

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA164/09
5161495

BETWEEN BRONWYN ANNE MILES
 Applicant

AND MURRAYS VETERINARY
 CLINIC LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rhonda Harris, Counsel for Applicant
 John Farrow, Counsel for Respondent

Investigation Meeting: 4 August 2009 at Dunedin

Determination: 1 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Miles) says that she was unjustifiably dismissed for redundancy on 18 March 2008.

[2] The respondent (Murrays) contend that Ms Miles's alleged personal grievance was not raised within time and that leave to raise it out of time ought not to be granted. In the event that leave is granted, Murrays says that they entered into a proper restructuring process which identified a need for a new position which would have subsumed within it the position previously occupied by Ms Miles. Murrays say that Ms Miles was asked to apply, did in fact apply, but made clear that she could not work the additional hours required.

[3] Accordingly, Murrays appointed another person and disestablished Ms Miles' position.

[4] Murrays is a growing veterinary practice based in Mosgiel on the Tairei Plain, south of Dunedin. Ms Miles had worked for Murrays on a part-time basis and had

commenced her initial engagement (albeit on a work experience basis) in July 2004. There were a series of changes to Ms Miles' hours of work occasioned by changes in demand for her services, but it seems common ground that from 21 April 2005 down to 18 March 2008 Ms Miles worked Tuesdays and did on-call work as required over the rest of the week.

[5] Ms Miles says that on 29 January 2008, Donald Murray, a Director of Murrays, told her that Murrays was advertising for a part-time Vet Nurse as they were seeking someone in that capacity to do more hours. The new position required a 20 hours a week commitment and there is dispute between the parties as to precisely what message Ms Miles conveyed to Murrays about her willingness to work additional hours. She says that she was ready, willing and able to do so and told Murrays that. They say that Ms Miles made it absolutely clear that she was in no position to consider working 20 hours per week, the requirement of the new job.

[6] Ms Miles submitted her curriculum vitae, had what she described as *a very informal interview* for the advertised position, was not successful and was subsequently advised both informally and formally that her employment would come to an end as a consequence of the restructure with effect from 18 March 2008.

[7] There were disputes around the final pay received by Ms Miles and she contacted, and got assistance from, a Department of Labour Inspector in resolving that issue satisfactorily. That process took some little time, but eventually successfully addressed the problem.

[8] Ms Miles gave her solicitor instructions in May 2008 to write a letter to Murrays raising a personal grievance and while the evidence before the Authority is that that letter was drafted and prepared, there is no evidence that it was ever received by Murrays, although Ms Miles is adamant that her lawyer sent it. Even if that letter were received by Murrays, there is a question about its content being sufficient to satisfy the legal test that the employer is fairly and squarely apprised of the grievance and its nature and is clear about what the grievant seeks to have done to remedy the alleged default.

Issues

[9] As Ms Miles can only have her personal grievance considered by the Authority if the Authority is satisfied that either the grievance was notified within

time or that leave ought to be granted, the first issue for consideration is whether in fact the grievance has been properly raised.

[10] Next, the Authority will need to consider if the grievance has not been properly raised whether leave ought to be granted, and finally, assuming an affirmative answer to that last question, the final issue is whether Ms Miles has satisfied the legal test of having sustained a personal grievance by reason of having been unjustifiably dismissed.

Was the grievance properly raised?

[11] There is no doubt in my mind that the grievance was not properly raised. First, the evidence is clear that Murrays did not receive the letter from Ms Miles' lawyer dated 30 May 2008. I am satisfied on the evidence that the first correspondence actually received by Murrays referring to Ms Miles' alleged grievance is dated 10 November 2008, well after the 90 day period had expired.

[12] Of course, the 90 day period must run from the date of the event complained of and the latest date that that can be is 18 March 2008, that is the date on which Ms Miles' employment ceased.

[13] I accept Murrays' evidence that they were prejudiced by the lateness of the notification. This was not a situation where there was no particular disadvantage to the employer by the late notification. Donald Murray gave evidence in the clearest terms that had Murrays known that Ms Miles was disgruntled about the way in which her employment had come to an end at Murrays, they would have taken urgent steps to remedy that situation and that they might well have been able to do something that would have met her needs if they had been advised of her grievance within time. As it was, with the very late notification, some months after the termination of the employment, new employment relationships had solidified and were meeting the employer's needs and there was no prospect of any change being made.

[14] On the issue of whether legally the Authority can properly conclude that a letter was deemed to have been received in the normal course of post, I reached the conclusion that in the circumstances of this particular case, there was actually no evidence before the Authority that any particular steps were taken by Ms Miles' law firm in attending to the postage of the letter, and there was simply an assumption that the letter was posted. Whether it was or it was not, I am absolutely satisfied with

Murrays' evidence that it was never received and I accept that the onus in personal grievance communications where time is of the essence, rests with the party making the allegation, in this case the applicant, Ms Miles. As she has not been able to demonstrate to the Authority that the letter was in fact received or that the Authority could make a reasonable inference that the letter was in fact received, and there is unequivocal evidence from Murrays to say that the letter was never received, I conclude that the grievance was not raised by Ms Miles pursuant to her lawyer's letter of 30 May 2008.

[15] Furthermore, arguably even if that letter had been received by Murrays, it would not have contained a sufficient degree of particularity to satisfy the Authority that the grievance had been properly notified.

[16] In the oft cited passage from the Employment Court judgment in *Creedy v. Commissioner of Police* [2006] 1 ERNZ, per Colgan CJ:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance ...

[17] The letter of 30 May 2008 prepared by Ms Miles' lawyer, had it been received, would simply have told Murrays that Ms Miles claimed a personal grievance because of an allegedly unjustified dismissal caused by restructure, but says nothing about what Ms Miles seeks by way of remedy. I hold that even if Murrays had received this letter, they would not have had sufficient specificity to enable them to address it. Curiously, the letter concludes with the contention that the writer will send further correspondence *within the next week* providing further and better particulars. No such follow-up letter within that timeframe was received (or it appears was generated by Ms Miles' lawyer) and the next letter from Ms Miles to Murrays was dated 10 November 2008.

[18] Ms Miles' counsel seeks to encourage me in the view that first it was reasonable to assume that the 30 May 2008 letter was, in truth, received and that its efficaciousness could be augmented by reference to the events of 4 March 2008. It is contended that at a meeting between Mr Donald Murray and Ms Miles on that date, the latter told the former that she was disgruntled about the failure of Murrays to

appoint her to the new position. I have already dealt with the first part of that submission. I am satisfied on the evidence before me that it is reasonable for me to conclude that the 30 May 2008 letter was not received by Murrays and thus the question of what it actually says is neither here nor there.

[19] However, to deal with that point further for the sake of completeness, it is true that there was a discussion between Mr Donald Murray and Ms Miles on 4 March 2008, but the evidence of what actually happened at that meeting is equivocal to say the least. Ms Miles said that she did not use the words *personal grievance* in the discussion, but that she said to Mr Murray that she was unhappy that someone else had been given the job she was doing. It was also not clear from her evidence before me that she had ever told Mr Murray what she expected him to do to remedy his alleged default.

[20] For his part, Mr Donald Murray denied absolutely that he had received the message that Ms Miles was raising a personal grievance. He said that he understood that she was unhappy about not getting the job, but given that on his evidence she never made clear that she could do the hours required to take the new job, he was comparatively untroubled by her apparent distress. Clearly there is dispute between the two principal protagonists about whether Ms Miles told Mr Donald Murray that she could do extra hours. His evidence was that he *had no knowledge of Bronwyn (Ms Miles) being flexible about hours*. Later in his oral evidence, Mr Donald Murray said that ... *when interviewed for the new position, Bronwyn (Ms Miles) said she would only work Tuesdays and Fridays and not work evenings*. Given that the role being advertised was for 20 hours per week and required significantly more flexibility than this span of hours suggests, Mr Murray speedily reached the conclusion that Ms Miles simply could not be considered for the new role.

[21] Ms Miles on the other hand, said that she made it clear to Mr Donald Murray that she could work additional hours. However, when I questioned her, she was never explicit about exactly how flexible she would be. She certainly did not claim at the investigation meeting that she was ready, willing and able to fulfil the obligations of the newly advertised position which necessitated 20 hours per week. All she would say was that she would do more hours than she currently was doing.

[22] I must say I prefer Mr Donald Murray's evidence to Ms Miles' on these questions. There was no suggestion in the employer's evidence that Ms Miles was

anything other than a valued employee and there is no reason why she would not have been seriously considered for the new role if it had been clear to the employer that she could work the hours required. Indeed, even Ms Miles' evidence before the Authority that she would work more hours than she was currently working seemed to be news to Mr Murray because he gave evidence (and I accept) that had he known that she was able to work longer hours than she had previously worked, he might have been able to come up with a different arrangement. .

[23] For these reasons then I conclude that Ms Miles did not make it clear that she would work additional hours and that it seems the employer believed, on reasonable grounds, that she certainly would not work the hours required by the new position.

[24] Accordingly then, I reject the suggestion that the alleged letter of grievance dated 30 May 2008 did in fact raise the grievance within time and I also reject the submission made on Ms Miles' behalf that the terms of that letter, taken together with the evidence of the meeting of 4 March 2008, constitute a perfecting of the grievance raising process in the same way as those two events are referred to by the Employment Court in *Coy v. Commissioner of Police*, an interlocutory judgment of Colgan CJ delivered on 19 November 2007. In that case, His Honour reached the conclusion that a less than adequate personal grievance letter was augmented by a meeting between the parties. The signal difference between *Coy's* case and the present situation is that in *Coy's* case the Commissioner accepted the terms of the verbal advice from the grievant, whereas in the present case, there has been no such concession. Mr Donald Murray was adamant that he had no idea from the meeting of 4 March 2008 that a grievance was to be raised.

Should Ms Miles be allowed to proceed anyway?

[25] Section 114(3) of the Employment Relations Act 2000 confers on the Authority power to grant leave to raise a grievance outside of the statutory 90 day period. The Authority's discretion to grant leave may be exercised subject to whatever conditions the Authority thinks fit, but the Authority must be satisfied that the delay in raising the grievance was occasioned by exceptional circumstances and that the granting of leave would be just in all the circumstances. Exceptional circumstances are defined in s.115 to include a range of grounds, but it is clear that the list set out in s.115 is not exhaustive.

[26] Murrays contend that there are no exceptional circumstances in the present case and that it would be unjust to grant leave, whereas Ms Miles suggests that it would be just to allow leave and that there are exceptional circumstances.

[27] I conclude that it is not appropriate for the Authority to exercise its discretion and allow Ms Miles to pursue her grievance. I reach this conclusion primarily because I accept the thrust of the submissions from Murrays, both in respect to whether or not there are exceptional circumstances and as to the broad requirements for the granting of leave to be just in all the circumstances.

[28] The contention made by Murrays is that Ms Miles did not in fact take proper steps to raise the grievance. I agree. While it is true that Ms Miles' agent (her lawyer) failed to ensure that the first letter raising the personal grievance was actually received, the real issue, as it seems to me, is Ms Miles' own failure to actively prosecute her personal grievance. Ms Miles gave me evidence that she had first seen her lawyer in mid February 2008, having been told that she was unsuccessful for the new role. Her evidence was that she wanted to remain employed by Murrays, yet she took no steps at all from that date, (effectively the date she was told that she was unsuccessful), down to the end of May when she attended on her solicitor and asked her solicitor to generate a letter raising a personal grievance. There is no adequate explanation for that lengthy delay in prosecuting the matter. If Ms Miles wanted to continue in the employ of Murrays why did she not do something immediately it became clear that that was to be denied her?

[29] Of particular moment in my judgement, is the fact that while it is clear that Murrays did not receive the initial letter of personal grievance dated 30 May 2008, it is equally clear on the evidence that Ms Miles did. Her lawyer sent her a copy and she gave evidence which I accept that she received the subject letter. One would have thought that she would have gone back to her lawyer immediately after receipt of that letter and encouraged her lawyer to fulfil the obligations she speaks of and write again *within the next week*. Further, it seems to me odd that with Ms Miles telling me she wanted to continue in the employ of Murrays, she would be satisfied with a letter being written on her behalf which makes no mention whatever of her remaining employed there. Probably by then it was too late to contemplate any re-engagement given the passage of time, but one would have thought that Ms Miles would take steps

to promote the re-engagement option as a matter of urgency rather than leave it for months after the dismissal.

[30] It seems clear that there was no engagement between Ms Miles and her lawyer after the initial instructions relating to the misplaced grievance letter until around the time that Ms Miles' lawyer produced the second grievance letter, the one dated 10 November 2008. This letter is more than six months after the termination of Ms Miles' employment and of course by the time it was received by Murrays, they are able to say, with some justice, that they were grossly prejudiced by any possible agreement to allow that grievance to proceed. Ms Miles' evidence is that she did not prosecute her personal grievance assertively between the termination of the employment and the following November, because she was engaging in the Department of Labour's process for the recovery of unpaid wages with the employer. There is no good or sufficient reason for the grievance to not be actively on foot at the same time as the wages claim is being dealt with. There is a sense in which the employer is entitled to know the extent of its liability and I consider that it was prejudicial to Murrays while they were dealing with the wages issue that they were not also cognisant of the fact that there was a grievance claim awaiting attention as well.

[31] Furthermore, given that the wages claim was the only tangible basis from Ms Miles's evidence that allegedly prevented her from progressing her personal grievance, it is difficult to square that claim with the fact that the wages claim was resolved by July, but no further steps in relation to the grievance were taken until November.

[32] Ms Miles also contends that her employment agreement did not provide a plain language explanation concerning the resolution of employment relationship problems, nor did Murrays provide written reasons for the dismissal despite her request. I am not persuaded by either of these grounds either.

[33] First, Murrays say that the resolution of employment relationship problems is covered in their policy and procedures manual, that this document was pointed out to Ms Miles and that indeed she worked adjacent to it in a physical sense whenever she was on duty. Given the length of time that Ms Miles worked for Murrays, it seems to me that Murrays' evidence is to be preferred over Ms Miles' failure to recollect that those provisions are contained in the manual.

[34] As to the contention that Ms Miles sought written reasons for her dismissal and the employer failed to do so, there is again disputed evidence to consider. Mr Donald Murray says that no such request was ever made. Had it been made, he said that he would have complied with it and I accept that evidence as truthful. Furthermore, Ms Miles' solicitor had no difficulty in preparing an extremely detailed letter of grievance dated 10 November 2008 without recourse to the alleged failure of Murrays to produce the necessary explanation.

[35] I conclude that the justice of the case does not favour the granting of leave to raise a personal grievance outside the statutory minimum provided in the Employment Relations Act 2000 principally for reasons of timeliness. Personal grievance matters and their resolution are supposed to be dealt with as close to the point at which the grievance arises as possible. That casts an onus on both parties to act promptly and assertively in raising matters of concern so that those matters can be properly dealt with. By their very nature, personal grievances are stressful and worrying, not just for grievants, but also for employers who have to confront them and it is unfair and unreasonable of employees to not actively prosecute an alleged grievance when that is prejudicial or potentially prejudicial to the employer.

[36] I hold that is precisely the position here; the evidence is plain that Murrays would have been able to deal with the grievance appropriately if it had been raised in a timely fashion and in particular that they would have been able (potentially) to find further hours for Ms Miles if it had become clear to them at an early stage that she was aggrieved about missing out on the appointment to the larger job and sought to increase her hours in consequence. But by reason of Ms Miles' continuing delay, none of that was clear until November, seven and a half months after her termination and then the basis for remedying the alleged grievance had changed dramatically, from a desire to remain in the employment to a desire to seek substantial financial compensation.

[37] In those circumstances, I decline to grant the discretionary remedy sought for the reasons I have enunciated above.

Determination

[38] I have decided that Ms Miles has failed to satisfy me that she raised her personal grievance within time and that it is not just to grant her leave to bring that

grievance on outside time having regard to the statutory test the Authority is required to consider.

Costs

[39] Costs are reserved.

James Crichton
Member of the Employment Relations Authority