



# New Zealand Employment Relations Authority Decisions

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## Sharma v Auckland District Health Board AA375/10 (Auckland) [2010] NZERA 683 (23 August 2010)

Last Updated: 9 November 2010

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION AT PARAGRAPH [6] OF THIS DETERMINATION

AA 375/10

5164854

BETWEEN SHARMILA SHARMA

AND AUCKLAND DISTRICT

HEALTH BOARD

Member of Authority: Representatives:

Investigation Meeting:

Further information  
received

Yvonne Oldfield

Mr Rakesh Kumar for the applicant Mr Anthony Drake for the respondent

26 March 2010

29 March 2010

Submissions received:

6 April 2010 from Applicant 29 March 2010 from Respondent

Determination:

23 August 2010

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] The applicant, Ms Sharma is a qualified nurse with over fifteen years experience. She was employed by the respondent (the Board) between 2001 and 2009, first as a permanent full time member of staff and then, towards the end of her employment, as a casual.

[2] Ms Sharma alleges that:

- i. her charge nurse, Ms Greer, discriminated against her on the basis of her race (directing racist remarks at her and soliciting a racist and unfounded complaint from a patient);
- ii. the process by which the abovementioned complaint was investigated and the outcome of the investigation was unfair, and

iii. Ms Greer unfairly failed to roster her for work when she was available, resulting in insufficient work for Ms Sharma to meet her commitments.

[3] Ms Sharma alleges that these matters amount to personal grievances of either discrimination or unjustified disadvantage. Ms Sharma also says that as a result of these actions (particularly the last issue) she was left with no option but to resign and has therefore been constructively dismissed.

### **Removal of respondent**

[4] When Ms Sharma lodged her employment relationship problem in the Authority she cited Ms Greer as an additional respondent. In her capacity of charge nurse Ms Greer is herself an employee of Auckland District Health Board. With the support of the Board, which accepted that it should bear any liability that might arise out of Ms Sharma's claims, Ms Greer sought to be removed as respondent.

[5] Ms Greer was not Ms Sharma's employer and I am satisfied that she should be removed as respondent.

### **Non-publication order**

[6] The Board has requested a non-publication order with the purpose of protecting the identity of the patient who complained about Ms Sharma. I accept that such an order should be made. Neither the name of that patient, or any details which might lead to the identification of that patient, are to be published.

### **Issues**

[7] The respondent denies each of the allegations. It also denies that Ms Sharma raised her grievances within 90 days.

[8] The statutory provisions relating to raising a personal grievance are set out in Section 114 of the Employment Relations Act which provides:

*"(1) Every employee who wishes to raise a personal grievance must... 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.*

*(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 employer wants the employer to address."*

[9] It was not clear from Ms Sharma's statement of problem exactly when she purported to have raised her grievances. For this reason the Authority investigation into the substantive employment relationship problems proceeded without prior determination of the 90 day issue.

[10] This determination will address Ms Sharma's concerns under three main headings: the alleged racism and the handling of the complaint, the issues around hours of work, and the allegation of constructive dismissal. The question whether each grievance was properly raised will be addressed under each heading in turn.

#### **(i) Alleged racism and complaint**

[11] On 19 October 2008 Ms Sharma recorded in the respondent's online incident reporting database that she had been the target of racist remarks by the relative of a patient. The notes record:

*"Relative present at bedside called me an Indian and was very racist. Got unhappy about timetin not given early. Explained delay and it can be done daytime and he requested another nurse to look after her."* [12] Although this information was recorded in order to comply with standard reporting requirements (without any particular objective in mind) Ms Sharma hoped that she would no longer be allocated to that patient. Contrary to her expectations she was required to care for that patient on subsequent shifts.

[13] On or around 14 November Ms Greer followed up on the incident by speaking about it with the patient and the other individual who had been involved. Racist comments were denied. Then, on 17 November 2008 the same patient and a relative (not the person alleged to have made the racist comments) formally complained about Ms Sharma. They alleged that she had been rough and had made errors in the dosage of medication.

[14] Ms Sharma's understanding at all times has been that the complaint related to a different (subsequent) night to that of the original incident. Ms Greer, on the other hand, told me that she understood the patient complaint related to the same night. She told that Authority that after the patient complaint came in she did not allocate Ms Sharma to that patient again.

[15] Once the complaint had been received the Board's standard complaints procedure was followed. This entailed:

- i. the complaint being reviewed by the Consumer Liaison Team, the Charge Nurse and a Clinical Nurse Advisor,
- ii. notification of the Service Manager and General Manager;

- iii. provision of a written response by Ms Sharma, and
- iv. a meeting between the Clinical Nurse Educator and Clinical Nurse Advisor to discuss the incident.

[16] The outcome was a decision that the complaint had some substance. In particular, it was accepted that Ms Sharma had proposed to administer pain relief in a way that the patient did not want. However, she had not actually done so and it was decided that the matter was not sufficiently serious to warrant disciplinary proceedings. Instead, on 17 December 2008, Ms Sharma was advised that she would be required to complete a Performance Improvement Plan designed to improve her working relationships, communication skills and quality control.

[17] Ms Sharma believed the complaint to be completely without substance. Coming as it did after she had cared for that patient on many previous occasions (without complaint) she felt it was made in retaliation for her having logged her own concerns. She felt the process by which the complaint was investigated was unfair, and in particular, that Ms Greer should not have participated in the investigation. Ms Sharma said she believed Ms Greer talked about her to patients. Coupled with the fact that the complaint was made to Ms Greer in the first instance this made her suspect that Ms Greer solicited the complaint.

[18] Ms Sharma also considered the performance plan to be unjustified. Even at the time of the Authority investigation meeting, over a year after these events, Ms Sharma was still very bitter about being put on the plan. She said it was very humiliating for a nurse of her experience and caused her to lose standing amongst her colleagues.

[19] At my request, Ms Greer explained why the complaint was found to have substance. Ms Greer noted that the patient who had made the complaint was a long-term patient who had never complained before and with whom no other staff had experienced difficulties. She said that other patients had complained about Ms Sharma and all the complaints were consistent in nature. During 2008 Ms Greer had found generally that Ms Sharma's work performance was slipping below her previous standard. Ms Greer inferred that this may have been a result of the fact that Ms Sharma was very busy balancing her paid work and the care of her own family which had grown to five children during the time she was employed by the Board.

[20] Ms Greer acknowledged the potential for patients to make malicious and racist complaints especially where a nurse had previously expressed concerns of her own. However she said that such complaints usually formed a pattern with multiple complaints from one patient and that was not the case here.

[21] Ms Greer said that the complaint was not the sole reason for implementing the performance improvement plan. Rather it was the culmination of the previous months' concerns about Ms Sharma's performance and a decision that Ms Sharma needed support to get her back to her previous level of performance.

[22] Ms Sharma says she voiced her objection to the plan when it was presented to her on 17 December and believes this amounted to the raising of a grievance. Ms Greer and Mr Entwistle (the Nurse Advisor) both dispute this and say that at the time Ms Sharma said she thought the performance plan was a good idea. Ms Sharma also said she mentioned this concern in her exit feedback but on checking her written responses to the exit survey I found no reference to this issue. She then told the Authority that the document in question had not been signed by her, despite the fact that the signature on the document (by her own admission) looked exactly like hers.

[23] I consider it highly unlikely that the respondent would fabricate a record of an exit interview (a document that was unlikely to be of great significance in this or any other matter.) Ms Sharma's credibility has been undermined by her insistence that she did not sign the document I saw. On balance therefore I prefer the evidence of Mr Entwistle and Ms Greer and accept that Ms Sharma did not express her objection to the plan. However, even if she had done so in the terms alleged it would not have amounted to the raising of the grievance in terms of section 114 of the Act. I am not satisfied that the grievance was raised within 90 days.

[24] Nonetheless it may be helpful for the parties to have some feedback about the merits of this grievance claim.

[25] I am satisfied that the final stages of the investigation process were not well handled. Ms Sharma did not receive a proper explanation of the conclusions that were reached about the complaint or the reasons why it was considered necessary to put her on the plan. However, after hearing Ms Greer's explanations, I do not consider the outcome (which was effectively the provision of additional support and training) to have been unjustified or inappropriate. Nor was it disadvantageous. Nor has there been shown to be any foundation to Ms Sharma's suspicion that Ms Greer "solicited" the complaint. Ms Greer was obliged by Board policy to tell the patient and her family that they should put any concerns in writing.

[26] It follows that even if the grievance had been raised in time, it would not have been made out.

#### *Racism*

[27] Ms Sharma's view is that the respondent must take responsibility for protecting her from racist behaviour from patients, including such incidents as the comment from the patient's relative in this case.

[28] Ms Greer acknowledged that there might be times when (for a variety of reasons) it would not be reasonable to expect a particular nurse to care for a particular patient. Being subjected to racist abuse is one example. In this case however the alleged comment had not come from the patient personally and (as Ms Sharma herself has pointed out) Ms Sharma had previously cared for that patient without any problems. Ms Greer did not initially see it as necessary to refrain from allocating Ms Sharma to care for that patient. I accept that in the circumstances at the time this was a reasonable view for her to take.

[29] Ms Sharma also felt that the Board's responsibility extended to protecting her against any reprisal from patients as a result of raising her own concerns. I accept, however, that the Board was obliged to investigate the patient's complaint with an open mind notwithstanding the inference that it was made in retaliation for Ms Sharma's complaint.

[30] For completeness I note that I do not accept that the recording of the original incident amounts to the raising of a grievance, and there was no evidence that a grievance<sup>[1]</sup> was raised in relation to this issue at any time subsequently.

[31] Ms Sharma also alleges one incident of racism directed by Ms Greer personally to her. She told the Authority that in the course of a conversation about Ms Sharma's family circumstances Ms Greer said: "*Indian men don't know how to keep their women.*" Ms Greer denied making any such statement.

[32] Ms Sharma did not make this allegation until the Authority investigation meeting, and could not provide any specific information about the timing or circumstances in which it occurred. I cannot accept that the comment was made, or that any grievance was raised in relation to the allegation.

### **(ii) Hours of work**

[33] As recorded above, Ms Sharma had been a member of the Board's permanent staff for several years when, in September 2008 she began to find childcare issues were making it difficult for her to work some of the shifts for which she was rostered. From her side, Ms Greer was becoming frustrated that Ms Sharma could not always make herself available for rostered work (as she was required to do under the terms of the collective agreement.) When Ms Sharma suggested "going casual for a while" Ms Greer accepted that suggestion as resolving the problems. At that time Ms Sharma did not intend to give up her permanent status for good; she expected to be casual only in the short term. (She did not explore other options, such as the utilisation of flexible work provisions. It seems that neither she nor Ms Greer were aware of their existence.)

[34] On 24 September Ms Sharma formally requested a change from permanent to casual status, in the hope that she would thereby be able to arrange her hours to suit her commitments. For a while this is what happened. Then in January 2009 a new ward opened and several new permanent staff were taken on. Ms Sharma did not apply for the January positions in the new ward or for any other permanent jobs which became available while she was working as a casual.

[35] The opening of the new ward dramatically reduced the amount of casual work available. What work there was tended to be offered to another casual first (because he was more flexible about when he could work) and so Ms Sharma reached the point where she was not getting enough work to give her the income she needed. In June 2009 she resigned, citing a lack of work as the principal reason.

[36] Ms Sharma now says that she was "forced to go casual" in September 2008. It is very unfortunate that Ms Sharma felt she had no other solution to her childcare problems other than to relinquish her status as a permanent employee, but the evidence does not support that assertion that she was unfairly forced to go casual. I am not satisfied that it could be said that Ms Greer was unjustified in taking Ms Sharma up on her suggestion of becoming a casual. Ms Sharma has not made out a grievance in respect of the events of September 2008.

[37] As for the problems in 2009, I must record that as a casual, Ms Sharma had no recourse in the event that she was not offered as much work as she would like. It was open to the respondent to hire additional permanent staff thus reducing the work available to her, just as it was open to the respondent to offer more casual work to another casual nurse. It follows that Ms Sharma has not made out a grievance in respect of the events in early 2009.

[38] In short, neither aspect of Ms Sharma's concerns about her hours of work give rise to a personal grievance. In relation to the 90 day issues I note for completeness that there was insufficient evidence to establish that a grievance was raised in respect of either the September 2008 concerns or the concerns of early 2009.

### **(iii) Constructive dismissal**

[39] Given my findings above, it follows that there has been no constructive dismissal.

### **Costs**

[40] This issue is reserved. If it cannot be resolved between the parties any application for costs (with submissions in support) must be made within 28 days of the date of this determination.

[1] Ms Sharma labelled her grievance in relation to the patient's racist remark as "discrimination." Given that it did not relate to any direct action by the respondent, her allegation would more properly be characterised as a further claim of unjustified action in failing to protect her.

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