

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 417/09
5166164**

BETWEEN ZENA FADHEEL
 Applicant

AND AUCKLAND DISTRICT HEALTH
 BOARD
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Anthony Drake and Christine Gordon, Counsel for
 Respondent

Investigation Meeting: 20 November 2009

Determination: 23 November 2009

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

The problem

[1] The applicant Ms Zena Fadheel ("Ms Fadheel") was formerly employed by the respondent Auckland District Health Board ("the Board") from June 1999 until her resignation in February 2001. She lodges an application in the Authority stating the problem for investigation as "*unjustified benefit, defamation, blocking me from further opportunity to work in the medical lab*". The Board says Ms Fadheel did not raise a personal grievance within the time prescribed by law and the other claims are not matters within the Authority's jurisdiction.

[2] The parties were unable to resolve the problem by mediation.

[3] Having regard to the time which has elapsed since Ms Fadheel's employment with the Board ended, the Authority agreed to determine the issue of whether a grievance was properly raised within time as a preliminary matter for determination.

This determination deals with that issue, and additionally without objection, whether leave might be granted for any personal grievance to be raised out of time.

The facts

[4] Ms Fadheel commenced employment with the Board on 13 June 1999. At that time she was employed as a laboratory assistant first in specimen reception biochemistry and later in histology.

[5] The Authority finds that Ms Fadheel was employed at the material times under the terms of prevailing collective documents firstly a collective employment contract between the Board and the Medical Laboratory Workers union with a term from 1 August 1999 to 29 October 2000 and then later a collective employment agreement with a term from 4 December 2000 to 13 March 2002 ("the collectives"). The collectives contained an express provision specifying that a personal grievance was required to be raised with the employer within 90 days of it arising or coming to the employee's notice.

[6] Ms Fadheel resigned from the employment on 9 February 2001.

[7] By letter dated 2 September 2008 Ms Fadheel wrote to the Board complaining about staff she had worked with in the histology lab in 2000-2001 and also accusing "them" of damaging her reputation. The latter complaint arose in the context of application for re-employment Ms Fadheel had made.

[8] By letter dated 11 November 2008 the Board's Manager HR Operations Ms Cheryl Kirkness ("Ms Kirkness") wrote to Ms Fadheel acknowledging receipt of Ms Fadheel's advice of 2 September 2008. Ms Kirkness expressed concern that no complaint had been raised within the statutory 90 days and advised that it was both impractical and unlikely that a satisfactory resolution could be achieved. Ms Kirkness further advised the Board could not find any basis for the claim of ongoing damage by the Board's employees to Ms Fadheel's reputation.

[9] Ms Fadheel met with the Board's Quality Manager Mr Andrew Keenan ("Mr Keenan") on 25 November 2008. Mr Keenan advised Ms Fadheel that her concerns regarding her employment during 2000-2001 should be raised with the human resources department. He also advised that he could only investigate and reply to Ms Fadheel on matters of privacy.

[10] Ms Kirkness met with Ms Fadheel on 28 November 2008 to clarify Ms Fadheel's complaints.

[11] By letter dated 26 March 2009 Mr Keenan wrote to Ms Fadheel and advised her that he had investigated her concerns in relation to alleged breaches of privacy in the context of applications by her for further employment with the Board. He advised he did not believe Ms Fadheel's privacy had been breached.

[12] By letter dated 30 April 2009 Ms Fadheel's legal representative wrote to Ms Kirkness advising her instructions that Ms Fadheel's resignation in February 2001 amounted to a constructive dismissal, and that unjustified comments were being made about Ms Fadheel.

[13] By letter dated 31 May 2009 Ms Kirkness wrote to Ms Fadheel's legal representative advising that the Board did not accept that Ms Fadheel had been treated unjustifiably in relation to her attempts to secure employment with it. Ms Kirkness further advised that in the particular circumstances, the Board declined to attend independent mediation.

[14] By application dated 16 June 2009 and lodged in the Authority on 19 June 2009, Ms Fadheel asked the Authority to investigate claims of "unjustified benefit, defamation, blocking me from further opportunity to work in the medical lab".

The merits

The claims of Defamation and "blocking opportunity to work in the medical lab".

[15] These claims arise out of Ms Fadheel's application for re-employment with the Board.

[16] This Authority is not empowered to investigate and determine defamation actions but despite the description of the problem I deal with these present two claims as claims for unjustifiable disadvantage. This I am obliged to do being required to concentrate on resolving the problem however it is described.

[17] Ms Fadheel has pursued these matters quite properly as matters of privacy both with the Board itself and through the office of the Privacy Commissioner.

[18] The claims however do not arise out of Ms Fadheel's employment with the Board. They arose subsequent to the termination of the employment relationship in the context of applications by Ms Fadheel for re-employment with the Board. **These are not matters that arise out of employment and this Authority has no concern with them. There will be no formal orders in relation to them.**

The claim for unjustified benefit

[19] I interpret Ms Fadheel's description of "unjustified benefit" to be an allegation of unjustifiable disadvantage and I proceed on that basis. There is no dispute that this claim does arise out of Ms Fadheel's time of employment with the Board. The question is whether Ms Fadheel raised a personal grievance within the time prescribed by law.

[20] Since its commencement as from 2 October 2000, the *Employment Relations Act 2000* ("the Act") provides as follows in relation to the raising of personal grievances:-

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), 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.

(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.*

(3) *Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee may apply to the Authority for leave to raise the personal grievance after the expiration of that period.*

(4) *On an application under subsection (3), the Authority, after giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—*

(a) *is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1 or more of the circumstances set out in section 115); and*

(b) *considers it just to do so.*

(5) *In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.*

(6) *No action may be commenced in the Authority or the Court in relation to a personal grievance more than 3 years after the date on which the personal grievance was raised in accordance with this section.*

115 Further provision regarding exceptional circumstances under section 114

For the purposes of section 114(4)(a), exceptional circumstances include—

(a) *where the employee has been so affected or traumatised by the matter giving rise to the grievance that he or she was unable to properly consider raising the grievance within the period specified in section 114(1); or*

(b) *where the employee made reasonable arrangements to have the grievance raised on his or her behalf by an agent of the employee, and the agent unreasonably failed to ensure that the grievance was raised within the required time; or*

(c) *where the employee's employment agreement does not contain the explanation concerning the resolution of employment relationship problems that is required by section 54 or section 65, as the case may be; or*

(d) *where the employer has failed to comply with the obligation under section 120(1) to provide a statement of reasons for dismissal.*

[21] At the investigation meeting, I did not accept Ms Fadheel's initial cursory description of the particulars but eventually I elicited from her three material components of the allegation. Firstly she described not being permitted to sit a qualified technical assistant examination. Secondly she complains about a performance review in May 2000 that was critical of her performance. Finally she referred to a decision not to permit her an increased salary taken by the Board in November 2000.

[22] I questioned Ms Fadheel in detail about these three components. She gave evidence that ultimately she reached a point in relation to them where she resolved

they posed no difficulty at all for her and she said of all them "I said ok, no problem". That concession I regard as determinative of matters. I found Ms Fadheel's description of matters unconvincing.

[23] I am not persuaded that Ms Fadheel raised **ANY** personal grievance with the Board as that concept is known in employment law. **I find that Ms Fadheel did not raise a personal grievance with the Board within the time prescribed for her to do so by statute in relation to the matters she now claims constitute her employment relationship problem for "unjustified benefit".**

[24] I conclude that Ms Fadheel really has no serious complaint about these very historical matters and in reality, they are peripheral and subordinate to her other concerns arising out of her attempts to obtain re-employment with the Board and which I am satisfied is her real "grievance".

Leave for exceptional circumstances

[25] Although there is no formal application for leave, I clarified with Mr Drake that I would proceed to consider whether leave should be granted and quite responsibly there was no opposition. Ms Fadheel made repeated statements to the Authority that she did not know the rules and that she was not told about the 90 day rule. She said that it was only in 2006 that she came to understand the requirement. I do not regard that situation as exceptional justifying the grant of leave.

[26] **I am satisfied there are no exceptional circumstances which occasioned the delay in raising a personal grievance. I consider it would be unjust to grant leave. Leave to raise a personal grievance out of time is refused.**

The determination

[27] The Authority determines that Ms Fadheel's claims in relation to defamation and blocking her from further opportunity to work do not arise out of her employment and therefore they are not investigated by the Authority. The Authority determines that the remaining claim of unjustified benefit was not raised within the time prescribed by law. Leave to raise a personal grievance out of time is refused.

The costs

[28] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Drake is to lodge and serve a memorandum as to costs within 28 days of the date of this Determination. Ms Fadheel is to lodge and serve a memorandum in reply within 14 days of being served of the Board's memorandum. I will not consider any application or memorandum lodged outside this timeframe without leave.

Leon Robinson
Member of Employment Relations Authority