

Attention is drawn to the order prohibiting publication of certain information in this Determination (refer paragraph 1)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 559
3232259

BETWEEN CPD
Applicant

AND THE CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT
Respondent

Member of Authority: Andrew Gane

Representatives: The Applicant in person
Sarah Lim and Alex Morimoto counsel for
the Respondent

Investigation Meeting 2 July 2024

Submissions received and other material 25 July 2024 from the Applicant
5 August 2024 from the Respondent

Date: 17 September 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Non-publication order

[1] At a case management conference on 8 May 2024, I made an interim non-publication order over any information regarding CPD's health. CPD has lodged a further written application to have their identity remain confidential. The Chief Executive of the Ministry for Social Development (MSD) opposes CPD's application for a non-publication order. After receiving submissions from CPD and MSD and reviewing the evidence before me I am satisfied it is appropriate to make an interim order under clause 10(1) of the Second Schedule of the Employment Relations Act 2000 (the Act) that any information identifying the applicant

is prohibited from publication until the order is revoked or varied by further orders of the Authority. The interim order will be reviewed at the substantive hearing.

[2] I order that CPD will be identified only by randomised letters (CPD) which have no correlation to CPD's actual name and any information referencing CPD's name or identifying details is prohibited from publication.

Employment relationship problem

[3] MSD is an agency of the New Zealand Government that provides a range of community services, including income, employment and housing support as well as health and disability assistance. MSD's employees work regularly with vulnerable clients who may need a range of support services.

[4] CPD was employed by MSD in September 2020. CPD has made a number of claims against MSD for unjustifiable disadvantage.

[5] A preliminary issue arises as to whether CPD raised their personal grievances within the 90-day period under s 114 of the Act.

[6] CPD claims they first raised their disadvantage claims with MSD in January 2022 in discussions and emails with MSD management. CPD said they formally raised their personal grievances by letter dated 20 February 2023, but does not rely on this date. CPD says that the content of emails, discussions and the letter were sufficient to raise the personal grievances at earlier dates.

[7] MSD says that CPD did not raise many of their personal grievance claims within the statutory time frame. MSD states CPD has complained about various aspects of their employment conditions and MSD's operations throughout their employment. However, none of those complaints appear to have been made with the genuine intention of discussing and resolving the issues in a constructive manner. MSD submits it engaged with CPD and provided an explanation for its actions and took steps to address CPD's concerns.

[8] MSD accepts that CPD did raise a personal grievance for an unjustifiable disadvantage regarding a final warning issued to CPD after a disciplinary process, however, MSD does not consent to CPD raising any other personal grievance out of time and denies it impliedly

consented to any grievances being raised out of time. MSD also said there are no exceptional circumstances justifying the delay by CPD in raising a personal grievance.

The Authority's Investigation

[9] For my investigation, an affidavit was lodged in the Authority by CPD in support of their application. On behalf of MSD, an affidavit from the human resources manager was lodged in the Authority.

[10] At the investigation meeting the witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions. At the completion of the investigation meeting the parties' representatives spoke to their submissions. After the investigation meeting the parties lodged further submissions in regard to CPD's application for a non-publication order.

[11] As permitted by s 174E of the Act this preliminary determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

Legal Principles

[12] Section 114(1) of the Act requires an employee wishing to raise a personal grievance to do so within 90 days of the date the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[13] What is required in terms of the raising of a personal grievance is dealt with at s 114(2) of the Act, which provides as follows:

(2) 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.

[14] The key principles for establishing if a communication, or series of communications, has/have sufficient information to make the employer aware that the employee is alleging a personal grievance are set out in various court decisions; in summary: ¹

- (a) The personal grievance process is informal and accessible.
- (b) Personal grievances can be raised in writing or orally and by a series of communications. There is no particular formula of words to be used.
- (c) The communications, in whatever form, must allege a complaint that is in the nature of a personal grievance - the type of personal grievance is not required to be specified nor does the complaint even need to be labelled a personal grievance.
- (d) The communications must indicate that the employee wants the employer to respond to the complaint, although the employee does not need to identify its preferred process for dealing with the complaint in the first instance, nor does it need to specify the type of relief sought.
- (e) The communications must convey the substance of the complaint with sufficient information so that the employer knows what it is that the employee expects it to respond to. The employer must be able to respond by addressing the merits of the complaint with a view to resolving it.
- (f) Generally, it is insufficient for an employee to make a bland statement that it believes it has a personal grievance, even naming the statutory type, without specifying more. However, it may be that identifying an unjustifiable dismissal would suffice if it is clear that in identifying the unjustifiable dismissal grievance the employee is complaining about the dismissal by the employer.

[15] In *Creedy v Commissioner of Police*, Chief Judge Colgan held that the personal grievance procedures in the Act are:

“...aimed not at preserving rights to litigate past or current injustices at some indefinite future time at which an employee may elect to revive them. Rather, the procedures exist to have alleged injustices identified and addressed quickly, and initially at least, informally, and directly between employer and employee ...”²

¹ *Creedy v Commissioner of Police* [2006] ERNZ 517 (EmpC) at [36]; *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139; *Clark v Nelson Marlborough Institute of Technology* (2008) 5 NZELR 628 (EmpC) at [37]; *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112; *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132; and *Disabilities Resource Centre v Sonia Moana Maxwell* [2021] NZEmpC 14.

² *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 at [15].

[16] In this case I need to consider if CPD identified their dissatisfaction with MSD's actions with sufficient information that MSD could engage and respond; can it be said that MSD knew what to respond to such that any of CPD's alleged injustices could be identified and addressed?

Issues

[17] At the completion of hearing evidence at the investigation meeting CPD advised that they were no longer pursuing a number of claims and reduced the number of active claims to five.

[18] The issue for determination is whether CPD raised a personal grievance for unjustifiable disadvantage against MSD in accordance with s 114(1) of the Act in relation to:

- (a) Not providing CPD with additional support in early 2022?
- (b) Declining CPD's numerous requests to work from home?
- (c) The implementation of a rehabilitation plan?
- (d) Declining requests to work overtime?
- (e) The relocation of work from CPD to other employees?

Background

[19] CPD began their employment with MSD in September 2020. At the end of 2021 CPD was appointed into a defined role.

[20] CPD alleges that since early 2022 they had raised a number of personal grievances both formally and informally, concerning unjustified disadvantages they experienced in the workplace.

[21] MSD contends that throughout 2022 CPD was frequently absent from work on sick leave or annual holidays and had some unexplained absences. MSD stated it supported CPD by treating some of the absences as annual holidays (because CPD had exhausted paid sick leave entitlement) or as unpaid sick leave and providing access to EAP services. However, the level of their absence from work was becoming unsustainable.

[22] MSD stated it engaged with CPD when they raised issues, addressed the issues with CPD at the time and believed the matters had been resolved.

[23] CPD submitted that although they were not particularly satisfied with the responses from MSD, they had chosen not to continue with pursuing some matters at the time as they were trying to improve their attendance and avoid taking on more conflict and stress.

[24] On 20 February 2023 CPD raised a personal grievance by email concerning unjustified disadvantage. CPD included previous concerns relating to providing additional resource in the office, requests to work from home, the implementation of the rehabilitation plan and the declining of requests to work overtime in January 2022. CPD then went on to explain what CPD was requesting and how CPD wanted the issue to be resolved.

Did CPD raise a personal grievance in accordance with s 114(1) of the Act?

(a) Not providing CPD with additional support in early 2022

[25] Due to COVID-19 some MSD employees worked from home from late 2021 to early 2022. In November 2021 CPD volunteered to return to work from the office.

[26] On 10 January 2022, CPD suggested that they work from home so that CPD could manage their workload and the transition with their medications and advised they would greatly appreciate it if MSD had more staff present in the office to help manage the workload.

[27] On 10 January 2022, CPD's manager thanked CPD for their work and explained the impact of COVID-19 on the in-person resources available in the office.

[28] On 24 February 2022 CPD asked MSD to provide them with additional paid sick leave, because they had exhausted their sick leave entitlements and mentioned the need for additional support in the office to support that request. On 27 February 2022 CPD emailed MSD management repeating the same issues.

[29] In June 2022 CPD again raised the issue of the office having additional support when CPD was requesting paid discretionary leave for their absence from work.

[30] MSD submitted CPD only brought up the issue of needing additional support in the office when CPD requested to work from home or additional paid leave, due to their health conditions. CPD did not explain why they were dissatisfied with the explanations received from MSD in respect of the same issues. CPD did not communicate to MSD sufficiently to put MSD on notice that they were raising a personal grievance.

[31] While CPD was not particularly satisfied with MSD's response to the concerns they had raised, CPD submitted that that they had chosen not to continue with pursuing the matter at the time, as they were trying to improve their attendance and avoid taking on more conflict and stress.

[32] It was only in CPD's email of 20 February 2023, raising a personal grievance for unjustified disadvantage, that CPD included their previous concern for additional resource in the office in January and June 2022 as an issue and went onto explain what CPD was requesting and how CPD wanted the issue to be resolved.

[33] I am not convinced that CPD's earlier communications raised a personal grievance within the meaning of the Act. I am satisfied that MSD's response to CPD's concerns were reasonable and note that CPD decided not to pursue the matter at the time.

[34] I find that there was insufficient evidence to show CPD had raised this claim as a personal grievance within the 90-day time period. CPD raised this grievance on 20 February 2023. Given the alleged actions of the employer were in January 2022 and June 2022, each claim is outside the required 90-day timeframe.

(b) Declining CPD's numerous requests to work from home

[35] During February 2022, CPD made a number of requests to work from home based on stress, health conditions and medications. On 7 January 2022 CPD submitted a work from home request for two weeks as CPD was dealing with health issues. MSD declined the request to work from home on the basis that CPD should not be working from home if CPD was unwell.

[36] A further request to work from home on 10 January 2022 was also declined on the basis that CPD should not be working from home if CPD was unwell, but should have been on sick leave.

[37] MSD stated it supported CPD by treating some of their absences as annual holidays (because CPD had exhausted paid sick leave entitlement) or as unpaid sick leave and providing access to EAP services.

[38] MSD allege that CPD's behaviour was getting more unpredictable at this time. CPD would say they needed to work from home because of their medical condition and the noise in the office and CPD would uplift their work equipment and try to leave the office without giving

notice. MSD alleged the level of CPD's absences was putting a strain on MSD's operations and was becoming unsustainable. CPD would send their manager a late text message notifying him that CPD would not be at work or would not contact their manager at all to notify MSD they had left for the day.

[39] MSD submits CPD's manager raised these concerns with CPD on 23 February 2022. In CPD's response on 24 February 2022, they stated they needed to work from home and receive additional paid sick leave.

[40] On 15 March 2022, MSD met with CPD. MSD explained the reasons why it could not allow CPD to work from home due to CPD's health issues, and offered various suggestions for support, including part-time hours, leave without pay, and reducing CPD's workload and duties.

[41] CPD again submitted that they had chosen not to continue with pursuing the matter at the time as they were trying to improve their attendance and avoid taking on more conflict and stress. I am not convinced CPD's request to work from home constituted the raising of a personal grievance within the meaning of the Act. I am also satisfied that MSD's response to CPD's concerns were reasonable and note that CPD decided not to pursue the matter at the time.

[42] I find that although CPD had requested to work from home there was insufficient evidence to show CPD had raised their dissatisfaction with the MSD response such that they had raised a complaint or injustice that MSD could identify and respond to within the 90-day time period. Given these issues related to actions in January, February and March 2022, and the personal grievance was not raised until 20 February 2023, each claim is outside the required 90-day timeframe.

(c) The implementation of a rehabilitation plan

[43] On 15 March 2022 when MSD met with CPD to discuss CPD's request to work from home, CPD's manager suggested that reducing CPD's hours or workload may be needed to support CPD. On 17 May 2022, CPD received an email from their manager about a potential rehabilitation/return-to-work plan.

[44] On 25 May 2022, CPD met with their manager and in accordance with the medical certificate, their manager suggested returning to work on a reduced hourly basis and without working any additional hours unless agreed.

[45] When the parties met on 22 August 2022, CPD was confident that they could work full-time hours and signed the rehabilitation plan on 26 May 2022. Again, in regard to this matter CPD submitted that that they had chosen not to follow up the matter at the time. I am not persuaded CPD's interactions with MSD amounted to the raising of a personal grievance within the meaning of the Act. As CPD signed the rehabilitation plan and its implementation at the time, MSD would not have known of CPD's complaint or injustice to be able to respond.

[46] CPD then sought to raise the implementation of the rehabilitation plan as a personal grievance in their email of 20 February 2023, some six months later. I find that as CPD had agreed to the rehabilitation plan in August 2022, the claim is outside the required 90-day timeframe.

(d) Declining requests to work overtime

[47] When CPD met with MSD on 22 August 2022, CPD raised issues about being able to work overtime. The request was integrated with their request to work from home. At the same time CPD was also claiming that they were stressed as a result of their workload. Again, these requests were declined on the basis of CPD's health issues that CPD should not be working overtime from home if they should have been on sick leave.

[48] Essentially what happened here was, CPD requested to work overtime and MSD declined that request. CPD's involvement in this discussion does not, on an objective basis, raise a personal grievance for unjustified disadvantage based on a complaint about MSD's refusal to grant the request to work overtime. CPD submitted that that they had chosen not to follow up on the matter at the time.

[49] CPD raised the issue of not being able to work overtime as an unjustified disadvantage personal grievance in their email of 20 February 2023, some six months after they requested to work overtime.

[50] I find there was insufficient evidence to show CPD had raised this claim as a personal grievance within the 90-day time period. While CPD was generally aggrieved by the concerns

they raised with MSD I am not convinced that the steps CPD took legally constituted the raising of a personal grievance within the meaning of the Act.

(e) The re-allocation of work from CPD to another employee

[51] On 1 June 2022 CPD's manager informed CPD that MSD was removing CPD from their defined role due to their unreliability.

[52] MSD stated this was not a restructure or a demotion, and it did not result in any changes to CPD's employment conditions. This was a re-allocation of work files to help alleviate CPD's workload (as requested), which was within their manager's prerogative. MSD claims this action resulted in no disadvantage to CPD's employment.

[53] CPD claims that they raised this as a personal grievance in an email on 7 June 2022. CPD repeated the same concerns on 21 July 2022, raising concerns about the way they were removed from their position on 1 June 2022 and suggesting that they felt this was an unjustifiable disciplinary action.

[54] On 29 July 2022, MSD responded to CPD's concerns and assured CPD that this was to support CPD's health and well-being and did not amount to any performance management or disciplinary action.

[55] In response CPD raised the issue of re-allocation of their duties again on 17 August 2022 and went onto explain what they were requesting and how they wanted the issue to be resolved. CPD states the impact of this unjustified disadvantage was damage to their reputation.

[56] I find that CPD did take reasonable steps to make MSD aware that they alleged a personal grievance in regard to MSD unjustifiably removing CPD from their role and how CPD wanted MSD to address the issue.

[57] I find there was sufficient evidence to show CPD raised this claim as a personal grievance within the 90-day time period.

Conclusion

[58] For the reasons stated above I find CPD failed to raise the first four grievance claims (a-d) in time and in accordance with s 114 of the Act. MSD does not consent to the personal grievances being raised out of time. These personal grievance claims cannot proceed.

Outcome

[59] I find CPD raised their fifth personal grievance claim (e) for unjustified disadvantage by the re-allocation of work in time, in accordance with s 114 of the Act. CPD can proceed with this matter as a substantive claim.

Next steps

[60] The Authority will convene a case management conference to set timetable directions for the investigation of CPD's outstanding claims.

Costs

[61] Costs are reserved pending the outcome of the substantive investigation of CPD's grievance claims.

Andrew Gane
Member of the Employment Relations Authority