IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 186
5583207

	BETWEEN	LYNDA MARIE EMMERSON Applicant
	A N D	NORTHLAND DISTRICT HEALTH BOARD Respondent

Member of Authority:	T G Tetitaha
Representatives:	S Henderson, Counsel for Applicant S Hornsby-Geluk, Counsel for Respondent
Investigation Meeting:	9 June 2016 by teleconference
Submissions Received:	27 May 2016 from Applicant 9 June 2016 from Respondent
Date of Determination:	9 June 2016

DETERMINATION OF THE AUTHORITY

A. The application for removal is dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Lynda Marie Emmerson has filed a personal grievance application alleging she was unjustifiably dismissed and disadvantaged by various actions of the Northland District Health Board. She now seeks to have those applications removed to the Employment Court for hearing.

Background

[2] Given its relevance to one of the grounds for removal, it is necessary to set out the background in the Authority to the current application.

[3] The statement of problem and an application for urgency seeking reinstatement was filed on 21 September 2015. It alleged a personal grievance of unjustified dismissal and disadvantages.

[4] A teleconference was held on 23 September 2015. The then Member directed the parties to mediation on 23 October 2015 in Whangarei. A hearing date was set down for 18 to 22 January 2016 with two possible extra days on 14-15 January 2016. She had also sought specific submissions and evidence be filed about the personal grievances and the remedy of reinstatement. She indicated an oral determination may be given at the end of the hearing.[1]

[5] The statement in reply was filed on 6 October 2015.

[6] On 30 October 2015 the respondent filed a Memorandum seeking an adjournment because the applicant had indicated she intended calling a number of witnesses whom were NDHB staff creating staffing shortages. In January a large number of the witnesses were still on annual leave, including the respondent witnesses.

[7] The file was reallocated to accommodate the possible changes in hearing. A teleconference on 6 November 2015 set down this matter for hearing on 25 and 29 January 2016 and 2 and 3 February 2016 in Whangarei.[2] Specific information was sought from the applicant about her witnesses and the alleged unjustified disadvantages including whether some or all formed part of the unjustified dismissal grievance.

[8] A list of witnesses was filed by the applicant on 11 November 2015 seeking to summons up to 16 witnesses many of whom were employed by the respondent. She also filed draft briefs of evidence for each of the summonsed witnesses.

[9] On 20 November 2015 the applicant filed her brief of evidence and an amended statement of problem.

[10] On 3 December the respondent filed a Memorandum seeking confinement of the hearing in January to the issues identified at paragraphs paras.1, 2(A), 2(B) and 2(C) of the amended statement of problem or an adjournment of the hearing. This is

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1 Minute emailed to parties dated 23 September 2015.

2 Minute dated 6 November 2015.

because Ms Emmerson was suing two respondent employees for defamation in the High Court at Whangarei (CIV-2015-488-00156) for the same acts that gave rise to her there were unjustified disadvantage claims. It sought to prevent duplication of the defamation proceeding here.

[11] In my Minute dated 10 December 2015 I noted there was a 90 day time limitation issue in respect of the unjustified disadvantage grievances that would need to be determined before those grievances continued to hearing. This included the alleged actions of the respondent employees being sued for defamation.

[12] In order to preserve the hearing time available and to address the most urgent issue of reinstatement, I directed the issues for the hearing on 25 January 2016 were:

(a) Whether the applicant was unjustifiably dismissed?

(b) Whether the applicant should be reinstated to her former position or one no less advantageous?

(c) Whether the unjustified disadvantages/actions set out in paras. 2(D)-(I) have been raised with the employer within 90 days?

(d) If not, whether leave should be granted to raise these personal grievances out of time, i.e. are there exceptional circumstances warranting the granting of leave and is it just to do so?

[13] The parties were directed to confer about numbers of witnesses. If the parties were unable to agree the matter was to be determined at a teleconference before me on 23 December 2015. The applicant was directed to file a table listing the dates and events she alleges gave rise to the unjustified disadvantages. No table was filed.

[14] The parties were unable to agree about witnesses and the applicant sought a teleconference. The Registry attempted to contact the applicant's lawyers on 23 December 2015 for the teleconference but they were unavailable. The respondent's lawyer was available to attend.

[15] Given the urgency of this matter I issued a Minute determining the witnesses I required for hearing in January 2016 given the imminent close down over the Christmas period and hearing in January 2016. These were the applicant, witnesses about the seriousness of the conduct, the employers' investigators and the employers

decision maker. I could not ascertain what additional witnesses were required for the time limitation issue around the disadvantage grievances as no table had been filed. The applicants' evidence including the draft witness briefs did not provide any further elucidation on this point. All other witness summonses were discharged.

[16] On 8 January 2016 the applicant filed a further Memorandum seeking disclosure within 7 days. I directed further disclosure about the decision maker's responses to the applicant's allegations about breaches of the NDHB Medication Prescribing policy. I declined to grant the remaining disclosure sought because it was irrelevant to the hearing in January.

[17] The hearing started on 25 January and continued until 28 January 2016. Unfortunately the hearing had to be adjourned to allow the respondent to seek new counsel. This is because during cross-examination Ms Emmerson raised for the first time an allegation the then respondent counsel, David Grindle, had advised during a telephone conversation that the respondent had cancelled the last meeting between her and the decision maker because of her Facebook postings. The respondent wished Mr Grindle to give evidence denying this occurred and wished to instruct alternative counsel. I granted the adjournment as a consequence.[3] The parties were also directed to further mediation.

[18] A further teleconference was held 8 March 2016 for the purposes setting this matter down for hearing. Ms Hornsby-Geluk had been instructed for the Respondent. The issues to be determined at hearing were identified as follows:

a) **Serious misconduct:** There is an acceptance Ms Emmerson wrote her defacto partner a prescription for a drug of dependency and/or psychotropic drug. Ms Emmerson denies that she was aware that this was inappropriate.

b) **Process leading to dismissal:** Ms Emmerson accepts all of the respondent's concerns were properly raised albeit in an unfocused way i.e. with several concerns being raised but only one pursued at the disciplinary hearings. She says she uncertain about what she was up against during those disciplinary meetings. As a result, she was 'scattered' in her approach when providing any reply. There is an issue about there being no final face-to-face meeting. She believes that it should have been held irrespective.

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[3] Minute dated 29 January 2016.

[19] The matter has been set down for a 5 day hearing from 11 – 15 July 2016 in Whangarei. The applicant was directed to file additional evidence by 29 April 2016 from an overseas former employee and specific evidence about her ability to be reinstated including evidence about her personal health and professional certification to resume practice. No evidence has been filed.

[20] The applicant was also directed to file a further amended statement of problem particularising the unjustified disadvantage grievances by 1 July 2016.

[21] Ms Emmerson now seeks to have the matter removed to the Employment Court.

The application for removal

[22] In summary the applicant alleges there are 5 important questions of law arising in this matter other than incidentally and her case is of such a nature and of such urgency that it is in the public interest it be removed immediately to the Court.

[23] Sections 178(2)(a) and (b) of the Employment Relations Act 2000 allow for removal of a matter if "an important question of law is likely to arise in the matter other than incidentally" or "the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court".

[24] An important question of law may arise if[4]:

- resolution can affect large numbers of employers or employees or both;
- if the consequences of the answer to the question are of major significance to employment law generally;
- it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[25] This is a two stage test. I must first find one of the grounds under s178(2) is proven and then consider whether to exercise my discretion to remove the matter.

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[4] *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 (EmpC) at 7.

Is there an Important Question of Law?

Can an employer justify a dismissal on the basis that the decision-maker did not know of relevant exculpatory matters, particularly where the decision-maker was given by the employer, or chose not to consider, such information with the result that the decision to dismiss was made in the absence of such information?

[26] Section 103A of the Act sets out the legal tests for justification of dismissal action by an employer. Whether the evidence in this matter meets the legal tests for justification is a determination well within the role of the Authority. This is not an important question of law.

What is the correct approach to determining compensation for a person who has lost a career requiring extensive and costly training due to an unjustified dismissal?

[27] There are well established legal principles for the method of establishing the amount of compensation awarded for personal grievances of unjustified dismissal.[5] This is not an important question of law.

Is there a heightened standard of investigation where an employee is facing loss of an entire career in a chosen field and, if so, what is the standard in this case?

[28] The standard of investigation required is set out in s103A of the Act namely "what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred". The burden of proof lies with the respondent employer to justify its actions to the civil standard of the balance of probabilities.[6] 'Career ending' dismissals of professionals including doctors[7] are sadly not unusual and in itself does not raise an important question of law.

Is it proper for an employer to raise a number of serious allegations against an employee, but then choose not to investigate or make any decision in relation to those, when the existence of such allegations is relevant to allegations the employer chose to pursue?

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5 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381; *Trotter v Telecom Corp of New Zealand Ltd* [1993] 2 ERNZ 659; *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA); *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA).

6 *Wellington Road Transport etc IUOW v Fletcher Construction Co Ltd* (1983) ERNZ Sel Cas 59 (AC) (*Hepi's case*) at 62.

7 See for example *X v Auckland District Health Board* [2007] ERNZ 66.

[29] This is an allegation about the factual matrix leading to dismissal. It is alleged employer conduct to be determined against the statutory tests set out in s103A of the Act. This is not an important question of law.

Does an employer have a duty to ensure that a complaint it makes to a registration body about its employee has a reasonable basis before it is made?

[30] This may be irrelevant because I understand the complaint was made by a work colleague pursuant to her ethical obligations. It was not an act authorised by this respondent employer.

Is there public interest in removing this case?

[31] Issues of public welfare in the prescribing practices at the Whangarei Hospital are more appropriately dealt with by the Health and Disability Commissioner and the Medical Council of New Zealand. The applicant has complained to the Ministry of Health. It is more appropriate that the Ministry address any issues of public welfare that arise.

[32] The applicant has already sought publication of my determination. Any public interest in the outcome of her application shall be met by that order.

[33] Complaints about delays occasioned by the structure of the hearing process are unwarranted and cannot be challenged under s179 of the Act. This must also indicate it is cannot be a factor in determining any removal to the Court under s178(2)(b). As can be seen from the above background, any delay has not been occasioned by the Authority or its processes. This matter is part heard and has a hearing date set down to start on 11 July 2016. This matter may be given an oral determination. It is likely to be resolved more quickly in this jurisdiction then by removal to the Court.

[34] Complaints about lack of disclosure as a basis for removal are also unwarranted. As indicated in my Minute dated 12 January 2016 directions for relevant information sought to be filed have been hampered by the lack of specificity around the unjustified disadvantage grievances. My powers under s160(1) of the Act are not to be used by parties as a 'fishing' exercise. The information must be shown to be relevant. The applicant is yet to file the information directed identifying the dates and events that give rise to the unjustified disadvantages. Until this has been

filed, it cannot complain about disclosure or the inability of the Authority to direct it be provided.

Should I exercise my discretion to remove this matter in any event?

[35] Even if the grounds under s178(2)(a) and (b) of the Act were made out, I would decline to exercise my discretion to remove this matter. This is because[8]:

(a) There were a number of questions of disputed fact that Parliament had intended be dealt with at first instance by the Authority.
(b) This matter is part heard.
(c) This matter has been set down for resumption on 11-15 July.
(d) An oral determination may be given at the end of submissions.
(e) It is likely the principle matters of concern namely reinstatement may be resolved as early as July 2016.
(f) There is a statutory right of challenge to a determination of the Authority and this may be by de novo hearing.
(g) To exclude the Authority's investigative problem-solving and decision-making would deprive the parties of one general "right of appeal".

Determination

[36] The application for removal is dismissed.

[37] Costs are reserved. The respondent had indicated it was content to seek costs be awarded at the Authority's notional daily tariff for a ½ day hearing which is $1,750. The applicant submitted she was impecunious. I had understood she was working or capable of working and owned a house in Whangarei.

[38] The applicant is to file any evidence and submissions about costs by 15 June 2016. The respondent may file anything in response by 22 June 2016.

T G Tetitaha
Member of the Employment Relations Authority

[8] *NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 74 (EmpC) at 83.