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## Dent v The Waikato District Health Board (Auckland) [2017] NZERA 253; [2017] NZERA Auckland 253 (25 August 2017)

Last Updated: 10 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 253  
5617051

BETWEEN ERIN THERESE DENT Applicant

A N D THE WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person

A Russell, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 10 July and 16 August 2017 from Applicant

27 July 2017 from Respondent

Date of Determination: 25 August 2017

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

**A. The application for reopening is dismissed.**

**B. The matter of Ms Dent's pay parity with other medical administrators with rostering duties is removed to the Court pursuant to [s178\(2\)\(c\)](#) of the [Employment Relations Act 2000](#).**

**C. Costs reserved. Employment relationship problem**

[1] This determination originated from an application for removal of a pay parity claim brought on the Authority's own motion. Ms Dent has now applied to reopen the investigation into her employment relationship problems. This is on the basis she lodged with the Authority a statement of problem dated 4 December 2013 which was

never investigated. She also alleges the statement of problem dated 6 June 2014 was not fully investigated.

[2] The Waikato District Health Board denies there is jurisdiction to reopen the investigation. It says there are no issues left for determination and no issues to be transferred to the Employment Court.

### Relevant Facts

[3] These parties have some history with the Authority. There are now four determinations about Ms Dent's applications. These include admissibility of evidence,<sup>1</sup> personal grievances of disadvantage and dismissal,<sup>2</sup> costs<sup>3</sup> and applications for leave to file personal grievances out of time and to remove matters to the Employment Court.<sup>4</sup> This is the fifth determination excluding costs.

[4] The Employment Court also has some history with these parties. It has now issued four judgments about a cross challenge,<sup>5</sup> stay,<sup>6</sup> disclosure<sup>7</sup> and admissibility of evidence.<sup>8</sup> The substantive hearing of the de novo challenge and cross

challenge remains outstanding. There is an interim hearing set down in September 2017. There is also an application for stay of the challenge.

[5] The resolution of the current applications before the Authority requires an inquiry into the circumstances surrounding the lodging of the statement of problem dated 4 December 2013 on 9 December 2013 (December SOP) and the statement of problem dated and lodged on 6 June 2014 (June SOP).

### **December SOP**

[6] Ms Dent's lawyers lodged her original statement of problem with the Authority on 23 October 2017 alleging various unjustified disadvantages. A filing fee was paid. The statement of problem was served upon the respondent by the

Authority. A statement in reply was lodged on 14 November 2013.

<sup>1</sup> *Dent v Waikato District Health Board* [2014] NZERA Auckland 390.

<sup>2</sup> *Dent v Waikato District Health Board* [2014] NZERA Auckland 526.

<sup>3</sup> *Dent v Waikato District Health Board* [2015] NZERA Auckland 86.

<sup>4</sup> *Dent v Waikato District Health Board* [2016] NZERA Auckland 356.

<sup>5</sup> *Waikato District Health Board v Erin Therese Dent* [2015] NZEmpC 72.

<sup>6</sup> *Erin Therese Dent v Waikato District Health Board* [2015] NZEmpC 73.

<sup>7</sup> *Erin Therese Dent v Waikato District Health Board* [2017] NZEmpC 27.

<sup>8</sup> *Erin Therese Dent v Waikato District Health Board* [2017] NZEmpC 76.

[7] On 9 December 2013 two bundles of documents were received by the Authority. Amongst the paperwork was an unsigned statement of problem dated 4 December 2013. No cover letter or other advice was included.

[8] The Authority Officer emailed the parties on 10 December 2013:

**Subject:** Re: 5437196 Dent v Waikato

Good evening Erin and Greg,

I have received two large bundles of documents but without a corresponding cover letter.

They were received in the Authority on 9/12/13. Can whoever sent them in advise their purpose?

The matter has been allocated to the list of Authority Member [RM] for investigation.

Regards

[Authority Officer] Support Officer

[9] Ms Dent replied the following day:

Good morning [Authority Officer]

I sent the documents to the ERA which arrived 9 December.

On 20 August 2013 I attended mediation with the DHB in Hamilton over the matters in the documents. There was no agreement. Since 20 August further bullying has been documented.

A further complaint was raised with the DHB on 29 October after further episodes of bullying including being raced over to HR for 'reasonable suspicion' drug testing.

The DHB response was to refuse to investigate new claims and to suggest I proceed to the ERA on the original claim.

That is the purpose of the bulk documents receipted on 9 December. Regards

Erin

[10] The two bundles were then placed on the file as “bundles of documents”.

[11] Due to illness the file was then reallocated to the current Member.

[12] A telephone conference was held with the parties on 23 May 2014. In the Minute<sup>9</sup> from that conference, it was noted Ms Dent’s original statement of problem had been overtaken by her dismissal. Ms Dent was directed to file an amended statement of problem. On 6 June 2014 an amended statement of problem was lodged.

[13] The Authority held an investigation meeting in Hamilton from 30 September to 2 November 2014. A determination was issued on 19 December 2014.<sup>10</sup>

### **Appeal**

[14] Ms Dent subsequently challenged that determination to the Employment

Court. In one of its judgments, the Court noted a submission by Ms Dent at a 4

November 2015 directions conference that she had raised further personal grievances in statements of problem that the Authority had not dealt with or were allegedly raised out of time. The Court stated those matters needed to go back to the Authority for determination or removal to Court. The challenge was adjourned until that process

could be concluded.<sup>11</sup>

### **Return to the Authority**

[15] Ms Dent lodged a statement of problem on 9 February 2016 in the Authority seeking removal to the Court of any outstanding grievances. The respondent lodged a notice of opposition to the removal because some grievances were raised outside of the 90 day time limitation.

[16] The matter was referred to the Member on 29 April 2016. A case management conference was held on 12 May 2016. The applications and issues for hearing were identified in the Minute<sup>12</sup> as set out below:

[2] Following discussions with Ms Dent and respondent counsel, the following applications are currently before the Authority:

(a) An application for leave to remove this matter to the Court pursuant to [s.178](#) of the [Employment Relations Act 2000](#) (the Act); and

(b) An application for leave to raise a personal grievance out of time pursuant to [ss.114\(4\)](#) and [115](#) of the Act.

[3] If application (a) is unsuccessful [then] application (b) seeks leave to raise three personal grievances as follows:

<sup>10</sup> See n 2 above.

<sup>11</sup> *Erin Therese Dent v Waikato District Health Board* [[2017](#)] NZEmpC 27.

(a) A personal grievance allegedly raised with Deryl Penjully by way of letter dated 13 March 2013;

(b) A post termination personal grievance against Kevin Harris regarding a memorandum dated 8 April 2015 he sent to staff which Ms Dent has only recently discovered; and

(c) A post termination personal grievance pertaining to “misallocation” of sick leave during periods the applicant was working which Ms Dent has only recently discovered.

[4] I understand Ms Dent is seeking leave to raise the personal grievances out of time pursuant to [s115\(a\)](#) and (b) of the [Employment Relations Act 2000](#). Section

115(a) requires her to show “exceptional circumstances” that require proof she “has been so affected or traumatised by the matter giving rise to the grievance” that she was unable to properly consider raising the grievance within [the] 90 day period since it occurred or was discovered.

[17] Ms Dent then indicated she had difficulties obtaining medical evidence from her psychologist. She was unable to obtain an appointment until early October. A hearing was set down in November 2016.

[18] Given the length of time until hearing, the parties were offered a settlement conference before another Authority Member. Although matters were unable to be resolved, Ms Dent did confirm by email she now wished to withdraw some of her grievances.

[19] A case conference was directed for 20 October 2016. Following some discussion, an oral determination was given

dismissing the application for leave and removal of all of the personal grievances. 13 The application for wage arrears arising from an alleged entitlement to a higher duties allowance was removed to the Court.

### **Appeal again**

[20] The Court subsequently heard an interlocutory issue about discovery and disclosure.<sup>14</sup> In the course of its judgment, the Court referred to an issue Ms Dent raised about pay parity. It noted that was not referred to in the Authority's determination of 20 October 2016. If it was raised within time and in a statement of

problem before the Authority, Ms Dent was required to return to the Authority "to

request that this grievance be investigated if that has not already occurred."<sup>15</sup>

### **Return to the Authority again**

[21] The Court's above comments and the file were referred to the Member by the Registry. A Minute dated 12 June 2017 sought submissions by 30 June 2017 on whether the issue of pay parity ought to be removed to the Court for determination on the Authority's own motion given it had similar matters before it.

[22] Respondent counsel emailed stating it had no idea what personal grievance the Court referred to in its judgement. It further alleged there has been no statement of problem identified where any claim for pay parity has been referred to. It also raised the possibility of this claim being out of time.

[23] Ms Dent was directed to identify where in her statement of problem she raised the pay parity cause of action.<sup>16</sup> The respondent subsequently sought confirmation that only the pay parity issue remained outstanding.

[24] The Authority directed Ms Dent confirm there are no other issues for investigation by the Authority other than the pay parity matter. Ms Dent then confirmed there were other issues.

[25] Ms Dent was then directed to identify what issues remain outstanding, i.e. that have not already been determined by the Authority in 2014 and have been raised in a Statement of Problem lodged in the Authority.<sup>17</sup>

[26] Ms Dent filed a table on 30 June 2017. This set out the issues she alleged were not determined from the December SOP and also the amended statement of problem dated 6 June 2014.

[27] An urgent telephone conference was directed for 3 July 2017. Unfortunately the parties were before the Employment Court in a settlement conference. Ms Dent later advised by email on 4 July that the challenge had not settled and that she now wished to apply for a rehearing.

<sup>15</sup> See above n7 at [18].

<sup>16</sup> Email Authority to parties dated 22 June 2017.

[28] On 10 July 2017 I issued a Minute directing the parties to address me about the outstanding issues and removal to Court. Ms Dent filed two documents headed "Submission of applicant re minute of Authority 10 July 2017" and "Memorandum of applicant re late filing SOP by Respondent". Within those documents Ms Dent sought a reopening of the investigation. The respondent filed its submissions in reply. Ms Dent was directed to file further documentation about the payment of filing fees which she has provided. She has also filed copies of emails between the Authority and her during that period of time and copies of the respondent's application seeking a stay of proceedings in the Employment Court.

### **Were proceedings commenced by the filing of the December SOP?**

[29] The commencement of proceedings requires two copies of a statement of problem in form 1 that complies with the regulations to be lodged with an Authority Officer. Regulation 5 of the [Employment Relations Authority Regulations 2000](#) sets this out below:

#### **5 Commencement of proceedings**

(1) Any person may commence proceedings before the Authority if that person wishes the

Authority to resolve any matter, being—

(a) an employment relationship problem; or

(b) any other matter in respect of which the Authority has jurisdiction.

(2) A person commences proceedings by lodging with an officer of the Authority 2 copies of an application that complies with these regulations.

(3) Except as provided in [regulations 9A, 10] and 12, the application must be in form 1.

[30] The regulations also require payment of a filing fee. The filing fee at that time was \$71.56. Regulation 6 sets out this requirement below:

#### **6 Statement of problem or matter**

(1) The application must—

(a) include a statement of the problem or matter to which the application relates; and

(b) be accompanied by the prescribed fee.

(2) The statement may deal with more than 1 problem or matter.

[31] The December SOP was set out in the required form 1. However only one copy was received. It was also not signed as required by form 1.

[32] Ms Dent submits she paid a filing fee into the bank account 03-0049-0002701-

028 on or about 21 November 2013. She also provided her bank account statement showing “18 November 2013 Employment R Auth BP \$71.56.” This was two weeks in advance of her sending the December SOP to the Authority.

[33] Regulation 6 requires that the filing fee be paid contemporaneously with the filing the statement of problem. This is prescribed by the words “accompanied by”.

[34] Despite these issues of non-compliance with the regulations, the Senior Authority Officer was directed to check the above information against the Authority’s records. She advised:

I could not find any proof of payment into the [Employment Relations Authority] account from Ms Dent. The bank account number she used is/was not the [Authority’s] account – [the Wellington Senior Authority Officer] checked on an old deposit book she had from Sept 2013

– the account then was **03-0049-0005128-26**. I have gone through the direct credit payments for the period of November 2013 and the two payments of \$71.56 on 20 November 2013 have both been matched to applications. I have been through all the unmatched direct credit payments and there aren’t any for \$71.56 from April 2013 through to June 2014.

[35] There is no record of Ms Dent paying a filing fee to the Authority as required by the regulations for the December SOP.

[36] From the email correspondence Ms Dent provided above, she never stated she wished to file a statement of problem at all in December 2013. In absence of any other record such as a filing fee or cover letter, the Authority Officer would not have processed the December SOP as commencing a new proceeding. It was not served in the usual way by the Authority. It was never referred to mediation as required by the

Act.18 The respondent was never required to file any statement in reply.

[37] Ms Dent was also directed on 26 May 2014 to file an amended statement of problem by 6 June 2014 which she did. This replaced any former statement(s) of problem. Although paragraph 4 of the amended statement of problem dated 6 June

2014 refers to a statement of problem dated 9 December 2013, it did not seek to

18 Section 159 [Employment Relations Act 2000](#).

preserve the claims therein. Even if the December SOP had been accepted as lodged, it was replaced by the amended statement of problem dated 6 June 2014.

#### **Opportunities to raise issues**

[38] I also take into account Ms Dent’s conduct during the relevant period. She was aware a filing fee needed to accompany the December SOP.

[39] From her submissions Ms Dent was also aware at the teleconference on 26

May 2014 the respondent wanted all matters heard at once and “did not want Ms Dent revisiting any issue with the DHB after this hearing.” An amended statement of problem was directed to be filed. The amended statement of problem dated 6 June

2014 should have contained all of her claims for investigation.

[40] At the start of the investigation meeting the parties were asked to identify the issues for hearing. Ms Dent did not refer to any pay parity issue or the December SOP. As recorded in the Determination itself:

[63] At the beginning of the first hearing day, ***the parties agreed the following issues are for investigation:***

(a) Was Ms Dent unjustifiably disadvantaged in her employment by the actions of the employer in issuing a written warning in relation to a complaint by Christine Haysom?

(b) Was Ms Dent unjustifiably disadvantaged in her employment by bullying behaviour by

Kevin Harris and Aileen McGowan?

(c) Was Ms Dent unjustifiability disadvantaged in her employment by the requirement she undergo a drug and alcohol test on 15 October 2013?

(d) Was Ms Dent's conduct incompatibility such that a fair and reasonable employer could

have dismissed her for it?

(e) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

(f) What remedies (if any) should be awarded?

[Emphasis added]

[41] The above issues either encompassed what Ms Dent complains were not investigated or Ms Dent did not raise additional matters for investigation at the time.

#### **Merits of problems allegedly not investigated in December SOP**

[42] For completeness I have also considered the merits of Ms Dent's allegation matters remain un-investigated from the December SOP. The below table sets out the problems Ms Dent alleges were not investigated and the reference she supplied to where it was raised in the December SOP. This information was contained in a table she supplied to the Authority on 30 June 2017. An additional column identifies the part of the determination dealing with each matter or an explanation of why the matter

may or may not warrant further investigation and/or removal.

Issue No		Problem	SOP Ref	Determination/Explanation
1		Pay parity other roster writers Medical Administrator position description (PD). I was on band D step 10 and they were on band E step 10 or higher (band E). Gynae roster person looked after 25 staff. I looked after 64	4 Dec [6]	Wage arrears subject to 6 year time limitation. May be removed given existing pay parity matter before Court.
2		Back pay five years pay parity PD same duties as myself	4 Dec [7]	Same claim as above.
3		Failure to pay higher duties for 14 months. Later giving that role to Karen Berry as a delegable duty and paid her band H, myself band D of MECA	4 Dec [9]	The higher duties allowance was removed to the Court by an earlier determination. <sup>19</sup>

4		Overtime for work done in 2008 to restore lost theatre data on 2 and 3 October 2008 6.5 hours and 3.5 hours	4 Dec [8]	This matter was determined in the context of the bullying allegations. <sup>20</sup> This is a matter for challenge.
5		Failure to log time in lieu hours 23 March 2013 invigilate doctor exam 8 hours pay on Saturday	4 Dec [74]	This matter was determined in the context of bullying by Mr Harris. <sup>21</sup>  This is a matter for challenge.

<sup>19</sup> See n4 above.

<sup>20</sup> See n 4 above at paragraph [112].

<sup>21</sup> See n4 above at paragraph [96].

7		No investigation into my serious allegations of conflict of interest between medical staff and employer impacting patient safety.	4 Dec [15]	This matter was determined. <sup>22</sup> Ms Dent now alleges there was a failure to investigate patient safety. That is not what the Dec SOP states. There is no basis for investigation of that concern.
12		HR failing a succession plan of covering my roster duties when I was on sick leave ie clerical relievers. Then I was disciplined on 26 September 2013 for work not done while I was on ACC leave, claims in a 29 October 2013 PG not investigated.	4 Dec [26]	There was a finding of substandard performance by Ms Dent. Ms Dent complained the attempts to manage her performance were bullying. I disagreed. <sup>23</sup> This is a matter for challenge.
16		In 2010 I asked to report to Libby MacEwan along with all other clerical staff. I was required to report to my tormentor compared to my role as rosterer to keep certain surgeons and anaesthetists apart – 4 April 2014 PG	4 Dec [41]	This matter was determined. <sup>24</sup> This is a matter for challenge.
17		DHB refusal to	4 Dec	This was determined in

	investigate further complaints of bullying against Aileen McGowan by myself considering the matter closed. In lodging a PG	[15]	the context of the allegations of bullying against Kevin Harris <sup>25</sup> and the report
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<sup>22</sup> See n 2 above at paragraphs [102] and [162].

<sup>23</sup> See n 2 above at paragraphs [128] and [129]

<sup>24</sup> See n 2 above at paragraph [104].

<sup>25</sup> See n 2 above at paragraph [92] ff.

	personally with Kevin on 29 October he refused to accept any further correspondence. Acknowledging PGs then dismissing me after receipt of 10 July PG and 29 October PG was a rebuttal presumption, even if not worded so.		provided about Ms Dent's allegations. <sup>26</sup> This is a matter for challenge.
18	Failure to investigate complaint against Christine Haysom as raised by lawyer on 18 July 2013. Christine had repeated I had accessed confidential patient information to Enoch Watene who told me. These are serious allegations set apart from the phone call. There was no questioning why the DHB did not do this investigation, or any other investigation.	4 Dec [79]	Paragraph 79 of the December SOP does not refer to any failure to investigate a complaint against Christine Haysom. There is no basis for further investigation.

**Merits of claims matters allegedly not investigated in Statement of problem dated 6 June 2014**

[43] There are no outstanding issues from the statement of problem dated 6 June

2014. All of the matters Ms Dent has identified in the table were before me at hearing. Ms Dent simply disagrees with my conclusions, seeks additional conclusions or to revisit them. The Authority is only required “to express a conclusion on the matters or issues it considers require determination in order to dispose of the matter.”<sup>27</sup> That is what has occurred. Ms Dent’s concerns are more properly explored

by way of challenge.

<sup>26</sup> See n 2 above at paragraph [136].

<sup>27</sup> Section 174E(a)(iii) [Employment Relations Act 2000](#).

### **Should this matter be reopened/removed?**

[44] The Authority has a statutory discretion to order the reopening of an investigation on *such terms as it thinks reasonable* and in the meantime to stay the effect of any order previously made.<sup>28</sup>

[45] The overriding consideration must be the interests of justice, having regard to the likelihood of a miscarriage of justice balanced against other relevant factors such as the importance of finality in litigation. A mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing.<sup>29</sup>

[46] Removal may be ordered where “<sup>30</sup>

[47] There is little or no evidence of any miscarriage of justice to found reopening the investigation. There were defects in lodging the December SOP. With the exception of the pay parity matters below, the remaining matters have either been determined or there are no particulars pleaded in the December SOP that warrant further investigation. Given the lengthy history of these matters, it now requires finality. I decline to reopen the investigation into Ms Dent’s employment relationship problems.

[48] the higher duties allowances has already been removed. The remaining pay parity matter is whether Ms Dent was entitled to be paid the same rate of pay as other medical administrators with rostering duties. Even if accepted for lodging today, this is within the six year time limitation for bringing a wage arrears claim<sup>31</sup> as Ms Dent was dismissed in 2013.

[49] The Court already has a similar pay parity matter that was removed early. It is also dealing with a challenge that will require investigation of the same factual matrix. It is in the best position to properly assess the success or otherwise of this matter. To require the parties to return to the Authority again to undertake the same or similar

exercise creates unnecessary cost.

<sup>28</sup> [Employment Relations Act 2000](#), Schedule 2, clause 4.

<sup>29</sup> *Young v Board of Trustees of Aorere College* [2013] NZEmpC 111 at [9].

<sup>30</sup> Section 178(2)(c) [Employment Relations Act 2000](#).

<sup>31</sup> Section 142 [Employment Relations Act 2000](#).

[50] Ms Dent has now lodged a claim for wage arrears arising from whether she was entitled to be paid the same rate of pay as other medical administrators with rostering duties. This matter is to be removed to the Court to determine.

### **Outcome**

[51] The application for reopening is dismissed.

[52] The matter of Ms Dent’s pay parity with other medical administrators with rostering duties is removed to the Court pursuant to [s178\(2\)\(c\)](#) of the [Employment Relations Act 2000](#).

[53] Costs reserved. If either party seeks an order for costs a memorandum shall be filed and served 28 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**T G Tetitaha**

**Member of the Employment Relations Authority**

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