IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 444/10
5311402

	BETWEEN	CHRISTINE MAYNARD
	AND	BAY OF PLENTY DISTRICT HEALTH BOARD

Member of Authority:	Yvonne Oldfield
Representatives:	Stan Austin for applicant Gail Bingham for respondent
Submissions received:	1 October 2010 and 6 October 2010 from Applicant 5 October 2010 from Respondent
Determination:	13 October

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE

Employment Relationship Problem

[1] Ms Maynard's employment relationship problem (described in her statement of problem as an "unjustifiable suspension and unjustifiable dismissal") was lodged with the Authority on 6 July 2010. Attachments to the statement of problem indicated that the suspension in question occurred in "*late December 2009*" and that the dismissal grievance arose out of an allegation that Ms Maynard's resignation on 21 February 2010 amounted to a constructive dismissal. Correspondence attached to the statement of problem also indicated that there had been a further issue relating to non-payment of a gratuity which Ms Maynard believes she was entitled to receive at the end of her employment.

[2] Bay of Plenty District Health Board (the DHB) responded immediately with an application to strike out the application on the grounds that Ms Maynard had not raised the grievances within 90 days of the suspension or the alleged constructive dismissal respectively.

[3] On 4 August 2010 Mr Austin wrote to the Authority advising that:

> *"The applicant's claim is just that her grievance on grounds of unjustified dismissal was raised within the 90 day period."*

[4] To establish that her grievance was raised in time, Ms Maynard relies principally on written communications to the DHB. Because of this, the parties agreed that this issue can be determined on papers. After considering all the documentation that the parties consider relevant along with written submissions, I now proceed to issue my determination on that question.

Was a grievance of unjustified dismissal raised within 90 days?

[5] Ms Maynard says that in deciding whether her grievance was raised in time, the Authority must consider the fact that prior to her resignation she had been the subject of a ten-week disciplinary investigation. It is also submitted for Ms Maynard that regard should be had to Ms Maynard's letter of resignation, and letters of 7, 20, and 29 April written to the DHB on her behalf by her then representative (Steve Franklin of Whakatane solicitors Hamerton Lawyers Limited), the DHB's responses to all of those letters, and subsequent communications between the parties regarding mediation.

[6] Ms Maynard tendered her resignation on 21 February, by email. On 23 February Sherida Cooper, (Business Leader, Non Clinical Support Services) responded by saying that her final pay would be calculated and paid out on 23 February 2010. In the same letter, Ms Cooper advised that Ms Maynard did not qualify for a gratuity payment.

[7] Mr Franklin's letter of 7 April began by addressing Ms Maynard's disappointment that the DHB had accepted her resignation and goes on to express the view that Ms Maynard:

> *"has been unfairly disadvantaged by her employer's decision to decline her gratuity payment…*

immediately after tendering her resignation our client has been assessed as unwell to the point that her doctor has determined that she was 'clinically not well enough to continue her job'. That was a determining factor in our client's decision to resign her employment…

We invite the BOPDHB to re-visit its decision with respect to payment of our client's gratuity payment. Our client has instructed us that if the gratuity is made to her within seven (7) days of the date of this letter she will not pursue matters any further. If however the payment is not made our client ***may*** *raise a personal grievance in relation to the way her employment ended and seeking payment of her gratuity payment in any event."*

(emphasis added by the Authority.)

[8] In a letter dated 12 April the DHB reiterated that it had determined that Ms Maynard did not qualify for a gratuity and would not receive one. On 29 April Mr Franklin wrote again, reiterating and expanding on Ms Maynard's concerns and concluding with an offer to settle expressed in the following terms:

"1.*You pay to our client a sum equal to 75% of her gratuity entitlement pursuant to Section 123 (1) (c) (i) of the Employment Relations Act;*

2. Our client refrains from issuing a Personal Grievance relating to her treatment during her time at the hospital and the nature in which the employment relationship ended; and

3. This arrangement remains strictly confidential to the parties.[1]*"*

[9] On 5 May Gail Bingham, the respondent's General Manager (Governance and Quality) wrote in response, saying:

"To ensure timely response please address all future correspondence to myself.

[1] I note that neither party has suggested that any privilege attaches to this document.

The BOPDHB's response remains unchanged from that set out in my letter of 12 April …therefore your offer is declined."

[10] Ms Bingham also provided her email and telephone contact details. On 4 June Mr Franklin wrote back saying that Ms Maynard "*remains dissatisfied with the position taken by the BOPDHB*" and remained of the view that she was entitled to the gratuity. No mention was made of any other aspect of the employment relationship problem. Mediation was suggested. Ms Bingham replied on 9 June with her agreement.

[11] Due to what I understand were scheduling difficulties, mediation did not take place until late August. Meanwhile, in late June Mr Austin took over as Ms Maynard's representative, and very soon after lodged the grievance in the Authority.

Determination

[12] Mr Austin argues for Ms Maynard that the series of letters to the respondent made it clear that Ms Maynard was raising a grievance. I am not persuaded of this. The letters of 7 and 29 April establish only that the applicant was considering taking a personal grievance in the event that the gratuity issue was not resolved. There is no evidence that any steps were taken to raise a dismissal grievance (or any other grievance) thereafter.

[13] It would appear therefore that the grievance could not be said to have been raised until the lodging of the statement of problem in July 2010. Since the time for raising the dismissal grievance began to run on 23 February, this was clearly well outside the 90 days required by s. 114 of the Employment Relations Act 2000.

Exceptional circumstances

[14] In the alternative it is argued for Ms Maynard that exceptional circumstances exist such that she should be permitted to raise the grievance out of time. The circumstances alleged are that Mr Franklin unreasonably failed to action instructions to raise the grievance.

[15] Ms Maynard provided the Authority with a witness statement in relation to the preliminary issue in which she had this to say about her instructions to her representative at the relevant time:

> *"I consulted Steve Franklin about my situation on 26 February 2010.*
>
> *At that meeting Steve Franklin and I discussed a range of issues including the non-payment of gratuity and my dissatisfaction with the way in which my employment had ended. The outcome of this discussion was that if I was paid my full gratuity or a significant portion of it then I would simply let matters relating to my resignation lie. I was very clear though that if the matter was not resolved at an early date I wanted Steve Franklin to proceed with a personal grievance claim on my behalf."*

[16] It is argued for Ms Maynard that the words of the solicitor's letters of 7 and 29 April 2010 are consistent with what she says in the witness statement. Mr Austin argued in submissions:

> *"The authority has noted that it may want to interview Mr Franklin in the event it is required to consider this application for leave. While I understand this may be helpful I respectfully suggest that on review of all the facts and his correspondence in particular, Mr Franklin has been expressly clear as to the nature of his instructions, as has Christine Maynard. I cannot see that that step then now would be necessary."*

[17] This submission cannot possibly be accepted. As already indicated, the letters of 7 and 29 April refer only to instructions that Ms Maynard "***may*** *raise a personal grievance in relation to the way her employment ended."* The Authority cannot determine what Ms Maynard's instructions to Mr Franklin were without hearing from both Ms Maynard and Mr Franklin on the subject.

[18] The question whether there were exceptional circumstances is therefore reserved. As previously advised to the parties the Authority is in a position to take evidence from Mr Franklin and Ms Maynard on this issue on 22 October. However, given the narrowness of the issues which need to be traversed, it is not efficient to

convene a full investigation meeting in Tauranga for this purpose. The investigation meeting set down for 22 October is therefore cancelled. The Authority support officer for this matter will arrange a teleconference to discuss how the Authority will take evidence on the issue of Ms Maynard's instructions.

[19] I direct also that a copy of this determination is provided to Hamerton Lawyers Limited, for the attention of Mr Franklin. I record for the information of all parties that if Mr Franklin or his representative wishes to join the proposed teleconference that that would be of assistance to the Authority.

Costs

[20] Costs are reserved pending the final outcome of this matter.

Yvonne Oldfield
Member of the Employment Relations Authority