

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 37  
3220059

BETWEEN                      BARRY CHURCH  
Applicant

AND                              CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority:      Geoff O’Sullivan

Representatives:            Allan Halse, advocate for the Applicant  
Nikki Farrell, counsel for the Respondent

Investigation Meeting:      3 October 2023 (in Wellington)  
17 November 2023 (by AVL)

Submissions Received:      3 October and 29 November 2023 from the Applicant  
23 November 2023 from the Respondent

Determination:                24 January 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Church is an employee of the respondent (Corrections). On 27 February 2023 Mr Church’s representative wrote to Corrections referring to Mr Church’s “personal grievance letter of 7 September 2022 ...”. The letter ended with Corrections asked to do the following:

1. (a) Back pay Barry special leave for the entire time since he went off work in September 2022 because his work environment was unsafe to the current date, and to continue to pay him special leave until a safe work environment can be guaranteed.
- (b) Reinstate any sick and annual leave Barry has used since September 2022 when he should have been on paid special leave.

2. Provide Hamilton Culturesafe with Barry's entire file, including records of the complaints that he has raised verbally with his supervisors and the outcome of each of those incident reports.
3. Fully investigate Barry's personal grievance of 7 September 2023 ..."

[2] On 28 March 2023 a statement of problem was filed on behalf of Mr Church stating that the problem Mr Church wished resolved is:

- 1.1 Corrections ... as quickly as practically possible, compliance with their obligations of good faith and the guiding principles of the Employment Relations Act 2000 in providing the applicant with the necessary safe working environment for him to be able to carry out his duties, and that he receives paid special leave until the grievances are resolved.
- 1.2 [Mr Church] suffered an unjustified disadvantage arising from the respondent's failure to provide a safe and healthy workplace and because of its repeated failure to address workplace hazards and their failure to act on his grievances concerning a lack of training and systems and procedures governing his personal safety.
- 1.3 [Mr Church] suffered an unjustified disadvantage arising from the respondent stopping his pay when he was forced to take sick leave when they failed to address his grievances.
- 1.4 Failing to provide a safe working environment is a breach of the Health and Safety at Work Act 2015. Under the Act an employee has the right to refuse to carry out work that is unsafe.

[3] Corrections responded in their statement in reply rejecting Mr Church's claims, saying it had always acted as a good employer in good faith and in a fair and reasonable manner towards Mr Church. It said further that Mr Church had not raised his personal grievance within the 90-day statutory time limit that is identified in s 114(1) of the Employment Relations Act 2000 ("the Act"). Corrections has declined to waive the statutory time limit within which Mr Church was required to raise his personal grievance.

[4] Corrections noted as at the date of the investigation meeting of 3 October 2023, Mr Church had not returned to the workplace, citing health issues.

[5] On 7 July 2023, a Case Management Conference was held between the parties and it was agreed the issue as to whether or not the personal grievances set out in the statement of problem were raised within 90 days, would be investigated as a preliminary issue. This determination accordingly deals only with the issue of whether or not Mr Church has raised his personal grievances within time.

**The Authority's investigation**

[6] The Authority heard evidence from Mr Church and from Corrections' two witnesses, Michelle Bussey, who is the lead service manager based in the Wellington District, and who in the time in question, oversaw the Wellington, Porirua, and Kapiti Community Probation Service Centres, and Jonathan Turner, who holds the position of Lead Service Manager overseeing Wellington, Kapiti, and Porirua Probation.

[7] The witnesses were cross-examined by each party's representative and, at the conclusion of the investigation meeting, both representatives filed helpful submissions. Mr Halse also filed opening submissions.

[8] As submitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made, but has not recorded all the evidence and submissions received.

**Background**

[9] Mr Church is employed as a community work supervisor at Kapiti Community Corrections. His employment relationship commenced on 4 July 2021. On 6 August 2022, at some point during the day Mr Church left his work because he was sick. He has not returned to work since.

[10] Whilst away from work, Mr Church provided medical certificates on a monthly basis, which ultimately deemed him unfit for work until 30 April 2023.

[11] On 31 August 2022, Corrections wrote to Mr Church asking to meet to discuss his health and wellbeing, and to discuss what support or assistance Corrections could provide him to enable a return to work (respondent's bundle 4.4). Mr Church responded on 1 September, stating he could not attend the meeting because of his health.

[12] On 7 September 2022, Mr Church emailed Corrections attaching a letter of complaint. The letter raised a number of concerns, including issues he was having with his phone not receiving emails, a complaint about the apparent selective deleting of a number of his contacts, a complaint about a conversation with Ms Bussey and what she said during an informal conversation.

[13] Mr Church took issue with a reply to his statement he was not very happy here, with Ms Bussey replying, well, if you don't like it, you know what you can do. Mr Church said he felt he was being bullied to leave, was being sent out on the job with little or no safety gear, had to deal with mental health offenders with no training or protection, which was unfair when in the office there were safety screens, panic buttons, and support staff. His email ended stating that the job was risky enough, the pay was low, but without feeling you were properly supported, it becomes overwhelming.

[14] In his covering email, Mr Church noted that he was "not well and off on leave for mental health reasons" and that "Jonathan Turner has asked to meet with me and I did reply that I did not feel able to due to health reasons". On 22 September, Mr Turner emailed Mr Church advising him he was taking six months parental leave and that Matthew Turton would be acting for him from 27 September. He advised Mr Church that it was important they received an update from him because he needed to know how best he (and, soon, Mr Turton) could support Mr Church's health and wellbeing so he could return to work. There was no response to that email.

[15] On 23 September 2022, Mr Church asked his manager, Mr Palmer, to inform Mr Turner that he did not wish to correspond with him or Ms Bussey, as they both formed part of the complaint in his letter of 7 September.

[16] On 27 September 2022, Mr Palmer responded by email acknowledging Mr Church's concerns that his health and wellbeing were paramount, and that it was important he took time to focus on his recovery. Mr Palmer advised that the appropriate time to address the concerns would be after Mr Church had been medically cleared to return to work.

[17] On 22 October 2022, Corrections had medical information from Mr Church's GP indicating that Mr Church presented in April 2022 with multiple severe physical symptoms, which required investigation. Nothing significantly physical had been found but Mr Church had described experiencing behaviour he found bullying towards him. The GP advised that Mr Church was anxious about returning to the workplace due to workplace issues and bullying.

[18] On 3 March 2022 to 3 May 2022, the Service Centre was closed as a result of Covid-19. Mr Church was paid 54 hours per fortnight over those two months.

[19] On 24 November 2022, Mr Turton invited Mr Church to a meeting scheduled for 5 December 2022 (respondent's bundle 4.7). In his letter, Mr Turton raised the GP's comment regarding bullying, saying:

There is nothing that I am aware of since acting in the role of service manager, that I've seen, to indicate you have been the recipient of bullying behaviour. Scott Palmer, Wellington District Manager, responded to concerns you raised in a letter dated 7 September 2022 to him by way of email on 27 September 2022, confirming that the focus was on your wellbeing and further, there was no retirement age at the Department. I understand your concern alleging interference by the administration officer with your work mobile in early 2022 was looked into and dealt with when you raised it with the service manager on 9 February 2022. On your return to the Service Centre, you and I can work together to agree a training programme specifically tailored to meet your requirements, including but not limited to our IT systems. The Department is committed to ensuring the safety and wellbeing of our people and our focus is about your health and wellbeing.

Mr Church did not reply to the letter.

[20] On 1 December 2022, Corrections received an email from Mr Halse advising he was representing Mr Church and that no meetings were to take place between Corrections and Mr Church (presumably without Mr Halse being present) and that Corrections were not to contact Mr Church because his doctor was concerned with his blood pressure being raised because of contact from Corrections.

[21] On 24 January 2023, Corrections advised Mr Halse that it proposed to meet with Mr Church to discuss his ongoing absence and to better understand what he required to enable him to return to his role. The parties met on 23 February 2023.

[22] On 27 February 2023, Mr Halse on behalf of Mr Church submitted a letter which he said was a supplementary personal grievance for unjustified disadvantage.

[23] Corrections replied on 6 March 2023, advising it did not agree that the letter constituted personal grievance. It also advised it would provide a further response within two or three weeks.

[24] On 27 March 2023, Mr Halse forwarded a statement of problem on behalf of Mr Church, which was filed with the Employment Relations Authority.

**The evidence***Mr Church*

[25] Before answering questions in respect of his written brief, Mr Church was asked questions regarding evidence filed by Mr Turner and Ms Bussey. At this point in time, neither Mr Turner nor Ms Bussey were available to be cross-examined. For that reason the investigation meeting reconvened on 17 November 2023.

[26] In respect of Mr Turner's evidence, Mr Church accepted paragraph 6 when he stated that Mr Church reported to work on 6 August 2022, but then departed citing illness. Mr Church accepted that he had no conversation with Mr Turner that day. So, although Mr Church said he couldn't remember the detail, he also accepted what Mr Turner deposed in paragraph 9 of his evidence, when he said he asked Mr Church if he would like to take two days off on annual leave to offset unpaid sick leave.

[27] Mr Church said that he raised a personal grievance with Mr Palmer by ringing him. He also said he spoke to his union, but it didn't support him and for this reason he sent his letter of 7 September 2022. Mr Church explained he didn't like the way he was spoken to by Ms Bussey. He claimed she had said to him that, if he didn't like it, he knew what he could do.

[28] He also said he had voiced concerned with Mr Turner regarding safety screens in vans, although he couldn't recall dates. He observed that he and others were required to take offenders out, and therefore they were the ones most at risk. He said that the only safety measure he had was his phone.

[29] Whilst giving evidence, Mr Church said he had made numerous complaints over the years and nothing had been done. When asked if he felt there was a difference between complaining about something and raising a personal grievance, he said he did not look at the matter technically and a complaint was the same as a grievance. He said, however, that if in his view Corrections had replied to his 7 September letter with constructive suggestions, he would have left it there.

[30] In giving his evidence, Mr Church agreed with Corrections that he had been too sick to engage with them regarding a return to work. He said he was suffering from high blood pressure and anxiety.

[31] When it was put to him that there were complaints and grievance procedures in place which he could have followed, he replied that he couldn't follow procedures because he needed computer knowledge, which he didn't have. He said he felt there was no respect for frontline staff who are the staff most at risk.

[32] In cross-examination, Mr Church was questioned regarding his statement he had raised the personal grievance with Mr Turner. He said he had done this in March or April of 2022. However, after further questioning, Mr Church said he did not do this at all, but rather he understood that his wife had raised them.

[33] Mr Church was also questioned regarding the 7 September letter and asked that if indeed he was raising grievances, why hadn't he said he was away on leave because of an unsafe work environment?

[34] In answer to this, Mr Church confirmed he was not away from work because it was an unsafe work environment; he was away from work because he was sick. He said it took numerous visits to his doctor to understand the triggers behind his illness. He then reiterated that, to him, any complaint was also a grievance. He confirmed he was making complaints about problems. Mr Church was questioned regarding the issues he said he had with his phone. Mr Church was adamant he was not disadvantaged by the phone issues, it was a complaint. He made it clear that in his mind the issues regarding his phone and the sudden loss of contacts from it, was a big issue for him.

[35] It was put to Mr Church that, after he had written his 7 September letter, Corrections came back asking him how he was. Mr Church replied that he classed that as harassment, and said he was suffering from mental illness.

[36] Mr Church was asked whether he was cleared to return to work. He replied, no. When asked how his evidence sat with the 7 September letter, he simply answered that mistakes were made.

[37] In re-examination, Mr Church explained his claims of personal grievances, that he felt Corrections did not care about him. He said they deserved to pay him for mental stress they were putting him through. He said his hourly rate did not properly remunerate him for 11 years of facing abuse from offenders, and this reflected his view that Corrections did not value their frontline staff.

[38] As indicated above, the investigation meeting reconvened on 17 November 2013, where the parties including Ms Bussey and Mr Turner, appeared by AVL. Both Mr Turner and Ms Bussey were adamant that no personal grievances had been raised that they were aware of. Mr Halse put to them, on behalf of Mr Church, that the 7 September 2022 letter raised a personal grievance. Both Corrections' witnesses gave evidence they did not believe the letter was a personal grievance, but rather it was a letter raising concerns.

### **Ms Bussey and Mr Turner**

[39] Both Ms Bussey and Mr Turner said repeatedly that they were unaware of Mr Church raising personal grievances with anyone else, although rightly conceded that was possible, but that if it had happened, the grievances hadn't been escalated. Ms Bussey said that, generally, if a personal grievance had been filed, she would be advised by the manager or directly by the person raising a grievance. This, however, had not occurred in this case and she had never been advised that a grievance had been raised.

[40] Mr Turner confirmed in his evidence that Mr Church had raised issues pertaining to his phone, however, he said that that was the main matter concerning Mr Church, and that in reality Mr Church did not want Mr Turner to address any other concerns. He said he did not take the complaint regarding the phone as a personal grievance. Indeed, Mr Church also confirmed that fact. Mr Turner said issues raised by Mr Church of course would be addressed, as was the case with issues raised in his 7 September letter. However, as he had not returned to work, it was impossible to address those concerns in any meaningful way. He reiterated, however, that from his perspective, no personal grievances had been raised.

### **Discussion and analysis**

[41] There is no evidence before the Authority that personal grievances were raised with Corrections through the proper process by Mr Church. Mr Church, however, says that he raised personal grievances in his letter of 7 September 2022. If grievances were raised in the letter, then of course Mr Church would be in time. There is no doubt that through his representative, Mr Church raised personal grievances on 27 February 2023, but if this was the first time the grievance has been raised, then they would be well outside the 90-day period provided for in the Employment Relations Act 2000. The

letter of 27 February refers to the 7 September 2022 letter as a personal grievance letter. Whether or not the 7 September letter properly raises the personal grievances referred to in the statement of problem needs to be carefully considered.

[42] The Act provides that a grievance is raised with an employer, as soon as an employee has made or taken reasonable steps to make the employer or representative of the employer aware that the employee alleges a personal grievance, that the employee wants the employer to address. The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there has 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.

[43] 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. 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.<sup>1</sup>

[44] As the Court of Appeal noted, "... however, not every criticism of an employer or the culture within a workplace, will obviously constitute a personal grievance ..." <sup>2</sup>

[45] The 7 September letter raised a number of issues as set out below.

#### *Mobile phone*

[46] The first issue raised in the 7 September letter related to Mr Church's phone. His work issued phone was not receiving emails and Mr Church says he could not

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<sup>1</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132

<sup>2</sup> *Shaw v Bay of Plenty District Health Board* [2022] NZCA 24.

access pay sheets. He was advised to hand his phone in so it could be checked. Mr Church says he handed his phone in together with his password so this could be attended to. Mr Church then became very ill and was away for some two weeks. When he received his phone back, it was still not receiving emails and Mr Church believed that a number of his contacts had been selectively deleted. He says he inserted family into his contact list by first name only, so realised someone had read his texts to see who was who. Mr Church approached Mr Turner and told him of his concerns. He said he was very upset that someone had gone through his phone without an explanation. Mr Turner then spoke to the person involved and passed on that any issue must be a technical fault. Mr Church found that unbelievable, to which the response was, "If you don't like it, you know what you can do". Mr Church said he presumed the meaning was that he should retire, but it sounded like a warning. Mr Turner, however, states that what would be meant is that Mr Church could go through the complaints process. Mr Church's phone issues are not mentioned in the Statement of Problem.

### *Bullying*

[47] Some two weeks after the phone incident, Mr Church met Ms Bussey. In response to her, "Good morning, Barry, how are you?" he replied, "I'm not very happy here". Mr Church says she then said, "Well, if you don't like it, you know what you can do". Mr Church says that this felt like they wanted to get rid of them. He says this was the second time since he had reached retirement age that this had been brought up by him to management. His 9 September letter says that it felt to him like he was being bullied to leave.

[48] Mr Church then complains that as a community work supervisor, he is sent out on jobs with little or no safety gear and expected to take out offenders on his own. He also says he deals with mental health offenders with no training. He says he has no protection when he leaves the centre, and the only backup is a phone call. He says that a colleague has had his back and has been his only support but cannot be expected to do much when he is a phone call away. The bullying allegation related to what Ms Bussey may or may not have said is not listed as one of the problems Mr Church wished the Authority to resolve.

*Failure to provide a safe and healthy workplace*

[49] Mr Church comments that it seems unfair that in the office there are safety screens and panic buttons that can support staff, whilst community work supervisors such as himself have to fend for themselves. He finishes by saying that the job is risky enough, the pay is low, but without feeling properly supported by management, it becomes overwhelming.

[50] Whilst paragraph 1.2 of the Statement of Problem discusses a failure by Corrections to provide a safety and healthy workplace and a lack of training, I do not consider this grievance was raised in the 7 September letter. Mr Church's statements appear to be observations and concerns but perhaps not personal grievances. Mr Church is speaking generally and on behalf of all community work supervisors. And he talks about a lack of IT training over the years, saying that if he had been given IT training he would be able to report safety issues over the tracker.

**Conclusions**

[51] There is no doubt Mr Church signalled concerns to Corrections. Equally, however, Corrections moved to deal with such concerns by attempting to arrange a series of meetings with Mr Church, which for reasons pertaining to his health and wellbeing, have yet to occur. As indicated above, this is because Mr Church has not been available due to illness.

[52] The concerns raised for Mr Church in his 7 September letter are general in nature. For instance, in the concerns he raised as regarding safety, he is not specific about when, where or how an issue may have arisen which would give grounds for a grievance. They seem to be general and ongoing complaints and indeed, when giving his evidence, Mr Church commented that over the years, he had often raised complaints and sometimes something was done about them, and other times nothing was done about them, and on some occasions Mr Church felt that by raising the complaint he had made his point.

[53] In this case, it is difficult to see how Corrections could have been aware of any specific grievance. Obviously, it would be aware that Mr Church had issues which would need to be looked into and clarified. This, however, is not the same as raising a grievance. Indeed, one can compare the 7 September letter with the more definite language contained in the letter of 27 February 2023 written on his behalf, that also,

however, confirms, “Barry has been reporting his concerns to his supervisors (he’s had many) for years and no action has been taken to support him”.

[54] I am further influenced by the fact that Mr Church is then away from work for some significant period of time. Not until well after the expiry of the 90-day time limit within which to raise a personal grievance, did Mr Church say he was away from work because of Corrections’ actions or inactions. Indeed, he is very clear he is away from work because of his health status.

[55] The 7 September letter does not satisfy the requirements of s 114(2) of the Act. Mr Church has not made Corrections aware that he was alleging personal grievances, which he wanted Corrections to address. The concerns he raised in his letter do need to be addressed and that it does outline concerns that Mr Church has. He, however, has not properly raised a personal grievance.

[56] For the sake of completeness, when giving evidence, Mr Church did say that should it be found he had not properly raised a personal grievance, then exceptional circumstances existed. However, he had not claimed this in his statement of problem, and nor did he provide any evidence as to why exceptional circumstances may have existed.

[57] Likewise, in his evidence, Mr Church claimed he suffered an unjustified disadvantage arising from the fact Corrections has stopped his pay whilst he was on sick leave. The basis of such a claim is not explained. Mr Church was not at work because he has suffered a significant health setback. The 7 September letter does not advise Corrections that Mr Church wishes to raise an unjustified disadvantage claim arising from Corrections’ failure to provide a safe and healthy workplace and also arising from a repeated failure to address workplace hazards and failure to act on grievances concerning a lack of training and support.

[58] The letter does not advise Corrections that Mr Church is claiming an unjustified disadvantage arising from the respondent stopping his pay as a result of him being forced to take sick leave, which he claims was as a result of Corrections’ failure to address his earlier grievances.

**Costs**

[59] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[60] If they are not able to do so and an Authority determination on costs is needed Mr Church may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Corrections would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[61] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>3</sup>

Geoff O'Sullivan  
Member of the Employment Relations Authority

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<sup>3</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).