

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN James MacGougan (Applicant)
AND The West Coast District Health Board (WCDHB) (Respondent)
REPRESENTATIVES Douglas J Taffs, Counsel for Applicant
Paul White, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Westport 31 May 2006
DATE OF DETERMINATION 30 August 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] James MacGougan worked for the West Coast District Health Board as a psychiatric nurse based in Westport from about June 2003 until his employment terminated in February 2005. In a letter dated 3 February 2005, Mr MacGougan through his representative raised an unjustified dismissal grievance claiming that his decision to discontinue his employment communicated in the same letter amounted to a constructive dismissal.

[2] The problem expressed in the 3 February 2005 letter arose from events principally in September and October 2004 where the WCDHB attempted to have Mr MacGougan admitted to Ashburn Clinic. Mr MacGougan says that there were breaches of confidence by WCDHB representatives. In December 2004, the WCDHB made a report to the Nursing Council under the Health Practitioners' Competence Assurance Act 2003. Mr MacGougan says that the report also constitutes a breach of obligation.

[3] The WCDHB points out that it received notification of a grievance arising from these issues for the first time on 7 February 2005 which is when it received the 3 February 2005 letter. There was no application to raise a grievance out of time and the WCDHB has not consented to any late grievance. It is correct to say that the only grievance raised within time which can be investigated is a constructive dismissal claim. To determine that grievance, it will be necessary to investigate the events from September 2004 which are said to have caused the resignation. However, those events cannot separately constitute a different grievance because of the time limitation issue.

[4] In respect of the point about notification to the Nursing Council, the WCDHB says that it had a legal duty to advise the Council and that it cannot be subjected to civil proceedings in respect of that notice given the provisions of the Health Practitioners' Competence Assurance Act 2003.

[5] To resolve the problem, it is first necessary to explain in greater detail what happened in 2004 and resolve the evidential disputes about those events.

Background

[6] Elaine Neesam is employed by the WCDHB as the District Manager of the Buller Community Mental Health Team. She was Mr MacGougan's manager. Ms Neesam wrote to Mr MacGougan in May 2004 offering him access to EAP or the WCDHB's OSH nurse given some emerging concerns about the amount of sick leave being taken by Mr MacGougan. Mr MacGougan took up the EAP invitation and he later gave the EAP counsellor permission to discuss his situation with Ms Neesam. Through such discussions, Ms Neesam heard about Mr MacGougan's problems with anxiety and panic attacks and alcohol. On or about 12 June 2004, Mr MacGougan gave Ms Neesam a medical certificate providing three months off work due to illness. Mr MacGougan never returned to active duty.

[7] In August 2004, Ms Neesam spoke to Mr MacGougan and then had a further discussion with Mr MacGougan's counsellor about his situation. On 30 August, Ms Neesam received a further medical certificate declaring Mr MacGougan unfit for work until January 2005. She also had a discussion at Mr MacGougan's initiative where he told her that he hoped to be fit for work within two or three weeks while the doctor thought he required a longer period.

[8] Mr MacGougan's partner (Karen Service) contacted Ms Neesam on 8 September 2004. Ms Service's evidence (which I accept) is that she did this because of her concern for Mr MacGougan's deteriorating state of mental health including his drinking. There is a protocol under which WCDHB staff can be funded for a referral to Ashburn Clinic. Ms Service (and Mr MacGougan were aware of the possibility of funded treatment at Ashburn Clinic from earlier discussions with Ms Neesam. There needed to be a referral by a psychiatrist so Ms Neesam made arrangements for Mr MacGougan to see Dr Fanshawe, a psychiatrist employed by the WCDHB. Ms Neesam told Ms Service that the assessment with Dr Fanshawe would be of a confidential nature. As Ms Neesam acknowledged in evidence, seeing a WCDHB psychiatrist was not optimal from the point of view of confidentiality but was arranged because of the urgency given the situation described by Ms Service. However, these arrangements were made with Mr MacGougan's consent, at least through Ms Service.

[9] The appointment with Dr Fanshawe was on 9 September 2004. Dr Fanshawe did not give evidence at the investigation meeting but I was provided with a copy of his letter of 5 May 2006 in which he sets out his view of events, his notes of the consultation with Mr MacGougan and other file material. After the consultation, Dr Fanshawe wrote to Dr Alfred Dell'Ario asking for Mr MacGougan to be considered for a referral to Ashburn Clinic. Dr Fanshawe also wrote to Mr MacGougan's GP (Dr Stuart Malone), advising him of the steps taken to arrange a referral to Ashburn Clinic and asking the GP to examine Mr MacGougan with a view to improving his physical health preparatory to acceptance by Ashburn Clinic.

[10] Mr MacGougan is critical of the quality of Dr Fanshawe's assessment. He also says that Dr Fanshawe represented to him that Ashburn Clinic was the proper place for him, that Ashburn Clinic would accept him, that he would get priority for admission to Ashburn Clinic and that the assessment would be kept confidential from the WCDHB so that not even DHB typists would be used to process the assessment.

[11] What happened was a WCDHB service in Greymouth rather than the WCDHB typists in Westport were used by Dr Fanshawe. It is safe to assume that Dr Fanshawe always knew that he would have to get material typed rather than typing himself. The options were to get the work done by WCDHB staff in Westport or another location, or to get it done by non-WCDHB typists locally

or at another location. Dr Fanshawe sent the material to a WCDHB typing service in Greymouth. I infer that he would have planned to do this at the time he was speaking to Mr MacGougan. In those circumstances, it is improbable that Dr Fanshawe said that *not even DHB typists would be used*. Either Mr MacGougan is mistaken about what was said or Dr Fanshawe gave a false assurance about his intentions. The former is more likely. I find that Mr MacGougan was told that the WCDHB typists in Westport would not be used in order to preserve confidentiality and that is what happened.

[12] Part of Mr MacGougan's complaint is that the letters to Dr Dell'Ario and Dr Maloney breached Dr Fanshawe's assurance about keeping details of the assessment confidential from the WCDHB. It is said that Dr Dell'Ario is an employee of the WCDHB. Dr Dell'Ario principally works for the Canterbury District Health Board. However, he has a role on behalf of the WCDHB which includes funding approval for Ashburn Clinic referrals for WCDHB staff members. I accept Ms Neesam's evidence that she told Mr MacGougan about Dr Dell'Ario's role in any Ashburn Clinic referral. There is a dispute between Mr MacGougan and Dr Fanshawe about whether Dr Fanshawe gave similar advice to Mr MacGougan but it is not necessary to resolve that dispute given my acceptance of Ms Neesam's evidence.

[13] Mr MacGougan's evidence is that he agreed to an admission to a Christchurch facility (Kennedy) for detoxification preparatory to an Ashburn Clinic admission. Mr MacGougan is very critical of the treatment regime imposed on him at Kennedy and he decided to discharge himself from Kennedy and return to Westport. The admission and discharge were both on 7 October 2004. However, while he was at Kennedy, Mr MacGougan was shown a fax from Ashburn Clinic recording its decision not to accept him for admission. The documentary evidence suggests that Dr Fanshawe would have known of Ashburn Clinic's decision before Mr MacGougan's admission to Kennedy but it is not necessary, nor is it appropriate, to make a finding on that point without evidence from Dr Fanshawe. I accept Mr MacGougan's evidence that he first learned of the Ashburn Clinic decision on 7 October 2004 while he was at Kennedy.

[14] On 12 October 2004, Mr MacGougan phoned Dr Fanshawe to talk to him about the situation. The call was put through to Lois Scott rather than Dr Fanshawe. Ms Scott is the Operations Manager of Mental Health Services for the WCDHB and is Ms Neesam's manager. By this time, Ms Scott had received a call from Dr Fanshawe and a copy of his 11 October 2004 letter so she knew that Mr MacGougan had self-discharged from Kennedy and that Ashburn Clinic would not admit him. Ms Scott read Dr Fanshawe's 11 October 2004 letter over the phone to Mr MacGougan. Mr MacGougan says that the communication from Dr Fanshawe to Ms Scott is a breach of his privacy and in contravention of the assurances given to him by Ms Neesam.

[15] Mr MacGougan says that Ms Scott said *we must be more vigorous in our approach and as our employee you must understand that you have been off work for a long time and we (the WCDHB) must either replace you or have you back at work*. Ms Scott's evidence is that the focus of her discussion was on the need to seek an alternative treatment provider since treatment by the GP and EAP Services were not meeting Mr MacGougan's needs. She also says that the power of dismissal rests with the Chief Executive and that there had been no thoughts of dismissing Mr MacGougan at this stage. I prefer the evidence of Ms Scott to the extent that there is any conflict with Mr MacGougan's evidence.

[16] On 16 December 2004, the HR Manager for WCDHB notified the Nursing Council of New Zealand that it had reason to believe that Mr MacGougan was unable to perform the functions required for the practice of nursing because of some mental or physical condition, pursuant to s 45 of the Health Practitioners' Competence Assurance Act 2003. That part of the Act had recently come into force. There had been some earlier discussion and correspondence with Mr MacGougan on that point. In the meantime, Mr MacGougan remained on sick leave.

[17] In the letter dated 3 February 2004, Mr MacGougan, through counsel, advised the WCDHB that he considered he had no option but to discontinue his employment and he raised a personal grievance.

Unjustified dismissal?

[18] The Court of Appeal in *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] ERNZ Sel Cas 136 identified categories of constructive dismissal, holding that the concept includes but is not limited to those cases where:

- (a) The employer gives the employee a choice between resigning and being dismissed;
- (b) The employer embarks on a course of conduct with a deliberate and dominant purpose of coercing an employee to resign; or
- (c) The breach of duty by the employer leads an employee to resign.

[19] Only the third category is at issue in the present case. Principally, Mr MacGougan relies on the actions of Dr Fanshawe allegedly in breach of assurances about confidentiality or privacy as being a breach of duty by the WCDHB. In *Merritt v. The Commissioner of Police* 16/3/98, Colgan J, AEC16/98, the Employment Court rejected a constructive dismissal claim because the actions complained of were not those of the employer. The same is true in the present case. Dr Fanshawe is a medical practitioner employed by the WCDHB but he cannot be said to have been acting as Mr MacGougan's employer in their dealings. It is therefore unnecessary to resolve any other evidential differences between Mr MacGougan and Dr Fanshawe. Mr MacGougan's personal grievance fails because his resignation was not caused by any breach of duty by his employer.

Health Practitioners Competence Assurance Act 2003

[20] Section 45 (6) of the Act is intended to protect a person with a duty to report from being deterred from meeting that duty by the possibility of collateral legal proceedings such as a personal grievance claim. The protection does not apply if the reporter acts in bad faith. There is no evidence to suggest that the WCDHB was doing anything other than meeting what it saw as its obligations under the Act in making its report to the Nursing Council. I reject any suggestion of bad faith on the part of the WCDHB.

[21] It follows that no legal proceedings such as a personal grievance or breach of contract claim lie against the WCDHB as a result of its report.

Summary

[22] Mr MacGougan was not constructively dismissed and he has no other grievance or claim against the WCDHB.

[23] Costs are reserved.