IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 404 /08
5122773

	BETWEEN	BRIDGET ANNE MORGAN Applicant
	AND	QUALITY ENVIRONMENTAL CONSULTING LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Cors Speksnijder, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions received:	2 September 2008 from Respondent 12 September 2008 from Applicant
Determination:	25 November 2008

DETERMINATION OF THE AUTHORITY

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[1] Quality Environmental Consulting Limited has raised three preliminary issues about Bridget Morgan's claims before the Authority:

(i) whether lodging a statement of problem in the Authority validly raises a personal grievance; and

(ii) whether Ms Morgan raised with QECL some or all of her alleged personal grievances within the time required by the law (the 90-day rule); and

(iii) whether the Authority has jurisdiction to investigate and determine issues relating to sale of shares in QEC by Ms Morgan following the redundancy of her position.

[2] By consent these issues are determined "on the papers" after considering submissions from the parties.

[3] Ms Morgan began work as an industrial consultant for QECL in January 2006. In November 2006 she was promoted to a management position under the terms of a written employment agreement. She also accepted an opportunity to take a ten per cent shareholding in the company.

[4] On 29 January 2008 QECL's general manager and majority shareholder Leigh-Anne Cronin told Ms Morgan her position was redundant.

[5] By letter of 8 February 2008 Ms Cronin confirmed the redundancy decision and told Ms Morgan her last day of work, based on a four week period for notice of redundancy, was calculated to be 26 February 2008.

[6] QECL says it expected Ms Morgan to apply for an industrial consultant position being advertised by the company at the time.

[7] There is some disagreement between the parties over whether Ms Morgan stopped working for QECL on 8 February or a few days later. By 11 February Ms Morgan made it clear – through a letter from her solicitor at the time – that she would not apply for the consultant's position and would not attend work from that date. She sought payment in lieu for the remainder of the four week notice period.

[8] On 29 April 2008 Ms Morgan lodged a statement of problem in the Authority. Authority records show this statement was delivered to QECL's registered office and address for service on 30 April 2008.

Raising a grievance

[9] Ms Morgan did not formally raise a grievance directly with QECL before lodging her statement of problem in the Authority.

[10] QECL's statement in reply denied that lodging a statement of problem validly raised a personal grievance. However its submissions on the preliminary issues accepted that, once served on the employer, a statement of problem may satisfy the requirements of s114 of the Employment Relations Act 2000 ("the Act") for making

an employer aware of a grievance, provided it is done within the statutory 90-day period.

[11] I accept this is correct because, as Ms Morgan submitted, the Act does not prescribe the form in which a grievance must be raised with an employer. Provided the statement makes the employer "*aware*" of the grievance that the employee wants the employer to address, it is sufficient.[1]

[12] In some cases it may be that such a statement does not contain sufficient information to properly make the employer aware of the grievance that needs to be addressed. However that is not so in this particular matter. In addition to the statutory form of the statement, Ms Morgan lodged an eight page document headed "Background" and a number of relevant documents such as her employment agreement and some correspondence.

[13] I find that the serving of Ms Morgan's statement of problem on QECL did satisfy the requirement of s114(2) of the Act for making the employer aware of the grievances she wanted addressed. What remains at issue is whether she did so within the 90 day period required by s114(1) of the Act.

Were some or all of the grievances raised within 90days?

[14] Ms Morgan's statement of problem sets out her view of her treatment by QECL, and specifically Ms Cronin. It begins with the following summary of her problem:

> *- Humiliation and hurt due to unfair redundancy*
> *- Exacerbation of pre-diagnosed depression (as result of workplace stress) due to unfair redundancy*
> *- Unjustified wage deductions after unfair redundancy*
> *- Restraint of trade still in place after unfair redundancy*
> *- Breach of Health and Safety Act led to depression caused by workplace stress*
> *- Financial loss as shareholder as result of unfair redundancy*
> *- Financial loss during time of unemployment after unfair redundancy*

[15] The alleged grievances alleged fall into two broad areas.

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[1] See review of case law in *Board of Trustees of Te Kura Kaupapa Motuhake o Tawhiuau v Edmonds* (unreported, EC Auckland, AC 14/08, 16 May 2008, Colgan CJ) at [44]-[50].

[16] Firstly, Ms Morgan claims she suffered an unjustified disadvantage from the way QECL treated her over health and performance matters. Ms Morgan says she told Ms Cronin in mid-December 2007 of being diagnosed with a depressive, stress-related illness but Ms Cronin made the illness worse by raising performance issues with Ms Morgan shortly afterward and this contributed to Ms Morgan taking "stress leave" on 25 January 2008.

[17] Secondly, Ms Morgan claims that the decision to make her position redundant and how it was carried out was unfair. This may be characterised as both a grievance of unjustified disadvantage and unjustified dismissal.

[18] There are other issues raised. A deduction from her final pay is a wage recovery matter not a personal grievance. Restraint of trade is said by QECL to be no longer at issue. Questions of hurt, humiliation and lost wages as a result of the redundancy are addressed only if the Authority finds Ms Morgan had a grievance and remedies need to be considered.

[19] The issue for resolution now is whether one or both of the substantive grievances were raised with QECL within the statutory 90-day period.

The redundancy grievance

[20] QECL submits that, having been told orally of the redundancy on 29 January 2008, Ms Morgan should have raised her grievance about that decision with the company by 27 April 2008. It says she is three days out of time for this grievance.

[21] I do not accept that submission for two reasons.

[22] Firstly, QECL was required by its employment agreement with Ms Morgan to give her four weeks notice of redundancy. Ms Cronin's letter of 8 February calculated that date to be 26 February 2008. This is the date at which, contractually, Ms Morgan's termination of employment by reason of redundancy was to become effective. That is the action alleged to amount to an unjustified dismissal. The grievance over it was raised on 30 April 2008 – some 64 days later. It is within time.

[23] There is some suggestion in the evidence that Ms Morgan in fact stopped working for QECL on either 8 or 11 February and one of those days is the date of the termination of employment. There is no dispute that she was working up until at least 8 February because Ms Cronin's letter of that date refers to appreciating that Ms Morgan was continuing to work out her notice. If 8 February is taken as the date at which the employment ended and the redundancy became effective, that is 82 days before the grievance was raised with QECL. It is within time.

[24] Secondly, the alleged disadvantage in how QECL decided on and carried out the redundancy is not limited to its actions in telling Ms Morgan of its decision on 29 January. The relevant actions include confirming the decision in writing on 8 February, how it dealt with the prospect of redeploying her to a consultant's role and how it dealt with notice requirements. These actions plainly extend until at least 8 February 2008 and are consequently within the 90-day period.

The health and performance grievance

[25] QECL submits that what it calls "*the 90-day clock*" for the disadvantage grievance over health and performance matters began "*ticking*" in late November or early December 2007. However Ms Morgan's statement of problem suggests a later date by identifying the "*final incident*" relating to this grievance as occurring on 25 January 2008. It concerned the content of an email that day from Ms Cronin suggesting Ms Morgan has been "*negligent*" in her handling of a matter for a QECL client. Within 20 minutes Ms Morgan had replied in an email with comments that included saying "*[m]y performance will not improve until my depression has improved*", that a promised discussion of the management team to talk about managing her condition had not occurred, and that she was "*going home on stress leave*".

[26] There was a 96 day gap between what Ms Morgan's statement described as this "*final incident*" and QECL being served with that statement on 30 April 2008. It consequently falls outside the statutory period. There is no application before the Authority for leave to raise this grievance outside the 90-day period and QECL has not consented to this occurring.

[27] On that basis the Authority cannot investigate how QECL treated Ms Morgan over health and performance issues as an alleged grievance of unjustified disadvantage. However that does not mean the Authority cannot consider those factual circumstances as part of resolving the employment relationship as a whole.

[28] The Authority resolves employment relationship problems according to the substantial merits of the case, without regard to technicalities: s157 of the Act. In doing so the Authority is not bound to treat a matter as being of the type described by the parties: s160 of the Act.

[29] On 11 February 2008 Ms Morgan's solicitor at the time advised QECL that she would not apply for the consultant's position and was "*unable to continue to work for QECL in her current position … and will not be in attendance henceforth*". It may be that the end of Ms Morgan's employment on that day amounted to a constructive dismissal. Arguably she was forced to resign at that point due to breaches of her terms of employment relating to safety, trust and confidence which were so serious that it must have been reasonably foreseeable to QECL that Ms Morgan would entirely end her employment with it rather than take up an available, alternative post.

[30] That is a matter which the Authority may investigate and will involve looking at how health and performance matters as part of the circumstances. It could result in a finding of an unjustified constructive dismissal.

[31] It must be emphasised at this preliminary stage that this matter is yet to be investigated and that no conclusions can be drawn in advance of that process.

[32] Ms Morgan's allegations may or may not be confirmed once the evidence of relevant witnesses has been heard and tested through an Authority investigation meeting.

[33] QECL strongly denies the allegations. Its statement in reply sets out an alternative account of relevant facts. It says attempts were made to assist Ms Morgan's health issues by offering options to reduce workload pressures and the redundancy of her management position in January 2008 had been discussed earlier as part of a plan to create a full-time consultant's role for her on the same salary.

Jurisdiction on issue of lost benefit from shares and dividends

[34] Ms Morgan says that as a result of her redundancy she was "forced" to sell her QECL shares back to Ms Cronin. Should Ms Morgan be found to have a grievance for unjustified dismissal, she seeks compensation for the loss of value of dividends she would otherwise have received.

[35] QECL says it was Ms Morgan who forced the share buy-back. However it says Ms Morgan's ownership of the shares (with any dividends flowing from that ownership) and any change in that ownership are not actions arising from or related to the employment relationship: s161(1)(r) of the Act. Consequently it says such matters are not employment relationship problems and cannot be determined by the Authority.

[36] At this preliminary stage I do not accept QECL's submission that the dealings in the shares are entirely ancillary to the employment relationship and that there is no direct connection between the actions of the parties in dealing with the shares and the employment relationship.

[37] A letter dated 28 February 2008 from Ms Morgan's solicitor at the time refers to a shareholder's agreement of 1 April 2007 but that agreement is not among background documents so far lodged by either party. The letter suggests a specific term of that agreement was that Ms Morgan must transfer her shares if she ceased to be an employee of QECL. If that is correct, her ownership of the shares (and entitlement to any dividends) is entirely subject to the existence of her employment relationship and could be said to arise from or relate to it.

[38] Evidence is also needed about the basis on which Ms Morgan was offered shares in the first place. There may also be an issue as to whether it was her – in her capacity as an employee – who held the shares or some other entity. I note that her solicitor's letter referred to the "*Morgan Hill Investments Trust*" as the shareholder and the Companies Office records show what have been referred to as "her shares" as being held (at the relevant times) in the names of Ms Morgan and two other people, which may be to do with some trust arrangement. That may give rise to an issue over whether the shares, and dividends from them, were benefits or money lost by Ms

Morgan as an employee of QECL rather than in some other capacity.

[39] If the share ownership arose directly from the employment relationship, and if an unjustified dismissal grievance is found, and remedies need to be assessed, the benefit of dividends lost may be the subject of assessment under s123(1)(b) and (c)(ii) of the Act. Evidence relating to the value of the shares and dividends would be relevant at that stage.

[40] Consequently I find this may be an issue on which the Authority has jurisdiction, depending on the specific terms on which Ms Morgan received, held and later transferred back shares in QECL. It is however subject to the detailed evidence on whether the share ownership arose directly from the employment relationship. This would be investigated as part of the wider investigation of the alleged grievances.

Mediation

[41] The parties have previously attended mediation but not resolved the issues between them. In light of this determination I consider that I am required in this case to direct the parties to attend further mediation: s159(1)(b) of the Act. Section 159(2) of the Act requires the parties to comply with this direction and attempt in good faith to reach an agreed settlement of their differences.

[42] While, at this stage, the question of jurisdiction on the share and dividends issue has not been determined, the issue may still be addressed in mediation as it concerns an aspect of what was, at least, a "work-related relationship": s144A of the Act.

[43] If the parties are not able to resolve matters in mediation, Ms Morgan is to promptly advise the Authority whether she wishes to withdraw her application or have the Authority proceed with its investigation. If the investigation is to proceed, a further telephone conference will be convened to discuss the scope of issues for investigation, what written witness statements need to be lodged, what additional documents are needed and a date for the investigation meeting.

Costs

[44] Costs are reserved.

Summary of determination

[45] Ms Morgan's alleged grievances regarding the redundancy of her position were raised with QECL within the required 90-day period.

[46] Her alleged grievances relating to treatment over health and performance matters were not raised within the required period. However the facts regarding her treatment may be considered in relation to whether Ms Morgan's ending of her employment on 11 February 2008 amounted to an unjustified constructive dismissal.

[47] The Authority requires further evidence to determine whether it has jurisdiction in relation to the alleged loss of benefit of shares and dividends.

[48] The parties are directed to attend further mediation and attempt in good faith to reach an agreed settlement of their differences.

Robin Arthur
Member of the Employment Relations Authority