

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 149
5330459

BETWEEN

RODERICK YOUNG
Applicant

AND

BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: R A Monaghan

Representatives: R Young in person
G Bingham, counsel for respondent

Investigation Meeting: Heard on the papers

Determination: 12 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Roderick Young has lodged a statement of problem in which he made the broad allegation that matters arising out of a disclosure he made under the Protected Disclosures Act 2000 have not been resolved. More particularly he alleged that as a result of the disclosure his former employer, the Bay of Plenty District Health Board (BOPDHB) dismissed him constructively and unjustifiably. He seeks reinstatement.

[2] However Mr Young's personal grievances in respect of his dismissal and an allegedly unjustified suspension have already been heard and determined by the Authority (the substantive determination).¹ Both the suspension and the dismissal were found to be justified. The substantive determination was the subject of an unsuccessful attempt made out of time to pursue a challenge in the Employment

¹ *Young v Bay of Plenty District Health Board* Member Anderson, 26 March 2010, AA 146/10

Court.² The new statement of problem in respect of the protected disclosure was filed in the Authority some 7 weeks after the court issued its judgment.

[3] Mr Young also now seeks an order for the stay of the Authority's order for costs following its substantive determination.³

[4] The BOPDHB resists both applications. It says in particular that the matter of the justification for the termination of Mr Young's employment has already been heard and determined in the Authority, and that the present application should be struck out.

[5] This determination addresses whether Mr Young can proceed with his claim of unjustified dismissal in respect of the protected disclosure.

Background

[6] Mr Young was suspended with effect from 7 May 2008 pending the outcome of a disciplinary investigation into a number of allegations that Mr Young was bullying, intimidating and harassing certain of his colleagues. Mr Young had made counter allegations that his colleagues had bullied and victimised him, and raised a personal grievance on the ground of 'unjustifiable action resulting in disadvantage' in respect of those and other allegations. Mr Young's counter allegations were also to be investigated.

[7] The investigation proceeded as described in the Authority's substantive determination. The regional manager prepared a draft report, in which he identified a number of incidents of concern and said there was 'overwhelming evidence' to support the allegations against Mr Young. He found no evidence to support Mr Young's allegations. The draft report ended with a recommendation that summary dismissal for serious misconduct be imposed on Mr Young because of: his breaches of policy in respect of his threatening and bullying behaviour; inappropriate use of email; failure to follow lawful and reasonable instructions; and behaviour that might

² *Young v Bay of Plenty District Health Board* [2010] NZEmpC 145

³ *Young v Bay of Plenty District Health Board* Member Anderson, 22 June 2010, AA 146A/10. Mr Young also applied for a stay while the application for leave to challenge the substantive determination was pending. The application was determined in *Young v Bay of Plenty District Health Board* Member Anderson, 16 July 2010, AA 146B/10.

contribute to disruption of the workplace or adversely affect the performance of official duties.

[8] Mr Young was given an opportunity to comment on the draft report, before it was forwarded to the Chief Executive Officer (CEO) in or about late July 2008. The CEO met with Mr Young and his lawyer. Among other things the CEO concluded from the discussion that Mr Young had no insight into the effect on his colleagues and managers of his behaviour and approach. The employment relationship had broken down to the extent that the necessary trust and confidence in Mr Young no longer existed.

[9] For these reasons, Mr Young was dismissed summarily on 13 August 2008.

[10] The Authority made these findings about Mr Young's dismissal:

[35] ...Given the overall evidence which is comprehensive and well documented, I conclude that there is no procedural deficiency to be found in the manner in which Mr Young was dismissed. On the contrary there was little more that the Board could have done to ensure that Mr Young was made fully aware of the allegations against him and given an opportunity to respond.

...

[37] ... it was the continual and cumulative words and actions of Mr Young which caused severe disharmony leaving the Board with no option but to dismiss him. I find that the words, actions, poor performance and general behaviour of Mr Young were such that the termination of his employment was an action that was available to the Board as a fair and reasonable employer in all the circumstances.

[11] By letter to the CEO dated 16 May 2008 (the May disclosure) Mr Young had made what he said in the letter was a protected disclosure under the Protected Disclosures Act. The letter alleged 'serious wrongdoing by the administration and management' of the area in which he worked, before making seven equally broadly-worded allegations which included the words 'gross misuse of authority', 'vendetta' and 'grave risk to public health and safety'. As the BOPDHB has pointed out, those named in the disclosure (although with a relatively minor exception no accusation in respect of any specific incident was levelled at them) were those involved in the disciplinary investigation.

[12] A second protected disclosure was made to the chairperson of the board, by letter dated 20 August 2008 (the August disclosure), a few days after the dismissal. In this disclosure Mr Young alleged that he had been victimised because he had raised his concerns. He asked the Board to 'investigate the other side of this matter from an objective perspective'.

[13] The May disclosure was investigated by Gail Bingham, the general manager governance and compliance, who is also a solicitor. The August disclosure was investigated by the CEO. Both reported their findings to Mr Young.

[14] The present statement of problem does not refer specifically to the May or the August disclosure, but from its context the allegation of unjustified and constructive dismissal must concern the May disclosure.

Whether personal grievance can proceed

[15] I explained to Mr Young that the first matter to be determined here was whether he could proceed with the allegation of unjustified dismissal he now makes, given that the justification for the termination of his employment has already been heard and determined. He did not accept that matter may amount to a legal impediment to proceeding further, and his submissions focussed on his dissatisfaction with the handling of the disclosure(s).

[16] In the submissions Mr Young made a number of allegations amounting in effect to reasons why he believes the substantive matters that have been before the Authority 'must also be placed under suspension until the protective (sic) disclosure matter can be addressed in light of the driving forces behind a bad faith report drafted and written in the DHB of BOP that ERA places its findings on and has never been challenged.' I understand the reference to a 'bad faith report' to be a reference to the draft report prepared in respect of the disciplinary investigation. Otherwise many of the concerns detailed in the submissions are with Ms Bingham's role as well as aspects of the handling of the matter before the Authority during the substantive hearing. Mr Young further alleges that the CEO - being aware of the protected disclosure - 'used a calculated strategy to unjustifiably dismiss a staff member to cover the matter up.'

[17] Mr Young was not dismissed, constructively or otherwise, because he made a protected disclosure. He was dismissed for the reasons set out in the substantive determination. In part he has cloaked his concerns about the protected disclosure in the mantle of a personal grievance because he says he wants the subject matter of the disclosure to be 'placed back inside the organisation from where it came so that it can be properly addressed and the ERA is the only body that can do this'. More specifically, and as he said during the Authority's teleconference call with the parties, Mr Young seeks reinstatement so that he can address the matter 'from the inside'.

[18] It is not open to Mr Young to assert a new personal grievance at this late stage and in the way he has. Not only has the justification for his dismissal been heard and determined - resulting in a strong finding from the Authority regarding the presence of justification in the form of Mr Young's own misconduct - but Mr Young had an opportunity to and did raise concerns about the relevance of his making a protected disclosure during that process. He is dissatisfied with the response, but that does not mean it is open to him to create an entirely new allegation of unjustified dismissal in a further attempt to obtain the response he requires.

[19] Because Mr Young had an opportunity to raise his concerns about the protected disclosure during the Authority's investigation into the substantive matter - and because the findings regarding both the true grounds and the justification for the dismissal were so clear - I would not in any event grant leave to Mr Young to proceed any further even had he made a less misconceived application than the present one.

[20] For these reasons the Authority declines to investigate the further personal grievance and there will be no order for reinstatement.

Whether stay of costs award should be granted

[21] The application for a stay was made on the ground that a stay of costs in respect of the substantive determination would be fair because of the relationship between the matters addressed in it, and the protected disclosure. Mr Young also suggested that since he is taking on a large government department, cost should not be a consideration in seeking justice. Finally he summarised his current financial position.

[22] Since there will be no investigation into the further personal grievance in respect of the protected disclosure, there is no reason to consider granting a stay. I decline to make such an order.

Costs

[23] Costs are reserved. If either party seeks a determination of the Authority on costs in respect of this application the party shall have 28 days from the date of this determination in which to file and serve a written statement of what is sought and why. The other party shall have 14 days from the date of receipt of such statement in which to file and serve a written reply.

R A Monaghan
Member of the Employment Relations Authority