

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 444A/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: 8 November 2010
Determination: 15 November 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 13 October 2010 (AA444/10) I concluded that Ms Maynard had not established that she had raised her dismissal grievance within 90 days and could not therefore have that matter investigated by the Employment Relations Authority.

[2] In the alternative Ms Maynard seeks leave to raise that grievance out of time. She does so on the grounds that the delay in raising the grievance was occasioned by exceptional circumstances, as set out in section 115 (b), which provides that leave may be granted:

“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...”

[3] In the determination of 13 October 2010 I gave leave for the applicant to provide further evidence in support of the application for leave to raise the grievance out of time. On 22 October 2010 I convened a teleconference with the representatives to discuss how this should be progressed. The outcome (as set out in the Minute attached as Appendix [1]) was that Mr Austin had a period of 14 days in which to provide any further evidence in support of Ms Maynard's application for leave.

[4] On 8 November 2010 Mr Austin wrote to advise that the applicant had no further evidence on the issue of exceptional circumstances. He provided further brief arguments as to why leave should be granted and asked that the Authority proceed to determine the issue on the evidence already presented. The respondent (the DHB) having previously set out its position on this issue, I now proceed to determine the matter.

[5] I note for completeness that although correspondence between the parties referred to alleged non-payment of a gratuity to which Ms Maynard believed herself entitled, that matter has not been lodged in the Authority (the Statement of Problem having identified the problem for resolution as "*my unjustifiable suspension and unjustifiable dismissal by Bay of Plenty District Health Board.*") Should that matter be a live issue for Ms Maynard, it remains open to her to pursue it as a separate employment relationship problem.

Determination

[6] Ms Maynard's position has been set out in a witness statement¹ and was recorded in the determination of 13 October 2010. It is that within days of her employment ending she instructed her solicitor (Mr Franklin of Hamerton's Lawyers Limited, Whakatane) that if her employment relationship problem was not resolved she wished him to proceed with a personal grievance claim on her behalf.

[7] Mr Austin argues that Ms Maynard's assertion is confirmed by the content of a series of letters (dated 7, 20 and 29 April 2010) which Mr Franklin wrote on her

¹ Ms Maynard did not supply an affidavit.

behalf to the DHB. Mr Austin argues that these letters, together with what his client has said in her witness statement, establish that the ground set out in section 115 (b) has been made out.

[8] These are the same letters which Ms Maynard had relied on as having raised the grievance, and which were discussed in the determination of 13 October 2010. In his letter of 8 November Mr Austin drew the Authority's attention to errors in that determination, namely that the dates of two of those letters were incorrectly recorded there. The Authority apologises for any confusion and inconvenience that have arisen as a result of those errors, which have now been corrected in the usual way by the issuing of formal errata notices. To prevent any uncertainty about what has been considered in relation to the application for leave to raise the grievance out of time, I attach the letters of 7, 20 and 29 April in full as appendices [2] [3] and [4].

[9] If I have understood it correctly, Mr Austin's submission is that it can be seen from the letters of 7 and 29 April that Ms Maynard had indeed instructed Mr Franklin to raise a grievance, thus making reasonable arrangements to have the grievance raised on her behalf by her agent. By implication Mr Austin appears also to argue that if the grievance was not in fact raised (although the applicant continues to dispute this) it follows that Mr Franklin unreasonably failed to ensure that it was.

[10] The letter of 7 April contains the following passage, upon which the applicant seeks to rely:

“Our client has instructed that if the gratuity payment 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...”

[11] The respondent declined payment of the gratuity. In the letter dated 29 April Mr Franklin set out an offer to settle (recorded at paragraph [8] of the determination of 13 October 2010) and then went on:

“We would be obliged if you would provide us with your response to this proposal within seven (7) days of the date of this letter. If we do not receive

your response within that time our instructions are to formally raise a personal grievance in this matter. It is our hope that that situation can be avoided.”

[12] The DHB responded (declining the offer) in a letter dated 5 May 2010 and stamped received on 6 May.

[13] Ms Maynard’s statement cannot be accepted without first having been put to Mr Franklin for comment. When approached directly by an Authority support officer with a request that he join a conference call to discuss arrangements to give evidence Mr Franklin declined saying that Ms Maynard had not authorised him to do so. Mr Austin has been given the opportunity to provide a statement from Mr Franklin, but has not done so.

[14] Since Mr Franklin cannot be required to give evidence to the Authority without Ms Maynard’s authorisation, the Authority can investigate no further of its own motion. As Mr Austin has requested I therefore proceed to determine the application for leave. I do so on the basis of the correspondence between Mr Franklin and the DHB, which both parties have agreed I may have regard to.

[15] I am not satisfied that taken separately or together the letters of 7 and 29 April establish that Mr Franklin had instructions to raise a grievance. The words “*may raise a grievance*” in the letter of 7 April cannot be construed as meaning that Mr Franklin had clear instructions to raise a grievance at that point. As for the letter of 29 April, it establishes that Mr Franklin had instructions to raise a grievance if the DHB failed to respond within 7 days, but says nothing about what instructions he had in the event that the DHB *did* respond within that timeframe, as of course turned out to be the case.

[16] The applicant has not therefore established that the delay in raising the grievance was occasioned by exceptional circumstances. The application for leave to raise the dismissal grievance out of time is therefore declined.

Costs

[17] Costs are reserved. Any application for costs in this matter should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority