

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 33A/07
AEA 1291/05

BETWEEN WENDY CLEAR

AND WAIKATO DISTRICT
 HEALTH BOARD

Member of Authority: Janet Scott

Representatives: Mark Hammond for Applicant
 Geoff Bevan for Respondent

Investigation Meeting: 3 July 2007 at Hamilton

Submissions received: 3 July & 20 July 2007 for applicant
 3 July for respondent & 3 August (last date for reply
 submissions).

Determination: 5 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 13 February 2007 the Authority issued a Determination on the substantive claims raised by Miss Clear i.e. that she suffered personal grievances in her employment (unjustified disadvantage and unjustified dismissal). The Authority declined a number of Miss Clear's claims. However, the Authority did find that Miss Clear has a disadvantage grievance against her former employer Waikato District Health Board (WDHB) in that it failed to investigate her fourth complaint against her clinical team leader, Mrs Parata and failed to treat her fairly in the process.

[2] By agreement between the parties the original Determination addressed only the question of liability. The matter of remedies was left for further consideration. Another Investigation Meeting was convened on 3 July 2007 to address that issue and a claim brought by Miss Clear that she is owed monies in respect of lieu days not taken by her prior the termination of her employment.

[3] This Determination will address and conclude these matters.

Applicant's claims as to remedies

- The applicant seeks compensation for hurt and humiliation pursuant to s. 123 (1) (c) (i) in the sum of \$30,000.
- The applicant seeks compensation for lost income between November 2003 (when her sick leave expired and 22 January 2005 when her employment was terminated) and further seeks lost income from 22 January 2005 for a period to be determined by the Authority. The applicant considers that if the investigation had been completed in a timely fashion her employment would have been continued with the respondent.
- The applicant seeks 60 hours pay for days in lieu not taken in respect of overtime worked prior to her dismissal.

Submissions of the Parties

Compensation for hurt and humiliation pursuant to s. 123 (1) (c) (i)

[4] For the applicant it is submitted the applicant is entitled to compensation for hurt and humiliation at the top end of the range. Counsel traverses the conclusions in *Simpson v Aberhart* AC 52/06; *Telecom v Post Office Union* [1992] 1 ERNZ 711 & *NCR (NZ) Corporation v Blowes* [2005] 1 ERNZ 932 and concludes that while there is no ceiling to awards, most awards will fall within a range up to \$27,000 but that exceptional cases may attract higher awards.

[5] It was submitted in this regard:

- That the breach by the Board of its obligations towards Miss Clear was at the most serious end of the scale.
- The Authority's criticisms of the way the Board dealt with Miss Clear's fourth complaint are unequivocal and stated strongly.

- While each case must turn on its facts the facts of this case compared, for example, with the *Aberhart* case (cited above) illustrate and support the submission that compensation at or above the notional ceiling is warranted.

[6] The evidence of hurt and humiliation suffered by Miss Clear is before the Authority e.g. the applicant's evidence, that of her friend Maree Gadsden, her GP (Duncan Gadsden) and Kevin Mist, a qualified psychologist. It is acknowledged that the line between the suffering, which occurred as a result of Miss Clear's general problems with Mrs Parata, and that which arose from the disadvantage grievance is somewhat arbitrary.

[7] A number of the respondent's submissions are disputed and/or are not accepted.

In particular:

- The respondent's position that compensation should be low or non-existent because any frustration and humiliation has been largely subsumed in the (non-compensatable) frustration she felt about her bullying claims not being recognised.
- The arguments for a low award based on such factors that the Board's conduct (which gave rise to Ms Clear's grievance) was not intentionally disrespectful or degrading; the breach was not public or publicised etc.
- That Ms Clear's actions were such as to require the Authority to reduce remedies pursuant to s. 124 of the Act. The respondent's submissions on this point together with its reliance on *Waitakere City Council v Ioane* [2005] 1 ERNZ 1043 were firmly rejected by counsel for the applicant with distinguishing features noted. It is submitted that in no way did Miss Clear contribute to the failure of the Board to conclude its inquiry into her fourth complaint.

[8] For the respondent it is submitted:

- Miss Clear cannot be compensated for the damage to her health (described in her evidence) because the breakdown in her health was not caused by any

- breach of duty by the respondent (but by the *belief* she was being bullied) and the Authority found that the Board's breach of duty which founded her disadvantage grievance did not cause further damage to her health. As a result she can only be compensated for stress and humiliation pursuant to s. 123 (1) (c) (i).
- That award should be low or non-existent because any frustration and humiliation suffered by Miss Clear has been largely subsumed in the non-compensatable frustration she has felt about her bullying claims not being recognised. On this point counsel referred to a number of cases including Reeves v Pyne Gould Guinness Ltd CEC 22/96 unreported; Northern Distribution Union v Sherilee Holdings Ltd t/a New World Titirangi [1991] 2 ERNZ 675.
- The Authority - must have regard to quantum of other s.123 (1) (c) (i) awards. A number of cases in the \$15,000 range e.g. Harbord and Waste Management Ltd WA 30/05 were cited and submissions were made that these cases are distinguishable on their facts from the case before the Authority in that the Board's conduct was (among other things) not intentionally disrespectful or degrading and neither was its conduct public or publicised. In these circumstances it is argued that the any initial award (before considering contribution) should be considerably less than \$15,000.
- Ms Clear's actions and attitudes contributed to the Board's breach of duty and this requires a reduction in compensation awarded. (Ioane¹ cited to submit that it is the totality of the applicant's actions that must be weighed in this context not just the procedural deficiencies that gave rise to the grievance). Examples of the Authority's findings of fault on Miss Clear's part were cited in support of the submission that the Authority should reduce any award of compensation on account of her contribution.

Lost Income

[9] For the applicant it is submitted her claim for lost income stems from the lack of any conclusion to her complaint. She was in limbo awaiting the outcome of the promised full and fair investigation. She could not go forward or back. It was not her fault and she deserves compensation for the income she could have potentially earned over this period.

[10] For the respondent is submitted (as noted above) that Miss Clear cannot be compensated for the damage to her health (described in her evidence) because the breakdown in her health was not caused by any breach of duty by the respondent (but by the *belief* she was being bullied) and the Authority found that the Board's breach of duty which founded her disadvantage grievance did not cause further damage to her health. As a result she can only be compensated for stress and humiliation pursuant to s. 123 (1) (c) (i).

Lieu Days

[11] Miss Clear has provided a schedule of lieu days earned (60 hours). The evidence discloses that a custom and practice pattern (outside of the applicable contract) has built up where staff would earn days in lieu of overtime worked which would be available to take off at a later date. This was not disputed by the respondent. Had Miss Clear remained in her employment she would have – at some stage - had the benefit of those days earned. The respondent's submission that the arrangement was a discretionary one is disputed.

[12] The respondent submits Miss Clear has no contractual entitlement for payment for lieu days not taken by her. It was submitted for the respondent that time in lieu was a good will informal arrangement that operated on a commonsense basis. Days in lieu worked were expected to be taken shortly after being earned and Margaret Parata's evidence was noted i.e. that it was outside her powers to approve this number of lieu days and the lengthy period of time they related to

¹ Cited above.

Discussion and Findings

[13] In setting remedies in this matter I have had regard to all the evidence received on the subject, to the submissions of counsel for the parties and to relevant case law including the cases cited.

Compensation for Hurt and Humiliation pursuant to s.123 (1) (c) (i)

[14] I accept that I must distinguish (in a remedy setting) between the stress and anguish felt by Miss Clear which flows from her ongoing belief she has been bullied by Mrs Parata from the hurt and humiliation which flowed from the employer's breach of duty towards her when it failed to complete its investigation into her fourth complaint and failed to keep her informed (including advising her of the outcome of the investigation).

[15] I find that the evidence on the hurt and humiliation suffered by Miss Clear that relates to the Board's breach that gave rise to her grievance supports an award of compensation to Ms Clear at the higher level of the scale. In particular, I note the evidence on the hope experienced by Ms Clear after being advised that the Board would carry out a full and fair investigation into her claims; the doubt that crept into her subsequent communications to Mr Peploe (where she requested advice on the progress of the investigation) and the despair that she felt when she received no communication whatsoever from Mr Peploe in response to her requests for information.

[16] My Determination was clear on the point that while Miss Clear was promised a full and fair investigation into her complaints about Mrs Parata what was delivered fell far short that – it was inept and unfair. I also found those charged with investigating the complaints developed closed minds in the matter and their initial scepticism developed into bias, which led to very unfair treatment towards her. The Board's breach of duty towards Miss Clear was very serious and it was sustained over a lengthy period (12 months). Further the Board knew Miss Clear was ill. It had a particular duty to complete its investigation in a timely manner.

[17] As a result I am not persuaded by the arguments of counsel for the Board that compensation for Ms Clear should be distinguished from those cases at the upper end of the range.

[18] Neither, on the facts of this case, am I persuaded that compensation to Ms Clear should be reduced on account of her contribution to the events giving rise to her grievance.

[19] I have no difficulty accepting the cited principles in *Ioane* but the facts of this case are clearly distinguishable.

- In the first place I have declined a number of claims raised by Ms Clear. Had those claims been upheld it would have been appropriate to weigh contribution in setting compensation. The grievance in question is distinguishable because it relates to a promise by the Board to Miss Clear that it would conduct a full and fair investigation into her claims. While it took steps to action that promise the end result was that Miss Clear was denied a full and fair investigation with a conclusion that was communicated to her and all completed in a timely manner.
- Secondly while I have found that Ms Clear made unreasonable demands (the dismissal of Mrs Parata) and presented with threatening behaviours the parties will note that the Board made its promise to conduct a full and fair inquiry into Miss Clear's claims in the face of these demands/behaviours. So this conduct provides no basis for reducing the compensation awarded to Miss Clear when the Board did not deliver on its promise. I have also found that the appropriate way for the Board to deal with these demands/behaviours was to park them and conduct its investigation. They do not in themselves justify reducing compensation to Miss Clear for a breach of duty that was wholly the Board's.

Therefore in all the circumstances I direct WDHB to pay \$15,000 compensation to Miss Clear for the hurt and humiliation she suffered as a result of her grievance.

Lost Remuneration

[20] Section 123 (1) (b) of the Act provides that where the Authority determines that an employee has a personal grievance it may...provide for...the reimbursement to the employee of a sum equal to the whole or any part of *the wages or other money lost as a result of the grievance*

[21] This calls for a consideration as to whether or not the remuneration lost by Miss Clear has been lost as a result of the grievance she has against the Board.

[22] Miss Clear has suffered a serious illness. However the evidence as to the state of Miss Clear's health is confusing.

- On one hand Miss Clear turned up to work in a District Nursing role on 15 November 2004, presumably fit for work. I found no such role had been offered to her.
- On the other hand the weight of the evidence (including the evidence provided to the Authority to consider in setting remedies) suggests that Ms Clear has a serious and continuing illness as a result of which she has suffered serious impairment and she has been and remains unfit to work.

[23] I also found that Miss Clear was dismissed not for incapacity but because she would not work in the only position available to her at Tokoroa Hospital (maternity) and she would not work at any of the other hospitals managed by WDHB.

[24] I find on balance that Ms Clear lost remuneration on account of the break down in her health and her continued ill health. Miss Clear is not entitled to an award of lost remuneration because I have found it was not a breach of duty by the employer that caused her ill health or her continued ill health. Miss Clear has not lost remuneration as a result of her grievance.

[25] As a result I decline to award remedies under this head.

Lieu Days

[26] I accept that there is a custom and practice arrangement for midwives at Tokoroa Hospital to take lieu days to compensate them for working over and above their rostered hours. Neither do I question Miss Clear's honesty in the record she has kept of the hours earned by her. However, I also accept Mrs Parata's evidence that the number of days in question here fall outside the normal parameters of lieu days earned and taken within a reasonable period. Miss Clear's claim represents a significant liability for a small maternity operation where staff shortages are a continual problem - to such an extent that I accept it falls outside the parameters of the custom and practice arrangement that prevailed.

[27] The bottom line however is that there is no evidence that the custom and practice arrangement that exists ever provided for such lieu days to be paid out rather than taken as leave. Clear evidence of an entitlement to be paid out lieu days would be required before I would make the order sought.

[28] As a result I decline the claim under this head.

Costs

[29] Costs are reserved. The substantive submissions are before me now. I reserve leave now for the parties to provide me with further evidence/submissions relating to Calderbank offers. The costs determination will be issued once these are received.

Janet Scott
Member of Employment Relations Authority