
> …
>
> Although you have indicated a process is to be followed it is quite vague, can you please give me the timeframes Downer will be working to, as I would like to know what this would be….
>
> …
>
> Your letter is totally silent on what the situation would be should I not succeed in attaining one of those unspecified positions? (sic)
>
> ….

[27] Then in a letter dated 6 August 2018 sent to Mr Rathod, Ms Young also stated:

> This process has taken over four months now and I am expected to continue to work until the end of November.
>
> My agreement indicates I will be advised of the possibility of similar roles as soon as reasonably practical. This entire process is now causing me some stress and frustration.
>
> Four months delay not knowing what positions are available would be unacceptable to me ….

[28] And then in a letter dated 31 October 2018 sent to Mr Rathod, Ms Young stated:

> I have received no information on any job opportunities since the process confirmed my position was no longer available. Due to the lack of any significant acceptable offer of work at this time I am prepared to take the redundancy as indicated and exit the company earlier.
>
> I feel for my own wellbeing this is the best scenario for me and will allow me to begin a new stage in my life as early as possible away from the stress of this process that has taken place over the last five months.

[29] Whilst none of these letters would constitute raising a personal grievance, it is clear that through this correspondence Ms Young raised concerns about the process of consultation over the restructuring being stressful and frustrating for her in terms of the information she was receiving (or not receiving) and her desire to have the information she needed to make decision in a timely manner.

[30] After the letter of 31 October 2018, Ms Young and Mr Rathod exchanged further correspondence about the termination of her employment and the redundancy payment should would receive from Spotless. Ms Young disagreed with the basis on which Spotless calculated her redundancy payment and how Spotless had treated her holiday and sick leave entitlements.

[31] Ms Young then met with Mr Hodson in January 2019 and instructed him to raise a personal grievance for her addressing the redundancy payment, the leave issues and complaints about the slowness of, and lack of detail in the information provided to her during the consultation process.

[32] On 15 January 2019 Mr Hodson spoke to Mr Rathod about Ms Young's redundancy:

(a) Mr Hodson says that in this call he discussed all of Ms Young's complaints that she had expressed to him in the January meeting, in particular he says he did raise the issues with the consultation process.

(b) Mr Rathod says that in the 15 January call he only discussed the redundancy payment calculation and the leave issues with Mr Hodson. In support of this evidence Mr Rathod refers to a contemporaneous email he sent to Spotless HR after the 15 January call in which he recorded the issues discussed with Mr Hodson and this email does not record any issues being raised with the consultation process.

[33] Having heard the evidence of both Mr Hodson and Mr Rathod and having considered the contemporaneous documents I conclude that I prefer the evidence of Mr Rathod. His recollection of the call appeared more reliable and was consistent with other evidence. Mr Rathod's account was also more plausible in terms of the whole context of the discussion, including matters discussed and events that occurred prior to the call and after it.

[34] The final relevant communication is a letter sent by Mr Hodson to Mr Rathod on 4 February 2019. This letter has the heading "Sandra Young Personal Grievance" and states the following:

> 1. Failure to apply correct redundancy payment under the terms negotiated in good faith in 2010 carrying Department of Corrections provisions.
>
> 2. Not truthfully answering all inquiries about what was happening in [Ms Young's] last six months of employment. This created stress related issues for [Ms Young].
>
> 3. Failure to meet all obligations under the holidays and wages protection act by not accruing annual leave and making a wage deduction without authorisation.
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> 4. All the above points you clearly stated that you were following correct procedures and weren't prepared to change any decision you already made.
>
> 5. Your reference to "Spotless employing a large number of employees where redundancies are quite common" doesn't mean that Spotless always gets the process right.
>
> 6. ….

[35] Returning to the principles set out by Judge Holden in *Zivaljevic*, the question is: as a result of all of the communications made to it, did Spotless know what Ms Young was complaining about such that it could respond to the complaints with a view to resolving them?

[36] First, it is clear from the communications that Ms Young's concerns about the calculation of her redundancy payment and the treatment of her leave entitlements were adequately raised with Spotless.

[37] Second, Ms Young's concerns about the process of consultation over the restructuring adopted by Spotless were less clearly stated but, in my view were adequately expressed such that Spotless knew what Ms Young was complaining about with enough detail so that it could respond. In coming to this conclusion I am not only guided by the principles in *Zivaljevic* but also the outcome in that case where the Court held Mr Zivaljevic had raised a grievance through a series of communications complaining about redeployment. I also found the outcome in *Coy v Commissioner of Police* to be persuasive.[9] In *Coy*, the Court held that a grievance had been raised in a communication that simply set out that the personal grievance would be based on general grounds of complaint such as, harassment and denial of procedural fairness with no further detail given at the time.[10]

[38] Mr Hodson's letter of 4 February 2019 refers to a personal grievance for Ms Young and identifies not truthfully answering all inquiries about what was happening in Ms Young's last six months of employment as an issue. Mr Hodson also refers to Spotless not always getting the process right. These two statements, by Mr Hodson in the 4 February letter, coupled with Ms Young's various requests for information and references to the timeliness of being provided that information sets out the basis for her overall complaint about the process of consultation.

[39] My conclusion on this second point is supported by fact that Spotless responded to the 4 February 2019 letter, in a letter from Mr Rathod dated 7 March 2019, in which he addressed the issue raised about the process of consultation. In this letter Mr Rathod engaged in a substantive response to the issue of providing information, addressing the merits of Ms Young's argument. And he was satisfied that his response was sufficient to dispose of the grievance. Mr Rathod concluded his letter with "I am certain this response will provide the clarity needed for you and [Ms Young] to understand the facts in this matter."

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[9] *Coy v Commissioner of Police* [2007] NZEmpC CC 23/07.
[10] At [14] and [15].

[40] So, considering the totality of the communications I conclude that Mr Hodson's 4 February 2019 letter does raise a personal grievance for Ms Young, that grievance being based on complaints about:

(a) The consultation process for the restructuring, specifically concerns about the accuracy and timeliness of information provided in respect of possible employment with Downer, possible redeployment within Spotless and how and when Ms Young's employment would come to an end; and

(b) Ms Young's complaints over the calculation of her redundancy payment and the calculation of her leave entitlements.

Was the personal grievance raised by Mr Hodson, raised within 90 days of the events complained of?

[41] Working backwards, a personal grievance raised on 4 February 2019 means the grievance can cover events complained of as giving rise to the grievance that occurred within 90 days preceding 4 February 2019; that is any events that occurred from 7 November 2018.

[42] The problem for Ms Young is that in terms of the personal grievance raised on 4 February 2019, the complaints about the treatment of her leave entitlements and her redundancy payment are covered by events occurring after 7 November 2018 but most of the events constituting the complaints about the consultation process for the restructuring occurred before 7 November 2018 and therefore the personal grievance covering these events was not raised in time.

[43] Ms Thomas, counsel for Ms Young, responded to this issue with two arguments that identify Ms Young's dismissal, occurring on 26 November 2018, as the event giving rise to Ms Young's personal grievance and therefore, the grievance was raised within the 90 day period. The two arguments are:

(a) The personal grievance as it relates to the consultation process for the restructuring is a course of conduct and the time for raising a grievance runs from the last event in that course of conduct, being the termination of Ms Young's employment; and

(b) The statement of problem could be amended to specify a personal grievance for unjustified dismissal as the employment relationship problem.

[44] I do not accept Ms Thomas's submission in respect of Ms Young's personal grievance being treated as an unjustified dismissal grievance. Whilst I can find a personal grievance or an employment relationship problem to be different from that which is set out in the statement of problem, there is still a requirement that the grievance that I investigate was raised as a grievance in accordance with s 114 of the Act. And, in terms of Ms Young having a grievance for unjustified dismissal that is not the case here. The 4 February 2019 letter deals with the consultation process but does not complain about Ms Young's dismissal for redundancy; in fact, it is implicit that Ms Young accepted the validity and justification of her dismissal as she accepted she was entitled to a redundancy payment, engaging with Spotless over the amount of that payment including the basis on which it was quantified.

[45] In terms of the course of conduct argument, Mr Towner, counsel for Spotless submitted that a process of consultation over restructuring was not a course of conduct; a course of conduct is the type of scenario that arises in a situation of ongoing behaviour that is not overtly obvious as being wrong or giving rise to harm, such as harassment, that builds up or escalates over time.

[46] I accept that a consultation process over restructuring is not akin to a course of conduct, such as harassment, for which the events can be said to occur over a period of time before they become sufficiently serious or sustained to form the basis of a complaint. Using harassment as an example, continuous behaviour may only become apparent as harassment over time as the behaviour is repeated or becomes sufficiently significant to have a detrimental effect. The key point here is it is a culmination of events or continuous behaviour

that then triggers the grievance as each earlier action is perhaps not sufficiently serious on its own to warrant a complaint or cause the employee to view the action as being wrong or harmful at the time. That is not the case here, Ms Young knew what she wanted and expected in terms of the information to be provided in the consultation process, evidenced by her own correspondence and she knew when she did not get what she requested or expected.

[47] However, a course of conduct is not confined to claims such as harassment, where the implications of the conduct is not known as events start to occur. A broader approach has been applied by the Employment Court in the analysis of whether separate events establish a course of conduct.

[48] In *Premier Events Group Limited v Beattie (No 3)*, Chief Judge Colgan stated:[11]

> [18] Also in *Waugh v Commissioner of Police*,[12] the Court accepted that there was a continuing cause of action in respect of actions taken by the employer against the plaintiff. This included actions which were four years apart. The Court commented, relying on the Court of Appeal decision in *Minister of Education v Bailey*,[13] that: "it is a question of fact and degree whether separate acts are so close in time and quality as to be properly described as constituting a continuous cause of action."[14]
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> [19] Similarly, in this case, it will be for Mr Regan to show that the events which occurred outside the 90 day period were connected to those within the period so as to establish a course of conduct which the Court can evaluate as the basis for a disadvantage grievance.
>
> [20] This approach coincides both with case law and with the practicalities of bringing a disadvantage grievance. It cannot be right that an employee who alleges he or she is suffering an on-going disadvantage must raise a personal grievance every 90 days while the claim is considered and dealt with by the employer or the employment institutions. 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 course of related conduct.

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[11] *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79 at [18].
[12] *Waugh v Commissioner of Police* [2003] 1 ERNZ 236.
[13] *Minister of Education v Bailey* [1992] 1 ERNZ 948.
[14] *Waugh v Commissioner of Police*, above n 12, at [97].

[49] Ms Young needs to show that the events complained of that fall outside the 90 day period are connected to events within the 90 day period so as to establish a course of conduct. It is a question of fact and degree as to whether the events are so close in time and quality to become a continuous course of conduct.

[50] I have already determined that Ms Young raised a personal grievance relating to the consultation process for the restructuring, specifically concerns about the accuracy and timeliness of information provided in respect of possible employment with Downer, possible redeployment within Spotless and how and when Ms Young's employment would come to an end. The events complained of are individual actions of failing to provide information in time (or even at all) and/or failing to provide accurate or truthful information about each of the stages of consultation, with these stages covering possible employment with Downer, possible redeployment with Spotless and then termination of employment for redundancy.

[51] There are a number of reasons why I accept these various actions constitute a continuous course of action. First, they are seen by the parties as part of a process of consultation. Second, each part of the process informs the next so for example it is not until Ms Young is not successful in obtaining employment with Downer that information about redeployment within Spotless becomes relevant. Third, the process is not complete until Ms Young's employment is terminated. Fourth, the events occur over a period of just under seven months (the process is commenced in terms of consultation by Spotless on 7 May 2018), being a relatively short period of time. Fifth, the provision of information at each stage are all of the same quality, the provision of information for Ms Young to consider in terms of the restructure and the implications for her ongoing employment with Spotless.

[52] I conclude that the process of consultation for the restructure was a continuous course of conduct that only ended when Ms Young's employment was terminated and therefore a personal grievance as it relates to Ms Young's complaint about the consultation process for the restructuring was raised within the requisite 90 day period.

Did Spotless consent to the grievance being raised outside of the 90 day period?

[53] As I have concluded that a personal grievance was raised in accordance with s 114 of the Act and I do not need to consider whether Spotless consented to a grievance being raised outside of the 90 day period. However, as I have already expressed factual findings that are relevant to resolving this question and because my decision on this provides an additional basis on which I find that the personal grievance raised for Ms Young does constitute an employment relationship problem that I can investigate I will briefly set out my answer to this question.

[54] In addition to setting out that a personal grievance must be raised within 90 days of the event giving rise to the grievance, s 114(1) of the Act also provides that an employer can consent to a grievance being raised after the 90 day period has expired.

[55] In some cases an employer can be deemed to have given consent to the late raising of a personal grievance by its actions even where it was not aware of the timeframe and/or that it was consenting. The question of whether an employer has consented to the late raising of a personal grievance is one of fact and degree. Consent requires more than just a passive standing by, there needs to be an affirmative action by the employer in respect of the late grievance. That action cannot just be participating in the grievance procedure particularly if participation is only attending mediation without any other engagement in the substance of the grievance raised.[15]

[56] In this case I am satisfied that Spotless's response to the personal grievance in the 4 February 2019 letter does amount to consent to the late raising of the grievance (if the events complained of that occurred outside of the 90 day period were not part of a continuous course of conduct). This is because Mr Rathod's letter is an affirmative action engaging in the substance of the grievance in an attempt to resolve it either through that correspondence or by

[15] *New Zealand Fisheries Ltd v Napier City Council* (1990) 1 NZ ConvC 342 at p 190; *Vulcan Steel Limited v Kirean Wonnocott* [2013] NZEmpC 15 at [45] – [46]; *Anna Ale v Kids At Home Limited* [15] [2015] NZEmpC 209 at [34].

subsequent mediation, which he offers to attend. This not merely standing by nor is it simply participating in the grievance procedure – it is active engagement in the substance seeking to resolve the grievance and therefore this is consent.

Conclusion

[57] Ms Young's personal grievance for unjustified action causing disadvantage as that relates to the process used by Spotless to carry out the restructuring of her role and her subsequent redundancy, was raised within the 90-day period or alternatively Spotless consented to the late raising of that grievance.

[58] Therefore, I have jurisdiction to proceed to investigate the employment relationship problem based on Ms Young's personal grievance.

Costs

[59] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority