

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 452/10
5160909

BETWEEN MALLORY SELLIMAN
Applicant

AND TE RUNANGA O
KIRIKIROA TRUST
Respondent

Member of Authority: Vicki Campbell

Representatives: Rose Alchin for Applicant
Alex Hope for Respondent

Investigation Meeting: 20 and 23 November, 3 December 2009 and 29 January
2010 at Hamilton

Submissions Received: 1 March and 3 April 2010 from Applicant
26 March 2010 from Respondent

Determination: 20 October 2010

DETERMINATION OF THE AUTHORITY

[1] My apologies to the parties for the unavoidable delay in getting this determination to them. Unfortunately due to work and other commitments this determination is out much later than I originally anticipated.

[2] Ms Selliman was employed by Te Runanga O Kirikiriroa Trust ("TROK") as a Career Coach on 4 February 2008. Ms Selliman is affiliated through her father to Te Ati Awa. Ms Selliman completed a Bachelor of Primary Teaching degree in 2006. Her employment with TROK was her first job which would utilize her teaching qualification.

[3] TROK operates two specialist youth transition services, one in Ngaruawahia (Waikato District Youth Transition Services) ("WD") and the other in Hamilton (Whai Marama Youth Connex) ("YTS"). Ms Selliman was employed to work at YTS.

[4] Ms Selliman claims she was subject to bullying and intimidation throughout her employment and that this led to her being disadvantaged by unjustifiable actions of her employer. Ms Selliman also claims she was unjustifiably dismissed.

[5] TROK denies Ms Selliman's claims and says that her claim for unjustified dismissal has not been raised within the requisite 90 day period as required by the Employment Relations Act 2000 (the Act). An Application for Leave to raise the personal grievance outside the 90 day period has been lodged in the Authority by Ms Selliman.

[6] The issues for this determination are:

- Was Ms Selliman's employment subject to an unjustified disadvantage?
- Did Ms Selliman raise her grievance for unjustified dismissal within 90 days as required by the Act;
- If the grievance was raised within 90 days was Ms Selliman unjustifiably dismissed?

Relevant Terms and conditions of employment

[7] The terms and conditions of Ms Selliman's employment were set out in an individual employment agreement which she signed on 1 February 2008. The agreement sets out obligations regarding Health and Safety, raising employment relationship problems and Equal Employment Opportunities.

[8] The position description dated July 2008 states:

Whai Marama Youth Connex is a kaupapa Maori Service and as such observance of Powhiri, Waiata, Whatakau and attendance at Noho Marae are a part of our operations. These events are fundamental to staff development and knowledge of tikanga and te reo and as such staff attendance at these events is expected.

[9] The position description also sets out the reasons why Ms Selliman could be dismissed, which are as follows:

- Consumption of alcohol or other mind-altering drugs during work hours.
- Sexual contact between staff and whānau.
- Theft of property. Theft is assumed when property is found in the possession of staff for which permission has not been obtained. Police intervention will be immediate.
- Physical or verbal abuse of co-Career Coaches, whānau members, manuhiri.
- Dishonesty either through the deliberate giving of inaccurate information or the withholding of critical information.
- Breach of confidentiality requirement.

- Derogatory remarks directed towards either co-Career Coaches or whānau members on the basis of their ethnic group, race, religion or gender.
- Personal, professional or cultural incompetence.

[10] In its Mission Statement TROK identifies and defines the values applicable to its organisation and includes:

- Openness/Transparency
- Be honest and reliable
- Enable people to say what they think without fear of it being held against them
- Create a climate of trust
- Say what you think
- Have an open door policy
- Respect confidentiality
- Don't hide things
- Don't backstab
- Don't lie

Ms Bevan's role

[11] Ms Michelle Bevan is Ms Selliman's mother. Prior to and during Ms Selliman's employment Ms Bevan contracted directly with TROK to provide clinical supervision, policy review and writing, clinical file auditing, and critical incident management services.

[12] Ms Bevan and Ms Tracey Tuhi (Ms Selliman's manager) had formed a close personal friendship and the two often met over dinner and during weekends to talk through issues Ms Tuhi was dealing with in her role as a Manager. Through their friendship Ms Selliman became acquainted with Ms Tuhi and it was Ms Tuhi who encouraged Ms Selliman to apply for the Career Coach position which had become vacant.

[13] Ms Bevan, along with Ms Tuhi, Ms Tuhi's daughter, and Ms Tarina Ranui, Team Leader at Ngaruawahia, made up the interview panel, that interviewed the candidates including Ms Selliman, for the career coach position.

[14] From January 2008 until July 2008 Ms Bevan also filled the role of Team Leader for the Hamilton staff on a temporary basis, until a new Team Leader was appointed. During this period Ms Bevan continued to provide clinical supervision to employees including Ms Selliman.

Disadvantage grievance

[15] There are three aspects to Ms Selliman's disadvantage grievance. These are:

- that Ms Selliman was subject to bullying and TROK failed to provide her with a safe working environment;
- that Ms Selliman was issued with a written warning which was unjustified; and
- that Ms Selliman was unjustifiably suspended from her employment.

[16] I am required to examine TROK's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[17] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether TROK's actions disadvantaged Ms Selliman in her employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.¹

[18] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If TROK can establish justification for a disadvantageous action, there is no grievance.²

[19] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.³

Failure to provide safe working environment

[20] Ms Selliman claims she was subject to bullying, intimidation and harassment throughout her employment at TROK by other employees, but in particular Ms Jodie Mason and Ms Ranui. She says their treatment of her led to her becoming unwell and

¹ *Mason v Health Waikato* [1998] 1 ERNZ 84

² *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

³ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

that this breached the employers' obligation to provide and maintain a healthy and safe work environment.

[21] Ms Selliman is a young lady who looks European, but as already stated identifies as Te Ati Awa through her father. Her appointment at TROK was her first permanent position having completed a teaching degree.

[22] During the course of the investigation meeting it became clear that Ms Selliman's appointment was not welcomed by all staff, particularly Ms Mason and Ms Ranui who were both based at the Ngaruawahia office (WD). Ms Selliman's manager, Ms Tuhi, was aware of Ms Ranui's feelings about Ms Selliman's appointment. It was common ground that both Ms Ranui and Ms Mason believed Ms Mason's husband should have been appointed to the position and not Ms Selliman, as she did not look Maori enough.

[23] Ms Selliman says that from day one she was excluded and made to feel unwelcome and was treated as an outsider. She says Ms Ranui had issues with her appearing to be non-Maori and was rude towards her. Ms Selliman told the Authority that the atmosphere in the office was often tense and she began calling in sick so that she did not have to deal with the situation.

[24] At the investigation meeting Ms Tuhi confirmed that Ms Ranui's behaviours at work were aggressive and that she was strongly opinionated. Ms Tuhi described Ms Ranui as having power and control issues and acknowledged she was difficult to manage.

[25] I am satisfied there was a general sense in the Hamilton (YTS) office that Ms Ranui's behaviour was bullying in nature. Ms Tuhi wrote an email to Ms Ranui on 29 July 2008 where she outlined a number of issues including raising with her that her behaviour was pushy and "...at times interpreted as bullying by a number of Hamilton staff."

[26] By August 2008 Ms Selliman's relationship with her new Team Leader Mr Rob Davis, was also beginning to deteriorate. Mr Davis was spending time with the WD staff and Ms Selliman felt that Mr Davis's attitude toward her was changing as a result of the time he was spending with Ms Mason and Ms Ranui and their influence on him.

[27] Approximately 2-3 weeks after his appointment, during a team meeting, Mr Davis made comments which offended both Ms Selliman and Ms Marama Kuru, a

Career Coach who worked with Ms Selliman at YTS. Both ladies complained to Ms Tuhi about the comments and at the next team meeting Ms Kuru says Mr Davis apologised for his comments in front of the whole team.

[28] Ms Kuru says she thanked Mr Davis for the apology but Ms Selliman remained unimpressed and did not acknowledge the apology. At the investigation meeting Ms Selliman denied Mr Davis had apologised at the team meeting, however I am satisfied that on balance it is likely Mr Davis did make an apology in front of the team but Ms Selliman was not prepared to accept it.

[29] On 29 August 2008 Ms Selliman took a telephone call from Ms Kuru. Ms Kuru was passing on a message from Ms Mason's sister (Ms Smith), the Careers Advisor at Sacred Heart Girls College ("Sacred Heart") in Hamilton. Ms Selliman had arranged with another teacher at Sacred Heart to present a workshop to year 12 students. Ms Smith was enquiring about who Ms Selliman had contacted at Sacred Heart and when she would be going to the school to present a careers workshop to students.

[30] Without speaking to Ms Smith, Ms Selliman concluded that Ms Mason was interfering in her job and that her sister would try and stonewall her from going to the school. To use Ms Selliman's own words, she "...went off in a rant..." to Ms Kuru. According to Ms Kuru, Ms Selliman also made an offensive remark about Ms Mason and Ms Smith before their call ended.

[31] After Ms Kuru expressed her unhappiness about the way Ms Selliman had spoken about Ms Mason and Ms Smith, Ms Selliman emailed Ms Kuru and apologised for the tone of her remarks but did not apologise for what she had said.

[32] Ms Selliman's perception of what had happened was that Ms Mason was now undermining her at Sacred Heart and that Ms Mason and Ms Smith were colluding to stop her from undertaking her workshops at the school.

[33] Immediately following this incident Mr Davis attempted to have a conversation with Ms Selliman, however, her response was rude and patronising. Ms Selliman apologised to Mr Davis in an email later that day for her behaviour and left the office early as she was feeling upset and tearful.

[34] Ms Selliman says she then tried to contact Ms Tuhi to tell her what had happened but she was not available so she rang her mother. Ms Bevan then made

contact with Ms Kuru. During a conversation with her, Ms Bevan informed Ms Kuru that Ms Smith had blocked the career coaches from entry into the school earlier in the year and told her that Ms Smith had been rude to her on two previous occasions. She also told Ms Kuru that Ms Selliman had been subject to bullying by the WD team which included Ms Mason.

[35] Ms Kuru perceived the intervention by Ms Bevan to be a ganging up on her by Ms Selliman and her mother. When Ms Tuhi found out what had happened she attempted to discuss it with Ms Kuru but she was so upset that she too, had to leave the office.

[36] Ms Kuru, who was still feeling distressed as a result of her conversations with both Ms Selliman and Ms Bevan, approached Ms Mason at her home after work and told her of the conversations she had had with Ms Selliman and Ms Bevan.

[37] On 3 September Ms Mason made a formal written complaint to Ms Mere Balzer, the CEO about the conversations between Ms Selliman and Ms Kuru which had been relayed to her by Ms Kuru.

[38] Ms Mason complained that Ms Selliman said "...who the f***k does she think she is; the f***ken b***ch". Ms Mason also complained about the fact that Ms Bevan had spoken about Ms Smith being rude and putting up barriers to stop the organisation going into Sacred Heart.

[39] As well as her own personal complaint to TROK Ms Mason advised Ms Smith of the comments made by Ms Selliman and Ms Bevan which had been relayed to her by Ms Kuru. On 5 September 2008, Ms Smith also made a formal complaint to TROK about what she regarded as defamatory comments and unprofessional conduct by both Ms Selliman and Ms Bevan.

[40] After receiving both complaints, on 5 September, Ms Selliman was advised of a disciplinary investigation and provided with copies of the complaints received from Ms Mason and Ms Smith. Ms Selliman was advised of her right to bring a support person to the meeting and advised that it would be inappropriate for Ms Bevan to be that person, as Ms Bevan was also the subject of the complaints.

[41] Ms Bevan set out a written response to the complaints which she referred to as "...a pile of crap...". In her written response Ms Bevan also states:

[Ms Selliman] phoned me later that afternoon from her house and was sobbing. She said she was sick of the constant bullying from WD, she was sick of feeling like her reputation was being trashed, she now believed her reputation was being trashed in her old school. She didn't feel like anyone was doing anything to address the situation and she wasn't ever going back to Whai Marama because she felt really unsafe there. ...

Mallory has been subjected to on-going bullying from the WD team, led by [Ms Ranui], since she commenced employment with Whai Marama. Although this has been acknowledged at all levels of the organisation, it has never been dealt with and [Ms Selliman] has been left to fend for herself. [Ms Selliman] is a young person, working for a youth service that has at no point provided her with any protection despite being fully aware of what she is experiencing. [Ms Selliman] is now being subjected to further bullying by being held to account for a petty conversation with a colleague, which SHE APOLOGISED FOR AT THE TIME. The fact that there is still nothing being done to address the endemic bullying that [Ms Selliman] experiences on an on-going basis, but she is being held to account for such a petty matter that other people have chosen to take out of the organisation, is further victimising her. Does anyone actually care about this young person's wellbeing or will it be acceptable to see her sacrificed rather than address the tough issues at the core of this matter?

[42] On 6 September Ms Selliman wrote to TROK formally complaining about the process in relation to the complaint from Ms Mason. Ms Selliman sets out her concerns about the fact that Ms Kuru had taken information outside the organisation to Ms Mason who then took it to Ms Smith. She also states that Ms Smith could only have heard that she was working with Sacred Heart from Ms Mason, who had been in attendance at a meeting on 28 August when the fact that Ms Selliman had an appointment at Sacred Heart was discussed.

[43] In her letter of complaint Ms Selliman also states:

I feel extremely concerned for my safety working with Marama, Jodie or Megan as their approach to this matter appears to have malicious intent towards me and I am concerned about who else may have been dragged into this matter both within Whai Marama and externally.

This situation raises serious questions in respect of the personal and professional ethics of those involved and I am further concerned that the fact that it has been entertained at all gives licence to the increasing level of bullying I am experiencing at Whai Marama. I wonder what I will have to endure next in what I am experiencing as a systematic process that is being undertaken to force me out of my job.

[44] Ms Selliman wrote a second complaint on that same day about Ms Mason and the fact that she had taken business information outside the organisation to an external stakeholder. Ms Selliman also complained about the lack of involvement of her mother and that fact that her mother was not allowed to provide her support in the investigation process. On that point Ms Selliman stated:

I see dragging my mother into the complaint as a way to prevent her providing me with support through the process and in my opinion this is intended to further isolate, victimise and marginalise me by taking away my ability to be supported by the key support person I have in my life. I am appalled the TROK have condoned my marginalisation in this respect

by recommending my mother not attend the disciplinary meeting on Monday 8 September. This further heightens how unsafe I feel within the organisation.

My family and I are highly distressed and disgusted by the immaturity displayed by staff working in a social service (Whai Marama) and we consider this matter to have further trampled on OUR mana and OUR wairua. As far as we are concerned this is just another example of the continual bullying I have experienced throughout my time working for Whai Marama.

[45] In a third letter of complaint, also dated 6 September, Ms Selliman writes about her unhappiness at the actions of Ms Kuru in taking the matter outside the YTS office and the involvement by her, of Ms Mason. Ms Selliman outlines her view that Ms Kuru's actions have further inflamed the relationship between herself and the WD team and expresses her concerns that as a result of Ms Kuru's actions the hostility, aggression and bullying she experienced from the WD team would escalate.

[46] In a fourth and fifth letter also dated 6 September Ms Selliman raises direct complaints about on-going racism and bullying she has experienced from Ms Mason and Ms Ranui and the wider WD team.

[47] Then, following the disciplinary meeting on 8 September Ms Selliman wrote a sixth and final letter of complaint about the process used by Ms Karen Whiteman, the Human Resources Manager for TROK. In this letter Ms Selliman expresses her perception that Ms Whiteman was contributing to the bullying against her.

[48] At a meeting on 10 September Ms Tuhi invited Ms Selliman to put the letter of complaint about bullying to one side and assured Ms Selliman that the issues she had raised would be dealt with and taken into account during the disciplinary process.

[49] On receipt of Ms Selliman's complaints Ms Balzer emailed Ms Selliman and advised her that her complaints were being processed and attached a copy of the grievance policy for her to read.

[50] On 12 September Ms Selliman felt she had further reason for complaint and wrote to Ms Balzer setting out areas of concern she had with regard to the disciplinary process. In particular Ms Selliman was concerned that Ms Kuru had used a colleague as her support person which widened the number of people who now knew what was going on. She also complained that Ms Bevan was not able to be her support person. Ms Selliman again referred to the issues of bullying and stated:

Once again my sense of being unsafe in the workplace is being aggravated by yet another highly inappropriate act by the people who are bullying me – that has once again been

condoned by TROK – and I am being isolated and marginalised within Whai Marama. This enforces my belief that this process is designed to force me out of my job.

[51] That same day, 12 September, Ms Whiteman emailed Ms Selliman and sought her consent to enter into mediation to address all of the complaints received since 29 August. Ms Whiteman offered for Ms Selliman to take discretionary paid leave until resolution of all the complaints and asked her to make contact with her, if there was anything Ms Whiteman could do or provide to ensure she was well supported in the process.

[52] In response Ms Selliman declined the offer of discretionary leave because of her view that it would be perceived as a disciplinary action against her and would further marginalise her.

[53] With regard to the offer of support, Ms Selliman asked TROK to disallow any further involvement in the process for other colleagues, that Ms Kuru's support person be given a full and balanced view of the situation and asked that the alignment and gossip be stopped so that she could get on with her job. She also requested that the bullying be stopped so that she could feel safe in her workplace.

[54] With respect to the offer of mediation Ms Selliman wrote:

Before I can give my consent for this matter to be passed on to the Department of Labour Mediation Services, I would need more information on what this process would entail. I will not be agreeing to anything that further threatens my safety and that includes working through a mediation process with the people who are bullying and attacking me. I have been bullied for several months and this has culminated in a group of people fabricating ½ truths and lies to make my situation untenable. The attention and support given to them by TROK has further encouraged the attacks on me. ... I do not trust any of the people involved and I do not feel safe with them in any way. I do not view this as a situation that can be "mediated". I would appreciate you providing me with all information relating to the process Mediation Services are proposing in order for me to make an informed decision in regards your request.

[55] On 22 September Ms Whiteman advised Ms Selliman in writing that her complaints would be investigated and advised that initial investigations had proven a breach of confidentiality by both Ms Mason and Ms Kuru. Ms Whiteman advised that disciplinary action would follow but would remain confidential.

[56] On the same day Ms Whiteman wrote a second letter advising Ms Selliman that the investigation of the complaint by Ms Mason had been completed and a second meeting was arranged to discuss the outcome. Ms Selliman was issued with a written warning on 24 September for making inappropriate comments that had the potential to

bring Whai Marama and TROK into disrepute. The warning was to be recorded on Ms Selliman's file for 12 months.

[57] Ms Selliman was married on 18 October 2008. About a week prior to her wedding Ms Selliman suffered from a break down and required medical attention. She was prescribed anti-anxiety medication. Ms Tuhi was fully aware of the situation Ms Selliman was in and the events leading up to her breakdown.

[58] On 20 October a new Team Leader, Mr Russleigh Parai, was appointed to the YTS team.

[59] On 3 November Ms Tuhi spoke with Ms Selliman and advised her that TROK were requiring her to meet with Ms Kuru and Ms Mason in the interests of moving forward. Ms Selliman refused to attend a meeting with Ms Mason or Ms Kuru until her previous complaints had been dealt with.

[60] On 4 November Ms Selliman was alerted to a complaint being formalised from Ms Smith regarding the service YTS had provided to the students at Sacred Heart. Ms Selliman viewed this complaint as a further attempt to besmirch her professional reputation. She forwarded the information on to Ms Tuhi for her information.

[61] On 7 November Ms Whiteman wrote to Ms Selliman responding to her claims of personal grievance for the written warning and for failing to provide an unsafe workplace. The Authority was staggered to read in Ms Whiteman's letter that she considered "Mallory has not made a formal complaint regarding bullying and harassment to which TROK or WMYC can respond."

[62] Given all the correspondence between Ms Selliman and TROK, it beggars belief that the organisation did not consider it had sufficient information on which to base a response or undertake an investigation.

[63] On 18 November Ms Tuhi invited Ms Selliman to attend a meeting. Ms Selliman advised that she would attend, but that she would like to bring a support person to the meeting with her. Ms Tuhi notified Ms Selliman that the meeting was not disciplinary in nature but was to address how TROK could ensure her safety and the functionality of the team moving forward.

[64] In a surprisingly hard line approach, Ms Tuhi advised Ms Selliman that if she refused to attend the meeting, or insisted on bringing a support person to the meeting with her, her actions would be viewed as wilfully refusing a lawful and reasonable request.

[65] I find Ms Selliman was clear with Ms Tuhi that she was not refusing to attend the meeting but instead, was insisting on having a support person with her at the meeting. Ms Tuhi acknowledged Ms Selliman had raised a personal grievance in relation to the warning, however, she too maintained, Ms Selliman had not made a formal complaint about bullying and harassment and therefore her refusal to attend a meeting without a support person was frustrating the process of managing the team.

[66] Contemporaneously with all this correspondence, Ms Selliman and her legal representative were endeavouring to arrange an urgent mediation between Ms Selliman and TROK with a view to resolving the various complaints and grievances which had been raised.

[67] On 19 November 2008 Ms Selliman was suspended (this suspension is discussed later on in this determination). During the suspension, on 21 November, the parties met in a meeting with Ms Selliman's legal representative where it was agreed Ms Selliman would return to work on 24 November and that Mr Parai would support her in any communications she needed to have with the WD team.

[68] After returning to work as agreed, Ms Selliman's second morning back got off to a bad start when Mr Parai greeted her three times before he received a response or acknowledgement. Ms Selliman says this was because she had her ipod turned on and was listening to it through earphones. Mr Parai invited Ms Selliman to meet with him in a meeting room which she did. Ms Selliman says Mr Parai asked her when she was going to get over her attitude and told her she made him look bad in front of the other staff. In Mr Parai's view, which he advised Ms Selliman of, her personal grievances had been resolved and she was just acting up.

[69] This meeting with Mr Parai appears to have been the final straw for Ms Selliman and she suffered from a second break down. She was found collapsed on the bathroom floor where she stayed for about 30 minutes until her mother arrived who took her immediately to seek medical assistance.

[70] The doctor reports that when Ms Selliman attended for consultation, she was in a catatonic type state and was not talking. He concluded that she was suffering from ongoing stress at work, caused through her personal grievance and the situation at work. The doctor considered Ms Selliman was not in a fit state to continue working.

[71] As already set out earlier in this determination I am required to scrutinise TROK's conduct in coming to any conclusions as to whether Ms Selliman was disadvantaged in her employment. This aspect of my determination deals with the allegation that TROK failed to provide a safe working environment.

[72] As previously set out in my determination, disadvantage may arise as a result of an employee suffering from disadvantageous consequences which may arise as a result of the total environment of an employee's employment.

[73] I find Ms Selliman was disadvantaged in her employment as a result of the failure by TROK to investigate and bring to a conclusion the many complaints made by Ms Selliman in September 2008.

[74] Ms Tuhi was aware of the attitude of the two WD employees who were the subject of Ms Selliman's complaint. As already set out earlier in this determination, Ms Tuhi herself had been treated with disrespect by Ms Mason and Ms Ranui. TROK was on notice that Ms Selliman wished to have her complaints of bullying investigated and addressed. The fact that this did not occur was a large factor which contributed significantly to Ms Selliman's sense of distress and feeling unsafe in the workplace.

[75] Had TROK taken the time to fully investigate Ms Selliman's claims it is possible it may have found no bullying had occurred. Some of the examples of alleged bullying provided by Ms Selliman during the course of the Authority's investigation meeting had been raised with Ms Tuhi during Ms Selliman's employment and had been dealt with.

[76] However, the role of the Authority is to determine whether TROK's actions and how it acted in all the circumstances of this matter were fair and reasonable, at the time the action occurred. I find that the action of failing to investigate Ms Selliman's complaints was not the action a fair and reasonable employer would have taken in the circumstances of this case.

[77] I find the failure of TROK to investigate and deal with Ms Selliman's complaints was a major factor in the decline of Ms Selliman's health. It follows therefore, that Ms Selliman's employment environment led to her suffering from disadvantageous consequences which were unjustifiable. Ms Selliman has established that she has a personal grievance and is entitled to a consideration of remedies.

Written warning

[78] Ms Selliman was issued a written warning on 24 September 2008 for making inappropriate comments that had the potential to bring Whai Marama and TROK into disrepute. The warning was to be recorded on Ms Selliman's file for 12 months.

[79] By letter dated 30 September Ms Selliman raised a personal grievance with respect to the written warning and the allegations of bullying. On 7 November TROK responded in writing to Ms Selliman. In relation to the warning Ms Whiteman refers to evidentiary material received from Ms Mason, Ms Kuru, Ms Rearne Gray and Ms Megan Bell. There is no evidence that this material was ever provided to Ms Selliman for her response.

[80] The process used by TROK in investigating and issuing the written warning contained errors and omissions significant enough to make the warning unjustified. Ms Selliman was never advised she was involved in a disciplinary process or what the possible consequences could be. Secondly, the decision maker was not involved in any of the meetings during the disciplinary process. It is a basic tenet of natural justice upon which procedural fairness is based, that Ms Selliman had the right to be heard by the decision maker⁴.

[81] TROK's written procedures setting out the process for investigating allegations such as the ones made by Ms Mason and her sister required an informal resolution in the first instance. It is only after matters are not resolved through the Service Manager that a matter is then escalated to the CEO. Despite that, when Ms Whiteman received the verbal complaints she required the complaints to be put in writing to the CEO circumventing the informal process.

[82] Finally, the Employment Agreement and policies, sets out TROK's warning system for conduct deemed to be misconduct. The first step requires a verbal warning. In this case, it seems that step was completely overlooked by TROK. Answers to

⁴ *Quinn v Bank of New Zealand* [1991] 1 ERNZ 1060.

questions at the investigation meeting show that other matters, other than the alleged misconduct, were taken into account in issuing the warning. For example Ms Balzer told the Authority Ms Selliman would not attend meetings and that this caused an inability for the organisation to function and get work done. This information is clearly not correct. As already set out in this determination, Ms Selliman did not refuse to attend any meetings. Further, this information, held by the decision maker, was never put to Ms Selliman for her explanation before the warning was issued.

[83] A written warning can constitute a disadvantage. The only question then is whether the warning was justified. I find it was not. The process used to make the decision to issue the warning in all the circumstances of this case was not what a fair and reasonable employer would have done. Ms Selliman has established to my satisfaction that she suffered from an unjustified disadvantage as a result of the warning issued to her on 24 September 2008.

Suspension

[84] Ms Selliman was suspended on 19 November for failing to attend a meeting to address how the parties would move forward in their employment relationship and for insisting that she be allowed to have a support person present at the meeting.

[85] That morning Ms Tuhi and Mr Parai requested Ms Selliman attend a meeting. When she asked what the purpose of the meeting was, she was advised that Mr Parai and Ms Tuhi were looking to work more closely with the WD team and would be looking at team dynamics.

[86] Ms Selliman requested that she be allowed to bring a support person with her to the meeting but was denied. Given that the issues to be discussed were the team dynamics of Ms Selliman and the WD team, it was a reasonable request that Ms Selliman have some support at the meeting. Instead Ms Selliman was instructed that she was required to attend the meeting alone and that her failure to attend the meeting would constitute failure to obey a lawful and reasonable instruction and could result in her dismissal.

[87] Under normal circumstances, it would be acceptable to hold a meeting between a manager and an employee to resolve issues with respect to team dynamics without the necessity to have a support person present. However, this was not a normal situation. Ms Selliman had made numerous complaints alleging bullying and had

raised a personal grievance with respect to those allegations and the written warning. Ms Selliman had instructed legal counsel to assist her with her employment relationship problems and her managers were fully aware of this. It seems to me it could have been to the managers' advantage to allow Ms Selliman to have a support person at the meeting as it may have helped prevent more allegations and complaints from being raised.

[88] In any event, the meeting did not go ahead. Ms Whiteman approached Ms Selliman and handed her a letter advising her that her employment was suspended due to her failure to obey a lawful and reasonable instruction. Ms Selliman was given no prior notice that she may be suspended nor was she provided with the opportunity to have any input into that decision. Ms Selliman was then escorted to her desk and asked to clear it out before being escorted off the premises.

[89] Ms Selliman has established to my satisfaction that her employment was subject to a disadvantage when she was suspended on 19 November 2008. I find that suspension was unjustified.

Conclusion

[90] Ms Selliman's employment or one or more conditions of her employment have been subject to disadvantageous actions by her employer which are unjustified. Ms Selliman is entitled to a consideration of remedies for the unjustified actions.

Dismissal

[91] Ms Selliman left the workplace on 25 November and did not return due to her medical condition. On 14 January 2008 Ms Whiteman advised Ms Selliman through Counsel that due to the amount of sick leave taken TROK was contemplating terminating her employment. In response Ms Whiteman was provided with a full medical report from a registered doctor. The Report notified TROK that Ms Selliman would return to work after all the work related issues had been resolved.

[92] On 22 January Ms Whiteman advised Ms Selliman that no information had been received and therefore a decision about her ongoing employment would be made in its absence. On 2 February Ms Selliman's employment was terminated due to medical incapacity and she was paid her final pay.

90 day issue

[93] TROK claims Ms Selliman did not raise a personal grievance within the requisite 90 day period and therefore the Authority has no jurisdiction to investigate and determine the matter.

[94] The evidence produced for the investigation into Ms Selliman's applications shows Ms Selliman received the written notice and her final pay cheque on 2 February 2009. By my calculations the 90th day is 3 May 2009.

[95] In the application for leave it is acknowledged that no letter raising the personal grievance was sent to the respondent. Instead, Counsel relies on the lodging of the statement of problem in the Authority, which included the claim of unjustified dismissal, as constituting the raising of the grievance.

[96] The statement of problem is recorded as being lodged on 5 May. It was common ground that a copy of the statement of problem was received by TROK's representative on 6 May 2009. This is three days outside the 90 day period. I find the personal grievance for unjustified dismissal was not raised with TROK within the 90-day period.

Should leave be granted to raise the grievance out of time?

[97] Section 114(3) of the Act allows an Applicant who is out of time, to apply to the Authority for leave to raise a personal grievance beyond the 90-day period. Pursuant to s 114(4) the Authority may grant leave if it is satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and if it considers it just to grant leave.

[98] An application for leave to raise the grievance outside the 90-day period pursuant to s 114(3) of the Act was lodged in the Authority on 30 June 2009. No reply to the application was received from the respondent.

[99] Section 115 of the Act provides for four specific situations which constitute exceptional circumstances. They are:

- that the applicant is so traumatised by the matter giving rise to the grievance that she was unable to properly consider raising the grievance within the 90-day time limit; or
- applicant made reasonable arrangements to have the grievance raised on her behalf by an agent, who then unreasonably failed to ensure the grievance was raised; or

- lack of an explanation concerning the resolution of employment relationship problems in the employment agreement; or
- failure by employer to comply with s 120(1).

[100] In *MacDonald v Health Technology Ltd*⁵ the Court stated:

Exceptional circumstances are ones that are clearly out of the ordinary. The nature of such exceptional circumstances must vary according to particular cases.

Was Ms Selliman so traumatised by the matter that she could not consider raising the grievance?

[101] At the time of her dismissal, Ms Selliman was on sick leave due to her ongoing incapacity to return to her workplace. There is no evidence before the Authority that the dismissal exacerbated this situation for Ms Selliman, or that she was unable to properly consider raising her grievance for unjustified dismissal.

Did Ms Selliman make reasonable arrangements to have the grievance raised by an agent who then unreasonably failed to ensure the grievance was raised in time?

[102] In the application for leave and in closing submissions Ms Alchin says she believed the 90-day period did not start until 5 February as she was under the mistaken belief that Ms Selliman had received the letter of dismissal and her final pay on that day. However, the undated letter of dismissal, produced into evidence shows, and it is not disputed, that Ms Selliman was dismissed and paid her final pay on 2 February 2009.

[103] There are two limbs to this situation. The first concerns the arrangements made by the employee. In this case there is no evidence to show that Ms Selliman made any arrangements with her representative to have the personal grievance for unjustified dismissal raised with her employer. In the absence of evidence about Ms Selliman's instructions regarding the raising of her grievance, the first limb is not met.

Lack of explanation concerning the resolution of employment relationship problems in the employment agreement

[104] Ms Selliman's employment was subject to a written employment agreement which provides at clause 19 a procedure for the settlement of personal grievances and disputes. Clause 19.2 requires an employee to raise any grievance within 90 days of

⁵ [1992] 2 ERNZ 735 at p 748.

the date of the action occurring or of the action coming to the attention of the employee.

Failure by employer to comply with section 120(1)

[105] There is no evidence before the Authority to show the employer has failed to comply with a request for the reasons for the dismissal. The undated letter received by Ms Selliman sets out the reason for the dismissal as being due to her medical incapacity.

Conclusion

[106] In order to grant the leave sought the Authority must be satisfied that the circumstances are out of the ordinary and unusual. Ms Selliman has not established that the circumstances which led to the raising of her grievance outside the 90-day time limit were exceptional.

Remedies

[107] Ms Selliman has been successful in her application for unjustified disadvantage and is therefore entitled to a consideration of remedies for that personal grievance. The Authority has taken a global approach to the remedies for Ms Selliman's unjustified disadvantage claims.

Lost wages

[108] Ms Selliman seeks payment for the periods of time on which she was on unpaid sick leave. There has been no attempt by Ms Selliman to quantify her losses under this heading. In the absence of any evidence as to quantum, the Authority is unable to make any awards.

Compensation

[109] TROK did not investigate Ms Selliman's complaints of bullying and harassment when she raised these as complaints with TROK. However, the Authority finds that it did take some steps to support Ms Selliman in her employment. In an effort to resolve all of the employment relationship issues (including her relationship with Ms Ranui and Ms Mason) TROK suggested they enter into mediation. This offer was declined by Ms Selliman.

[110] TROK also offered Ms Selliman the opportunity to take paid discretionary leave until such time as all issues were resolved. By this stage, however, Ms Selliman was seeing everything as a conspiracy and responded to the offer negatively. I find Ms Selliman was also seeing difficulties where none existed.

[111] The Authority is however, satisfied that Ms Selliman should be compensated for the hurt and humiliation she suffered during her employment and as a result of the lack of investigation into her complaints by TROK, for the unjustified warning and the unjustified suspension.

[112] As required by section 124 of the Act I have given consideration as to whether Ms Selliman's remedies should be reduced. I find Ms Selliman did not contribute in any blameworthy way to the actions giving rise to her personal grievance and therefore her remedies will not be reduced.

Te Runanga O Kirikiriroa Trust is ordered to pay to Ms Selliman the sum of \$15,000 for compensation for hurt, humiliation and distress pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[113] Costs are reserved. 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, Ms Selliman may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell
Member of Employment Relations Authority