IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 47
5319086

	BETWEEN	JIM GORMAN Applicant
	A N D	SOUTHERN DISTRICT HEALTH BOARD Respondent

Member of Authority:	James Crichton
Representatives:	Jock Lawrie, Counsel for Applicant Janet Copeland, Counsel for Respondent
Investigation Meeting:	15 March 2011 at Invercargill
Date of Determination:	8 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gorman) alleges that he was unjustifiably dismissed from his employment by the respondent (the Board). The fundamental issue for determination here is whether Mr Gorman raised his personal grievance within the statutory 90 day period. The Board contends that he did not, that it does not consent to his raising the grievance out of time, that there are no exceptional circumstances that would warrant the granting of leave to raise the grievance out of the time and that it would not just for the Authority to grant the relief sought.

[2] Mr Gorman was employed by the Board as a registered nurse in February 2006. At the time that his employment with the Board came to an end, he was employed in the Assessment, Treatment and Rehabilitation Unit (AT & R). By letter dated 15 September 2008, the Board had referred Mr Gorman's professional practice

to the Nursing Council of New Zealand because of concerns about his clinical competence.

[3] Then, after a succession of contacts between the parties, there was a meeting on 28 May 2009 at which the Board told Mr Gorman that his employment would be terminated by the giving of four weeks notice. The consequence of that announcement was that Mr Gorman's last day of employment with the Board was 26 June 2009.

[4] By letter dated 29 January 2010 the Nursing Council communicated its view that Mr Gorman was competent to practice and by letter dated 26 February 2010, Mr Gorman raised a personal grievance for unjustified dismissal.

[5] The essence of the claim advanced by Mr Gorman is that in bringing his personal grievance claim within 90 days of the decision of the Nursing Council to determine him fit to practice, he has complied with the terms of s.114 of the Employment Relations Act 2000 (the Act) . That requires a personal grievance to be raised within the 90 days beginning with the date on which the action alleges to amount to the personal grievance occurred or came to the notice of the employee, which ever is the later. In the alternative, if the Authority finds that the grievance has not been raised within the 90 day statutory period, then leave is sought to raise the grievance out of time.

[6] Conversely, the Board argues that the termination decision was notified by it to Mr Gorman on 28 May 2009 and took effect on 26 June 2009 and that the raising of the grievance on 26 February 2010 cannot be within time. The Board says the employment relationship was between itself and Mr Gorman and it was its decision to dismiss which ought to have been the fulcrum for Mr Gorman's raising of a grievance, not the subsequent decision of the Nursing Council to find Mr Gorman fit to practice. In the event the Authority finds for the Board in that regard, the Board also urges on me the proposition that there are no exceptional circumstances and that it would be unjust to grant leave to bring the personal grievance out of time.

Issues

[7] For reasons just sketched above in this determination, it will be helpful if the Authority considers first the question of whether a personal grievance was raised within time and second the question of whether leave should be granted for the

personal grievance to be raised out of time, assuming the Authority makes a finding that the personal grievance was not raised within time.

Was the grievance raised within time?

[8] I am satisfied on the evidence before the Authority that the personal grievance was not raised within time. It seems to me inevitable that in order for the Authority to conclude that the grievance was raised within time it would be necessary for the Authority to decide that it was the finding of the Nursing Council notified to the parties on 29 January 2010 that Mr Gorman was fit to practice clinically, that gave rise to the personal grievance. But I accept the submission of the Board in this regard that it cannot be the position that the decision of the third party (albeit an important third party) notified some eight months after the dismissal, determines whether or not the dismissal decision made by the employer ought to be challenged.

[9] Put another way, Mr Gorman has a right to challenge the decision made by his employer to dismiss him but that right exists because of the employment relationship between those two parties. The decision of a third party, conveyed eight months after the employment relationship had come to an end, cannot logically found a complaint about the actions of the employer eight months previously. In order for the Authority to conclude in that way, it would be necessary for the Authority to find that the personal grievance was not a claim of unjustified dismissal made against the employer so much as a claim somehow directed at the efficacy of the Nursing Council's process. If, as Mr Gorman's statement of problem claims his complaint is a complaint that he has been unjustifiably dismissed from his employment by the Board then it must be the circumstances surrounding that dismissal which are being challenged. And of course, those circumstances, whatever they were, were known at or around the time of the dismissal and not eight months later.

[10] The next issue for the Authority to consider is the efficacy or otherwise of a statement made by Mr Yeats, the Nurses Organisation organiser at the dismissal meeting on 28 May 2009. Mr Yeats was in attendance as Mr Gorman's support person, Mr Gorman being a member of the Nurses Organisation. It is common ground that Mr Yeats referred to the prospect of a personal grievance being raised by the Nurses Organisation on behalf of Mr Gorman if the Nursing Council found Mr Gorman fit to practice. There is dispute about the extent to which Mr Yeats went in his remarks; Mr Yeats maintains that he said that if the Nursing Council found

Mr Gorman competent to practice then NZNO would take a personal grievance whereas the Board's recollection is that Mr Yeats said something more to the effect that the NZNO may need to look at taking a claim.

[11] Either way, clearly there was a discussion about the issue and Mr Gorman's advocate was making it plain that if the Nursing Council in effect ratified Mr Gorman's professional competence then a claim was at least likely and might well be inevitable. The question for the Authority to resolve here is whether Mr Yeats' observations at that 28 May 2009 meeting assist Mr Gorman in persuading the Authority that a grievance has been raised. The answer must be that Mr Yeats' observations, while well intentioned, make no difference to the position. The law is clear that in order for a grievance to be validly raised that grievance must be specified with sufficient particularity to enable the employer to address it. There is no particular form of words which is required and it is clear law that a grievance can be raised orally but it is not sufficient simply to talk about a grievance without identifying what it is that the employer must put right in order for the grievance to be appropriately addressed. A particularly difficulty with the facts in the present case is that all Mr Yeats could be said to be doing is foreshadowing a future intention to raise a grievance and plainly that is not enough: *Creedy v. Commissioner of Police* [2006] ERNZ 517 (Employment Court).

[12] It was clear from Mr Yeats' evidence before the Authority that his considered view was that there was no grievance unless and until the Nursing Council had delivered its view that Mr Gorman was fit to continue his practice as a nurse. Had the Nursing Council produced the alternative decision (and plainly on the evidence the one that the Board and its witnesses expected) namely that Mr Gorman was not fit to continue his practice as a nurse then there would have been no question of a personal grievance being raised. As I understood Mr Yeats' evidence this was because the Nurses Organisation sought only to protect members who were competent to practice. Of course, at the time that the parties were discussing this matter on 28 May 2009, neither of them could have had it in their contemplation that the Nursing Council would take as long as it did to decide on Mr Gorman's competence. It seems a fair inference to draw from the evidence in front of the Authority that both parties expectation was that the Nursing Council would make a prompt decision on the matter while Mr Gorman remained in the employment of the Board. That it took the Nursing Council as long as it did to determine this matter reflects badly on the Nursing

Council and does them no credit whatever. By the unconscionable delay in dealing with this issue appropriately, they have caused both parties considerable distress as well as calling into question with many senior nurse practitioners their whole process and utility.

[13] When the Board decided that Mr Gorman was not fit to practice as a registered nurse and referred his practice to the Nursing Council, it promptly took steps to remove him from clinical practice. Mr Gorman was retained in the Board's employment working primarily in medical records after a period of special leave. There was an argument between the parties about the rate of Mr Gorman's pay during the period that he was not working as a registered nurse but that is not relevant to the present dispute. The short point is that the Board took steps to remove Mr Gorman from clinical practice as soon as it became anxious about his professional competence and it kept him employed for around nine months before it concluded that it was unable to employ him indefinitely in a role other than that for which he was originally engaged.

Should Mr Gorman be allowed to bring his grievance out of time?

[14] The first question for determination here is whether there are exceptional circumstances which would justify Mr Gorman's failure to raise his grievance within time. A non-exclusive list of circumstances which might constitute exceptional circumstances is contained in s.115 of the Act. Despite Mr Gorman's pleadings, on the face of it none of those categories would seem to apply. Mr Gorman's pleadings proceed on the basis that sub-clause (a) of s.115 applies. That sub-clause provides for circumstances where the applicant employee has been so affected or traumatised by the circumstances of the grievance that he or she has been unable to consider raising it within the statutory period. To suggest that that exception fits the case is I think to do violence to the facts. The factual position is that Mr Gorman simply chose not to take steps until it became clear that, rather against the run of play it seems, the Nursing Council concluded that he was fit to practice. There was no evidence of trauma before the Authority nor any evidence that Mr Gorman was so "affected" by the circumstances giving rise to the grievance that he was unable to deal with the matter appropriately. Indeed, all the evidence suggests it was a conscious decision by Mr Gorman and his advisers not to raise a grievance unless and until the Nursing Council had made a positive determination in Mr Gorman's favour.

[15] The inevitable consequence of those conclusions is that the Authority's view is that there are no exceptional circumstances in the present case.

[16] However, in order to do justice to Mr Gorman's argument and for the avoidance of doubt, it is appropriate for the Authority to comment on the detail of his argument. In essence Mr Gorman says that the Board's dismissal of him was "predicated upon the Nursing Council referral". But that is not what the Board says. The Board's evidence, which I prefer, is that the Board determined that Mr Gorman was not professionally competent and that as a consequence of that independent finding which it says it was entitled to make as employer, it referred Mr Gorman's practice to the Nelson Nursing Council, as it was obligated to do.

[17] The Board's view then is that it was its decision to remove Mr Gorman from professional practice and that is precisely what it did once it became concerned enough about Mr Gorman's professional practice to doubt his care of patients in the Board's charge. All of the Board's actions it seems to me, are consistent with the Board's initial finding (and a finding made of its own notion) that Mr Gorman was not fit to practice. It is true that the Board referred the issue to the Nursing Council but it was obligated to do that because it had already reached its own concerns about Mr Gorman's professional ability. Because it had reached those conclusions itself, the Board promptly removed Mr Gorman from clinical practice and refused to allow him to practice clinically again for the balance of his employment.

[18] Those actions I hold are absolutely consistent with the Board's conclusion that Mr Gorman was not fit to care for patients and it was within the Board's remit to make such a decision for itself. So I reject Mr Gorman's submission that the Board's behaviour is consistent with his view that its decision was predicated on the referral to the Nursing Council. As I say, I think that puts the cart before the horse. The Board first reached a conclusion about Mr Gorman's professional practice and as a consequence of that conclusion, which it was the Board's to make, Mr Gorman was removed from patient care duties. Those decisions I find were absolutely consistent with the Board's initial determination that Mr Gorman was not fit to practice and its subsequent referral of him to the Nursing Council. Because its own decision about his competence had to proceed the decision to refer him to the Nursing Council, (there would have been no basis to refer him otherwise), its own decision is the one which Mr Gorman ought to have challenged and he ought to have challenged it at the time.

[19] Mr Gorman pleads that the reason given for his dismissal was that he could not undertake his clinical duties while the Nursing Council referral was in process. It is true that the wording of the various documents including the letter of dismissal all suggest the interpretation that the Nursing Council referral was relevant. But I am satisfied that the Board's decision to dismiss was reached because it effectively lost patience with the interminable process of the Nursing Council and was simply unable to continue Mr Gorman in employment in a role for which he was not recruited. It is also appropriate to remark that as well as referring to the then incomplete Nursing Council review, the Board also referred to its own conclusions in respect to Mr Gorman's competence and made clear that the reason he could no longer practice was because it had doubts about his clinical ability.

[20] The third reason advanced by Mr Gorman for the view he seeks to impress upon the Authority is the absence of disciplinary action taken against him by the Board. Mr Gorman refers to the conclusion of two senior nurse practitioners in particular, both of whom thought that he was unsafe or potentially unsafe to practice clinically. The fact that the Board did not discipline him is considered significant. I do not accept that submission. First, the Board had no need to take any further steps because as soon as it reached the conclusion that Mr Gorman might be injurious to patients by reason of his lack of professional ability, it removed him from any clinical interface so the issue could not arise. Second, this was not a disciplinary issue but a performance issue. There was no suggestion that Mr Gorman was as it were behaving badly; the suggestion was that he was behaving incompetently. Had the Board taken any steps in addressing the issue after removing Mr Gorman from clinical practice, it might have contemplated further performance management steps of the sort which it had clearly undertaken prior to its decision to remove him from clinical practice.

[21] Given the decision to remove Mr Gorman from interface with patients, any further action by the Board was completely unnecessary.

[22] Mr Gorman's conviction that the Board had impliedly accepted the primacy of the Nursing Council's decision on the matter, when it indicated in its evidence that had the Nursing Council's decision come back during Mr Gorman's employment, the Board would still have had to reach its own definitive conclusions, is also misplaced. In my opinion, the Board's evidence on that point simply emphasises its role as employer and the primacy of its decision making rather than the decision making of a

third party. Clearly, what the Board is saying is that if the Nursing Council had, during the course of the employment, opined that Mr Gorman was fit to practice, the Board would itself have needed to reach its own independent conclusion as it, and not the Nursing Council, was responsible for patient safety. All that evidence does in my view is to again emphasise that it was the Board's responsibility to make decisions about Mr Gorman's fitness and it was not proposing to abrogate that decision to anybody including the Nursing Council.

[23] Mr Gorman urges on me the proposition that the legal definition of *exceptional circumstances* as refined by the Supreme Court decision in *Creedy v. Commissioner of Police* [2008] NZSC 31 simply requires him to show that the circumstances were *unusual*. While reliance on the dicta in *Creedy* is important as the leading case on the interpretation of the phrase *exceptional circumstances*, the factual matrix does not in the Authority's opinion meet the test. In particular, the Authority is not attracted by Mr Gorman's argument that the fact that he was referred to the Nursing Council whilst still in the employment made for a unique situation as did the inordinately long process undertaken by the Nursing Council. I do not accept those circumstances.

[24] First, and most importantly, the factual matrix simply does not support the conclusion that the process was unique or that the length of time taken by the Nursing Council was somehow determinative of Mr Gorman's decision or not to act. As to the first point, I prefer the evidence of the Board which suggests that there had been previous examples of nurses referred to the Nursing Council whilst still in the employment. Even if that is not so, the delay occasioned by the inordinately delayed process of the Nursing Council did not affect or have any impact on the decision taken by the Board as Mr Gorman's employer to dismiss him from its service. As I have already found, the Board was the decision maker, the Board made the initial decision about Mr Gorman's professional competence and having made that decision, then referred the matter to the Nursing Council, as it was obligated to do. But it was the Board's decision first and foremost and it was the Board's decision which is open to challenge. The fact that the Nursing Council took an inordinately long time to make its decision and that it may have been unusual that Mr Gorman remained in the employment while time passed, is not the issue.

[25] Even if my conclusion that there are no exceptional circumstances here is a mistaken one, I am driven to accept the submission of the Board that a proper construction of what happened is that Mr Gorman was fully aware of the basis of his dismissal at the time it took place, had the benefit of proper professional advice at the same time but chose not to protest the decision. The Board's conclusion that Mr Gorman was incompetent was plainly not a decision that he shared. He could have protested the decision immediately it was made or within the 90 days thereafter. All that changed when the Nursing Council made its determination was that somebody else agreed with Mr Gorman's own assessment that he was not in fact incompetent. But as I have already made clear, that assessment by the Nursing Council not only surprised the Board (and many of its senior clinical staff) but also, and more importantly, changed nothing so far as the Board was concerned. The Board still thought that Mr Gorman was incompetent and they did not wish to employ him in a clinical role because of that assessment. It was the Board's assessment that mattered and it was the Board's assessment that Mr Gorman should have challenged at the appropriate time.

[26] Finally, I need to turn to assessing the justice of the case and I conclude that it would not be just to grant leave to Mr Gorman to bring his grievance out of time. The sheer passage of time since the dismissal which Mr Gorman now seeks to challenge will, in my opinion, grossly prejudice the Board in its defence of any claim. In particular, there is no ability whatever for the Board to deal appropriately with the resolution of Mr Gorman's grievance as the statute fundamentally requires. Evidence gathering to justify the decision will be more difficult because of the passage of time. Understandably, the Board notes that it was fully a month after the Nursing Council issued its decision that the personal grievance was raised thus creating a further and unexplained delay in bringing the matter to its attention.

[27] What is more, the law clearly suggests the Authority must turn its attention to the substantial merits of the case in assessing whether it is just to allow the grievance to be pursued out of time. The remarks of Judge Travis in *Melville v. Air New Zealand Ltd* [2010] NZEM PC87 are illustrative of the legal requirement. In the present case, it is difficult to see how Mr Gorman can claim to have a strong arguable case. There were extensive efforts made by the Board to address Mr Gorman's performance deficits over a significant period of time. The evidence suggests that Mr Gorman was reluctant or even resistant to participating appropriately in those

measures. A particular professional mentoring programmed designed to assist Mr Gorman to *come up to speed* was aborted midway through because of Mr Gorman's reluctance to engage. The Board undertook extensive medical assessment of Mr Gorman to try to understand if there were any health issues which had an impact on his unsatisfactory performance. A period of leave was provided and a job away from clinical practice found for a period.

[28] None of these steps seem to me to be the steps of an unreasonable or unjust employer and the totality of the Board's behaviour seems to the Authority redolent of a fair and reasonable employer acting in a reflective and measured fashion when confronted with grave professional deficits in a work environment where patient safety is a fundamental driver.

[29] I conclude that if Mr Gorman has any grounds for a personal grievance, they are weak indeed.

Determination

[30] For the forgoing reasons I conclude that:

(a) Mr Gorman did not bring his personal grievance within the statutory 90 day timeframe;

(b) There are no exceptional circumstances which would justify consideration of granting leave to raise the grievance out of time or in the alternative if there are exceptional circumstances they did not occasion the failure to raise the grievance within time;

(c) In any event it would not be just to grant leave to raise the grievance out of time.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority