IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA AUCKLAND 151
5372563

	BETWEEN	ANNE CARNEY Applicant
	AND	MAKANA NORTHLAND LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Liz Lambert, Advocate for Applicant Matthew McGoldrick, Counsel for Respondent
Investigation Meeting:	19 March 2013 at Whangarei
Submissions received:	19 March from Applicant and from Respondent
Determination:	30 April 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Anne Carney, claims non-payment of her notice period by the Respondent, Makana Northland Limited (Makana), following the termination of her employment on the grounds of incapacity on 26 November 2011.

[2] Makana claims that Ms Carney was provided with notice, however denies that she was entitled to payment of notice on the basis that she could not have worked at any time during the period of her notice.

[3] Ms Carney is also claiming that Makana's interactions with ACC constituted a disadvantage in employment.

[4] Makana claims that its contact with ACC did not disadvantage Ms Carney in her employment. Makana further claims that Ms Carney did not raise her personal

grievance of unjustifiable disadvantage within the 90 day statutory period specified in s 114(1) of the Employment Relations Act 2000 (the Act) and it does not consent to the raising of a personal grievance after the 90 day statutory period.

[5] Makana further claim that if it is determined that Ms Carney did raise the personal grievance claim of unjustifiable disadvantage within the 90 day statutory period, or that Makana consented to the late raising thereof, the Authority does not have the jurisdiction to determine Ms Carney's claim on the basis that Ms Carney's contact with ACC in asserting its own rights and complying with its obligations is a matter within the scope of the Accident Compensation Act 2001.

Issues

[6] The issues for determination are whether or not:

- Ms Carney is entitled to payment of the notice period set out in clause 12 of her individual employment agreement (the Employment Agreement)

- Ms Carney raised the personal grievance of unjustifiable disadvantage within the 90 day statutory period specified in s 114(1) of the Act.

  If it is determined that Ms Carney did not raise the personal grievance within the 90 day statutory period, whether or not:

- Makana consented to the raising of the personal grievance out of time

  If it is determined that Makana did so consent, whether or not:

- The Authority have the jurisdiction to determine Ms Carney's claim

  If it determined that the Authority do have the jurisdiction, whether or not:

- Makana's interactions with ACC unjustifiably disadvantaged Ms Carney

Background Facts

[7] Makana is a boutique chocolate maker operating in two locations, Kerikeri and Blenheim. The numbers employed vary between 8 to 19 employees at Kerikeri and 8 to 17 employees at Blenheim, depending on the season.

[8] Ms Carney commenced employment with the previous owners of Makana on or about April 2004 and her employment had been transferred upon the business being purchased by Mr Brian Devlin and his wife Ms Carole Flowers in 2006. Ms Carney had been issued with an individual employment agreement (the Employment Agreement) upon her employment being transferred, which she had signed on 26 January 2006.

[9] As the Kitchen Manager for the Makana Kerikeri branch, Ms Carney had a mixture of supervisory and production duties. The supervisory duties included directing and supervising all the employees who worked in the kitchen, stock ordering, recruitment and training. The production duties involved the manufacture of the chocolates made in the kitchen.

[10] On 9 August 2011 Ms Carney had experienced discomfort in her left wrist and had contracted Ms Alicia Smith, another employee, on 10 August 2011 to explain that she would not be at work that day due to a sore wrist, and that she would be visiting her doctor. This information was subsequently passed on to Mr Devlin.

[11] On 11 August Ms Carney's doctor, Dr Eloise Caswell, had diagnosed Ms Carney as suffering from Carpal Tunnel Syndrome (CTS) and issued a medical certificate stating that Ms Carney would be fit to return to work on 25 August 2011.

[12] Mr Devlin said that it had been unclear from the medical certificate whether or not Ms Carney had been able to undertake light duties, therefore he had written to Dr Caswell that same day, 11 August 2011, to ask if light duties might be an option for her. Mr Devlin explained that at that time of the year when the production of chocolate was less than in the period leading up to Christmas, the light duties available would consist of supervision, training, paperwork and planning.

[13] Mr Devlin said that he had not received a direct response to this letter; instead he had received by facsimile an ACC Medical Certificate ACC18 which stated that

Ms Carney was unable to resume any duties at work from 12 August 2011 for 7 days. Mr Devlin said that the ACC Medical Certificate ACC18 also stated that Dr Caswell would reassess Ms Carney in the next week, and that Ms Carney was unable to undertake any duties.

[14] As Makana had not heard from Ms Carney between 18 and 26 August 2011, Ms Flowers had telephoned Ms Carney to enquire how she was feeling. Ms Flowers said Ms Carney had informed her that she was due to see an Orthopaedic Surgeon that week, that her wrist had been in a splint, and that she would be seeing her doctor that day.

[15] Mr Devlin said that on 19 August 2011 Makana received a medical certificate from Dr Caswell stating that Ms Carney was unable to resume duties from 19 August 2011 for 7 days. The medical certificate also stated that Ms Carney was awaiting an appointment with an Orthopaedic Surgeon.

[16] A further medical certificate for Ms Carney had been provided to Makana stating that she would be unable to resume any duties at work for 7 days from 25 August 2011.

[17] Mr Devlin said that on 1 September 2011 Makana received an ACC 18 Medical Certificate from the Orthopaedic Surgeon stating that Ms Carney would be unable to resume duties for 28 days from 1 September 2011, and later that same day Mr Devlin said Ms Carney had telephoned to advise that she would be having an operation.

[18] Ms Carney said that the Orthopaedic Surgeon had advised her that if approved by ACC, the surgery could take place within two weeks, and the recovery time would be 4 to 6 weeks.

Employer's Questionnaire

[19] Mr Devlin said that on 21 September 2011 he had received a facsimile from ACC notifying Makana that Ms Carney had made a work related personal injury claim. Attached to the form had been an Employer's Questionnaire which ACC requested Makana to complete.

[20] Mr Devlin said he had completed the Employer's Questionnaire and faxed this to Ms Danielle Reese, the ACC Case Manager responsible for administering Ms Carney's claim, on 26 September 2011.

[21] Mr Devlin said that in the Employer's Questionnaire he had provided a broad overview of Ms Carney's tasks and had stated that he did not agree that Ms Carney's work had caused the injury, the reason being that Ms Carney's duties involved a: "*very low level of physical work".*

[22] On 29 September 2011 Mr Devlin said he had telephoned Ms Carney and asked her if she had been prepared to return to work to undertake light duties, however Ms Carney had explained that she was unable to do so due to pain she was experiencing. Mr Devlin said they had discussed the proposed surgery and he had asked if she had a date for this, and Ms Carney had informed him that ACC were to make a decision later that day.

[23] Mr Devlin said that on 3 October 2011 he had received a telephone call from Ms Reese who informed him that Ms Carney's ACC claim had been rejected, and he had subsequently received a letter from ACC confirming this.

[24] That same day, 3 October 2011, Ms Flowers said she had received an email from Ms Carney stating that ACC had refused to fund the surgery and that Dr Caswell had placed her on the public waiting list for surgery. In the email, Ms Carney, whose entitlement to paid sick leave had expired, also requested payment of her annual leave entitlement.

[25] On 4 October 2011 Mr Devlin said Ms Carney had forwarded to Makana an email from Ms Reese in which Ms Reese stated that she had forwarded Ms Carney's claim to the ACC Branch Manager for a second opinion and the second opinion had confirmed the ACC decline decision. Ms Reese had also advised that ACC would be seeking to arrange a Worksite Assessment (WSA) at the Makana premises.

[26] On 7 October 2011 Ms Flowers said she had received a telephone call from Ms Reese, who had initially asked to speak with Mr Devlin, but he had not been available. During the conversation Ms Flowers said that Ms Reese had informed her that ACC considered Ms Carney to have a gradual onset condition, and she had asked Ms Reese how this might affect Makana's ACC experience rating.

[27] Mr Devlin said that he had, as requested, returned Ms Reese's telephone call, and she had asked him if Makana were prepared to have a WSA in relation to Ms Carney's claim. Mr Devlin explained that he had understood this to involve having one or more ACC representatives spending a day in the Makana kitchen observing the chocolate production operation. Mr Devlin said he had also believed that this would involve those employees working in the kitchen having to explain the various operations.

[28] Mr Devlin said he had asked Ms Reese what would happen if he did not agree to allow the WSA to take place, and she had informed him that he was not legally obliged to agree to the WSA, and in that eventuality Ms Carney might choose to lodge a formal review application which would be handled by an independent advisor.

[29] On that basis Mr Devlin said he had not agreed to the WSA taking place as the lead-up period to Christmas was a particularly busy time for Makana and he had been reluctant to allow the disruption in the workplace which he had believed would ensue if he agreed to the WSA.

[30] Ms Carney said that she had been informed by Ms Reese on 7 October 2011 that Mr Devlin had not agreed to allow the WSA to take place and she had been offered a referral to an Occupational Physician.

[31] On 14 October 2011 Mr Devlin said Ms Carney had sent Makana an email informing it that she did not have a date for surgery, and that she would provide a letter requesting that her 4 weeks' annual leave entitlement be paid to her. This had been confirmed by letter the following day. Ms Carney had been paid the 4 weeks' annual leave entitlement on 20 October 2011.

[32] On 26 October 2011 Mr Devlin telephoned Ms Carney asking for an update on the situation as her medical certificate had been close to the expiry date.

[33] Mr Devlin had also written a letter to Ms Carney that day, requesting a meeting with her and a support person to take place on 31 October 2011 to explore whether or not there was a realistic expectation that Ms Carney could return to her full time duties and when this might be. Mr Devlin had also stated in the letter that:

"*There is a possibility that your employment may be terminated as a result of this process".*

4 November 2011 Meeting

[34] As the proposed date of the meeting coincided with the date of her assessment with the Occupational Physician, Ms Carney had requested that the meeting be postponed, and it had therefore taken place on 4 November 2011.

[35] Ms Carney said that prior to the meeting she had had a discussion with Dr Caswell on 4 November 2011 concerning a return to work. Ms Carney said Dr Caswell had advised that she could give her a steroid injection which might alleviate the pain, but which would aggravate the problem and so Ms Carney would only be able to undertake light duties.

[36] Ms Flowers said she had sent an email to Ms Carney on 27 October requesting that she bring the report from the Occupational Physician, together with all reports and certificates, to the scheduled meeting. Ms Carney said she had been unable to provide the requested information at the 4 November 2011 meeting as this had not been available to her.

[37] Ms Carney said she had, accompanied by a support person, Ms Sophie Bliss, attended the meeting on 4 November 2011 with Mr Devlin and Ms Flowers. Mr Devlin had subsequently written to Ms Carney confirming what had been discussed at the meeting on 4 November 2011.

[38] Mr Devlin stated in the letter dated 4 November 2011 that Ms Carney had confirmed that she had attended an occupational medical assessment on 31 October 2011 and that ACC expected the results on 8 November 2011, after which she would meet with Dr Caswell and discuss a treatment plan and prognosis.

[39] In the letter Mr Devlin recorded Ms Carney's outline of her possible options to return to work as being either:

i. she would have surgery as recommended by the specialist if ACC would fund it, in which case she would be able to return to full duties 4 to 6 weeks after the date of the surgery; or

ii. she would have a steroid injection, which had not been recommended by the specialist, and then be available for light duties with effect from 13 November 2011.

[40] Mr Devlin had confirmed that it had been agreed that a further meeting would take place on 9 November 2011, and concluded the letter with the sentence: "*You need to understand that there is a possibility that your employment may be terminated as a result of this process.*

[41] Mr Devlin explained during the Investigation Meeting that Makana was reaching the busy pre-Christmas production period and on this basis he had informed Ms Carney that there were no light duties available.

[42] Mr Devlin said he had further explained to Ms Carney that as a result of her absence, Makana had been struggling to keep her position open, that he himself had been working 7 days a week managing the kitchen and training the new casual employees recruited for the Christmas period, and that a key employee at the Blenheim branch had had to be temporarily relocated to the Kerikeri branch.

Meeting 11 November 2011

[43] The meeting scheduled for 9 November 2011 had taken place on 11 November 2011 and was attended by Mr Devlin, Ms Flowers, Ms Carney and Ms Bliss. Ms Carney had provided a prognosis letter from Dr Caswell dated 8 November 2011 prior to the meeting; however Mr Devlin said that he and Ms Flowers had not found this prognosis helpful, in particular it had not stated a date when Ms Carney would be fit to return to work.

[44] Ms Carney said that she had not received the report from the Occupational Physician to be able to have it available for the meeting on 11 November 2011, nor had she had a decision from ACC as to whether or not it would fund the necessary surgery.

[45] Mr Devlin said that he recalled Ms Devlin stating that her condition 'was no better than it was three months ago' and advising him and Ms Flowers that the public waiting list for surgery at Whangarei Hospital was 6 to 9 months.

[46] Mr Devlin said that there had been discussion about Makana's need to make a balanced decision about how to address Ms Carney's inability to carry out her role as Kitchen Manager.

[47] On 14 November 2011 Ms Flowers said she had telephoned Ms Carney as Makana had had no further contact from her since the meeting on 11 November 2011 although it had been expecting to receive information about the occupational medical assessment and the ACC decision.

[48] In an email sent in confirmation of the telephone discussion, Ms Flowers had written that unless Makana received information concerning the occupational medical assessment and the ACC decision by the close of business the following day, 15 November 2011, it would be making a preliminary decision about the continuation of Ms Carney's employment at that time.

[49] Mr Devlin said that as Makana had heard nothing from Ms Carney since 14 November 2011, he had sent an email and a letter on 16 November 2011 summarising the information as provided by Ms Carney to date.

[50] On the basis that there did not appear to be a realistic chance that Ms Carney would be able to make an early return to full duties, Mr Devlin confirmed that Makana's preliminary decision was to terminate her employment for incapacity, and asked Ms Carney to attend a meeting on 18 November 2011 to discuss this preliminary decision.

18 November 2011 Meeting

[51] The meeting on 18 November 2011 had been attended by Mr Devlin, Ms Flowers, Ms Carney and Ms Bliss. Ms Carney had confirmed that she had no further medial evidence or reports. Mr Devlin said that on the basis of the limited medical information Ms Carney had provided, Makana confirmed its preliminary decision to terminate her employment on the basis of medical incapacity.

[52] Mr Devlin said that Ms Bliss had stated that Ms Carney fully understood the reason for its decision, although she had been disappointed by the decision given her length of service. Ms Carney confirmed that she had been disappointed by the

decision, although she had understood that Makana had been busy and needed to replace her.

[53] Mr Devlin had confirmed the decision to terminate Ms Carney's employment by letter dated 18 November 2011. In the letter Mr Devlin had written: "*Carole will arrange for your final pay to be calculated at the end of the next payroll period – 26th November 2011*

Events subsequent to termination

[54] On 28 November 2011 Mr Devlin said he had received a telephone call from Ms Emma Saunders, a Case Manager at ACC. During the telephone call Mr Devlin said he had advised Ms Saunders that Ms Carney's duties as Kitchen Manager had been 50% 'hands on' and 50% managerial.

[55] Mr Devlin said he had also advised Ms Saunders that he had CTS in his right hand and that the work he undertook at Makana did not affect his condition.

[56] Ms Flowers said that on 1 December 2011 she had calculated and paid Ms Carney's final pay. Ms Flowers said she had understood that although Ms Carney had been entitled to notice, as she could not work during her notice period, she had not been entitled to be paid for the notice period.

[57] Ms Flowers said she had checked her understanding with Ms Kathy Owen of the NZ Retailers Association, whom Ms Flowers said had in turn checked with the Department of Labour, and had confirmed that while technically the notice period applied, there had been no payment due to Ms Carney.

[58] On 2 December 2011 Ms Carney said she had requested copies of the Employment Agreement, her job description, and payslips.

[59] Ms Carney said that she had heard on 29 November 2011 that her application to ACC had been rejected and had understood that this decision was based upon industry standards and Mr Devlin's completion of the Employer's Questionnaire of her work balance, and had been informed that she could appeal the ACC decision. Accordingly on 11 December 2011, Ms Carney had completed an Application for Review form.

[60] At the Investigation Meeting Ms Carney said she had received the Documentation for Review – Interested Parties – Review No 406085 dated 5 January 2012 (Documentation for Review) on 6 January 2011. Mr Devlin confirmed that he had also received the Documentation for Review on 6 January 2012.

[61] Mr Devlin said the ACC Review had been heard by Mr Erik Vogel on 21 March 2012 at Piahia, and he had attended in person as an interested party. Mr Devlin said he had not been asked any questions by Mr Vogel, and although Mr Vogel had asked Ms Carney and Ms Bliss, who had attended the meeting by telephone, if they had any questions for him, they did not.

[62] On 24 February 2012 Ms Carney had filed a Statement of Problem (the First Statement of Problem) with the Authority claiming non-payment of notice in accordance with clause 12(a) and 12 (b) of the Employment Agreement.

[63] At paragraph 8 of the First Statement of Problem Ms Carney had made reference to the: "*many untrue statements made by them to ACC".*

[64] On 9 March 2012 Makana filed a Statement in Reply which was confirmed as received by the Authority on 19 March 2012.

[65] On 17 April 2012 Ms Carney said she had received the Application for Review Report of Mr Vogel which had quashed the ACC decision. On page 13 of the report, Mr Vogel had written:

> *Of significance is the fact that Mr Devlin declined a worksite assessment. While he is under no obligation to allow one, the effect of his refusal was that it became difficult for ACC to obtain objective information as to the actual work environment.*

[66] Based on what Mr Vogel had written in the Application for Review Report Ms Carney said she had realised that Mr Devlin's refusal to agree to a Worksite Assessment had caused ACC to initially refuse her cover of the workplace injury.

[67] Mediation in regard to the non-payment of notice issue had been scheduled for 2 May 2012; however it had not occurred on that date and had been rescheduled to 19 June 2012.

[68] On 22 June 2012 Ms Carney had filed an amended Statement of Problem (the Amended Statement of Problem) in which she had amended her claim to encompass "*unjustifiable Forced Dismissal'.* Ms Carney does not refer to an unjustifiable disadvantage claim in the email of 22 June 2012; however she does refer to becoming aware of the details of Makana's contact with ACC after receipt of the Application for Review Report and makes reference to: "*Mr Devlin's deliberate attempt to disadvantage my ACC claim".*

[69] Ms Carney had subsequently withdrawn the unjustifiable dismissal claim.

Determination

Is Ms Carney entitled to payment of the notice period set out in clause 12 of the Employment Agreement?

[70] Ms Carney's entitlement to notice is set out in clause 12 (a) and (b) of the Employment Agreement:

> ***12. Termination***
>
> *(a) Notice: Employment may be terminated by either party giving ninety (90) days written notice. In the absence of appropriate notice being given, wages equivalent to the length of notice shall be paid or forfeited in lieu of notice. These provisions shall not prevent Employer from summarily dismissing the employee for serious misconduct. During an investigation into an allegation of serious misconduct, Employer may suspend Employee on pay if it deems such action to be necessary or desirable.*
>
> *(b) Illness or incapacity: In the event of Employee becoming unable to perform his or her obligations under this contract as a result of illness or capacity, Employer may terminate this contract by giving due notice as provided in paragraph 12 (a), provided that the illness or incapacity is of such*

severity as to render it impractical for Employer to continue to hold the position open.

[71] Ms Carney had been unable to perform her obligations under the Employment Agreement due to her medical condition, and in this situation Makana was entitled to terminate her employment in accordance with clause 12(b), providing due notice was given in accordance with clause 12(a) of the Employment Agreement.

[72] Clause 12(a) of the Employment Agreement stipulated that in the absence of appropriate notice being given to Ms Carney, she was entitled to wages equivalent to the length of notice, that period of notice being specified as 90 days written notice.

[73] Ms Carney had not been provided with 90 days written notice, nor had she been paid wages equivalent to the period of notice as set out in clause 12(a) of the Employment Agreement.

[74] In accordance with clause 12(a) of the Employment Agreement, Makana could dismiss summarily, but only in the event of serious misconduct on the part of the employee. This proviso had not applied in the case of Ms Carney, who had been dismissed on the grounds of incapacity pursuant to clause 12(b) of the Employment Agreement

[75] I determine that Ms Carney is entitled to a payment equal to 90 days wages in lieu of written notice.

Was the personal grievance of unjustifiable disadvantage raised within the 90 day statutory period specified in s 114(1) of the Act?

[76] Ms Carney claims that Makana's interactions with ACC in relation to her work related injury claim caused her to suffer a disadvantage in employment.

[77] The statutory time period relating to the raising of a personal grievance is set out in s 114(1) of the Act which states:

114 Raising personal grievance

> *(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 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, unless the employer consents to the personal grievance being raised after the expiration of that period.*

[78] The Employment Court has considered s 144(1) and the meaning of the phrase: "*came to the notice of the employee"* in a number of cases.

[79] In *Warburton v Mastertrade Limited* [1] Judge Palmer refers to the phrase and states that it:[2] "*... obviously contemplates information/facts coming to the notice of the affected employee which is inherently sufficient to reasonably cause him/her to conclude .."*

[80] In *Wyatt v Simpson Grierson*[3] Judge Couch carefully considered previous case law and the Act and commented:[4]

> *In summary, I find that the construction to be placed on s 33(2) of the Employment Contracts Act 1991 and s 144(1) of the Employment Relations Act 2000 is that the 90-day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer's action was unjustifiable.*

[81] In *Silver Fern Farms Limited v North*[5] Chief Judge Colgan applied *Wyatt v Simpson Grierson,* and stated in reference to s 114(1) of the Act:[6]

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[1] [1999] 1 ERNZ 636
[2] Ibid at pg 647-648
[3] [2007] ERNZ 489
[4] Ibid at para [29]
[5] [2010] NZEmpC 79

> *That section focuses … not on a cause of action coming to the employee's notice, but, rather, the coming to notice of the action (or, by necessary implication, omission) alleged to amount to a personal grievance.*

[82] The Chief Judge further stated[7] of that judgment that he did not accept a submission that a correct interpretation of s 114(1) required a belief in the existence of a personal grievance.

[83] On the basis of the judicial analysis set out above, I consider that the essential question to be decided at this juncture is: when did Ms Carney become aware of the extent of Mr Devlin's contact with ACC, and when would it have been reasonable for her to have formed a view that his conduct in this respect had been unjustifiable?

[84] Ms Carney said that she had not become aware of the effect of Mr Devlin's actions relating to ACC until she had received the Application for Review Report on 17 April 2012, whereupon she claimed she had only then been able to form the view of unjustifiable disadvantage.

[85] However, Ms Carney agreed and confirmed at the Investigation Meeting that she had received the Documentation for Review on 6 January 2012.

[86] The Documentation for Review contains a full report of all aspects of Makana's contact with ACC. In particular I note as relevant to consideration of this issue the ACC file notes dated 3 October 2011, 7 October 2011 and 28 November 2011.

[87] I also note that Ms Carney said that she had heard on 29 November 2011 that her application to ACC had been rejected and she had understood that this decision was based upon industry standards and Mr Devlin's completion of the Employer's Questionnaire of her work balance.

(i) File note 3 October 2011

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[6] Ibid at para 23
[7] Ibid at para [44]

[88] On 26 September 2011 Mr Devlin had faxed the completed Employer's Questionnaire to Ms Reese. The ACC file note dated 3 October 2011 records a telephone discussion between Ms Carney and Ms Reese in which Ms Reese records her conversation with Ms Carney and writes:

> *... I advised that following the recipt (sic) of all the information from herself the employer and the GP that we have considered the claim for cover and that unfortunately have declined cover, that following confirmed diagnosis that we then considered the sec 30 criteria and that looked at the work she did on a day to day basis, not work related tasks ...*

(ii) File note 7 October 2011

[89] On 7 October 2011 Mr Devlin had confirmed to Ms Reese that he did not agree to the worksite assessment. The file note dated 7 October 2011 records this confirmation in a telephone discussion between Ms Reese and Mr Devlin:

> *I explained to Brian about the need for the WSA to provide an independent report on the work undertaken and that can confirm the current understanding of work tasks .....Brian asked what happens if they don't do this, I noted that possibly the next step for Anne would be to lodge a review which was a more formal process .... Brian advises that doesn't see that they have anything to gain by the WSA, and that not keen to make anything easier for her, not happy to have assessment.*

[90] A further telephone conversation that same day with Ms Carney concerning Makana's refusal to have a worksite assessment records that Ms Reese had discussed with Ms Carney her conversation with Mr Devlin about the worksite assessment, and ACC would like to refer her to an occupational physician to carry out an assessment. The file note states :

> *I explained that unable to do the WSA in her work place and that have discussed with my TM and would like to offer instead to be referred to an Occupational Physician to do an assessment ....*

> *Anne asked why not able to do the WSA. I noted that not able to have an assessor do the WSA, Anne asked if this was because of the employer not allowing it. I noted that they are not required to let us and up to them.*

(iii) File note 28 November 2011

[91] The Documentation for Review file note dated 28 November 2011 records ACC Officer Ms Emma Saunders' contact with Makana and states:

> *I have asked Brian to tell me about the actions that Anne is doing with her wrists that include flexion and extension – He has advised that the work she does involving wrist movement would be:*
> *Spreading of chocolate*
> *Cutting toffee*
> *Dipping caramels and toffee's (sic)*
>
> *I have asked about repetition and force with these jobs – Brian has indicated that there is little/no force requires and re repetition there is only a little repetition involved in the role*
>
> *Brian has indicated that the job Anne does is more supervisory – so she would be doing the supervising for about 50% of the time and then hands on for about 50% of the time*
> *…*
> *Brian had indicated that he has CTS in his right hand and has advised that none of the work that they do affects him at all so is unsure if they would affect Anne.*

[92] Ms Carney claimed that she had been not been aware of the effect of Makana's contact with ACC until she had received the Application for Review Report on 17 April 2012

[93] In accordance with the reasoning of the Employment Court regarding the interpretation of s 114(1), I find that Ms Carney had, following receipt on 6 January 2012 of The Documentation for Review which contains a full written report of all aspects of Makana's contact with ACC, every piece of information necessary for her to have formed a reasonable belief that the actions taken by Makana, namely the refusal to allow the WSA and Mr Devlin's report to ACC relating to Ms Carney's duties, had been 'unjustifiable'.

[94] Furthermore, I consider that Ms Carney's reference in the First Statement of Problem received by the Authority on 24 February 2012 to the: "*many untrue statements made by them to ACC"* clearly indicates that on or before 24 February 2012 Ms Carney had knowledge about Makana's interactions with ACC and had formed a view that they were unjustifiable which supports this conclusion.

[95] Ms Carney did not raise a personal grievance in relation to unjustifiable disadvantage until 22 June 2012. I find that this was outside the statutory 90 day period pursuant to s 114(1) of the Acton on either calculation.

[96] I determine that Ms Carney did not raise a personal grievance of unjustifiable disadvantage within the 90 day statutory period specified in s 114(1) of the Act.

Did Makana consent to the raising of the personal grievance out of time?

The Law

[97] An employee must raise a personal grievance within the 90 day statutory limitation period in accordance with s 114(1) of the Act: '*unless the employer consents to the personal grievance being raised after the expiration of that period.*

[98] The Act is silent on whether consent by the employer must be express or implied. In the Employment Court case *Vulcan Steel Limited v Kirean Wonnocott*[8], Chief Judge Colgan stated that:[9]

[8] [2013] NZEmpC 15
[9] Ibid at para [45]

> *Although participation in the grievance resolution process by the employer has been a feature of a number of cases where implied consent has been found to have been given, that is not the test.*

[99] The Chief Judge proceeded to clarify that: "*As case law establishes, whether there was implied consent is a matter of fact and degree. All relevant facts are for assessment individually and collectively*"[10] In *Jacobsen Creative Surfaces Ltd v Findlater*[11] and *Phillips v Net Tel Communications*[12] it was held that in this respect, the matter of fact and degree will be made in each case depending on its own particular facts.

[100] In *New Zealand Fisheries Ltd v Napier City Council*[13] the Court of Appeal stated[14]:

> *As the dictionary definition indicates, "consent" involves agreement to a proposal or request. Mere acquiescence in a state of affairs would not be enough ... acquiescence involves no more than the passive standing by without objection, whereas consent requires a positive affirmative act ..."*

[101] The issue of whether consent could be given impliedly was considered by the Employment Court in *Hawkins v Commissioner of Police*[15] which decided that 'consent' to a personal grievance being raised outside the 90 day statutory limitation period may be implied by the employer, and this decision was upheld on appeal by the subsequent Court of Appeal case,[16] in which the Court of Appeal stated"[17]

> *The real issue is not whether, in formal terms, the Commissioner "turned his mind" to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.*

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[10] Ibid at para [46}
[11] [1994] ERNZ 35
[12] [2002] 2 ERNZ 340
[13] (1990) 1 NZ ConvC, 342
[14] Ibid at pg 190
[15] [2007] ERNZ 762
[16] *Commissioner of Police v Hawkins [2009] NZCA 209*
[17] Ibid at para [24]

Facts

[102] Makana had agreed to attend mediation in respect of the non-payment of notice issue raised by Ms Carney in the First Statement of Problem on 24 February 2012. The date for mediation had originally been set for 2 May 2012; however Ms Carney had not attended for mediation on that occasion.

[103] A further mediation took place on 19 June 2012 but had not resolved the issue between the parties, which at that time was only for the non-payment of notice.

[104] On 22 June Ms Carney filed and served by way of an email the Second Statement of Problem in which she had amended her initial claim to encompass "*unjustifiable Forced Dismissal'.* Ms Carney does not specifically refer to an unjustifiable disadvantage claim in the email of 22 June 2012; however she does refer to becoming aware of the details of Makana's contact with ACC after receipt of the ACC Review Hearing decision and refers to "*Mr Devlin's deliberate attempt to disadvantage my ACC claim".*

[105] Ms Carney subsequently filed a second Amended Statement of Problem dated 20 September 2012 in which she stated that the claims for non-payment of notice and unjustified dismissal in the First Amended Statement of Problem had been: "*accepted by the respondents as they requested we go to mediation on the amended claim. This took place on 9 August 2012."*

[106] The parties attended mediation following receipt of the Second Statement of Problem on 9 August 2012. Mr Devlin stated that as the First Amended Statement of Problem had been referred to mediation he had attended the mediation on 9 August 2012 on the assumption that this was the "*normal process"* and that this was what has been required as stated in clause 15(b) of the Employment Agreement..

[107] Mr Devlin, who had been unrepresented at that time, said he had attended the mediation in good faith.

[108] Following receipt of the Second Amended Statement of Problem on 20 September 2012, Makana had filed an Amended Statement of Reply with the Authority on 5 October 2012. At this stage Makana had obtained professional legal advice.

[109] In the Amended Statement of Reply, Makana expressly stated that Ms Carney had raised the unjustifiable dismissal and unjustifiable disadvantage claims outside of the 90 day statutory time period, and that it did not consent to the grievances being raised outside the 90 day time limit.

[110] Prior to obtaining the advice of legal counsel, Makana had been engaging in a mediation process arising out of the personal grievance regarding the issue of Ms Carney's unpaid notice period. There had been two dates set for mediation at that time, the second date of 19 June 2012 being required as Ms Carney had not attended the first mediation scheduled for 2 May 2012.

[111] I note that Makana is a small business without the benefit of human resources assistance and had not had the benefit of legal advice at the point at which the First Amended Statement of Problem had been filed.

[112] Although Makana had attended a further mediation on 9 August 2012 after the raising of the First Amended Statement of Problem, I find that this was on the basis that Mr Devlin had assumed that attendance at this mediation was part of an on-going process.

[113] In these circumstances, I find that although Makana had participated in the mediation process, this is not decisive of the issue of whether or not it had '*turned its mind'* to the amended claim, and thereafter so conducted itself following the raising of the First Amended Statement of Problem, as to constitute consent to the raising of a personal grievance in respect of the unjustifiable dismissal and unjustifiable disadvantage claims out of time.

[114] Rather I find participation in that mediation process to be indicative of what the Court of Appeal in New *Zealand Fisheries Ltd v Napier City Council*[18] described as '*mere acquiescence'*.

[115] Following receipt of the Second Amended Statement of Problem on 20 September 2012, I find that Makana did turn its mind to the unjustifiable dismissal and unjustifiable disadvantage claims. I find that Makana having had the benefit of legal advice, so conducted itself by the filing of the Amended Statement in Reply on 5

[18] (1990) 1 NZ ConvC, 342

October 2012 as to make clear that it did not consent to the raising of the unjustifiable dismissal and unjustifiable disadvantage claims out of time.

[116] I determine that Makana by its conduct in attending mediation on 9 August 2012, which it believed to be part of an on-going process and expected good faith behaviour, did not consent to Ms Carney raising a personal grievance in relation to the unjustifiable dismissal and unjustifiable disadvantage claims outside the 90 day statutory limitation period.

[117] On the basis that I have determined that Ms Carney did not raise her personal grievance in relation to the unjustifiable disadvantage grievance within the 90 day statutory time period, and have determined that Makana did not consent to her raising the unjustifiable disadvantage grievance out of time, I am unable to assist her any further.

Remedies

[118] In respect of the non-payment of the notice period set out in clause 12 of the Employment Agreement, Ms Carney is to be paid a sum equivalent to 90 days wages in lieu of written notice by Makana. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Costs

[119] Costs are reserved. Given the extent to which both parties have been successful I am of a mind that costs should be moderate, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, they may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions to be lodged with 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority