

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 12
5465092

BETWEEN DAPHNE DOREEN HAY
 Applicant

A N D GISBORNE DISTRICT
 COUNCIL
 Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant
 Libby Brown, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 27 November 2015 from Applicant
 11 December 2015 from Respondent

Date of Determination: 11 January 2016

FIRST DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem filed in the Authority on 16 July 2015, the applicant (Ms Hay) alleges that her employer, the Gisborne District Council (the Council), breached the terms of her employment, breached its duties of good faith and by unjustified actions caused her a personal grievance by way of disadvantage.

[2] The Council's initial response to the statement of problem was reviewed by another member of the Authority to deal with an allegation that without prejudice correspondence was both referred to in the statement in reply and attached to that document. In the result, the Authority directed that a paragraph from the statement in reply be deleted and that three documents be removed. Those instructions were complied with by the Council and an amended statement in reply was filed on

12 August 2015. For the avoidance of doubt, I confirm that I have not seen any of the offending material.

[3] In the amended statement in reply, the Council first alleges that no valid personal grievance was raised, second confirms it does not consent to the grievance being raised outside of the justiciable period and third seeks the determination of whether the matter was filed within time or not.

[4] It is important to note that the Council's allegation is that the practical effect of the Authority's ruling directing that certain correspondence be removed from the statement in reply document, is to remove from consideration the very document which Ms Hay says raised her personal grievance within time.

[5] Without having that document before the Authority, it is contended by the Council that the personal grievance was never raised until Ms Hay filed her statement of problem in the Authority.

[6] That stance not unnaturally provoked a response from Ms Hay's advocate and this was filed on 13 August 2015. In that memorandum, Ms Hay's advocate first addresses the removal of the documents directed by the Authority and indicates agreement with the Authority's direction in respect to two of the documents but only partial agreement in respect of the third. Ms Hay's advocate (Mr Austin) advances the proposition that the third document (for ease I refer to this as document 23 as the parties do), ought to have been amended so as to redact the portion of the letter that is plainly subject to the privilege (because it makes an offer to settle), but to leave the rest of the letter on the record for the very practical reason that the rest of the letter raises a personal grievance of precisely the type pleaded in the subsequently filed statement of problem.

[7] Document 23 is dated 13 June 2014. On the argument advanced for Ms Hay then, her personal grievance was not raised when the statement of problem was filed at all but was raised when the Council received Ms Hay's then counsel's letter raising a personal grievance and dated 13 June 2014.

[8] Mr Austin, in his memorandum of 13 August 2015, then goes on to allege that the Council has taken advantage of the Authority's direction to redact a portion of the statement in reply and remove certain documents from it and rather than do exactly what the Authority directed and no more, has redrafted the statement in reply and

then filed an amended statement in reply which goes further than the directions of the Authority.

[9] Mr Austin seeks a direction from the Authority that the filing of the amended statement in reply be rejected and that the Council be directed to file a statement in reply which complies strictly with the Authority's directions and no more.

[10] Next, Mr Austin proposes that there be a direction to mediation once the preliminary matters before the Authority have been dealt with and finally Mr Austin submits that Ms Brown, instructed as counsel for the Council, ought to cease acting because she will likely be required by the Authority as a witness. I observe without making any additional comment at this point in the determination that it is certainly the case that Ms Brown (previously Ms Inger) acted for the Council from an early stage in the proceeding and has retained management of the file despite moving firms.

[11] When the file came onto my list, I convened a telephone conference with the representatives on 13 November 2015 and after a helpful discussion agreed that I would deal with what now, by common consent, were three preliminary matters on the papers after receipt of written submissions from the parties.

The issues

[12] Those three issues are respectively:

- (a) The scope of the amended statement in reply filed in response to the Authority's Minute of 7 August 2015;
- (b) The allegation that the personal grievance has been raised outside of the justiciable period; and
- (c) The question whether Ms Brown should recuse herself.

The amended statement in reply

[13] I observe at once that I am at something of a disadvantage in addressing part anyway of Mr Austin's submissions on this point as I have not seen the original statement in reply; nor should I have given the direction my colleague, Member Tetitaha, made in her Minute of 7 August 2015 which had the effect of requiring the Council to redact a paragraph from the statement in reply then on the Authority's file

and refile it with the deletion of three documents which were attached to the original filing.

[14] Mr Austin alleges that the Council has taken advantage of the Authority's direction and filed a document which is materially different from the original statement in reply in that the respondent has taken the opportunity of removing certain other paragraphs as well as the paragraph that the Authority directed must be redacted.

[15] Because I have not had the benefit of reviewing the documents myself, I am not prepared to make any definitive ruling on the propriety of the changes made by the Council. It seems to me that the general principle ought to be that parties determine for themselves how they plead their case and especially in the case of the responding party, their pleadings will represent their response to the allegations they confront.

[16] In the present case, it may be that I will need to engage with the representatives again to further address this point, especially if it is necessary for either party to further amend their pleadings, but for now I am happy to rest on the footing that I am not persuaded I should make any direction to the Council to withdraw its current amended statement in reply and refile it.

[17] Mr Austin's submissions in respect of the legal position on statements in reply are accurate but we must take a practical approach. The Council filed its statement in reply and that document was immediately objected to by Mr Austin on the grounds that it contained material that was imbued with privilege; the Authority dealt with that matter by directing that there be certain changes to the statement in reply and the Council attended to those directions but it appears at the same time made certain other amendments.

[18] In all the circumstances, I am not persuaded that there is anything improper in the Council's action in making further amendments to the statement in reply than were required by the Authority and I decline to make any orders in that regard.

Was the personal grievance raised in time?

[19] I see this matter quite simply. In Mr Austin's memorandum of 13 August 2015, he argues persuasively that the Authority's decision of 7 August 2015 was in

error in relation to document 23. In essence what Mr Austin says is that document 23 (which the Authority's Minute of 7 August 2015 directs is to be removed from the record), contains two separate portions, one of which raises a personal grievance on exactly the terms that are subsequently referred to in the statement of problem and the second raises an offer to settle. Plainly the offer to settle is subject to privilege and ought to have been redacted but the effect of the Authority's removal of the whole letter is to take the initiation of the personal grievance off the record as well and there cannot be any privilege attaching to the raising of a personal grievance.

[20] No doubt it would have been more elegant for the practitioner concerned to deal with those two matters in separate correspondence, but equally I venture to disagree with my colleague in her decision to remove the whole document from the record when it would have sufficed to remove only the part imbued with a privilege.

[21] In any event, it seems to me apparent that document 23 dated 13 June 2014 apparently addressed correctly to the Gisborne District Council responding to correspondence from the Council on the same subject matter, raises a personal grievance and did this on 13 June 2014.

[22] On that basis, the Council's reliance on Member Tetitaha's direction to remove the personal grievance letter is misplaced and its attempt to create a basis on which the grievance was not raised in time cannot succeed. Moreover, counsel for the Council is quite wrong in her submission that Ms Hay had the ability to challenge Member Tetitaha's Minute of 7 August 2015; first, in order for a challenge to lie there must be a determination: s.179(1) of the Employment Relations Act 2000 (the Act), and second the Minute is concerned with the procedure that the Authority intends to follow and is therefore also excluded: s.179(5)(a) of the Act.

[23] But even if I am wrong in my conviction that the letter of 13 June 2014 ought to be before the Authority in a redacted form to facilitate the Authority's investigation into Ms Hay's personal grievance, the real issue is not whether the Authority has seen the subject letter but whether the employer has and there is no suggestion before me that that letter did not arrive at its destination within time; nor is there any suggestion that the Council was never aware that Ms Hay had a personal grievance. Indeed, it seems from the submissions for the Council that the only basis on which it is now being contended that there was no grievance ever raised is the Authority's 7 August 2015 Minute removing the letter from the record.

[24] If it were contended that the subject letter was never received by the Council, I would have expected to have that allegation made to me, particularly given this letter was one of a small group which the parties were arguing about from the moment the proceedings were on foot.

[25] I note for the sake of completeness that Ms Brown is quite correct in drawing my attention to an error in the statement of problem which incorrectly identifies the date of the personal grievance letter, but nothing turns on that.

[26] For the foregoing reasons then, I am satisfied that the personal grievance was raised by Ms Hay within time and it may now proceed to resolution and/or investigation by the Authority.

Should Ms Brown continue to act as counsel?

[27] I have no hesitation in concluding that there is no necessity for Ms Brown to stand aside. I understand the professional rules that apply as do the representatives. I make the observation that in this Authority, the strict rules that might apply to counsel in a court of record need not apply here and that despite Mr Austin's efforts to persuade me otherwise, I am not satisfied that there is anything that I would want to ask Ms Brown in her personal capacity.

[28] Nor do I think it particularly helpful to categorise Ms Brown's style of communication as "*argumentative*" and "*contentious*". I venture the suggestion that Ms Brown might make the same allegation about Mr Austin's style of communication; the short point is that representatives express themselves in their own unique way doing their very best to serve their clients' best interests and I do not think it is appropriate to be critical of the way that representatives express themselves provided they do not break the law, defame other parties or make the kinds of threats which can invoke criminal sanction.

[29] I would expect that any questions that need to be asked about the Gisborne District Council's activities in respect of Ms Hay's personal grievance can be directed to its witnesses and having considered the matter carefully, I have no questions that I wish to ask Ms Brown nor will I be interested in Mr Austin seeking to question her about matters either. I am satisfied that both representatives have throughout acted entirely correctly as their clients' best advocate and I see no reason to disturb those existing professional arrangements.

Determination

[30] I decline to direct the Gisborne District Council to file any further amended statement in reply at this time.

[31] I am satisfied that the personal grievance was raised within time and can now proceed to resolution and/or investigation by the Authority.

[32] I do not consider that Ms Brown ought to stand aside as counsel in this matter.

[33] I agree with Mr Austin's observation that once these preliminary issues have been clarified by decision of the Authority, which they now have been, the proper course is for me to direct the parties back to mediation to see if the matter is capable of resolution by agreement.

[34] I accept that there is the prospect that either or both parties may want to challenge this determination and so I propose to stay my hand in sending out the formal direction to mediation for a period of 28 days from the date of this determination to give both parties the opportunity of reviewing their positions and deciding whether they want to challenge this determination or not.

[35] If there is no challenge from either party, then a formal direction to mediation will be signed in the Authority and sent to the representatives. I would be grateful if Mr Austin for the applicant would take responsibility for letting my Authority officer know about the results of the directed mediation.

Costs

[36] Costs are reserved.

James Crichton
Chief of the Employment Relations Authority