

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 10
3015872**

BETWEEN	MICHELLE TAYLOR Applicant
AND	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Emma Monsellier, Counsel for Applicant Anthony Russell, Counsel for Respondent
Investigation Meeting:	19 December 2017 at Hamilton
Submissions received:	12 December 2017 from Applicant and from Respondent
Determination:	12 January 2018

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] This determination addresses the preliminary issue of whether or not the Applicant, Ms Michelle Taylor, raised her personal grievance with the Respondent, Waikato District Health Board (WDHB), within 90 days of the grievance occurring or coming to her notice, whichever is the later in accordance with the requirements of s114 (1) of the Employment Relations Act 2000 (the Act), such that she is entitled to pursue her grievance before the Authority.

[2] WDHB denies that Ms Taylor raised her personal grievance within the requisite 90 days statutory period.

Issue

[3] The issue for determination is whether or not Ms Taylor raised a personal grievance within the statutory 90 day time period pursuant to s 114(1) of the Act.

Note

[4] I order that the name of the Clinical Nurse Manager (CNM) involved in the bullying allegation but who did not appear as a witness is not to be published. The CNM is to be referred to as GRK, letters bearing no relationship to her actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

Background facts

[5] Ms Taylor is employed by the WDHB as a registered midwife on Ward E1 of the Womens' Health Department. Ms Taylor is an experienced and senior level midwife who with effect from 2013 reported to GRK, Clinical Nurse Manager (CNM).

[6] Ms Taylor said that since 2013 she had suffered bullying and harassment at the hands of GRK, being subjected to belittling remarks and constant criticism, her sense of judgement being continually questioned, and being given unachievable tasks and unmanageable workloads by her. GRK undermined and openly degraded her in front of colleagues and patients and humiliated her in hurtful ways.

[7] During the early part of 2016 a number of the WDHB employees, including Ms Taylor, raised complaints concerning two managerial level employees, one of whom was GRK, with Mr Greg Peplow, Head of Human Resources.

Letter dated 14 March 2016

[8] Ms Taylor wrote a letter of complaint dated 14 March 2016 addressed: "*To whom it may concern*" and set out in detail her concerns about GRK. Ms Taylor opened the letter by stating: "Please accept my letter of concern regarding the unsupportive environment and managerial leadership of the Clinical Nurse Midwife Manager on E1.

[9] Thereafter the letter stated it included Ms Taylor's: "*personal grievances, experiences, witnessed events and behaviour*". It was set out in paragraphs, each of which commenced with the words "*She*" which clearly refer to the CNM, GRK. The letter concluded with the statement:

I am absolutely terrified about my manager finding out about how I feel, my job security and my midwifery career; that is why I have worked under this bullying manager for so long and not gone to my line managers to find a way to resolve this.

[10] Ms Taylor's letter was one of those which were forwarded to Mr Peplow with a covering email which stated:

Dear Greg,

We have attached letters to this cover letter.

We have grave concerns with the culture of women's health and in particular the behaviours of ...and GRK. We need your help with the situation please and no longer can continue working under these conditions and wish to bring to your attention some of our concerns.

*Kind regards,
Midwives, clerical staff and support workers.*

Investigation 2016

[11] Ms Natalie Griffin, Employee Relations Consultant, provides support and advice to the WDHB regarding employment relations matters and represents it in employment relation matters in a variety of forums, reporting to Mr Peplow.

[12] Ms Griffin explained that Mr Peplow had forwarded the complaints about GRK and another manager to her in late March/early April 2016 and asked her to conduct an investigation into a complaint of bullying that had been lodged by employees from within the WDHB's Womens' Health Service.

[13] Ms Griffin said the complaint was extensive as it was submitted on behalf of 21 employees including Ms Taylor and it made allegation of bullying against two CNMs. Ms Griffin said despite the use of the words 'personal grievance' in Ms Taylor's statement she understood her letter dated 14 March 2016 to be a complaint and treated it as such.

Investigation

[14] The WDHB commenced a process to investigate the complaints. During the course of the investigation GRK was removed from the workplace by suspension.

Meeting 14 April 2016

[15] Ms Taylor received an acknowledge of receipt of her grievance from Ms Griffin on 12 April 2016, and on 14 April 2016 she met with Ms Griffin accompanied by her husband as her support person.

[16] During the meeting Ms Taylor said she was able to make it clear to Ms Griffin that the issues concerned the bullying and harassment by GRK and her poor working conditions. She said Ms Griffin did not provide her with any form of professional assistance such as counselling.

[17] Ms Taylor said she received an email from Ms Griffin on 20 May 2016 which stated: “... my investigation into the concerns raised about GRK has concluded and the final report forwarded to Greg Peplow for consideration.”

[18] Ms Taylor said there had been no indication in the letters of the outcome of the investigation. This had the effect of making her continue to feel unsafe in the workplace due to a fear that the suspension of GRK might be lifted and she would return to the workplace.

[19] Ms Taylor said during the period of GRK’s suspension at the end of April 2016 and until Ms Gina Chaney assumed the role as Acting CNM in GRK’s absence there was no formal leadership on Ward E1. During this period Ms Taylor said she began to seek trade union advice and assistance and approached Ms Rachel Taylor , a representative of MERAS (Midwifery Representation and Advisory Services), the union of which she was a member.

Baby A incident April 2016

[20] Ms Taylor said that she felt her health was in decline as a result of the bullying by GRK.

[21] An incident had arisen while Ms Taylor was on shift on 1 April 2016 which had been the subject of a formal complaint by the parents of the baby who was the focus of the incident (Baby A).

[22] Ms Ros Morell, Patient Safety Facilitator within the Quality and Patient Safety team at WDHB, explained that all incidents at WDHB are reported by an electronic system called Datix. Incidents are graded according to a national system for the Severity Assessment Code (SAC) rating. Any incident rated SAC-1 or SAC-2 was reviewed by one of the Quality In-patient Safety Team.

[23] It was a formal process with the objective to understand how the incident occurred, if there were any contributing factors, identify lessons learned, and make recommendations such as process changes, in order to prevent recurrence.

[24] Ms Morell explained that SAC-1 or SAC-2 reviews are not a disciplinary process and if the review indicates there might be performance issues, the review is closed and managed by the relevant services through appropriate channels, usually including the HR department.

[25] The process involves interviewing any person who had contact with the patient and generating a clear and comprehensive record of events. A first report is then generated from

the information collected and submitted to a panel of experts to discuss, review and suggest changes.

[26] Interview transcripts are kept in the file generated by Ms Morell, not seen by others and whilst they inform part of the final report, are never seen as a separate document by anyone else.

Baby A investigation process

[27] Ms Morell said she had been first contacted by the Quality In-patient Safety Risk Team Leader during the week of 10 April 2016 with the request that she investigate an event which had occurred on 31 March 2016 and had been reported on 4 April 2016.

[28] The first step in the process required her to copy the clinical records from the event so as to have all the relevant documentation included in the review. From the records she built a timeline and determined the list of staff who needed to be interviewed. Ms Taylor was one of the midwives present during the event and therefore she considered it necessary to interview Ms Taylor as part of the review.

[29] She said that rather than contacting Ms Taylor directly, she contacted via email the CNM of the post-natal ward who was temporarily overseeing the ante-natal ward. In the email Ms Morrell explained that she was investigating the serious adverse event which occurred in Ward E1 on the night of 31 March 2016 and that she needed to establish what had happened to the patient leading up to and following the event. As part of this process she would need to meet with a number of staff including Ms Taylor.

[30] The email explained that it was an adverse event investigation which was conducted for all events of serious harm that happened. The intention of the email was to assure participants that information provided by them would remain anonymised and confidential and concluded by explaining that the person who was invited to attend the meetings was welcome to bring along a support person.

[31] In addition that any transcript of the interview would be sent to them for review before it was finalised and that they would receive a copy of the final report.

Meeting with Ms Taylor 13 May 2016

[32] Ms Morell said that she explained this process when she met with Ms Taylor on 13 May 2016 who was accompanied by the union representative Ms Rachel Taylor.

[33] Ms Taylor discussed how her shift on E1 had started during the baby A incident and said she had expressed concerns about the skill mix or staffing. She explained that although

there was no bullying or harassment occurring at that time since GRK had been removed from the workplace, she had been too frightened to go with her concerns to the acting CNM because of her concerns emanating from her relationship with GRK.

[34] Ms Morell said she had asked Ms Taylor to talk her through the shift and the events of that day, asking clarification questions, and Ms Taylor had discussed the workload, staffing and communications and concerns during that shift.

[35] Ms Morell said she had also asked if there are any other concerns Ms Taylor wished to raise in regard to the event. The only additional concern raised by Ms Taylor was that more staff members were needed at night, which Ms Morell recorded this as a concern.

[36] Ms Morell said Ms Taylor had not mentioned the word 'grievance' or requested that she took action on her behalf about any of her concerns. If Ms Taylor had specifically asked her to deal with a complaint or grievance, she would have been very clear that Ms Taylor needed to document the issue, and that if she felt unable to take it to her manager or senior manager, she would need to contact HR for that intervention and assistance.

[37] Following the meeting Ms Morell prepared a transcript which was sent to Ms Taylor who had the opportunity to review it and add or delete any comments, which she did. The finalised copy of the meeting notes included the track changes imported by Ms Taylor and contains the statement:

Michelle said she felt unsafe with the situation at work and doesn't see it getting any better.

[38] And on the second page there was a concern noted:

Concern – need more staff at night.

[39] Ms Morell said she had prepared a finalised report from the interview transcript from Ms Taylor and from the other participants in the SAC-1 process which included some of the comments which have been made by the participants, although they were anonymised and not identified by person.

[40] Ms Morell explained the issues raised by Ms Taylor were included as contributory factors in the final report including staffing and skill mix, communication and process issues.

Baby B incident 23 July 2016

[41] A second tragic baby incident (Baby B) occurred on 23 July 2016 on Ward E1. On this occasion Ms Taylor had been on duty as senior midwife when a premature baby died.

[42] Ms Taylor said that this incident had contributed to the decline in her emotional health.

GRK's resignation 5 August 2016

[43] Ms Taylor was included on an email dated 5 August 2016 advising the employees of GRK's resignation and attaching a memorandum dated the same day confirming the resignation.

Meeting with Ms Chaney 24 August 2016

[44] Ms Chaney was the acting CNM when she met with Ms Taylor on 24 August 2016 in response to a request by Ms Taylor.

[45] During the meeting Ms Taylor complained to Ms Chaney that she had experienced negative feedback and isolation from some of her colleagues on Ward E1 which she believed to be as a result of the formal grievance she had raised in March 2016 and which had resulted in the resignation of GRK.

[46] Ms Chaney said Ms Taylor had been in tears and in an emotional state, and had asked to transfer to another ward as a result of the change in attitude she was experiencing from her colleagues on Ward E1.

[47] During the meeting Ms Chaney said Ms Taylor also made it clear that she was struggling emotionally due to the impact on her of the Baby B incident. She had considered that Ms Taylor was raising her concerns on an official basis to progress in these in a formal capacity.

[48] As a result Ms Chaney said she had escalated Ms Taylor's grievance through what she considered to be the formal channels in WDHB by completing the Staff Performance Discussion (SPD) template.

Staff Performance Discussion template 24 August 2016

[49] Ms Chaney said she had made notes of the meeting which were entered on a SPD template on 24 August. Ms Chaney had written;

Michelle came to be in tears asking if she could move wards for a couple of weeks. She has experienced cold shoulder and a negative attitude towards her from some of the E1 staff. This has been getting worse as the weeks have gone by but has been particularly noticeable since GRK's resignation was announced. Michelle feels in some way the nurses are blaming her for GRK...

[50] The document concluded by setting out the actions taken by Ms Chaney and stated:

I have discussed this with Tracey Burke [Ward E2 CNM] who is prepared to lead a meeting today to call the poor behaviour and attitude, as all three staff are on today). Tracey had since discussed this with Janet and due to the sensitive nature of this in relation to GRK, has advised me to put all this in writing, get Michelle to sign it as a true record of the conversation and then scan and email it to her as it will be dealt with at an HR level.

[51] Ms Chaney said she had raised the matter with Ms Burke and was aware that Ms Burke had intended progressing the matter by referring it to Ms Janet Bland, then Operations Manager.

[52] Ms Chaney said Ms Bland had spoken to her, asked her to document Ms Taylor's grievance so Ms Taylor could review it and sign it as a true record in order that Ms Bland could forward it to the HR department as being the next appropriate formal step.

[53] Ms Taylor said that she had signed the SPD form as requested, however she had heard nothing further in relation to the issues she had raised orally with Ms Chaney.

[54] Ms Griffin said she was not aware of any information being received by the HR department as a result of the SPD template and explained the SPD template is accessible only to various Women's Health managers, unlike the Datix system which is accessible to all WDHB employees, and used for the purpose of logging, managing and reporting incidents and for managing risk and complaints.

[55] As a result the HR department had not been aware of any grievance raised in the meeting on 24 August 2016 by Ms Taylor as the SPD template completed by Ms Chaney was not accessible by HR.

[56] On 30 December 2016 Ms Chaney wrote to Ms Nicole McNeil, Human Resources Consultant, about the issues facing Ms Taylor. She stated:

Michelle was involved in the processes that went on earlier in the year with the deputation to Greg Peplow in HR surrounding the bullying by ... and GRK – this is confidential.

For a number of reasons, Michelle has now come to a crashing halt, is on medication for anxiety and depression and is seeing mental health. Michelle has a number of unresolved issues relating to being subjected to years of bullying and harassment by GRK. Even though GRK no longer works in E1 the legacy she left behind and the damage and trauma that she did to Michelle has now reached a crisis point.

...

Mary-Jo suggested I email you as EI's HR person so that you are aware that there are still ongoing repercussions from what happened in women's health earlier in the year...

[57] Ms Taylor did not return to work on 10 January 2017 and is currently on sick leave. Ms Griffin said she first became aware of the SPD form as a result of a letter received from Ms Monsellier on 29 May 2017. In the letter from Ms Monsellier dated 2 May 2017 stated:

Background

We note that Michelle has been employed by the DHB as a midwife in the maternity services department for several years. Unfortunately, over the last few years, Michelle has been subjected to bullying, harassment and intimidation at the hands of her former line manager.

On 14 March 2016 Michelle had no alternative but to raise a formal written grievance with the DHB setting out her concerns regarding the bullying and harassment that she (and others) suffered on a regular basis...The overall impact of the incident has caused considerable upset and stress for Michelle. She had been subjected to criticism, belittling, snide and nasty remarks on an almost daily basis for at least three years and inevitably this has affected her level of confidence and emotional wellbeing...In addition to the above Michelle has also been subjected to additional issues in the workplace such as being overworked due to staff shortages; working unreasonable hours; being required to achieve unreasonable demands; together with a complete lack of support following two particularly tragic events that arose in the ward during September 2016...

[58] Ms Griffin said the letter referred to the deterioration of Ms Taylor's health but it was not clear to her that anything other than the March 2016 complaint was to be considered as a personal grievance.

[59] She sent a written response to Ms Monsellier on 19 May 2017 saying that the WDHB did not accept that matters raised in her letter met the 90 day threshold for her raising a personal grievance as required under s.114 of the Act.

Determination

[60] Did Ms Taylor raise a personal grievance within the statutory 90 day time period pursuant to s 114(1) of the Act?

(i) *First personal grievance March 2016*

[61] An employee who considers that they have a personal grievance must raise it with their employer within 90 days pursuant to ss 114(1) of the Act which states:

1. Raising a Personal Grievance

(1) *Every employee who wishes to raise a personal grievance must ... 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.*

[62] In accordance with this section the 90 day statutory limitation period begins on the day ‘*on which the action alleged to amount to a personal grievance*’, either occurred, or ‘*came to the notice of the employee*’.

[63] In *Wyatt v Simpson Grierson (A Partnership)* the Employment Court stated:¹

... that the 90 day period will usually begin when the action alleged to amount to a personal grievance occurs but, if the circumstances in which that action was taken are an essential element of the personal grievance, it will begin when the employee becomes aware of those circumstances to the extent necessary to form a reasonable belief that the employer’s action was unjustifiable.

[64] Ms Taylor’s evidence was that she had suffered ongoing bullying and harassment from GRK since 2013, however she did not raise the grievance with her employer until she did so in the letter dated 14 March 2016.

[65] I note Ms Taylor’s comment in that letter that she had been concerned by GRK finding out that she had made a complaint, however the time frames set within the Act are to encourage parties to resolve an employment relationship problem as speedily as possible once the employer becomes aware that an employee has raised one.

[66] There is furthermore the good faith duty on the parties in an employment relationship which requires that the parties are: “*active and constructive in establishing and maintaining a productive employment relationship in which the parties are ... responsive and communicative*”²

[67] By delaying almost 3 years I find Ms Taylor did not act in good faith and she prevented the WDHB from addressing and resolving her issues with GRK at an early stage.

¹ [2007] ERNZ 489 at para [29]

² S 4(1A) of the Act

[68] However the complaint regarding GRK having been brought to the WDHB's attention by Ms Taylor and others, I find that WDHB acted appropriately by initiating an investigation into the complaints about GRK's behaviour and suspending her from employment.

[69] Ms Taylor said that she continued, despite GRK's suspension, to feel concerned in the workplace as a result of her apprehension that GRK's suspension could be lifted. I can understand this concern on Ms Taylor's part, however she did not contact Ms Griffin to advise her of this concern, or give her the opportunity to address it.

[70] Ms Taylor was advised on 5 August 2016 that GRK had resigned. At that point I find that the basis of the first personal grievance, being that of bullying and harassment on the part of GRK, had been addressed and resolved by WDHB.

(ii) *Second Personal Grievance 13 May 2016*

[71] The meeting with Ms Morell arose from the Baby A incident, and the necessity for a SAC-1 review with the purpose of investigating the serious adverse event which occurred in Ward E1 on the night of 31 March 2016. It was not to address a personal grievance which Ms Taylor claims had been raised.

[72] Ms Taylor states that she raised a personal grievance orally in the meeting; however this is denied by Ms Morrell or that she was asked to refer any personal grievance made by Ms Taylor to the HR department.

[73] The transcript of that meeting containing Ms Taylor's tracked changes refers to Ms Taylor feeling unsafe with the situation at work, but does not refer to the reason for this other than that indicated by the concern noted that more staff members were needed at night.

[74] Personal grievances need to be set out in sufficient specificity for the employer to know what it is to address. I find that the concern noted falls short of the requirement for a personal grievance.

[75] I note that in her written evidence Ms Taylor stated that just prior to the meeting invitation from Ms Morrell she had every intention of seeking a meeting with the HR department to discuss her concern about the Baby A incident, however she did not do so. I consider this to indicate that Ms Taylor knew the process for raising a personal grievance formally.

[76] I do not find that Ms Taylor raised a personal grievance with the WDHB on 13 May 2016.

(iii) *Third Personal Grievance 24 August 2016*

[77] At the meeting with Ms Chaney held on 24 August 2016 Ms Taylor raised her concerns about the attitude of her colleagues on Ward E1. She had described their negative behaviour towards her and Ms Chaney said the emotional effect this had on her was obvious. Ms Taylor had asked for the situation to be addressed by actioning a transfer for her to another department.

[78] Ms Chaney had completed a SPD template and had escalated the matter to Ms Burke. Her understanding due to her interaction with Ms Bland, was that the WDHB was aware of Ms Taylor's concerns and intending to address them.

[79] The SPD was a limited access form and not accessible to HR. However I find that it was reasonable for Ms Taylor to believe that she had raised her personal grievance in her meeting with Ms Chaney, her acting line manager. The personal grievance being her concern at the behaviour of the nursing colleagues on Ward E1 towards her, and the manner in which she wanted it to be resolved, namely to by her her transfer to another ward, to WDHB management.

[80] Ms Taylor's evidence was that she had, as requested, signed and returned the SPD form, but that there had been no feedback subsequently from either Ms Bland or the HR department.

[81] In the leading case on the interpretation of this section of the Act, *Creedy v Commissioner of Police*, the then 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. As the court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. That is not to find, however, that the raising cannot be oral or that any particular formula of words 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.

[82] Whether the grievance has been specified sufficiently to enable the employer to address it, is to be assessed objectively i.e. from the standpoint of an objective observer³.

[83] I find that Ms Taylor had specified her personal grievance to Ms Chaney; it concerned the negative behaviour of colleagues which Ms Taylor wished to have addressed by her transfer to another ward.

[84] Ms Chaney understood that a personal grievance had been raised, and took what she considered to be appropriate action to have it addressed. The fact that she entered the information on an SPD template which was not the appropriate route to ensure it was seen by the appropriate members of the WDHB management was not a failing on Ms Taylor's part who was entitled to rely on Ms Chaney whom she perceived to be her acting line manager.

[85] Moreover Ms Chaney had acted appropriately by escalating the matter to Ms Bland as the Operations Manager at that time, and Ms Taylor's evidence is that she complied with the instructions issued by Ms Bland and reasonably believed the personal grievance was being addressed by the WDHB.

[86] Whilst Ms Taylor attributed the attitude of her colleagues to her actions concerning GRK, it was a concern in its own right and I find she raised it in a timely manner.

[87] I determine that Ms Taylor raised a personal grievance as a result of the actions of her colleagues towards her in August 2016 within the statutory 90 day time period pursuant to s 114(1) of the Act.

Next Steps

[88] A case conference call will be arranged shortly to progress the matter.

Costs

[89] Costs are reserved pending the outcome of the substantive matter.

Eleanor Robinson
Member of the Employment Relations Authority

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