

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 464
5291222

BETWEEN BARRY DUNN
 Applicant

A N D WAITEMATA DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: K J Anderson

Representatives: M Ryan, Counsel for Applicant
 A Russell, Counsel for Respondent

Investigation: On consideration of the papers

Date of Determination: 18 December 2012

DETERMINATION OF THE AUTHORITY

Introduction

[1] For reasons that are not entirely clear, this matter has had a protracted history. Via a statement of problem received by the Authority on 18 December 2009, the applicant, Mr Barry Dunn, conveys that his employment was terminated by the Waitemata District Health Board (the WDHB) on 23 October 2008. Mr Dunn alleges that the dismissal was substantially and procedurally unjustified. Mr Dunn also alleges that he was disadvantaged in his employment by unjustified actions by the WDHB. This claim relates to a verbal warning issued to Mr Dunn on 5 June 2007.

[2] Mr Dunn presents a further personal grievance claim whereby he alleges that he was disadvantaged in his employment by the unjustified actions of the WDHB. Mr Dunn says that he was subjected to workplace bullying and he provides details of the alleged actions (not exclusive) pertaining to this claim. Finally, Mr Dunn alleges that the WDHB failed to act in good faith in relation to various matters pertaining to

his absence on extended sick leave during 2008 and his subsequent dismissal. Mr Dunn seeks that the Authority upholds his alleged personal grievances and a claim of breach of good faith of the provisions of the Employment Relations Act 2000; and award him various remedies.

[3] On 18 January 2010, the Authority received a statement in reply from the WDHB. First, the WDHB says that the personal grievance claim of Mr Dunn relating to the verbal warning issued on 5 June 2007, is outside the 90 days period for submission of a personal grievance pursuant to s.114(1) of the Employment Relations Act 2000 (the Act). Furthermore, the WDHB says that even if the personal grievance is not out of time the verbal warning provided was substantively justified and carried out in a procedurally fair manner; and in any event, it expired on 5 December 2007.

[4] In regard to Mr Dunn's allegations pertaining to the further unjustifiable disadvantage whereby he says that he was subjected to bullying, the WDHB denies those allegations and says that the actions of the line manager involved were legitimate and reasonable in regard to addressing performance and other concerns with Mr Dunn. The WDHB says that a personal grievance does not arise from the circumstances involved.

[5] Finally, the WDHB says that it acted in good faith in regard to the applicant's extended period of sick leave between March 2008 and October 2009 and that the termination of Mr Dunn's employment was justified as the WDHB was not able to establish if, or when, he could return to work.

[6] Furthermore, the WDHB says that a personal grievance in relation to the unjustifiable dismissal claim was not raised within 90 days of the termination date, albeit Mr Dunn had ample opportunity to do so.

[7] The Authority file shows that the matter was referred to the Mediation Service on 19 January 2010 and it was scheduled for a mediation meeting on 18 June 2010; but for reasons unknown to the Authority, the mediation did not proceed. The record shows that as of 20 July 2010, the Mediation Service and the Authority were awaiting notice of the applicant's intentions. The submissions for the respondent allude to mediation occurring on 1 December 2010.

[8] The Authority's file shows that there was no further communication from the applicant until 10 April 2012 when counsel for Mr Dunn informed, by an email, that: "...*this matter was not resolved at mediation*".

[9] A request was made for an Authority investigation meeting to be scheduled.

[10] Upon the Authority seeking to convene a conference call with the parties, counsel for the WDHB filed a: *Notice of Application by Respondent Seeking to Dismiss Proceedings and Claiming Lack of Jurisdiction* dated 29 June 2012.

[11] Following a conference call with the parties on 2 July 2012, the Authority issued a Minute outlining the history of the proceedings, in addition to seeking an indication from the applicant as to whether he now intended to pursue the two unjustifiable disadvantage grievances.

[12] Via a memorandum dated 24 July 2012, counsel for the applicant (Mr Ryan) notified the Authority of the withdrawal of the two unjustifiable disadvantage grievances but Mr Dunn still wishes to pursue the claim of unjustifiable dismissal and the breach of good faith allegation.

[13] Given that the WDHB says that the unjustifiable dismissal grievance was raised outside the 90 days requirement of s.114(1) of the Act, and that consent has not been given for the grievance to be raised out of time, the focus has now turned to whether, or not, a letter dated 30 October 2008 should be accepted as raising a personal grievance. The parties have provided their respective written submissions pertaining to this issue.

The letter dated 30 October 2008

[14] Due to Mr Dunn being absent from his employment on sick leave from 20 March 2008, the WDHB wrote to him on 19 August 2008 noting that he had:

... been reported as saying that you do not intend to return to your current position nor are you interested in any other Mental Health nursing position in Waitemata DHB Mental Health Services. Would you be able to let us know if this is not the case and/or if you are interested in returning to a position at a later date. We would appreciate a response by Friday 5 September as to what your intentions are regarding your employment at the WDHB.

[15] Because the WDHB had not received a response to their letter dated 19 August 2008, a further letter was sent to Mr Dunn on 9 September 2008. Once again, the WDHB asked Mr Dunn to advise whether he intended to return to work at the WDHB. The WDHB concluded its letter by saying:

If we haven't had any clarity about your intentions to return to work by Friday 19 September we will assume that you do not intend to return to work and will look to terminate our employment relationship accordingly.

[16] In a letter dated 11 September 2008, Mr Dunn's representative, Mr Ryan, responded to the WDHB. A number of matters were canvassed but the pertinent point is that Mr Ryan informed the WDHB that:

My client instructs that a return to work is possible. However, this is conditional upon WDHB removing the barriers as outlined in Dr Kenny's report.

[17] Via a letter dated 19 September 2008 the WDHB asked that Mr Ryan please clarify what "barriers" he was referring to regarding Mr Dunn's possible return to work as it was "rather unclear at the moment". The WDHB then went on to inform that: "Once you have provided us with some more detail we will be more than happy to respond."

[18] It appears that no further response was provided by Mr Dunn and on 13 October 2008, the WDHB again wrote to him and asked him to explicitly state what the WDHB should do to facilitate his return to work. The WDHB informed further:

If you do not provide this information, WDHB will proceed to terminate Mr Dunn's employment on notice. If you do provide information, it will be considered before any decision is made. We seek a response to this letter by Monday 20 October at 4pm. We reiterate if no response is received, WDHB will then proceed to terminate the employment.

[19] Given that it had not received a response from its last correspondence to Mr Dunn, the WDHB then wrote to him again on 23 October 2008. In this letter the WDHB informed Mr Dunn that it had been seeking information from him since August in regard to his return to work and asking what needs to be done to facilitate this. The WDHB informed further that as it had advised in a letter dated 13 October

2008, that if this information was not provided by 20 October 2008, then the WDHB would proceed to terminate Mr Dunn's employment on notice. Mr Dunn was informed that the WDHB are unable to keep his position open indefinitely while he was not actually performing the role. The letter concluded;

As WDHB have not received this information, your employment is terminated with one month's notice, last effective day of employment being 28 November 2008. You are welcome to provide the requested information within the notice period and if it is received, it will be considered by WDHB before your termination date and WDHB may review its decision in regards to such.

[20] By the letter dated **30 October 2008** Mr Ryan informed the WDHB on behalf of Mr Dunn that:

I advise that your decision to terminate my client's employment is premature and in the circumstances is unjustified. If WDHB fails to identify the practical steps that it is going to put in place to enable Mr Dunn to return to his position with WDHB and terminate Mr Dunn' employment on 28 November 2008 then an additional employment relationship problem alleging unjustified dismissal will be pursued in the Employment Relations Authority.

[21] The WDHB responded on 4 November 2008. The WDHB informed Mr Ryan that:

We note that we have previously sought information from you in regards to what you seek for your client to facilitate his return to work in our letters of 19 September 2008 and 13 October 2008. We did not receive a response to those.

We now advise in respect to our third letter of 23 October 2008 that what you are seeking is resolution of his employment issues, but you put forward no proposal or basis of how this might be achieved. These employment issues have been discussed with the PSA and then subsequently at mediation on 31 March 2008 and then 30 April 2008. A resolution did not occur. Subsequently, WDHB have attempted to engage Mr Dunn either directly or through you and have either received no response or a response saying [sic] need to resolve employment issues before Mr Dunn can consider returning.

We are prepared to consider suggestions for resolution of these, but this is not assisted by a generic request for us to solve the employment relationship problem. We note that Occupation Health reports stated that Mr Dunn was unable to carry out the tasks for which he was employed and was pessimistic about his ability to return to work and gave no timeframe for such. Mr Dunn has now been on leave for over seven months.

We are prepared to meet to discuss this matter. This should probably occur before the end of the notice period. Please advise of suitable dates. Alternatively, you can provide any submissions or comments you wish on the matter in writing. We look forward to hearing from you.

We note this matter needs to be dealt with in the next two weeks. Therefore, we trust that you will contact us shortly to arrange a meeting or provide any written comments by Friday 21 November 2008. Otherwise termination of employment on notice will occur.

[22] By a letter dated 5 November 2008, Mr Ryan wrote on behalf of Mr Dunn and pursuant to s.120 of the Employment Relations Act 2000 he asked the WDHB to provide in writing the reasons for Mr Dunn's dismissal.

[23] The WDHB duly obliged on 12 November 2008. In essence the letter from the WDHB explained that as Mr Dunn had not performed his role for nearly eight months and was still unable to perform the role; and given that there appears little prospect of him returning to his employment in the near future, the WDHB had terminated Mr Dunn's employment on notice. The letter concludes:

We reiterate our offer to meet to discuss this matter and/or receive any suggestions or proposals in regards to such during the notice period. If you wish to accept this offer, please advise as soon as possible.

[24] There is no evidence of any further communication from Mr Dunn in relation to his employment until a personal grievance was raised via the application to the Authority received on 18 December 2009.

The respective submissions

[25] In support of the argument that the letter dated 30 October 2008 (the letter) should be accepted by the Authority as raising a personal grievance, it is submitted for Mr Dunn that:

- (a) The relevant extracts from the letter are: "... *the decision to terminate employment was premature and in the circumstances unjustified,*" and that the WDHB had been advised that: "... *an additional employment relationship problem alleging unjustified dismissal would be pursued in the Employment Relations Authority*".

- (b) The letter, when read in combination with other documents and communications between Mr Dunn and the WDHB, satisfies s.114 of the Act.
- (c) Mr Dunn's submissions refer the Authority to a number of Employment Court judgments. In particular *Board of Trustees of Te Kura Kaupapa Motuhake O Tawhiuau v. Edmonds* (Kura)¹ and *Creedy v. Commissioner of Police*.² Among other matters, the submissions for Mr Dunn refer to the WDHB participating in mediation and linking that to a statement by Chief Judge Colgan in *Kura* (at para.[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.

[26] The submissions for the WDHB include:

- (a) That the letter cannot constitute the submission (raising) of a personal grievance because:
- (i) Any claim of unjustified dismissal was subject to two conditions not being met;
 - (ii) The WDHB was still prepared to consider representations and review the notice of termination prior to any termination occurring and requested further comment and clarification from Mr Dunn;
 - (iii) The letter does not contain the elements necessary to submit a personal grievance;
 - (iv) A personal grievance of unjustified dismissal cannot be submitted before the dismissal actually occurs.

¹ [2008] ERNZ 139

² [2006] 1 ERNZ 517

- (b) The WDHB points to the letter and the indication that a claim of unjustified dismissal will be pursued in the Employment Relations Authority if two conditions are not met. The conditions being: first, that the WDHB fails to identify the practical step that it is going to put in place to enable Mr Dunn to return to his position; and the second condition being that the WDHB terminates Mr Dunn's employment on 28 November 2008. It is submitted for Mr Dunn that only upon the occurrence of those two events, will an additional employment relationship problem, alleging unjustified dismissal, be pursued in the Employment Relations Authority.
- (c) It is submitted that a claim of unjustified dismissal that is subject to conditions being met cannot constitute the submission of a personal grievance that complies with s.114 of the Act; because it is conditional. The WDHB says that a personal grievance cannot be conditional in that it is either a personal grievance or it is not.

[27] Furthermore, the WDHB points to the fact that as of 4 November 2008, it was prepared to discuss with Mr Dunn (and/or his representative) the proposed termination of his employment. Alternatively, Mr Dunn was invited to provide any submissions or comments that he wished the WDHB to consider during the notice period. The WDHB says that its decision to terminate the employment of Mr Dunn was not irrevocable. However, Mr Dunn elected not to make any representations. It is submitted for the WDHB that the opportunity for Mr Dunn to make further representations before it confirmed the termination of his employment, combined with the two pre-conditions set out in the letter, means that the letter in itself, cannot constitute the submission of a personal grievance.

[28] In regard to its attendance at mediation, the WDHB says that it was required by the Authority that mediation be attended pursuant to s.159 of the Act and refers to *Creedy* (para.[41]) where it was held that complying with the direction of the Authority, acting under s.159 of the Act, cannot be seen to be a waiver of an entitlement to say that a grievance has no proper foundation in law or fact. I accept that this must be so in regard to this matter.

Determination

[29] Having closely considered the respective submissions of both parties, along with the relevant documents provided, I conclude that the content of the letter dated 30 October 2008 does not raise a personal grievance. I accept the submissions for the WDHB that as at the time of this letter being prepared, while a decision to terminate the employment of Mr Dunn had been communicated, it was still open to him to make further submissions as to why this decision should not be implemented.

[30] I also accept that the letter set pre-conditions that would need to exist before a claim of unjustified dismissal would be pursued with the Employment Relations Authority and as at 30 October 2008, Mr Dunn's employment had not been terminated. Of course, it is axiomatic that before an employee can raise a personal grievance for unjustifiable dismissal, there must, in fact, be a dismissal. Indeed, s.103(1)(a) specifically requires:

That the employee **has been** unjustifiably dismissed.
(Emphasis added)

[31] For the above reasons, I find that Mr Dunn did not raise a personal grievance via the letter dated 30 October 2008 and hence the Authority does not have jurisdiction to pursue its investigation any further.

Costs

[32] Costs are reserved. The parties are invited to attempt to reach a resolution in regard to the matter of costs. In the event that a resolution is not achieved, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority