

NOTE: This determination contains an order prohibiting publication of the names of certain individuals and other information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

I TE RATONGA AHUMANA TAIMAHI TĀMAKI MAKURAU ROHE

[2023] NZERA 532
3176729

Member of Authority: Sarah Blick

Representatives: John Wood, advocate for the Applicant
David Traylor, counsel for the Respondent

Investigation Meeting: 18 April 2023 by audio visual link

Submissions and information received: 10 February and 2 May 2023 from the Applicant
5 April and 16 June 2023 from the Respondent

Determination: 15 September 2023

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Jeshurun Chandra was employed as a national Health and Safety Manager by InvoCare New Zealand Limited (InvoCare). InvoCare operates 24 funeral home and crematorium “brands” around New Zealand.¹ Ms Chandra believes she has a personal grievance for unjustified disadvantage on the basis InvoCare failed to provide a safe

¹ InvoCare is a global company that operates funeral homes, cemeteries and crematoria around New Zealand, Australia and Singapore: <https://www.invocare.com.au/our-brands/funeral-homes/new-zealand/>.

and healthy work environment, and that after raising matters with InvoCare it failed to investigate and adequately address the health and safety matters. She says she became unwell because of the actions and inactions she felt were occurring and the way her employer addressed health and safety matters. She claims compensation relating to stress and an award of lost wages for the time she was unable to work due to work stress.²

[2] InvoCare submits Ms Chandra has not raised a personal grievance for unjustified disadvantage in respect of the issues she is seeking to pursue in the Authority within the period of 90 days beginning with the date on which the actions alleged to amount to a personal grievance occurred or came to her notice. It does not consent to any personal grievances being raised out of time. InvoCare's position is therefore that the Authority has no jurisdiction to deal with Ms Chandra's personal grievance claim.

Non-publication order

[3] In its amended statement in reply in the substantive application before the Authority, InvoCare sought non-publication orders in respect of references to an individual who attempted suicide and an individual who committed suicide at two InvoCare's worksites, referred to later in this determination. It is appropriate to make the orders sought. The names and any information likely to identify the two individuals referred to in the documents and evidence is permanently prohibited from publication in this matter.³

What was the Authority's process?

[4] The Authority has required Ms Chandra, through her advocate, to lodge two amended statements of problem during the case management process. This was due to the statement of problem and first amended statement of problem being unclear and referring to health and safety concerns dating back to March 2020. The Authority directed a second amended statement of problem to be lodged that would sufficiently particularise:

- (a) what aspects of Ms Chandra's employment were affected to her disadvantage;

² Ms Chandra is also pursuing a holiday pay recovery and penalty claim pursuant to the Holidays Act 2003.

³ Employment Relations Act, sch 2 cl 10(1).

- (b) which unjustifiable actions were taken by InvoCare that were said to cause disadvantage;
- (c) what steps Ms Chandra took to make InvoCare aware of the personal grievance she wanted addressed.

[5] The second amended statement of problem went into more detail about health and safety issues at InvoCare and her actions in relation to them. This time, they went even further back in time - to November 2019.

[6] It became clear the Authority needed to investigate when Ms Chandra first raised her personal grievances in relation to InvoCare's management of health and safety in its workplaces.

[7] The parties agreed that the Authority would resolve the issue over whether a personal grievance for unjustified disadvantage was raised within the necessary timeframe as a preliminary matter.

[8] The parties each provided affidavit evidence, but a short investigation meeting was subsequently held by audio visual link which allowed the Authority and the representatives to question Ms Chandra and a director of InvoCare, Rowan Chapman.⁴

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination. The Authority has set out relevant facts and law, then based on these expressed conclusions on issues as necessary to dispose of the matter.

What are the issues for resolution of the preliminary matter?

[10] The starting point for this preliminary matter is sections 114(1) and 114 (2) of 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.

[11] Section 114(2) sets out what constitutes the raising of a personal grievance:

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

⁴ As at the date of this determination, Mr Chapman is no longer a director.

representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[12] The key principles for establishing if a grievance has been raised pursuant to s 114(2) of the Act have been addressed in various court decisions.⁵ They can be summarised as follows:

- (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.
- (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) 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.

[13] In submissions lodged after the investigation meeting, Ms Chandra's advocate articulated more clearly which communications she relies upon as having raised her grievance for unjustified disadvantage. They are:

- (a) A 17 February 2022 phone call with Mr Chapman;
- (b) A "Whistleblower report" dated 24 February 2022;
- (c) A 10 May 2022 letter from her advocate;

⁵ *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; and *Chief Executive of Manukau Institute of Technology v Aleksander Zivaljevic* [2019] NZEmpC 132.

(d) Her first statement of problem dated on 29 June 2022 (which was served on InvoCare on 1 July 2022).

[14] The Authority notes there is also relevant email communication dated 17 March 2022. Subsequent information exists, but given the Authority's findings, these do not need to be outlined in this preliminary determination.

17 February phone call with Mr Chapman

[15] It is common ground Ms Chandra attempted to call Mr Chapman by telephone on 17 February 2022. He says the call came "out of the blue" and was unable to answer, but a short time later, he called her back and they spoke. Ms Chandra says she spoke about an attempted suicide at one of InvoCare's worksites in March 2020 and a suicide in September 2021 at another. She said she spoke about InvoCare's lack of transparency, lack of independent investigation and concerns regarding its failings as a duty holder. There is no suggestion Ms Chandra used the words "personal grievance" or "disadvantage" or words to that effect during the call.

[16] Mr Chapman says he made a file note of the conversation immediately after the call, which has been provided to the Authority. I prefer Mr Chapman's file note over Ms Chandra's notes, the latter of which was only produced at a late stage upon request by the Authority at the investigation meeting. The file note relevantly states:⁶

She phoned me in my capacity as an independent director of InvoCare New Zealand Ltd and out of *concerns for some business practices which are happening in the company...*

She was *concerned about health and safety practices*, and among other things raised the fact that a member of staff had committed suicide in [name of South Island city] last year (which I advised her I was aware of), and another staff member in [name of North Island city] had attempted suicide. While she acknowledged that support was provided in both locations, there was not investigation carried out by an independent person from a health and safety point of view. *She indicated that the environment at InvoCare was toxic and one of the worst environments she had worked in.*

I suggested that she send a letter to the chairman, Graeme Rhind, setting out her concerns and copying me in on the basis I was the only independent director on the board.

She went on to indicate there were *significant concerns around health and safety* and the basis of reporting of incidences, particularly where there had been changes at the direction of Australia. She also advised that her husband was

⁶ Emphasis added.

killed as a result of a workplace accident, so she was very passionate about health and safety for employees.

[17] Mr Chapman says Ms Chandra told him he must keep the matter confidential, and he confirmed he would (and did until she submitted her whistleblowing complaint on 24 February 2022).

22 February 2022 phone call

[18] Mr Chapman telephoned Ms Chandra on 22 February 2022 by way of follow up, and his file note records:

I followed up Jesh as a result of my discussion with her on 17 February 2022.

Jesh in that call indicated she had a number of concerns about management of the business and was going to write to Graeme Rhind as Chairman of the company, copying myself.

The purpose of my call was to enquire as to whether she still intended to that. She advised me that she was in the process of preparing a report and would probably send it to Graeme in the next 2 or 3 days, copying myself. *She indicated because of the toxic culture in the business she would probably then apply for sick leave while the matter was being discussed.* She referred to a number of people that have left the organisation in the last 3 or so years, the way there were exited and the fact that no exit interview was carried out. She felt that they were targeted by Gavin because they questioned some of his management decisions.

I reconfirmed that I had not raised the matter with anyone within the business, but felt I had a fiduciary duty to the company as a result of what she had raised. She reassured me that she intended sending a report to Graeme and copying myself. On that basis I agreed to wait until the report was available.

[19] There is no evidence Ms Chandra expressly made reference to a personal grievance during this call.

The whistleblowing report" of 24 February 2022

[20] On 24 February 2022 Ms Chandra emailed Mr Rhind and Mr Chapman attaching a document titled "Whistleblowing Report". The report was 103 pages in length and traversed multiple health and safety topics including incident and reporting management, serious incident management and health monitoring. The report does not reference Ms Chandra's personal circumstances or that she believed she had a personal grievance.

Subsequent phone calls

[21] Ms Chandra called Mr Chapman on 28 February 2022 while he was on holiday. He says she asked him whether he knew she had been presented with a proposal to restructure her role. Mr Chapman advised he was not aware and told her strongly that he had not told anyone about their 17 February 2022 conversation other than Mr Rhind and, in his case, he had only told Mr Rhind after the whistleblowing complaint had been received. There are no file notes in relation to this call.

[22] Mr Chapman says Ms Chandra called him again on 4 March 2022. He cannot now recall the details of the conversation and did not make a file note of the call. However, he does recall that Ms Chandra was reiterating the same concerns she had about health and safety issues that she had already raised with him. He told her that she needed to work through the process that was already underway.

Ms Chandra's email of 17 March 2022

[23] On 17 March 2022 Ms Chandra sent an email to an InvoCare operations manager and others saying it was to advise of her "condition". She said she had been under a lot of stress over the years due to InvoCare's "cavalier attitude" towards its workers' health, safety and wellbeing. Among her other comments she stated:

I believe that IVC NZ is responsible for the pervasive, endemic and systematic failures and the result could be imminent and critically impact the health and wellbeing of our workers.

Recently, the combined effort [sic] of Exposure monitoring results and my role restructure sent me over the edge, and as a result, I took 2 weeks (6 working days off). I believe this time-off is a result of work-related stress leave. The doctors have noted my stress, including panic attacks.

[24] Ms Chandra telephoned Mr Chapman on 28 March 2022. His file note of that date records the following:

... Jesh's call today was to enquire if there had been a Director's meeting to discuss the issues she has raised particularly in relation to health and safety. I indicated that the Directors were considering a response from management and the intention was to convene a meeting later in the week. The day and time had yet to be confirmed. I indicated that it was not appropriate that I should comment any further. She indicated that she has further correspondence that she would like to send to me, and I suggested that she sends it directly to the Chairman Graeme Rhind and should not be communicating directly with myself. *She then went on to say that she was still on stress leave having spent some time in the office early last week. She obtained a doctor's certificate to confirm she should be on leave.* I indicated to her that I believe there are two issues that she has raised, one that is relating to the whistleblower complaint

and the second is the health and safety issues she had included in an email to the senior leadership team at Invacare. *I confirmed that the company were taking her complaints seriously.* Jesh also confirmed I could now advise my fellow directors that she first made contact with me on 17th February 2022 in which she raised her concerns about management and health and safety matters.

Findings

[25] I accept InvoCare's submission that a protected disclosure under the Protected Disclosures Act 2000 cannot constitute the raising of a personal grievance with an employee.⁷ The report however is only one part of the picture. The Authority is in all the circumstances satisfied the totality of these communications constitutes the raising of a personal grievance by Ms Chandra. I find Ms Chandra raised her grievance by 17 March 2022 in her email to the operations manager. Although the email did not expressly ask InvoCare to address what she believed were significant health and safety failures or suggest how her concerns could be resolved, it would have been clear she was asking for action to improve health and safety systems to be taken at least around management of hazardous substances exposure. In that email, she also clearly connected the alleged failures and the effect it was having on her – which included taking two weeks of leave due to stress and panic attacks. At this time Ms Chandra was also waiting for action to be taken by the directors in response to her whistleblowing report.

[26] Any residual possibility that InvoCare was oblivious to Ms Chandra having raised a grievance ought to have extinguished by 28 March 2022 during her phone call with Mr Chapman on that day. During that conversation Ms Chandra again connected the health and safety issues raised in the report with her own personal circumstances – namely still being on stress leave. Mr Chapman clearly understood Ms Chandra was awaiting action by InvoCare, because she was inquiring if there had been a director's meeting to discuss the issues she has raised particularly in relation to health and safety. At this point Ms Chandra also made clear to Mr Chapman that he could advise other directors of their first conversation on 17 February 2022.

[27] While it has been difficult to obtain clarity from Ms Chandra during the Authority process in terms of pleadings on some matters, this does not take away from the fact Ms Chandra validly raised a grievance in March 2022.

⁷ *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 45.

[28] In making these findings, the Authority does not entirely discount the possibility Ms Chandra raised her grievance earlier in February 2022. Once the Authority has had the opportunity to hear evidence of InvoCare staff with more direct knowledge of Ms Chandra's circumstances at that time this may become clearer.

[29] I am also satisfied her personal grievance was raised within the statutory timeframe. This is because the protection of workers and other persons against harm to their health, safety, and welfare by eliminating or minimising risks arising from work is an ongoing obligation. Ms Chandra clearly held ongoing concerns around InvoCare's management of health and safety hazards which ultimately culminated in her personal grievance.

[30] In pursuing her grievance now, Ms Chandra needs to understand the Authority will not be investigating whether she has a personal grievance for unjustified actions causing disadvantage relating to InvoCare's actions in 2020 or 2021. The body of correspondence referred to by Ms Chandra in those years appears consistent with the nature of her role as Health and Safety Manager within InvoCare. However, that factual matrix which ultimately led to Ms Chandra raising a grievance and may emerge as relevant to the reasonableness of InvoCare's actions in 2022 while Ms Chandra remained employed until July 2022. Significant facts in the factual matrix likely include at least: the attempted suicide by a worker at one of InvoCare's worksites in March 2020; WorkSafe's issuing of a provisional improvement notice in August 2021 in relation to InvoCare's health and safety monitoring of the health of workers nationally; the death by suicide of a worker at one InvoCare's work sites in September 2021.

Outcome

[31] The Authority is satisfied it has jurisdiction to investigate and determine Ms Chandra's personal grievance claim arising out of alleged unjustifiable actions causing disadvantage. Ms Chandra raised her personal grievance in relation to health and safety matters on 17 March 2022.

[32] An Authority officer will contact the parties' representatives to schedule a case management conference so that directions can be set for the investigation of that claim.

Costs

[33] Costs are reserved.

Sarah Blick
Member of the Employment Relations Authority