IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 366
5400885

	BETWEEN	TANIA CHRISTENSEN Applicant
	AND	THE MONTESSORI FOUNDATION Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Scott McKenna, Counsel for Applicant Vinay Deobhakta, Advocate for Respondent
Investigation Meeting:	14 August 2013 at Hamilton
Submissions received:	14 August 2013 from Applicant and from Respondent
Determination:	16 August 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination addresses the preliminary issue as to whether the applicant, Ms Tania Christensen, raised her personal grievances with her employer, The Montessori Foundation, within 90 days of the grievances occurring in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievances before the Authority.

[2] In the event that it is determined that Ms Christensen failed to raise her personal grievance within the 90 day statutory time period Ms Christensen applies pursuant to s 114(3) of the Act for leave to raise a grievance outside the 90 day time period on the basis that "*exceptional circumstances"* pursuant to s115 and s 115(b) of the Act had occasioned the delay.

[3] Specifically Ms Christensen claims that she made reasonable arrangements with her counsel at the time, Mr Alex Hope, to have the personal grievance claims raised on her

behalf, however circumstances beyond her control led to her application being filed outside the statutory 90 day time limit set out in s 114 (1) of the Act.

Issues

[4] The issues for determination are whether:

- Ms Christensen raised a personal grievance within the statutory 90 day time period, or

- If is determined that Ms Christensen did not raise a personal grievance within the statutory 90 day time period, whether she should be granted leave pursuant to s.155 (b) of the Act to raise a personal grievance outside the statutory 90 day time period.

Brief Background Facts

[5] Ms Christensen commenced employment with the Montessori Foundation in 1996 and in 1999 was appointed as Directress and Centre Manager at both the Rimu Street and Cameron Road Montessori Foundation facilities.

[6] On 20 September 2012 Ms Christensen, who said she had been suffering from stress as a result of staffing shortages, had left work early after having organised relief teacher cover.

[7] Ms Christensen said that she had subsequently been certified as unfit to work by her doctor until 27 September 2012, however when she had attended for work on 27 September 2012, she had not been allowed to resume her duties by the Montessori Foundation.

[8] Following a meeting on 1 October 2012 between Ms Christensen and her lawyer, Mr Hope, and Ms Hayley Hayes, Trustee of the Montessori Foundation, Ms Christensen received a letter dated 2 October 2012 signed by Ms Hayes, which advised that she was on sick leave and stated: "*she should not return to the premises until further notice".*

[9] On 8 October 2012 Ms Christensen received a further letter from Ms Hayes dated 8 October 2012 which set out 5 allegations of misconduct and invited her to a meeting on 10 October 2012 to discuss the allegations against her.

[10] By response email Mr Hope requested, on Ms Christensen's behalf, further information relating to Ms Christensen's employment and in respect of the allegations against

her. The request for further information had been repeated in an email to Ms Hayes from Mr Hope dated 12 October 2012.

[11] On 15 October 2012 a disciplinary meeting was held and attended by Ms Christensen, Mr Hope, Ms Hayes, and Mr Aaron Ogilvie, Representative for the Montessori Foundation. Mr Ogilvie said that during the meeting he had put each of the 5 allegations to Ms Christensen and requested her response whilst Ms Hayes had taken notes.

[12] Mr Hope said he repeatedly requested from the Montessori Foundation further information pertaining to the allegations against Ms Christensen and advised that failure to have provided this information prior to the disciplinary meeting in order that Ms Christensen could respond accordingly was a breach of natural justice.

[13] Ms Christensen confirmed that Mr Hope had provided the advice to the Montessori Foundation regarding the possible process failures, however Ms Hayes and Mr Ogilvie deny this advice had been provided and Ms Hayes pointed out that the notes she had made during the meeting make no mention of Mr Hope providing the information as stated.

[14] Ms Christensen said that on 18 October 2012 she had received a letter from the Montessori Foundation terminating her employment on the basis of serious misconduct. Following receipt of the dismissal letter Ms Christensen said she had contacted Mr Hope and had issued him with instructions to raise a personal grievance on her behalf with the Montessori Foundation.

[15] Mr Hope said he had done so by way of an email dated 31 October 2012 addressed to Ms Hayes. The email stated:

> *I write to advise that Tania has personal grievances against the Montessori Foundation in respect of:*
>
> 1. *Your dismissal of her on 18 October which she says was unjustified as the process was unfair and no conduct was fairly identified that could have justified a dismissal; and*
>
> 2. *Your suspension of her on or about 27 September which was without justification and without proper process (disadvantage)*
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> 3. *Your failure to ensure that the stress she was working under was relieved (disadvantage)*

She seeks compensation for hurt and humiliation and lost wages.

She also seeks a penalty under the Employment Relations Act 2000 for your failure to pay her final wages to her promptly.

Mediation

Please advise whether or not you will consent to mediation assistance in an attempt to resolve these issues.

[16] Ms Hayes responded to Mr Hope by an email dated 1 November 2012. In the email Ms Hayes stated:

I know your game of going to mediation to extract money to pay your fees. We wont (sic) be playing. …

You were present at both meetings and you know the evidence of serious misconduct was there to the required standard. …

You never objected to the process being used at the time and when it could have been remedied. Were you trying to conduct a setup? There is bad faith right there.

You do not specify the process error leading to dismissal even now so we can be fully and fairly informed.

You never raised the issue of incorrect process regarding suspension because you agreed she would be off on sick leave and that is confirmed without objection in writing.

You heard my explanations about her alleged stress, that she never raised the issue before, that the centre has one extra staff member, that she arranged the trainees to come in creating more work for herself, that her doctor confirmed to me that she was not stressed and that Tania told me there was no problem with herself but then changed the story two more times (obviously with your assistance). Also because she stuck to her written story she provided no medical evidence she was stressed.

….

> *If your client is foolish enough to want to carry this matter on into the ERA, they can order mediation which we may attend but be sure no money will change hands.*

[17] Mr Hope said he had not responded to the request by Ms Hayes in the email for more information specifying the process error leading to dismissal as he believed he had explained that clearly enough during the disciplinary meeting on 15 October 2012 and because he had been concentrating on trying to arrange for mediation.

[18] Mr Hope stated that he believed that the email dated 31 October 2012 had properly raised a personal grievance, but if it were determined that it did not, then he accepted full responsibility for that failure as Ms Christensen had instructed him, and had relied on him, to raise the personal grievances correctly on her behalf.

[19] Although the parties had subsequently attended mediation, this had not resolved matters and on 8 February 2013 Ms Christensen had filed a Statement of Problem with the Authority.

Determination

[20] Section 114(2) of the Act states:

> *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."*

[21] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police.*[1] In this case, Chief Judge Colgan stated:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an*

[1] *Creedy v Commissioner of Police*[2006] ERNZ 517

> *employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.*

[22] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer[2].

[23] The email of 31 October 2012 opens with the statement that: "*Tania has personal grievances against the Montessori Foundation …"* I do not consider that these words can be construed as expressing some future intention to raise a personal grievance, rather I find that the words are in the present tense and the meaning is clear that Ms Christensen has personal grievances which she wishes the Montessori Foundation to address. The email then proceeds to outline the issues forming the basis of the personal grievances.

[24] Whilst the email is brief, I find that it succinctly identifies the issues about which Ms Christensen is raising the personal grievances as being:

1. The substantive justification for the dismissal in that no conduct had been identified as serious enough to justify dismissal' and the process followed;

2. The lack of substantive justification for the suspension, and the failure to follow proper process; and

3. The failure to relieve Ms Christensen's stress

[25] The email of 31 October 2012 further sets out the remedies Ms Christensen is seeking in respect of the personal grievances and concludes with a request for mediation.

[26] The email does not specify in the detail later set out in the Statement of Problem the facts upon which the personal grievance are based, nor are the remedies sought quantified, however I do not find that this suffices to invalidate the raising of a personal grievance in the email of 31 October 2012. As observed in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*[3]

> *Although what is raised must be more than bare advice of a personal grievance or even the type of grievance, the requirement is certainly*

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[2] *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503
[3] [2008] ERNZ 139 at [24] per Colgan CJ

> *not for the sort of detail that may be required subsequently when lodging a statement of problem with the Authority.*

[27] Further as observed by Judge Travis in reference to s 114 (2) in *Melville v Air New Zealand Ltd*[4]*: "This means that the grievance must be specified sufficiently to enable the employer to address it, presumably at that time".*

[28] I find that in the email dated 1 November 2012 sent in response to the email of 31 October 2012 the employer does address the personal grievances raised. Specifically I find Ms Hayes addresses:

- The dismissal personal grievance by asserting that the dismissal was justified by making reference to the evidence as discussed at the meetings [on 1 and 15 October 2012], and stating that Mr Hope did not specify the process errors, requesting more information;

- The suspension personal grievance by denying there had been a suspension but rather alleging there had been an agreement to sick leave; and

- The workplace stress personal grievance by addressing this issue in some detail.

[29] Further I note that the concluding comments in the email support the fact that a personal grievance had been accepted as raised by the Montessori Foundation in that it refers to the fact that if Ms Christensen wants to : "*carry this matter on into the ERA, they can order mediation …"* which I find both acknowledges that personal grievances had been raised and indicates that Ms Hayes had a clear understanding of the procedural steps involved in progressing personal grievances to the Authority should they not be resolved earlier between the parties.

[30] I have considered in determining whether the email of 31 October 2012 raised a personal grievance, whether reliance can be placed upon what had been discussed between the parties at the disciplinary meeting on 15 October 2012.

[31] Mr Hope asserts, as supported by Ms Christensen's evidence, that he raised concerns about the process being undertaken by the Montessori Foundation during the disciplinary meeting on 15 October 2012. Ms Hayes and Mr Ogilvie deny that this advice had been provided and point to the meeting notes of 15 October 2012 provided in evidence in support of this assertion.

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[4] [2010] NZEmpC 87 at para [16]

[32] During the investigation Meeting, it had been conceded by the Montessori Foundation that the notes of the meeting held on 15 October 2012 had not been comprehensive and that some comments which were agreed to have been made by Mr Hope had been omitted.

[33] I consider it to be more likely than not that Mr Hope, an experienced employment lawyer, would have requested more information about the allegations if he believed there had not been sufficient information provided and that he would have indicated procedural flaws at the time of the meeting.

[34] However even were that not to be the case, I find that in the email of 1 November 2012 from Ms Hayes she also refers to matters discussed at the disciplinary meeting on 15 October 2012 in support of her responses to the personal grievance issues, thus opening the door for the raising of the personal grievances to be considered in light of matters raised at that meeting.

[35] Irrespective of the issue of extraneous supporting evidence of discussions between the parties at the disciplinary meeting on 15 October 2012, I find that the email of 31 October 2012 of itself meets the requirements test in *Creedy v Commissioner of Police* and.is sufficient to raise Ms Christensen's personal grievances with MF.

[36] I determine that Ms Christensen has raised her personal grievances within the statutory 90 day time period pursuant to s114 of the Act.

Should Ms Christensen be granted leave pursuant to s.155 (b) of the Act to raise a personal grievance outside the statutory 90 day time period?

[37] As I have determined that Ms Christensen had raised her personal grievances within the statutory 90 time period I consider this issue only briefly to provide completeness.

[38] The exceptional grounds upon which Ms Christensen seeks to rely on those set out in s 115(b) of the Act which states:

> ***115 Further provision regarding exceptional circumstances under section 114***
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> *For the purposes of section 114(4)(a), exceptional circumstances include-*
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> *(b) where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time*

[39] There are two limbs to the test in s 115 (b) of the Act. The first limb is concerned with whether the applicant had made reasonable arrangements to have the matter raised by an agent on their behalf, and the second limb is whether the agent failed unreasonably to ensure that the grievance was raised within the requisite time limit.

[40] Ms Christensen states that she made reasonable arrangements to have the matter raised on her behalf by Mr Hope, and Mr Hope confirms that she did so.

[41] Mr Hope stated that he believed he had raised the personal grievances within the requisite time limit via the email dated 31 October 2012 and fully accepted that had I determined he had failed to so, the blame would be entirely his.

[42] In *Davies v Dove Hawkes Bay Inc*[5] the Chief Judge considered a claim brought by an Applicant pursuant to s 115(b) of the Act, and stated at paragraph [29}:

> *If a dismissed employee engages a qualified, knowledgeable, and experienced agent to advise on and protect the grievant's interests following a dismissal with which the former employee is dissatisfied, it is reasonable to expect such an agent to do so. The grievant's steps to have the agent raise the grievance must be reasonable but that reasonableness must be judged in light of the grievant's inexperience with such matters, the agent's corresponding expertise, and the sufficiency of the information provided to the agent to enable the agent to take those protective steps.*

[43] I find that Ms Christensen, a person inexperienced in employment law matters, was entitled to rely upon Mr Hope, an experienced employment law lawyer and who had advised Ms Christensen throughout the disciplinary process, to raise the personal grievances within the statutory time limit.

[44] In these circumstances, I find that Ms Christensen's reliance on Mr Hope's expertise to have been reasonable.

[45] I find that the onus was upon Mr Hope to meet the statutory requirements in relation to the raising of Ms Christensen's personal grievances in accordance with her issued instructions and reliance on his expertise and advice. I have not found that Mr Hope failed to do so, but if I had determined otherwise then the failure would have been his alone since Ms Christensen had issued reasonable instructions to him to raise the personal grievances.

[46] I determine that both limbs of the test in s 115(b) of the Act have been met.

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[5] [2013] NZEmpC 83

[47] In all the circumstance, had I not determined, which I have, that the email of 31 October 2012 adequately raised Ms Christensen's personal grievances, I would find it just in all the circumstances to grant Ms Christensen leave to raise the personal grievances out of time.

[48] The Authority will contact the parties shortly for a telephone conference to progress the matter.

Eleanor Robinson
Member of the Employment Relations Authority