New Zealand Employment Relations Authority Decisions

A v New Zealand Police CA 21/06 (Christchurch) [2006] NZERA 637 (14 February 2006)

Last Updated: 24 November 2021

Attention is drawn to paragraph 2 prohibiting publication of certain information contained in this determination.

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Determination Number: CA 21/06 File Number: CEA 98/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH OFFICE

BETWEEN A (Applicant)

AND New Zealand Police (Respondent)

REPRESENTATIVES Robert Thompson, Advocate for Applicant

Raewyn Gibson, Advocate for Respondent

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING 24 November 2005

DATE OF DETERMINATION 14 February 2006

INTERIM DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] Given the nature of the factual material traversed in the papers filed before the investigation meeting and at the investigation meeting itself, there was agreement that the Authority should make an order prohibiting the publication of the name of the applicant and the name of a medical practitioner referred to in the proceedings together with any identifying information about the location of the practice of that medical practitioner. To achieve those objectives, I also prohibit the publication of the name of one witness.

[2] I make the order prohibiting publication of the name of the applicant, the name of a medical practitioner referred to in the proceedings, the name of a Police witness and prohibition also on any information that may lead to the identification either of the applicant or the medical practitioner concerned including in particular the name of the town or city in which the medical practitioner practises.

[3] The applicant is referred to throughout as Ms A and the medical practitioner concerned as Dr B. A witness is referred to as Witness C.

[4] Ms A says that she was unjustifiably disadvantaged in terms of s103(1)(b) of the Employment Relations Act 2000.

[5] The respondent (the Police) say that Ms A does not have a personal grievance claim for unjustifiable disadvantage and that in any event the claim is time-barred.

[6] Ms A made an application to join the New Zealand Police in 1989 and on 22 December 1989 she submitted to a medical examination by Dr B. The examination included a breast examination and vaginal and rectal internal examinations.

[7] Some time during 1993, Ms A became concerned that the medical examination that she had had on 22 December 1989 was, by virtue of its extent, not consistent with the medical examination of other female colleagues.

[8] Ms A spoke to the Police's Chief Medical Officer who Ms A alleges dismissed her concerns as unreasonable.

[9] Next, Ms A spoke to the Police officer who had referred her to Dr B for medical examination, (Witness C) and her evidence was that she obtained an assurance from Witness C that no further candidates for the Police would be sent to Dr B for examination.

[10] On 20 August 20031, Ms A made a complaint to Police in respect of Dr B's conduct. On 16 October 2003, Ms A learned from the investigating officer responsible for her complaint that Dr B was still examining Police recruits. This was contrary to Ms A's understanding from Witness C. This exacerbated Ms A's distress as she had, to some extent, been comforted by the fact that Dr B was not able to perform the kind of examination he performed on her, on anybody else.

[11] Ms A contacted the Police Association and instructed them to raise a personal grievance on her behalf. The grievance was raised on 17 November 2003 (that is a calendar month and a day after Ms A was told that Dr B was still performing examinations on Police recruits) and it is in the following terms:

Hi Chris [the reference is to Chris Shield, the Human Resources Manager for the Police in Canterbury]

This is to confirm the verbal lodging I did at 1600 hours today of an employment problem on behalf of [Ms] A ...

This has only come to my notice today and is close to the statutory 90 day lodging period. The problem is in relation to the medical examination ... in December 1989 when [Ms] A was employed by Police. She first raised this as an issue with Hector McDonald (medical adviser of OoC) approximately 8 years ago and OoC failed to deal with the complaint appropriately. [Ms] A made a criminal complaint/statement on 20 August 2003 in regard to this matter which is currently being investigated.

I will forward further details of this problem, hopefully in about two weeks, after I have had time to talk to [Ms] A and after I have had time to collate details.

[12] That email was responded to by Chris Shield, Human Resources Manager Canterbury for New Zealand Police, in his letter of 25 November 2003. In that letter, Mr Shield makes the point that the Police reserved their right to raise the time limitation issue in any defence of the claim.

[13] Mr Shield's letter then concludes by noting that Mr McKirdy would forward further information shortly. For reasons which are not clear, no such information was ever forwarded and no further steps appear to have been taken, either by the Police Association or indeed by the Police.

1 Some documentation before the Authority suggests that the complaint was made on 13 August 2003; I am inclined to the view the later date is more likely to be correct.

[14] In the statement of problem filed by Ms A, she identifies that the nature of the grievance is the allegation that she was misled and deceived by Witness C when it became clear that, notwithstanding the undertaking that Ms A thought that Witness C had given her, Dr B was still conducting medical examinations for Police recruits.

[15] Ms A became aware of the fact that Dr B was still conducting these Police recruit examinations on 16 October 2003 and it was this fact which she says in her statement of problem that precipitated her to raise the grievance

dated 17 November 2003.

Issues

[16] There is an absolutely fundamental legal question of whether Ms A has conformed to the rules about the timeliness of raising her grievance.

[17] A second issue falls for consideration assuming that the applicant fails to satisfy the Authority that her grievance has been raised within time. The second issue is whether the applicant has properly made application to the Authority for the right to bring her grievance out of time under the exceptional circumstances provisions contemplated by s114(3) ff of the Employment Relations Act.

Raising the grievance – the time limitation

[18] The Police say that the grievance is *out of time*. They say this because the email of 17 November 2003 did not raise the grievance within 90 days of the events complained of.

[19] It seems to me that that argument rather begs the question of what the event is which triggers the grievance and crystallises the employment relationship problem. If the events complained about in the 17 November 2003 email are indeed outside the 90 day period, then the argument is well made. This would be the position if, for instance, Ms A was complaining about the initial medical examination which had taken place fully 13 years before, or in relation to the attitude of the Chief Medical Adviser to the Police which was expressed eight years before the notification.

[20] However, although both those matters are referred to in the 17 November 2003 email raising the grievance, the author of the email, Mr McKirdy, quite clearly refers to the grievance being *close to the 90 day lodging period*. As an experienced Police Association representative, Mr McKirdy cannot seriously be contending in that statement that matters eight and 13 years before respectively were *close* to the 90 day lodging period. He must be referring to something else and in the Authority's view, he is referring to the lodging of a criminal complaint by Ms A with the Police against the actions of Dr B which criminal complaint was made by Ms A on 20 August 2003.

[21] If that is indeed the basis for Mr McKirdy's view that the raising of the grievance is in truth *close to* the 90 day statutory period, then I think his view is misconceived because nothing that happened on 20 August 2003 when Ms A apparently filed her criminal complaint against Dr B had, so far as the evidence before the Authority is concerned, anything to do with Ms A's personal grievance.

[22] What Ms A now says grounds her grievance is the realisation that Dr B was still performing medical examinations for Police recruits. The evidence before the Authority is that Ms A found this out, admittedly as part of the criminal complaint process, on 16 October 2003, that is, about 30 days or thereabouts before the personal grievance was raised by Mr McKirdy of the Police Association.

[23] The evidence was that Ms A had spoken to Witness C, the recruiting officer, in about 1993 and she thought that she had received an assurance from Witness C that Dr B would not be used for Police recruits in future. Clearly that advice, although apparently misconceived, gave Ms A comfort and for 10 years or thereabouts she was relatively free of worry about the medical examination by Dr B.

[24] When Witness C gave his evidence before the Authority, he confirmed that he had at no stage told Ms A that Dr B would not perform medical examinations on Police recruits. What he did say was that he, as a Police recruiting officer, would not use Dr B.

[25] Witness C made the point that he was not in any position to take physicians off the approved list and he said that he thought that Ms A would have known that. He did say that he did not like Dr B and tried not to put people to Dr B for medical examination.

[26] In her oral evidence before the Authority, Ms A confirmed precisely what Witness C had said in his evidence, namely that Witness C had said that he would not use Dr B any more, not that Witness C would ensure that Dr B ceased to be a medical practitioner approved for examining Police recruits.

[27] Further clear evidence of Ms A's reliance on discovering that Dr B was still performing Police examinations as the basic nub of the grievance is found in her departure on stress leave almost immediately after this revelation. She was then away from duty for an extended period. The evidence was that prior to October 2003, Ms A took very little sick leave and no stress leave at all.

[28] Given that Ms A argues that she first became aware of the nature of her grievance on 16 October 2003, notification to the employer on 17 November 2003 cannot be said to be out of time. However, that is not the end of the matter because the law also requires that the employer is given sufficient information about the nature of the grievance to enable it to respond appropriately in the hope that the matter is able to be resolved promptly and without the loss of the employment relationship.

[29] In my opinion, none of that has been achieved by the raising of the grievance in Mr McKirdy's email of 17 November 2003. That document really has to be read as being silent as to the nature of the grievance which the employer is asked to resolve. Indeed, that interpretation of it is supported by Mr McKirdy's final paragraph in which he indicates that he will *forward further details of this problem hopefully in about two weeks ....* For whatever reason, that did not happen and the Police were left to draw their own conclusions.

[30] In their submissions to the Authority, the Police allege that the first occasion on which Ms A has identified her grievance as being the sense of betrayal which she felt when she discovered that Dr B was still examining Police recruits, was in the statement of problem which was filed in the Authority on 31 March 2005. The same submissions from the Police draw my attention to the fact that previous correspondence from Ms A's advocate suggests a different basis for the grievance.

[31] Nothing really turns on these apparent differences in the presentation of Ms A's grievance. In my opinion, they simply give mute testimony to Ms A's advocate's earnest attempts to create a forum in which Ms A could have her strong sense of grievance addressed.

[32] The law, however, requires that the employer have a proper notion of the basis on which the grievance is raised and in my opinion, the Police were never advised, within 90 days of the events complained of, the actual basis for the disadvantage grievance.

[33] It follows that the *grievance* that was raised on Ms A's behalf on 17 November 2003 cannot proceed. Without more, there can be no live proceeding.

The exceptional circumstances claim

[34] In closing submissions filed on Ms A's behalf by her advocate, an attempt is made to in effect apply to the Authority retrospectively for leave to raise the grievance outside of the 90 day period.

[35] The relevant law is contained in s.114(3), (4) and (5). There are then further provisions relating to exceptional circumstances in s.115.

[36] In essence, these provisions require that an application be made to the Authority for leave and that that leave may be granted after giving the employer an opportunity to be heard.

[37] This is a situation where Ms A's advocate has, in closing submissions, thought to interest the Authority in an application that exceptional circumstances apply by reason of the alleged default of the Police Association in adequately prosecuting Ms A's personal grievance claim.

[38] I am satisfied that the statute requires the Authority to conduct a proper process where leave is sought and that advancing an application for leave almost as an afterthought as part of closing submissions does not constitute the process contemplated by the statute.

[39] However, in my opinion, it would be repugnant to justice and inconsistent with the object of the Act and the provisions of section 157 of the Act to not give Ms A a proper opportunity to progress her claim that there exist *exceptional circumstances* in raising her grievance outside the 90 day period.

[40] For the avoidance of doubt and to obviate the need for any unnecessary additional delay, I will take the reference in the closing submissions of the applicant as being the application to the Authority contemplated by s114(3) of the Act.

[41] The Police as respondent will need to be provided with a proper opportunity to make submissions and to ensure that that whole process is fair as between the parties, I will convene a telephone conference between the representatives of the parties as soon as it can be arranged after the issue of this interim determination so that arrangements for the application for leave can be made.

Determination

[42] In my opinion, Ms A has not given the Police sufficient information about the nature of her alleged personal grievance to enable them to *address* that personal grievance within the meaning that that word has in the statute. It follows that Ms A's referral of her grievance by an email from the Police Association dated 17 November 2003 does not in fact raise a personal grievance within the meaning of the law.

[43] I have accepted Ms A's reference in her closing submissions to the Authority's ability to grant leave to raise a grievance outside the 90 day period, as an application in terms of s114(3) of the Act.

[44] I have decided that there will be a telephone conference between the Authority and representatives of the parties to agree a process for dealing with the application for leave.

Costs

[45] Costs are reserved.

James Crichton

Member of Employment Relations Authority