

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 257
5539991

BETWEEN MARCIA KRKA
 Applicant

A N D AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Andrew Caisley, Counsel for the Respondent

Investigation Meeting: 21 August 2015 at Auckland

Submissions Received: 21 August from the Applicant
 20 August from Counsel for the Respondent

Oral Determination: 21 August 2015

Written Record Issued: 24 August 2015

**ORAL DETERMINATION OF THE AUTHORITY
ON A PRELIMINARY ISSUE**

- A. The unjustified disadvantage claim alleging workplace stress was raised within the statutory 90 day time period;**
- B. The circumstances surrounding the offer of secondment do not constitute an unjustified disadvantage.**
- C. Costs are to lie where they fall.**

Employment relationship problem

[1] The applicant, Ms Marcia Krka, says that she raised a personal grievance claim with the respondent (her employer), Air New Zealand Limited (Air New Zealand) concerning an unsafe work environment. She says that occurred in a letter to the Chief Medical Officer, Mr Timothy Sprott on 17 June 2013.

[2] Ms Krska says she also raised a personal grievance with Air New Zealand on 22 January 2014 concerning unfair treatment regarding an offer of secondment to her.

[3] Ms Krska's third personal grievance claim relates to alleged failures by Air New Zealand to follow its performance management procedures in respect of her performance review for the year 1 July 2013 to 30 June 2014.

[4] Ms Krska claims to have been disadvantaged in each of these cases, by the alleged unjustifiable actions of Air New Zealand. Ms Krska says each of the claims was raised with Air New Zealand within 90 days as required by s.114 of the Employment Relations Act 2000 (the Act).

[5] Ms Krska says if she is not correct, then leave should be granted to her by the Authority to raise her personal grievances out of time under s.114(4) of the Act, on the grounds it is just to do so.

Air New Zealand's reply

[6] Air New Zealand denies each of Ms Krska's claims. In respect of the first personal grievance claim alleging an unsafe work environment, Air New Zealand says Ms Krska did not raise the grievance within 90 days and so cannot pursue it by virtue of s.114 of the Act.

[7] With regard to the second claim, Air New Zealand says the alleged unfair treatment regarding the secondment offer does not constitute an unjustified disadvantage personal grievance under s.103(1)(b) of the Act and further that it was not raised within 90 days.

[8] With regard to the third personal grievance claim regarding the following of performance management procedures, Air New Zealand accepts that Ms Krska raised a personal grievance within 90 days.

[9] In the event the Authority finds any of the grievances were not raised within 90 days, Air New Zealand says Ms Krska has not been able to establish "*exceptional circumstances*" under s.114(4)(a) of the Act and it would not be just to grant her leave to raise the grievances out of time.

The legislation

[10] Section 114 of the Act states:

- (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.*

[11] Section 115 states:

Further provision regarding exceptional circumstances under section 114

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 ...*

Issues

[12] There are a number of issues for determination by the Authority. They are:

- (a) Did Ms Krska raise her first personal grievance claim of an unsafe work environment within 90 days as required by s.114 of the Act?
- (b) Did the circumstances surrounding the second personal grievance claim constitute an unjustified disadvantage under s.103 of the Act?

- (c) If the second personal grievance claim did constitute an unjustified disadvantage under s.103 of the Act, did Ms Krska raise it within 90 days?
- (d) If Ms Krska did not raise her personal grievance claims within 90 days, were the delays in raising the personal grievances occasioned by “*exceptional circumstances*”?
- (e) In the event that the answer to this last question is “yes”, the Authority will be required to consider whether it is just to grant Ms Krska leave pursuant to s.114(4) of the Act to raise her personal grievance outside the statutory 90 day time period.

Investigation meeting

[13] The investigation of the preliminary matter took half a day in the Authority. Closing submissions were filed by Counsel for Air New Zealand the day before the Investigation meeting and by Ms Krska at the conclusion of the Investigation meeting.

[14] For the Authority’s investigation, Ms Krska provided a witness statement and Mr Timothy Sprott filed a witness statement on behalf of Air New Zealand.

[15] Each witness confirmed their evidence was true and correct and were given the opportunity to provide any further comments. There were a large number of documents provided to the Authority which were looked at by me and were useful in assisting me with this preliminary investigation.

[16] The witness statements and evidence were all helpful. However, in this oral decision I have only referred to some of the evidence and the facts, findings and legal issues which are necessary for me to make my finding in relation to the preliminary issue as I am permitted to do under s.174 of the Act.

First Issue

Did Ms Krska raise her first personal grievance claim of an unsafe work environment within 90 days as required by s114 of the Act?

Employment by Air New Zealand

[17] Ms Krska was employed by Air New Zealand on 1 October 2012. Ms Krska’s initial role was a fulltime position providing administrative support for the Aviation

Medicine Unit. Ms Krska's terms of employment were contained in an individual employment agreement dated 04 September 2012.

[18] Ms Krska is currently employed by Air New Zealand on secondment in the role of Aircraft Leasing Administrator on terms and conditions set out in a letter dated 31 March 2014. The secondment is for two years from 5 May 2014 to 3 May 2016.

Unsafe work environment

[19] Ms Krska says that soon after commencing in her role, she and her colleagues were subjected to behaviours by her manager, which she described as "*intimidating and unprofessional*". Ms Krska gave a considerable amount of evidence about the manager's management style and how it affected her and her colleagues. Ms Krska says she had numerous meetings with Mr Sprott to discuss these behaviours and how they were causing her stress.

[20] In her witness statement, Ms Krska says that:

On 29 May 2013 I felt that I had reached my breaking point with regard to the stress level in the Unit. I prepared a draft email to send to Dr Sprott specifically describing the stress level in the Unit. Dr Sprott came into my room to have a confidential discussion with me to reassure me that some action was finally going to take place in the very near future....

[21] After this meeting, Ms Krska says she was approached by her manager "*demanding*" to know what the meeting with Mr Sprott had been about. When Ms Krska refused to disclose what the meeting was about, Ms Krska says she was subjected to a "*sustained aggressive verbal assault*". This led to another meeting between Mr Sprott and Ms Krska at which time Ms Krska informed Mr Sprott she was going to put a complaint in writing.

[22] On 6 June 2013 a facilitation meeting was organised by Air New Zealand attended by the manager concerned, Ms Krska, Mr Sprott and other members of his team. This meeting was a forum for staff to address aspects of the manager's behaviour. Ms Krska found the meeting extremely difficult and on 7 June 2013, took a day off sick to attend a session with a counsellor through the Employee Assistance Programme (EAP).

Letter of 17 June 2013

[23] Matters did not improve and on 17 June 2013 she sent a long letter to Mr Spratt enclosing her draft email of 29 May 2013.

[24] Mr Spratt accepts in his witness statement that Ms Krska:

... regularly raised with me things that displeased her in the workplace The matters Marcia raised with me were usually general in nature. From time to time she indicated to me that she was feeling stressed and/or that she was feeling bullied.

[25] Ms Krska says the letter she sent to Mr Spratt on 17 June 2013 raised a personal grievance regarding bullying which resulted in an unsafe workplace.

[26] Mr Spratt does not accept the letter of 17 June 2013 raises a personal grievance. Mr Spratt's reasons for this were that the letter did not refer to any personal grievance claim, it lacked specificity and was in the same vein as Ms Krska's previous complaints. Mr Spratt says he thought Ms Krska's complaints were that she "*... was unhappy with the team, and she considered there were issues between her and [the manager], and the team wasn't working well as a unit*".

[27] The letter of 17 June 2013 is a long letter which traverses issues of concern to Ms Krska from the time she started in the role on 1 October 2012.

[28] In the first paragraph of the letter, Ms Krska states:

... I have been made to feel uncomfortable, demoralised and harassed by my ... [manager] ..., since starting my employment with Air New Zealand ...

[29] Ms Krska makes a number of other references to the workplace and bullying behaviours by her manager in the letter including:

... I recall the conversation with you in the Staff Room in early May 2013 ... how bad we were all feeling and how demoralised, by the still regular instances of harassment, aggressive communication style and un-professional behaviour.... You reassured us that [the manager] was receiving management mentoring and that you were aware of our situation.

... I believed you had witnessed for yourself how I was bullied and harassed immediately afterward by [the manager], once [the manager] learned we had had a confidential conversation ...

... making me wait months for any facilitation input after my colleagues and I had raised workplace issues to you ... is quite

clearly not meeting the duty of care Air New Zealand has to keep me safe in my workplace ...

[30] Ms Krska then refers to examples of conduct by [the manager] that she says “caused a high degree of workplace stress ...”. Examples were listed as:

- *Un-professional behaviours-Sharing of confidential Unit business and talking down senior staff with subordinates,*
- *Lack of Empathy/Planning,*
- *Lack of Support for subordinates,*
- *Lack of lines of communication.*

[31] Ms Krska concludes her letter as follows:

I appreciate ‘bullying’ is a strong term to use and I have never used it before when describing to you or anyone else in the team, my experiences to date. I have managed this by telling myself that as an ex-RAF officer no-one could ever bully me. However, after my counselling sessions I have come to recognise that certain behaviours that I have experienced in the Unit from [the manager] can be defined as bullying behaviours. They are behaviours that I would not tolerate in any other life situation, but I tolerate them because [the manager] is my manager and in a position of authority. However, [the manager] fails to recognise that with authority comes responsibility.

Dr Spratt, I love working as part of the Aviation Medicine Unit. ... However, the vicious circle of negative communication and lack of any real empathy or understanding from [the manager] as to how [the manager] should manage, has created for me an environment of intolerable workplace stress. I have informed you of this now in writing and I have also kept you informed of the assistance I have sought recently to best manage my wellbeing over the coming weeks, whilst you set to address these issues. Should the situation not change however, I feel that in order to maintain my physical wellbeing I will have no other option but to resign my post should this not be adequately addressed and resolved in the very near future. This is a truly heart breaking state of affairs for me and something that I would rather not have to deal with.

[32] Mr Spratt says that at no time during the numerous conversations he had with Ms Krska from the time she started employment until he received her letter on 17 June 2013 does he ever recall a formal complaint being laid by Ms Krska nor any reference to the raising of a personal grievance claim by her. Mr Spratt accepts that he received Ms Krska’s letter on 17 June but says it did not raise a personal grievance and there is no reference to the phrase personal grievance in the letter.

[33] Mr Sprott says in essence that in the letter Ms Krska raised similar complaints that she had been making, namely that she was not happy with the team, considered there were issues between her and [the manager] and the team was not working well as a unit.

[34] During the investigation meeting today, Mr Sprott accepted that in May 2013, matters in the Unit had become serious. At this time, Mr Sprott sought advice and guidance from Air New Zealand's Human Resources Department. Following receipt of this advice, Mr Sprott took steps to address the issues, steps included convening a facilitation meeting and a team building exercise.

[35] Mr Sprott acknowledged that Ms Krska's subsequent letter of 17 June 2013 contained specific issues and that he had a different view of those to Ms Krska. Mr Sprott accepted that the letter raised grievances which were being taken seriously by Air New Zealand.

[36] As a result of steps taken by Air New Zealand to address Ms Krska's complaints, things improved in the Unit. There was no further correspondence from Ms Krska about matters for some 18 months. Ms Krska says issues were raised by her verbally. Given this, Air New Zealand may have understood matters to have been resolved.

[37] Counsel for Air New Zealand submits that the letter of the 17 June 2013 did not raise a personal grievance claim and that the only document that could ever have amounted to the raising of a personal grievance was the statement of problem filed by Ms Krska on 30 March 2015. Counsel referred in his submissions to well known cases including *Creedy v. Commissioner of Police*¹ as authority for the proposition that grievances must be raised by an employee with sufficient particularity to enable the employer to be able to address the grievance.

[38] It is my view that the letter of the 17 June 2013 does describe in sufficient detail the nature of Ms Krska's complaint. She refers to specific behaviours by [the manager] that she considers to amount to bullying and which caused her stress. Ms Krska notified Mr Sprott in the letter that unless the situation changed she would have no other option but to resign and she sought the issues to be addressed and resolved. While the words "*raising a personal grievance*" are not used, it is my view

¹ [2006] ERNZ 517

that Ms Krska's complaints are that her employment had been affected to her disadvantage by the unjustifiable actions of Air New Zealand.

[39] I refer to a decision of the Employment Court in *Clark v Nelson-Marlborough Institute of Technology*². In that decision, Judge Couch considered a letter written by Ms Clark to the Nelson-Marlborough Institute of Technology detailing complaints about the manner in which she had been treated and seeking remedies. Judge Couch stated at para.[37]:

In deciding whether the effect of the plaintiff's letter of 22 July 2005 was to raise a personal grievance, it does not matter what she intended her complaint to be or her preferred process for dealing with it in the first instance. Equally it does not matter whether the defendant, through Mr Cox, recognised the plaintiff's complaint as a personal grievance or not. The only issues are whether the nature of the plaintiff's complaint was a personal grievance within the meaning of s.103 and, if so, whether the letter complied with s.114(2) by conveying the substance of the complaint sufficiently to the defendant.

[40] It is my view that Ms Krska's complaints specified in the letter of 17 June 2013 did constitute a personal grievance within the meaning of s.103 of the Act and the letter of 17 June 2013 conveyed the substance of the complaint sufficiently to Air New Zealand.

[41] I find that Ms Krska did raise a personal grievance in her letter of 17 June 2013 in accordance with s.114 of the Act.

Second issue

Did the circumstances surrounding the second personal grievance claim constitute an unjustified disadvantage under s.103 of the Act?

[42] As Judge Couch stated in *Clark*, it is necessary to consider the nature of a complaint brought to see whether it is a personal grievance within the meaning of s.103 of the Act and if so whether it was raised with the employer in compliance with s.114 of the Act.

[43] On 5 November 2013, Ms Krska was offered a secondment by Air New Zealand. Ms Krska was given until 8 November 2013 to accept the secondment. In her letter of 11 November 2013 to Ms Lorraine Murphy at Air New Zealand, Ms Krska declined the offer of secondment. This appears to have been because the

² CC12/08, 19 August 2008

secondment was for a six month period with two weeks to return to her previous role and in the event that a role no longer existed, a discussion would be held with her prior to the conclusion of the secondment. Ms Krska expressed her sadness, shock and disappointment but did not mention a personal grievance.

[44] Discussions continued between Mr Sprott and Ms Krska about the offer of secondment despite the date for acceptance having passed. Mr Sprott asked Ms Krska to consider the offer over the Christmas break which Ms Krska did.

[45] On 22 January 2014, Ms Krska was informed that because the timeframe for accepting the secondment had passed, the whole process would need to start again. Ms Krska replied in an email dated 22 January 2014 which she claims is a submission of a personal grievance. Ms Krska said in her email of 22 January to [the manager]:

I remain disappointed (possibly an under-statement) re the post, as no doubt anyone would be, if they put themselves in my position. Especially in the light of Tim's very robust attempt to try to change my mind during our meeting in PlaneSafe at the end of last year, and his offer made then to me, to let him know the moment I could find a way to agree to the role.

*I felt I let him know just as soon as I was able after our Xmas break – my being mindful of how busy he was during his first week back after Xmas. When I asked him when you were off sick if the offer was still there and that I would be prepared to sign the contract if the wording of that sentence could be changed. He told me to “go away and write a sentence I would be happy with and he would send to HR” certainly gave me the impression that the post would still go ahead. I related this to you in our recent meeting. Then on Monday, when I asked to speak to Tim on quite another matter, I'm informed it's not. I would certainly be interested to know exactly **when** this decision was actually made?*

[46] First, I agree and accept the submissions made by counsel for Air New Zealand that the secondment issue does not meet the requirements of being a personal grievance under s.103 of the Act.

[47] Section 103(1)(b) of the Act defines a personal grievance as including:

... that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[48] Ms Krska was offered a secondment which she declined, or if not declined by her, despite the wording of her email of 11 November 2013, it lapsed or was

withdrawn because it was not accepted by Ms Krska within the timeframe. Therefore, Ms Krska had not accepted and was not subject to terms and conditions of employment which were affected to her disadvantage.

[49] Counsel for Air New Zealand referred the Authority to the Court of Appeal decision in *Mattes v NZ Post Limited*³. The Court of Appeal in *Mattes* stated:

The ... question for the Employment Court's decision ... was whether the particular employee's employment or a condition of the employment was affected to the employee's disadvantage by that action. In the words of the paragraph it is whether "the employment ... is ... affected to the employee's disadvantage by some 'unjustifiable action'". That necessarily involves focusing on the present employment, considering the changes that have occurred and assessing their impact on the employee. The Employment Court is not confined in that assessment to evidence that was in the possession of the employer when it engaged in the unlawful action.

[50] In my view, there is no personal grievance claim in relation to the secondment matter. Ms Krska was made an offer, it was declined, there were further discussions and it was withdrawn. Ms Krska's terms of employment continued throughout.

[51] Even if I am incorrect in that matter, I do not accept that Ms Krska raised a personal grievance in relation to the secondment matter in her email to [the manager] on 22 January 2014. The email of 22 January 2014 refers to Ms Krska's disappointment; there is no notification to Air New Zealand of a personal grievance claim. There was simply an expression of disappointment by Ms Krska.

[52] Given the answers to the first two issues, there is no need for the Authority to consider the other issues relating to 90 days and "exceptional circumstances".

Determination

[53] In conclusion, Ms Krska did raise a personal grievance claim in relation to an unsafe work environment within 90 days.

[54] The issue raised by Ms Krska relating to the offer of secondment did not amount to an unjustified disadvantage under s.103(1)(b) of the Act and therefore there is no personal grievance claim which could have been brought by her within a period of 90 days.

³ [1994] 1 ERNZ 994 at 997 per Richardson J (CA)

[55] Even if the Authority is wrong in this matter, Ms Krska did not raise the secondment matter as a personal grievance within 90 days of it occurring.

Costs

[56] Costs are to lie where they fall.

Anna Fitzgibbon
Member of the Employment Relations Authority