

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 261/08
5100170

BETWEEN IAN BREEZE
Applicant

AND BAY OF PLENTY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Dzintra King
Representatives: Philip Bartlett, Counsel for Applicant
Mark Beech, Counsel for Respondent
Investigation Meeting: On the Papers
Submissions received: 28 May 2008 from Applicant
23 May and 13 June from Respondent
Determination: 18 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Dr Ian Breeze, has filed a personal grievance alleging disadvantage.

[2] The respondent has filed an application to strike the matter out and also says there are 90 day issues.

Strike Out Application

[3] On 7 February 2008 the parties attended mediation. At the conclusion of the mediation the respondent says a proposal was put by the applicant to the respondent whereby the mediation would be reconvened at a later date once the respondent had

had an opportunity to conduct further enquiries and to make a decision regarding the applicant's proposal.

[4] The respondent says the applicant has not acted in good faith by filing proceedings before a further mediation could take place.

[5] The respondent argues that the issuing of proceedings is designed to circumvent the mediation privilege that attached to confidential conversations the respondent had with certain staff.

[6] The applicant says it was the respondent that initially and openly raised the issue of internal resistance to Dr Breeze's return. Mr Stubbs had repeatedly asked for details as early as June 2007. I accept the applicant's contention that the respondent's position on this issue might have some validity if the internal resistance argument had been raised for the time at mediation but this clearly was not the case.

[7] Dr Breeze says there was no agreement to delay filing a Statement of Problem pending further mediation.

[8] Whether or not there was an agreement to mediate further does not affect Dr Breeze's right to file a Statement of Problem. Mediation often takes place once proceedings have been filed. The filing of proceedings was not a breach of the duty of good faith. There is nothing preventing the parties continuing to mediate.

[9] I decline to strike out the proceedings.

90 Day Issue

[10] The respondent says that two of Dr Breeze's personal grievances are time barred. It says they should have been raised within 90 days of a letter dated 25 January 2006 written to Dr Breeze by its Chief Executive, Mr Cammish. Dr Breeze raised his grievance on 6 March 2008.

[11] The letter from Mr Cammish states:

I also wish to note, in order to avoid any confusion that BOPDHB does not have an obligation to increase your current contract or scope of practice at the completion of your sabbatical and successful retraining. Any change in employment status will be at the discretion of the BOPDHB.

[12] The applicant's personal grievances are that the respondent is affecting his employment, or one or more conditions of his employment, to his disadvantage by the following unjustifiable actions:

- Its repudiation of undertakings, or in the alternative, of expectations that it gave him to the effect that it would support him in progressively credentialing him back to surgery.
- Its repudiation of its undertaking, or in the alternative, of the expectation that it gave him that it would allow him to resume his former role as a general surgeon employed by it on an 8/10ths basis on completion of a retraining programme. In accordance with the Medical Council's requirements.

[13] The applicant says that the first grounds of the personal grievance allege an ongoing obligation indicated by the word "progressively". Accordingly, as long as the DHB was supporting Dr Breeze to progress to a point where he could return to general surgery there could be no basis to raise a personal grievance. The DHB was continuing to support him through the period of retraining by, for example, allowing him to take annual leave for that purpose. The 25 January letter did not bring that to an end.

[14] The second alleged ground was dependent on Dr Breeze having completed a retraining programme in accordance with the Medical Council's requirements. He could not raise a personal grievance until at least such time as he had completed the retraining to the Medical Council's satisfaction, had then established those matters to his employer's satisfaction, and had obtained the DHB's response to his request to be returned to general surgery.

[15] Mr Bartlett submitted that there was a fallacy in the respondent's argument, being that the argument assumed that Dr Breeze could have raised a grievance regarding an anticipated future event – a decision made by the DHB after the

completion of his retraining that it would no longer honour its commitment to support him in his return to general surgery.

[16] In *Creedy v Police* [2006] ERNZ 517 at para 29 Colgan CJ stated that “the statutory scheme does not allow for a known or even anticipated future event, let alone a speculative future event...”. I agree that Mr Cammish’s letter at most foreshadowed a future event and that Dr Breeze could not sensibly have raised a personal grievance at that stage because he could not have claimed that Mr Cammish’s views were affecting his employment to his disadvantage.

[17] The first definitive notification, after Dr Breeze had completed his retraining, that the respondent did not regard itself as obliged to return him to general surgery was in the letter of 9 August 2007 from Sharp Tudhope.

[18] Dr Breeze’s grievances have been raised within the 90 day period.

Statement in Reply

[19] The applicant has also raised a concern about the delay in filing a Statement in Reply. If, now it has this determination, the respondent does not agree to file the Statement in Reply on the terms sought in Mr Bartlett’s memorandum dated 31 March 2008 I will deal with the matter in the course of a conference call.

Costs

[20] Costs are reserved. If the parties are unable to agree the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the respondent’s memorandum.

Dzintra King

Member of the Employment Relations Authority