

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Maree Ann Vaile (Applicant)  
**AND** West Coast District Health Board (Respondent)  
**REPRESENTATIVES** William John Vaile, Representative for Applicant  
Paul White, Counsel for Respondent  
**MEMBER OF AUTHORITY** Philip Cheyne  
**INTERVIEW MEETING** 30 May 2006  
**DATE OF DETERMINATION** 6 June 2006

DETERMINATION OF THE AUTHORITY

***Employment Relationship Problem***

[1] Maree Vaile worked as a registered nurse at Buller Hospital for the West Coast District Health Board and its predecessors for many years. In March 2003 Mrs Vaile went on leave without pay until July 2004 during which she sought employment in England. She was asked by a recruitment company for a reference from her line manager at the Hospital (Bev Poynter) so she provided contact details. The recruitment company contacted Bev Poynter who gave references that were critical of Mrs Vaile. Mrs Vaile returned to the Hospital in July 2004 after the expiry of her leave, but soon after she resumed work she resigned.

[2] Mrs Vaile says that her problem is the defamatory references and the constructive dismissal. She seeks compensation for lost income arising from her difficulties obtaining employment in England resulting from the references and associated costs, compensation for distress and compensation for the loss of contractual benefits such as redundancy given her resignation.

[3] The DHB says that no grievance was raised within time, that it did not provide any defamatory references and is not liable for the actions of Mrs Poynter and that Mrs Vaile simply resigned on 26 July 2004. It also says that it agreed to and implemented the three actions originally required by Mrs Vaile when her solicitor first raised an issue with it about the references.

[4] Given my preliminary view of the issues for determination, I made arrangements for Mrs Vaile to provide any supporting statements of evidence from herself or others and ensured all relevant documents were exchanged and disclosed to the Authority. I then arranged to interview Mrs Vaile and also took evidence on oath from a co-worker. A representative of the DHB was present along with counsel in case I needed to ask any questions. I am satisfied that I can properly determine this problem without hearing further from the respondent.

### *Defamatory references*

[5] There are several hurdles that Mrs Vaile cannot get over and which cause me to decline any remedies. Mrs Vaile returned to New Zealand when she discovered what had been said about her by Mrs Poynter. She instructed a solicitor who wrote to the DHB on 12 December 2003 fully setting out the basis of Mrs Vaile's complaint as it was at the time. Mrs Vaile required an apology from Mrs Poynter, an assurance from the DHB that the references would be removed from Mrs Vaile's file and an assurance that Mrs Poynter would not provide any further references. Eventually Mrs Vaile received a letter from Mrs Poynter containing an apology and an assurance she would not provide any further references. It was also agreed that the references would be removed from DHB files. That happened because Mr Vaile sought access to Mrs Vaile's personal information held by the DHB. Mrs Poynter told him that she had shredded the references. I find that Mrs Vaile settled her complaint against the DHB about the references by demanding actions and them being implemented. During our interview, Mrs Vaile acknowledged that she only sought to revive her complaint because of subsequent events explained below.

[6] The complaint about the references in the solicitor's letter was advanced on the basis of negligent mis-statement rather than as a personal grievance. No personal grievance about the references was mentioned until 26 July 2004 at the earliest, nearly a year after the relevant events occurred. Mrs Vaile learnt about the references in August 2003 and returned to New Zealand in September that year. Even if the 12 December 2003 letter could be read as the raising of a personal grievance, it would be out of time. A grievance must be raised within 90 days unless the employer consents to it being raised out of time or leave is granted by the Authority based on exceptional circumstances. The DHB has not consented, no application for leave has been made and I doubt any application could succeed in any event.

### *Constructive dismissal*

[7] There are also fatal difficulties for a constructive dismissal claim. As part of her return to work in July 2004, Mrs Vaile went to see Mrs Poynter on 12 July 2004. Mrs Vaile told me and I accept for present purposes that Mrs Poynter showed no remorse about her conduct over the references. I should mention that there is something of a history, on Mrs Vaile's account, of animosity by Mrs Poynter towards her. However, despite Mrs Poynter's apparent lack of remorse, the exchange was perfectly civil and Mrs Vaile was told that she would be resuming her previous duties with some minor changes. Mrs Vaile actually resumed work on 16 July and worked on 19 July. She saw little of Mrs Poynter and makes no complaint about Mrs Poynter's conduct during this period. However, being back at work crystallised for Mrs Vaile her feelings that she had lost trust and respect for Mrs Poynter. Mrs Vaile saw her doctor on 20 July who certified her unfit for work from 20 July until 21 July 2004. The certificate was provided to the DHB. When Mrs Vaile did not attend work on 22 July, Mrs Poynter rang to be told that Mrs Vaile was still unwell and would not be in the following day either.

[8] On 26 July, Mrs Vaile's resignation letter dated 22 July 2004 was delivered to the DHB. The letter says that the reason for the resignation is *...the stress and humiliation I have suffered as a result of the malicious and vindictive actions of Beverly Poynter. ...retaining my dignity and reputation (as a well respected nurse) is very important to me, and I am unable to maintain that given Ms Poynter's defamatory remarks and treatment ...please accept this letter as notification of a personal grievance.* It is clear from this communication as from Mrs Vaile's evidence that the resignation was caused by the references.

[9] I accept that Mrs Vaile raised her grievance about the termination of her employment in a timely manner. The difficulty for Mrs Vaile in succeeding with a July 2004 constructive dismissal grievance based on the August 2003 references is that she had already decided not to resign even though she knew the full circumstances. She had a choice in August 2003 about how to respond and there is no difficulty with her taking until December to make that choice. In the language of the law, she could have accepted the repudiatory breach by resigning and suing for constructive dismissal or she could have enforced the contract. It is clear from Mrs Vaile's demands through her solicitor that she chose the latter option to continue the employment relationship provided she received an appropriate response to her demands. Mrs Vaile received that response. By July 2004 it was too late for Mrs Vaile to undo that choice.

[10] During the interview Mrs Vaile referred to a failure on the part of the DHB to keep her informed about a review of nursing that was underway during her leave without pay. The outcome was a decision to do away with the fulltime charge nurse position that Mrs Vaile had occupied but that decision was not made until after July 2004. I am satisfied from Mrs Vaile's evidence that this matter did not influence her decision to resign. If she had not resigned, Mrs Vaile might have received redundancy compensation, and that is now one of the reasons for the regret about the resignation. However, that is not any basis for challenging the resignation.

[11] For the foregoing reasons, I find that Mrs Vaile resigned and was not constructively dismissed. Her claims against the DHB cannot succeed.

***Final comment***

[12] For Mrs Vaile this has been a case about establishing that Mrs Poynter's personally critical comments were without foundation. In the event, the problem has been resolved on a different basis. However, I do acknowledge that many eminent people who she worked with and others genuinely hold Mrs Vaile in high regard. There is no reason to doubt the validity of those views.

[13] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority