

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 314  
5378831**

BETWEEN                      AKANESI SISIFA  
   Applicant  
  
AND                                BIG BLACK SACKS NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Sione Fonua, Counsel for Applicant  
   Anthony Drake, Counsel for Respondent  
  
Investigation Meeting:        20 December 2012, 20 February (by telephone) and 28 June  
   2013 at Auckland  
  
Submissions received:        20 December 2012 and 28 June 2013 from Applicant and  
   Respondent  
  
Determination:                23 July 2013

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

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**Issue**

[1] This determination addresses the preliminary issue of whether the Applicant, Ms Akanesi Sisifa, who was dismissed on 23 December 2010, raised a personal grievance for unjustifiable disadvantage with her employer, Big Black Sacks New Zealand Limited (BBS) within the 90 day period specified in s 114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievance before the Authority.

[2] Specifically the issue for the Authority to address is whether the letters dated 13 and 28 October 2009 and 28 October 2010, and/or the letter dated 12 November 2010, and/or the letter dated 30 November 2010, written by Ms Cziana Reuben of Waitakere Community Law Services on behalf of Ms Sisifa, were sufficient to constitute the raising of a personal grievance with BBS for the purposes of s114 of the Act.

**Note**

[3] The reason for the delay in addressing this matter is attributable to the non-availability of Ms Cziana Reuben, a witness for the Applicant, for the first Investigation

Meeting, and the subsequent difficulty in finding a suitable date for her to be available at a second Investigation Meeting fully supplied with all the relevant documentation.

### **Background Facts**

[4] BBS markets, packages and engages in the wholesale distribution of plastic rubbish bags. BBS employs piece-rate outworkers to roll the plastic bags.

[5] Ms Sisifa commenced employment as a cleaner with BBS in 1995 and in 1997 commenced employment as a piece-rate outworker pursuant to a written individual employment agreement (the Employment Agreement) which Ms Sisifa signed on 12 June 2008.

[6] Ms Sisifa confirmed at the Investigation Meeting that she had read and understood the Employment Agreement which stated at clause 15.2:

*If an Employee alleges a personal grievance, he or she must notify the Employer of the personal grievance within 90 days of the problem arising, or within 90 days of the Employee becoming aware of the problem.*

[7] Schedule 1 of the Employment Agreement details information about the process for resolving the Employee's relationship problem, and states at point 2 of the section entitled: Procedure for settlement of personal grievance:

*The grievance must be raised 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, which ever is the later, unless the Employer consents to a personal grievance being submitted after the expiration of that period.*

[8] The nature of piece-rate work is that it is seasonal and fluctuates in accordance with the demand for the product. The Employment Agreement addresses this situation at clause 5.1 which states:

*The employee acknowledges and understands and agrees that there is no expectation of piece-rate work out-work being available on a daily or on-going basis, and also that there is no expectation that the volume amount of piece-rate out-work available on a daily or on-going basis is going to be consistent. The Employee also agrees that they understand that there may be no piece-rate out-work at all on any given day or days or at the designated out-worker time slot.*

[9] Mr James Taylor, Operations Manager, said that in August 2010 BBS proposed reducing the piece-rate for one of its products, drawstring POR 10s, from \$4.90 to \$4.40.

[10] Mr Quinten Henderson, Warehouse and Outwork Manager, said that during week commencing 2 August 2010 he had spoken to all the out-workers, including Ms Sisifa, who packaged the drawstring POR 10s concerning the piece-rate reduction. Mr Henderson said that all the out-workers had agreed to the reduction in the piece-rate and accordingly the new piece-rate had commenced on 20 August 2010.

[11] Ms Sisifa said that on 2 September 2010 she had noticed from her payslip that her rate of pay had reduced from \$4.90 to \$4.40 per box of drawstring POR 10s. As a result, Ms Sisifa said that she had met with Mr Taylor and Mr David Waddell, Director and Manager, on 3 September 2010 to raise her objection to the reduction in the drawstring POR 10s piece-rate.

[12] Mr Taylor said that as a result of this discussion with Ms Sisifa, BBS had reinstated the \$4.90 piece-rate for the drawstring POR 10s and had informed Ms Sisifa of this. Mr Taylor explained that all out-workers who had packed the work at the reduced piece-rate had been reimbursed and paid the balance as if the piece-rate had not been altered.

[13] On 16 September 2010 Ms Sisifa had been paid \$211.00 which represented the difference between what she had been paid to roll the boxes at \$4.40 per box and what she would have been paid had the piece-rate not been reduced from \$4.90 per box.

[14] At some point prior to 8 November 2010 Ms Sisifa had made a complaint to the then Department of Labour regarding her entitlements to minimum wage and holiday pay. By letter dated 8 November 2010 a Labour Inspector from the Department of Labour had written to BBS confirming that there had been no breach of the Minimum Wage Act 1983 or the Holidays Act 2003.

[15] Ms Sisifa said that after she had raised the objection to the change in the piece-rate for the drawstring POR 10s she had noticed that the volume of work allocated to her between 6 and 10 September 2010 had been reduced.

[16] Mr Henderson disputed that the work allocated to Ms Sisifa had reduced during 6 and 10 September 2010, and produced in evidence Ms Sisifa's outwork sheets which showed that she had in fact received more work during that period than she had during the three week period either side of those dates.

[17] Ms Sisifa said that on 6 October 2010 she had collected some piece-rate work, and this had been the last time she had been allocated piece-rate work by BBS.

[18] Mr Henderson said Ms Sisifa had also received piece-rate work on 7 and 11 October 2010, and she had returned the completed piece-rate work on 15 October 2010.

[19] Mr Henderson said that on 29 October and 16 November 2010 Ms Sisifa had contacted him for out-work availability and he had advised that there had been no out-work available.

[20] Apart from these dates, Mr Henderson said Ms Sisifa had not contacted him to check if there was out-work available, and confirmed that there had been out-work available which he had planned to offer to Ms Sisifa during the period from 19 October 2010 until the termination of her employment on 23 December 2010.

[21] Ms Sisifa said that she had met with Ms Reuben of the Waitakere Community Law Service who had written on her behalf to BBS by letter dated 13 October 2010.

*Letters dated 13 and 28 October 2010 addressed to BBS*

[22] Mr Taylor stated that BBS had not received a letter from Ms Reuben dated 13 October 2010, however it had received a letter from Ms Reuben which was dated 28 October 2009.

[23] Copies of letters dated 13 and 28 October 2010 were produced in evidence by Ms Sisifa, and the Authority noted that these letters were identical in content. However the letter dated 28 October 2010 differed from the letter dated 28 October 2009 received and produced in evidence by BBS. In particular the date had been amended from 2009 to 2010, and the subject heading had been amended by the deletion of the word "Latu".

[24] The letter dated 28 October 2009 received by BBS had been signed by Ms Reuben, however the letters dated 13 October and 28 October 2010 provided in evidence by Ms Sisifa had not been signed.

[25] The letters raised 15 bullet points of concern concentrated on two main issues: (i) the change in the piece-rate from \$4.90 to \$4.40 per box, and (ii) the non-allocation of work to Ms Sisifa following the raising of her concern at the change in the piece-rate in respect to which the letter stated:

- *Since this time Ms Sisifa has not been given any further boxes despite other workers receiving them*
- *Ms Sisifa is very distressed over the disparaging treatment and the fact that she has been without work for the last 2-3 weeks.*
- *The lack of work is causing the family extreme hardship*

[26] The letter also stated:

*We understand from Ms Sisifa that she does not want to raise a personal grievance as she enjoys her work with BIG Blak Saks, however, Ms Sisifa does want some assurance that she will be treated fairly and be given some work....*

*If you believe a meeting with yourself and Ms Sisifa would help to resolve this matter we are willing to attend.*

[27] Ms Reuben said she had met with Ms Sisifa on 12 November 2010 and as no response had been received from BBS to the letters dated 13 and 28 October 2010, it had been agreed that a personal grievance should be raised formally.

*Letter dated 12 November 2010 addressed to BBS*

[28] Ms Reuben said she had accordingly sent a further letter to BBS on 12 November 2010. The letter dated 12 November 2010 produced in evidence by Ms Sisifa referred to three members of Ms Sisifa's family being Ms Sisifa, Mr Tupou Sisifa and Ms Salote Latu, and to correspondence which had been sent on 13 and 28 October 2010, and on 3 and 4 November 2010: *"in relation to various issues the family are having relating to their employment with Big Blak Saks."*

[29] The letter stated: *"Therefore, be put on notice, the family are raising Personal Grievances with Big Blak Saks. The grounds are Disadvantage in the Workplace and Constructive Dismissal"*. The letter concluded by itemising the individual remedies sought for each family member and had been signed by Ms Reuben.

[30] Mr Taylor said BBS had not received the letter dated 12 November 2010 and that when he and Mr Waddell had been provided with a copy of the letter which had been attached to Ms Sisifa's witness statement, they had reviewed it.

[31] Mr Taylor explained that he and Mr Waddell had noticed a significant number of differences between that letter and the ones dated 13 October and 28 October 2010 which had been provided and the letter dated 28 October 2009 which BBS had received. Mr Taylor said that he had concluded that it was possible that the letter dated 12 November 2010 had subsequently been modified.

*Letter dated 19 November 2010 from BBS to Ms Reuben*

[32] On 19 November 2012 BBS had instructed its lawyers to write to Ms Reuben in response to the letter dated 28 October 2010. The letter of 19 November 2010 from Ms Childs of Kensington Swan referred to complaints raised by Ms Sisifa and stated:

*The company is investigating Ms Sisifa's actions. The company is currently formulating allegations of serious misconduct, which it intends raising with her. We will contact you shortly in this regard. Mrs Sisifa will be given the opportunity to respond to the allegations and the company's concerns at a formal disciplinary meeting.*

*Letter dated 30 November 2010 addressed to BBS*

[33] On 30 November 2010 BBS received a letter from Ms Reuben. In the letter Ms Reuben had written:

*To unilaterally demand a meeting lends nothing to your clients' obligations under the Employment Relations Act pertaining to good faith relations between employer and employee.*

*You were advised in advance that due to prior commitments I, as Counsel, am unable to attend a meeting before the 8 December 2010 or date after to be agreed upon.*

*I am sure you are aware my clients are not physically in the work place nor have they had any outwork for approximately 6 weeks, therefore, any delay in meeting is of no detriment to your clients.*

*You have left my clients with no alternative but to raise a Personal Grievance on the grounds of Disadvantage in the Workplace.*

[34] Mr Taylor said that BBS had not understood to what the disadvantage claim related since the alteration in the piece-rate had been nullified and rectified.

*Letter dated 30 November 2010 from BBS to Ms Reuben*

[35] Ms Childs had responded to Ms Reuben's letter on that same date, 30 November 2013, and had stated:

*You raise the issue that your clients are not physically in the workplace and have not had work for approximately six weeks as a piece-rate outworker.*

[36] The letter further stated that Ms Sisifa contacted Mr Henderson for piece-rate work on 29 October and 16 November 2010 but there had been no work available for her at that time, and that since that time Ms Sisifa had not contacted Mr Henderson to ascertain if there had been piece-work available.

[37] In the letter Ms Childs confirmed that there would be a disciplinary meeting with Ms Sisifa on 8 December 2010 and stated:

*You claim in your letter that your clients have no alternative but to raise a disadvantage. You have not provided any details of what the disadvantage is or your clients' specific complaints. Therefore we consider that no grievance has been submitted.*

[38] Mr Taylor said no response had been received to the letter of 30 November 2010. However Ms Reuben said that she had responded to the letter dated 30 November 2010 in an email to Ms Rosemary Childs dated 6 December 2010. In the email Ms Reuben had stated:

*Dear Rosemary,*

*Thank you for your letter dated 30 November 2010. Sorry for the delay in replying. I have been out of the office until this afternoon.*

*Thank you for finally agreeing to meet with us on the 8 December 2008. Is it not possible to have the meeting for the clients at the same time, as the matter is so interrelated?*

*Please note the grievance has been raised and stands, as for the substance I refer you to my letters to Big Blak Saks and to your letters in reply.*

[39] Ms Childs had responded by email dated 7 December 2010 in which she wrote: “*Thank you for your email*”. The email then continued to discuss details in respect of the proposed disciplinary meetings for Ms Sisifa and Ms Latu.

[40] Ms Natalie Kjerreng, Customer Services Manager, said she had been appointed to carry out the disciplinary investigation into the allegations relating to Ms Sisifa. The allegations included Ms Sisifa’s behaving inappropriately and aggressively toward a number of employees, falsifying company documents and procuring false statements from co-workers.

[41] On 8 December 2010 Ms Sisifa said she had attended a disciplinary meeting at BBS accompanied by family members and Ms Reuben. Ms Kjerreng and Mr Waddell had attended the meeting on behalf of BBS.

[42] Ms Kjerreng said that during the disciplinary meeting Ms Sisifa had provided explanations in relation to the allegations; however she had not raised any personal grievance.

[43] Following the disciplinary meeting BBS had sent Ms Sisifa a letter setting out its preliminary findings and proposing a disciplinary penalty. Ms Kjerreng said the letter had invited Ms Sisifa to attend a further meeting on 22 December 2010 to discuss any feedback she had or to provide further written feedback prior to this time, however BBS had not heard from Ms Sisifa.

[44] Ms Sisifa said BBS had subsequently terminated her employment by letter dated 23 December 2010. Ms Kjerreng said that following the termination of her employment neither Ms Sisifa, nor Ms Reuben on her behalf, had raised a personal grievance.

[45] On 23 April 2012 Ms Sisifa had submitted a Statement of Problem to the Authority claiming unjustifiable dismissal and unjustifiable disadvantage in relation to the change in piece-rate from \$4.90 to \$4.40 and the alleged refusal to provide her with piece work.

## **Determination**

[26] Section 114 of the Act is the section governing the raising a personal grievance. Section 114 of the Act states:

### ***114 Raising 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.*
- a. *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.*

[46] The leading case on the interpretation of this section of the Act is *Creedy v Commissioner of Police*.<sup>1</sup> (*Creedy*) In this case, Chief Judge Colgan stated:

*[36] It is the notion of the employee wanting the employer to address the grievance that means it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a rising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.[emphasis added]*

*[37] ... 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.*

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

*The letters dated 13 October and 28 October 2009/2010 addressed to BBS*

[48] BBS denied receiving the letter dated 13 October 2010, but confirmed that it did receive the letter dated 28 October 2009. Ms Reuben confirmed that the letter dated 13 October 2010 had been sent to BBS.

[49] At the second Investigation Meeting Ms Reuben explained that as the Waitakere Community Law Service had not maintained individual client files at that time, copies of the original letters sent had not been retained and were not available, and therefore the copy letters Ms Sisifa had provided to the Authority dated 13 October 2010 and 28 October 2010 were not physical copies of the originals but copies obtained from the Waitakere Community Law Service common computer and provided to Ms Sisifa in Ms Reuben's absence.

[50] Ms Reuben explained the differences in the two letters dated respectively 28 October 2009 and 28 October 2010 as being attributable to a colleague altering the copy taken from the Waitakere Community Law Service common computer and subsequently provided to Ms

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<sup>1</sup> *Creedy v Commissioner of Police* [2006] ERNZ 517

<sup>2</sup> *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503

Sisifa. Whilst no reason was given for the alterations, I find such an action to have been unprofessional, but I do not find it to invalidate the content or intention of the 28 October 2009 letter which clearly refers to events taking place in October 2010.

[51] The content of the three letters dated 13 October 2009, and 28 October 2009 and 28 October 2010 is virtually identical. Ms Reuben attributed this to the fact that, having not heard from BBS, a repeat letter would have been sent in line with normal Waitakere Community Law Service practice.

[52] I find there is reasonable doubt raised as to whether or not BBS received the letter dated 13 October 2009, however, since the content is identical in each of the three letters I address these letters (the Letters) together.

[53] The Letters state that Ms Sisifa “*does not want to raise a personal grievance as she enjoys her work with Big Blak Saks ...*”

[54] I find that the content of the Letters did not raise a personal grievance as the wording clearly stated that Ms Sisifa did not wish to do so at that time. Even were I to accept that the Letters indicated an intention to raise a personal grievance at some future stage, an intention to raise a personal grievance does not constitute the actual raising of the grievance at that time<sup>3</sup>.

*The letter dated 12 November 2010 addressed to BBS*

[55] BBS denied receiving the letter dated 12 November 2010.

[56] In considering this assertion by BBS I note the following points:

- Ms Reuben said the letter had been presented for posting in the usual manner at the Waitakere Community Law Service, however she had not personally posted it;
- Unlike the copy letters dated 13 and 28 October 2010, this copy letter has been signed by Ms Reuben who explained that this copy letter had been taken from the original letter;
- Ms Reuben said she had not been present when the copy of the letter provided to the Authority by Ms Sisifa had been given to her, and she had no explanation as to why a copy obtained from the Waitakere Community Law Service common computer had been signed;

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<sup>3</sup> *Dickson v Unilever New Zealand Limited* (2009) 6 NZELR 463

- The formatting of the letter dated 12 November 2010 differs significantly from that of the Letters which Ms Reuben attributed to the Waitakere Community Law Service not using template letters at that time;
- The letter from BBS to Ms Reuben dated 19 November 2010 makes reference to the letter dated 28 October 2010, but not to the letter dated 12 November 2010; and
- The letter dated 12 November 2010 from Ms Reuben requests a response from BBS within 7 days, which time period corresponds to the date of the BBS letter of 19 November 2010.

[57] Taking all these points into consideration, I find that on balance they add credence to BBS's assertion that it did not receive this letter.

[58] However I shall proceed to consider whether the letter dated 12 November 2010 raised a personal grievance. The letter stated that Waitakere Community Law Service was assisting Ms Sisifa and two other family members in employment matters and made reference to four previous letters having been sent on 13 October, 28 October, 3 November, and 4 November 2010. The letter does not identify to which family members these earlier letters related, but Ms Reuben confirmed at the Investigation Meeting that the letters dated 3 and 4 November 2010 did not concern Ms Sisifa.

[59] The letter states: "*Therefore, be put on notice, the family are raising Personal Grievances with Big Blak Saks. The grounds are Disadvantage in the Workplace and Constructive Dismissal*". The letter concludes by detailing what remedies are sought in relation to each family member.

(i) *Disadvantage in the Workplace*

[60] As set out in *Creedy*<sup>4</sup>, it is not sufficient for an employee to state that he/she has a personal grievance even by: "*specifying that statutory type of the personal grievance as, for example, unjustified disadvantage in employment ...*". The employer must be given sufficient information to address the grievance.

[61] As observed by the Employment Court in *BOT of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*<sup>5</sup> it is not necessary for the grievance to contain the level of detail of a

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<sup>4</sup> [2006] ERNZ 517

<sup>5</sup> [2008] ERNZ 139

statement of problem, however there does need to be sufficient detail for the employer to address it<sup>6</sup>:

*The level of information required to raise a grievance is not an end in itself. The grievance process is designed to deal speedily and informally with the employment relationship problem. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, and employer must know sufficiently of the complaint to be able to begin to address it promptly and informally and with a view to resolving it.*

[62] I find that the letter of 12 November 2010 does not provide any information as to what constituted the nature of the disadvantage grievance in order for BBS to begin to address it, and I find as a consequence that it does not raise a personal grievance in relation to the disadvantage in the workplace claim.

[63] I find support for this view in the statement contained in the letter dated 30 November 2010 that: “*You have left my clients with no alternative but to raise a Personal Grievance on the grounds of Disadvantage in the Workplace.*” I consider that this statement would be superfluous if the letter dated 12 November 2010 had raised a personal grievance in relation to a disadvantage grievance.

(ii) *Constructive Dismissal*

[64] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer

[65] There is no evidence before the Authority which confirms that Ms Sisifa resigned from her employment. Moreover, the letter provides no details of the actions of the BBS which may have forced Ms Sisifa to resign.

[66] I find that the valid raising of a constructive dismissal grievance in the letter dated 12 November 2010 is undermined by the reference in the letter dated 30 November 2010 from Ms Reuben to Kensington Swan: “... *your clients’ obligations under the Employment Relations Act pertaining to good faith relations between employer and employee.*”. I consider that this reference indicates that Ms Reuben, and by inference Ms Sisifa, accepted that there was still an employment relationship subsisting between the employer and the employee since the obligations as regards good faith only apply to current employment relationships<sup>7</sup>

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<sup>6</sup> Ibid at para [58]

<sup>7</sup> *Balfour v The Chief Executive, Department of Corrections* (Employment Court, Wellington WC 33/07, 14 December 2007; *Idea Services Ltd v Barker* [2012] NZEmpC 112

[67] I further consider that this conclusion is strengthened by the reference in the 30 November 2010 letter to Ms Reuben's being unable to attend a meeting before 8 December 2010. The proposed meeting on 8 December 2010 was to be a disciplinary meeting which subsequent events confirm that Ms Reuben did attend with Ms Sisifa on 8 December 2010, and no reference or comments were made relating to Ms Sisifa not being an employee. Only employees are under an obligation to attend disciplinary meetings.

[68] I do not find a constructive dismissal grievance to have been raised in the letter dated 12 November 2010.

*Letter dated 30 November 2010 addressed to BBS*

[69] The letter dated 30 November 2010 makes no reference to any earlier correspondence, being the letters dated 13 and 28 October 2010 and 12 November 2010.

[70] The letter states that it is raising a personal grievance on the grounds of disadvantage in the workplace. There are no details provided as to the nature of the disadvantage, nor are details of any remedies claimed in relation thereto outlined.

[71] I find this somewhat surprising given that when BBS had written to Ms Reuben on 19 November 2010 in response to the letter dated 28 October 2010, it had made reference to Ms Sisifa's complaints regarding her entitlements to minimum wage and holiday pay, which it noted the Department of Labour had found to have no substance; and to Ms Sisifa's claim that she could only roll a low rate of boxes per hour, which it considered to be an unlawful strike.

[72] The BBS letter dated 19 November 2010 further referred to Ms Sisifa being given the opportunity to respond to allegations against her at a formal disciplinary meeting. There was no reference in that letter to the issue of Ms Sisifa not being provided with piece-rate work, which may be attributable to its understanding that there had been piece-rate work available which Ms Sisifa had failed to collect.

[73] The letter from Ms Reuben dated 30 November 2010 appears to be referring to the notification of a formal disciplinary meeting, but it does as noted provide no details as to the nature of disadvantage grievance claimed although it is noted that Ms Reuben's clients had not had: "*... any outwork for approximately 6 weeks ..*".

[74] In the response letter from BBS dated the same date, 30 November 2010, this lack of clarification is noted:

*You claim in your letter that your clients have no alternative but to raise a disadvantage. You have not provided any details of what the disadvantage is or your clients' specific complaints. Therefore, we consider that no grievance has been submitted.*

[75] I do not find that the letter dated 30 November 2010 raised a personal grievance.

*Totality of communications*

[76] The letters from Ms Reuben on behalf of Ms Sisifa taken individually might not have sufficed as the raising of a grievance. However in *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds*<sup>8</sup> Chief Judge Colgan cited the case of *Liumaihetau v Altherm East Auckland Ltd*<sup>9</sup> as authority for the proposition:

*... that where there has been a series of communications, not only would each be examined as to whether it might constitute a submission, but the totality of those communications might also constitute a submission.*

[77] The totality of communications must be examined objectively in the context of the facts of each case as noted by the Employment Court in *Idea Services Limited (in statutory management) v Barker*<sup>10</sup> :

*Ultimately, the issue of whether an employee has done enough to inform his/her employer of the nature of the alleged grievance he/she wants addressed will be objectively determined having regard to the facts of each case. This may be reflected in a number of communications, and there is no requirement that it be reduced to writing.*

[78] In respect of the raising of a personal grievance by Ms Sisifa, I find that taken together the letters from Ms Reuben which had been acknowledged as received by BBS, being the letter dated 28 October 2009 and 30 November 2010, constituted a totality of communications.

[79] The letter dated 28 October 2009 contained 15 bullet points and referred to two main issues: the alteration in the piece-rate which BBS believed had been resolved at that date, and to Ms Sisifa having been being assigned no piece-rate work after she had raised the complaint with the Department of Labour over minimum wage and holiday pay entitlements.

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<sup>8</sup> *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v Edmonds* [2008] ERNZ 139

<sup>9</sup> *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958,963

<sup>10</sup> [2012] NZEmpC 112 at para [41]

[80] The 28 October 2009 letter states that Ms Sisifa: “*is very distressed over the disparaging treatment and the fact that she has been without work for the last 2-3 weeks*” and that: “*The lack of work is causing the family extreme hardship*”.

[81] The letter further states: “*Ms Sisifa does want some assurance that she will be treated fairly and given some work*” and concludes with an offer to meet if BBS believed a meeting would: “*help to resolve this matter*”.

[82] Whilst some of the issues raised on behalf of Ms Sisifa in the letter had been resolved at the time of writing, it is clear that Ms Sisifa considered that the non-provision to her of piece-rate work constituted a disadvantage in employment as set out in s 103 (1)(b) of the Act which she wanted to have resolved, as highlighted by the offer to attend a meeting for that purpose, even if she did not at that time wish to raise a formal personal grievance in connection with it.

[83] The letter from BBS to Ms Reuben dated 19 November 2010 refers to the 28 October 2010 letter, specifically to the Department of Labour complaint which it considers to be at an end, but it makes no reference to, or attempts to address, the complaint of Ms Sisifa that she had not been allocated piece-rate work as a result of her making this complaint.

[84] In light of Mr Henderson’s observations that, rather than BBS not allocating her any work, Ms Sisifa had not been attending BBS at her allocated time slots to be able to be allocated work, I would have expected this to be referred to in the BBS letter of 19 November 2010.

[85] In the letter dated 30 November 2010 Ms Reuben states:

*I am sure you are aware my clients are not physically in the work place nor have they had any outwork for approximately 6 weeks”.*

*You have left my clients with no alternative but to raise a Personal Grievance on the grounds of Disadvantage in the Workplace.*

[86] Taken in conjunction with the letter dated 28 October 2009 I find that BBS had been made aware that Ms Sisifa had a concern that she had not been allocated any piece-work, and that this concern had been acknowledged by BBS in the letter dated 30 November 2010 in which Ms Childs had stated:

*You raise the issue that your clients are not physically in the workplace and have not had work for approximately six weeks as a piece-rate outworker.*

[87] In response to Ms Childs statement in the letter dated 30 November 2010 that BBS were unaware of the details of the Disadvantage grievance, Ms Reuben referred in the email dated 6 December 2010 to the substance being contained within the letters “ *to Big Blak Saks and to your letters in reply.*”.

[88] I consider it significant that in her email response Ms Childs had stated: “*Thank you for your email*” rather than by challenging the assertion that BBS had been appraised of the details of the disadvantage grievance in the letters which had been sent.

[89] With regard to the totality of communications, I consider that BBS was aware that Ms Sisifa had a disadvantage grievance which had been based on her perception that BBS had not been allocating her piece-rate work with effect from late October 2010 following her complaint to the Labour Inspector.

[90] I determine that Ms Sisifa had raised a personal grievance with BBS within the 90 day period specified in s 144(1) of the Employment Relations Act 2000.

[91] The Authority will shortly contact Mr Fonua and Mr Drake for a telephone conference to progress the matter.

### **Costs**

[92] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**