

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 280
5448325

BETWEEN

JASUMATI BHANA
Applicant

A N D

CHU LI-CHUAN
EDUCATIONAL SERVICES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Stephen Bhana, for the Applicant
Sarah O'Brien, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: No submissions from the Applicant
7 May 2014 from the Respondent

Date of Determination: 2 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Bhana) filed a Statement of Problem in the Authority on 11 February 2014. That document appears to raise a personal grievance in respect of Ms Bhana's employment with the respondent (CLC) and seeks a range of remedies. In particular, Ms Bhana seeks declarations from the Authority that various actions taken by CLC subsequent to the employment ending were illegal. That last mentioned matter concerns action taken by CLC in making a mandatory report to the New Zealand Teachers' Council about the circumstances surrounding the end of Ms Bhana's period of employment.

[2] Once CLC was seized of the Statement of Problem, it promptly raised limitation issues (specifically whether the purported raising of the personal grievance

was within the justiciable period), and sought agreement from the Authority for that issue to be dealt with as a preliminary one in the Authority's process.

[3] I convened a telephone conference with the parties on 2 April 2014 as a consequence of which it was agreed that the preliminary issues would be dealt with on the papers and a timetable was set for the exchange of submissions.

[4] To assist Ms Bhana whose representative was a lay advocate, CLC's counsel helpfully agreed to file and serve her submissions first.

[5] Because the timing of the exchange of submissions is relevant, I observe that CLC was given 28 days to file and serve its submissions and Ms Bhana was given 30 days to respond. That timeframe of course is generous; in the normal course of events, the Authority would expect that parties would have submissions available on a much tighter timeframe than this, typically over 14 days. I note also that I made it painfully clear during the telephone conference that no further extension would be granted.

[6] I was concerned then and remain concerned now at the apparent unwillingness of Ms Bhana and her representative to deal with matters expeditiously. Having filed the Statement of Problem, Ms Bhana seemed to adopt the stance of saying that it was not urgent, did not need to be dealt with expeditiously and in effect that the respondent party and the Authority could wait until she was ready to proceed.

[7] For the avoidance of doubt, that is not how matters are dealt with in the Authority; this is a jurisdiction which prides itself on providing speedy low cost resolution of employment relationship problems and parties must expect that when they file their proceedings in the Authority, the Authority will use its best endeavours to get the matter brought on for hearing and disposed of as quickly as is reasonably possible.

[8] That said, Mr Bhana, the advocate for his sister Ms Bhana, made clear at my telephone conference that "*the timeframe will be suitable for us*".

[9] Then, for whatever reason, the submissions from CLC were not received by Ms Bhana and there was a request for that time lost (circa a week) to be made up. I note for the sake of completeness that I am absolutely satisfied that Ms O'Brien forwarded the submissions to Mr Bhana; they were received on the date sent in the

Authority and were clearly marked as being sent not just to the Authority but also to Mr Bhana, Ms Bhana's advocate.

[10] In any event, Mr Bhana maintained that he had not received them on due date and he sought an extension to 12 June 2014 for the filing and serving of Ms Bhana's submissions. I considered that to be excessive and allowed an extension to Friday, 6 June 2014 and subsequently extended that to 9 June 2014.

[11] Then on that date, Mr Bhana sought a further extension, this time without any indication of when he would be in a position to produce his submissions. I responded on 10 June 2014 and despite my wish not to keep drip feeding extensions to Ms Bhana, I did want to give her the opportunity to be heard. Accordingly, I indicated that she had a final extension of seven days from the date of my email notification, that is to 17 June 2014, to file and serve her submissions and to protect the respondent's position, I signalled that any submissions filed for Ms Bhana would be referred to the respondent so it would have a right of response as well.

[12] In the result, no submissions whatever have been received from Ms Bhana. It is difficult to escape the conclusion that she is simply treating the Authority as a convenience. What I said in my final communication was that if the submissions were available by 17 June 2014 or before the determination came to be prepared, I would consider them but not otherwise. In the result, no submissions have been received and accordingly I am not able to consider what Ms Bhana has to say about the arguments advanced by CLC.

[13] This determination will issue at the beginning of July 2014 so in effect, by virtue of the orders I made concerning submissions from Ms Bhana, she has had a further two weeks to file her submissions (between 17 June and 30 June 2014) and has still failed to provide anything for the Authority to consider.

[14] I am satisfied Ms Bhana has been given ample opportunity to comply with the Authority's directions. The time allowed for her to file and serve submissions in the matter has been more than generous and despite my saying I would not extend the timeline, I have given two substantive extensions. I am satisfied that any further delay in issuing the Authority's determination will unjustly prejudice the position of the employer which wants to get the matter resolved and will mean an unreasonable delay in the Authority disposing of the matter because I will shortly be away from the

office for a period of annual leave which will preclude the matter being dealt with within anything like a reasonable timeframe given that the Statement of Problem was filed in February.

[15] Ms Bhana was employed as a provisionally registered early childhood teacher with CLC and commenced that employment on a permanent full time basis on 19 April 2010.

[16] On 15 November 2010 there was an allegation that Ms Bhana had ill-treated a child during her employment.

[17] On 19 November 2010, CLC met with Ms Bhana to investigate the allegations. Amongst other things, Ms Bhana provided a written response.

[18] CLC made a preliminary decision on 23 November 2010 which was to the effect that Ms Bhana's actions constituted serious misconduct and she was invited to a further meeting to discuss those preliminary findings.

[19] That further meeting took place on 25 November 2010 and in that meeting, CLC indicated that there would be disciplinary consequences which might result in dismissal and Ms Bhana indicated her intention to resign her employment.

[20] The following day, Ms Bhana formally resigned from the employment and in consequence, the disciplinary process was never completed.

[21] For the avoidance of doubt, the resignation letter denies wrongdoing but does not raise a personal grievance or indicate that one is in contemplation. The burden of the letter is simply to say that Ms Bhana cannot continue working in an environment where allegations she considers are false are made against her.

[22] On 3 December 2010, CLC filed a report with the New Zealand Teachers' Council as the law required, advising that there was an ongoing disciplinary matter at the point at which Ms Bhana resigned her employment.

[23] Then on 11 February 2011, Ms Bhana purported to raise a personal grievance. That letter is in the following terms:

Pursuant to my employment contract with Ole School House, I advise herein that I'm pursuing a personal grievance against the Ole School

House under the Employment Act and will also pursue a complaint to the Teachers Council.

Issues

[24] The central issue in the present case of course is whether Ms Bhana has raised a personal grievance in compliance with the law and the subsidiary question the Authority must investigate, assuming a personal grievance has been raised in time, is the question whether the Authority has the power to make the orders sought by Ms Bhana concerning the report to the Teachers' Council.

Did Ms Bhana raise the grievance in time?

[25] I am satisfied on the material before me that Ms Bhana has not raised a personal grievance at all in this matter. It seems to me absolutely plain that there was no personal grievance raised in the letter of resignation. That letter, as I have already noted, simply proceeded on the footing that Ms Bhana denied the allegations against her, was not prepared to continue working in an environment where allegations she thought were false were entertained by the employer and therefore she resigned her employment. There is no suggestion whatever that a personal grievance was raised, no suggestion that a personal grievance was in contemplation but simply a firm indication that the employment relationship was at an end for the reasons set out in the letter.

[26] The letter of 11 February 2011, which purports to raise a personal grievance, in my judgment does not avail Ms Bhana. There is perhaps an implied link between the 11 February 2011 letter and the letter of resignation. But there is no link. The resignation letter stands on its own as no more and no less than a severing of the employment relationship. It explains the reason for the severing of the relationship (because the employer chose to find fault with Ms Bhana's professional practice), but it in no sense puts the employer on notice that a personal grievance is raised or even in prospect.

[27] That being the case, there cannot be a link of any sort between the resignation letter and the subsequent thoroughly inadequate attempt to raise a personal grievance. The letter of 11 February 2011 must also stand on its own and there is simply no basis on which it satisfies the requirements of the law for the raising of a personal grievance.

[28] The essence of that requirement is that the employer is aware that a personal grievance is raised, aware of the nature of that personal grievance and aware of what the employee sought in order to remedy the grievance. The whole point of the exercise of notifying the existence of a personal grievance is to give the employer the opportunity of addressing the matters in contention as quickly and as cost-effectively as possible so that the matter can be resolved with the least possible damage to the parties including any ongoing relationship (if any).

[29] Looked at practically, the 11 February 2011 letter does nothing more than say that Ms Bhana has a personal grievance but there is no intimation of how she proposes that that be remedied or even any clarity about precisely what it is that she says her personal grievance consists of.

[30] After all, she had recently resigned her position in circumstances where she says the employer had made provisional findings which she disagreed with but it would have been unclear to CLC whether she was alleging constructive dismissal (perfectly possible on these facts) or was simply alleging that the employer's preliminary conclusions about the alleged mistreatment of the child were unreasonable or inappropriate, thus potentially grounding a disadvantage grievance.

[31] The short point is that the letter of 11 February 2011 simply does not provide sufficient particularity to enable the employer to address the purported grievance and I am satisfied in consequence that no personal grievance was ever raised by Ms Bhana.

[32] That being my conclusion, the second issue really does not fall for determination because without a personal grievance on foot, there is no entitlement to the consideration of any remedy.

Could the Authority provide the orders Ms Bhana seeks?

[33] While this question is entirely academic given my conclusion that Ms Bhana has not raised a personal grievance within the justiciable period, has not made application to the Authority for consent to bring a grievance out of time and the employer has refused to allow the personal grievance to proceed out of time, I choose to make these observations on the remedies, or some of them, which Ms Bhana seeks.

[34] I consider it is appropriate that I comment on the suggestion that the Authority could grant the remedies that Ms Bhana seeks in respect of the report to the Teachers' Council.

[35] I start by referring to the Authority's remit. The Authority is a creature of statute. It has no inherent jurisdiction. It cannot take steps that its governing statute does not specifically authorise.

[36] The sections in the Employment Relations Act 2000 (the Act) concerning the remedies that the Authority may award begins at s.123 and concludes at s.128. Section 123 provides the broad sweep of the remedies that the Authority may grant and nowhere in that section or indeed in the subsequent sections, is there any power to consider the remedies sought by Ms Bhana.

[37] Moreover, the role of the Authority is determined in s.157 of the Act and that establishes that the Authority is an investigative body which resolves "*employment relationship problems*" and in doing that, the Authority has wide powers: s.160.

[38] Section 161 of the Act, while listing a range of matters over which the Authority has jurisdiction, commences the section by referring to the Authority's "*exclusive jurisdiction to make determinations about employment relationship problems generally, ...*".

[39] The only two subparagraphs of s.161 that are particularly worthy of comment here are subparas.(r) and (s) of s.161(1). Subparagraph (r) refers to the Authority's jurisdiction to make determinations about employment relationship problems generally including any action "*arising from or related to the employment relationship*" and subpara.(s) relates to determinations, inter alia, conferred by any other statute.

[40] Dealing with the second point first, the actions Ms Bhana complains about were actions taken by CLC pursuant to a statutory duty conferred on it by s.139AK of the Education Act 1989 (the Education Act). There is nothing in the Education Act which confers on the Authority the right or duty to interfere in the performance of a statutory duty by which an educational institution (such as CLC) is bound. Indeed, it would be an extraordinary situation if the Authority were seen to interfere with statutory obligations created by an enactment other than the Employment Relations Act.

[41] The same point arises in considering whether subpara.(r) could apply. While the words in subpara.(r) might be construed broadly, I am satisfied that there is no basis on which they can be construed as giving me the power to abrogate, or even comment on, the exercise of a statutory duty by a party to an employment relationship.

[42] Looked at broadly, it may be that the matters Ms Bhana complains about arise from the employment relationship, but in the absence of specific powers, I am satisfied that I do not have any right to interfere in the performance of CLC's statutory duties.

[43] This interpretation of the statutory enactment that governs the performance of the Authority's duties is well supported by decided cases. I have been referred to *Pain Management Systems (NZ) Ltd v. McCallum* (High Court, Christchurch, CP72/01, 14 August 2001), a decision of His Honour Justice Pankhurst and *BDM Grange v. Parker* [2006] 1 NZLR 353. In *BDM Grange*, the Court held that the Authority's remit broadly was to deal with employment relationship problems where the cause of action "... is to be found entirely within the employment relationship itself".

[44] Applying that dictum, it is apparent that the relief sought by Ms Bhana is outside the Authority's aegis. It is not wholly within the employment relationship involving as it does the filing of a report (a statutory duty) with a third party.

[45] Moreover, Ms Bhana's proceedings seem to be misconceived. She seems to take the position that CLC had some discretion in the matter of reporting to the Teachers' Council whereas nothing could be further from the truth. Even assuming the Authority had power to comment on the matter (which I am satisfied it does not for reasons already advanced), it is still apparent on a straightforward construction of the Education Act that CLC is bound by statute to make the report that it did.

[46] This is because the relevant provision in the Education Act requires such a report to be made in circumstances where a teacher resigns and within the 12 months preceding that resignation, the employer advised the teacher it was dissatisfied with or intended to investigate the conduct or competence of the teacher.

[47] Plainly, that is precisely the position in this case. There is no basis on which CLC can avoid making the report to the Teachers' Council. There were concerns

about Ms Bhana's practice by CLC and Ms Bhana resigned within days of those concerns first being brought to her attention. In those circumstances, there is a mandatory requirement to report and no basis on which that reporting can be avoided.

Determination

[48] For reasons that I have advanced earlier in this determination, I am satisfied that Ms Bhana never raised a personal grievance in respect of her employment with CLC and as a consequence she is not entitled to the consideration of remedies.

[49] Moreover, some of the remedies that Ms Bhana seeks are not available to her anyway because I am satisfied that they fall outside the Authority's remit.

Costs

[50] Costs are reserved but the parties are urged to try to resolve costs between them. In the normal course of events, as CLC has been entirely successful in this proceeding, it can look to Ms Bhana to contribute to its costs.

[51] If the parties are unable to resolve costs on their own terms, CLC may file and serve a memorandum requesting the Authority to fix costs and Ms Bhana has 14 days from the date of her receipt of that document to file a responding memorandum.

[52] Costs will then be determined by the Authority on the papers.

James Crichton
Member of the Employment Relations Authority