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Hutchison v Nelson City Council (Christchurch) [2012] NZERA 1208; [2012] NZERA Christchurch 208 (25 September 2012)

Last Updated: 18 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 208
5361377

BETWEEN ROBYN ANN HUTCHISON Applicant

A N D NELSON CITY COUNCIL Respondent

Member of Authority: Christine Hickey

Representatives: Robyn Hutchison in person

Maree Kirk, Counsel for Respondent

Investigation meeting: On the papers

Submissions Received 3 August 2012, from Respondent

14 August 2012, from Applicant

Date of Determination with errata:

25 September 2012

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment relationship problem

[1] This determination addresses the preliminary issue of whether the Applicant, Ms Robyn Hutchison, raised her personal grievance with the Respondent, Nelson City Council (NCC), within 90 days, so that she is entitled to pursue her grievance before the Authority.

[2] Specifically, the issue I need to address is whether a letter written by Mr Steven Zindel, at that point Ms Hutchison's counsel, to the Chief Executive Officer of the NCC was sufficient to constitute the raising of a personal grievance with NCC for the purposes of [section 114](#) of the [Employment Relations Act 2000](#) (the Act).

[3] The parties agreed to me determining this issue based on the Statements of Problem and in Reply and on written submissions from the parties. After receiving those submissions, I held a second telephone conference with the parties on

18 September 2012.

Background facts

[4] Ms Hutchison worked at the NCC as an Executive Assistant. She began on

30 May 2011.

[5] By 5 October 2011 NCC was aware that Ms Hutchison had e-mailed confidential workplace information relating to another

NCC employee to her home e-mail address. She later produced a copy of those notes to the Police because she considered it could be potential evidence in a Coroner's inquest. Ms Hutchison also gave the Police a written statement which included some information about an NCC ex-employee.

[6] An investigation and disciplinary process was entered into by the NCC. After an unsuccessful mediation on 14 October 2011, Ms Hutchison was advised that NCC would take disciplinary action against her based on what it considered to be inappropriate use of its e-mail facility.

[7] On 31 October 2011, a disciplinary meeting was held. After this meeting, Ms Hutchison was suspended from her employment on full pay.

[8] A second mediation occurred on 2 November 2011. No resolution was reached. There were further meetings between the NCC and Ms Hutchison on

9 November 2011 and 2 December 2011.

[9] I understand that in relation to the ongoing disciplinary process, the NCC also sent Ms Hutchison letters dated 31 October 2011, setting out allegations against her, and 21 November 2011. However, I have not seen copies of those letters.

[10] On 9 December 2011, NCC sent Ms Anjela Sharma, at that stage Ms Hutchison's counsel, a letter setting out findings that the NCC had made on the allegations against Ms Hutchison. The main allegation made by the NCC was that Ms Hutchison's conduct *has resulted in a breakdown in the essential relationship of*

trust and confidence between her and the NCC. Specific allegations were listed as including:

1. *Failing to act to the required standard as an EA to the*

Executive Manager, Alec Louverdis.

2. *Unsatisfactory conduct in role as EA to Geoff Mullen.*

3. *Inappropriate communications with other staff.*

4. *Breach of duty of good faith.*

5. *Breach of terms and conditions of employment as they relate to secondary employment.*

[11] The letter went on to set out which of the allegations NCC considered were proved and classified them as misconduct or serious misconduct. The NCC concluded that:

...Robyn's conduct has brought about a breakdown in the essential relationship of trust and confidence between her and NCC.

In light of our findings, we have contemplated the appropriate disciplinary outcome. Our interim decision is that of summary dismissal. This is not a final decision and we invite Robyn's comment on this.

Please provide any feedback on the proposed sanction by 12pm on Monday 12 December 2011, at which time a final decision will be made. ... Robyn is invited to provide comment only in relation to the proposed disciplinary outcome of summary dismissal.

[12] On 9 December 2011, Ms Sharma wrote to counsel acting for the NCC. For a number of reasons set out in Ms Sharma's letter, she wrote that Ms Hutchison saw no need to respond to the letter setting out the interim decision of summary dismissal from the NCC within the deadline time set by the employer. As far as I am aware Ms Hutchison made no response to the NCC letter of 9 December 2011.

[13] On 13 December 2011, NCC wrote to Ms Sharma:

The 7 (sic) December 2011 letter advised our conclusion that Robyn's conduct has brought about a breakdown in the essential relationship of trust and confidence between her and the Nelson City Council (NCC). The letter stated our proposed disciplinary outcome of summary dismissal and invited Robyn's response to this by 8 (sic) December 2011.

You were advised of an extension of time for Robyn's comments

through until 9am on 13 December 2011. Unfortunately no

comments on the issue of the proposed disciplinary outcome were provided.

We confirm the proposed disciplinary outcome of summary dismissal, effective immediately.

[14] On 1 March 2012, Mr Zindel wrote to NCC on Ms Hutchison's behalf. The

letter opened with:

Ms Hutchison previously engaged Anjela Sharma on this employment personal grievance, notification of which is formally given to you although there is an extensive history already.

[15] Mr Zindel then went on to explain what he called the *nature of the grievance* and set out Ms Hutchison's view of her employment history with NCC. His letter ended thus:

After the second mediation, the disciplinary process gathered momentum and, very soon after the admissions were made at what was a second disciplinary meeting, Ms Hutchison was summarily dismissed. There is a letter of 13 December 2011 to this effect.

... Accordingly we are writing to you direct to provide the necessary formal notification of the personal grievance for unjustified dismissal. We include in this matter the earlier actions in terms of an unjustified disadvantage grievance in relation to the bullying and other conduct that had occurred, when Ms Hutchison had done nothing out of order and otherwise had provided good and faithful service.

[16] On 5 March 2012, Ms Maree Kirk, counsel acting for the NCC, responded to

Mr Zindel via e-mail. She noted that the NCC did not accept his letter of 1 March

2012 amounted to formal notification of two personal grievance claims. In relation to the claim of unjustified dismissal she wrote:

The statement that "Ms Hutchison was summarily dismissed" was a fact known to NCC. That statement does not provide any detail, let alone "sufficient detail", for NCC to address.

*This is not accepted as a properly raised personal grievance complying with [section 114\(2\) Employment Relations Act 2000](#) as interpreted and applied by the Employment Court in *Creedy v. Commissioner of Police* [[2006\] NZEmpC 43; \[2006\] 1 ERNZ 517 \(EC\)](#) at paragraph 36.*

[17] In relation to the unjustified disadvantage grievance referred to in Mr Zindel's

letter, Ms Kirk wrote:

The reference here is the "bullying and other conduct that had occurred" and that presumably is a cross reference to the preceding paragraphs where a version of the background is presented. All of the alleged matters going to an unjustified disadvantage claim are not

only insufficient in detail but also outside the 90 day time limit under [section 114\(1\) Employment Relations Act 2000](#).

All of the allegations pertain to events prior to Robyn's suspension on

or about 20 October. The 90 days therefore expired well before

18 January 2012. To purport to raise a personal grievance on

1 March 2012 is outside the statutory time limit and NCC do not

consent to a personal grievance being raised out of time.

The statutory test

[18] [Section 114](#) of the Act sets out the requirements for raising a 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.

(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.

[19] The Employment Court case of *Creedy v. Commissioner of Police*¹ is the leading case on what is meant by the phrase *raise*

the grievance. The Chief Judge said:

[36] *It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and not a raising 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 employer to be able to address a grievance as the legislation contemplates, the employer must know what to address ... That is not to find, however, that the raising cannot be oral or that any particular formula of words is 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.*

[37] ... *It is clearly unnecessary for all of the detail of a grievance*

to be disclosed in its raising, as is required, for example, by

1 [2006] NZEmpC 43; [2006] 1 ERNZ 517

the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[20] The Creedy test has been applied a number of times since it was decided. It was applied by the Chief Judge of the Employment Court in the case of *Coy v. Commissioner of Police*². In that case, Ms Coy wrote a letter to her employer on 22

December 2002, the relevant part of which read:

As per our conversation of the 4th of December 2002, I wish to formally advise you that I intend to proceed with a personal grievance against the Department.

My personal grievance will be based on:

- *Harassment*
- *Denial of procedural fairness*
- *Intimidation*
- *Victimisation*
- *Professional Mismanagement*

My submission is currently being prepared and I anticipate it will be forwarded to you some time in the New Year, after Association input and other professional advice has been obtained.

[21] The Chief Judge decided at para.[14] that:

Although by a narrow margin, I conclude that Ms Coy's letter to Inspector Gaskin of 22 December 2002 meets the test for raising a grievance under [section 114\(2\)](#) in the sense that it made known to the Commissioner's representative that the plaintiff alleged a personal grievance that she wanted the employer to address. Read in conjunction with the advice the defendant concedes Ms Coy gave to Inspector Gaskin on 3 or 4 December 2002 about her intended personal grievance, the letter to the Commissioner of 22 December

2002 meets the test of [section 114\(2\)](#) for the raising of a personal grievance.

[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 observer³.

² Unreported, Employment Court, Christchurch CC23/07, CRC 12/07, 19 November 2007, Colgan CJ

³ *Winstone Wallboards Ltd v. Samate* [1993] 1 ERNZ 503

Did Ms Hutchison adequately raise her personal grievance with the NCC within

90 days?

Ms Hutchison's view

[23] Ms Hutchison submits that Mr Zindel's letter to the NCC dated 1 March 2012 made her intent *quite explicit*. She concedes that much of Mr Zindel's letter made reference to issues relating to unjustified disadvantage, but says that that was merely by way of providing background information.

[24] Ms Hutchison says that she did not consider making a claim of a personal grievance by way of unjustified disadvantage in employment. I note that at our first telephone conference Ms Hutchison made it quite clear that she is not seeking to pursue any claim of unjustified disadvantage.

[25] Ms Hutchison submits that until she received the letter of dismissal dated

13 December 2011, she had no personal grievance. However, once she was dismissed, she considered that she had a personal grievance of unjustified dismissal.

[26] Ms Hutchison considers that the case of *Creedy* is not applicable to her case. Instead, Ms Hutchison considers that even after the NCC sent the letter dated

9 December 2011 she was not adequately informed of the facts which were being considered in the disciplinary process which ultimately led to her summary dismissal. Ms Hutchison considers that the two heads of allegations which were being considered as serious misconduct, namely the breach of her duty of confidentiality and the alleged breach of her terms and conditions of employment as they related to secondary employment, were *vague and unsubstantiated*. Ms Hutchison considers that even to date she has *not been clearly and adequately advised of the facts* surrounding her dismissal. That is what forms the basis of the unjustified dismissal personal grievance she wishes to bring.

[27] A bulk of Ms Hutchison's submissions relate to the substantive issue of whether or not she was unjustifiably dismissed. Those submissions are not relevant to the preliminary issue I am considering in this determination.

[28] Ms Hutchison points out that in the 1 March 2012 letter Mr Zindel asked for

...a precise statement of the reasons for our client's dismissal to guide us in drafting the statement of problem for the Employment Relations Authority

However, she submits that the NCC letter of 5 March 2012 in response failed to provide the explanatory information that Mr Zindel had asked for. Ms Hutchison submits that was *critical information relevant to enabling the Applicant's complete adherence to statutory requirements with respect to [Section 114](#)*.

[29] In effect, Ms Hutchison's reason for considering that the dismissal was unjustified is that her *understanding of the reasons for her dismissal remains vague and puzzling to her*. She considers that the basis for her personal grievance claim was stated in the letter of notification dated 1 March 2012 as simply unjustified dismissal because:

... in the absence of the necessary explanatory detail, [it was] based upon the scant information available to the Applicant and her representative at that time.

NCC's view

[30] Ms Kirk for the NCC submits that the 90 day period after the date of dismissal on 13 December 2011 means that the 90 days expired on or about 12 March 2012. NCC considers that no personal grievance was adequately raised before 12 March 2012.

[31] In response to Ms Hutchison's claim that she relies on the letter of 1 March

2012 prepared by Mr Zindel, Ms Kirk says that the letter traversed:

... background information that goes solely to an unjustified disadvantage claim. Unjustified disadvantage is not now being pursued.

[32] Although the letter of 1 March 2012 referred to formal notification of a personal grievance for unjustified dismissal, the NCC, by way of its letter of 5 March, notified Ms Hutchison that:

The purported personal grievance was not accepted as a properly raised personal grievance.

[33] NCC relies on the *Creedy* decision that it is insufficient and does not amount to the raising of a personal grievance for an employee to advise that she considers she has a personal grievance or even to specify the statutory type of personal grievance.

[34] NCC submits that its letter of 5 March 2012 clearly communicated the view that there were insufficient details of a personal grievance. It notes that there was still time for a response to that letter giving more detail thus allowing the personal grievance to be properly raised within 90 days. However, NCC received no response from either Ms Hutchison or Mr Zindel.

[35] Ms Kirk submitted that it was:

... disingenuous for the applicant to say, ... that she did not know the

reasons for the dismissal.

[36] Instead, Ms Kirk submitted that Ms Hutchison had a number of documents provided to her by the respondent prior to the 1 March 2012 letter. In particular, Ms Kirk refers to:

- The letter to Ms Hutchison dated 31 October 2011 setting out allegations against her;
- The letter of 21 November 2011 advising Ms Hutchison of NCC's

findings in respect of those allegations;

- Further information provided to Ms Sharma on 6 December 2011;
- The letter of 9 December 2011 in which the NCC confirmed its previous interim findings and in particular advised which of the allegations it considered to be substantiated and which it did not; and indicated an interim decision of summary dismissal;

[37] Ms Kirk referred me to a number of cases in which the Authority and the Employment Court have considered the issue of what is adequate to notify the employer of a personal grievance. I have had regard to those cases - *Dickson v. Unilever New Zealand Ltd*⁴, *Barker v. Idea Services Ltd (in statutory management)*⁵, the relevant aspect of which survived a challenge to the Employment Court in *Idea Services Ltd (in statutory management) v. Barker*⁶ and *Faith v. Taonga Imports Ltd*⁷.

I have also had regard to the Employment Court case of *Melville v Air New Zealand*⁸.

⁴ [\[2009\] NZEmpC 35; \(2009\) 6 NZELR 463](#)

⁵ [2011] NZERA Auckland 409

⁶ [\[2012\] NZEmpC 112](#)

⁷ ERA, Auckland, Member Urlich, AA261/07, 5047470, 28 August 2007

⁸ [\[2010\] NZEmpC 87](#)

Determination

[38] Ms Hutchison's view is that she still does not know why she was dismissed and that is why Mr Zindel's letter of 1 March 2012 could not have been more specific about why she considered that she had a personal grievance of unjustified dismissal. If that was the case Ms Hutchison had an opportunity under [section 120](#) of the Act within 60 days of becoming aware of the dismissal to request the NCC to provide a written statement of the reasons for the dismissal. She did not do so.

[39] Given the detailed letter dated 9 December 2011 sent to Ms Sharma I consider that Ms Hutchison must have known *before* 1 March 2012 of the reasons her former employer considered that it had for dismissing her. That being the case she would also have known why she believed that she had been unjustifiably dismissed her. She would have known enough to have been able to express, at the very least, whether she agreed or disagreed with the conclusions the NCC had set out in its letter dated

9 December 2011 setting out which allegations it found proved and which of those allegations it considered amounted to serious misconduct. However, Mr Zindel's letter did not disclose even scant detail of why Ms Hutchison believed she had been unjustifiably dismissed. Ms Hutchison has suggested in her submissions on this matter that she considered that the allegation relating to her secondary employment was *vague and unsubstantiated*. That is the kind of detail that would have helped to ensure that NCC was adequately informed of the reasons she considered that she had a personal grievance for unjustified dismissal.

[40] In *Coy* the Employment Court considered that the list of reasons given by Ms Coy in her letter to her employer met the test for raising a personal grievance *although by a narrow margin* when taken together with other earlier advice to her employer. That is in contrast to the *Faith* case in which Ms Faith included in her letter to her employer:

This letter is to advise that I am taking a claim against Taonga Imports

Limited for an employment related grievance as follows.

Constructive dismissal Loss of wages and benefits Humiliation

Defamation

Breach of promise in relation to shares

[41] The Authority decided that Ms Faith's letter was not sufficient to raise a personal grievance as it had not adequately notified her employer of *what was to be addressed*⁹.

[42] Mr Zindel's letter did not contain as much detail as that sent by Ms Faith or Ms Coy to their employers.

[43] I take Mr Zindel to have still been representing Ms Hutchison as at 5 March

2012 when Ms Kirk wrote by e-mail to him that the NCC did not accept that any personal grievance had been validly raised. There was sufficient time for a response setting out at the very least which aspects of the disciplinary process, conclusions reached or reasons given for the dismissal Ms Hutchison considered gave rise to a personal grievance.

[44] Ms Hutchison submits that it was obvious by way of Mr Zindel's letter of

1 March 2012 that he only included the details of events in the workplace as background information. However, I do not consider that was clear from his letter, although that may have been Ms Hutchison's intention. The plain meaning of the words used in Mr Zindel's letter *an unjustified disadvantage grievance* was reasonably considered by NCC to convey a purported notification that Ms Hutchison considered that she had two personal grievances; one for unjustified disadvantage and one for unjustified dismissal.

[45] Because Ms Kirk's letter of 5 March 2012 went unanswered NCC was not aware that Ms Hutchison was only pursuing one personal grievance being for unjustified dismissal until she filed her Statement of Problem with the Authority on

13 June 2012.

[46] I consider that the 1 March 2012 letter did not give enough information to enable NCC to address a personal grievance of unjustified dismissal. It contained no detail about the grievance. I do not consider that NCC would have been able to

deduce what Ms Hutchison relied on to conclude that she had been unjustifiably

9 At paragraph 31

dismissed. Applying the test from *Creedy*, I find that the letter dated 1 March 2012 raised the fact that Ms Hutchison considered that she had a personal grievance of unjustified dismissal but did not advise of sufficient detail so as to allow the NCC to be able to address her concerns. It follows that Ms Hutchison has failed to meet the criteria set out in [section 114\(1\)](#) of the Act.

[47] If Ms Hutchison still wishes to pursue a personal grievance of unjustified dismissal she must make an application to the Authority under [section 114\(3\)](#) of the Act for leave to raise her personal grievance after the 90-day period. I set out the relevant part of [section 114](#) here:

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after giving

the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

(a) is satisfied that the delay in raising the personal grievance

was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in [section](#)

[115](#)); and

(b) considers it just to do so.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.

[48] Ms Hutchison indicated her intention to make such an application during our telephone directions conference on 18 September 2012. When making the application Ms Hutchison should set out in as much detail as possible which ground or grounds of exceptional circumstances, as set out under [section 115](#) of the Act, she relies on. She should also annex any

relevant documents to her application. I set out [section 115](#) of the Act here:

For the purposes of [section 114\(4\)\(a\)](#), exceptional circumstances include—

(a) where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in

[section 114\(1\)](#); or

(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; or

(c) where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by [section 54](#) or [section 65](#), as the case may be; or

(d) where the employer has failed to comply with the obligation under

[section 120\(1\)](#) to provide a statement of reasons for dismissal

[49] At the 18 September 2012 telephone directions conference Ms Kirk submitted that Ms Hutchison was unable to rely on [section 115\(d\)](#) because she did not make any request of the NCC under [section 120\(1\)](#) within 60 days of becoming aware of the decision to dismiss her.

[50] If Ms Hutchison makes an application under [section 114\(3\)](#) the Authority will arrange a further telephone directions conference to set down the process and timeframe for considering the application for leave.

Costs

[51] Costs are reserved. If a further application is made then it may be appropriate that costs are determined when that matter is disposed of.

Christine Hickey

Member of the Employment Relations Authority