

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 59A/08
5098470

BETWEEN KIM MACDONALD
 Applicant

AND TRACY GIFKINS
 First Respondent

AND GREY LYNN VETERINARY
 CLINIC LIMITED
 Second Respondent

Member of Authority: Robin Arthur

Representatives: Glenn Finnigan for Applicant
 Garry Pollak for Respondent

Investigation On the papers

Submissions received: 25 March and 21 May 2008 from Respondents
 9 April and 5 June 2008 from Applicant

Determination: 9 September 2008

DETERMINATION OF THE AUTHORITY

Application to reopen investigation

[1] The Respondents have applied for a reopening of the Authority's investigation that resulted in determination AA59/08 (22 February 2008).

[2] That determination found the First Respondent ("Ms Gifkins") had unjustifiably dismissed the Applicant. It ordered the First Respondent to pay remedies of lost wages, outstanding holiday pay and compensation. She was also ordered to pay a penalty for failing to provide records under s130 of the Employment Relations Act 2000 ("the Act").

[3] By consent the application to reopen the investigation has been determined on the papers.

[4] These papers comprise the Respondents' application for a re-opening, an affidavit in support from Ms Gifkins, the Applicant's statement in reply, submissions from both parties, and a copy supplied by the Respondents of their former solicitors' file on this matter. I have also referred to the Authority's file containing copies of correspondence sent to the parties and courier records regarding deliveries of correspondence.

Grounds for the application

[5] The Respondents' central argument for reopening of the investigation is that they were unaware of the hearing – that is the Authority investigation meeting – which was notified to the parties on 29 November 2007 and held on 8 February 2008.

[6] They say this lack of knowledge was due to a communication breakdown with their former solicitors, Langton Hudson.

[7] The particular grounds on which a reopening of investigation is sought are set out in the affidavit of Ms Gifkins, who is sole director of the Second Respondent. They are:

- (i) that Ms Gifkins wanted to express her point of view about the Applicant's allegations of unjustified dismissal; and
- (ii) that Ms Gifkins had no knowledge of the 8 February hearing date; and
- (iii) that Ms Gifkins expected a mediation to be held before any Authority hearing; and
- (iv) that Ms Gifkins had not received emails, invoices and letters from her solicitors; and
- (v) that between August and December 2007, due to a back injury, Ms Gifkins was absent from the veterinary clinic to which mail was addressed and may not have been passed mail by locums running the clinic at that time; and
- (vi) that Ms Gifkins was waiting for a mediation to occur but that no one from

- the Mediation Service contacted her about a mediation date; and
- (vii) that Ms Gifkins did not receive a letter from her solicitors dated 7 December 2007, which she accepts was correctly addressed and sent by courier, advising that they could no longer act for her; and
 - (viii) that Ms Gifkins had not seen some correspondence regarding this case until she paid her solicitors' invoice on 13 March 2008 and was given her file; and
 - (ix) that Ms Gifkins did not receive any telephone message on the day of the investigation meeting; and
 - (x) that the Authority determination wrongly identifies Ms Gifkins as the employer of the Applicant rather than the Second Respondent and the Respondents should have the opportunity to present evidence on that and other aspects of the Applicant's claim.

Applicant opposes reopening

[8] The Applicant opposes the reopening of the investigation. She says no miscarriage of justice will arise if the reopening is refused.

[9] She says that the Respondents must have been aware of the investigation for the following reasons:

- (i) Ms Gifkin's explanation that couriers may not have delivered correspondence to the clinic street address or that locum staff did not pass on post received is not credible; and
- (ii) Ms Gifkin's has acknowledged receiving some correspondence expressly referring to the investigation meeting; and
- (iii) Ms Gifkin has not denied receiving a Minute from the Authority dated 29 January 2008 referring to the investigation meeting and warning of the consequences of not attending; and
- (iv) Telephone messages left for Ms Gifkin by an Authority support officer on the day of the investigation meeting means that her claim of knowing nothing of the 8 February hearing until seeing the Authority determination shortly after 22 February 2008 is not credible.

Discussion

[10] The Respondents' submissions put their position succinctly. They submit that Ms Gifkins "*did not know about the Authority investigation date. This is simply to be believed or not be believed*".

[11] I have come to the conclusion that it is not to be believed. I do so for the following reasons.

Knowledge of the hearing date by December 2007

[12] There is no dispute that at all relevant times in this matter, the proper address of the First and Second Respondents for business and legal purposes was the street address of the veterinary clinic. It was the address which Ms Gifkins gave on her letters to her own solicitors and throughout it was the registered office and address for service of the Second Respondent recorded at the Companies Office.

[13] On 20 December 2007 Ms Gifkins sent a letter to Langton Hudson, who had by this time ceased to act as her solicitors.

[14] In that letter she acknowledged receiving a witness statement from the Applicant.

[15] Importantly the letter includes this sentence: "*You refer to your letters of 29 November and 7 December which I have received, however I have not received any letter from you dated 14 December 2007*". The underlined emphasis is mine.

[16] Her acknowledgement of receiving correspondence dated 29 November is entirely at odds with Ms Gifkins affidavit of 17 March 2008 in support of the reopening application in which she avers: "*There is no evidence in the file that the Minute of 29th November was ever sent to me*".

[17] The copy of the solicitors' file released to Ms Gifkins by Langton Hudson shows two letters dated 29 November 2007 and addressed to her. The content of both include direct references to the investigation meeting.

[18] One letter attaches a copy of an Authority Minute received that day. An Authority Minute dated 29 November 2007 had been sent as a PDF attachment to an email to Langton Hudson that day. The Minute includes a direction to mediation and a statement that “[i]n the event that mediation does not occur or resolve the differences between the parties” an investigation meeting had been scheduled. It identifies the date of the investigation meeting as 8 February 2008 and refers to the Notice of Investigation Meeting .

[19] The second letter of Langton Hudson addressed to Ms Gifkins and dated 29 November 2007 also refers to arrangements for mediation to occur between 3 and 7 December 2007 but states that “*if this matter does not resolve at mediation, the matter is set down for an investigation meeting of one day on either 4 or 8 February 2007* (sic)”. While there is a typographical error regarding the year, it is clear that a hearing date had been set for February 2008.

[20] The 7 December letter from Langton Hudson to Ms Gifkins states that the firm have received no further instructions from her “*since forwarding a copy of the file to you on 29 November 2007*” and that the law firm cannot act further until its outstanding bills are paid.

[21] I note in passing that in her affidavit Ms Gifkins also insists that she did not receive this 7 December letter but says in her 20 December letter to her solicitors – a copy of which she attached to the affidavit – that she did.

[22] From all the foregoing information I conclude that Ms Gifkins did know, or should have known, from the correspondence she acknowledges receiving that a hearing was scheduled on 8 February 2008 if the matter was not resolved before that date by mediation. Attempts to arrange mediation in December had not resulted in any meeting in mediation or other resolution. She knew, or should have known, that this meant the next step was the hearing.

Knowledge in January 2008 of the February hearing date

[23] On 29 January 2008 an Authority Minute was sent by courier to the clinic

street address and addressed to Ms Gifkins. By typographical error the Minute bore the date 29 January 2007 but had a covering letter with the correct year. The Minute referred to a letter from the Applicant's lawyer expressing concern that the Respondents had not filed any witness statements. It referred to the investigation meeting or "hearing" scheduled for 8 February 2008 and confirmed that the Authority intended to proceed with the meeting. It also drew attention to the notes on the statutory form of the Notice of Investigation meeting which warn "*that if the Respondents do not attend the meeting, the Authority may issue a determination in favour of the Applicant without obtaining any further information*".

[24] Courier Post 'track and trace' records on the Authority file show that this Minute was delivered to the clinic street address on 31 January 2008 and signed for with the words: "*Greylvnvet Kristie*". The record includes a signature which appears to read "*Kristi*".

Message on the day of the investigation meeting

[25] The Authority file also includes a note from the Support Officer that shortly after 10am on 8 February 2008 he rang firstly a mobile telephone number for Ms Gifkins and secondly a land line telephone number of the veterinary clinic. The mobile telephone was not answered but at the clinic number he spoke with someone called Kristie. He records that Kristie said she would leave a message on Ms Gifkin's computer for her to telephone the Authority on the number left by the Support Officer. No response was received that day or subsequently.

Receipt of determination

[26] Ms Gifkins avers that the first she knew of the Authority's determination of 22 February 2008 "*was a day or so afterwards when I received a copy of it at the clinic*" sent to her by the Authority. A day or so later she received a further copy by post from the Applicant's solicitor.

[27] Both copies of those determinations were addressed to the street address that is the site of the veterinary clinic and the registered office of the Second Respondent. There was clearly no problem with deliveries at that time because Ms Gifkins

acknowledges receiving those documents.

Determination

[28] Because I have concluded that the Respondents – in the person of Ms Gifkins – did know about the hearing, I am satisfied that no miscarriage of justice arises from deciding not to reopen the investigation.

[29] Rather I accept the Applicant's submissions that the Respondents had an adequate opportunity to participate in the Authority's investigation and knew or should have known that the hearing was to be held. At the very least Ms Gifkins received copies of Minutes of the Authority dated 29 November 2007 and 29 January 2007 (sic) which identified the 8 February 2008 date of the investigation meeting and the consequences of not attending.

[30] On the basis of the evidence discussed above and for the reasons given I decline the application to reopen the investigation.

[31] The orders made in determination AA59/08 stand. Certificates of determination have been issued for sums of lost wages, holiday pay and compensation to be paid by the First Respondent to the Applicant (12 March 2008), and a penalty of \$500 to be paid by the First Respondent to the Crown (25 March 2008). Each remain enforceable.

Costs

[32] Costs were reserved in determination AA59/08 and the Applicant subsequently sought an order of costs of \$3000 plus reimbursement of her \$70 lodgement fee. Her actual costs were said to be \$7114 plus disbursements of \$133. Her solicitor has since lodged a statement in reply and submissions in relation to the reopening application.

[33] The Respondents asked that costs not be fixed until the reopening application was determined. Now that is done, the Respondents may lodge a reply to the Applicant's earlier costs memorandum if they wish to do so. I do not require a further

memorandum from the Applicant updating her costs application but if she wishes to lodge a copy of her solicitors' invoice regarding additional attendances on the reopening issue that will be taken into account in awarding costs. Both parties have 14 days from the date of this determination for lodging those documents.

Robin Arthur
Member of the Employment Relations Authority