

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Veisia Molimau Pulu (Applicant)  
**AND** Guardian Healthcare Limited (Respondent)  
**REPRESENTATIVES** Amelia Schaaf (Counsel for Applicant)  
Bruce Wall (Advocate for Respondent)  
**MEMBER OF AUTHORITY** Robin Arthur  
**SUBMISSIONS** 4 January and 20 February 2006 (Respondent)  
18 January and 10 March 2006 (Applicant)  
**DATE OF DETERMINATION** 3 May 2006

DETERMINATION OF THE AUTHORITY

[1] There is a ‘threshold’ issue to be determined in this matter. It is whether the applicant’s personal grievance action was filed with the Authority within the three year period provided under s114(6) of the Employment Relations Act 2000 (“the Act”)?

[2] The respondent says it was not and that consequently the Authority cannot investigate the applicant’s claim. It has applied for a determination of this issue. Both parties have provided written submissions.

[3] The applicant says her personal grievance was raised by a letter on 28 August 2002 and that the filing of her action in the Authority on 26 August 2005 was within three years of that date.

[4] The respondent says the applicant’s personal grievance was raised by her lawyer on or about 14 June 2002 and that from 15 June 2005 any action would be out of time. It does not waive its right to rely on the statutory time limit.

**Background**

[5] The applicant was employed as a caregiver at Cornwall Park Hospital from 12 May 1999 until her dismissal on 18 June 2002. In this workplace she was known as Moli Mau and will be referred to in this determination as Ms Mau.

[6] At that time the hospital was owned by Havencare Hospitals Limited (“Havencare”) but is now owned by Guardian Healthcare Operations Limited, the respondent. Although I have

not yet confirmed this aspect, for the purposes of this determination I have presumed that the respondent assumed the liabilities of Havencare on purchasing its business, including the hospital.

[7] Ms Mau alleges warnings given to her prior to dismissal were unjustified as was the dismissal itself. She seeks lost wages and compensation for hurt and humiliation.

[8] On 18 June 2002 Ms Mau attended a disciplinary meeting with the hospital's principal nurse manager and a supervisor. She was accompanied by a union delegate. She was given a letter on 14 June calling her to the meeting. This letter advised that she would be asked to explain why she was late to work on 11 June 2002. The note also said: "*You need to be aware that this is a disciplinary meeting and your employment may be in jeopardy in light of your final warning you received on the 31 (sic) May 2002*".

[9] Following the meeting the manager considered Ms Mau's response to the accusation – that she had slept in – and resolved to dismiss her for breach of the house rules on timekeeping and arriving for duty. The manager dismissed her that night on two weeks notice paid in lieu. The dismissal was confirmed in writing by letter dated 19 June 2002.

### **The issue**

[10] The matter for determination here turns on when the applicant subsequently raised her personal grievance. The applicant says it was by letter on 28 August 2002 but the respondent alleges that it was earlier – on or around 19 June 2002. Either date brings the applicant within the 90 days period to raise a grievance. A finding as to which of these two dates the applicant raised her grievance is required to identify when time began to run for the three year statutory period to start an action in the Authority.

### **The law**

[11] The Act defines the initiation of a grievance at s114(2) in this way:

*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 aware that the employee alleges a personal grievance that the employee wants the employer to address.*

[12] The necessary elements are (i) an allegation of a personal grievance, (ii) made by the employee, (iii) known to the employer, (iv) and a desire by the employee to have the grievance addressed by the employer.

[13] The Employment Court has found the meaning of the term "raised" in this section of the Act to be "virtually synonymous" with the requirements of the previous legislation to "submit" a grievance.<sup>1</sup> In this light, the case law of that period remains of assistance in interpreting the present statute. Some relevant propositions include:

- The test for raising a personal grievance to an employer is a liberal one and a formal or written submission is not required.<sup>2</sup>

<sup>1</sup> *Ruebe-Donaldson v Sky Network Television Ltd (No 1)* [2004] 2 ERNZ 83 at [9] (EC, Travis J)

<sup>2</sup> *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 511 (EC, Finnigan J)

- The legislature intended grievances to be dealt with promptly and informally in exchanges between the employee and employer, so raising a grievance must given an employer something to respond to in writing or orally.<sup>3</sup>
- The communication must – to an objective observer – be clear enough and sufficient to elicit a response from the employer or enable the employer to remedy it or the parties to settle the matter.<sup>4</sup>

### **The letters**

[14] On 28 August 2002 the applicant’s lawyer sent the nurse manager a letter headed “*Moli Mau – raising of personal grievance action*” and stating in part:

*I write to notify HavenCare Hospitals Limited of Ms Moli Mau’s personal grievance action in accordance with section 114 of the Employment Relations Act 2000 (“the Act”). This is a summary of Ms Mau’s claim. The full details will be sent tomorrow.*

[15] The grievances are stated to be an unjustified action arising from a final written warning issued on 31 May 2002 and then unjustified dismissal on 18 June 2002.

[16] A more detailed letter with same heading was sent by the applicant’s lawyer to the nurse manager on 29 August 2002. It asked the employer to agree to attend mediation.

[17] On 12 September 2002 HavenCare’s solicitors advised they were instructed to act on the matter. In a letter from those solicitors dated 10 October 2002, the employer comprehensively denied the allegations but agreed to attend mediation. Mediation occurred on 31 January 2003 but the matter was not resolved. The letter refers to the letter of 29 August as advising that Mrs Mau “*wishes to raise a personal grievance*”.

### **Respondent’s submissions**

[18] The respondent’s submissions suggest that Ms Mau’s personal grievance was raised with the employer earlier than 28 August 2006. It refers to the raising of a personal grievance by another worker dismissed around the same time. It notes that the grievance of that other worker – also represented by Ms Mau’s lawyer – was raised the day after that worker’s dismissal. It then suggests that “*the inference can be made that the same prompt action occurred in relation to Ms Mau*”.

[19] If that inference could be made, Ms Mau’s personal grievance would have been raised on or about 19 June 2002. However there is no evidence that Ms Mau’s personal grievance was raised with the employer any earlier than her lawyer’s letter of 28 August 2002. There is nothing to the contrary in undisputed copies of the contemporary correspondence between the parties and provided to the Authority. There is no evidence, by way of affidavit, of a grievance having being raised orally earlier than 28 August 2002.

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<sup>3</sup> *Farmers Trading Limited v Opuariki* [1998] 1 ERNZ 313, 321 (EC, Colgan J)

<sup>4</sup> *Winstone Wallboards Ltd v Samate* [1993] 1 ERNZ 503, 511 (EC, Finnigan J); *Goodall v Marigny (NZ) Limited* [2000] 2 ERNZ 60, 70

**Determination**

[20] On that basis I am not satisfied that the inference suggested by the respondent can be made. Rather I am satisfied that Ms Mau's grievance was not raised with the employer until 28 August 2002, that is 70 days after her dismissal but well within the required 90 day period. Consequently her action in relation to that grievance filed in the Authority on 26 August 2005 was within the three year period provided in s114(6) of the Act. The matter may now proceed to investigation by the Authority.

Robin Arthur  
Member of Employment Relations Authority