IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 205/10
File Number: 5313359

	BETWEEN	Vicki Barclay & 10 Ors (see par 7 for full list of applicants' names) Applicants
	AND	Cranford Hospice, a registered Charity Respondent
Member of Authority:	Denis Asher	
Representatives:	Paul McBride for the applicants Peter Churchman for the Hospice	
Investigation Meeting	Wellington, 16 December 2010	
Submissions Received	On the day of the investigation	
Determination:	23 December 2010	

DETERMINATION OF THE AUTHORITY: Strike Out Application

The Problem

[1] Should part of the applicants' applications be struck out on the ground that some of their grievances are time barred and the Authority has no jurisdiction to here a claim for damages for reputational harm?

The Investigation

[2] A substantive investigation into this employment relationship is set down for the week commencing Monday 7 March 2011, in Napier.

[3] During the last telephone conference call on 26 November 2010 the parties agreed to a preliminary investigation in Wellington on Thursday, 16 December in respect of the respondent's claim that various aspects of the applicants' grievances should be struck out as time barred or the Authority was lacking in jurisdiction.

[4] Informal discussion between the parties during the investigation did not resolve this employment problem but – I am advised – they continue to talk and have expressed the hope that, possibly with further mediation, a resolution may be achieved.

[5] In the meanwhile they have asked the Authority to release its determination on this aspect of their problem.

Background

[6] The applicants were all employed by the respondent (Cranford/the Hospice) as nurses. Their employment came to an end in the context of a restructuring (detailed below) during which they either took voluntary redundancy or were not appointed to the new positions arising out of the restructuring and were thus made redundant.

[7] Their commencement, nursing qualification and termination details are as follows:

a. Vicki Barclay is a registered nurse and was employed from July 2008 to June 2010;

b. Dawn Birchall is a registered nurse and was employed from March 2007 to June 2010;

c. Erika Burt is an enrolled nurse and was materially employed from August 2001 to June 2010;

d. Sharon Greene is a registered nurse and was employed from November 1996 to May 2010;

e. Helen Hallgarth is a registered nurse and was employed from October 2007 to June 2010;

f. Bridget Halse is a registered nurse and was employed from February 2006 to June 2010;

g. Barbara Hill is a registered nurse and was employed from April 2005 to May 2010;

h. Jane Houlahan is an enrolled nurse and was employed from February 2003 to June 2010.

i. Annette Purser is an enrolled nurse and was employed from September 2003 to June 2010;

j. Faith Tough is a registered nurse and was employed from December 1986 to June 2010; and

k. Sheryl Walker is a registered nurse and was employed from August 1994 to May 2010.

[8] Cranford is a care facility operated by Presbyterian Support East Coast (PSEC). It is located in Hastings and has provided palliative care for residents for over 25 years. It was and is dependent on the financial support of the PSEC, the community and, most significantly, the Hawkes Bay District Health Board (HBDHB).

[9] Cranford employs a range of staff including doctors, nurses, pharmacists, social workers, therapists and administrative support workers.

[10] The Hospice has a troubled recent past which has drawn considerable media attention.

[11] The respondent says that, in discharge of its ongoing obligations to ensure the Hospice meets the needs of patients, whanau and stakeholders and retains the confidence of its supporters and funders, PSEC has in recent years engaged it in a number of governance and operational reviews. Changes have resulted from the reviews: "*Not all of the changes have been popular with staff, and some have been actively resisted by staff*" (par 2.7, statement in reply).

[12] Existing and former staff members made public their concerns and the changes, to which the PSEC responded.

[13] In February 2010 HBDHB arranged for an audit to measure Cranford's compliance with health and disability sector standards – the TAS Report resulted, dated February 2010.

[14] In April 2010 PSEC appointed a change manager to Cranford.

[15] In the same month HBDHB and PSEC jointly released an audit report which concluded that, amongst other things, there were dysfunctional relationships between teams at Cranford and a culture of blame and mistrust.

[16] On the same day, 28 April, staff were notified that the Cranford inpatient service would move to HBDHB on 17 May for six months as the Hospice was to be restructured.

[17] On 29 April a restructuring proposal was provided to staff. In response to criticism in the TAS Report, the intended restructure provided for far fewer opportunities for enrolled nurses than had previously existed at Cranford. A final plan was presented to staff on 17 May: it included a proposal that 23.5 FTE positions be reduced to 22 FTE. As a result of a decision to have less part-time nurses, there were actually some 10 fewer positions available in the restructure for nurses than had previously existed, with far more of the positions being either fulltime or, if part time, with a requirement for working a higher number of hours per week.

[18] The application and interviewing of applicants process for the new positions was discussed and negotiated by the respondent with the NZNO.

[19] Mesdames Greene, Hill and Walker opted for voluntary redundancy.

[20] Later that month, having applied for new positions, Mesdames Barclay, Birchall, Burt, Hallgarth, Halse, Houlahan, Purser and Tough (and others) were advised they had been unsuccessful in securing positions under the new structure.

[21] By letter dated 1 July 2010 Cranford received the following advice on behalf of the applicants:

> ***Dear Sir***
>
> ***RE: PERSONAL GRIEVANCES – HALLGARTH and OTHERS***
>
> *1. We have been instructed by the following in respect of the termination of their employment, the unjustifiable nature of that, and the circumstances leading to that. For the avoidance of doubt, we now formally raise personal grievances on behalf of:*
>
> (applicants' names)
>
> *2. Reinstatement and substantial financial remedies are sought. Separately, our clients are considering action against the District Health Board, which has instigated the unjustifiable dismissals.*
>
> *3. Our clients would be prepared to attend mediation in an attempt to address and hopefully resolve the issues. As you are aware, our clients' employment terminated for reasons of purported redundancy when in reality the employment remained – albeit that Cranford/the DHB sought different faces to undertake that.*
>
> *4. Please advise by return whether Cranford agrees to mediation in the hope of resolving matters.*
>
> (signature)

[22] The parties subsequently underwent mediation but the employment relationship problem remained unresolved.

[23] The applicants filed their statement of problem in the Authority on 5 October.

Summary of Parties' Positions

[24] The respondent says the applications by all eleven applicants for findings of unjustified disadvantage, the allegations in their supplementary statements of problem seeking damages for reputational harm, and the constructive dismissal grievances of Greene, Hill and Walker should all be struck out on the ground they are time barred, being first alluded to in the statement of problem filed on 6 October and the Authority has no jurisdiction to hear a claim of damages for reputational harm, being an action founded in tort.

[25] The applicants say the basis for a strike out has not been made out; personal grievances in respect of unjustified disadvantages were properly raised within 90 days; personal grievances in respect of unjustified dismissals were also properly raised within 90-days and there is no statutory requirement to specifically claim constructive dismissal; and the claim about defamation is misguided as the common law contractual duty to protect employees against reputational harm has been recognised by the New Zealand Courts for many years – see *Malik* v *BCCI* [1997] 3 All ER 1.

Discussion & Findings

Time Barred

[26] While the respondent has raised legitimate concerns about the timeliness and adequacy of the alleged grievances, I find that these concerns are best held over to be assessed in light of more adequate evidence that can reasonably be expected at the substantive investigation set down to commence on 7 March 211.

[27] I adopt this approach because I accept the applicants' submission that any application for a strike out must meet a high threshold. That is because of well-settled principles including: the case pleaded is so clearly untenable it cannot possibly succeed; the jurisdiction is to be used sparingly; and the Court will not strike out a proceeding if it has to decide disputed questions of fact: *Sibly* v *Christchurch City Council* [2002] 1 ERNZ 476.

[28] In this case it cannot be said that the case pleaded, that unjustified disadvantage grievances were filed within time, is clearly untenable and plainly cannot succeed. I reach this conclusion primarily because of disputed questions of fact. The applicants' claim of sufficient notice rests on two legs: the first is their letter of 1 July. Does it amount to adequate notice of any of the grievances?

[29] The second leg comprises claims alluded to in untested statements provided by their counsel, on the applicants' behalf, by email dated 12 November. Ms Sheryl Walker, in her oral evidence to the investigation on 16 December, amplified those claims. She gave evidence to the effect that, like others and before opting for voluntary severance, she clearly communicated her various disadvantage concerns to senior staff employed by the respondent and thereby put Cranford on notice of her unjustified disadvantage grievance. The evidence of the other applicants and those managers to whom Ms Walker says she put her concerns (and who I apprehend deny the claims) has yet to be heard and tested.

[30] More evidence is therefore required from the parties before I can confidently apply the principles set out at par 36 in *Creedy* v *Commissioner of Police* [2006] ERNZ 517, and determine whether notice of what the employee wanted the employer to address was sufficiently specified.

[31] To be able to say they provided sufficient and timely notice, and as set out in *Creedy* (above), the applicants must meet the following clear requirements:

> *… it is insufficient, and therefore not a raising of a grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance … . As the Court determined in cases under the previous legislation, for an employer to be*

> *able to address a grievance as the legislation contemplates, the employer must know what to address. That is not to find, however, that the raising cannot be oral or than any particular formula of words needs to be used. What is important is that the employer is made sufficiently aware of the grievance to be able to respond as the legislative scheme mandates.*

[32] A sufficiency of information is required so that an employer might address an employee's grievance on its merits (par 37, *Creedy*, above).

[33] What I therefore anticipate in respect of the substantive investigation scheduled to commence on Monday 7 March in Napier is clear evidence of that sufficiency. On its own, the applicants' letter of 1 July may fall short of that requirement in respect of the alleged unjustified disadvantages. And the applicants' preliminary statements are also short on relevant detail. But it is improper to arrive at a final conclusion until the parties have enjoyed a full opportunity to put their respective sides of the story.

[34] On a similar note, I put the parties on notice of their need to fully and clearly address the substance of the restructuring resulting in the termination of the applicants' employment. In particular I will be looking for clear evidence to support the applicants' claim that it was – my words, not theirs – a sham intended to effect their removal, and that the employment remained but that Cranford *"sought different faces to undertake"* the applicants' employment (letter of 1 July).

[35] It is a serious allegation for which credible, supporting evidence will be required. It is not enough to believe in the allegation: the claim must be borne out by way of a balance of probabilities test. What is the evidence to overturn Cranford's defence that, subjected as it was to a legitimate audit, a genuine restructuring was put in place as well as a selection process put to and approved by one of the employees' unions? What is the evidence to support a claim that the selection process was then abused so that different faces were selected to undertake the applicants' work?

[36] I repeat here my observation during this investigation that the parties clearly share a common passionate commitment to the services provided by Cranford, the wellbeing of its patients and their own professional integrity. Those feelings, and

attendant frustrations, are best addressed through the benefits of mediation, so that a fair, just and bespoked outcome might result, rather than by way of – arguably – the club of a determination.

Jurisdiction

[37] While labelled *"reputational harm"*, I comprehend the applicants' claim in this regard as a 'normal' application for compensation for hurt and humiliation. It any way is a matter that can be held over to the substantive investigation and is not sufficient ground to strike out any or all of the applicants' application. I therefore decline the respondent's contention the Authority lacks jurisdiction to hear this matter.

[38] I note here that the evidence advanced to date in respect of this claim appears to relate as much, if not more, to the findings of the TAS Report and subsequent comment by other parties, as reported in the media, about that report, as it might the respondent's stated views. Cranford may have a legitimate defence in stating it only spoke of what the TAS Report had found.

[39] I struggle at this point to see the respondent's responsibility for those findings and subsequent publicity of them but leave any findings to the substantive investigation where these matters are to be properly addressed.

Notice of Constructive Dismissal

[40] I note the applicants' submissions in this regard, that the Employment Relations Act 2000 does not distinguish between types of unjustified dismissals, but reserve any determination on this issue – and the adequacy of the 1 July notice of grievance in respect of that allegation – to the substantive investigation in March, wherein more complete evidence will ensure an informed and more reliable finding on this and other matters.

Determination

[41] The respondent's strike out application is declined.

[42] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority