

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 197/08
5136630

BETWEEN TAMARA ATLEY
Applicant
AND SOUTHLAND DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Philip Cheyne
Representatives: Mary-Jane Thomas, Counsel for Applicant
Peter Churchman, Counsel for Respondent
Submissions: 12 December 2008 from the applicant
18 December 2008 from the respondent
Determination: 19 December 2008

DETERMINATION OF THE AUTHORITY

[1] Tamara Atley works for the Southland District Health Board as a nurse. In November 2008 she lodged a statement of problem claiming unjustifiable disadvantage and unlawful discrimination in her employment by her employer. Ms Atley also seeks an order removing the matter to the Employment Court without the Authority investigating it. SDHB denies that Ms Atley has a grievance or was discriminated against and also opposes the removal application. By agreement, the removal application has been investigated by both parties providing written submissions. This determination resolves whether or not the matter should be removed to the Employment Court.

Grounds for removal

[2] It is not suggested that the unjustified disadvantage grievance gives rise to any ground for removal of the matter to the Employment Court.

[3] The basis for the removal application is that important questions of law are likely to arise other than incidentally in respect of the discrimination claim: see s.178(2)(a) of the Employment Relations Act 2000. It is necessary to refer to both the statement of problem and counsel's submissions to properly reflect the applicant's reasons for wanting the problem removed.

[4] The statement of problem refers to three sections of the Human Rights Act 1993 and identifies questions that will arise on the facts as claimed by the applicant. I accept the respondent's point that discrimination claims under the Human Rights Act 1993 are for the institutions established under that Act and not for the Authority. However that does not end the matter. The unlawful discrimination allegation effectively raises a personal grievance claim as defined by s.103(1)(c) of the Employment Relations Act 2000. The claim is of discrimination due to disability. A claimant can elect a personal grievance under the Employment Relations Act 2000 or a complaint under the Human Rights Act 1993. I am not aware of any proceedings under the Human Rights Act 1993 in respect of this matter so the applicant must be taken as having chosen this jurisdiction: see s.112(3) of the Employment Relations Act 2000.

[5] To return to the questions of law said to arise, s.22 of the Human Rights Act 1993 is not relevant. Discrimination is exhaustively defined by s.104 of the Employment Relations Act 2000. When a claimant elects this jurisdiction s.104 must be applied. The substance of the present problem is whether SDHB has breached s.104. That is a mixed question of fact and law. I am not satisfied that it raises an important question of law.

[6] Sections 29 and 35 of the Human Rights Act 1993 are also mentioned by the applicant. Those provisions are relevant to the issue just mentioned because s.104(3) and s.106 of the Employment Relations Act 2000 import them as exceptions in relation to discrimination that would otherwise give rise to a personal grievance. The application here of these provisions is again a mixed question of fact and law. Both involve considerations of what are reasonable expectations or impositions on SDHB in the circumstances of this case. Again I am not satisfied that important questions of law arise.

[7] At paragraph 10.2 and 10.3 of counsel's submissions the applicant posits several hypothetical questions related to the exceptions just mentioned. Those

hypothetical questions do not arise in personal grievance proceedings. It is not for the Authority or the Court on removal to answer questions that do not arise on the facts of the particular case.

[8] Paragraph 10.1 asks whether it was incumbent on the applicant to tell the respondent about her disability prior to her employment or transfer. The point arises because SDHB in its statement in reply says that Ms Atley did not disclose her disability either in 2001 or in 2005. Whether there was an obligation to disclose the disability is a mixed question of fact and law and it arises incidentally since it may be relevant to remedies if a grievance is established.

Conclusion

[9] To summarise, I do not accept that there are grounds established to enable the matter to be removed to the Employment Court.

[10] Costs are reserved.

[11] The Authority will arrange a conference call to expedite arrangements for an investigation meeting.

Philip Cheyne
Member of the Employment Relations Authority