

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 322
5593008

BETWEEN ANA SHAW
 Applicant

A N D BAY OF PLENTY DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Allan Halse, Advocate for applicant
 Mark Beech and Jessica Easton, Counsel for respondent

Investigation Meeting: On the papers

Date of Determination: 16 October 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY ISSUE**

Employment relationship problem

[1] This determination addresses the preliminary issue of whether the applicant, Ms Ana Shaw, raised her personal grievance claims with her employer, Bay of Plenty District Health Board (“the Health Board”) within 90 days of the grievances occurring. This is the statutory requirement of s.114(1) of the Employment Relations Act 2000 (“the Act”).

[2] In the event Ms Shaw has raised her grievances in time, she is entitled to pursue her grievances before the Authority.

[3] In the event that it is determined that Ms Shaw failed to raise her personal grievances within the statutory 90 day period, she must apply pursuant to s.114(3) of the Act for leave from the Authority to raise her grievances outside the 90 day time period.

[4] The Authority may grant such leave to Ms Shaw pursuant to s.114(4)(a) of the Act if satisfied there are “exceptional circumstances” as specified by s.115 of the Act, or under s.114(b) of the Act if it considers it just to do so.

Issue

[5] The issue for determination by the Authority is whether Ms Shaw raised personal grievances (other than her personal grievance claim of unjustified dismissal raised on 5 May 2015) within the statutory 90 day time period.

Background

[6] Ms Shaw was employed by the Health Board in the position of Cardiac Physiologist from 16 August 2010. Ms Shaw claims that shortly after her employment started she began “being singled out for unfavourable treatment in comparison to [her] colleagues.”¹

[7] Ms Shaw says she was also the subject of disparate treatment, bullying and harassment and that this occurred from the time of the commencement of her employment by the Health Board.

[8] On 13 August 2014, Ms Michelle Bayles, Clinical Physiology Team Leader wrote to Ms Shaw to inform her that a complaint had been received by a team member about an email sent by Ms Shaw on 29 July 2014. Ms Bayles asked to meet with Ms Shaw about allegations arising out of the complaint.

[9] An investigation was carried out by the Health Board during August and September 2014, which culminated in an investigation report dated 23 September 2014. The report made findings and recommendations in relation to Ms Shaw’s conduct in sending the email.

[10] On 3 October 2014, a personal grievance was raised with the Health Board on behalf of Ms Shaw (“first grievance”).

¹ Witness statement of Ana Shaw dated 28 February 2017.

[11] The letter from Ms Shaw's advocate from Employment Advocacy Service set out the grievance as follows:

“Our client instructs that we raise the matter as a personal grievance on the basis of disadvantage in that the matters that were the cause of the investigation are as a result of ongoing procedures and failures which have been documented over time and presented to the Clinical Physiology Manager without any resultant finalisation of those matters.”

[12] On 9 October 2014, the Heath Board responded to the Employment Advocacy Service expressing its view that Ms Shaw did not have grounds to raise a personal grievance claim of unjustified disadvantage.

[13] The Employment Advocacy Service replied on the same day challenging the investigation process, and requesting that Ms Shaw be reinterviewed.

[14] Following further investigation, Ms Shaw's employment was terminated on 24 March 2015.

[15] In a letter of 5 May 2015, Ms Shaw's then Counsel, Ms Helen Gilbert raised two grievances on behalf of Ms Shaw as follows:

“In relation to the two grievances, my client has firstly suffered an unjustified disadvantage arising from various breaches of her employment agreement by the BOPDHB, during the term of her employment. Secondly, Ana was unjustifiably dismissed on 27 March 2015 for an alleged breach of patient privacy.”

[16] There is no dispute that the grievance in respect of the unjustified dismissal claim was raised within the 90 day period.

[17] Ms Shaw says the unjustified disadvantage grievances were raised with the Health Board within 90 days of their occurrence.

[18] The substantive matters were to be investigated by the Authority in their entirety. However, it became apparent that a preliminary issue as to whether or not Ms Shaw had raised the disadvantage claims with her employer within 90 days of them occurring in accordance with s.114(3) of the Act, was necessary.

The Authority's process

[19] The Authority was of the view that determining this issue as a preliminary matter was the appropriate course for it to follow. This was agreed to by the parties and their respective representatives. Subject to compliance with the principles of natural justice and its duty to act reasonably, the Authority may, in investigating any matter “follow whatever procedure the Authority considers appropriate”.²

[20] Following the receipt of memoranda from representatives for both parties, the Authority issued a direction on 23 May 2017 directing that the question of whether or not Ms Shaw raised her grievances within the 90 day period would be dealt with as a preliminary matter ‘on the papers’. This was to save time and costs for all involved.

[21] The Authority's direction stated:

“[7] In order to satisfy myself on this matter I require Ms Shaw to file a sworn affidavit setting out her evidence relating to when she raised her grievances with the DHB, what grievances were raised, and how they were raised. Section 114 of the Act sets out the requirements when raising a personal grievance.

[8] The affidavit should also include evidence as to whether Ms Shaw took legal advice or obtained union support at the time she raised her personal grievance claims. If so, with whom and when. Relevant exhibits must be attached to the affidavit and sworn at the time of swearing the affidavit.

[9] Once I consider Ms Shaw's affidavit evidence, I will consider what response may be required from the respondent before I determine whether or not the matter can be dealt with on the papers.”

[22] Ms Shaw filed a lengthy affidavit on 26 September 2017 attaching numerous exhibits.

[23] Both parties were given a further opportunity to comment on or provide further evidence in respect of the preliminary matter. Ms Shaw's representative, Mr Allan Halse informed the Authority in an email of 10 October 2017, that: “The Applicant's position is well known to the Authority Member and we have nothing further to add at this time.”

[24] On 12 October 2017, Counsel for the Health Board, Mr Beech, filed a memorandum in the Authority dated 12 October 2017 that the unjustified disadvantage grievances raised in the letter of 5 May 2017, were “...in vague terms without reference to particular incidences of bullying or unfair treatment that gave rise to an identifiable grievance or grievances.”

² s.160(1)(f) of the Employment Relations Act 2000

Ms Shaw's affidavit evidence – 26 September 2017

[25] I have considered Ms Shaw's affidavit evidence together with the annexed exhibits. The affidavit in my view, does not set out evidence as to when Ms Shaw raised her unjustified disadvantage grievances with the Health Board, what grievances were raised and how they were raised.

[26] For example, the first exhibit referred to by Ms Shaw in support of her claim that she raised personal grievances with the Health Board within 90 days is exhibit H which is at pages 51 to 72 of the affidavit. The exhibit referred to is a Powerpoint presentation on communication delivered on 10 April 2013. No grievance is raised and it is not clear what the "grievance" is.

[27] The next exhibit referred to by Ms Shaw is exhibit A10 at page 15 of the affidavit. This is an email from Ms Shaw dated 4 May 2012 to her Health Board colleagues in relation to an incident in the laboratory on 3 April 2012. The incident related to the setting up of transducers. No grievance is raised and it is not clear what the "grievance" is.

[28] Another exhibit, exhibit J at page 244 of the affidavit, is a phrase which has been typed on a page stating, "everybody needs encouragement, you can speak a word that changes someone's life". It seems individuals have written words around this phrase including "positive", "average", "lesbian", and others. This, I understand from Ms Shaw's affidavit, is evidence that she was being singled out. This is not evidence of the raising of a personal grievance claim in accordance with the requirements of the Act.

[29] I have been through all of the other documents annexed to the affidavit and am unable to identify evidence in support of Ms Shaw's claim that she raised unjustified disadvantage grievances with the Health Board and that she raised them within 90 days of their occurrence in accordance with s.114 of the Act.

The law

[30] An employee who considers that he or she has a personal grievance must raise it with their employer within 90 days pursuant to s.114(1) and (2) of the Act which states:

- “(1) Raising a personal grievance: 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 or came to the notice of the employee whichever is

the later unless the employer consents to the personal grievance being raised after the expiration of that period.

- (2) For the purposes of sub-section (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 employee wants the employer to address.”

[31] The Employment Court in *Creedy v Commissioner of Police*³ said that for an employer to be able to address a grievance which an employee has raised then the employer must know what it is that it is required to address. Based on the evidence that has been presented to me by Ms Shaw, I am not satisfied that she has identified unjustified actions or disadvantages.

[32] Nor has Ms Shaw been able to satisfy me that the matters she claims amounted to unjustified disadvantage claims were raised with the Health Board within 90 days of occurring.

[33] In the circumstances, and from the evidence available, I determine that Ms Shaw did not raise within 90 days, personal grievances of unjustified disadvantage, as required by s.114 of the Act.

[34] My understanding is that the Health Board does not consent to Ms Shaw raising her personal grievances outside the 90 day period. The Authority has a discretion under s.115 of the Act, to grant leave to Ms Shaw to raise her grievances outside the 90 day if it is satisfied that the delay in raising the personal grievances was occasioned by exceptional circumstances and it considers it just to do so.

[35] I do not consider that there are any exceptional circumstances.

Costs

[36] Costs are reserved.

[37] The parties will be contacted by the Authority regarding the investigation of Ms Shaw’s claim of unjustified dismissal by the Health Board on 27 March 2015.

Anna Fitzgibbon
Member of the Employment Relations Authority

³ [2006] ERNZ517