IN THE EMPLOYMENT COURT
AUCKLAND

AC 14/08
ARC 3/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	THE BOARD OF TRUSTEES OF TE KURA KAUPAPA MOTUHAKE O TAWHIUAU Plaintiff
AND	JOHN EDMONDS Defendant

Hearing: 8 May 2008
(Heard at Whakatane)

Appearances: Christine Pidduck, Counsel for Plaintiff
Tim Oldfield, Counsel for Defendant

Judgment: 8 May 2008

Reasons: 16 May 2008

REASONS FOR JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] These are the reasons for the judgment given at the end of the hearing on 8 May 2008 dismissing the challenge, directing further mediation of the personal grievance and, if that is unavailing, recommending an early resumption of the Employment Relations Authority's investigation and awarding costs to be fixed in favour of the defendant.

[2] The question for decision after this challenge is whether the Employment Relations Authority decided correctly that John Edmonds raised his personal grievance with his former employer, Te Kura Kaupapa Motuhake o Tawhiuau ("the kura"), within the statutory time for doing so. Although the Employment Relations Authority found in Mr Edmonds's favour, the kura's challenge to that preliminary

determination has suspended the Authority's investigation of his claim that he was dismissed unjustifiably.

The facts

[3] I first set out my findings of the relevant facts from evidence heard and seen by me as follows.

[4] Mr Edmonds was kaitiaki taiao (school caretaker/cleaner) employed by the kura. It purported to dismiss him summarily on 13 February 2007 following allegations of serious misconduct in relation to his management of the school's swimming pool and that he had misled the principal, Pem Bird, about the condition of the pool. Mr Edmonds was a member of the Service & Food Workers' Union Nga Ringa Tota Inc and following his dismissal, contacted its area organiser, Jacqui Hurst.

[5] On Mr Edmonds's instructions Ms Hurst made contact with the school on 23 February 2007 in an initial attempt to raise Mr Edmonds's personal grievance. At about the same time a kura newsletter to parents informed them of Mr Edmonds's dismissal and of the reasons for it. The announcement was defensive in tone in the sense of justifying the dismissal. It concluded: *"Te Poumarmaru* [the Board of Trustees] *will be upholding its position as union officials get involved."*

[6] On 26 February the kura instructed James (Alex) Hope, a Hamilton solicitor, to act on its behalf in respect of Mr Edmonds's complaint. Mr Hope wrote to the union advising that he was instructed and that all correspondence should be conducted through him.

[7] On the afternoon of 1 March 2007 Ms Hurst telephoned Mr Hope. She told him that she was raising a personal grievance on behalf of Mr Edmonds for unjustified disadvantage and unjustified dismissal under s103(1)(a) and s103(1)(b) of the Employment Relations Act 2000 ("the Act"). When Mr Hope asked Ms Hurst for further particulars she said that the school had breached clause 6.8 of the relevant ca and had also breached the agreement's Part 7. Ms Hurst also complained on Mr

Edmonds's behalf about the publication by the school of the newsletter in which his dismissal was announced. There was a discussion between Mr Hope and Ms Hurst about whether the newsletter publication could form part of Mr Edmonds's grievance. When Mr Hope asked what were the background facts to the grievance complaints, Ms Hurst said she would submit these in writing.

[8] Clause 6.8 (*"Discipline and Dismissal"*) of the School Caretakers' and Cleaners' (including Canteen Workers) Collective Agreement 2006 ("the ca") deals, at clause 6.8.1 with *"principles"* that are to be followed when dealing with disciplinary matters. Summarised, these include requirements that:

- an employee must be advised in writing of specific matters causing concern and given a reasonable time and opportunity to provide an explanation;

- an employer, before making a final decision, may need to make further inquiries to be satisfied of the facts of a matter causing concern;

- an employee must be advised of the right to request representation at any stage;

- where there is a requirement to advise of any corrective action, there be a reasonable opportunity to amend conduct;

- if an allegation is sufficiently serious, an employee may be suspended pending further inquiry and, in most cases, on pay; and

- the employer will record the process and any disciplinary action to be taken and will have this record sighted and signed by the employee and placed on the employee's personal file.

[9] Clause 6.8.2 allows for appropriate modifications of these principles where there may be summary dismissal for serious misconduct. I think, as Mr Oldfield submitted, this modifies a requirement for advice of corrective action if there is

serious misconduct warranting summary dismissal but does not go so far as to negate any or all of the other requirements of fair process in all cases.

[10] Part 7 of the ca that was also relied on by the union in its advice to the kura is entitled *"Employment Relationship Problem Resolution"*. After defining *"an employment relationship problem"* to include a personal grievance, this part of the ca states: *"Any worker (or employer) has the right to be represented at any stage"* of the process to resolve an employment relationship problem. Part 7 also recommends that when employment relationship problems arise, union members should contact the local union organiser for advice and representation. It also advises employers to contact the New Zealand Trustees Association or other adviser or representative of the school's choice. Part 7 also sets out that employees may have personal grievances in circumstances where:

- they have been dismissed without good reason or the dismissal has been carried out improperly;

- employees have been unfairly treated; or

- in other circumstances amounting to statutory grievances but not relevant in this case.

[11] There was a disagreement, in evidence heard by me, between Mr Hope and Ms Hurst as to whether the latter told the former, expressly rather than inferentially, that a part of Mr Edmond's complaint was that he was not allowed a representative.

[12] Although the Employment Relations Authority did not resolve the conflict between Mr Hope and Ms Hurst as to whether the latter said that one of Mr Edmonds's complaints was that he had not been allowed representation before his dismissal, it is necessary to do so on this challenge. I should explain now why that is so. It is because if Ms Hurst had so communicated with Mr Hope, the kura could not maintain its argument that it had been given insufficient information about Mr Edmonds's complaint. Although Ms Pidduck accepted that conclusion, counsel nevertheless said that in these circumstances Mr Edmonds would only have been

entitled to have a personal grievance of unjustified dismissal to the extent that he may or may not have been allowed representation. I do not accept that hypothetical position. If an employee raises a grievance in terms of s114, the Employment Relations Authority's task is to inquire into the fairness and reasonableness of the employer's conduct under s103A. The grievance being one of unjustified dismissal, the Authority cannot only consider whether dismissal was justified in all the circumstances but may, indeed, conclude that the employee has a personal grievance other than as categorised by the employee: see s122 of the Act. So if I had been satisfied on the balance of probabilities that Ms Hurst had told Mr Hope that one of Mr Edmonds's complaints was that he had not been allowed representation before he was dismissed, there could have been no doubt that he raised his grievance within 90 days on the plaintiff's argument.

[13] I have concluded, however, that it is more probable that Ms Hurst did not refer in as many words to a lack of representation for Mr Edmonds. On this issue, Mr Hope, Ms Hurst and Mr Edmonds all gave evidence of what was said in a telephone call between Ms Hurst and Mr Hope which was conducted by speakerphone in Mr Edmonds's presence in Ms Hurst's office. There is, otherwise, a substantial measure of agreement between Ms Hurst and Mr Hope about what was said. Mr Hope made a contemporaneous electronic record of the main points of Ms Hurst's discussion with him although certainly not a verbatim account. I am satisfied that if Ms Hurst had referred expressly to an absence of representation for Mr Edmonds, Mr Hope would have both recalled this and noted it at the time. Mr Edmonds could not recall his representative saying this. Ms Hurst said she probably made some scribbled notes about the conversation although these were not preserved in the manner of Mr Hope's. She accepted, realistically, that her notes would probably not have been comprehensive as she was doing much of the talking and, I infer, it is both difficult to conduct a discussion and record it accurately at the same time. Ms Hurst said she expected that Mr Edmonds would have made some notes but there was no suggestion otherwise that this was so. Finally, it is significant that Ms Hurst's subsequent letter to Mr Hope, confirming their discussions and providing further detail, does not refer expressly to a failure to permit representation as might have been expected if this had been an issue raised in the early discussion.

[14] For these reasons I conclude that Ms Hurst more probably did not tell Mr Hope in so many words that one of Mr Edmonds's complaints was that he was not permitted representation before being dismissed.

[15] On 15 March 2007 Mr Hope received Ms Hurst's letter, material elements of which included the following:

> *On instructions from our union member John Edmonds, whom we are authorized to represent and act for pursuant to Section 236 of the Employment Relations Act.*
>
> *We refer to our telephone conversation at 4.07 p.m. on 01/03/07 concerning our union member John Edmonds' employment relationship problem.*
>
> *We take this opportunity to invoke a Personal Grievance under Part 7 of the School Caretakers' and Cleaners' (including Canteen Workers) Collective Agreement, also under Section 103 of the Employment Relations Act and Amendments.*
>
> *NOTICE OF GRIEVANCE:*
>
> *1. Our union member Mr. John Edmonds was unjustifiably dismissed in terms of s.103(1)(a) of the Employment Relations Act and Amendments.*
>
> *2. Our union member Mr John Edmonds was treated unfairly in terms of Part 7 of the School Caretakers' and Cleaners' (including Canteen Workers) Collective Agreement.*
>
> *FACTS:*
>
> *1. Implications of bias and discrimination ,i.e. failure to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.*
>
> *2. Breach of Good Faith by the employer as to consultation of fair and reasonable dealing. Particular reference to the substantive omission by Mr. Edmonds's employer to endeavour to facilitate open and honest communication between employer and employee.*
>
> *3. Our union member's (John Edmonds) employer was not open and honest in his dealings with our union member and failed to treat our Union member in a fair and reasonable manner. Failure to consult with decisions that had an adverse effect (i.e., negative) effect on our union member (John Edmonds) employment.*
>
> *4. Failed to comply with the duty and general obligation of good faith, we believe the failure was deliberate and serious and the intent was to undermine the employment relationship.*
>
> *REMEDIES:*
>
> *1. Compensation for humiliation, loss of dignity and injury to feelings.*

2. *Compensation for loss of wages.*

3. *Cost of any expenses relevant to the proceedings.*

4. *Costs of and incidental to any proceedings in the Employment Authority.*

Please respond within 14 days from the date of this letter advising of:

1. *your view of the facts.*

And

2. *your reasons for not granting the remedies sought (if this is the case)*

[16] Mr Hope replied by letter of 27 March to Ms Hurst that:

- requested details of the grievance;
- asserted that Ms Hurst's letter had not clarified the details of the claim and had contained a number of errors;
- drew to Ms Hurst's attention that s114 required her to advise him what was wrong that the employee wanted remedied;
- recommended Ms Hurst have regard to the judgment of this Court in *Creedy v Commissioner of Police*;
- further requested details of Mr Edmonds's grievance;
- stated that the school did not agree to the remedies claimed at that stage; and finally
- agreed that the problem should be the subject of mediation.

[17] Documents put before the Court in the *"AGREED BUNDLE OF DOCUMENTS"* tend also to show the following relevant facts going to the kura's knowledge about these events at the relevant times. The poutoko's (principal's) letter to Mr Edmonds dated 15 February 2007 confirmed officially the notification of his dismissal on 13 February 2007 and concluded:

> *I am 100% confident in the veracity of the facts surrounding the grounds for your dismissal. These have been reported in full to Te Poumarumaru* [the Board of Trustees] *who have ratified my decision, totally endorsing my actions in doing so.*

[18] This tends to indicate that dismissal was effected by the principal, ex officio a member of the board, and subsequently ratified by it. It may be inferred, therefore, that the board was aware of the circumstances surrounding the purported dismissal within two days of it having taken place.

[19] Next, there is a more detailed statement on kura letterhead and over the name of the poutoko dated 20 February 2007 under the heading *"DISMISSAL OF JOHN EDMONDS"*. This includes Mr Bird's recording:

> *12. I called [Mr Edmonds] to the office and with the Poumua* [no translation provided] *present advised him that his behaviour amounted to dereliction of his duties and allied with his deliberate misleading of me he was to be dismissed immediately.*
>
> …
>
> *14. I then instructed him to leave his keys at the office where upon he told me 'this is a kangaroo court and a set up'. He then left.*

[20] By letter dated 21 February the board wrote to Mr Edmonds confirming that at its monthly meeting on 20 February it "*ratified the decision taken by the Poutoko Pem Bird to dismiss you from your job …*".

[21] Ms Hurst considered that she had raised the personal grievance on Mr Edmonds's behalf as required by the Act in both her telephone discussion with Mr Hope on 1 March and in her letter to him of 15 March. She took the view that she was not required to provide further details at that stage, especially as the kura had agreed to mediation and such details could be brought up then.

[22] On 17 May 2007, that is just after the 90 days allowed by the statute for the raising of a grievance, the parties attended mediation in an attempt to settle Mr Edmonds's claims that he had been unjustifiably disadvantaged and dismissed. Mediation was unavailing.

[23] At the end of the mediation, that is after the expiry of 90 days after the dismissal, Mr Hope advised Mr Edmonds and his representative that the kura did not consider that the grievance had been raised properly and would not consent to it being raised out of time. Mr Hope then also raised another technical legal issue, the union's entitlement to represent Mr Edmonds. Mr Hope said he had not received any advice from the union of compliance with clause 60 of its constitution. That ground of challenge to Mr Edmonds's grievance was abandoned by the kura after it had been rejected by the Employment Relations Authority.

The Authority's determination

[24] The Authority held that the test for raising a grievance is that the advice to the employer, written or oral, should be sufficiently specific to enable the employer to address the grievance. Although what is raised must be more than bare advice of a personal grievance or even the type of grievance, the requirement is certainly not for the sort of detail that may be required subsequently when lodging a statement of problem with the Authority.

[25] The Authority Member concluded that Ms Hurst raised Mr Edmonds's personal grievance with Mr Hope by a combination of the telephone call and subsequent written advice. The employer was told that Mr Edmonds alleged that he had been unjustifiably disadvantaged and dismissed, that there had been breaches of clause 6.8 and Part 7 of the ca that included that the dismissal was not carried out properly. It was significant, in the Authority's view, that the allegation of breach of clause 6.8 of the ca was specified in advice to the employer: this clause requires the employer to advise the employee in writing of the specific matters causing concern, of the right to representation, and the provision of a reasonable time and opportunity to provide an explanation.

[26] The Authority did not make an affirmative finding one way or the other whether Ms Hurst specifically advised Mr Hope that Mr Edmonds alleged that he was refused the right of representation. The Authority described this as *"simply a difference in recollection"*. It found it unnecessary to determine that conflict

because, in its view, express reference to clause 6.8 of the ca was sufficient to raise the question of representation.

[27] The Authority concluded that Ms Hurst's letter of 15 March did nothing to elucidate the grievances she had raised by telephone on 1 March although it alleged further grievances being breaches of good faith, bias, discrimination, and a failure to consult with Mr Edmonds. It found that *"It would have been better"* for Ms Hurst to have specified precisely the breaches of clause 6.8 of the ca but it was not fatal that she did not do so.

[28] In these circumstances there was no need for the Authority to go on to consider whether Mr Edmonds should be given leave to raise his grievance out of time under s114(4) of the Act.

The Law

[29] The starting point for determining the issue raised by this challenge is s114 (*"Raising personal grievance"*) of the Act. This provides materially:

> *(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 … unless the employer consents to the personal grievance being raised after the expiration of that period.*
>
> *(2) For the purposes of subsection (1),* ***a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address***. [my emphasis]
>
> …

[30] The interpretation of those tests is affected by s101 setting out the objective to Part 9 of the Act that deals with personal grievances. The object is said to include:

> *(a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; and*
>
> *(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first*

raised and discussed directly between the parties to the relationship; and

(b) to continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers;

…

[31] Of particular importance, in Mr Oldfield's submissions to me, is the word *"facilitate"* in s101(b) above. Counsel submitted that Parliament intended to lower the threshold for the raising of a grievance under the 2000 Act than had applied previously for the "submission" of a grievance under the counterpart section of the Employment Contracts Act 1991. Counsel submitted that the use of the word *"facilitate"* in s101(b) was intended to illustrate that a more liberal interpretation was to be given by the courts to the test for the raising of a grievance under s114.

[32] It is correct, as Mr Oldfield points out that, the meaning of the word *"facilitate"* includes to make easy or easier. Counsel submitted, probably correctly, that s101(b) did not appear to have been brought to the attention of the Judges in the post-2000 cases that I analyse later in this judgment: it is certainly not referred to in our analyses of the differences, if any, between raising personal grievances and submitting them.

[33] It is not entirely clear whether, by substituting the word "submit" with the word "raise", in an otherwise materially similar provision, Parliament intended in 2000 to adopt a lower threshold to be surmounted by employees wishing to have their personal grievances advanced. The argument is that by telling the Authority and the Court that this is a provision to *"facilitate"* the raising of personal grievances with employers, Parliament intended to alter the then applicable threshold.

[34] In these circumstances, research undertaken for me into the legislative process reveals the following. Clause 127 of the Employment Relations Bill 2000 as introduced into the House, which was later to become s114 of the Act, was initially drafted in identical terms to s33 of the Employment Contracts Act 1991. It was entitled *"Submitting personal grievance"* and continued that *"Every employee who wishes to submit a personal grievance must … submit the grievance to his or her*

employer …". The words *"submit"* or *"submitted"* were also used in later clauses of the Bill. They contrasted, however, with the original object section of Part 9 of the Bill, clause 115 that was adopted unaltered as s101(b). This referred to the facilitation of the "raising" of personal grievances with employers. There is no extrinsic material that throws any light upon the initial use of the two separate words or their derivatives.

[35] Introducing the Employment Relations Bill, its explanatory note included the following:

> *In terms of problem resolution in employment relationships, a strong emphasis is placed on the prior resolution of problems by the parties themselves, who will have access to a wide range of resources, through information provision, structured or unstructured mediation and other services to voluntarily resolve matters at an early stage. Mediation is the preferred option at all stages, although it is recognised that some problems will nevertheless eventually require specialist intervention, but this should not necessarily be constrained by the application of strict procedural requirements.*

[36] Clause 127 was addressed in the report of the Select Committee of 1 August 2000 to which the Bill was referred for submissions and recommendations. The Select Committee's changes did not, however, address the notions of raising or submitting but, rather, recommended the addition of a new subclause that employees had to make or take reasonable steps to make the employer or the employer's representative aware of the grievance.

[37] The Select Committee's report stated, materially:

> *The purpose of raising a grievance with an employer is to let the employer know a grievance exists, so that the parties may attempt to resolve it between them, and to encourage the speedy resolution of grievances. It is not necessary that the raising of a grievance is done through a formal written process,* ***but this needs to be balanced with the requirements of certainty for employers.*** [my emphasis]
>
> *Therefore, while the emphasis is on informal submission to the employer, this should not mean that employers can use this as a way of denying that a grievance has been submitted, and deny the other party the right to pursue a grievance further. …*

[38] In a speech to the House on 9 August 2000 at the In-Committee stage of the legislative process, the Minister of Labour who was responsible for the Bill, the Honourable Margaret Wilson, said:

> *Part 9 deals with the important issues of personal grievances, disputes and enforcement. The personal grievance provisions are substantially the same as in the previous legislation, because an attempt was deliberately made to try to ensure that the current jurisprudence could, in fact, be applied.*

[39] Section 101(a) is also relevant to discerning what is required to "*raise*" a personal grievance. This specifies as one of the objects of Part 9 that it is "*to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; …*".

[40] So the raising of a grievance is important to its resolution by the parties themselves, whether directly and without the assistance of an external agency or, if not, at statutory mediation. Getting to such dispute resolution mechanisms is to be regarded as more important than ensuring that there is adherence to what are described as "*rigid formal procedures*". Less rigidity and less formalism are guidelines in interpreting provisions in Part 9 including the requirement to raise a personal grievance.

[41] Although the courts must be alive to the possibility that a change of descriptive words may indicate an intention to alter correspondingly substantive meaning, sometimes also Parliament adopts new language, if not for its own sake, then to be consistent with a more modern or different regime.

[42] Although it is arguable, at least by reference to the word "*facilitate*" in s101(b) that Parliament intended a lower threshold, recourse to the legislative material just summarised tends not to confirm this. In these circumstances, I am not persuaded that I should depart from the reasoning adopted by the Court in such cases as *Ruebe-Donaldson*, *Creedy* and *Coy* (analysed below), more particularly as these continue a low threshold of notification of the raising of a grievance.

[43] In any event, the decision in this case does not turn on the question of the height of the bar for raising a personal grievance: by even an arguably more stringent test, the result is no different.

The case law

[44] The following is a summary of relevant cases decided under the Employment Contracts Act's requirement for the submission of a grievance. In *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 509 the Court adopted the definition of the word in the Concise Oxford Dictionary, "*to present for consideration or decision*". The essential requirement was that the employer was to be given some positive notice of the bringing of a claim.

[45] The test for determining whether there had been the submission of a grievance was said to be whether, from an objective standpoint, the employee had presented a grievance to the employer for consideration. In that case (*Samate*), the grievant's representative had written to the employer requesting reasons for dismissal and advising that should these not be provided in the statutorily required period, the representative had instructions to commence proceedings in view of the unlawfulness of the dismissal. The Court had no hesitation in finding that this communication amounted from the outset to a request for justification of the dismissal and, viewed objectively, should have made it clear to the employer that the employee was submitting a grievance about his dismissal. However, a request for reasons for dismissal alone did not constitute the submission of a grievance: *Houston v Barker (t/a Salon Gaynor)* [1992] 3 ERNZ 469, 478. In *Liumaihetau v Altherm East Auckland Ltd* [1994] 1 ERNZ 958, 963 it was held that against a background of other communications with the employer and in light of the employer's subsequent conduct in requesting an employee's written statement in terms of clause 4 of the standard procedure under the statute, a request for reasons for dismissal amounted to the submission of a grievance. The case was authority for the proposition that where there had 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.

[46] *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512, 524 dealt with the situation of protests made by an employee at the time and these were found capable of amounting to the submission of a grievance provided they were of sufficient strength and purpose to alert the employer to make a response as envisaged in the statutory grievance procedure. The same Judge as decided *Wilkinson*, however, remarked in a subsequent case *Start v Forster (t/a The Hutt Pet Centre)* [1994] 2 ERNZ 200, 211 that the proviso in *Wilkinson* did not go far enough and that in order to submit a grievance "*the employer must be given some positive notice of the bringing of a claim …"*.

[47] Cases on the point decided under the current Act include, for present purposes, three judgments. First in time was *Ruebe-Donaldson v Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83. In addition to concluding that the substitution of the word "*raise*" in s114(1) for the former "*submit*" in s33(2) of the Employment Contracts Act 1991 did not make a material difference, the Court held that a combination of a letter from the plaintiff herself and a first letter from her solicitor made it clear that she was complaining that she had been disadvantaged by the employer's conduct. While there was no characterisation of a grievance as such, the correspondence was treated clearly by the employer as indicating an employment relationship problem. It was equally clear that the plaintiff was not raising a dispute (another form of employment relationship problem) but, rather, complaints about the way in which she had been treated by the employer, which is a disadvantage grievance. The Court found, therefore, that the plaintiff had taken reasonable steps by way of this correspondence to raise a disadvantage grievance and that this had been done in the 90 days.

[48] Next is the judgment in *Creedy v Commissioner of Police* [2006] 1 ERNZ 517. In that case the grievant's lawyer wrote to the employer stating: *"… by this letter [the grievant] serves notice that he commences a personal grievance with you pursuant to section 103 of the Employment Relations Act 2000. It is claimed that one or more of [the grievant's] conditions of employment is or are affected to his disadvantage by the unjustified way in which you, as his employer have applied the disciplinary process to him."*

[49] The employer's immediate response was to seek specific details of the unjustified actions that had allegedly disadvantaged the grievant but there was no response to that request. The Court found that the lawyer's communication did not constitute the raising of a grievance and held:

> *[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment … As 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.*
>
> *… It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.*

[50] Finally, in *Coy v Commissioner of Police* CC 23/07, 19 November 2007, the Court concluded that an oral statement by the employee to the employer that *"I can tell you now I am going ahead with a Personal Grievance because I think I have been personally treated very badly"* did not meet the test of raising a grievance and indeed the employee did not so contend. Rather, the following written communication was found to have met the test for the raising of a grievance, albeit by a narrow margin and when read in conjunction with the oral statement set out above:

> *As per our conversation of the 4th of December 2002, I wish to formally advise you that I intend to proceed with personal grievance against the department.*
>
> *My personal grievance will be based on:*
>
> - *Harassment*
> - *Denial of Procedural fairness*
> - *Intimidation*
> - *Victimisation*
> - *Professional Mismanagement*

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

Decision of challenge

[51] Whether Mr Edmonds raised his grievance with his employer within 90 days of his dismissal is, in turn, determined by whether he made his employer aware that he alleged a personal grievance that he wanted the defendant to address, or took reasonable steps to do so. To the extent that the Authority focussed on whether any particular event of a number of events amounted to the raising of a grievance, that was incorrect and misleading, but it may well have followed the parties' cases that adopted thereby that approach. In this case, as in many, there will be a series of interactions between the employee and his or her representative, and the employer (or, in this case, and its representative). So the question in this case is whether those interactions being Ms Hurst's advice to the kura, Mr Hope's advice to the union, the Hurst-Hope telephone discussions, Ms Hurst's letter to Mr Hope, Mr Hope's reply, and other communications leading up to the mediation held just after the expiry of the 90 days, together amounted to the raising of the grievance with the employer.

[52] Looking at it from the kura's point of view, can it be said that it was both aware that Mr Edmonds considered that his dismissal was unjustified and that it had sufficient knowledge of relevant events to deal with that allegation, either in an attempt to settle the grievance or, if that was not possible, to take steps to defend its position if Mr Edmonds was to refer his grievance to the Employment Relations Authority for settlement?

[53] There can be no doubt that the kura was aware that Mr Edmonds was dissatisfied with his dismissal and with the justification for it. Nor can there be any doubt that the kura was also aware that the fairness and reasonableness of the way in which it went about dismissing Mr Edmonds was challenged by him by way of personal grievance. The remedies Mr Edmonds sought from the school were known to it, albeit not in the precise detail that might have subsequently emerged in a statement of problem to the Employment Relations Authority.

[54] I am satisfied, as was the Employment Relations Authority, that Mr Edmonds's grievance was raised with his employer within time. Even accepting that Ms Hurst did not tell Mr Hope expressly that Mr Edmonds alleged he had been denied representation, the combination of advice given by telephone and letter enabled the employer to understand the broad nature of the allegations against it so as to try to remedy, or otherwise address, the grievance.

[55] That it was able to do so was illustrated by the fact that the employer agreed to mediation of Mr Edmonds's personal grievances. Although s148 of the Act precludes the Court from knowing what went on at mediation and even, arguably, the subject matter of the parties' negotiations, the fact that the kura agreed to and attended a mediation in an effort to settle those grievances means that it must have been sufficiently aware of Mr Edmonds's complaints that it could prepare to address them in that forum.

[56] The kura was represented by an experienced and astute solicitor who, I am satisfied, if he had not understood sufficiently the nature and appropriate detail of Mr Edmonds's complaint, would have persisted in requiring the disclosure of these before mediation.

[57] Put another way, the level of detail that the plaintiff says ought to have been provided to have raised in law the grievance, would have been that required for a statement of problem in the Authority. Case law establishes that a lower threshold is needed to raise a grievance.

[58] 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 problems. The merits of these, rather than technical compliance with a process, are to prevail. In getting to the merits, an 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. Such a resolution mechanism almost invariably includes a discussion or discussions and not simply a formal exchange of correspondence. Details or uncertainties can be raised and dealt with during the course of such discussions. It is unnecessary for every "i" to be dotted and "t" to be

crossed by an employee raising a grievance. What the cases say is that written or oral advice alone, such as "I have a personal grievance" or "I have been unjustifiably disadvantaged and want compensation and an apology" will usually be insufficient. This is not one of those cases.

[59] In cases where the employer may be less aware, or even unaware, of a grievance, the onus on an employee will be greater to inform the employer of the complaint. So, for example, where an employee alleges sexual harassment by a customer or a work colleague, an employer may be unaware of that problem or at least not well informed about it. Similarly, where a resignation is said to amount to an unjustified constructive dismissal, an employer may likewise be unaware of the background and the information raising the grievance may have necessarily to be more detailed.

[60] This is a case of a summary dismissal for misconduct made by the employer after an inquiry. The employer is a Board of Trustees that is obliged by law, among other things, to minute its deliberations and decisions. It must be taken to have been aware of its obligations under the ca. The "complainant" was the principal, the kura's chief executive and, ex officio, a member of the employer Board. Those factors together must have meant a very substantial level of knowledge about what had gone on leading to Mr Edmonds's dismissal so that the threshold requirements for raising a grievance in his case would not be high. Additionally, the communications from the grievant's representative were made directly to the employer's solicitor who is very experienced in the field of employment law. It is unlikely that the kura could have been inadequately informed of Mr Edmonds's complaint.

[61] Finally, as a matter of equity and good conscience, the plaintiff's preparedness to agree to resolve the grievance by mediation, counts against its subsequent decision that Mr Edmonds had not raised his grievance beforehand. Although it is unnecessary to determine whether in law this amounts to an estoppel, an employer pursuing such a course ought not, in my view, to be heard to assert in equity and good conscience after the dispute resolution process has commenced, that the employee should be found to have been disentitled to have engaged in that process.

[62] For the foregoing reasons I find that the Employment Relations Authority correctly determined that a grievance had been raised. Mr Edmonds's representative took both reasonable steps to make the employer aware, and did make the employer aware, that the employee alleged a personal grievance that he wanted the employer to address.

[63] I conclude, regrettably but surely, that the kura's reliance upon an unmeritorious technical legal point to defeat any examination of the merits of Mr Edmonds's claim, is not in accordance with the spirit of the legislation or as to how it should deal with employment issues generally. This should and will be reflected in costs.

[64] The challenge is dismissed. The defendant is entitled to costs which, if they cannot be settled informally, may be the subject of memoranda to be filed and served within 21 days (defendant) and 42 days (plaintiff) respectively from the date of this judgment.

[65] I reiterate my directions to further mediation and, if this is unavailing, early resumption of the Employment Relations Authority's investigation.

GL Colgan
Chief Judge

Judgment signed at 12 noon on Friday 16 May 2008